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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LEE MICHAEL YANDL, a single individual, Appellant, v. HIGHLINE PUBLIC SCHOOLS, DISTRICT 401, an Authorized Washington Government Entity Operating in King County, Respondent.	DIVISION ONE No. 80901-6-I UNPUBLISHED OPINION

DWYER, J. — Lee Yandl, a disabled veteran, appeals from an order granting summary judgment dismissal of his claims of disparate treatment and hostile work environment against his former employer, Highline Public School District 401. Because no reasonable jury could find in Yandl's favor on either claim, we affirm.

I

In November 2015, Lee Michael Yandl, a veteran suffering from posttraumatic stress disorder (PTSD), was hired as a campus security officer, a limited time contract position in the safety and security department, by Highline Public School District 401. He received a hiring letter stating that the position was "non-continuing" and that the position was represented by the Teamsters

Union. Yandl was initially assigned to New Start High School,[1] an alternative school for "very troubled" students.

Campus security officer was an unarmed position, but Yandl was provided with several pieces of safety equipment. Safety and security department employees are fitted for and provided with protective vests, which can take several weeks to arrive. New employees awaiting their vests may borrow a vest from the District or use a personal vest. While Yandl waited for his vest to arrive, he used his own vest. Yandl was also provided with a radio. After Yandl complained that his radio did not work, he was asked to bring the radio to a supervisor for repair and was offered a loaner radio. Like other safety and security employees, Yandl was allowed to carry pepper spray after completing a district-approved training, which took between several weeks and a month to schedule.

Less than a month after starting as a campus security officer, Yandl inappropriately responded to a "potential fight" between students. While waving his arms in a "shooting" motion, Yandl screamed, "Get the fuck out of here!" and "Get the fuck off my property" at students and other young adults who were present but did not attend New Start. Witnesses to this event included New Start principal, Michael Sita. Yandl was subsequently fired.

Yandl's union advocated for him and his termination was rescinded. Yandl was given back pay for the duration of his termination and reassigned to

[1] New Start High School is sometimes also referred to in the record as "Salmon Creek." Salmon Creek is the name of the campus upon which New Start is located.

Highline High School. He completed his contract at the end of the school year, June 2016.

Yandl had strained relationships with other school employees. In his deposition, Yandl testified that an employee named Luis Rosales did not like him and teased Yandl behind his back. Yandl overheard Rosales making fun of his camouflage military hat "a couple times." On one occasion, Yandl recalled Rosales laughing at him after he experienced an anxiety attack:

> Q. Who laughed at you?
> A. Luis, some of his buddies. But mainly Luis. I was told, Oh, big tough vet guy can't handle a few kids, after my anxiety panic attack, that I thought was a heart attack at that time.

Yandl also alleged Rosales made a rude remark about his truck, and that Rosales did not sit next to him during meetings and "g[a]ve [him] dirty looks."

In August 2018, Yandl filed suit in King County Superior Court alleging that he was "discriminated against and treated in a disparate manner" during his employment by Highline and that Highline created a hostile workplace environment. Yandl filed an amended complaint with additional detail in February 2019. Highline then moved for summary judgment in November 2019 and, after a hearing, the trial court granted the motion and dismissed both claims.

II

Yandl contends that the trial court erred in granting Highline's motion for summary judgment dismissal of his disparate treatment and hostile work environment claims. This is so, Yandl asserts, because genuine issues of material fact exist as to whether he was treated less favorably because of his

status as a protected veteran and whether Highline should have been aware of harassment Yandl experienced while an employee.

The appropriate standard of review for an order granting summary judgment is de novo. Accordingly, we perform the same inquiry as the trial court. McDevitt v. Harborview Med. Ctr., 179 Wn.2d 59, 64, 316 P.3d 469 (2013). Summary judgment is appropriate only when "'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" Ehrhart v. King County, 195 Wn.2d 388, 409, 460 P.3d 612 (2020) (alteration in original) (internal quotation marks omitted) (quoting Locke v. City of Seattle, 162 Wn.2d 474, 483, 172 P.3d 705 (2007)). We consider all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Ehrhart, 195 Wn.2d at 409. "A genuine issue of material fact exists when reasonable minds could differ on the facts controlling the outcome of the litigation." Dowler v. Clover Park Sch. Dist. No. 400, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

A

Yandl first contends that the trial court improperly dismissed his disparate treatment claim. Because Yandl failed to meet his obligation to proffer evidence of a similarly situated nonprotected "comparator," we disagree.

Under Washington's Law Against Discrimination (WLAD), chapter 49.60 RCW, it is an unfair practice for an employer to discriminate against any person in the terms or conditions of that person's employment on the basis of a protected characteristic, including honorably discharged veteran status or the

presence of a disability. RCW 49.60.180(3). "At trial, the WLAD plaintiff must ultimately prove that [the protected characteristic] was a 'substantial factor' in an employer's adverse employment action." Scrivener v. Clark Coll., 181 Wn.2d 439, 444, 334 P.3d 541 (2014). A "substantial factor" means that the protected characteristic was a significant motivating factor bringing about the employer's decision, not that the protected characteristic was the sole factor in the decision. Scrivener, 181 Wn.2d at 444.

"[S]ummary judgment to an employer is seldom appropriate in the WLAD cases." Scrivener, 181 Wn.2d at 445. To overcome summary judgment, a plaintiff needs to show only "that a reasonable jury could find that the plaintiff's protected trait was a substantial factor motivating the employer's adverse actions." Scrivener, 181 Wn.2d at 445. "This is a burden of production, not persuasion, and may be proved through direct or circumstantial evidence." Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 149, 94 P.3d 930 (2004), abrogated on other grounds by Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County, 189 Wn.2d 516, 404 P.3d 464 (2017).

When a WLAD plaintiff lacks direct evidence of discrimination, the burden-shifting analysis articulated in McDonnell Douglas Corp v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), is used to determine the proper order and nature of proof on summary judgment. Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 354, 172 P.3d 688 (2007). First, the plaintiff must establish a prima facie showing of discrimination. Hegwine, 162 Wn.2d at 354. If the plaintiff successfully does so, the burden shifts to the employer to present evidence of a

legitimate, nondiscriminatory explanation for the adverse employment action. Hegwine, 162 Wn.2d at 354. If the employer does so, this rebuts the presumption of discrimination and the burden returns to the plaintiff to show that the employer's stated reason for the action was pretextual. Hegwine, 162 Wn.2d at 354. "If the plaintiff satisfies the McDonnell Douglas burden of production requirements, the case proceeds to trial, unless the judge determines that no rational fact finder could conclude that the action was discriminatory." Scrivener, 181 Wn.2d at 446.

To establish a prima facie case of disparate treatment, a plaintiff must show that he or she (1) belongs to a protected class, (2) was treated less favorably in the terms or conditions of his employment than a similarly situated, nonprotected employee, and (3) that the nonprotected "comparator" was doing substantially similar work. Washington v. Boeing Co., 105 Wn. App. 1, 13, 19 P.3d 1041 (2000).

There is no dispute that Yandl belongs to a protected class—he is an honorably discharged veteran and has a disability (PTSD). He contends that he was treated differently than nondisabled, nonveterans because he was terminated after the incident with students at New Start. Yandl compares this situation to that of Tyler Maxwell, a weekend shift officer.[2] According to Yandl, he "got harsher treatment [than Maxwell] . . . for less objectionable conduct." Maxwell's misconduct was visiting his girlfriend during his shift—around two in the morning on a Saturday—when no students were on campus. Maxwell was

[2] Whether or not Maxwell is a veteran is not in the record.

given "the harshest punishment short of termination" and was suspended without pay.

Maxwell is not a similarly situated employee because his misconduct differed significantly. Maxwell's misconduct did not directly involve students and occurred in the middle of the night and on a weekend when no students were on campus. Scott Logan, chief operating officer of Highline Public Schools, explained in a declaration that misconduct that involves behavior toward students is more serious than misconduct that does not. Because Yandl's misconduct was different and more serious, Maxwell is not a suitable "comparator" for the purposes of proving disparate treatment. See Domingo v. Boeing Emps.' Credit Union, 124 Wn. App 71, 82-83, 98 P.3d 1222 (2004) (employee could not use other employees who received lesser discipline for less serious misconduct as "comparators" to prove disparate treatment), abrogated on other grounds by Mikkelsen, 189 Wn.2d 516.

Furthermore, and importantly, Yandl's termination was rescinded and he was provided with back pay for the duration of the period during which he was terminated. Yandl's rescinded termination therefore cannot be considered less favorable than Maxwell's suspension, which was not rescinded and for which Maxwell lost pay. Cf. Ticali v. Roman Catholic Diocese of Brooklyn, 41 F. Supp. 2d 249, 264 (E.D.N.Y. 1999) (retracted termination cannot be used as adverse employment action to show retaliation under Title VII of the Civil Rights Act of 1964, §§ 2000e to 2000e-17).

Yandl also asserts that the timeliness with which he received equipment, his transfer to Highline, that he was required to pay into a union retirement fund, and that he was teased by co-workers constituted less favorable treatment. However, Yandl does not show that any nonprotected employee was treated differently.

Because Yandl does not demonstrate that he was treated less favorably than a similarly situated employee, he fails to establish the second element of a prima facie case of disparate treatment. Accordingly, the trial court properly dismissed Yandl's disparate treatment claim.

B

Yandl also contends that harassment based on his disability, status as a military veteran, or both created a hostile work environment. Because the alleged harassment did not affect the terms or conditions of Yandl's employment, we disagree.

In order to withstand summary judgment on a discriminatory hostile work environment claim, a plaintiff must make a prima facie showing that (1) the harassment was unwelcome, (2) the harassment was because of a protected classification, (3) the harassment affected the terms or conditions of employment, and (4) the harassment can be imputed to the employer. Washington, 105 Wn. App. at 12-13.

Whether allegedly discriminatory conduct is sufficiently severe and pervasive to affect the terms and conditions of employment is a question of fact. Adams v. Able Bldg. Supply, Inc., 114 Wn. App. 291, 296, 57 P.3d 280

(2002) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)). "But a civil rights code is not a 'general civility code.'" Adams, 114 Wn. App. at 297 (footnote and internal quotation marks omitted) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)).

A grant of summary judgment dismissing a hostile work environment claim is therefore appropriate if the plaintiff's submissions demonstrate nothing more than "[c]asual, isolated or trivial manifestations of a discriminatory environment" because such manifestations do not affect the conditions of employment "to a sufficiently significant degree to violate the law." Washington, 105 Wn. App. at 10 (citing Faragher, 524 U.S. at 788; Glasgow v. Ga.-Pac. Corp., 103 Wn.2d 401, 406, 693 P.2d 708 (1985)).

Harassment is imputed to an employer when an "owner, manager, partner or corporate officer" has personally participated in the harassment. Glasgow, 103 Wn.2d at 407. Managers are those who have the authority to affect the hours, wages, and working conditions of the employer's workers. Robel v. Roundup Corp., 148 Wn.2d 35, 48 n.5, 59 P.3d 611 (2002).

An employer can also be held responsible for a discriminatory work environment created by a plaintiff's co-workers if the plaintiff can show that "the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action." Glasgow, 103 Wn.2d at 407.

A plaintiff may demonstrate this by proving that "complaints were made to the employer through higher managerial or supervisory personnel" or by proving that the harassment was so pervasive "as to create an inference of the employer's knowledge or constructive knowledge of it," and "that the employer's remedial action was not of such nature as to have been reasonably calculated to end the harassment." Glasgow, 103 Wn.2d at 407.

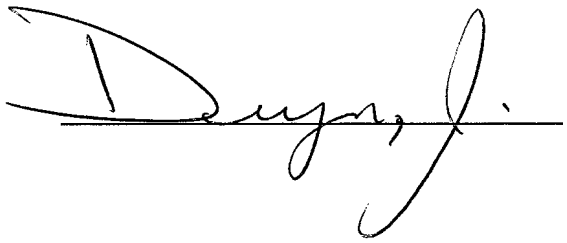
Here, the harassment alleged by Yandl was not sufficiently pervasive so as to alter the conditions of his employment. While offensive, Yandl testified that Rosales's statement following his panic attack was an isolated incident. See Washington, 105 Wn. App. at 13 (racial slur used once did not create a hostile work environment). Rosales's other comments and behaviors may have been discourteous, but the WLAD is not a "'general civility code.'" Adams, 114 Wn. App. at 297 (internal quotation marks omitted) (quoting Faragher, 524 U.S. at 778). Rather, Yandl described "[c]asual, isolated or trivial manifestations of a discriminatory environment." Washington, 105 Wn. App. at 10. Accordingly, Yandl failed to make a prima facie showing of a hostile work environment.

Furthermore, Yandl proffered no evidence indicating that the harassment should be imputed to Highline. Yandl does not allege that an owner, manager, partner, or corporate officer participated in harassing him, nor does he show that Highline was or should have been aware of the harassment. Although Yandl asserts—without citation—that "[c]omplaints were made, and management did nothing," the record contains no indication that complaints were made to

appropriate Highline officials or that these Highline officials had any reason to be aware of the alleged harassment.

Yandl failed to show both that the harassment he experienced was sufficiently severe and pervasive so as to affect the terms or conditions of his employment or that it should be deemed to be imputed to Highline. Thus, summary judgment dismissal was appropriate.

Affirmed.



WE CONCUR: