NO. 35119-6

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
STATE OF WASHINGTON
BY
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MARIO TORRES,

Appellant,

v.

WASHINGTON STATE LIQUOR CONTROL BOARD; RICHARD PHILLIPS and JANE DOE PHILLIPS, and their marital community; MARK KELLER and JANE DOE KELLER, and their marital community; KEN STARKEY and JANE DOE STARKEY and their marital community,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This is an employment action brought by a former Liquor Control Board (LCB) agent who resigned on July 11, 2003, in order to avoid an investigation into an allegation that he was using state time and resources to conduct his private business. Plaintiff was previously suspended for 10 days after being found guilty of misconduct related to his use of state time and his state car. The investigation leading to that discipline was the result of plaintiff's supervisor, Mark Keller, discovering on March 6, 2001, that the plaintiff had not been turning in copies of his agent's notebook and vehicle mileage reports as required.

Shortly after the plaintiff was confronted about his missing mileage reports and notebook copies, plaintiff wrote a memo on March 8, 2001, claiming discrimination based on race. He wrote another memo on March 27, 2001, claiming he was being retaliated against for filing the discrimination complaint.

Plaintiff filed this lawsuit on January 7, 2005, alleging causes of action for race discrimination, hostile work environment, retaliation and wrongful discharge. The first three claims were premised on the events identified in the March 8, 2001, letter and the investigation, and restricted duty, resulting from Mark Keller's discovery of the missing mileage reports and notebook entries. The wrongful discharge claim was premised

on the plaintiff's resignation, in order to avoid an investigation into allegations of misconduct, on July 11, 2003. Plaintiff alleged the investigation was retaliation for the discrimination complaint he had filed over two years earlier.

Defendants moved for summary judgment on the following grounds:

1. Plaintiff cannot state a claim for wrongful discharge because the cause of action does not apply to a civil service employee, he voluntarily resigned in order to avoid an investigation into allegations of misconduct, there was no adverse action which would support a claim of constructive discharge and the defendants had legitimate non-discriminatory reasons for conducting an investigation into the allegations of misconduct made against the plaintiff;

2. Plaintiff cannot state a claim for retaliation because the acts he complains of occurred prior to his filing a complaint alleging discrimination;

3. Plaintiff cannot state a claim for race discrimination or retaliation because he cannot show the prima facie element of an adverse employment action and, even if he could, there are legitimate non-discriminatory reasons for all the actions he complains about;

4. Plaintiff cannot state a claim for a hostile working environment because the facts alleged by plaintiff either did not occur while he was employed by the LCB or the conduct he complains of was not sufficiently pervasive or severe to create a hostile work environment; and

5. Plaintiff's claims are barred by the statute of limitations.

CP 225.

Plaintiff filed a lengthy reply which relied in large part on inadmissible evidence. Defendants filed a motion to strike the inadmissible evidence which was granted by the trial court. The court then granted the defendants' motion for summary judgment. Plaintiff timely filed this appeal.

In this appeal, plaintiff has abandoned his hostile work environment and race discrimination claims as his opening brief assigns error only to the dismissal of his retaliation and constructive discharge claims. Appellant Br. at 1. Plaintiff fails to assign error, or set forth argument or authority addressing a number of the grounds upon which the trial court's order was based. For example, plaintiff fails to identify any adverse employment action to support his retaliation claim or assign error to the court's dismissal of the retaliation claim on statute of limitations grounds. As a result, plaintiff's appeal with respect to the retaliation claim is moot because the trial court's order should be affirmed based on the grounds for dismissal which he has not appealed. Similarly, the appeal of the constructive discharge claim is moot as it is premised on the same actions as the retaliation claim which the trial court found non-retaliatory and barred by the statute of limitations.

Even if the court were to reach the merits of the appeal, there are numerous grounds upon which to affirm the dismissal of both the retaliation and constructive discharge claims, many of which are not addressed in plaintiff's brief. For example, plaintiff fails to present any argument or authority rebutting either the legitimate non-retaliatory reasons for the investigations and discipline he complains of, or the presumption that his resignation was voluntary thereby negating his constructive discharge claim.

Finally, plaintiff's factual statement is incomplete, inaccurate, and largely based on evidence which was stricken by the trial court. Because plaintiff has not assigned error to the trial court's order striking the inadmissible evidence and has not presented any argument as to why the court's order was in error, that evidence is not a part of the record on appeal and should be disregarded by this Court.

II. STATEMENT OF ISSUES

1. Whether the Court should disregard evidence which was stricken by the trial court, when plaintiff has not assigned error to the order striking the evidence, and has not presented any argument or authority establishing that the court's ruling was incorrect?

2. Whether plaintiff's appeal is moot when the plaintiff has not assigned error or presented argument or authority addressing the

court's dismissal of his retaliation and constructive discharge claims because:

a. they are barred by the statute of limitations;

b. there was no adverse employment action to support the claims;

c. there was no evidence to establish that the defendants' legitimate, non-retaliatory reasons for the investigations and discipline plaintiff complains of were pretextural; and

d. any acts occurring in July 2003 occurred too long after the complaint of discrimination in March 2001 to support an inference of retaliation.

3. Whether the trial court's dismissal of the retaliation claim based on the grounds identified in issue statement number 2 was correct?

4. Whether dismissal of plaintiff's retaliation claim should be affirmed because the defendants had no knowledge of the plaintiff's discriminatory complaint at the time the alleged retaliatory actions occurred?

5. Whether dismissal of the plaintiff's constructive discharge claim should be affirmed because there is no adverse or retaliatory act to support the claim and plaintiff's resignation was voluntary?

III. STATEMENT OF THE CASE

A. Factual Background

1. Plaintiff's Workload Increases As Other Agents Leave Kennewick Office

Plaintiff began his LCB employment as an enforcement officer in the Kennewick office in March 1998. CP 187. When he began, there were two other agents in the Kennewick office, Kendra Ogren and Kent Williams. CP 187. Initially, the Kennewick office was supervised out of Spokane by Bob Stamper; however, in March 2000, it was placed under the supervision of Senior Agent Mark Keller, who also supervised the Yakima office. CP 187, 109. The Kennewick office added a fourth agent, Mike Gibbons, in October 1998. CP 106. Subsequently, Kendra Ogren left the Kennewick office and was not replaced. CP 188. At that time, Agent Ogren's territory was divided between plaintiff and Agent Gibbons. CP 188. On February 26, 2001, Mike Gibbons left the Kennewick office. CP 106.

When Mike Gibbons left, Agent-in-Charge (AIC) Jesse Mack asked Senior Agent Kevin Starkey to prepare a realignment plan for Eastern Washington due to the number of agents who had left and had not been replaced. CP 94, 151. Plaintiff was asked to cover Agent Gibbons' territory pending the implementation of that plan. CP 110. Agent Starkey

submitted his draft plan on March 6, 2001, and it was implemented in April 2001 with the understanding that it would be modified as necessary. CP 151-152, 169-170. Senior Agent Keller was on vacation at the time the plan was implemented. CP 110.

Plaintiff complained that the plan was unfair because he had more licensees (326) than any other agent, including Agent Williams (262). CP 94. These numbers were misleading, as Agent Williams' total did not include the Yakama Indian Reservation for which he was responsible. CP 94. When the 41 licensees from the reservation were included, Agent Williams had 303 licensees. CP 94. The numbers were also overstated because Agent Starkey had erroneously included non-retail licensees for which the retail enforcement agents were not responsible. CP 111.

Upon his return from vacation, Agent Keller was asked to make any adjustments to the realignment he believed necessary for the agents he supervised. CP 111. Agent Keller recommended several adjustments, including removing Adams County from the Kennewick office and assigning it to the Wenatchee office. CP 111, 172-173. When the adjustments were implemented, effective May 14, 2001, and the non-retail licensees removed from the agent's counts, the plaintiff had the lowest number of licensees (249) of any of the agents supervised by Senior Agent Keller. CP 111, 175-176.

2. Plaintiff Fails To Turn In Required Mileage Reports And Copies Of His Agent's Notebook

On March 6, 2001, Senior Agent Keller discovered that plaintiff had not turned in weekly copies of his agent's notebook as required.[1] CP 109. Except for one week in February, there were no copies of the notebook entries since November 2000. CP 109. At the same time, Senior Agent Keller discovered that the plaintiff had not turned in copies of any mileage reports for his state vehicle, as required, since May 2000. CP 110. Agent Keller contacted LCB Fleet Services Manager Maggie Flynn in Olympia on March 7, 2001, to see if he could get copies of the mileage reports from her. CP 110. Ms. Flynn indicated that she had not received any mileage reports from the plaintiff since May 2000. CP 110. She also indicated she had sent an e-mail to a number of agents asking for missing mileage reports on January 14, 2001, and plaintiff had been the only one not to respond. CP 110.

Agent Keller confronted plaintiff about the missing notebook copies and mileage reports on March 7, 2001. CP 110. Plaintiff admitted not turning in notebook copies since the beginning of January 2001, but denied that he had failed to turn in mileage reports. CP 110. This information was conveyed to AIC Jesse Mack, who met with the plaintiff

[1] LCB agents document their work activities in notebooks similar to other law enforcement officers.

on March 8, 2001. CP 110, 93. During their meeting, AIC Mack informed plaintiff of the allegations and told him to turn in the missing documents. CP 93.

Plaintiff failed to submit the requested documents, and on or about March 20, 2001, AIC Mack assigned Senior Agent Kevin Starkey to do an investigation into Agent Torres' use of state time and the reason for the missing documents. CP 93, 150. At the same time, he placed Agent Torres on restricted duty prohibiting him from taking any enforcement action. CP 93. AIC Mack did not want Agent Torres involved in enforcement activity while an investigation involving his credibility was ongoing. CP 93. The restrictions on Agent Torres' duties were contained in a memo given to him on March 19, 2001. CP 98.

3. Investigation Into Plaintiff's Missing Notebook Copies And Mileage Reports Reveals He Has Multiple Employments And Inconsistencies In His Reporting Of Mileage And Hours Worked

Senior Agent Starkey attempted to reconstruct the work activity and miles driven by the plaintiff during his investigation. CP 150. The evidence reviewed by Senior Agent Starkey early on indicated inconsistencies between the work activities reported by plaintiff and the miles driven. CP 150. For example, there were instances where plaintiff's notebook reported working on a particular day, but there was no mileage

reported for his vehicle. CP 150, 163-167. There were also instances where plaintiff reported working, but the vehicle fuel purchase records did not support the miles necessary to complete the work. CP 150, 163-167.

Senior Agent Starkey decided to check with the Franklin County Prosecutor's Office, where the plaintiff also worked, due to the discrepancies identified in the plaintiff's reporting of his work activity. CP 150. Agent Starkey met with the Prosecutor's Office on April 11, 2001, and a comparison of work records revealed a number of instances where plaintiff was reporting having worked the same hours for both Franklin County and the LCB. CP 150, 156-161. This resulted in the prosecutor requesting the Washington State Patrol (WSP) to investigate the plaintiff for any potential criminal wrong doing. CP 150, 156-161. Senior Agent Starkey suspended his investigation pending the outcome of the WSP investigation. CP 150.

The WSP identified nine dates where the records reflected that the plaintiff was claiming to have worked for both the LCB and the Prosecutor's Office during overlapping hours. CP 156-161. In a report dated August 22, 2001, the WSP concluded that the Franklin County records could not be relied upon as accurate because the plaintiff, who was responsible for reporting when he worked, claimed that although he reported working Tuesdays, Wednesdays, and Thursdays, the actual work

was spread out over the entire week. CP 160. Thus, no charges were brought. CP 151.

When the WSP concluded its investigation, Senior Agent Starkey completed his investigation. CP 151. In a report dated November 19, 2001, Senior Agent Starkey detailed numerous instances where the plaintiff had not submitted notebook copies and where the available notebooks and mileage reports were inconsistent and/or did not support the work plaintiff claimed to have done. CP 163-167.

4. Plaintiff Is Found Guilty Of Misconduct After A Loudermill Hearing And Does Not Appeal

The results of Senior Agent Starkey's investigation were reviewed by Assistant Chief Rex Prout who determined there was sufficient evidence to initiate disciplinary proceedings against the plaintiff. CP 40. As a result, a pre-disciplinary letter was sent to plaintiff charging him with (1) failing to submit monthly mileage report statements from May 2000 through March 2001, (2) failing to correctly and completely log activities and work hours in his agent's notebook and weekly summaries from June 2000 to February 2001, and (3) entering false or misleading information in his notebook and on his weekly payroll summary reports. CP 40, 141. In addition to plaintiff simply failing to report required information, instances were identified where reported gasoline purchases did not support the

mileage reported as having been driven, where the plaintiff reported driving his state vehicle but his logbook showed him as being off duty, and where his log book showed him as being on duty but his mileage reports reflected no miles driven at that time. CP 141-148.

The plaintiff was provided an opportunity to respond to these charges which he did in a letter signed by his union representative. CP 40-43. In many instances, the plaintiff provided no response to the allegations in the disciplinary letter. CP 141-142. In other instances, plaintiff did but, in doing so, provided explanations based on further misinformation such as attempts to inflate his vehicle's MPG or reduce the mileage between known fixed destinations. CP 41-42, 145-148.

LCB Administrative Director Pat Kohler considered the plaintiff's response and found the plaintiff guilty of the following three acts of misconduct;

1. Failing to submit monthly mileage reports from June 2000 through March 2001;

2. Failing to log activities and work hours in his agent's notebook and weekly summaries and turn them in as required between June 2000 and February 2001; and

3. Submitting false and conflicting information in his agent's notebook and mileage reports between September 2000 and February 2001.

CP 140-148.

Plaintiff was suspended without pay for 80 hours as a result of his misconduct. CP 148. Plaintiff appealed the suspension, but then voluntarily dismissed the appeal. CP 217.

5. Plaintiff Alleges He Is Being Discriminated Against By Being Assigned More Work Than Other Agents

Plaintiff alleges that on February 20, 2001, he complained orally to LCB Diversity Coordinator Ermelindo Escobedo that he was being discriminated against by Senior Agent Mark Keller. CP 370. In a declaration filed after the defendants moved for summary judgment, Mr. Escobedo, for the first time, alleges he "notified" Chief of Enforcement Rick Phillips[2] and/or Assistant Chief Rex Prout and Human Resource Director Bonnie Boyle about the complaint, "certainly within less than a week." CP 370-371. This contradicts Mr. Escobedo's statement in his report that, "the complaint was forwarded to Chief Phillips on April 2, 2001, for his notification and response to the complaint." CP 52. In any event, nothing in the record suggests what plaintiff allegedly told Mr. Escobedo on February 20, 2001, or what information was allegedly conveyed to Chief Phillips, Assistant Chief Prout or HR Director Boyle by Mr. Escobedo.

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[2] Chief Phillips indicates that his first knowledge of the complaint occurred on April 2, 2001, when he received a copy of plaintiff's written complaint from Mr. Escobedo. CP 129.

On March 8, 2001, after plaintiff was confronted about his missing notebooks and mileage reports, plaintiff wrote a letter to Mr. Escobedo alleging he was being discriminated against due to race. CP 219-220. Contrary to the assertions in appellant's brief, the letter did not reference any alleged statements by Senior Agent Keller that "Blue Eyes and Blond Hair are Excellent Aryan Traits" or that Agent Keller "vigorously challenged" Hitler's knowledge of the genocides occurring during World War II as claimed by plaintiff.[3] Appellant Br. at 2. Rather, plaintiff's letter focused on Agent Keller's allegedly excessive editing of the plaintiff's written documents and the alleged uneven distribution of work between plaintiff and Agent Kent Williams. CP 34-35. This latter issue related to the stop gap measure put in place by Agent Keller after Agent Gibbons left the Kennewick office while a permanent realignment plan was being worked out. CP 110. Plaintiff did complain that Agent Keller had a German flag in his office and a picture of what he believed was a swastika.[4] CP 35.

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[3] In fact, appellant has never presented any admissible evidence to establish that either of these alleged facts are true. CP 387. In the trial court, plaintiff cited to Exhibits B and C (CP 34-38) to support the "Arian Traits" statement, neither of which contains the alleged statement. Plaintiff cited to Exhibit L (CP 70-71) in support of the Hitler statement. Exhibit L does not support the assertion made by plaintiff and, in any event, it was stricken by the trial court as being inadmissible hearsay. CP 432.

[4] Senior Agent Keller admits having a West German flag in his office but denies ever having a picture of a swastika in his office. CP 111.

Plaintiff followed up his March 8, 2001, letter to Mr. Escobedo with a document titled Formal Complaint on Mark Keller dated March 27, 2001. CP 37-38. Again, plaintiff did not reference any instances where Agent Keller used ethnic slurs, spoke poorly of Hispanics or other minorities, or made comments about Aryan traits or Hitler. CP 37-38. Similar to the March 8, 2001, memo plaintiff again complained about workload distribution, Agent Keller's editing of his written product and Keller's German flag. CP 37-38. Plaintiff also complained about restrictions that had been placed on him precluding him from working at night or taking enforcement action and an increase in administrative responsibilities. CP 37-38.

This latter complaint related to the previously referenced memo issued to the plaintiff on March 19, 2001, by AIC Jesse Mack restricting plaintiff's duties pending the investigation of plaintiff's missing mileage reports and notebook copies. CP 98. This memo prohibited plaintiff from taking enforcement action or working at nights when the primary activities were enforcement related. CP 93, 98. AIC Mack did not want plaintiff taking enforcement action while the investigation was ongoing, since the investigation and allegations being investigated impacted the plaintiff's credibility. CP 93.

AIC Mack anticipated that the effect of restricting plaintiff's enforcement activities would reduce his workload, as he would not be writing reports and doing the follow-up tasks which result from enforcement activities. CP 93. As a result, AIC Mack directed plaintiff to focus on activities such as license training, annual inspections, and other non-enforcement related activities to fill this void. CP 93. AIC Mack was not aware of any discrimination complaints by the plaintiff at the time he issued the memo restricting the plaintiff's duties. CP 95.

6. LCB Diversity Coordinator Escobedo Is Assigned To Conduct An Investigation Into Plaintiff's Complaint After Informal Attempts At Resolution Fail

LCB Chief of Enforcement Rick Phillips first learned of the plaintiff's discrimination complaint when it was forwarded to him by Mr. Escobedo on April 2, 2001. CP 129. On April 19, 2001, Chief Phillips met with the plaintiff and discussed the plaintiff's complaint with him. CP 129. During their conversation, Chief Phillips stated that based on the complaint and what the plaintiff was telling him, the plaintiff's complaints seemed to center around work issues such as workload and supervisory style rather than racism. CP 129. Chief Phillips followed this up with a letter dated April 30, 2001, suggesting that Agent Keller and plaintiff meet with a neutral third party to see if the issues

could be resolved or if further investigation was necessary. CP 129, 131-132.

The plaintiff did not agree with Chief Phillips' proposal and, as a result, Mr. Escobedo was assigned to do an investigation. CP 129. During the course of Mr. Escobedo's investigation, the plaintiff informed Mr. Escobedo about ethnic slurs or inappropriate comments allegedly made by Agent Keller that had been relayed to him by third parties. None of these comments were made in the plaintiff's presence and plaintiff's knowledge of them was based solely on hearsay. CP 387-388. Mr. Escobedo completed his investigation and completed a report concluding that, based on hearsay and incomplete information, Senior Agent Keller had discriminated against the plaintiff. CP 52-57.

7. Mr. Escobedo's Flawed Investigation Is Rejected And An Independent Investigation Results In A Conclusion Of No Discrimination

Mr. Escobedo's report was reviewed by Assistant Chief of Enforcement Rex Prout who concluded that the report did not support the conclusion of discrimination. CP 120. He further concluded that the report could not serve as the foundation of disciplinary action even if a conclusion of discrimination was warranted. CP 120. One of the primary deficiencies in the report was that factual conclusions were drawn based purely on hearsay, the testimony of unidentified witnesses or on

Mr Escobedo's recollection of what witnesses told him rather than witness statements. CP 120. In addition, the investigation lacked depth. CP 120. Statements were taken at face value without corroboration and critical facts to the determination of the case were omitted. CP 120. For example, Mr. Escobedo's report contains no reference to the reasons plaintiff was temporarily assigned Agent Gibbons' area, the inaccuracy in the initial count of licensees assigned to each agent in the March 6, 2001, memo or the reasons plaintiff was placed on restricted duty. CP 52-57.

Due to the poor quality of Mr. Escobedo's investigation, as well as his attempt to broker a dismissal of plaintiff's complaint against Agent Keller in exchange for a dismissal of the disciplinary investigation pending against plaintiff, Assistant Chief Prout decided to retain an outside investigator to conduct an investigation. CP 60-62, 121. As a result, Gary Rice of PSI Incorporated was retained to conduct an investigation. CP 60-62. Based on a review of the facts as developed by Mr. Rice, LCB Human Resources Director Barb Vane concluded that Agent Keller did not discriminate against the plaintiff. CP 103.

8. Plaintiff Resigns After The Agency Receives A Report From A Private Party That He Is Using State Resources To Conduct His Private Business

While employed with the LCB, the plaintiff operated a private business engaged in the service of legal papers. CP 186. In June 2003,

the LCB received a report from a private citizen, Robert Lack, that the plaintiff was serving legal papers for his private business on state time while using his state car. CP 122, 125-127. Assistant Chief Prout met with Mr. Lack who provided a letter documenting his concerns and copies of 10 affidavits of service signed by the plaintiff. CP 122, 125-127. On July 9, 2003, Agent Justin Nordhorn was assigned to investigate these allegations. CP 396.

On July 10, 2003, Agent Starkey served plaintiff with notification of the complaint and that there would be an investigation by Agent Nordhorn. CP 152, 178. Plaintiff asked if his customers would be contacted and Agent Starkey said if he was conducting the investigation, they would be. CP 152. The plaintiff asked if the investigation would go forward if he resigned. CP 152. After consulting with Assistant Chief Prout, Agent Starkey told plaintiff the investigation would be held in abeyance if he resigned. CP 152-153. The plaintiff immediately tendered his resignation effective July 11, 2003. CP 180.

9. Plaintiff Sues His Private Business Competitors And Testifies They Are The Cause Of His Resignation From State Service

Plaintiff subsequently sued nine separate process servers and individuals in federal court alleging they intentionally interfered with his employment relationship with the state. CP 200-208. In that case, he

testified that the reason he resigned was to avoid having his customers contacted by the LCB, as he feared he would lose them if that occurred. CP 192-193, 195. He further testified that he was not concerned about the LCB investigation or being fired as a result of the investigation. CP 197. Plaintiff further testified that, prior to the complaint, it was his intent to work for the LCB until he died. CP 198. Plaintiff settled that lawsuit. CP 210-214.

B. Response To Plaintiff's Statement Of Facts

Plaintiff's statement of facts is largely based on evidence which was stricken by the trial court and therefore is not properly before this court – a matter which is addressed below in Section A of the Legal Argument. Much of the remainder of plaintiff's statement of facts is based on innuendo, an incomplete representation of the facts or misrepresentation of the facts.

For example, plaintiff asserts that "Agent Torres' supervisor engaged in an overly zealous and unwarranted investigation regarding some missing mileage reports which to the best of anyone's knowledge, could actually have been disposed by Senior Agent Keller." Appellant Br. at 4. No citation to the record is cited to support any portion of this "factual" assertion. More importantly, it mischaracterizes the nature of the investigation as being about "missing mileage reports" when in fact the

investigation was about the plaintiff's inability to account for the use of his time or state resources because he did not maintain the required documentation. CP 140-148, 150, 163-167. Plaintiff of course never acknowledges that he was found guilty of misconduct for not only failing to fully maintain the required documentation, but also for making false statements in the records he did maintain as a result of this investigation. CP 140-148.

Similarly, plaintiff claims that the Franklin County Prosecutor found "no wrongdoing" without any citation to the record. Appellant Br. at 11. What plaintiff is referring to is the criminal investigation conducted by the WSP at the Franklin County Prosecutor's request. CP 156-162. Contrary to plaintiff's assertion, the WSP did not find "no wrongdoing". What the WSP concluded was that the documentation established that plaintiff reported working for Franklin County at the same time he reported working for the LCB. CP 157-159. However, the WSP concluded that the Franklin County records could not be relied upon as accurate because the plaintiff, who was responsible for reporting his work hours accurately, admitted they were not reported accurately. CP 160. Thus, the WSP concluded the evidence was "inconclusive and no determination could be made." CP 156.

Plaintiff attempts to infer that Senior Agent Keller was responsible for the plaintiff's missing mileage reports by citing to the deposition testimony of Jodi Comstock. Appellant Br. at 5-6. However, plaintiff fails to acknowledge that Ms. Comstock directly refuted that inference when she testified that she believed the reports were missing because the plaintiff failed to file them. CP 272.[5]

Similarly, plaintiff attempts to infer that AIC Jesse Mack's decision to place plaintiff on restricted duty was unwarranted by referring to Senior Agent Keller's deposition testimony that mileage reports are not used in enforcement actions. Appellant Br. at 4-5. The inference plaintiff attempts to draw is misleading because AIC Mack identified the reason for the restricted duty as being plaintiff's credibility, not whether the mileage reports were used in enforcement activities. CP 93. As noted by Senior Agent Keller in the deposition testimony cited by plaintiff, the issue is one of accountability and plaintiff's lack of accountability impacts his credibility. CP 261.[6]

Finally, plaintiff contends Senior Agent Keller complained about Mr. Escobedo's report because it was adverse to him and Assistant Chief Prout decided to simply disregard the report based on Senior Agent Kellers' e-mail. Appellant Br. at 8-9. Senior Agent Keller could not have

[5] P. 22, l. 23; p. 23, l. 2.
[6] P. 30, ll. 10-17.

been complaining about Mr. Escobedo's conclusions at the time he wrote the e-mail plaintiff identifies because he had not seen the report. CP 58. As the e-mail indicates, Senior Agent Keller was complaining about how Mr. Escobedo conducted the investigation. CP 58. Furthermore, Assistant Chief Prout did not disregard Mr. Escobedo's investigation based on Senior Agent Keller's e-mail, he decided to hire an outside investigator due to the numerous problems with Mr. Escobedo's investigation identified in his report to Chief Phillips at the time and the declaration he submitted in support of defendant's motion. CP 60-62, 119-121.

IV. LAW AND ARGUMENT

A. The Court Should Disregard Plaintiff's Factual Statements Which Are Not Supported By The Record

Plaintiff's statement of facts relies almost exclusively on declarations and exhibits filed by plaintiff in opposition to defendants' motion for summary judgment. Unfortunately, plaintiff's brief fails to acknowledge that many of the facts plaintiff relies on were found to be based on inadmissible evidence and stricken by the trial court pursuant to the defendants' motion to strike. CP 442-444. Because plaintiff's reliance on evidence stricken by the trial court is so extensive, defendants have attached a copy of plaintiff's factual statement, with the stricken facts highlighted, as Appendix A to this brief. In summary, any statements

attributed to Mr. Keller, Mr. Williams, or Ms. Comstock regarding Aryan traits, Hitler, missing mileage reports, or "shitwork" plaintiff was allegedly required to do were stricken. CP 442-444; RP 3-24.

Plaintiff has not assigned error to the trial court's order striking the inadmissible evidence nor has he presented any argument or authority in support of the proposition that the trial court erred in striking the inadmissible evidence. Consequently, plaintiff cannot rely on the stricken evidence in this appeal.

While an appellate court reviews a summary judgment order de novo, it must first define the scope of the record. *See Sunbreaker Condo. Ass'n, v. Travelers Ins. Co.*, 79 Wn. App. 368, 373, 901 P.2d 1079 (1995) *review denied,* 129 Wn.2d 1020 (1996). A ruling on evidentiary decisions, such as a motion to strike, is discretionary with the trial court and subject to review only for an abuse of discretion. *King Cy. Fire Prot. Dists. v. Housing Auth. of King Cy*, 123 Wn.2d 819, 872 P.2d 516 (1994); *Sunbreaker*, 79 Wn. App. at 372.

A ruling of the trial court to which no error has been assigned is not subject to review. *McKee v. Am. Home Prods., Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989). Similarly, the court will not consider issues on appeal that are not supported by argument and citation of authority. *Id.* This is true even if an order is designated in the notice of appeal.

Charbonneau v. Wilbur Ellis Co., 9 Wn. App. 474, 512 P.2d 1126 (1973). Finally, an issue raised and argued for the first time in a reply brief is too late to warrant consideration. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Plaintiff in the present case has not assigned error to the trial court's order striking the inadmissible evidence in the declarations and exhibits he submitted in opposition to the defendant's motion. Nor has he submitted any argument or authority establishing that the trial court abused its discretion in determining that the evidence submitted by the plaintiff was inadmissible. As a result, that issue is not before this court and the evidence stricken by the trial court is not a part of the record on appeal. Because the stricken evidence is not properly part of the record on appeal, this court should disregard plaintiff's factual statements, as identified in Appendix A, which are premised on evidence stricken by the trial court.

B. The Trial Court's Dismissal Of Plaintiff's Retaliation Claim Should Be Affirmed Because Plaintiff Has Not Challenged Four Of The Grounds For Dismissal Identified By The Trial Court

Defendants moved for dismissal of the plaintiff's retaliation claim on numerous grounds. Chief among these grounds was that the investigatory and disciplinary acts plaintiff complained of did not

constitute adverse employment actions and even if they did there were legitimate non-retaliatory reasons for the investigations and discipline. Defendants also argued that any claims based on events occurring in 2001, including the initiation of the investigation in March 2001, resulting in discipline, were barred by the statute of limitations. Finally, defendants argued that the initiation of the investigation in July 2003 occurred too long after the discrimination complaint in March 2001, to support an inference of discrimination.

The trial court granted the defendant's motions on all of these grounds. The court specifically found that to the extent plaintiff was relying on events that occurred in the first half of 2001, plaintiff's claims were barred by the statute of limitations. RP 58-60. The court specifically found that he did not suffer any adverse employment action, which was a necessary component of his prima facie case. RP 61, 63. The court found that even if the plaintiff had established an adverse action, he had not rebutted the legitimate, non-retaliatory reasons the defendants identified for those actions. RP 62-64. Finally, the court found that the July 2003 investigation was too distant in time from the discrimination complaint to support a claim of retaliation. RP 64. Plaintiff has not assigned error to any of these rulings nor does his brief present any argument or authorities addressing these issues.

Plaintiff's assignment of error with respect to the retaliation claim does not address any of the specific grounds for dismissal of the claim but rather is only a generalized assertion that the trial court erred in ruling that there was not sufficient evidence from which the jury could find that plaintiff was retaliated against (Assignment of Error 1, Appellant Br. at 1). Defendants respectfully assert this assignment of error is inadequate because it does not identify any of the legal basis for the court's ruling as being erroneous. "It is well settled that a party's failure to assign error or to provide argument and citation of authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error." *Escude ex rel. Escude v. King County Pub. Hosp. Dist. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003) (citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, n.4, 974 P.2d 836 (1999)); *Cowiche*, 118 Wn.2d at 809. However, even assuming such a generalized assertion sufficiently preserves the issues related to the dismissal of the claim on its merits, it does not raise or preserve the issues related to the dismissal of the claim based on the statute of limitations. This is significant because the arguments in appellant's opening brief focus entirely on the events which occurred in the first half of 2001, which the trial court found were barred by the statute of limitations. Because plaintiff has not assigned error to the statute of limitations ruling, summary judgment on that basis

should be affirmed and the rulings with respect to the merits of the claim are moot. *See Dutton v. Washington Physicians Health Program,* 87 Wn. App. 614, 618, 943 P.2d 298 (1997) (because of appellant's failure to present argument on common law quasi-judicial immunity of defendant Medical Disciplinary Board, Court of Appeals "will not disturb the trial court's summary dismissal of the Board on that basis" and, therefore, will not reach appellant's arguments with respect to applicability of statutory immunity).

Even if plaintiff's failure to assign error to the statute of limitations ruling does not render his appeal of the retaliation claim moot, his failure to address grounds cited by the trial court for dismissal does. Plaintiff has offered no argument or cited any authority addressing the statute of limitations. Similarly, he has not submitted any argument or authority establishing that the investigations and discipline he complains of constitute adverse employment actions for purposes of a retaliation claim. Plaintiff merely makes a conclusory assertion that the evidence is sufficient to take the retaliation claim to the jury, but presents no argument or authority rebutting the legitimate non-retaliatory reasons for the actions of which he complains. Finally, it appears plaintiff is no longer claiming the July 2003 investigation was retaliatory, but if he is, he has provided no argument or authority establishing that an action taken over two years

after a discrimination complaint can be found to be retaliatory. *See Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 862-63, 991 P.2d 1182, *review denied*, 141 Wn.2d 1017 (2000) (passage of 15 months between complaint and adverse action shows no proximity in time nexus between the two).

The effect of plaintiff's failure to present argument or authorities on any of these grounds the trial court based the dismissal of the retaliation claim on amounts to a waiver of any appeal on these issues. *Cowiche*, 118 Wn.2d at 809. That waiver renders his appeal of the retaliation claim moot and he may not resurrect these issues in his reply brief. *Id.*

C. The Trial Court Correctly Dismissed Plaintiff's Retaliation Claim

1. Plaintiff's Retaliation Claim Based On Events That Occurred Prior To, Or In Early 2001, Are Barred By The Statute Of Limitations

Plaintiff's claims of discrimination and retaliation in the trial court focused on events that occurred during two separate time periods. [7] The first related to complaints plaintiff had about his workload in February 2001, which he alleged was discriminatory. Plaintiff alleged that as a result of this complaint a retaliatory investigation into alleged misconduct

[7] Plaintiff has not appealed the dismissal of his discrimination claims and they are referenced here only for background information.

was initiated in March 2001 resulting in his being placed on restricted duty on March 19, 2001. The second time period related to the initiation of an investigation in July 2003 into allegations of misconduct made by a private third party.

Plaintiff did not file his complaint until January 7, 2005, more than three years after the events of 2001 of which plaintiff complained. The trial court found that any retaliation claim based on these events was barred by the statute of limitations, a ruling, which as noted above, the plaintiff has not appealed. However, even if the plaintiff had appealed that ruling it should be affirmed as correct.

The three-year statute of limitations applies to the plaintiff's claims in this case. *See Washington v. Boeing Co.*, 105 Wn. App. 1, 7-8, 19 P.3d 1041 (2000). All of the actions plaintiff complains about, other than his involuntary resignation in July 2003, occurred in 2001. That is when he was temporarily assigned to Mike Gibbons' area, was investigated as a result of failing to turn in agent notebook copies and mileage reports, and was placed on restricted duty. All of those events occurred in March—April of 2001, more than three years prior to the filing of his complaint in January 2005.

Plaintiff argued in the trial court that the continuing violation doctrine applied and precluded dismissal of his claims on statute of

limitations grounds. The trial court analyzed, and correctly rejected, this argument. Under Washington law there are two kinds of continuing violation, serial and systemic. *Boeing*, 105 Wn. App. at 8. A serial violation occurs where a chain of similar discriminatory acts emanating from the same discriminatory animus exists and where there has been some violation within the statute of limitations period that anchors the earlier claims. *Id.* But a serial claim fails if the employee knew or should have known that the earlier acts, which are untimely at the time of asserting the claim, were discriminatory at the time they were taking place. *Id.*

Here the trial court correctly found that the continuing violation doctrine did not apply because the plaintiff knew the acts he was complaining of were discriminatory at the time they occurred. RP 60. All of the acts identified by plaintiff as being retaliatory (i.e. his work assignments, the March 2001 investigation and his placement on restricted duty) were identified in his March 8, 2001, and March 27, 2001, letters to Mr. Escobedo. CP 219-223. This conclusively establishes that he knew he was allegedly being retaliated against more than three years prior to bringing his action and the trial courts ruling should be affirmed.

2. The Trial Court Correctly Ruled That An Investigation Initiated Over Two Years After Plaintiff's Discrimination Complaint Was Not Retaliatory

The LCB received reports in July 2003 that the plaintiff was serving legal papers for his private business while on state time and while using a state car. Plaintiff does not assert this as basis for his retaliation claim in his appeal brief. However, to the extent he may inappropriately try to raise it in his reply brief the trial court correctly found that it occurred too long after his discrimination complaint to support a claim of retaliation.

A significant passage of time between a complaint and an alleged adverse action is less likely to suggest retaliation, whereas a close proximity, coupled with evidence of satisfactory supervisory evaluations and work performance, would present a prima facie case. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18, 29 (1991). To support an inference of retaliatory motive or causation, the adverse action must have occurred fairly soon after the protected activity. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002). The United States Supreme Court, citing cases holding that three-month and four-month time lapses were insufficient to infer causation, held that a 20-month lapse, by itself, suggests no causation at all. *Clark Cy. Sch. Dist. v. Breedon*, 532 U.S. 268, 273-74, 121 S. Ct. 1508, 149 L. Ed. 2d

509 (2001). *See also Francom*, 98 Wn. App. at 862-63 (passage of 15 months between complaint and adverse action shows no proximity in time nexus between the two). Based on these authorities, the trial court correctly found that the initiation of an investigation in July 2003 over 28 months after the plaintiff filed his discrimination complaint, was too remote in time to support an inference of discrimination.

3. The Trial Court Correctly Found There Was No Adverse Action To Support The Plaintiff's Claim Of Retaliation

To make out a prima facie case of retaliation, the plaintiff must show that (1) he engaged in statutorily protected activity, (2) adverse employment action was taken against him, and (3) there is a causal link between the activity and adverse action. *Milligan v. Thompson*, 110 Wn. App. 628, 42 P.3d 1182 (2000); citing *Francom,* 98 Wn. App. at 862. The trial court correctly found that the acts plaintiff complains of, the discipline taken in this case and the investigations into allegations of misconduct, do not constitute adverse employment actions as a matter of law. RP 61. Again this is an issue plaintiff has neither appealed nor briefed.

Washington courts have defined "adverse employment action." According to our Supreme Court, discrimination requires "an actual adverse employment action, such as 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, 59 P.3d 611 (2002). This court in a case directly on point held that investigatory and disciplinary actions, although inconvenient, do not constitute adverse employment actions. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827, (2004) (citing *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995)). The trial court correctly found, in accord with *Kirby*, that the investigatory and disciplinary acts complained of by plaintiff did not constitute adverse employment actions. Dismissal of plaintiff's retaliation claim should be affirmed on this basis as well.

4. The Trial Court Correctly Found There Were Legitimate Non-Retaliatory Reasons For The Investigation And Discipline Plaintiff Complains Of

The trial court correctly found there were legitimate, non-retaliatory reasons for the investigations and disciplinary actions plaintiff now complains of in this lawsuit. Plaintiff incorrectly characterizes the investigation initiated in March 2001, as being about "some missing mileage reports." Appellant Br. at 4. In fact, the investigation related to the plaintiff's failure to turn in not only mileage reports for his state vehicle but also copies of his notebook documenting his activities. The purpose of the mileage reports and notebook is to ensure accountability for

the use of state resources, and it is certainly appropriate to investigate an employee who fails to document his activity as the plaintiff did.

The legitimacy of the investigation is borne out by the information discovered during the investigation and the fact the plaintiff was found guilty of misconduct. The investigation revealed that not only did the plaintiff fail to turn in his mileage reports and notebook copies but that he also failed to accurately complete his weekly summaries, and entered false information in his notebooks and weekly payroll summary reports. CP 141. Further, a comparison of records with the Franklin County Prosecutor's records revealed numerous instances where the plaintiff was claiming to have worked for both the LCB and the prosecutor during the same time period. CP 156-161. The fact that plaintiff was able to escape criminal prosecution due to his own inaccurate reporting of the hours he worked for the prosecutor, adds, rather than subtracts from the legitimacy of the concerns the LCB had about the plaintiff's failure to accurately document his work activities.

All of these concerns resulted in a pre-disciplinary letter being written to the plaintiff detailing numerous instances of misconduct, many of which the plaintiff did not dispute. CP 140-148. Contrary to plaintiff's claim, the primary reason for the discipline was not that his gas mileage

was too good, [8] although plaintiff did further destroy his credibility by contending his Ford Taurus could get between 37 and 48 mpg. CP 145-146. The primary reasons for his discipline were his failure to turn in required records and reporting false information, matters which were largely uncontested and which the plaintiff did not appeal. Based on all these factors, and the plaintiff's failure to introduce any evidence of pretext, the trial court had no choice but to conclude there were legitimate non-retaliatory reasons for the March 2001, investigation and ensuing discipline.

Plaintiff also complains about being prohibited from working at night pending the outcome of the March 2001 investigation. The trial court correctly concluded that the restrictions on plaintiff's duties were for legitimate, non-retaliatory reasons as set forth in the declaration of Jesse Mack. The investigation focused on issues related to the plaintiff's credibility and it was therefore logical to restrict his enforcement activities where the officer's credibility is crucial in any resulting hearings. The trial court correctly disregarded plaintiff's misguided attempts to rely on Senior Agent Keller's admission that mileage reports were not used in enforcement activities as evidence of pretext because it is irrelevant to the reason the plaintiff's duties were restricted.

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[8] Appellant Br. at 17-18.

Finally, although plaintiff has not articulated an argument that the July 2003 investigation was retaliatory, the record establishes that it was not. The undisputed evidence shows that the LCB received unsolicited complaints from a private citizen, Robert Lack, that the plaintiff was using state resources to operate his personal process serving business. Given the complaints, and the plaintiff's prior lack of accountability, the LCB was obligated to investigate the complaint and determine if the plaintiff was misusing state resources.

Plaintiff erroneously asserts that the defendants knew there was not any wrongdoing at the time he was told he was being investigated. Appellant Br. at 12-13. Plaintiff bases this claim on a spreadsheet prepared by Agent Justin Nordhorn. Agent Nordhorn was assigned to investigate allegations that plaintiff was utilizing his state car and official duty time to conduct his private business of serving legal process on July 9, 2003. CP 396. At that time, he received ten affidavits of service signed by the plaintiff that had been provided to the LCB by the individual who filed the complaint about the plaintiff. CP 396. Sometime on July 10, 2003, or shortly thereafter, Agent Nordhorn took the preliminary step of generating a spreadsheet comparing the dates and times reflected in the affidavits of service to the hours plaintiff reported working in his weekly reports. CP 396. There is no evidence that the spreadsheet was even

completed, much less that the results were communicated to Agent Starkey, prior to the plaintiff submitting his resignation on July 10, 2003, after being informed about the investigation by Agent Starkey.

The record does not support plaintiff's assertion that the defendants knew the plaintiff was not serving process on state time using his state car as alleged by Mr. Lack prior to initiating the investigation or the plaintiff's resignation. A comparison of the affidavits to the plaintiff's time sheet was the logical first step in the investigation after the investigation had been assigned. However, it was not the only step particularly given the plaintiff's prior history. The unspoken assertion that defendants should rely on the plaintiff's record keeping, rather than try to corroborate the facts through independent sources, is contrary to all commonly accepted investigatory practices. Given the unreliability of the plaintiff's record keeping as demonstrated by the prior investigation, defendants would be remiss if they relied solely on the plaintiff's reports as a basis for exonerating him. More importantly, once the allegation was made, defendants had an obligation to the public to do more than a perfunctory review of the documents supplied by the complaining party as plaintiff suggests. *See* RCW 42.52.

The trial court correctly concluded there were legitimate, non-retaliatory reasons for the investigations and discipline of plaintiff and summary judgment should be affirmed.

5. The March 2001 Investigation And Restrictions On Plaintiff's Duties Were Initiated Prior To The Defendants Having Any Knowledge Of The Plaintiff's Discrimination Complaint

Plaintiff's failure to present any evidence that the defendants knew of his discrimination complaint at the time the alleged retaliatory actions occurred provides yet another ground for affirming the trial court. A plaintiff claiming retaliation must present evidence from which a reasonable fact-finder can conclude that those who made the adverse employment decisions were aware that the employee engaged in protected activity. *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003). The U.S. Supreme Court has also noted the significance of the absence of the evidence that a plaintiff's supervision/decision maker knew about his or her opposition activity. *Breeden*, 532 U.S. at 273.

Plaintiff's complaints focus on the investigation that resulted from Senior Agent Keller's discovery of the missing mileage reports on March 6, 2001, and his placement on restricted duty on March 19, 2001, by AIC Mack. It is undisputed that neither Senior Agent Keller nor AIC

Mack knew of the plaintiff's discrimination complaint prior to April 2, 2001. Thus, their actions could not have been retaliatory.

The only defendant who purportedly knew of the complaint prior to April 2, 2001, is Chief Phillips.[9] However, there is no evidence of any retaliatory acts by Chief Phillips or that he participated in any way in the decision to investigate plaintiff or place him on restricted duty. Therefore, plaintiff failed to establish the element of causation. The trial court correctly concluded plaintiff's retaliation claim failed factually, as well as legally, and should be affirmed.

D. The Same Reasons Which Support Dismissal Of Plaintiff's Retaliation Claim Support Dismissal Of His Constructive Discharge Claim Because His Resignation Was Allegedly Due To Retaliation

Plaintiff's constructive discharge claim is based on the assertion that he was retaliated against for filing a discrimination complaint and thus forced to resign his position. In essence, plaintiff is contending that his resignation is the adverse action which supports both his retaliation and his constructive discharge claim. To the extent the trial court found he was not retaliated against, or that his retaliation claim was precluded by

[9] As previously pointed out, Chief Phillips says he did not learn of the complaint until April 2, 2001, which is consistent with the report generated at the time by Mr. Escobedo, the individual now claiming he informed Chief Phillips sometime prior to April 2, 2001.

v. City of Walla Walla, 84 Wn. App. 393, 398, 928 P.2d 1108 (1996). A resignation is involuntary or coerced only if the employer "*deliberately* makes working conditions so intolerable that a reasonable person would have felt compelled to resign in the circumstances" (emphasis in original). *Bulaich v. AT&T Info. Sys.*, 113 Wn.2d 254, 260, 778 P.2d 1031 (1989).

"Intolerable" working conditions require a showing of "aggravated" circumstances or a continuous pattern of discriminatory behavior. *Boeing*, 105 Wn. App. at 16. Plaintiff's subjective belief is not determinative of whether the working conditions are intolerable. As the court stated in *Molsness*:

> Duress is not measured by the employee's subjective evaluation of a situation. Rather, the test is an objective one. While it is possible plaintiff, herself, perceived no viable alternative but to tender her resignation, the record evidence supports [the Civil Service Commission's] finding that plaintiff chose to resign . . . rather than challenge the validity of her proposed discharge for cause. The fact remains, plaintiff *had a choice*. She could stand pat and fight. She chose not to. Merely because plaintiff was faced with an inherently unpleasant situation in that her choice was arguably limited to two unpleasant alternatives does not obviate the voluntariness of her resignation.

84 Wn. App. at 398 (quoting *Christie v. United States*, 518 F.2d 584, 587 (Fed. Cl. 1975)) (emphasis in original).

The presumption that a resignation is voluntary applies even when an employee is threatened with termination for cause, where there is good

cause for termination. *Travis v. Tacoma Pub. Sch. Dist.*, 120 Wn. App. 542, 551, 85 P.3d 959 (2004); *Nielson v. AgriNorthwest,* 95 Wn. App. 571, 576, 977 P.2d 613 (1999). Further, the employee's subjective belief that he had no choice but to resign is irrelevant. *Id.*; *Molsness,* 84 Wn. App. at 399. In both the *Molsness* and *Travis* appeals, summary judgments were affirmed against government-employee plaintiffs who resigned under alleged threats of performance related job loss or dismissal. *Molsness,* 84 Wn. App. at 398; *Travis*, 120 Wn. App. at 551-52.

Plaintiff's position with respect to his constructive discharge claim is simple. He resigned to avoid an investigation he believed would be frivolous and unfair. There are a number of reasons that this is insufficient to overcome the presumption that his resignation is voluntary thereby defeating his constructive discharge claim.

First, while plaintiff may properly question the motives or veracity of the private individual who alleged he was misusing state resources, the LCB did not have the luxury of ignoring the complaint. Once the allegation was made, and the LCB was put on notice of possible wrongdoing, the LCB had an obligation to investigate. This is particularly true since the plaintiff had already been found guilty of misconduct involving his use of state time and his state issued car.

Second, regardless of the merit of the proposed investigation, the plaintiff was not forced to resign, he chose to. Plaintiff has not cited any authority for the proposition that quitting in order to avoid an investigation into alleged misconduct gives rise to a constructive discharge claim. Plaintiff's theory is inconsistent with the legal principle that an investigation does not constitute an adverse employment action. *See Kirby*, 124 Wn. App. at 465 (actions which are disciplinary or investigatory in nature do not constitute adverse employment actions). If an employee cannot sue on the basis of an investigation that allegedly is discriminatory or retaliatory, it makes no sense to allow him to do so if he simply quits to avoid the investigation. This would accord the employee who quits to avoid an investigation into alleged misconduct more rights then the employee who stays on and weathers the investigation.

Plaintiff's contention that being threatened with an investigation is sufficiently intolerable to negate the voluntariness of his resignation is also inconsistent with the uniform authority that a threat of termination or job loss is not. *See Molsness*, 84 Wn. App. at 399; *Travis*, 120 Wn. App. at 551. The same principle that applies in the termination cases applies in the situation where the employee is investigated for misconduct. Regardless of how unpleasant it may be, the employee has a choice, he may stand pat and fight. *See Molsness*, 84 Wn. App. at 398. The

incongruity of allowing an employee who quits to avoid an investigation of misconduct to sue, when an employee who is threatened with termination cannot, is readily apparent. The former is subject to an investigation that may or may not result in a finding of misconduct leading to discipline up to and including termination. The other is told they are being terminated. It simply makes no sense to accord the employee who is being investigated for misconduct more protection then the employee who is being threatened with termination.

The proposition that an investigation into an allegation of misconduct can create intolerable working conditions sufficient to support a constructive discharge claim is also inconsistent with the comprehensive scheme governing civil service employment. The terms and conditions of civil service employment are governed by statute. *Yantsin v. City of Aberdeen*, 54 Wn.2d 787, 345 P.2d 178 (1959). The statutory scheme provides that employees may be subject to discipline and contemplates that they will exercise their right to appeal if they feel the discipline is unwarranted. *See Reninger v. Dep't of Corrections*, 79 Wn. App. 623, 629-634, 901 P.2d 325 (1995), *affirmed*, 134 Wn.2d 437, 951 P.2d 782 (1998). Both the state civil service law, RCW 41.06, and the Ethics in Public Service Law, RCW 42.52, contemplate employees will be disciplined for engaging in misconduct or ethical violations as plaintiff is

alleged to have done. RCW 41.06.170; RCW 42.52.520. Conducting an investigation is an inherent part of any formal disciplinary process where the employer has the burden of proof in any formal hearing. Conducting such an investigation cannot constitute the basis for a constructive discharge claim as a matter of law. If it did, it would undermine the legislatively created system for disciplining public employees who engage in misconduct.

Finally, plaintiff has admitted in federal court, in the trial court, and now this court that he resigned in order to avoid having the customers of his process service business contacted. That has nothing to do with his working conditions but rather relates to some interest outside of his employment with the LCB. Because the plaintiff resigned for a reason other then one related to his working conditions, his resignation is presumed to be voluntary and he cannot maintain an action for constructive discharge.

Plaintiff's reliance on *Allstot v. Edwards*[10] is misplaced. Unlike the cases cited by defendants or the present case, the plaintiff in *Allstot* did not resign to avoid termination or an internal investigation. The plaintiff resigned because his Chief of Police would not provide him with information regarding ongoing drug investigations. The plaintiff alleged

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[10] *Allstot v. Edwards*, 116 Wn. App. 424, 434, 65 P.3d 696 (2003).

that this placed him and his fellow officers at risk of serious physical harm as well as undermined his relationship with his coworkers. *Allstot*, 116 Wn. App. at 429. Having one's physical safety placed at risk with no means to combat the reason is quite different then being subject to a personnel action which may be administratively appealed. *Allstot*'s reasoning simply does not apply to the present case.

Plaintiff cannot overcome the presumption that his resignation was voluntary and the dismissal of his constructive discharge claim should be affirmed.

V. CONCLUSION

This court should affirm the trial court's dismissal of the plaintiff's retaliation and constructive discharge claims. Plaintiff improperly relies on material stricken by the trial court without even advising the court that is was stricken. Plaintiff's appeal is moot because he has not assigned error, or presented argument, with respect to multiple rulings by the trial court which are dispositive of his claims. Thus, there is no need for the court to address the merits of the rulings the plaintiff did appeal.

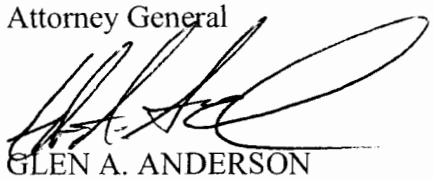
To the extent the court was to address the reasons for the trial court's dismissal of the claims, the trial court should be affirmed. Plaintiff's complaints focus on investigatory and disciplinary actions

which were legitimate, non-retaliatory and which do not constitute adverse employment actions as a matter of law.

Finally, the trial court correctly found plaintiff's claims were barred by the statute of limitations.

RESPECTFULLY SUBMITTED this 29th day of December, 2006.

ROB MCKENNA
Attorney General



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PROOF OF SERVICE

I certify that I served a copy of the *Brief of Respondents* on all parties or their counsel of record on the date below via United States Mail, proper postage affixed, as follows:

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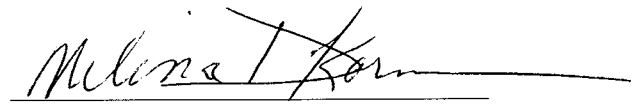
I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29th day of December, 2006, at Olympia, Washington.



MELISSA KORNMANN

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Appendix A

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No. 35119-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

AGENT MARIO TORRES,

Appellant,

vs.

WASHINGTON STATE LIQUOR CONTROL BOARD, *et al.*,

Appellee

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

Issue No. 1: The trial court erred in ruling that there was not sufficient evidence from which the jury could find that Agent Mario Torres was retaliated against for lodging a discrimination complaint against his supervisor Senior Agent Mark Keller – subject to *de novo* review.

Issue No. 2: The trial court erred in ruling that there was not sufficient evidence from which the jury could find that Agent Mario Torres was constructively discharged based upon the retaliatory actions on the part of the supervisory agents at the Liquor Control Board – subject to *de novo* review.

II. STATEMENT OF THE CASE

Agent Mario Torres, a Mexican-American, was a law enforcement officer with the Washington State Liquor Control Board from March 26, 1998 until July 11, 2003. For an extended period of time while he was employed as a law enforcement officer, Agent Torres was treated unfairly based upon his race, and he began expressing corresponding concerns to the diversity manager, Ermelindo Escobedo, in early 2001.[1] Agent Torres orally complained to the diversity manager about Senior Agent Keller on February 20, 2001 -- over two weeks prior to the initiation of the purportedly missing mileage report investigation began.[2]

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[1] It is understood that Mr. Escobedo immediately conveyed notice of the complaint to Chief Phillips and the HR director at the time, Bonnie Boyle, in accordance with internal policies on or around February 20, 2001. Thereafter, Mr. Escobedo was told to ask Agent Torres to reduce his complaint to writing. This history of occurrences was just recently relayed from Ms. Escobedo to Agent Torres. The undersigned counsel has also learned that Mr. Escobedo fears retaliation by the Liquor Control Board in that he is still a State employee. (CP 370-71).

[2] (CP 370-71)

After having already initiated an oral discrimination complaint, on March 8, 2001, Agent Torres reduced to writing the complaint about the discriminatory practices on the part of his supervisor, Senior Agent Mark Keller, in relation to assorted instances related to "jokes about [Agent Keller's] Giant Sized German Flag he has hanging in his office along with a photo that he used to have of what [Agent Torres] believe[d] was a swastika on the wall."[3] Senior Agent Keller's ongoing workplace commentary such as that "Blue Eyes and Blond Hair are Excellent Arian Traits" were also part of the concerns giving rise to Agent Torres's complaint.[4] Senior Keller was also known to vigorously challenge, during on duty conversations with junior agents, the degree of knowledge that Hitler had about the genocides that "purportedly" occurred during World War II.[5]

After complaining about Senior Agent Keller, Agent Torres was subjected to severe hostile and retaliatory measures, including false accusations and manufactured internal investigations regarding purported criminal conduct, on the part of his supervisors for having complained about the discriminatory practices and hostile work environment.[6] In a declaration drafted by Agent Torres in support of a different, but related harassment lawsuit filed by another employee within the Liquor Control Board offices, Agent Torres explained:

> Kennewick Agent Kent Williams specifically told me that Senior Agent Mark Keller had advised him that any and all "Shit work" that he did not feel like doing were to be assigned to me. During my conversation with Agent Williams our secretary Jodi Comstock

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[3] (CP 21-71)

[4] *Id.*

[5] *Id.*

[6] *Id.*

> also agreed with what Williams was saying and she stated that she was also ordered by Senior Agent Keller to give all work that belonged to Agent Williams and assign it to me. I felt that the Kennewick office was a clear hostile work environment. At the time, I was working all these counties with hundreds and hundreds of licensees and the other Agent in the Kennewick office, Kent Williams, had very little to do and hardly any area to cover. It was so bad and I was so stressed that my desk at times was covered in paper work and I had Agent Williams approach me and ask for some of his work back. Agent Williams advised me that he had nothing to do due to me covering his area and doing the majority of his work. This went on for a period of 16 months.[7]

Shortly after the written complaint against Senior Agent Keller was filed, the retaliatory intent on the part of the supervisors at the Liquor Control Board was actually expressed to Agent Mario by and through Chief Phillips, explaining: **"If you pull down your Race Discrimination complaint that you have filed against Senior Agent Keller, I'll make all this go away."**[8] Chief Phillips also made it clear to Agent Torres that "Mark and I have been friends for some time, I just don't think he's a raciest. Do you want me to fire Mark Keller? Is that what you want, I would have to fire Mark Keller if any of this were true."[9] Agent Torres noted:

> *...there is a clique among the upper management, including Chief Rick Phillips, The assistant Chief Rex Prout and the Agent in Charge of our region who is Jesse Mack. The Senior Agents, including Mark Keller, who's my immediate supervisor, and Kevin Starkey, the Senior Agent in the Wenatchee Office, all seem to cover each other and when you complain about anything then you become a target of retaliation. This is what happened to me.*[10]

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

It should also be noted that Senior Agent Keller reportedly went so far as to stalk Agent Torres and his family at their home.[11]

Additionally, Agent Torres's supervisors engaged in an overly zealous and unwarranted internal investigation regarding some missing mileage reports which, to the best of anyone's knowledge, could actually have been disposed of by Senior Agent Keller. During the timeframe that the investigation was conducted contemporaneously as the discrimination complaint, as of March 19, 2001, Officer Torres was prohibited from engaging in any real law enforcement activities.[12] Agent In Charge Jesse Mack explained his purported rationale for curtailing Agent Torres's enforcement abilities:

> *...I placed Agent Torres on restricted duty at that time pending the outcome of the investigation. In doing so, I prohibited Agent Torres from working nights as the activities undertaken at night are primarily enforcement related. I did not want Agent Torres engaging in enforcement activities while the investigation was ongoing because there were issues about Agent Torres's credibility raised by the investigation. As a result, did not want to create a situation where an enforcement activity could be challenged based on Agent Torres' credibility.*[13]

Interestingly, Senior Agent Keller admitted that the mileage reports have nothing really to do with any law enforcement activities:

> Q. When is the last time a mileage report was introduced as being significant to any law enforcement effort on your part?
>
> A. What do you mean?
>
> Q. When is the last time a mileage report was introduced as being significant to any law enforcement effort on your part?

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[11] *Id.*

[12] (CP 92-101)

[13] (CP 92-101)

A. I don't understand how you would introduce a mileage report to a law enforcement effort.

Q. Okay. Has any mileage report ever been significant in any law enforcement efforts on your part?

A. Okay. What do you mean, enforcement to like the public?

Q. Right.

A. Not that I recall.

Q. Okay.

A. I mean I don't know what you would use it for. It's for accountability for the officer.

Q. So it has no relation, really, to law enforcement?

A. It's an internal accountability function. Just like your time sheet, you do a weekly summary that says what hours you worked. It's an accountability. A weekly summary has no impact on what I write as far – what enforcement action I take. It's an internal audit feature.[14]

Agent Torres has always maintained that he did turn in the missing mileage reports and that those reports were turned into Senior Agent Keller.[15] A secretary from the office testified:

Q. How were the mileage reports -- how were they kept track of? Who would handle those?

A. Mark Keller.

* * *

Q. Okay. But it's your understanding that generally when Mark Keller was in the office he would be the one to oversee and manage the --

A. Yes.

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[14] (CP 253-339)

[15] Therefore, the inference in this instance is that the mileage reports were indeed turned in properly by Agent Torres.

Q. Okay. And how do you know that?

A. Because he managed everything, I'd say. He was a micromanager. So everything went through him.

* * *

Q. Well, I'd like to know what you witnessed in relation to the allegations.

A. Officer Keller discovered some documents missing. He came and he asked me about them. I did not have them. I did not know where they were at. And my understanding is that then when I was not present he had gone to Mario Torres and they had talked and they could not find these missing documents. Keller came back, and the document was to say that, no, the documents were not in the office.

* * *

Q. And to your recollection the mileage reports referred to in this report were kept in his office. Is that right?

A. That's my understanding.

Q. Okay. So your involvement with relation to identifying missing reports was going in and --

A. Verifying that they were not there.

Q. That they weren't in Mark Keller's office?

A. Right. Or wherever they were supposed to be.

* * *

Q. Would it be like Mark Keller to let someone go without filing a report for four or five, six months?

A. That doesn't sound like Mark Keller.[16]

Despite Senior Agent Keller's known propensity to micromanage everything, he purportedly did not notice that Agent Torres had not turned in any mileage reports

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[16] (CP 253-339)

for nearly a year and only notice the discrepancy at the same time that the allegations of racism were alleged in March of 2001. Another employee, Agent Kent Williams, has a similar opinion about Senior Agent Keller:

> *...What I know is that Mark alleged when Mario wasn't turning in his mileage reports, which, if you know Mark, you've worked under him, you know it's just an absolutely silly thing to say because if your mileage reports weren't there on the 1st or 2nd day, he was saying something. He was at us all the time about making sure we always had them in. I think they alleged Mario didn't have it done for 6 months or a year or something, there's just no way it can happen, because Mario-, or Mark is a very demanding, very perfectionist and everything has to be followed his way was you have those things in. And a couple times I was a couple days late and I got a talking to, you know, "Where are these?" and all this...*[17]

It is also worth noting that Senior Agent Keller recalls Agent Torres reporting to him that other items had come up mysteriously missing over the past year.[18]

The discrimination complaint against Senior Agent Keller was investigated by the diversity manager, Mr. Escobedo. After conducting an extensive investigation, Mr. Escobedo concluded with the following written findings:

> ...This Investigator concludes that M. Keller did:
> - Make inappropriate racial statements to two employees and one Licensee
> - Singled out M. Torres for harassment and retaliation.
> - Provide false information about The Sheriff's Office racial profiling complaint.[19]

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[17] *Id.*

[18] *Id.*

[19] (CP 21-71)

It should be noted that Mr. Escobedo's findings were formulated in accordance with Liquor Control Board internal directives:

> When the investigator has completed all relevant interviews and reviewed all relevant written statements or other documentation, he or she will conclude the investigation, review evidence, and make a determination as to reasonable cause.[20]

It is also worth noting that Chief Phillips purported in his deposition that Mr. Escobedo's investigation had to be thrown out because he drew conclusions about the allegations.[21]

After learning about the impending report from Agent In Charge Mack before it was ever disclosed, Senior Agent Keller wrote an email to his supervising agents, Agent In Charge Jesse Mack, Senior Agent Rex Prout, and Senior Agent Rick Phillips, protesting against Mr. Escobedo's investigation and conclusive findings.[22] Senior Agent Keller admitted that his concern was based upon the fact that the investigation came out as being adverse to him:

> Q. Okay. So you think that his investigation was unfair because it came out against you?
>
> A. I think that could be. I mean I know what happened in this investigation. I know what my actions were, you know. If he says something differently, and I know that's not true, I'd say that's not fair and impartial.[23]

And that Senior Agent Keller was upset because Mr. Escobedo did not ask any follow up questions:

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[20] (CP 253-339)

[21] (CP 253-339)

[22] *Id.*

[23] *Id.*

> Q. So because Ermelindo didn't follow up with a half an hour's worth of questions, you think his investigation was improper?
>
> A. Could be flawed.
>
> Q. Okay. Did it ever cross your mind that maybe he thought he didn't need the additional information; he for the information elsewhere?
>
> A. I don't know. I don't remember.
>
> Q. And so based upon the consideration with respect to not asking the additional half an hour's worth of questions, you thought, hey, this isn't a fair investigation?
>
> A. Knowing the facts that I know from the investigation, for him to come out with an adverse result, I knew the investigation would be flawed.[24]

Upon review of Senior Agent Keller's email, Senior Agent Prout and Senior Agent Phillips decided to simply disregard Mr. Escobedo's findings, and to then hire a new investigator.[25] In a telling email, Mr. Escobedo protested the decision to disregard his report:

> ---- Original Message ----
> From: Escobedo, Ermelindo
> Sent: Wednesday, July 25, 2001 9:54 AM
> To: Perry, Frances E; Phillips, Rick
> Subject: CIVIL RIGHTS REINVESTIGATION
>
> Thank you for updating me on the Mario Torres finding. <u>I am very disturbed that the Enforcement division is requesting an independent outside investigator to reinvestigate what has already been investigated.</u> We have an agency policy and procedure to follow, to deviate from that exposes us to major legal liability. **To my knowledge the LCB has never reinvestigated a civil rights complaint, why now?** I am requesting a meeting with you and Rick to discuss this agency precedent setting decision. I am also

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[24] *Id.*

[25] (CP 21-71)

requesting that we consult with our legal staff for their opinion and guidance.[26]

Thereafter, an investigation ensued with respect to Agent Torres's mysteriously missing mileage reports.[27] And while Senior Agent Keller was able to have Mr. Escobedo's report tossed out by sending an email complaining about not being asked follow up questions, Agent Torres was ultimately suspended 10 days based upon missing mileage reports without even having been asked his side of the story by the investigator:

> Q. So you never actually interviewed Mr. Torres with respect to the missing mileage report investigation, did you?
>
> A. Right. Not that I remember.
>
> Q. Okay. Why not?
>
> A. Because the State Patrol report, I found that there was -- if I could look at the report probably, but they determined that they couldn't verify the Franklin County hours worked because Mario didn't fill them out. A secretary filled them out for him or something along those lines. So they couldn't verify the hours, if there was any problem there. So it was basically concluded at that point. So I simply compiled what I had and their report and turned it in.
>
> * * *
>
> Q. Okay. Why does it make sense for you not to interview the focus of an investigation, the person of focus, because there's an inadequate -- or a discrepancy as to the reports you're relying on? Why does that make sense?
>
> A. Because they found it was -- because the State Patrol concluded the investigation basically for me. There was no point for me to go any further with it. I'm sure I called Olympia and asked directions and they said just finish your report and send it in.

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[26] *Id.*

[27] (CP 149-180)

> Q. Okay. So – I'm unclear on this.
>
> A. Okay.
>
> Q. You didn't interview Mr. Torres because the Franklin County prosecutor's office had inaccurate records, and based on those inaccurate records you concluded that you didn't need to ask Mario Torres about the allegations. Is that right?
>
> A. The State Patrol concluded that they couldn't prove any wrongdoing as far as overlapping of work times, along those lines. And so at that point the investigation was closed, and I finished it.
>
> Q. Okay. How did you go about finishing it?
>
> A. I wrote down what I had done up to that point and included the State Patrol report and turned it in.
>
> Q. Okay. Did you draw any conclusions?
>
> A. No.
>
> Q. Okay. Well, what was your impression? Was there anything wrong?
>
> A. Yeah. There was -- well, there was missing mileage reports and missing notebooks. And there were times when he stated he worked and drove to a certain city, but yet mileage reports or gas -- mileage or gas records would indicate that he hadn't purchased any gas for – I'm going off memory, but for like a week or so. So he would have been able to like get miles to the gallon or something along those lines if he had actually gone to where he said he'd gone and back.[28]

And then, even after the Franklin County Prosecutor found no wrongdoing, and even though the investigation was about missing mileage reports, the investigator did nothing to verify what actually happened to the missing reports.[29]

Immediately before Agent Torres resigned, *i.e.* was constructively discharged, he was threatened with another invasive, yet frivolous, investigation

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[28] (CP 253-339)

[29] *Id.*

that could ruin his employment with the Liquor Control Board and his personal business which included the following written allegations:

> **You have utilized your state vehicle and official duty time for which you received payment as a liquor control officer to conduct personal business for profit by the service of legal documents for various clients while working on behalf of Casey Investigations, L.L.C., P.O. Box 729, Richland, WA 99352. Such an allegation, if proven, may also include inaccurate/untruthful accounting of time in various official logs, records, and documents which are required for time, activity and vehicle use accounting as well as payroll completion.**[30]

In lieu of being subjected to another unfair and unfounded investigation that could result in more frivolous criminal proceedings, and upon the supervising officers' invitation, Agent Torres resigned the next day.[31] Senior Agent Starkey received the resignation letter and admitted that no additional investigation was conducted:

> Q. Did any investigation occur after he resigned?
>
> A. Not that I'm aware of.
>
> Q. Okay. Why not?
>
> A. Why wasn't an investigation done? Because he resigned.[32]

Shortly after being constructively discharged, Agent Torres inquired via a public records request as to the documents contained in whatever investigation had taken place, and learned that the Liquor Control Board had already compiled an internal document that conclusively established that there was no wrongdoing, *i.e.* no cross-over as to on an off duty activities:

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[30] (CP 149-180)

[31] *Id.*

[32] (CP 253-339)

Served	City	Dated	Time	Weekly
Alverado, Nivea	Moses Lake	3/22/2003	2:59pm	11p-4a Field
Alverado, Lee	Moses Lake	4/17/2003	7:15pm	11:30a-3:30pm Of
Silvers, Laura	Moses Lake	4/17/2003	7:00pm	11:30a-3:30pm Of
Damian	Moses Lake	4/17/2003	6:40pm	11:30a-3:30pm Of
Stacey	Moses Lake	4/17/2003	6:19pm	11:30a-3:30pm Of
Dwyer, Kim	Moses Lake	4/17/2003	6:03pm	11:30a-3:30pm Of
Sebens, Carolyn J	Moses Lake	3/23/2003	1:13pm	off
Ramon	Moses Lake	3/23/2003	2:13pm	off
Bensal, Lisa	Moses Lake	2/10/2003	9:27pm	A/L[33]

Indeed, it was already known that Agent Torres was not double billing anyone at the time that he was threatened with another investigation.

Jodi Comstock, a secretary in the office wherein Agent Torres and Senior Agent Keller were assigned and interacted, explained:

> Q. Do you have any understanding as to why Mr. Torres left employment with the Liquor Control Board?
>
> A. Yes.
>
> Q. And what is your understanding of why?
>
> A. My understanding is Mario had an outside business that was approved by the Board. And as his business was growing and improving he -- when his wife was able to quit her job and go work full time at this second job, from that point things escalated and it seemed -- this is my personal opinion -- that Mark Keller didn't like it. And they made it very difficult for Mario. And Mario finally said enough and quit.
>
> Q. And how did Mark Keller make it difficult for Mario?
>
> A. A lot of pressure. A lot of negative pressure. It's hard to work when you're constantly being criticized, and he just said enough.[34]

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[33] (CP 21-71)

[34] (CP 253-339)

And furthermore, Ms. Comstock, a white woman, admitted that certain behaviors on the part of Senior Agent Keller bothered her even though she didn't witness that acts first hand:

> Q. Ever heard him make any remarks about Naziism?
>
> A. No.
>
> Q. Arian Nation?
>
> A. Not from Mark Keller, no.
>
> Q. Okay. From someone else then?
>
> A. The other officers, yes.
>
> Q. What did the other officers -- what remarks did you hear from them about that sort of thing?
>
> A. They just commented that there was a -- that he had the flag. And just kind of things like you've said where he would make comments. It was hearsay. So that's how I found out about it. But I never saw it.
>
> Q. Did hearing that other officers had witnessed these things make you feel at all uncomfortable?
>
> A. Yes.
>
> Q. Why is that?
>
> A. Because I saw how he treated the other employees and how they felt about it, and I was not treated that way. And I had previously had problems with him, but we were able to resolve them. And the problems weren't resolved with the other employees. So I was left in a boat of waiting for the other shoe to drop type of thing or waiting for my turn to be in the same position. And that didn't happen.[35]

In addition to Ms. Comstock at least two other Liquor Control Board employees, Agent John Gawlick and Gabe Ramos, were offended by Senior

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[35] *Id.* Ms. Comstock's testimony is not offered to prove that Agent Keller made the statements but instead to demonstrate the pervasive offensiveness of his actions.

Agent Keller's offensive tendencies that were directed towards Hispanics and Mexicans. Agent Gawlick recalls:

> *My experience with Mark was not positive. I have heard him call Hispanics "beaners." It was clear that he did not like them by his mannerism of how he talked to them, which was in a fashion of talking down to them. He also called members of the Yakama Indian Nation "war hoops."*[36]

And Agent Ramos recalls.

> *When I first started working here, I remember Mark Keller frequently use the term "grassy-ass", instead of "gracias", which means thank you in Spanish. To me, it was inappropriate, and he stopped doing that out of the clear blue sky. I don't know if somebody talked to him about it or not.*[37]

The excerpted comments are portions of sworn declarations from another investigation that was conducted against Senior Agent Keller and determined to be founded:

> To show that a hostile condition may have existed for Ms. Ramos and others working with Mark Keller, I've prepared a list of potentially corroborating incidents. In +/- 1995 to 1998, Mark Keller made insensitive remarks about Mexicans and Hispanics..., which created a hostile working environment.[38]

III. PROCEDURAL POSTURE ON REVIEW

On review, this court engages in the same review (*de novo*) of the record as the trial court to determine whether Agent Torres submitted sufficient evidence from which the jury could find in his favor after the completion of a trial. *Police Guild v. City of Seattle*, 151 Wn.2d 823, 830, 92 P.3d 243 (2004). Of course, all

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[36] (CP 253-339)

[37] *Id.*

[38] *Id.*

reasonable inferences are to be drawn in Agent Torres's favor and against the defendants. *Id.* In this instance, the trial court erred in that respect.

IV. ARGUMENT

A. Mario Torres Has A Strong Claim For Retaliation Stemming From His Complaints Regarding Discriminatory Activity On The Part Of Senior Agent Keller.

According to RCW 49.60.210, it is unlawful to retaliate against an employee for complaining about unlawful and/or discriminatory conduct.[39] Complaining about racial discrimination is a protected act that triggers the protections from retaliation set forth under RCW 49.16.210 which, if contravened, violates public policy. *See* RCW 49.16.180. A prima facie case of unlawful retaliation calls for a showing that the plaintiff (1) engaged in a protected activity, (2) suffered adverse employment action, and (3) based upon the inferences from

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[39] *See e.g. Hudon v. West Valley Sch. Dist. No. 208*, 123 Wn. App. 116, 97 P.3d 39 (2004). (Summary judgment for the employer on the employee's claim under the Washington Equal Pay Act, RCW 49.12.175, and for retaliation in violation of RCW 49.60.210(1) was improper where questions of material fact existed as to whether the employer actually used a statistical survey to set salaries, whether the survey was a valid gender-neutral basis for setting salaries, and whether the employee's bad evaluations that were rejected by her new supervisor were related to her protected activity of asserting her right to equal pay.); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004). (Although the ministerial exception to Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., precluded a minister who was discharged from her employment at a church from recovering damages because the church modified her duties and terminated her employment, it did not preclude the minister from recovering damages from a pastor who allegedly intimidated and verbally abused her in retaliation for complaints she made, alleging that he sexually harassed her, and the appellate court reversed the trial court's judgment dismissing the minister's lawsuit under Title VII and RCW 49.60.210 and 49.60.220.); *Riccobono v. Pierce County*, 92 Wn. App. 254, 966 P.2d 327 (1998) (An employee alleging that she was discharged in violation of this section need not exhaust her civil service and collective bargaining remedies where she was not alleging that there had been a violation of either the civil service statutes or her union's collective bargaining agreement.); *Galbraith v. TAPCO Credit Union*, 88 Wn. App. 939, 946 P.2d 1242 (1997), review denied, 135 Wn.2d 1006, 959 P.2d 125 (1998) (The plaintiff established a prima facie "unfair practice" where he demonstrated that he was expelled from a credit union because he had assisted credit union employees in their law suit against the credit union for age and gender discrimination.); *Delahunty v. Cahoon*, 66 Wn. App. 829, 832 P.2d 1378 (1992). (Replacement of waitresses who refused to work because of sexual harassment by their manager was unlawful retaliation.)

the evidence there was a connection between the protected activity and the adverse employment act(s).[40]

Based upon the evidence that has been submitted, the jury could, and probably would, conclude that Agent Torres was retaliated against for filing a racial discrimination complaint against Senior Agent Keller. Agent Torres lodged his complaint in February of 2001. Even taking the assertions included in the declarations with regard to when the assorted supervisory agents learned about the discrimination complaint as credible (and while keeping in mind that questions of credibility are for the jury), after learning about the discrimination complaint, it is clear that efforts against Agent Torres were concerted, deliberate, and retaliatory. The *degree* to which the efforts to discredit and disparage Agent Torres after the discrimination complaint was lodged were disproportionate given the circumstances, irrational, and can only be described as deliberate choices on the part of the Liquor Control Board.

After the supervisory agents learned that Agent Torres was asserting a discrimination complaint, an overzealous investigation was conducted against him with respect to a relatively mundane matter, and even though the Franklin County Prosecutor found insufficient evidence to sustain allegations of wrongdoing, the Liquor Control Board continued to investigate without even interviewing Agent Torres or seriously considering the true cause as to the missing mileage reports – such as that Senior Agent Keller was somehow responsible. It should be noted that one of the primary reasons that the Liquor Control Board disciplined Agent

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[40] *Id.*