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CASE NO. 73521-7

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

CHRISTOPHER YOUNG,

Appellant

v.

KING COUNTY,

Respondent

APPELLANT'S REPLY BRIEF

On Appeal from the Superior Court of King County
Cause No. 13-2-32009-SEA
The Honorable Monica Benton

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I. INTRODUCTION AND RESTATEMENT OF THE ISSUES

A. Young's Claims Under the Washington Law Against Discrimination.

Young has not relied upon mere speculation and conclusions about the motives of the decision makers here but on reasonable inferences from the admissible evidence. The trial court considered the total record before it. See CP 1030-1031. This Court must do the same. See RAP 9.12.

The County's brief infers that Young has a burden of persuading this Court that his race and opposition to Williams' discrimination treatment *were the only* motivations for its actions. That is not the appropriate standard for review. *Scrivener v. Clark College.*, 181 Wn.2d 439, 447, 334 P.3d 541 (2014), other citations omitted. As in all employment discrimination cases, if reasonable minds can reach differing conclusions from *all admissible evidence* as to whether the County's actions were *substantially motivated* by race or retaliation, summary judgment is improper. See *Haubry v. Snow*, 106 Wn. App. 666, 670, 31 P.3d 1186 (2001); [sex discrimination case under WLAD]; *Rice v. Offshore Systems*, 167 Wn. App 77, 272 P.3d 865 (2012) [age discrimination case under WLAD]

The Court "must take the facts alleged by [Young] to be true." *Haubry supra*. At summary judgment, employees *are not required to*

produce evidence beyond that offered to establish the prima facie case, nor introduce direct or "smoking gun" evidence. Rice, supra, 272 P.3d at 872, other citations omitted. In short, while Mr. Young "must meet a burden of production to create an issue of fact ... he is not required to resolve it." Id. other citations omitted. If, after review of all the available evidence relevant to the County's reasons for its actions, the motives for those actions "are called into question by...evidence rebutting their accuracy and credibility," summary judgment [on his WLAD claims] is inappropriate. Id. See also Selberg v. United Pacific Insurance Co. 45 Wn. App.469, 726 Pd. 468 (1986) [reversing summary judgment in retaliation case under WLAD].

As in the above cases and as in this appeal, there are numerous factual disputes that call into question the County's true motives for its actions towards Young. The trial court's grant of summary judgment on Young's WLAD claims should be reversed.

B. Young's Common Law Claims For Negligent Infliction Of Emotional Distress.

In contrast, on his common law negligent infliction of emotional distress (NIED) claim, there are no genuine issues of material fact in dispute. It is undisputed that over the course of his work relationship with Williams, Young developed symptoms of claustrophobia, anxiety and panic attacks and was ultimately diagnosed with PTSD. The Court must

determine as a matter of law whether these mental health conditions were proximately caused by a single traumatic injury within the coverage of our Industrial Insurance Act. He also agrees that the Court must also determine as a matter of law that the County had a recognized duty to maintain a safe work environment for Young. Based on the resolution of these issues in Young's favor, it is for a jury to decide whether the County breached that duty and to what extent he should be compensated for the resulting emotional distress.

II. ARGUMENT IN REPLY TO COUNTY'S BRIEF.

A. There Is Admissible Evidence That Young's Performance And Conduct Was Scrutinized Differently Than Other Employees in Permitting, RES, Or FMD Which Preclude Summary Judgment.

This case involves allegations of disparate treatment of Young, both with respect to performance and workplace expectations and in discipline. Young and the County agree that to establish that "he was treated less favorably in the terms or conditions of employment than a similarly situated employee (outside of his protected class), the relevant comparator(s) *should perform substantially the same work..., should have the same supervisor and be subject to the same standards.*" *Kirby v. City of Tacoma*, 124 Wn. App. 454, 475 n. 16, 98 P.3d 827 (2004). See p., 27-28 of Respondent's brief and particularly fn. 13. Similarly, in cases asserting disparate

application of conduct standards, a plaintiff must establish that he and the comparator employee(s) “*were similarly situated in all respects and that the other employee[s'] acts were of comparable seriousness to his own.* *Cox v. Electronic Data Systems Corp.*, 751 F.Supp. 680 (E.D.Mich.1990); *see also Johnson v. Dep't of Social & Health Servs.*, 80 Wn. App. 212, 214 n.1, 907 P.2d 1223 (1996).

Whether employees are similarly situated ordinarily presents a question of fact for the jury." *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir.2000); *see also Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1555 (D.C.Cir.1997). As the *Graham* Court noted:

The standard for comparing conduct requires a reasonably close resemblance of the facts and circumstances of plaintiff's and comparator's cases, rather than a showing that both cases are identical. *See Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 20 (1st Cir.1999) (explaining that "[r]easonableness is the touchstone" and recognizing that "the plaintiff's case and the comparison cases ... need not be perfect replicas")

Id.

Here, it is undisputed that Aaron Halley, Matthew Burke and Alex Perlman were Real Property Agents under Williams, performing essentially the same work and subject to the same workplace expectations and standards for processing the backlog of permits by Williams as Christopher Young. While Williams conclusory states that he counseled them on the

issues he brought to Young's attention, there was no suggestion that he monitored their personal phone calls, questioned their honesty, permitted coworker surveillance of others' daily activities, or viewed them as insubordinate as he did with Young.

Williams does admit that he initiated an investigation into conduct of Matthew Burke. CP 227-228. Significantly, beyond his self-serving statement, there is no evidence that he used the existing County procedures for initiating concerns about conduct or performance. *Id.* See also CP 105-106. In contrast, it is undisputed that Williams escalated his concerns about Young's conduct on multiple occasions through multiple requests for formal HR investigations even after HR informed him that discipline was not warranted. CP 124-131.

The County asserts that Young consistently failed to comply with attendance policies of *non-hourly* employees particularly as to adherence to an "approved work schedule". Respondent Brief at p.8, emphasis added. It was this alleged misbehavior that prompted Williams and Halley to monitor Young's conduct and ultimately for manager Salyer to impose a written reprimand. *Id.* There is no evidence that Salyer initiated discipline or reprimanded any other employee in Real Estate Services ("RES") during this period for adherence to attendance standards. The evidence produced

by the County as to treatment of alleged “disciplinary comparators” with respect to attendance did not identify any individuals employed within RES.

During the exact same time period that Halley allegedly began to document Young’s conduct and identified Young as a “slacker”, Dorothy Bolar worked in close proximity to Young and Halley. She did not observe Young neglecting his responsibilities. CP 764-765. Bolar verified that the individuals in Permitting worked independently without time keepers and that Young took the same breaks as she observed others did. *Id.* Her testimony supports the inference that although Young’s conduct setting his own schedule was consistent with the practices of other exempt employees, only he was targeted for discipline. This reasonable inference of selective enforcement of attendance standards of exempt *employees* of the Facilities Management Division (“FMD”) is reinforced by the County’s admission that as late as September 2013, senior FMD management believed that there was a widespread perception that its exempt employees were not generally not adhering to established work schedules. CP 435. Coupled with the County’s failure to produce evidence of any corrective action or discipline directed to any other exempt employee other than Young on this expectation, a jury could conclude that Young was treated less favorably than his Caucasian colleagues engaging in similar conduct.

The County asserts that soon after arriving, Williams experienced rude, uncooperative and argumentative behavior in his attempts to manage Young. See Respondent Brief at p. 8. Yet, testimony from sources other than Young however also raise question as to the accuracy of Williams' characterizations of Young's conduct. Dorothy Bolar often observed interactions with Young and Williams. CP 763. While she observed some "tension" in their relationship, she did not observe rude or disrespectful conduct by Young. CP 764.

B. The Record Contains Evidence As To Mr. Young's Contemporaneous Reports Of Racial Conduct By Williams before July 2012.

The County asserts that Young never reported that he believed race was a factor in actions taken by Williams until the summer of 2012. Respondent Brief at 19. There are genuine factual disputes on this issue. Young testified that well before that time, he informed HR and management "that Mr. Williams had a problem with his own race." CP 528. That information was conveyed to the County's EAP program, its Ombudsman staff and his chain of command including FMD Division Director Kathy Brown, and Ameer Faquir, Deputy Director of FMD. CP 529-530. *Id.*¹ He also repeatedly reported to these individuals how Williams discredited his

¹ This information remains unrebutted as there is no testimony from either manager of FMD that Young did not bring these issues to their attention.

ideas as opposed to his Caucasian colleagues through use of an analogy to describe the difference in treatment. CP 582. Washington cases have held that a plaintiff need not prove the conduct opposed was in fact discriminatory but need show only that he or she reasonably believed it was discriminatory. *See e.g. Estevez v. Faculty Club of the Univ. of Wash.*, 129 Wn. App. 774, 797, 120 P.3d 579 (2005).

C. The Record Contains Sufficient Evidence Of A Hostile Work Environment Occurring Prior To September 2013.

1. A Jury Could Find That Williams' Actions Towards Young Were Objectively And Subjectively Abusive.

The parties agree that the trial court did permit limited argument on the legal and factual basis for his hostile work environment based on events occurring prior to his initiation of this litigation in September 2013.² The Court did permit Young to assert a racially discriminatory and/or hostile work environment claim arising from his opposition to Williams' conduct. Respondent mischaracterizes the record by asserting that this cause of action is based only on Williams' actual or threatened disciplinary actions towards Young 3 times in 5 years. Respondent Brief at p. 4. First, by its

² As stated in his Opening Brief, Young is not appealing the trial court's denial of his motion to state a cause of action based on retaliation based on his workers' compensation claim filed in September 2010. Thus, Respondent's brief at pp 24-25 is irrelevant.

nature, a hostile work environment claim does not require evidence of a series of discrete adverse actions. *See Antonious v. King County*, 153 Wash.2d 256 103 P.3d 729 (2004). As that Court stated in quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 n. 11, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).

Hostile work environment claims "are different in kind from discrete acts" and "[t]heir very nature involves repeated conduct." *Morgan*, 536 U.S. at 115, 122 S.Ct. 2061. [It] therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.... Such claims are based on the cumulative effect of individual acts. ...*Morgan*, 536 U.S. at 115, 122 S.Ct. 2061. *Id.*

A reviewing Court such as this one must review the "totality of the circumstances" to determine whether the unwelcome conduct was both subjectively and objectively pervasive and/or severe enough to affect the terms and conditions of employment. *Adams v. Able Building Supply*, 114 Wn. App. 291, 57 P.3d 280 (2002). Factors include whether the conduct involved words alone or also included physical intimidation or humiliation, and whether the conduct interfered with the employee's work performance. *Id.* These are factual issues for the jury.

"Whether the conduct constituted a sufficiently hostile environment to trigger the statute is then a disputed fact. *It would be for a jury to decide whether Mr. Thomas's exhibitions merely reflected a gruff, direct management style—as characterized by Able—or were sufficiently severe and*

pervasive to alter the conditions of employment and create an abusive working environment.” Id.

Young has produced evidence of more than one act of physical intimidation by Williams directed at him that could be viewed as objectively abusive. As alleged by Young through his attorney, that conduct included physical assault and other aggressive conduct. CP 324-325; CP 937-938. Other employees viewed that conduct similarly. CP 759-760. A jury could find that conduct sufficiently severe or pervasive to affect Young’s conditions of employment.

2. A Jury Could Find That Mr. Young’s Race Or Opposition To Williams’ Motivated The Abusive Actions And Treatment Of Him.

To state an actionable claim, the record must also contain evidence from which a jury could conclude that Williams’ action was motivated by his race or opposition to Williams’ racially motivated abusive behavior. Here, his reports to HR were viewed as disruptive and unacceptable. A jury could find that rather than meaningfully investigating the racially charged treatment at the time he made his initial complaints Young complained of, the County’s decision makers viewed him as the cause of the conflict. As the Ninth Circuit has held:

“[A] the jury could have found that Swift’s refusal to investigate stemmed from its blame-the-victim mentality, wherein it wrongly perceived Pavon as the problem [and] labeled him a troublemaker...”

Pavon v. Swift Transportation, 192 F 3d 902 (9th Cir. 1999).

D. Young’s Cause of Action for Negligent Infliction of Emotional Distress Is Not Predicated Only On the “Assault” and/or Acknowledged Surveillance of His Conduct by Aaron Halley but by the County’s Breach of Its Duty to Maintain a Safe Workplace for Young

As stated in his Opening Brief, the County’s attempt to bring Young’s common law claim within the exclusive coverage of the Industrial Insurance Act is not supported by construction of the statute’s terms nor precedent of this Court examining the parameters of claims of negligent infliction of emotional distress (“NEID”) in the workplace. He is not seeking damages for emotional distress as a result of ordinary stress in his work relationship with Williams. In fact, it is undisputed that Mr. Young experienced work-related stress and difficulties in his work relationship with Williams *before September 10, 2010 and reported that prior history to his physician when reporting his physical injury five days later.* CP 1015. Thus, there was no single traumatic injury.

It is undisputed that at that time, he did not seek coverage for any mental health condition under the Industrial Insurance Act as either an “occupational disease” or an “injury” RCW 51.08.140 and 51.08.010. CP 966-967. See Appendix A to Opening Brief. Because his mental health

conditions are not covered by the Industrial Insurance Act, this NIED claim is not preempted.

It is also undisputed that Young' treatment for anxiety and panic attacks occurred for an extended period of time well after the September 2010 encounter and arose because of repeated conduct by Williams. CP 1015-1023. Similarly, Young sought mental health counseling and was diagnosed with Panic Disorder and Post-Traumatic Stress Disorder ("PTSD") only after repeated aggressive conduct by Williams. CP946

Despite the County's argument to the contrary, PTSD does not require exposure to only one incident. See Respondent Brief at p. 48. As the County acknowledges, the relevant diagnosis of PTSD applied by his 2012 therapist is contained in the DSM IV. The County misstates that definition. The language it quotes actually states that to qualify for a PTSD diagnosis, "the person must have experienced ... *an event or events....that* threatened ... the physical integrity of self..." *Id.* CP993-994, emphasis added.

In *Boeing v. Key*, this Court found that the employee's diagnosis of PTSD was not covered by the Industrial Insurance Act precisely because there was no single traumatic injury. *Boeing v. Key*, 101 Wn. App. 629, 5 P3rd 16 (2000). There, an employee described a series of workplace encounters culminating with a reported death threat directed at her by a

colleague. This Court affirmed that her PTSD was not an occupational disease covered by the Act. As here, there was evidence that the “tension at the [worksite] had been building for some time” *Id.* at 18. The employee’s “*emotional distress manifested as a result of events that unfounded gradually over a period of time.*” *Id.*

1. Unlike *Snyder*, Young Has Articulated A Recognized Duty Of His Employer.

The holding of *Snyder* that an employer has no obligation or duty to provide a “stress-free workplace” does not require reversal here. Young has never argued or asserted that that the County has such an obligation or that his NIED claim is premised on such a duty.

As the Supreme Court stated in *Snyder v. MSC*, “the existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent.” *Snyder v. MSC*, 145 Wn. 2d. 233, 35 P.3d 1158 (2001), citing *Lords v. N. Auto. Corp.*, 75 Wn. App. 589, 596, 881 P.2d 256 (1994). The Court noted that *Snyder* “fails to clearly articulate what duty she would have us impose on her employer.” *Id.* In contrast, as early as 2012, through counsel, Young has always articulated that his employer had a duty to maintain a safe work environment for him. CP 938.

2. As In Chea, Young Is Stating An Alternate Theory of Relief And Is Not Seeking A Double Recovery

In contrast to the County's argument, the *Johnson* court held only that an employee cannot obtain a duplicative remedy that is available under the WLAD. *Johnson, supra*, 907 P.2d at 1233. In contrast, in *Chea v. Men's Warehouse*, this Court approved jury instructions for NIED along with a claim for employment discrimination under the WLAD. *Chea v. Men's Warehouse*, 85 Wn. App.405, 932 P.2d 1261 (1997). There the jury returned verdicts on both claims. As here, *Chea's* NIED claim was based on conduct beyond discipline, i.e. the "emotional distress claim was based both on that incident and all of the non-racial remarks that were directed at Chea". *Chea, supra.*, 85 Wn. App. at 413.

At summary judgment, as Young is only asserting a claim from Williams' aggressive behavior towards him and the County's response to it, Young is not foreclosed from seeking a remedy grounded under this common law theory. Our rules permit a party to make alternative arguments and theories of recovery. CR 8(e) (2). As Young's emotional distress does not arise solely from workplace discipline and/or disputes with Williams, he is entitled to move forward with this claim.

III. CONCLUSION

Construed in his favor, the record contains evidence of repeated

investigations and actual discipline, and physically intimidating conduct, directed at Christopher Young by Williams. A jury could find that no other employee of Permitting or RES experienced such conduct. A jury could find that the County took inadequate action to deter Williams, the conduct affected Young's terms and conditions of employment and caused his emotional distress. This Court should reverse the trial court's summary dismissal of Young's complaints under the WLAD under both disparate treatment and hostile work environment theories. The Court should also reverse the trial court's erroneous dismissal of his claim for negligent infliction of emotional distress as it was not preempted by the Industrial Insurance Act and there was sufficient evidence that the County failed to maintain a safe work environment for Young.

Respectfully submitted this 2nd day of March, 2016

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CERTIFICATE OF SERVICE

I am counsel of record for Appellant, I filed the original of the Appellant's Reply Brief in the above-captioned matter by personal delivery to Richard Johnson, Clerk of the Court, on March 2, 2016 and addressed as follows:

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