

NO. 41948-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JASON HALEY,

Appellant,

v.

PIERCE COUNTY WASHINGTON and
JOHN and JANE DOES 1-10,

Respondents.

APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

This is an employment discrimination case in which the Plaintiff, an African American, claims his employer discriminated and retaliated against him in denying him a promotion. The trial court granted summary judgment to the Defendant. In doing so, it improperly construed all of the evidence in favor of the employer and resolved all factual disputes in favor of the employer.

The Plaintiff, Jason Haley, was hired by the Pierce County Sheriff's Department as a correctional officer and applied for a promotion to sheriff's deputy. Sergeant David Perry, who was in charge of the unit that administered promotions, almost immediately disqualified Mr. Haley based on a report, later determined to be false, that Haley had falsified work reports as a correctional officer. Haley complained about his disqualification, and indicated he believed Perry, who had made racist comments about black officers in the past, had singled him out because of his race.

As a result of his complaint, Mr. Haley was reinstated to the list of eligible candidates for the promotion to deputy. Sergeant Perry was extremely angry that Haley had complained about him, and he hand-picked the panel that interviewed Haley for the job. Those panelists failed Haley and he was denied the promotion. The reasons given for

their decision were entirely subjective, and lacked factual support. The panelists stated that they felt Haley lacked integrity, “professional impact,” and “desire for self-improvement.” Their rationales for giving Haley low ratings in these areas do not stand up to scrutiny because other white candidates had similar and even far worse records but were promoted anyway.

This is clearly not a summary judgment case. To hold otherwise is to cast aside and ignore the fact—well-recognized in the caselaw—that employers rarely admit discriminatory motives, and summary judgment is not appropriate where there is evidence from which a fact finder could conclude that race or retaliation played a role in an employment decision. The trial court’s summary judgment should be reversed and the case should be remanded for trial.

II. ASSIGNMENT OF ERROR

Did the trial court err in granting summary judgment dismissal to the employer on the Plaintiff’s race discrimination and retaliation claims where the sergeant in charge of the promotion process had openly mocked blacks and complaints of race discrimination and was openly hostile toward the Plaintiff for complaining of race discrimination, and the Defendant treated white candidates much more favorably than the Plaintiff?

III. STATEMENT OF THE CASE

A. **The Pierce County Sheriff's Department's Racial Composition and Reaction to Jason Haley.**

Jason Haley is married and has five children. See Clerk's Papers ("CP") 479-80. He served in the United States military, and his career goal is to work in law enforcement. See CP 700-01, 547, 471-72. In 2007, he applied to work for the Pierce County Sheriff's Department, and was hired to be a correctional officer in the county jail. CP 17.

The Sheriff's Department is divided into two groups, the corrections bureau and law enforcement. See CP 590. The entry level operational staff in the corrections bureau are known as correctional officers, and on the law enforcement side are called sheriff's deputies. CP 591-92. Correctional officers staff the county jail, and sheriff's deputies patrol the county streets. The sheriff's deputy position is the more desirable position, both in terms of compensation and quality of work.

The Sheriff's Department hires African Americans in law enforcement at a far lower rate than in corrections. As of June of 2009, only 3.4% of sheriff's deputies were African American, while

12.4% of correctional officers were black. See CP 591-592.¹ The disparity is even greater (2.7% versus 12.3%) if one includes all “commissioned” staff, which includes higher-ranking officers, because there are virtually no African Americans in supervisory positions on the law enforcement side. CP 590.² Mr. Haley had originally sought a job in either capacity, corrections or law enforcement; he was hired as a correctional officer. CP 17.

Mr. Haley’s race became an issue from the outset of his employment. Before he was hired, he wore his hair in a traditional African style, braided on his scalp. CP 656. He asked when he would need to cut it and was told he did not have to, as long as it was not touching his ears or the top of his collar. *Id.* He completed his first four weeks of in-house training, and then began working at the jail. CP 659. A few days after he started, Captain Spencer called him in to tell him his hair had created a problem, and he needed to cut it. CP 657-58. Apparently, people had been talking about Haley’s hairstyle, saying things like “how are [we] gonna tell [him] from an inmate?” CP 660. People seemed to move away from him when he entered the

¹ The data show eight African American deputies out of 234 (CP 592) and 35 African American correctional officers out of 281 (CP 591).

² The data show 9 African Americans out of 330 commissioned law enforcement staff, and 40 African Americans out of 324 commissioned corrections staff. CP 590.

room, and someone commented, "Oh, we're hiring thugs now." CP 662.

Captain Spencer, who is also African American, had also been criticized about his hairstyle after joining the department. CP 60. Nonetheless, he stated that Haley was very receptive to his instruction to cut his hair, and that he did so immediately. CP 59-60.

B. Haley Received Positive Performance Evaluations as a Correctional Officer.

Sergeant Bruce Cary was one of the supervisors who observed and evaluated Haley's performance as a correctional officer. He rated him "successful" in all categories. See CP 697-704. He found Haley to be dependable, decisive, and professional. CP 698, 703. He said Haley's military experience showed in his ready, "honor guard" appearance, that he regularly sought out more knowledge about the job, and that Haley communicated with others "in a nice, level manner," never losing control. CP 699-700. Cary said Haley displayed a "command presence" with challenging situations, and described his written reports concerning various incidents as nearing "excellent." CP 698-99, 701.

Sergeant David Schultz, who also directly supervised Haley, described Haley as a "conscientious officer." CP 686, 676. "He's one of the folks that I can count on to do the work that's assigned." *Id.* He

also considered Haley to be a person of high integrity. *Id.* And when Sergeant Schultz was asked to rate Haley's ability to respond to high-stress situations he said he would give him a 3 out of 4. CP 685.

Lieutenant Charla James-Hutchinson was Haley's second-line supervisor. CP 710. She is a veteran officer with an excellent work record and her superiors consider her to be fair and objective. CP 711-12. Lieutenant James-Hutchinson said Haley's performance was above average, and that she had heard from several people that Haley went out of his way to perform his job and help others in the jail. CP 718.

Sergeant Mark Ferko, who had worked with Haley and was asked about his performance, commented on "his loyalty to the Department and dedication to duty," and stated that he was a "top performer," who was "personally and professionally motivated." CP 597. Sergeant Shirley Lobdell similarly recommended Haley, describing him as "a quiet, well-spoken, effective young man. He continually seeks ways to improve, by asking questions and additional assignments." CP 652.

C. Haley Applied for Promotion, but the Background Unit Improperly Disqualified Him Based on Poor Performance, Ignoring His Own Supervisors' Assessments.

After working in the jail for some time, Mr. Haley applied for a promotion to sheriff's deputy. *Id.*; CP 479. A candidate for deputy must first take and pass several tests in order to make it onto the eligibility list. See CP 479, 93. From there, the Department's "background unit" processes the list of eligible candidates to determine whom to hire. See CP 30, 93. They collect personal history statements and do some preliminary background investigation. *Id.* They schedule and administer a "pre-oral interview," followed by an "oral board." *Id.* If the candidate passes those steps, then the background unit completes a formal background and reference check. *Id.* If the candidate passes and is selected for promotion, then the background unit calls him to offer the job. CP 30. Thus, the background unit is almost solely responsible for determining promotions to sheriff's deputy. And at the time of Jason Haley's application, Sergeant David Perry supervised the background unit and was in charge of the process. See CP 31, 749.

Perry initially decided to disqualify Mr. Haley almost immediately after he applied. This decision was allegedly based on some information that the unit had received suggesting that Haley had not

performed a “welfare check” properly in the jail. CP 750. Correctional officers are required to check on all the inmates at least once an hour to ensure their welfare, and to record each time they perform a check. CP 740.

The incident had occurred when Haley was performing late night checks in a low-security dorm-style cell in his area known as B Unit. Rather than actually entering the cell, he had only looked in on the inmates through a window. CP 678. This came to the attention of the acting Sergeant on duty, David Schultz, who informed his superior, Lieutenant Charla James-Hutchinson, and then went to talk to Haley about it. CP 677-78. In talking to Haley, it quickly became clear to Schultz that Haley had been incorrectly trained about the requirements of welfare checks in B Unit and thought he had been doing them correctly. CP 679. Schultz explained to him that he must actually enter the cell, and Haley immediately took responsibility for correcting this mistake. *Id.*

C/O Haley was very receptive to my advice, and offered no excuses beyond his original statement that he had seen others do the same. I talked with C/O Haley at some length about the proper procedures for doing our job properly and the importance of inmate welfare. He assured me that he would be sure to do as I asked of him in the future. He seemed very concerned about having done something incorrectly and I felt as though he was in

no way trying to skirt the issue or make excuses for what he had done.

CP 602; *see also* CP 686, 678-79. “[M]y impression that day at the end of the day was that the message was received and it wouldn’t be a further problem.” CP 680. Haley had no further problems with welfare checks.

When Haley first learned that he had been disqualified for promotion he was only told it was because of a work performance issue, and he was shocked. CP 665. He got copies of all his performance evaluations to see if there were any performance problems listed, and could not find any. *Id.* He wrote to the background unit and asked them to identify the issue so he could correct it, but he got no response. *Id.* He contacted Human Resources, which told him to contact Sergeant Perry. CP 666. Sergeant Perry was not responsive either. *Id.* Eventually, Perry called Haley. During that call, Haley said he had heard he was removed from the list and wondered why. CP 667. Perry immediately turned hostile and began yelling at Haley. CP 667-68. He asked him whether he had ever falsified a welfare check, and Haley told him he had not. CP 667, 669. When Haley tried to explain what had

happened, Perry continued to threaten and yell at him, but said he would look into it further. CP 667-68.

Perry soon found out that Haley's own supervisors did not believe he had falsified anything. In fact, all of Mr. Haley's chain of command, including Lieutenant James-Hutchinson, Captain Marvin Spencer and Chief Robert Masko, concluded that Haley's mistaken approach to a welfare check was not his fault and should not be used against him. CP 719-20, 741, 712. "We made the determination that he had done the welfare check with the training that he had been given and that it was not his fault that it did not occur absolutely correctly." CP 714.

However, even after Sergeant Perry learned that Mr. Haley's superiors had concluded that Haley had not done anything wrong with respect to welfare checks, he persisted in rejecting Haley for promotion. See CP 751-52. He directed the background staff to do "additional background work that typically would be—wouldn't come out until later," in order to sustain the decision to disqualify. CP 752.

The additional reasons Perry used to disqualify Haley were: (1) alleged misuse of sick leave; (2) forgetting to bring his gun to work on one occasion; and (3) extending his training as a correctional officer by two weeks. CP 71. These were considered trivial by Haley's own

supervisors, and similar or worse issues were routinely overlooked when they concerned white candidates.

For example, regarding sick leave, several white applicants for promotion around the same time as Haley had repeatedly misused sick leave because they were “burnt out” and did not want to work, or wanted to go surfing instead of work, yet Perry’s background unit promoted them to deputy. CP 269, 366.³

Second, Lieutenant James-Hutchinson said forgetting one’s weapon on one occasion was not serious, and many people, including herself, had done it. CP 722. A white applicant for promotion around the same time as Haley had left his gun *in his car* and it had been *stolen*, yet Perry’s background unit promoted him to sheriff’s deputy. See CP 186, 266-67. Finally, the extension of Haley’s probationary period was a mutual decision because he had missed some days during probation due to an injury and some outside training. CP 604.

D. The Background Unit Promoted Similarly Situated White Candidates.

Indeed, similar and more serious concerns were raised about several white correctional officer applicants for promotion, but the

³ Through civil discovery and agreement of the parties, Plaintiff obtained redacted files of other deputy candidates who were hired as deputies during the period of Plaintiff’s candidacy, and they are located at CP 194-462, and summarized at CP 184-92. See CP 180-81.

background unit gave them the benefit of the doubt and promoted them. For example, at least three white correctional officers who applied for and were hired to be a sheriff's deputy had recently been *suspended* for sending and receiving sexually and racially demeaning and offensive pictures to others using their county e-mail accounts. CP 444, 446-48, 452-55, 459-61, 723-24. Yet, the background unit determined this was not serious enough to disqualify them for promotion. See CP 7-8, 757.

One of these white candidates, Seth Huber, had also been counseled several times by his lieutenant, at the direction of the captain, and had refused to follow orders and then lied about it. CP 645, 725. Mr. Huber had repeatedly parked his car in an unauthorized area during work, and had received seven or eight tickets for it, which he had not paid. CP 726. Captain Mike Larson received complaints from other county employees, and told Lieutenant James-Hutchinson to talk to Huber about it. CP 725. Mr. Huber, who had a history of altercations with inmates in the jail, told Lieutenant James-Hutchinson that he kept parking there because "he doesn't like to be told what to do." CP 726, 729-30. The lieutenant told him to stop, and to pay his tickets. CP 726. However, Huber did neither. When Captain Larson heard more complaints, he called Lieutenant James-Hutchinson again

and asked her to follow up with Huber again. *Id.* She did, and Huber reported that the tickets had been paid. CP 727. But this was still not true, and Captain Larson called James-Hutchinson a third time, very angry, and wanting her to issue a formal reprimand to Huber. *Id.* Lieutenant James-Hutchinson assured the captain that the tickets had been paid, based on Huber's word to her. *Id.* But when she checked with Huber a third time, he admitted he still had not paid the tickets, despite having told her he had. As James-Hutchinson explained, "I was livid because I had gone to bat for him with my captain." *Id.*

When the background unit was considering Huber for promotion to deputy and received information about this, it treated the incident completely differently than it had treated the information it had received about Jason Haley's alleged (and disproven) falsified welfare check. See CP 645. Instead of immediately assuming the worst and disqualifying Huber, or digging deeper into his background ahead of schedule, Perry decided to have a "special call in, sit down, tell-us-what's-up conference" with Huber about the allegations against him. CP 758-59. As Perry explained, the allegations against Huber "[did]n't look good." CP 760. However, his way of responding was to simply give Huber a chance to explain, and that was all it took to alleviate

Perry's concerns. "He came me in. We talked. I was satisfied that what he had done was reasonable and appropriate." *Id.*

In Haley's case, on the other hand, when Perry discovered an isolated incident that "[did]n't look good," he immediately decided to disqualify him, without any further investigation and without even bothering to discuss it with Mr. Haley. CP 65.

E. Haley Complained of Race Discrimination, and the Background Unit was Forced to Reconsider Haley for Promotion.

Haley appealed the decision to disqualify him to the civil service commission, and also filed a complaint of race discrimination with the county's Equal Employment Opportunity (EEO) specialist. See CP 8. Haley's civil service appeal was assigned to civil service examiner Sandra Pietz. CP 777. Ms. Pietz conducted a thorough and independent review of all available information. CP 780. She found that Mr. Haley's performance "in some areas was rated at the top of the range and some areas was rated a little below that." CP 781. She concluded that Mr. Haley's alleged misconduct with respect to the welfare check was based on statements attributed to his supervisors that were simply not true. CP 782-83; *see also* CP 683-84. She concluded that there was insufficient evidence to disqualify Haley from promotion, and she directed that he be reinstated. CP 783.

The people running the background unit could not conceal their anger at having to reconsider Haley. Sergeant Perry's boss in the background unit, Captain Carder, said he thought reinstating Haley to the promotion list was done only "because of white guilt." CP 791. Sergeant Perry's reaction was even sharper. He considered Haley's complaint "extremely, extremely offensive." CP 767. He said he thought it showed "despicable" character for Mr. Haley to raise any suggestion of race discrimination, and he publicly referred to Haley as "a punk" because of it. CP 766-67. He even admits he may have said something to the effect that Haley should shut up if he ever wanted to get hired because "he's not doing himself any favors by continuing this." CP 768.

Sergeant Perry had been the subject of a complaint of racism two years earlier. CP 648. He had sent an e-mail to a county human resources employee in which he derisively mocked African Americans and the very idea of complaining about race discrimination. He pointed out that only two candidates for detective had failed a test, and both of them were black:

OK.... What is the deal..... only two candidates for this detective deal did not pass..... both BROTHERS (if you know what I mean), Jerry and Dolan...what is this Democrat supposed to think about that? I guess it is time to contact the NAACP, ACLU, [black former DSHS

director and county chief of staff] Lyle Quasim, The Black Collective, or maybe even [black civil rights activist] Alton McDonald! What kind of racist program are you runnin over there!

CP 650 (ellipses in original). In addition, African American employees have complained that Perry is rude and intimidating to them. CP 619.

F. The Background Unit's Hand-Picked Interview Panel Failed Haley Based on Subjective Standards Which Were Applied Differently to Other Candidates.

Despite Sergeant Perry's open hostility toward Haley for questioning the decision and suggesting a racial motive, Perry remained in control of Mr. Haley's candidacy. See CP 43. Perry personally selected and recruited two of the three panelists to interview Haley for the promotion. CP 608-09. Besides Chief Eileen Bisson herself, who had said she wanted to be on the panel, Perry picked Captain Ed Smith, who was about to take over from Carder as captain of the background unit, and Craig Adams, who had served as attorney to Sheriff Paul Pastor for 18 years. *Id.*; CP 45, 527.⁴ Perry admitted that the makeup of this panel was "highly unusual," and indeed "unprecedented." CP 610-11. Oral boards are normally supposed to be comprised of one peer, one supervisor, and one administrator. CP 46. Moreover, all of the panelists assigned to interview Haley were

⁴ Smith was known to be historically a "tough grader" on oral boards and had once been banned from serving on them. See CP 642.

aware of Haley's previous disqualification, complaint and reinstatement, and likely knew how Perry felt about it. See CP 76.

The entire oral board process is astoundingly subjective. The three panelists ask the candidate specified questions, and from the candidate's answers they each independently grade the candidate on eight broad and completely subjective attributes: Appearance, Oral Presentation, Writing Skills, Professional Impact, Interpersonal Sensitivity, Self Improvement, Reasoning/Problem Solving, and Integrity. See CP 561; CP 49-51. The panelists rate the candidate on each attribute on a scale of one to four. *Id.* The candidate must receive passing grades from at least two out of the three panelists in order to pass the oral board and proceed through the promotion process. CP 561. A passing grade consists of an average grade of 2 on the first seven attributes, and a grade of at least 2 on the eighth, "Integrity." *Id.*

Some of the most subjective of the attributes—"Professional Impact," "Interpersonal Sensitivity" and "Reasoning/Problem Solving"—are given the most weight in determining the total score. See CP 561. And "Integrity," probably the most vague and vulnerable to the influence of bias, is given the most weight; it must be assessed positively or the candidate automatically fails. *Id.*

Mr. Haley's oral board took place on November 30, 2007. He received passing grades from Chief Bisson, but the panelists Perry picked, Captain Smith and Craig Adams, failed Haley. *Id.* A review of the scores and the reasons given for them highlights how utterly subjective and variable this process is. For example, Chief Bisson gave Haley only 1.5 (between marginal and acceptable) for "Reasoning/Problem Solving Abilities." CP 51. According to her notes, her factual support for this appears to have little or nothing to do with reasoning or problem-solving abilities.⁵ She gave Haley only a 2, "acceptable," for integrity, explaining that he "remained pretty stoic throughout the Board." *Id.*

Captain Smith rated Haley low on everything but his appearance. CP 2.5. He gave him a 1.5 on "Oral Presentation" because "he misspoke a couple of times." CP 77. He gave him a zero on "Reasoning/Problem Solving" and "Integrity" because of an incident involving a gun some 20 years earlier, at age 16. See CP 85; 77-80.⁶

⁵ "Some minor marijuana usage at 17 years. Had a juvenile contact regarding a gun incident. He bought the gun as it was 'cool.' Credit problems that were known at hiring as c/o. Still continues to have credit problems. He claims he is current on all his bills. Wife going to community college. Paying day care. Been working O.T. to cover bills and daily living." CP 51.

⁶ Captain Smith completely misrepresented this incident. In fact, Mr. Haley, as a teenager, had purchased a gun, and then loaned it to someone else, who had actually fired it. CP 468. He was charged with reckless handling of a firearm and

This contrasts sharply with the way Captain Smith rated a white candidate two months later, who had possessed marijuana with the intent to distribute, supplied alcohol to a minor, committed theft, and driven while intoxicated. CP 302-04; *see infra* (re “Deputy D”).

Craig Smith explained that he had rated Haley poorly largely because of the impression he had when talking to him, that Haley was “unapproachable and quite rigid.” CP 528. He said that Haley displayed a rather “flat affect and was somewhat monotone” and did not smile enough. *Id.* These complaints would appear to be more related to the candidate’s reaction to being interviewed by three high-ranking county officers after having complained of discrimination than they are related to the candidate’s actual “Professional Impact” or “Integrity.” In addition, multiple white candidates were also found to be unapproachable and unfriendly, or too quiet, yet unlike Haley they passed and were promoted. *See* CP 348, 212, 205, 234. Adams also concluded Haley had had “employment problems” in the past, potential anger issues, and “financial problems” such as poor credit. CP 535. It is not clear what Adams relied upon to reach these conclusions but, as

sentenced to three months house arrest. CP 467. The written standards for promotion expressly rule out consideration of juvenile criminal activity. CP 594.

is shown below, white candidates had far worse problems in these areas but were promoted anyway.

The subjectivity and bias in the county's deputy selection process is even more apparent in comparing Haley's results to white candidates who passed their oral board and were promoted. One, referred to as "Deputy D," had been fired by another law enforcement agency because he was "too much of a liability"; had recently been suspended by Pierce County for sending pornographic material by e-mail; had been investigated by internal affairs before *and currently* for excessive use of force, and had been in multiple physical altercations off the job; had taken sick leave under false pretenses; had possessed marijuana with the intent to distribute, supplied alcohol to a minor, committed theft, and driven while intoxicated. CP 267-68, 280, 269, 271-72, 274, 282. Nonetheless, he was given good marks in all categories at his oral board—which included Captain Smith as a panelist—and was hired as a deputy. CP 292.

Another, "Deputy B," had been disqualified from two police departments due to concerns about his background, which includes two incidents of vandalism, several incidents of driving while intoxicated, and recent theft of a barbecue grill from a Home Depot store. CP 202-03. He submitted a weak writing sample and received

marginal scores on his oral board, but was passed and promoted to deputy sheriff. See CP 223-24, 210.

A third, "Deputy G," had been involved in several physical fights with strangers and with his ex-wife and current wife; had been accused of excessive use of force at the jail; had been accused of stealing from one employer and admitted stealing from another; had been convicted of burglarizing automobiles; had filed bankruptcy; and had patronized prostitutes several times and recently viewed pornographic websites. CP 409, 411, 412, 415-16. Although he, like Haley, was noted as being "a little quiet," and showed weak writing skills, he passed and was hired as a deputy. CP 427, 429, 434, 440-42.

Yet another, "Deputy C," had received a domestic violence restraining order and engaged in recent theft. CP 236, 243. Yet Sergeant Perry described him as having a "clean background" and he was given passing scores on his oral board. CP 258, 264. All of these white correctional officers were promoted to sheriff's deputy during the time frame of Mr. Haley's application and rejection. See CP 177, 180.

Many people who have worked in and around the Pierce County Sheriff's Department have observed both racial and retaliatory bias in promotions to sheriff's deputy. The civil service examiner, Sandra Pietz, has observed that once the background unit has "decided that

they don't like somebody, typically, that person is not going to go forward." CP 787. Pietz recalled raters discounting a candidate for being pregnant, and believes there may be racial bias in the hiring process for sheriff's deputy. CP 789, 792. Other African Americans who are veteran officers feel the same way. See CP 631-32.

Lieutenant Charla James-Hutchinson believes race was a factor in the decision to reject Mr. Haley. CP 731, 732.

G. Procedural History.

After the background unit gave Mr. Haley a failing grade on his oral board interview and he was again removed from consideration for promotion, he amended his earlier EEO complaint to include retaliation. See CP 613. Nearly a year passed, then in October 2008, the EEO investigator issued his report and findings. *Id.* He concluded that while race "may or may not" have affected the process or outcome, "there are sufficient aspects of intended or unintended retaliation by Sergeant Perry that sufficiently contributed to a non-routine oral board panel interview that may have played a role in [Haley's] failure on the interview." CP 641.⁷ He recommended Haley be given another oral board interview. CP 643.

⁷ The investigator pointed out that Haley's oral board was rushed, giving Haley less preparation time than others, possibly because Captain Smith was to take over the

Haley was given another oral board interview over a year after his first one, in January 2009. He was given passing grades by two panelists on all but the “integrity” category, and thus failed again. CP 581. Notably, Haley received a higher total score than at least one white candidate who passed and was promoted. *Compare* CP 581 *with* CP 210. At least one of Haley’s panelists knew that the process was being repeated for Haley, CP 115, and all three of them said that a major factor in their assessment of him was that Mr. Haley seemed “tense,” “guarded,” and in “more of a defensive posture,” which is not surprising given his past experience with the process. CP 104, 121, 146.

Plaintiff filed this suit in May 2009. In it he alleged race discrimination, retaliation, and several other causes of action that are not at issue on appeal. CP 4. In January 2011, the Sheriff moved for summary judgment. At a hearing on March 4, 2011, the trial court granted that motion. CP 513. This appeal followed.

IV. ARGUMENT

A. Standard of Review and Rules of Decision.

Review of a summary judgment is *de novo*. The Court must construe all facts in favor of the plaintiff, and draw any reasonable

background unit the following week and would then not be able to serve on the interview panel because of the concern about retaliation. CP 642.

inferences from those facts in his favor, not the defendant's favor. *Johnson v. Dept. of Social & Health Servs.*, 80 Wn. App. 212, 226, 907 P.2d 1223 (1996). When there are "competing reasonable inferences, both discriminatory and nondiscriminatory, then a jury must decide the question." *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 622, 60 P.3d 106 (2002). "[I]t is not for the trial court to resolve [factual] inconsistencies but rather to recognize that they create material issues of fact as to the real reason" for the employer's action." *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 861, 851 P.2d 716 (1993). In this case, the trial court drew inferences in favor of the defendant rather than the plaintiff.

1. Because Motive is Always a Question of Fact, Summary Judgment is Rarely Appropriate in Employment Discrimination Cases.

The ultimate question in an employment discrimination case is motive. See *Johnson*, 80 Wn. App. at 227 n. 20; *Sellsted*, 69 Wn. App. at 860. This is quintessentially a factual question. "The issue of the defendant's intent at the time of [its decision] is clearly a factual question." *Sellsted*, 69 Wn. App. at 863 (quoting *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 899 (3d Cir. 1987)).

Thus, by pointing to evidence which calls into question the defendant's intent, the plaintiff raises an issue of material fact which, if genuine, is sufficient to preclude summary judgment.

Id.

Because employers rarely admit or “openly reveal” an unlawful motive for their employment decisions, discrimination cases ordinarily must be decided by weighing credibility of witnesses and drawing from competing inferences based on circumstantial evidence. *See Renz*, 114 Wn. App. at 621. For this reason, “summary judgment should rarely be granted in employment discrimination cases.” *Johnson*, 80 Wn. App. at 226 (citing *DeLisle v. FMC Corp.*, 57 Wn. App. 79, 84, 786 P.2d 839 (1990)).

2. An Employee May Defeat Summary Judgment in a Discrimination Case Simply by Raising an Inference of Unequal Treatment.

On a motion for summary judgment, courts often resort to a “burden-shifting” analysis of the evidence, which was originally set forth in a federal case under Title VII of the Civil Rights Act of 1964, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *See Johnson*, 80 Wn. App. at 227. Under the so-called “*McDonnell Douglas* test,” the plaintiff is generally required to produce evidence supporting a prima facie case of discrimination. What constitutes a prima facie case varies depending on the facts of each case, but is not onerous. *Johnson*, 80 Wn. App. at 227 n. 21. The employer must then produce evidence of a legitimate non-discriminatory reason for its

decision. *Id.* at 227. The employee may then defeat summary judgment by producing evidence that the employer's reason is "pretextual" or unworthy of belief. *See id.*

This framework "was never intended to be rigid, mechanized, or ritualistic." *Furnco Const. Co. v. Waters*, 438 U.S. 567, 577 (1978). Rather, it was developed to aid the plaintiff in surviving summary judgment, in recognition that discriminatory intent is often difficult to prove. *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002) (en banc) ("This legal proof structure is a tool to assist plaintiffs at the summary judgment stage so that they may reach trial."); *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff [has] his [or her] day in court despite the unavailability of direct evidence.") (citations omitted).

Accordingly, Washington courts, while often utilizing the *McDonnell Douglas* approach, have repeatedly cautioned that it should be used "flexibly to address the facts in different cases." *Johnson*, 80 Wn. App. at 227 n. 21 (citing *Texas Dept. of Comm'y Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981)); "Above all, it should not be viewed as providing a format into which all cases of discrimination must somehow fit." *Grimwood v. Univ. of Puget Sound, Inc.*, 110

Wn.2d 355, 363, 753 P.2d 517 (1988) (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016-17 (1st Cir. 1979)).

[T]he *McDonnell Douglas* test need not be used, if it makes the analysis needlessly complex, or if the plaintiff chooses some other method to meet the burden of producing evidence that would allow the factfinder to find unlawful discrimination by a preponderance of the evidence.

Johnson, 80 Wn. App. at 227 n. 21.

Ultimately, the plaintiff's burden is only to "offer evidence that 'give[s] rise to an inference of unlawful discrimination.'" *Diaz v. American Tel. & Tel.*, 752 F.2d 1356, 1359 (9th Cir. 1985) (quoting *Burdine*, 450 U.S. at 253). And one way to do that is to show that defendant "'simply treats some people less favorably because of their race'" or, in the case of retaliation, because of their complaint of discrimination. *Johnson*, 80 Wn. App. at 226 (quoting *Shannon v. Pay 'N Save Corp.*, 104 Wn.2d 722, 726, 709 P.2d 799 (1985)).

Here, there is ample evidence that the people in charge of making promotion decisions treated Mr. Haley differently than similarly situated white candidates, and that they were biased against Mr. Haley because he had complained of discrimination. In order to decide the ultimate question whether Mr. Haley's race or his complaint played a role in the Sheriff's decisions, a fact-finder must make credibility

determinations and choose from multiple competing inferences, making summary judgment inappropriate.

3. Because Subjective Decision Making Can Easily Mask Discrimination, Courts Scrutinize it Carefully.

Another important consideration bears on this case in particular. Courts have long recognized that employment decisions which are based on subjective factors, such as “appearance,” “presentation,” or “integrity”—some of the factors used to reject Mr. Haley in this case—are “ready mechanisms for discrimination.” *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986); *Sellsted*, 69 Wn. App. at 864. Courts therefore must carefully scrutinize such decisions where discrimination is alleged to have resulted.

Where termination decisions rely on subjective evaluations, careful analysis of possible impermissible motivations is warranted because such evaluations are particularly “susceptible of abuse and more likely to mask pretext.”

Weldon v. Kraft, Inc., 896 F.2d 793, 798 (3d Cir. 1990) (internal citation omitted); *see also Lujan v. Walters*, 813 F.2d 1051, 1057 (10th Cir. 1987) (noting that “subjective criteria as ‘dedicated’ and ‘enthusiasm’ may offer a convenient pretext for giving force and effect to prejudice, and can create a strong inference of employment discrimination”).

Here, the Sheriff’s decision to reject Mr. Haley for the job of deputy was based solely on highly subjective judgments—derived

largely from a personal interview—about his perceived “professional impact,” “interpersonal sensitivity,” “desire for self improvement,” and his perceived “integrity.” CP 561. As discussed further below, there is evidence that the Defendant judged Mr. Haley on these attributes differently than it judged white candidates and candidates who had not complained of discrimination, and such evidence easily raises an inference of discrimination which must be decided by a jury. *Sellsted*, 69 Wn. App. at 864 (“Because the bank relies on subjective reasons to support Sellsted’s discharge, the issue must be resolved by a finder of fact who can evaluate the credibility of the bank’s and Sellsted’s witnesses.”).

B. There is Direct and Circumstantial Evidence of Race Discrimination and the Sheriff’s Department Treated White Employees More Favorably Than Haley.

Mr. Haley’s evidence defeats summary judgment regardless what analytical framework is used. As noted above, several people besides Haley perceived race discrimination in the promotion process in general and with respect to Mr. Haley in particular. CP 792, 631-32, 731-32. This is direct evidence of discrimination, which is alone enough to create a factual question for the jury. *Sellsted*, 69 Wn. App. at 864.

In addition, there is statistical evidence that the Sheriff's department discriminates against African Americans, because it employs nearly five times as many blacks in the lower-status correctional bureau than it does in law enforcement. See supra subsection III.A; CP 590. See *Shannon*, 104 Wn.2d at, 735 (“[s]tatistics showing a general pattern of discrimination are probative on the question of whether the reasons given for a particular action are pretextual.”) (quoting *Bauer v. Bailar*, 647 F.2d 1037, 1045 (10th Cir. 1981)).

And, under the *McDonnell Douglas* approach, Mr. Haley has presented a prima facie case of race discrimination by showing that (1) he is African American, (2) he was denied a promotional opportunity, (3) he was qualified for the promotion, and (4) his employer continued to seek applicants from persons of his qualifications.⁸ *Hill*, 144 Wn.2d at 181; *Johnson*, 80 Wn. App. at 227. This shifts the burden to the Sheriff to articulate a non-discriminatory reason for its rejection of Haley for promotion. *Johnson*, 80 Wn. App. at 227; *Sellsted*, 69 Wn. App. at 859. Then, to defeat summary judgment, Mr. Haley need only

⁸ Haley establishes that he was qualified based on his positive performance evaluations, discussed above in subsection II.B. See *Sellsted*, 69 Wn. App. at 858 (employer's dispute over employee's qualifications does not defeat prima facie case where plaintiff produces evidence of satisfactory performance).

produce evidence that calls into question the Sheriff's explanation. *Johnson*, 80 Wn. App. at 227. This is a burden of *production*, not of *persuasion*. *Jones v. Kitsap County Sanitary Landfill*, 60 Wn. App. 369, 372-73, 803 P.2d 841 (1991).

While retaining the ultimate burden of persuasion at trial, the employee's task at summary judgment is limited to showing that a reasonable trier of fact could, but not necessarily would, draw the inference that [race] was a [substantial] factor in the decision.

Sellsted, 69 Wn. App. at 860.⁹

The evidence here shows that Sergeant Perry was in charge of the promotion process and that he had exhibited bias toward African Americans in the past. See CP 650. He took the first opportunity to disqualify Mr. Haley, who is African American, based on a false accusation that Perry did not bother to fully investigate. CP 65, 782-83. When the accusation was contradicted by all of Haley's superiors, Perry went out of his way to find other reasons to disqualify him. CP 752. At the same time, Perry treated similarly-situated white candidates completely differently, by ignoring past misconduct and giving them the benefit of the doubt and the chance to explain. See, e.g., 757, 760.

⁹ See *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 309-10, 898 P.2d 284 (1995) (construing WLAD (after *Sellsted*) to require a plaintiff to prove discrimination was a substantial factor rather than a determining factor in discharge).

Then, after Perry's decision was reversed and he was ordered to put Haley back on the list and consider him for promotion, Perry personally selected the panelists who would rate Mr. Haley, and he likely told them his opinion of Haley, which by that time was openly hostile and extremely negative. CP 609, 766-77. The panelists rated Mr. Haley on totally subjective attributes, many of which cannot possibly be accurately and fairly measured in a short interview, and all of which readily invite the application of personal biases. CP 561; CP 49, 83, 530. As Justice Ginsberg recently explained about subjective promotion systems:

The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware.

Wal-Mart Stores v. Dukes, 2011 U.S. LEXIS 4567, *59 (U.S. June 20, 2011) (Ginsberg, J., concurring in part and dissenting in part).

Finally, there is ample evidence that the Sheriff's Department treated white candidates more favorably than Mr. Haley. In addition to Perry's disparate treatment of Haley in initially disqualifying him but not others who were accused of misconduct, the ratings given Haley on his oral board interview are not consistent with the ratings that similarly-situated white candidates received. See, e.g., CP 85, 304. As

explained in more detail above, many white candidates submitted weak writing samples and appeared to be too quiet or “unapproachable,” yet unlike Haley they passed and were promoted. CP 223, 440, 348, 212, 205, 234. And many had serious accusations and even criminal records of wrongdoing in their past, yet were given high marks in the categories of “desire for self-improvement,” “reasoning and problem solving,” and “integrity”—precisely the subjective areas Haley was given low marks for similar reasons. See subsection III.F, *supra*; CP 202-03, 236, 243, 267-74, 409-16.

This evidence is plainly sufficient to defeat summary judgment because it raises genuine factual issues as to the Sheriff’s Department’s reasons for rejecting Mr. Haley for promotion. When a black employee presents “comparator” evidence showing that the employer treated whites better than they treated him, he “*necessarily* ha[s] raised a genuine issue of material fact with respect to the bona fides of the employer’s articulated reason for its employment decision.” *Johnson*, 80 Wn. App. at 229 (quoting *Sischo-Nownejad v. Merced Comm’y Coll. Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991)). As this Court explained in *Johnson*, although there may be some dispute about how similar or dissimilar the comparators were, those are factual disputes not appropriate to resolve on summary judgment. *Id.* at 230:

Turning summary judgment on such narrow questions as the distinction between the behavior of [plaintiff and comparators] defeats the fundamental concept of allowing discrimination claims to be decided on the merits.

For all of the foregoing reasons, the trial court should not have entered summary judgment against Mr. Haley on his claim of race discrimination, and its judgment should be reversed.

C. There is Evidence of Unlawful Retaliation: Haley's Complaint Was a Substantial Factor in the Sheriff's Decision to Reject him for Promotion.

Summary judgment was also improper on Mr. Haley's retaliation claim. There are three essential elements to proving unlawful retaliation: (1) the employee complained of discrimination; (2) the employer took adverse action against the employee; and (3) the employee's complaint was a substantial factor in the decision to take adverse action. See *Estevez v. Faculty Club of the Univ. of Wash.*, 129 Wn. App. 774, 799, 120 P.3d 579 (2005); 6A WASH. PRACTICE, WASH. PATTERN JURY INSTR. CIV. (WPI) 330.05 (5th ed. 2011).

The employee may prove the first element by showing that he complained about conduct he reasonably believed was discriminatory; he need not prove the employer actually discriminated. *Estevez*, 129 Wn. App. at 798. Thus, even if Mr. Haley could not sustain a claim of race discrimination, he would have a viable retaliation claim because

he reasonably believed the background unit had discriminated against him. See CP 640-41 (concluding that race may or may not have played a factor in Haley's rejection).

As for the second element, it cannot be disputed that the Sheriff's Department took adverse action against Haley by rejecting him for promotion. Regarding the third element, causation, as in the case of race discrimination, a retaliatory motive "need not be the employer's sole or principal reason" for its adverse action, "so long as the employee establishes that retaliation was a substantial factor" in the employer's decision. *Renz*, 114 Wn. App. at 621.

As discussed more generally above, summary judgment is rarely appropriate in a case involving alleged unlawful retaliation. If an employee opposes discrimination, and the employer knows of the employee's opposition and takes adverse action against the employee, there is a rebuttable presumption of unlawful retaliation, "which precludes [the court] from dismissing the employee's case." *Estevez*, 129 Wn.App. at 799 ¶59 (quoting *Vasquez v. Dept. of Soc. & Health Servs.*, 94 Wn. App. 976, 985, 989 P.2d 1143 (1999)). That is clearly the case here.

Mr. Haley complained of race discrimination in August 2007. CP 613. Sergeant Perry was aware of this complaint. *Id.*; CP 766-77.

His unit then rejected Haley for promotion in November 2007. CP 561. This creates a rebuttable presumption of retaliation, and summary judgment should have been denied.

There is also additional evidence supporting a finding of retaliation and precluding summary judgment. First, Sergeant Perry offered direct evidence of a retaliatory motive, admitting he and the entire background unit were angry at Haley for complaining. CP 753. The people Perry picked to interview Haley knew exactly what had occurred previously, CP 609, and they rejected Haley just as Perry had tried to do twice before. CP 651. "When the plaintiff offers direct evidence of discriminatory motive ... 'a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial.'" *Estevez*, 129 Wn. App. at 801 (quoting *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998)).

Second, the reasons given for rejecting Haley have been shown to be without factual support and pretextual. As discussed in detail above, multiple white correctional officers had similar backgrounds and in some cases far worse criminal and personal records, yet they passed and were promoted to deputy. *See supra* pp. 32-33 & subsection III.F.

Conflicting reasons or evidence rebutting their accuracy or believability are sufficient to create competing inferences. Such inconsistencies cannot be resolved at the summary judgment stage.

Renz, 114 Wn. App. at 624 (reversing summary judgment where plaintiff offered evidence to rebut the reasons articulated by the defendant). Moreover, in this case the reasons given for rejecting Haley for promotion are entirely subjective, so that it is impossible to know their veracity without making credibility determinations. *Sellsted*, 69 Wn. App. at 864. This cannot be done on summary judgment.

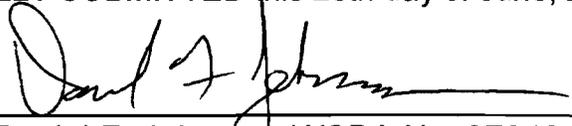
For these reasons, the trial court should not have dismissed Plaintiff's claim of unlawful retaliation, and its judgment should be reversed.

V. CONCLUSION

Summary judgment should be granted only when reasonable minds could reach only one conclusion. This is rarely the case in an employment discrimination case because the ultimate issue—the state of mind of the employer—is purely factual but normally concealed, and is rarely susceptible to certain proof. That is especially true when justifications for the decision at issue are totally subjective, because such judgments are inherently prone to bias. The record here is replete with facts that support competing inferences and material

factual disputes about the reasons for rejecting Mr. Haley for promotion. Summary judgment was not appropriate.

RESPECTFULLY SUBMITTED this 28th day of June, 2011

A handwritten signature in black ink, appearing to read "Daniel F. Johnson", written over a horizontal line.

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CERTIFICATE OF SERVICE

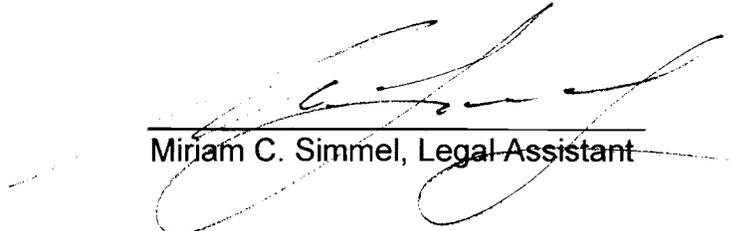
I, Miriam Simmel, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein. On this 1st day of July 2011, I filed in court (original and one copy) and served true and correct copies of the document to which this Certificate is attached on the following in the matter listed below.

P. Grace Kingman
955 Tacoma Ave S Ste 301
Tacoma, WA 98402-2160
United States

- Via Facsimile
- Via First Class Mail
- Via Messenger
- Via Email

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



Miriam C. Simmel, Legal Assistant