

NO.110
65713-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JERRY WILLIAMS, individually,

Appellant,

v.

BOSE CORPORATION, a Delaware corporation; DON CHRISTENSEN
and "JANE DOE" CHRISTENSEN, and the Marital Community
Composed thereof,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

In a transparent attempt to inflame the Court, Appellant Jerry Williams (“Williams”) mischaracterizes the trial of this case as one where the “system failed” an African American employee who claims he was exposed to highly offensive racial conduct and slurs on a regular basis over an 18 month period. In fact, the evidence presented during trial on Williams’s hostile work environment claim established that the manager in question made racially inappropriate comments on a *few isolated occasions* and immediately apologized for and stopped his behavior when counseled by management. Williams never suffered an actual adverse employment action. Nor did the challenged conduct create such a dramatic change in his employment conditions that it would amount to an adverse employment action. To the contrary, the jury heard extensive evidence establishing that, until he filed this lawsuit, Williams himself did not find the complained of behavior “offensive” or the working environment “abusive.”

Nevertheless, Williams now alleges that the trial court committed reversible error in all phases of its handling of this case – by granting partial summary judgment on Williams’s discrimination, retaliation, and common law claims; by denying his motion for a new trial on his hostile work environment claim; and by excluding a proposed expert and

allowing evidence directly relating to his credibility and claims of severe emotional distress during trial. This Court should affirm each of the trial court's rulings for three critical reasons.

First, the trial court properly granted summary judgment on Williams's discrimination, retaliation, and common law claims. Williams failed to present any evidence – in response to that motion or even later at trial – establishing that he suffered an actual adverse employment action while employed at BOSE, or was treated less favorably because of his race. His failure to establish a genuine issue of fact on each element of his claims was fatal to his statutory claims for disparate racial treatment and retaliation, as well as to his common law claims based on the same set of facts.

Second, the jury considered substantial evidence from which it could reasonably conclude that Williams failed to establish two of the four necessary elements of his claim for hostile work environment: that he regarded the conduct complained of as “offensive,” and that the conduct complained of was so severe and pervasive it altered the conditions of his employment and created an abusive working environment. That evidence included Williams's admissions that, during the same time the allegedly “offensive” behavior was taking place, he recruited a minority friend to come work at BOSE; asked that his hours be increased, rather than

decreased; told numerous other employees that he “preferred” working with the allegedly racist manager as opposed to other managers; and wrote a resignation letter, which he agreed was accurate, describing his work experience at BOSE as “great.” In light of the substantial evidence supporting the jury’s verdict, the trial court properly exercised its discretion in denying Williams’s motion for a new trial.

Third, the trial court did not abuse its discretion in any of its evidentiary rulings. The trial court properly rejected Williams’s last-minute request to play a song containing offensive lyrics to the jury, where his counsel *agreed* to a stipulation that was read to the jury describing the lyrics of the song instead. The trial court correctly determined that one of Williams’s proposed experts, Dr. Albert Black, sought to testify on an ultimate legal issue, did not have the qualifications to support his remaining opinions, and would not have been helpful to the jury. Finally, because Williams sought damages for severe emotional distress, evidence of statements that he made to prospective employers just *three months* after he resigned his employment at BOSE – including statements that he “had fun at BOSE” and “denied recent stressors of significance” – were highly relevant to rebut his claims. Similarly, evidence of false statements Williams made, under penalty of perjury, in his application to the Arlington Police Department three months after he resigned his

employment with BOSE, were directly relevant to Williams's credibility. This Court should affirm each of the trial court's rulings.

II. COUNTERSTATEMENT OF ISSUES

1. Did the court properly grant BOSE's motion for summary judgment on Williams's statutory claims of disparate treatment and retaliation, and his derivative common-law claims for negligent hiring, negligent/intentional infliction of emotional distress, negligence and outrage?
2. Did the court properly exercise its discretion in denying Williams's motion for a new trial on his hostile environment claim where substantial evidence supported the jury's verdict?
3. Did the court properly exercise its discretion in determining the admissibility of evidence at trial, including:
 - (a) introducing a stipulated description of an offensive song allegedly played in the workplace into evidence, rather than playing the song for the jury;
 - (b) excluding the testimony of Dr. Albert Black on the grounds that he was unqualified, unhelpful to the jury, and sought to testify about an ultimate question of law;

(c) admitting relevant testimony and documentary evidence from Williams's Arlington Police Department employment application pertaining to his credibility and damages;

(d) admitting relevant testimony and documentary evidence from Williams's employment at Study Island pertaining to his credibility and damages; and

(e) admitting relevant testimony pertaining to Williams's claims of emotional distress and damages, including the results of his mental health screening made shortly after he left BOSE's employment?

III. STATEMENT OF FACTS

A. Williams Had a "Great Experience" Working at BOSE for Eighteen Months Before Moving to Texas With His Family.

BOSE is a premier designer and manufacturer of audio and video equipment, headquartered in Framingham, Massachusetts. In Washington, BOSE has three retail stores – one in downtown Seattle, one in the Bellevue mall, and one that recently opened up in Tacoma, in addition to a small kiosk in the SeaTac airport. RP 050510 and 050610 102:15-19.

In November of 2006, Williams began working at BOSE's Bellevue, Washington retail store through a temporary staffing agency. RP 050510 121:4-8. He was hired by store manager, defendant Don Christensen, as a part time "Demonstration Specialist" – a salesperson

who receives specific training on BOSE's products and who presents merchandise to customers in the in-store theater. Around December 2006, Williams asked Christensen to hire him as a regular part time employee. *Id.* at 68:12-14. Williams did not look for any other job with any other company. CP 1730:19-1731:5. Christensen hired Williams as a regular part time employee, working approximately 25 hours a week. RP 050510 121:9-11.

Sometime in the summer or early fall of 2007, Williams recruited his friend, Eric Wong, to come to work at the BOSE Bellevue store. *Id.* at 50:18-51:7. At the time he did so, Mr. Christensen was the assistant store manager, having been demoted and replaced by Mike Krassner in March 2007 due to problems with his performance. RP 050410 107:1-14. In late December 2007, Williams asked that his hours be increased from part to full time and his request was granted. RP 050510 95:13-16. When he decided to seek full time employment at BOSE, Williams again chose not to look for any other job with any other company. *Id.* at 126:2-25. With the exception of the time that he was out on an approved medical leave of absence, Williams remained a full time BOSE employee until he voluntarily resigned in June 2008. *Id.* at 183:14-184:5. In the resignation letter that he submitted – a letter which he admitted was written

voluntarily and in his own words (RP 050510 183:25–184:20) – Williams stated the following:

I, Jerry Williams will become a Police Officer in Dallas Irving Texas in the Month of June 2008. My last day will be June 15, 2008. I have enjoyed being apart [sic] of a *wonderful team of individuals* and this has *truly been a great experience*. There have been ups and downs but I have enjoyed my job experience here. *Thank you BOSE demo-specialist and staff management for a great opportunity* and wish you well.

Trial Exhibit #100 (emphasis added).

B. BOSE Promptly Addressed Each of Williams’s Complaints During His Employment.

During his employment at BOSE, Williams made two formal complaints against management and specifically against Don Christensen. The first complaint occurred on November 4, 2007, when Williams told demonstration team lead Katherine Autry-Schiffgens that Christensen was using terms that he [Williams] considered “racial.” RP 050610 and 051010 164:9–168:11. Significantly, Williams did *not* complain to Autry-Schiffgens that Christensen used the word “nigger” in his presence; used racially offensive or inappropriate comments on a frequent or daily basis; or had ever mimicked a “Sambo” routine at work.¹ *Id.* at 166:4-17.

¹ At the time she testified at both her deposition and at trial, Ms. Autry-Schiffgens no longer worked for BOSE and had been working for another employer for well over a

Autry-Schiffgens immediately forwarded Williams's complaint to store manager Krassner. *Id.* at 168:16–169:5. Despite the fact that Williams and Autry-Schiffgens were friends, the November 4, 2007 complaint was the one and only complaint about Christensen's behavior that Williams ever brought to her attention. *Id.* at 163:5-9; 173:13-20.

Upon being notified of the complaint, Krassner immediately notified BOSE Human Resources and began an investigation. RP 050610 and 051010 at 5:16–7:6; RP 050510 and 050610 151:15–153:9. The investigation revealed that Christensen had, on occasion, made comments and jokes that could be seen as insulting or offensive. No one – including Williams – complained, however, that Christensen had ever used the word “nigger” or was “constantly” making comments using the word “nigger.” RP 050610 and 051010 39:19–40:5. Because this was the first complaint that BOSE had ever received against Christensen, it was decided that, consistent with BOSE's progressive discipline policy, the appropriate response would be to provide a verbal warning and strong coaching that future inappropriate behavior would result in his [Christensen's] termination. *Id.* at 41:8–42:12; RP 050510 and 050610 153:23–155:12. After receiving the warning, Christensen apologized to all of the store's employees, including Williams. RP 050610 and 051010 41:19–42:1. By _____
year. As such, she had absolutely no stake in the outcome of the case. RP 050610 and 051010 154:6-16.

all accounts, Christensen's behavior immediately and significantly improved after being counseled and warned by Krassner. Every employee who worked at the store other than Williams testified that after November of 2007, Christensen *never* said or did anything that was remotely objectionable. See RP 050510 and 050610 156:5-21; RP 050610 and 051010 42:13-20; 174:11–175:25; RP 051010 and 051110 19:2-9.

In early 2008, Williams learned that his wife was being transferred to Texas for her job. RP 050510 154:1-23. Shortly thereafter, on February 4, 2008, Williams placed a call to the BOSE Human Resources hot line, and spoke with Human Resources Specialist Marissa Abrams. *Id.* at 154:24–155:4. During the call, Williams raised several concerns about store manager Krassner – including Krassner's improper handling of Williams's request for medical leave. CP 173-176. At the end of the call, Williams mentioned in passing his concern that Christensen had used the word “nigger” in his presence. Specifically, Williams told Abrams that Christensen had used the word “nigger” twice – once in March 2007 when referring to specific movie scenes; and once in August or September 2007 when he and Christensen were discussing the oral exams that Williams would be required to take if his applications to various local police departments were accepted. CP 174. In that conversation, Christensen helped Williams prepare for the difficult types of questions he might be

asked during those exams, such as what he would do if a white suspect he was trying to arrest called him a “nigger.” CP 174. Significantly, at no time did Williams ever tell Abrams that Christensen had said or done anything inappropriate after Christensen was counseled in November 2007, nor did Williams ever tell Abrams that Christensen had used the word “nigger” frequently or constantly, or that Christensen engaged in offensive racial conduct on a daily basis. CP 176. On February 5, 2008, the day after he first spoke with Abrams, Williams filed an on-line complaint with the Washington State Human Rights Commission (“Washington HRC”). RP 050510 162:5-12 and Trial Exhibit # 91. In his charge to the Washington HRC, Williams alleged the same basic story he told Abrams and sought punitive damages and attorneys’ fees as relief. *Id.* at 163:14–164:15. Fourteen days later, Williams amended his complaint to the Washington HRC to add the allegation that Christensen had once used the term “sweet chocolate Christ” and stated that he “hates all races.” Trial Exhibit # 95. Williams never complained to the Washington HRC that Christensen used the word “nigger” on a “constant” basis. *Id.* and CP 358.²

² BOSE was never informed of Williams’s February 5 complaint to the Washington HRC. After conducting an interview of Williams on February 14, 2008 and learning about BOSE’s response to his initial internal HR complaint, the investigator closed the case, noting that “[c]orrective action [had been] taken.” Trial Exhibit #37. The investigator informed Williams of BOSE’s responsibility under the law, and told him that

After Williams first spoke to Abrams on February 4, 2008, BOSE contacted him to address his complaint and offered to meet with him. RP 050510 and 050610 159:8–160:9. Williams, however, refused to provide anyone at BOSE with any additional information about his complaints regarding Christensen and his use of the word “nigger” without his attorney present. *Id.* at 160:10–161:14. Because no complaints had been made against Christensen since he was counseled back in November of 2007, and unable to get further details from Williams, BOSE took the action of reminding Christensen again about the company’s policy against harassment and placing a written warning in his file. Trial Exhibit #99.

Reflecting on his employment with BOSE, Williams could not identify a single statement in the performance evaluation he received in May of 2008 – after he had made his complaints to both Autry-Schiffgens and BOSE Human Resources – that he considered unfair or discriminatory. CP 271:17-25 and Trial Exhibit #35. To the contrary, Williams admits that during the entire time he was a regular BOSE employee – from January 2007 through June 2008 – he had no complaints

“there’s not much of a case if they’ve met their responsibility.” The Washington HRC never issued a formal complaint based on that February 5 complaint. Following Williams’s new allegations on February 19, 2008, the Washington HRC drafted a formal complaint, which was filed on February 26, 2008. *Id.* BOSE submitted its Position Statement in response to the formal complaint on April 25, 2008. On May 28, 2008, the Washington HRC closed Williams’s case because he filed a private lawsuit against BOSE. *Id.*

about the terms and conditions of his employment, including any complaints about his pay, the number of hours he was scheduled to work, the commissions he received or promotions. CP 257:11–258:2; 265:12–21; 267:18–21. Moreover, during the time he worked at BOSE, Williams often stated to both his wife and his co-workers that he preferred working with Christensen rather than with other managers. RP 050610 and 051010 73:21–25; 161:6–162:8; 051010 and 051011 15:10–16:20.

C. Williams’s Conduct During His Post-BOSE Employment Contradicts His Damage Allegations.

Shortly after resigning from BOSE, Williams applied to become a police officer with the Arlington (Texas) Police Department (“APD”). As of mid-September 2008 – three months after leaving BOSE – Williams completed a detailed written application in which he answered numerous questions about his background, including his prior employment history. *See* Trial Exhibit #106. In the application, Williams certified that there were “*NO MISREPRESENTATIONS, FALSIFICATIONS, OR OMISSIONS in the foregoing statements and answers. All entries are true and correct.*” However, Williams made no reference to his pending lawsuit against BOSE in which he claimed serious mental injuries in the application, even though that information would have been responsive to multiple questions. *Id.* As part of the application process, Williams also

met with a number of different APD officers, including Officer Rick Eudy, and was questioned about the answers he provided on the APD application. RP 051010 and 051110 96:1-7.

Additionally, Williams was also required to undergo extensive physical and psychological testing as part of the application process. On September 10, 2008 – again, three months after resigning from BOSE – Williams underwent a psychological exam performed by police psychologist, Dr. Brandy Miller. After extensive testing and examination, Dr. Miller concluded that Williams passed the psychological evaluation and that his testing revealed “no evidence of psychological disorders.” CP 2500:23–2501:1 and Trial Exhibit #60. Significantly, Dr. Miller noted that during her interview with Williams, he [Williams] “denied any recent stressors of significance.” Trial Exhibit #60. Eventually, Williams was offered and accepted a position as an entry level APD officer – one of his long time goals. RP 050510 17:20–18:7; 78:6-22. He started working for APD in April of 2009 – a position he remains in today. *Id.* at 5:14-15.

IV. PROCEDURAL HISTORY

A. The Trial Court Granted BOSE's Motion for Summary Judgment In Part, Concluding That Only Williams's Hostile Work Environment Claim Presented Any Material Factual Disputes.

Williams asserted five separate causes of action against BOSE: disparate treatment racial discrimination; hostile work environment; retaliation; negligent hiring, retention and supervision; and negligent/intentional infliction of emotional distress, negligence and outrage. After the critical depositions had been taken in this case, BOSE moved for summary judgment on each of the causes of action alleged in the complaint. CP 205-239. *First*, with respect to Williams's discrimination and retaliation claims, BOSE argued that, taking the facts in the light most favorable to him, Williams had failed to present any specific, material fact establishing that he suffered an actual adverse employment action as a result of the alleged discriminatory behavior, or that he was treated less favorably because of his race. To the contrary, the undisputed evidence showed that his hours had been increased from part to full time, he had no complaints about the numbers of hours worked, he had no complaints about the salary he received, and he was never denied a promotion. CP 205-239 at 222-226. *Second*, with respect to the hostile work environment claim, BOSE argued that the conduct he complained

could not affect the terms and conditions of his employment as a matter of law, because the evidence established that he himself did not subjectively perceive the environment at BOSE as offensive or abusive. *Third*, BOSE argued that Williams's remaining common laws claims were based on the same allegations that supported the discrimination, retaliation and hostile work environment claims, and that Williams had not come forward with evidence creating a genuine issue of material fact regarding his common law claims. CP 205-239 at 236-239.

The trial court conducted a hearing on BOSE's summary judgment motion on November 20, 2009. On November 23, 2009, the court granted BOSE's motion in part. The court dismissed with prejudice Williams's statutory claims for racial discrimination and retaliation. The court also determined that Williams had failed to identify any genuine factual dispute regarding his common law claims. CP 607-609. The trial court denied BOSE's motion for summary judgment on Williams's claim for hostile work environment, however, concluding that Williams's testimony created a genuine factual dispute. *Id.*

B. The Trial Court Granted BOSE's Motion in Limine to Exclude One of Plaintiffs' Proposed Experts.

BOSE moved in limine to exclude one of Williams's two proposed expert witnesses, Dr. Albert Black. Dr. Black – a retired sociology

professor – offered a panoply of “expert” opinions for which he lacked the necessary expertise and qualifications, including his conclusions that (1) a “hostile work environment” existed at BOSE; (2) BOSE did not comply with its own anti-harassment policy; and (3) Williams suffered from depression and emotional damage as a direct result of his treatment at BOSE. CP 701-713. It was uncontested that Dr. Black was neither a physician nor a psychologist, and had no training or experience in either human resources or the law. CP 725-726; 733-737; and 738-739. Indeed, Dr. Black admitted that it was Williams’s attorneys who actually prepared the portion of his “expert” report that discussed the legal elements of Williams’s hostile work environment claim. CP 723-724. The trial court granted BOSE’s motion on April 12, 2010, noting that *“once the improper legal, medical and psychological opinions of the witness are snipped away (as all agree that should be since there is no foundation) the little that remains of the proposed testimony is not appropriate under ER 702.”* CP 998-999.

C. After a Six-Day Trial, the Jury Returned a Verdict for BOSE on Williams’s Hostile Work Environment Claim.

Trial on Williams’s remaining claim began on May 3, 2010. The jury heard testimony from 15 live witnesses and the video taped testimony of three witnesses. At the trial, Williams’s story changed significantly

from the story that he had reported to BOSE Human Resources and to the Washington Human Rights Commission. Now, according to Williams, Christensen subjected him to offensive racial comments “constantly” – from the day he first began working at BOSE in November of 2006, until he resigned his position in June of 2008. RP 050510 34:7-23. Though he passed the mental health screening required for him to work as a full time police officer in the Arlington Police Department, Williams argued that he suffered depression and emotional distress as a result of treatment he was forced to endure at BOSE, contradicting his own prior statements.

In support of his allegation that BOSE caused him to suffer long standing emotional damage, Williams offered the testimony of his wife, Cicely Williams, and Michael Kane – a social worker offered as an expert. Ms. Williams testified that her husband was “emotionally drained” as a result of his experience at BOSE. RP 050610 and 051010 70:9-14. And Kane testified to a dramatic and different description of Christensen’s conduct than had been previously heard before. According to Kane, Williams informed him that Christensen would “*constantly follow him around as he attempted to do his work assignments and continuously taunted him, many times using the word nigger under his breath.*” *Id.* at 96:24–97:6. Kane testified that, at the time of his examination in January 2010, Williams was in “deep emotional distress” as a result of his time at

BOSE and diagnosed him with Post Traumatic Stress Disorder (PTSD).
Id. at 111:9-19; 119:2-9; 150:8-16. Surprisingly, Kane made the diagnosis notwithstanding the fact that the testing he himself administered to Williams demonstrated “post traumatic” stress levels well within normal limits. *Id.* at 134:25–135:24.³

To bolster his contention that Christensen engaged in inappropriate behavior on a daily basis, Williams offered the testimony of three former BOSE employees, Robin Ramos, Shawn Riibe, and Colin Sarchin. All testified, over BOSE’s objections, to offensive comments they claimed to have heard Christensen make on a regular basis. This may have created an initial impression that Christensen engaged in inappropriate behavior “constantly.”⁴ On cross examination, however, a different picture emerged. All three witnesses admitted that any comments they claimed to have heard occurred before August 2007 – well before Christensen was counseled in November. RP 050410 39:18-24; 147:19-22; 193:20–194:2. And, despite claiming that they were “offended” by Christensen’s repeated

³ Indeed, the only clinically significant score Williams received on the test Kane administered was for narcissistic personality disorder. RP 050610 and 051010 137: 1-15.

⁴ BOSE objected to Ramon and Crozier’s testimony on the grounds that, to the extent the witnesses offered statements made outside of Williams’s presence, the evidence was improper under ER 404(a) and (b). Moreover, to the extent the witnesses were unable to remember what was said, the context in which it was said or when the statement was made, there was lack of a proper foundation and the evidence was inadmissible under ER 402, 403 and 404 (b). *See* CP 610–624. Nevertheless, the trial court denied BOSE’s motion and allowed the evidence.

use of offensive racial comments and behavior, none of the three could remember specifics about a *single* comment they allegedly heard. Rather, all admitted that they could not remember specifically *what* was said, *when* the offensive comments were made, or the *context* in which the comments were made. *Id.* at 47:5-16; 160:5–161:14; 183:9–186:19.⁵

On cross examination, Williams’s story also changed once again. He now told the jury that he did *not* hear the phrase “nigger” used after Krassner became store manager in April 2007. RP 050510 64:17–65:14. More significantly, however, Williams admitted to a series of behaviors that were inconsistent with his claim that he *ever* found Christensen’s behavior to be either abusive or offensive. Thus, Williams admitted that *at the same time he claimed that Christensen was “constantly” subjecting*

⁵ In fact, Sarchin testified that Williams was *not* present for any of the “rare” occasions that he heard Christensen make a comment that was inappropriate. RP 050410 184:9-13; 185:8-13; 195:7-10. Likewise, Robin Ramos eventually admitted that he only heard Christensen use the word “nigger” a total of *one time* – and that involved the scenario where Christensen was preparing Williams for the oral police exams. *Id.* at 45: 20–46:2. Significantly, as to all the other “offensive” comments he claimed to have heard Christensen say, although Ramos could not remember the specifics of what was said or the context in which the comment was made, he could remember that everyone who was present for the comments was *laughing – hardly something one would do if they found the behavior abusive or offensive*. *Id.* at 47:5-22. Witness Dawn Crozier testified to much the same thing. Ms. Crozier testified that on one occasion, she heard Christensen call an applicant for employment “ghetto black.” *Id.* at 63:4-12. She also testified that, while out on smoke breaks with Christensen, she heard him use offensive racial terms on numerous occasions. *Id.* at 64:5-22. Yet, on cross examination, despite being able to specifically remember remarks Mr. Christensen made in a mundane conversation, she could not remember a single detail about the allegedly offensive racial comments that she claimed Christensen made on a regular basis, including what was said, when the comments were made, the context in which the comments were made or who was present for the discussions. *Id.* at 67:3–69:15.

him to racially offensive statements and conduct, he (1) asked Christensen to become a regular employee of BOSE (*Id.* at 68:12-14); (2) recruited a minority friend, Eric Wong, to come work with him at the BOSE Bellevue store (*Id.* at 50:25–51:7); (3) asked that his hours be increased from part to full time (*Id.* at 95:13-16); (4) did not bother to look for another job anywhere in the mall (*Id.* at 126:2-25); and (5) repeatedly told other co-workers that he “preferred” working with Christensen more than he did with other managers (*Id.* at 132:21–134:2). In addition, Williams admitted that despite claiming to have been subjected to offensive racial comments and behavior on a daily basis, he (6) wrote a resignation letter wherein he accurately and truthfully described his time at BOSE as a “great experience” – in direct contrast to a resignation letter he had written earlier to a different employer where he had not been so complimentary (*Id.* at 185:23–186:10 and Trial Exhibits #79 and #100). Williams also (7) described his time at BOSE as “fun” to a prospective employer shortly after he resigned his employment (*Id.* at 108:3-10 and Trial Exhibit #54); and (8) denied any “recent stressors of significance” and passed a rigorous psychological examination three months after he resigned his employment with BOSE, notwithstanding his claims of lasting emotional harm (Trial Exhibit #60 and RP 050510 and 050610 11:16–12:16).

In contrast to Williams, defendant Christensen's testimony remained consistent with the statements he made during discovery. He testified that he hired Williams and thought they were friends, despite their significant age gap. RP 050410 108:6–109:18; 113:20–114:3.

Christensen admitted that he used the word “nigger” three times in the workplace – once when he and Williams were discussing his police oral exam and Christensen posed the question “what would happen if a suspect you were trying to arrest called you a “nigger”” (*Id.* at 123:17–124:19); once when discussing police officer Mark Furman and noting that the word “nigger” had destroyed his career (*Id.* at 124:24–125:23); and finally, once when repeating a Richard Pryor joke in which the word was used (*Id.* at 125:24–126:10). In each instance, Christensen testified that his use of the word was wrong and was not used with the intent to hurt or be malicious. *Id.* at 124:6-23; 125:8-10; 126:8-10.

Refuting Williams's claims regarding the number of times he complained, and about Christensen's behavior after the November 2007 verbal warning, BOSE presented the testimony of Krassner, District Manager Jim Donnellan, Autry-Schiffgens, and current BOSE demonstration specialist Chris Zerangue. Krassner testified that, at the time he first became the store manager in April 2007, he sat down with every store employee, including Robin Ramos, Shawn Riibe, Colin

Sarchin and Jerry Williams, and asked them, among other things, about any concerns they had about the operation of the Bellevue store. RP 050610 and 051010 26:15–27:5. *Not a single employee – including Ramos or Williams – told Krassner in April 2007 that Christensen was making offensive racial comments on a frequent, constant or even isolated basis. Id. at 27:2–30:24; RP 050510 127:13–128:2.* Krassner also testified that Williams never asked him to re-arrange the work schedule to minimize the amount of time he would have to work with Christensen. RP 050610 and 051010 35:14-18.

BOSE also presented evidence regarding its reaction to Williams’s complaint, and Christensen’s behavior after being counseled by BOSE. Krassner and Donnellan testified about the investigation that BOSE conducted into Williams and others’ complaints about Christensen in November 2007 (RP 050510 and 050610 151:15–153:6; RP 050610 and 051010 9:13–10:16; 39:24–40:5) and the subsequent action taken. Donnellan testified as to how critical he felt it was for Christensen to understand the gravity of the situation. Christensen received a verbal warning, consistent with BOSE’s progressive discipline policy on first incidents of misconduct. RP 050510 and 050610 153:23–155:1. A number of witnesses, including former employee Autry-Schiffgens; Krassner; Donnellan; and Zerangue, all testified that after Christensen

received his counseling and warning in November of 2007, his behavior immediately and significantly improved, and there were no further problems with inappropriate comments. *See* RP 050510 and 050610 156:5-21; RP 050610 and 051010 42:13-20; 174:11–175:20.

Additionally, to rebut Williams’s claim that he suffered emotional damage caused by BOSE, the company offered testimony of two PhD psychologists – Dr. Brandy Miller and Dr. Arthur Davis. Dr. Miller was a psychologist employed by the Arlington Police Department who conducted an extensive examination of Williams in September 2008 – three months after he resigned from BOSE – to determine his fitness for duty as a police officer. During her examination, Williams specifically denied “any recent stressors of significance.” Trial Exhibit #60. Dr. Miller determined that Williams revealed “no evidence of psychological disorders” and was a young man who was “extremely satisfied with his life.” *Id.* Dr. Arthur Davis was hired by BOSE to conduct a psychological evaluation of Williams and did so in September of 2009. RP 051010 and 051011 40:16-22. Dr. Davis specifically disagreed with Williams’s expert’s opinion that Williams suffered from PTSD. *Id.* at 39:19–40:14. Rather, like Dr. Miller, Dr. Davis found no evidence that Williams suffered any emotional distress or other damage caused by BOSE. *Id.* at 69:20–75:15.

Finally, other substantial evidence called Williams's credibility into question. Officer Rick Eudy of the Arlington Police Department testified about misstatements that Williams made, under oath, in his application to the Arlington Police Department. Specifically, Officer Eudy testified that as of October 2008, Williams was asked, to his face, whether he had any pending lawsuits, but Williams did not disclose his lawsuit against BOSE, nor did he disclose that he suffered from PTSD or any other type of psychological disorder. *Id.* at 100:4-12. Similarly, other substantial evidence rebutted Williams's testimony that he found the environment at BOSE hostile or offensive, including the testimony of Kelly Shoaf, Williams's supervisor at a job he held for brief period of time while waiting to join the APD.⁶ Shoaf testified that during a job interview in September 2008 – three months after he resigned from BOSE – Williams told her that he “had fun” while working at BOSE; and that he “liked” his managers. CP 2610:22–2611:24 and 2613:21– 2614:4.

The trial concluded on May 12, 2010, when the jury returned a verdict in favor of BOSE. CP 3201-3202.

⁶ While waiting to finish the APD application process, Williams worked for a short time as a customer service representative for a company in Arlington, Texas called Study Island. Ms. Shoaf was Williams's supervisor at Study Island. CP 2605:2-21. Williams left Study Island after less than four months employment – having threatened to sue the company for discrimination. CP 2616:11-13; 2625:18-20; 2634:11-19.

D. The Court Denied Williams’s Motion for a New Trial.

On June 2, 2010, Williams filed a Motion for Reconsideration and For New Trial. CP 3189-3200. Williams argued that during trial, he presented “overwhelming evidence” establishing that BOSE created and maintained a racially hostile work environment. CP 3197-3198. BOSE argued, in response, that the jury verdict in the case was supported by substantial, largely uncontested evidence that Williams had failed to prove two of the four required elements of his claim for hostile work environment – namely, that he did *not* find the complained of behavior “offensive” or the work environment “abusive,” and that Christensen’s behavior was *not* severe or pervasive. CP 3242-3252. BOSE argued that the overwhelming evidence of Williams’s own actions – as opposed to his words – permitted the jury to conclude that Williams was not “offended” by Christensen’s behavior and did not find the work environment “abusive,” and that the testimony of multiple witnesses established that Christensen had only made inappropriate remarks on a few, isolated occasions. *Id.* Agreeing that substantial evidence existed to support the jury’s verdict, the trial court entered an order on July 2, 2010, denying Williams’s Motion for Reconsideration and New Trial. CP 3317-3318.

V. ARGUMENT

A. The Trial Court Properly Granted Summary Judgment on Williams's Discrimination, Retaliation, and Common Law Claims.

Appellate courts “review summary judgment de novo.”

Cornerstone Equipment Leasing, Inc. v. MacLeod, ___ Wn. App. ___, 2011 WL 359192 at *1 (Div. 1, 2011) (citing *Hubbard v. Spokane County*, 146 Wn.2d 699, 706-07, 50 P.3d 602 (2002)). Summary judgment is properly granted where, as here, the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Teller v. APM Terminals Pacific, Ltd.*, 134 Wn. App. 696, 704, 142 P.3d 179 (2006). “The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). To survive summary judgment, the responding party may not base its assertions on conclusory allegations, speculations, personal beliefs, or unsupported assertions. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992).

As Williams observes, employment cases often present genuine factual disputes that preclude summary judgment. Br. of Appellant at 21

(citing *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 160, 991 P.2d 674 (2000)). Nevertheless, “in order for a plaintiff alleging discrimination in the workplace to overcome a motion for summary judgment, the worker *must* do more than express an opinion or make conclusory statements,” but “must establish *specific* and *material* facts to support *each* element of her prima facie case.” *Sangster*, 99 Wn. App. at 160 (emphasis supplied) (citations omitted).⁷

1. Williams failed to present evidence of disparate treatment racial discrimination.

To prevail on a claim of disparate treatment racial discrimination, Williams had to establish that BOSE actually treated him less favorably because of his race. *Johnson v. Dep't of Social & Health Servs.*, 80 Wn. App. 212, 226, 907 P.2d 1223 (1996) (citation omitted). Specifically, Williams had to prove that (1) he belongs to a protected class; (2) suffered an adverse employment action; (3) was doing satisfactory work; and (4)

⁷ Contrary to Williams's contention, Br. of Appellants at 21, Washington appellate courts routinely affirm summary judgments for defendants in employment cases under the CR 56 standard. See, e.g., *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 98 P.3d 1222 (2004) (affirming summary judgment for defendant where former employee failed to establish a disparate treatment race discrimination claim); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004) (affirming summary judgment for defendant where plaintiff failed to establish prima facie case of age discrimination); *Wilson v. Wenatchee School Dist.*, 110 Wn. App. 265, 40 P.3d 686 (2002) (affirming summary judgment for defendant where the employer did not fail to reasonably accommodate employee); *McClintick v. Timber Products Manufacturers, Inc.*, 105 Wn. App. 914, 21 P.3d 328 (2001) (upholding summary judgment in wrongful termination cases involving an at-will employee); *Chen v. State*, 86 Wn. App. 183, 937 P.2d 612 (1997) (affirming summary judgment for defendant where employee failed to show pretext with respect to the reason for his dismissal in merely pointing to his self-evaluations and own explanations for his poor work performance).

was treated differently than someone not in the protected class. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 468, 98 P.3d 827 (2004). Williams failed to create a genuine issue of fact on his disparate treatment claim, either by direct evidence⁸ or through *McDonnell Douglas* burden shifting, because he did not identify a *single* adverse employment action taken against him, or *any* employee who was treated more favorably than he was with regard to the specific terms and conditions of his employment. While Williams claimed that BOSE management had less “open communication” with him, CP 2214:17–2215:4, that allegation, even if true, would not constitute an actual “adverse employment action.” *See Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004) (noting that for an action to be adverse, it must have a tangible, detrimental impact on workload or pay and be more than a mere “inconvenience”). Indeed, yelling at or even threatening to fire an employee has been recognized as conduct that does not rise to the level of an adverse employment action. *Id.* (citation omitted). Furthermore, Williams admits he had *no* complaints about the terms and conditions of his employment at *any* point during his tenure at BOSE. He had no complaints about his pay, the number of hours

⁸ Direct evidence “is evidence which, if believed, proves the fact of discriminatory animus *without inference or presumption.*” *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 662 (9th Cir. 2002) (emphasis added). “[D]irect evidence of discrimination is rarely available.” *Johnson v. Dep’t of Social and Health Services*, 80 Wn. App. 212, 227 n.20 (1996).

he was scheduled to work, the commissions he received, promotions or performance reviews. CP 257:11–258:2; 265:12-21; 267:18-21; 271:17-25. Indeed, Williams received a number of raises during his employment at BOSE. CP 190; 193-197.

Instead of identifying a specific actual adverse employment action he suffered, Williams instead attempts to bootstrap his hostile work environment claim into satisfying the “adverse employment action” prong of the separate disparate treatment test. Br. of Appellants at 29-30 (citing *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004)). As this Court recognized in *Kirby*, however, a plaintiff can establish unlawful employment discrimination under the WLAD by establishing *either* the elements of a “hostile work environment” claim, *or* the elements of a “disparate treatment” claim. 124 Wn. App. at 465, 468.⁹ *See also Antonius v. King County*, 153 Wash.2d 256, 264, 103 P.3d 729 (2005) (distinguishing “cases involving discrete retaliatory or discriminatory acts, such as termination, failure to promote, denial of transfer, or refusal to

⁹ As the Supreme Court observed in the case cited by this Court in *Kirby*, a plaintiff can establish a *retaliation* claim by establishing that the employer improperly responded to protected conduct by *either* “an actual adverse employment action, such as a demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action.” *Robel v. Roundup Corp.*, 148 Wn.2d 35, 74, n.24 (2002) (Bridge, J., dissenting in part); *see also id.* at 49 (majority affirms retaliation claim). But a plaintiff bringing a *discrimination* claim under the WLAD must establish the elements governing either a disparate treatment approach or a hostile work environment theory. *See Kirby*, 124 Wn. App. at 468 (disparate treatment); *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985) (hostile work environment).

hire, from cases involving claims of a hostile work environment”). The trial court properly granted summary judgment on Williams’s *disparate treatment* claim because he failed to show that he suffered any adverse employment action.

2. Williams failed to present evidence supporting his retaliation claim.

To make a prima facie case of retaliation, Williams needed to show that: (1) he engaged in statutorily protected activity, (2) BOSE took an adverse employment action against him, and (3) there was a causal link between the protected activity and the adverse action. *Harris v. City of Seattle*, 315 F. Supp. 2d 1112, 1125 (W.D. Wash. 2004); *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002). As established above, Williams failed to show that BOSE took *any* adverse employment action against him either *before or after* his complaints in November 2007 and February 2008. Though Williams again asserted that his hostile work environment claim sufficed to prove retaliation, the only behavior he claimed constituted a hostile work environment and occurred after his complaints was (1) the alleged lack of “open communication” with management; and (2) being questioned about when he was going to resign, which he characterized as a “constant bother.” CP 577-578.¹⁰ As

¹⁰ What Williams characterized as a “constant bother” in his deposition, he then termed a constructive discharge in his opposition to BOSE’s motion for summary judgment, and

previously stated, however, such minor inconveniences do not rise to the level of a hostile work environment and could not support Williams's retaliation claim. *See Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985) ("Casual isolated or trivial manifestations of a discriminatory environment do not affect the terms and conditions of employment to a sufficiently significant degree to violate the law. The harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive environment."). Moreover, beyond his own self-serving conclusions, Williams did not connect any of that conduct to his complaints. Consequently, the trial court properly granted summary judgment on his retaliation claim.

3. Williams failed to establish material issues of fact on his common law claims.

Williams's common law claims were based on the same facts that supported his statutory discrimination, hostile work environment and retaliation claims under the Washington Law Against Discrimination.

BOSE argued in its motion for summary judgment that, in the absence of

now in his appeal. CP 578; Br. of Appellant at 33. But constructive discharge can be proved only when an employee shows "a deliberate act by the employer that made [his] working conditions so intolerable that a reasonable person would have felt compelled to resign; and (2) that ... [he] resigned because of the conditions and not for some other reason." *Washington v. Boeing Co.*, 105 Wn. App. 1, 15, 19 P.3d 1041 (2000) (footnote omitted). An employee being asked when he is going to be giving notice, even repeatedly, is not "intolerable." And, although Williams resigned from BOSE in June 2008, he knew back in February that he would be leaving BOSE to move to Texas with his wife because she was being transferred, not because Williams was being discriminated against. RP 050510 153:25-154:23; Trial Exhibit #100.

different facts on which to base those claims, it was proper for the court to grant summary judgment on those claims, as well. *See Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 864-65, 991 P.2d 1182 (2000) (holding that the trial court properly dismissed emotional distress and negligent supervision claims because they were based on the same set of facts as the employment discrimination claims), *accord Batacan v. Reliant Pharm., Inc.*, 228 Fed. Appx. 702, 705-06 (9th Cir. 2007) (affirming dismissal on the pleadings where the common law claims alleged the same facts as those alleged under the statute, where statutory claim was also dismissed as a matter of law).

Williams failed to assert any different facts supporting his common law claims, and did not even attempt to identify any evidence regarding these common law claims. CP 578 (opposing BOSE's motion as to the common law claims only on the grounds that "should any [of plaintiff's statutory] causes of action be dismissed by the jury, the jury could alternatively rule favorably that defendants are liable for one of the common law claims."). The trial court properly granted summary judgment on the common law claims. *See, e.g., Francom*, 98 Wn. App. at 864-65; *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (declining to search for evidence or manufacture arguments for a plaintiff because "judges are not like pigs, hunting for truffles buried in briefs.")

B. Because Substantial Evidence Supported the Jury’s Verdict, the Trial Court Properly Denied Williams’s Motion for New Trial on His Claim of Hostile Work Environment.

“Abuse of discretion is the standard of review for an order denying a motion for a new trial.” *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). In the context of a motion for a new trial, discretion is abused if “such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial.” *Id.* (quoting *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978)) (quoting *Slattery v. City of Seattle*, 169 Wn. 144, 148, 13 P.2d 464 (1932)). The trial court’s determination of whether a litigant has been so prejudiced will not be disturbed by mere disagreement with the trial court; a showing of “manifest abuse” of discretion is required. *Kohfeld v. United Pacific Ins. Co.*, 85 Wn. App. 34, 41, 931 P.2d 911 (1997).

Motions for new trials are governed by CR 59. CR 59(a) lists nine separate grounds for a new trial, seven of which are inapplicable to the present case. The remaining two are as follows:

- (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(9) That substantial justice has not been done.

CR 59(a)(7), (9). Williams improperly implies that the existence of “simple proof of individual prejudice by a decision-maker,” or some facts at trial that could support his claim, are sufficient to warrant a new trial under CR 59. See Br. of Appellant at 16. Not so. To meet the burden imposed by CR 59(a)(7), there must be “no evidence or reasonable inference from the evidence to justify the verdict.” CR 59(a)(7); *Sommer v. Dep’t Soc. & Health Servs.*, 104 Wn. App. 160, 172, 15 P.3d 664 (2001) (emphasis added). And the reviewing court “must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence.” *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). Finally, when considering such a motion, all evidence must be viewed in the light most favorable to the party against whom the motion is made. *Id.* (citing *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980)).

Further, motions for a new trial under the “substantial justice” prong of CR 59(a)(9) are extremely limited and *rarely granted*. See *Kohfeld*, 85 Wn. App. at 41; *Lian v. Stalick*, 106 Wn. App. 811, 825, 25 P.3d 467 (2001)(affirming trial court’s denial of motion for new trial based on CR 59(a)(9) and recognizing that motions for new trial under

“substantial justice” grounds are rarely granted). It has long been recognized that courts grant new trials based on “substantial justice” grounds only in the most egregious circumstances.¹¹ And a party is not denied substantial justice merely because the court disagrees with the credibility given, or the interpretation of the evidence, by the trier of fact. *See Larson v. Georgia Pac. Corp.*, 11 Wn. App. 557, 562, 524 P.2d 251 (1974).

- 1. Substantial evidence was presented during trial from which a jury could reasonably conclude that Williams did not subjectively regard the conduct complained of as “offensive” or “abusive.”**

In order to establish a hostile work environment claim, the employee must establish that he or she *subjectively* perceived the environment to be abusive. *Clarke v. State Attorney General’s Office*, 133 Wn. App. 767, 787, 138 P.3d 144 (2006); *see also Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993) (“If the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment.”). The trial court properly denied Williams’s motion for a new trial because the overwhelming evidence presented at trial regarding his actions during and

¹¹ *See e.g., Berry v. Coleman Systems Co.*, 23 Wn. App. 622, 596 P.2d 1365 (1979) (new trial granted after it was learned that defendant lied in its answers to interrogatories); *Barth v. Rock*, 36 Wn. App. 400, 674 P.2d 1265 (1984) (new trial granted where key medical testimony expressly based on statements in a medical textbook was later found to be entirely inaccurate after review of the textbook).

after his employment with BOSE suggested he did *not* subjectively view Christensen's conduct as offensive or abusive. BOSE presented uncontested evidence that, during the time Williams claimed to be regularly subjected to racist slurs by Christensen, Williams (1) asked to become a regular employee and to have his hours increased (RP 050510 68:12-14; 95:13-16); (2) never looked for or applied for a different job (*Id.* at 126:2-25); (3) recruited a minority friend to come work in the same store as Christensen (*Id.* at 50:25-51:7); (4) never asked to have his scheduled adjusted to minimize contact with Christensen (RP 050610 and 051010 35:14-18); (5) repeatedly stated that he preferred working with Christensen rather than other managers (RP 050510 132:21-134:2); (6) wrote a resignation letter describing his time at BOSE as a "great experience," which he "enjoyed," although he had written other resignation letters to other employers where he was highly critical of his job experience there (*Id.* at 185:23-186:10 and Trial Exhibits #79 and #100; and (7) described his time at BOSE as "fun" to a subsequent employer (*Id.* at 108:3-10 and Trial Exhibit #54). *Significantly, while Williams attempted to explain this behavior to the jury, he never denied it.* Each of these actions, taken individually, diminished Williams's argument that he was "offended" by the behavior, bit by bit. Taken together, they constituted substantial evidence for the jury to conclude that, despite

Williams's self-serving after the fact statements to the contrary, his contemporaneous actions did not reflect those of a person who viewed his work environment as offensive or abusive.

2. Substantial evidence was also presented during trial from which the jury could have reasonably concluded that the conduct complained of was not "severe and pervasive" so as to alter Williams's terms and conditions of employment.

Williams concedes that in order to prevail on his hostile work environment claim, he also had the further burden of proving that the defendants' conduct was so "*objectively* hostile and abusive" as to "alter the conditions" of his employment. Br. of Appellant at 17 (citing *Oncale v. Sandowner Offshore Serv.*, 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998)) (emphasis supplied).¹² Whether harassment is sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment is determined by looking at the totality of the circumstances. *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d at 406-07, 693 P.2d 708 (1985). The totality of the circumstances, in turn, is evaluated by examining the frequency of the conduct and its severity, whether the conduct is humiliating or physically threatening or a mere offensive utterance, and whether the conduct unreasonably interfered with the employee's work performance. *Harris v. Forklift Sys., Inc.*, 510 U.S.

¹² Williams also improperly cites at length from an unpublished decision of this Court, in violation of GR 14.1. Br. of Appellants at 18.

17, 23 (1993). As previously stated, “[c]asual, isolated or trivial manifestations of a discriminatory environment” are not actionable. *Glasgow*, 103 Wn.2d at 406.

Here, the testimony from both BOSE and Williams’s witnesses supported the jury’s conclusion that Christensen used offensive terms on *a few isolated occasions*, and that his conduct was not severe and pervasive. While Williams testified that the conduct was “constant,” the majority of other witnesses (including ones Williams called) could only recall a limited number of incidents where Christensen behaved inappropriately. Furthermore, even those few witnesses who stated that Christensen regularly used offensive language could not recall the specifics of any of the comments, the context of those comments or who was present to hear them. RP 050410 47:5-22; 160:5–161:14; 183:9–186:19. Further, those witnesses did not and could not testify about Christensen’s conduct after he was counseled by BOSE in November 2007, *see* RP 050410 at 39:18-24; 147:19-22; 193:20–194:2, while all the witnesses – other than Williams – with knowledge of Christensen’s conduct after November 2007 uniformly agreed that it was wholly unobjectionable. RP 050510 and 050610 156:5-21; RP 050610 and 051010 42:13-20; 174:11–175:20; RP 051010 and 051110 19:2-9.

What is more, Williams never alleged and could not prove that Christensen engaged in any physically threatening conduct, nor that his work performance was affected by the alleged conduct. Although Williams now claims to have been “drained” and emotionally distressed because of Christensen, his work performance did not suffer and he remained a top salesman at the store, by his own admission. RP 050510 50:5-17; 135:11–136:5. In that face of this testimony, there was substantial evidence for the jury to conclude that the complained of behavior was not severe or pervasive and that the conduct did not alter the terms and conditions of Williams’s employment.

C. The Trial Court Did Not Abuse Its Discretion In Its Evidentiary Rulings.

Williams assigns error to several of the trial court’s evidentiary rulings. Br. of Appellant at 4-5. Appellate courts review a trial court’s decisions “to admit or exclude evidence for an abuse of discretion.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583 (2010) (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). Discretion is abused only when a decision is indefensible: “manifestly unreasonable or based on untenable grounds or reasons.” *Id.* at 668-69. Manifestly unreasonable means no reasonable person would come to the same

decision. *Id.* (citing *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 402-03, 219 P.3d 666 (2009)).

1. The trial court properly admitted the parties' stipulation regarding song lyrics.

During re-direct examination, Williams was asked about a song called "Rednecks" by Randy Newman, which he claimed that Christensen would play in the store on his iPod. His counsel then asked, for demonstrative purposes, to play the song for the jury. RP 050510 and 050610 61:8-24. Outside the jury's presence, BOSE's counsel objected to the song being played to the jury on a number of grounds, including the grounds that it was prejudicial and not timely disclosed on plaintiff's exhibit list. *Id.* at 80:23-89:3. The trial court offered the parties a compromise of having a stipulation read to the jury which stated, in relevant part, as follows:

What I want to do is inform you of the significant aspects of that song, and then that will be the extent of it. Randy Newman, as you may or may not know, is a songwriter. He was raised in Louisiana. He wrote the song "Rednecks" as a biting satire mocking his view of the perceived hypocritical moral superiority of northern whites regarding race relations in this country. That was the point of the song. The song does contain the word "nigger." It repeatedly appears in the refrain to that song that is repeated as the refrain over the course of that song a number of times.

Id. at 91:16–92:2. Significantly, Williams’s counsel agreed to the stipulation, telling the trial court “[W]e accept the stipulation ... We’ll take the stipulation” *Id.* at 88:3–4, 22–89:1. Williams nevertheless assigns error to the trial court’s ruling. Br. of Appellant at 41. Having agreed to the stipulation regarding the contents of the song, Williams is precluded from now arguing that the trial court erred in its decision to present the lyrics rather than to play the song to the jury. *See Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004) (“Under the invited error doctrine, a party may not set up an error at trial and then complain of it on appeal. This doctrine applies when a party takes an affirmative and voluntary action that induces the trial court to take an action that a party later challenges on appeal” (citations omitted)).

Even if his objection were well-founded, which it is not, Williams presents no evidence to suggest that the trial court abused its discretion in admitting the stipulation, rather than playing the song. As the court noted, the song is satirical, and there was a substantial risk that the jury would “misperceive” the lyrics of the song. RP 050510 and 050610 at 86:14–87:3. In order to mitigate that possibility, the jury was informed that the song repeatedly used the word “nigger” but the song itself was not played. *Id.* at 91:16–92:2. This was an entirely appropriate balancing, given that Williams had never previously identified this song and BOSE had no

opportunity to oppose its admission before trial. *Id.* at 83:22–84:2. Thus, the trial court did not abuse its discretion in admitting the agreed-upon stipulation.

2. The trial court properly excluded the testimony of Dr. Albert Black.

Williams next assigns error to the trial court’s refusal to admit testimony by one of his proposed experts, Dr. Albert Black. Br. of Appellant at 42. Under Washington law, no expert opinion is admissible unless the witness has first been qualified by a showing that he or she has sufficient expertise to state a helpful and meaningful conclusion to the jury. *See Sehling v. Chicago, Milwaukee, St. Paul & Pac. Railroad Co.*, 38 Wn. App. 125, 132-133, 668 P.2d 492 (1984). Dr. Black was neither qualified, nor would his opinions have been helpful. Williams proposed that Dr. Black testify as to the ultimate legal issue of whether a hostile work environment existed at BOSE, as well as to whether BOSE violated its anti-harassment policy and whether Williams suffered from depression and emotional distress. CP 701-713. While Williams claims that Dr. Black “would not have provided a legal opinion on the ultimate legal issues in this case,” Br. of Appellant 43, his own excerpt of Dr. Black’s proposed testimony shows that Dr. Black intended to share his own definition for “hostile work environment” with the jury, even though he

had no knowledge of Washington case law relating to the elements of a claim for hostile work environment and Williams's counsel drafted the section of his report on hostile work environment. *Id.* at 43; CP 723:16–724:5.

The law also prohibits testimony on an ultimate legal issue. *King County Fire Protection, Districts No. 16, No. 36 and No. 40 v. Housing Authority of King County*, 123 Wn.2d 819, 826 n.14, 872 P.2d 516 (1994) (“legal opinions on the ultimate legal issue before the court are not properly considered under the guise of expert testimony...” (emphasis in original) (citation omitted). Moreover, it was undisputed that Dr. Black had no training in the law, human resources or medicine. CP 725-726; 733-737; and 738-739. Furthermore, juries are able to understand questions of discrimination without expert testimony. *See Smith v. Colo. Interstate Gas Co.*, 794 F. Supp. 1035, 1044 (D. Colo. 1992) (“Gender and race discrimination are issues an average person can evaluate and understand without the assistance of an expert. Thus, on this basis alone the expert’s testimony on discrimination should be excluded.”). The trial court did not abuse its discretion in excluding Dr. Black.

3. The trial court properly admitted evidence regarding Williams's application process to the Arlington Police Department and the testimony of witness Officer Rick Eudy.

Williams assigns error to the trial court's admission of evidence regarding the Arlington, Texas Police Department, including testimony by Ricky Eudy. Br. of Appellant at 45. Officer Rick Eudy – one of the people at the Arlington Police Department responsible for determining whether applicants like Williams met all of the general requirements to be hired as a police officer – testified regarding prior inconsistent statements that Williams had made, under oath, in his application to the department. RP 051010 and 051011 84:22–89:12. The credibility of a witness is always relevant. ER 607. Nevertheless, in response to objections from Williams's counsel, the trial court carefully limited Officer Eudy's testimony. Officer Eudy was *not* allowed to testify as to what the hiring criteria were for applicants to the Arlington Police Department, nor was he allowed to testify whether Williams's statements, if found to be false, would disqualify him for a position as an Arlington police officer. *Id.* at 88:2–89:12. As a result, Officer Eudy testified only that, as of October 2008, Williams did not tell him that he had a pending lawsuit against BOSE, nor did Williams tell him that he [Williams] suffered from PTSD. *Id.* at 100:4-12. This limited testimony was hardly prejudicial to

Williams, though it was highly relevant to challenge Williams's credibility and claims of emotional distress. The trial court did not abuse its discretion in allowing its admission.

4. The trial court properly admitted evidence regarding Williams's employment at Study Island, including testimony by his supervisor Kelly Shoaf.

Immediately after leaving his employment with BOSE, and before he was accepted onto the Arlington Texas Police force, Williams worked at Study Island. RP 050510 59:2-7. At trial, BOSE presented an excerpt of video taped deposition testimony by Williams's supervisor at Study Island, Kelly Shoaf. CP 1402-1407 at 1406. Shoaf testified that during a pre-hire interview in September of 2008, when she asked Williams about his previous employer, Williams told her that he "liked" the employees/manager and "had fun" at BOSE. CP 2613-2614. This testimony was relevant to rebut Williams's claim that he found the environment at BOSE abusive or offensive. While Williams argued in his pre-trial motion that Shoaf's testimony carried the risk of prejudice, none of the issues he raised dealt with the narrow category of comments that were ultimately admitted. CP 1118-1129 (arguing that Shoaf should not be permitted to testify as to his dishonesty, emotional state, or work performance). In any event, the probative value of Shoaf's testimony

outweighed the limited risk of prejudice, and the trial court did not abuse its discretion in admitting the evidence.

5. The trial court properly admitted the testimony of Dr. Brandy Miller rebutting Williams’s damages testimony.

In his case in chief, Williams presented evidence from his expert witness, social worker Michael Kane, opining that Williams suffered “deep emotional distress” and PTSD as a result of his experiences at BOSE. RP 050610 and 051010 111:9-19; 150:8-16. Kane also testified that Williams was a “deeply troubled man” who suffered from “ongoing psychological trauma” as a direct result of his treatment at BOSE (*Id.* at 101:4-11; 106:18–107:13), but who was capable of “hiding” or “covering” the trauma or feelings that he was having within (*Id.* at 110:25–111:8).

BOSE presented the video taped deposition of psychologist Dr. Brandy Miller to rebut Williams’s evidence of emotional injury. Dr. Miller was the police psychologist who examined Williams in September 2008 to determine his fitness for duty as an Arlington police officer. CP 2473–2475; 2486–2488. Williams contends that the trial court erred by admitting Dr. Miller’s testimony. Br. of Appellant at 49.

The trial court did not err its determination that Dr. Miller’s testimony had probative value. After conducting an extensive series of tests, Dr. Miller determined that Williams showed no evidence of

psychological problems. Trial Exhibit #60. Significantly, three months after leaving BOSE, Williams denied “*any recent stressors of significance.*” And to Dr. Miller, Williams appeared to be someone who was “*extremely satisfied*” with his life. *Id.*

The trial court also properly exercised its discretion in concluding that Dr. Miller’s testimony was not unduly prejudicial. In her deposition, Dr. Miller observed that a psychologist would be unlikely to miss an individual’s deep emotional distress, unless that individual had sociopathic tendencies and the ability to “charm ... [and] fool” the psychologist. CP 2484:5-20. While Williams suggests that BOSE tried to imply *he* was a sociopath with its questioning, Br. of Appellant at 48-50, Dr. Miller only brought up the issue in response to general questions about the circumstances in which a psychologist might be unable to detect severe emotional distress in an individual. CP 2484:5-11. Furthermore, those questions occurred at the beginning of the deposition, before any questions relating to Williams were asked whatsoever. *See* CP 2486:13 (for first question on Williams). At no time did BOSE characterize Williams as a sociopath in the deposition or ask the jury to draw the inference that Williams lied about his mental and emotional distress. To the contrary, it was *Williams’s expert* who suggested that he was able to mask his “true” emotions, RP 050610 and 051010 110:25–111:8, while Dr. Miller had

simply stated that Williams showed no signs of psychological disorders and denied having recent stressors of significance, *without speculating as to why*. CP 2500:23–2501:1; 2506:24–2507:5.

The videotaped testimony from Dr. Miller was directly relevant to Williams’s emotional distress claims and was admissible to rebut his expert’s claim that he suffered from PTSD. The probative nature of the testimony outweighed any risk of prejudice, and the trial court did not abuse its discretion in its admission.

VI. CONCLUSION

In an attempt to portray his trial as one that would shock the conscience of any humane person opposed to racial discrimination, Appellant Jerry Williams exaggerates the evidence he presented below, and ignores the breadth of evidence refuting his claims. Having failed to persuade the jury and the trial court, Williams has now fashioned a lurid story as a smokescreen in this Court, hoping it will distract from his failure to identify any reversible error. Williams had a full and fair opportunity to present his case to a judge and a jury of his peers. His claims were rejected, not because error occurred, but because he failed to establish the elements of each claim. This Court should affirm the judgment because (1) Williams failed to establish a genuine issue of material fact on his disparate treatment, retaliation, and common law claims; (2) substantial

evidence supports the jury's verdict on his hostile work environment claim; and (3) the trial court did not abuse its discretion in its evidentiary rulings.

RESPECTFULLY SUBMITTED this 28th day of March, 2011.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct. On March 28, 2011, I caused to be filed and served a true and correct copy of RESPONDENT'S BRIEF to the Court and counsel of record as follows:

<u>Original to Court:</u> Clerk of the Court Division I, Court of Appeals One Union Square 600 University Street Seattle, WA 98101-4170	<input checked="" type="checkbox"/> Hand-delivery via legal messenger
<u>Copy to:</u> Thaddeus Martin THAD MARTIN & ASSOCIATES 4928 109 th Street SW Lakewood, WA 98499	<input checked="" type="checkbox"/> Via U.S. Mail

DATED this 28th day of March, 2011.

By Valerie C. Macan
Valerie Macan

Appendix

228 Fed.Appx. 702, 2007 WL 1170918 (C.A.9 (Hawai'i))
 (Not Selected for publication in the Federal Reporter)
 (Cite as: 228 Fed.Appx. 702, 2007 WL 1170918 (C.A.9 (Hawai'i)))

H

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
 Ninth Circuit.
 Elaine BATAKAN, Plaintiff-Appellant,
 v.
 RELIANT PHARMACEUTICALS, INC., Defend-
 ants-Appellees.

No. 05-15714.
 Argued and Submitted March 16, 2007.
 Filed April 18, 2007.

Background: Former employee brought action alleging that her termination while on pregnancy-related leave violated Pregnancy Discrimination Act (PDA), Family Medical Leave Act (FMLA), and state law. The United States District Court for the District of Hawaii, Samuel P. King, Senior Judge, 324 F.Supp.2d 1144, entered summary judgment in employer's favor, and employee appealed.

Holdings: The Court of Appeals held that:

- (1) employee's termination did not violate PDA;
- (2) employee's termination did not violate FMLA; and
- (3) pregnancy discrimination could not form basis of state common law wrongful termination claim.

Affirmed.

West Headnotes

[1] Civil Rights 78 ↪1176

78 Civil Rights
 78II Employment Practices

78k1164 Sex Discrimination in General

78k1176 k. Pregnancy; Maternity. Most Cited Cases

Employer's termination of employee while on pregnancy-related leave during company-wide reduction in force was not pretext for pregnancy discrimination, in violation of Pregnancy Discrimination Act (PDA). Civil Rights Act of 1964, § 701(k), 42 U.S.C.A. § 2000e(k).

[2] Civil Rights 78 ↪1176

78 Civil Rights

78II Employment Practices

78k1164 Sex Discrimination in General

78k1176 k. Pregnancy; Maternity. Most Cited Cases

Under Hawaii employment discrimination law, employer was not compelled to reinstate employee whose position was eliminated pursuant to reduction in force just because she happened to be taking pregnancy-related leave at time of layoff. HRS §§ 378-1, 378-2(1); HAR § 12-46-108.

[3] Labor and Employment 231H ↪368

231H Labor and Employment

231HVI Time Off; Leave

231Hk361 Rights of Employee; Violations

231Hk368 k. Discharge or Layoff. Most Cited Cases

Employer's termination of employee taking pregnancy-related leave pursuant to legitimate company-wide reduction in force did not violate Family Medical Leave Act (FMLA). Family and Medical Leave Act of 1993, §§ 102(a)(1), 104(a)(1, 3), 29 U.S.C.A. §§ 2612(a)(1), 2614(a)(1, 3); 29 C.F.R. § 825.216(a).

[4] Civil Rights 78 ↪1704

78 Civil Rights

78V State and Local Remedies

78k1704 k. Existence of Other Remedies; Exclusivity. Most Cited Cases

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Labor and Employment 231H ↪379

231H Labor and Employment

231HVI Time Off; Leave

231Hk379 k. Existence of Other Remedies; Exclusivity. Most Cited Cases

Under Hawaii law, pregnancy discrimination could not form basis of common law wrongful termination claim in violation of public policy, where policy at issue was embodied in statutes providing their own remedy, including Pregnancy Discrimination Act (PDA), Family Medical Leave Act (FMLA), and state anti-discrimination law. Family and Medical Leave Act of 1993, §§ 102(a)(1), 104(a)(1), 29 U.S.C.A. §§ 2612(a)(1), 2614(a)(1); Civil Rights Act of 1964, § 701(k), 42 U.S.C.A. § 2000e(k); HAR § 12-46-108.

*703 Daphne Barbee, Honolulu, HI, for Plaintiff-Appellant.

Barry W. Marr, Esq., Marr Hipp Jones & Wang, LLP, Honolulu, HI, for Defendants-Appellees.

Appeal from the United States District Court for the District of Hawaii, Samuel P. King, Senior Judge, Presiding. D.C. No. CV-03-00578-KSC.

Before: HUG, W. FLETCHER, and BEA, Circuit Judges.

MEMORANDUM ^{FN*}

FN* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

**1 Elaine Batacan appeals the district court's grant of summary judgment in favor of Reliant Pharmaceuticals, Inc. ("Reliant"). Batacan also appeals the district court's grant of judgment as a matter of law on her common-law claim, as well as the district court's denial of her motion to compel discovery. Reliant terminated Batacan from her job as a sales representative while she was on pregnancy-re-

lated leave. Reliant claims that Batacan was laid off as part of a company-wide reduction in force, but Batacan contends that she was discriminated against for taking maternity and disability leave. Seeking damages for this perceived discrimination, Batacan sued Reliant alleging violations of the Pregnancy Discrimination Act ("PDA"), the Family Medical Leave Act ("FMLA"), state antidiscrimination laws, and state common law. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

We must first address whether the district court erred in denying Batacan's motion to compel discovery. *See Diaz v. AT & T*, 752 F.2d 1356, 1362-63 (9th Cir.1985). A district court's denial of a motion to compel discovery is reviewed for abuse of discretion. *Clark v. Capital Credit & Collection Serv., Inc.*, 460 F.3d 1162, 1178 (9th Cir.2006). The district court's denial of Batacan's motion to compel discovery for the reasons expressed in its order entered on March 4, 2005, does not constitute abuse of discretion.

[1] Based on the evidence in the record, the district court did not err in granting summary judgment on Batacan's PDA claim. We review a district court's grant of summary judgment de novo and determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact for trial. *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir.2001); Fed.R.Civ.P. 56(c). The PDA prohibits discrimination based on "pregnancy, childbirth, or related medical*704 conditions." 42 U.S.C. § 2000e(k). Batacan's PDA claim is subject to the familiar burden-shifting framework applied to Title VII cases that the Supreme Court established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Tysinger v. Police Dep't of City of Zanesville*, 463 F.3d 569, 572-73 (6th Cir.2006). Assuming, as the district court did, that Batacan presented a genuine issue of fact regarding whether she established a prima facie case for discriminatory discharge, Reliant articulated a legitimate, non-discriminatory

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reason for Batacan's termination: the company-wide reduction in force. *See Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 661 (9th Cir.2002); *Winarto v. Toshiba Am. Elec. Components, Inc.*, 274 F.3d 1276, 1295 (9th Cir.2001). Batacan failed to present "specific" and "substantial" evidence that Reliant's proffered reason was pretextual. *See Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1066 (9th Cir.2003); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir.1998). Thus, summary judgment was warranted.

****2** [2] Similarly, the district court properly granted summary judgment on Batacan's state-law claim. Batacan alleged that Reliant violated Hawaii Revised Statute § 378 ("Chapter 378"), which, like the PDA, makes it unlawful for an employer to discriminate based on pregnancy. Haw.Rev.Stat. §§ 378-1, 378-2(1). The same burden-shifting framework used in Title VII cases also applies to pregnancy-discrimination claims under Chapter 378. *Sam Teague, Ltd. v. Haw. Civil Rights Comm'n*, 89 Hawai'i 269, 971 P.2d 1104, 1114 n. 10 (1999). Accordingly, as with the PDA claim, Batacan failed to establish a genuine issue of fact regarding pretext. Batacan's state-law claim is also based on Hawaii Administrative Rule § 12-46-108. Contrary to Batacan's assertion, however, § 12-46-108 does not compel an employer to reinstate an employee whose position was eliminated pursuant to a reduction in force just because she happens to be taking pregnancy-related leave at the time of the layoff. Rather, Chapter 378 (the statute from which § 12-46-108 is derived) only requires that pregnant employees be treated equally. It does not mandate that pregnant employees be given preferential treatment. Consequently, summary judgment on Batacan's § 12-46-108 claim was justified. *See Puana v. Summ*, 69 Haw. 187, 737 P.2d 867, 870 (1987) (noting that an agency's "authority is ... limited to enacting rules which carry out and further the purposes of the legislation and do not enlarge, alter, or restrict the provisions of the act being administered").

[3] Summary judgment was also properly granted on Batacan's FMLA claims. The FMLA entitles eligible employees to take a leave of absence after the birth of a child and mandates that any employee who takes leave must be restored to her position (or an equivalent position). 29 U.S.C. §§ 2612(a)(1), 2614(a)(1). At the same time, an employee "has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period." 29 C.F.R. § 825.216(a); *see* 29 U.S.C. § 2614(a)(3). Accordingly, an employee taking FMLA leave may be terminated pursuant to a legitimate reduction in force. 29 C.F.R. § 825.216(a)(1). Because Batacan produced no specific or substantial evidence of pretext to rebut Reliant's non-discriminatory explanation for her termination, the district court properly found that she failed to establish a genuine issue of material fact on her FMLA claims.

[4] Finally, the district court's grant of judgment on the pleadings in favor of Reliant on Batacan's state common-law claim ***705** for wrongful termination in violation of public policy was also proper pursuant to Federal Rule of Civil Procedure 12(c). A dismissal on the pleadings is reviewed de novo. *See Dunlap v. Credit Prot. Ass'n. L.P.*, 419 F.3d 1011, 1012 n. 1 (9th Cir.2005). Under Hawaii law, a claim for wrongful termination in violation of public policy cannot be brought "where the policy sought to be vindicated is already embodied in a statute providing its own remedy for its violation." *Ross v. Stouffer Hotel Co.*, 76 Hawai'i 454, 879 P.2d 1037, 1047 (1994) (applying *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625, 631 (1982)). In this case, the PDA and Chapter 378 contain remedial schemes applicable to Batacan's complaint. *Hew-Len v. F.W. Woolworth*, 737 F.Supp. 1104, 1107-08 (D.Haw.1990); *Lapinad v. Pac. Oldsmobile-GMC, Inc.*, 679 F.Supp. 991, 993 (D.Haw.1988). Similarly, the FMLA has its own remedial scheme, including compensatory and liquidated damages, as well as injunctive relief.^{FNI} *See* 29 U.S.C. § 2617. As a result, under *Ross*,

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pregnancy discrimination cannot form the basis of a wrongful termination claim under Hawaii law because the policy at issue is embodied in statutes providing their own remedy. Judgment as a matter of law was, therefore, appropriate, and the district court properly granted judgment on the pleadings. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir.2001).

FN1. Batacan's reliance on *Liu v. Amway Corp.*, 347 F.3d 1125 (9th Cir.2003), is misplaced because that case involved California law, which has not been limited in the same manner as Hawaii law. *Id.* at 1137.

****3 AFFIRMED.**

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