

COURT OF APPEALS  
DIVISION II

NO. 41948-3-II

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STATE OF WASHINGTON  
BY   
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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

JASON HALEY, Appellant

v.

PIERCE COUNTY, et al., Respondents

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**RESPONDENT'S OPENING BRIEF**

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**I. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR**

A. Did the trial court properly grant Defendant's summary judgment motion on Plaintiff's claim of racial discrimination when Plaintiff failed to establish a prima facie case of discrimination because two members of Plaintiff's protected class were promoted to the position Plaintiff sought?

B. Did the trial court properly grant Defendant's summary judgment motion on Plaintiff's claim of retaliation where Defendant properly took multiple steps to exclude persons with potential bias from being decision makers on Plaintiff's application for promotion?

**II. STATEMENT OF THE CASE**

A. PROCEDURE

Plaintiff filed this action in May 2009, alleging racial discrimination, hostile work environment, retaliation, disparate treatment, disparate impact, negligence, intentional and negligent infliction of emotional distress, outrage. CP 1-5.

On January 20, 2011, Defendant Pierce County filed its Motion for Summary Judgment Dismissal of All Claims. CP 805-35. Plaintiff filed his Response on February 22, 2011. CP 836-79. On February 28, 2011,

Defendant filed its Reply in Support of Summary Judgment along with its Motion to Strike inadmissible materials submitted by Plaintiff. CP 880-96; 897-99. On March 4, 2011, the trial court granted Defendant's Motion for Summary Judgment, dismissing all claims. CP 509-11. Plaintiff filed a timely notice of appeal regarding the dismissal of his claim of racial discrimination and retaliation. CP 516-21. He has not assigned error to the dismissal of the remaining claims. Appellant's Opening Brief ("AOB"), p. 2.

**B. FACTS**

**1. Plaintiff's Performance as a Correctional Officer.**

In July 2006, Plaintiff Jason Haley, an African American, was hired by the Pierce County Sheriff as a Corrections Officer in the Pierce County Jail. CP 536. During Plaintiff's three month Field Training, his training officers noted problems with officer safety on four occasions and inmate welfare checks on at least two occasions. CP 537. There were also issues concerning pat downs of inmates, handcuffing inmates, and missed radio calls. *Id.*

In October 2006, Plaintiff's supervisors in the jail deemed it necessary to extend his Field Training period due to Plaintiff's failure to satisfactorily respond to training in the areas of Stress Conditions; Non-Stress

Conditions; Problem Solving/Decision Making; Adaptability; and Officer Safety. CP 543.

After completing his extended training, Plaintiff's subsequent Performance Appraisals reflected a "Success" rating in each category on each evaluation; Plaintiff did not ever receive marks in the "Excel" category, nor did he obtain marks of "Needs Improvement." CP 537. However, Plaintiff had performance problems noted in his evaluations. *Id.* On one occasion, Plaintiff left his duty weapon at home, contrary to departmental policy that the duty weapon be at work and available for use, if needed. *Id.* As such, Plaintiff could not perform the task to which he was assigned on the day in question. *Id.* In another instance, Plaintiff was counseled about suspicious sick leave usage. *Id.* Plaintiff also missed a supervisor's deadline for submission of written goals. *Id.*

**2. The Background Unit Disqualifies Plaintiff From the Application Process For the Position of Deputy Sheriff.**

In approximately May or June, 2007, before he even completed his one year probationary period, Plaintiff applied for a promotion to the position of Deputy Sheriff. CP 17. The Background Unit of the Sheriff's Department performs background investigations for all deputy sheriff candidates. CP 93. The Background Unit also conducts all phases of the background process, including pre-oral interviews, structured oral board inter-

views, criminal history checks, credit checks, scheduling polygraph examinations, psychological evaluations, checking references, verifying prior employment, among many other things. *Id.*; CP 30. If a candidate is disqualified at any point in the process, the Background Unit sends out a disqualification letter. CP 31. The Background Unit does not make hiring and promotional decisions. Every recommendation and decision the Background Unit makes is subject to review. CP 757.

In July 2007, the Background Unit investigated an unsolicited allegation that Plaintiff had falsified inmate welfare checks during graveyard shift in the jail two months prior. CP 31-37. Sgt. Perry, Deputy Roberts, and Officer Mock of the Background Unit telephonically interviewed Sgt. Schultz who was Plaintiff's acting sergeant on the night in question. CP 36-37; 94; 65. Sgt. Schultz relayed that Plaintiff had logged inmate checks into the computer when in fact the checks had not been done on all inmates. *Id.* Schultz relayed that at the time of the incident, Lt. James-Hutchison told him to handle it as training issue. *Id.* Schultz reported to the Background Unit that Plaintiff's violation was serious and he disagreed with the Lieutenant's handling of the situation believing Plaintiff should be written up. *Id.* Corrections deputies had been fired for this misconduct in the past. CP 64.

The Background Unit disqualified Plaintiff from the application

process for deputy sheriff and referred the matter to command staff in the jail to investigate whether Lt. James-Hutchison handled the welfare checks issue appropriately. CP 64; 65. It was at this time (two months after the incident) that Lt. James-Hutchison ordered Sgt. Schultz to put in writing and e-mail to her what happened that night. CP 162. This e-mail was a totally different version of the events than what Schultz had given to Background Unit personnel, and it agreed with the Lieutenant's handling of the issue. CP 98. Command staff in the jail concluded that while Plaintiff did not perform the welfare check properly, the incident was properly handled as a training issue. CP 58.

At that point, Sgt. Perry concluded that there may have been some conflict in how the welfare checks were to be done and that some of the corrections deputies were not strictly following the correct procedures. CP 68. However, additional background investigation revealed other areas of concern regarding Plaintiff's work performance. As Sgt. Roberts testified: "In review of his FTO [Field Training Officer] files and talking with Russ Clawson, who was the training officer for the jail at the time, it was documented in his training files that he was trained on how to properly do the checks. He was given the manual and the policies and instructed to read those, as all new employees are." CP 95. Giving Plaintiff "the benefit of the doubt, that there may have been training discrepancies,"

the welfare check issue (now carrying far less weight), coupled with other performance deficiencies, ultimately lead the Background Unit to arrive at the same conclusion: that Plaintiff should be disqualified. CP 68-70.

Along with the improperly conducted welfare check, the Background unit considered other performance issues: (1) Plaintiff required an extension of his field training period because he was deficient in several areas; (2) during his probationary period, he forgot to bring his gun to work as required; (3) he was counseled on sick leave abuse; and (4) he failed to comply with a supervisor's directive regarding goal setting. *See* Section B(1) herein; CP 71.

In late August 2007, as part of the background investigation, Sgt. Perry made inquiry regarding Plaintiff's performance and reputation in the jail. All three of the corrections deputies he spoke to gave consistent information: Direct observation that Plaintiff does only what he needs to in order to get by in his job; that Plaintiff has a reputation as a weak performer; and one other negative perspective on work performance. CP 796.

Sgt. Perry stated:

You put all of those together, and I've got a candidate that is not acceptable to be offered a position for deputy sheriff. ... I'm not suggesting he should be fired. ... I'm taking the best we've got, and he was not the best we had.

CP 71.

On September 11, 2007, Sgt. Perry sent Plaintiff an e-mail explain-

ing their decision to disqualify him from the process at that time. CP 804. Sgt. Perry further advised Plaintiff that the current decision would not preclude him from seeking a deputy sheriff position in the future. *Id.* After this point in time, Sgt. Perry had no decision-making authority with regard to Plaintiff's candidacy for deputy sheriff. CP 796.

Upon later learning that Plaintiff had filed a complaint of racial discrimination regarding his disqualification, Sgt. Perry was both bothered and offended. CP 767. He was extremely offended that Plaintiff would unjustly accuse him of racism when Plaintiff does not know his background, history or anything about him. *Id.* Sgt. Perry firmly believed in the integrity of the background process and was offended that anyone could fathom that race entered into the decision. *Id.* In fact, within a month or two of Plaintiff's accusation of racism, Plaintiff's co-worker from the jail, Deputy A, had gone through the same background process as Plaintiff, with the same decision makers, and received a promotion to Deputy Sheriff. Deputy A is African American. CP 184.

### **3. Plaintiff Failed His First Structured Oral Board.**

Plaintiff appealed his disqualification with Civil Service and also filed an Equal Employment Opportunity (EEO) Complaint. CP 537; 777. Civil Service's Chief Examiner Sandra Pietz investigated Plaintiff's complaint that he was wrongfully disqualified. CP 777; 784. **Significantly,**

**Ms. Pietz's investigation revealed no racial discrimination by the Background Unit.** CP 489. However, in her judgment, Plaintiff's performance deficiencies were not significant enough to allow Plaintiff's removal from the civil service register. CP 777; 783. Ms. Pietz accordingly granted Plaintiff's appeal, placing Plaintiff back on the register of applicants to be considered for deputy sheriff. CP 777; 537-38. The structured oral board would be the next step in the application process. Ms. Pietz recommended an oral board comprised of members who had not been involved with the Background process. CP 538. Undersheriff Bisson agreed. CP 43.

In order to have a fair and objective oral board, Undersheriff Bisson hand-selected Captain (then Lieutenant) Smith, Craig Adams, and herself as the panel members. CP 44. Sgt. Perry made suggestions, but the Undersheriff made the selection. CP 72. Normally the board is composed of members of the background unit, or people of their choosing. CP 44-45. All three members, although outside the Background Unit, had vast experience sitting on oral boards. CP 45. She chose Craig Adams because she respects him and thinks he is a very fair person. CP 44. She chose Captain Smith because he was about to become the Captain in charge of the Background and Training Units. CP 45.

The structured oral board consists of three evaluators, usually a

peer, a supervisor and an administrator. CP 538. There is also a recorder present whose function is to take notes and ensure that the Civil Service rules are not violated. *Id.* Each evaluator is typically provided with a packet of information on the candidate to include a personal history statement, pre-oral interview, criminal history check, past application information to include an employee's initial background investigation paperwork, and all documentation obtained up to that point. *Id.* In Plaintiff's case, documentation of the welfare checks incident was not included. *Id.* While the board members acquaint themselves with the packet of information, the candidate is given 30 minutes to fill out a writing sample. *Id.*

The standard oral board questions are asked by the peer, supervisor and administrator. CP 538. The Recorder takes notes, which are typed and attached to the Oral Board Worksheet. *Id.* Each evaluator's hand written notes are attached to the evaluator score sheets. The evaluators score the candidates on several categories: Appearance, Oral Presentation, Writing Skills, Professional Impact, Interpersonal Sensitivity, Desire for Self-Improvement, Reasoning/Problem Solving Abilities, and Integrity. CP 539. A series of questions follow each category to guide the evaluator in what factors to consider in scoring the candidate. *Id.* Each evaluator completes the Oral Board Evaluator Score Sheet during the candidate's oral board. *Id.* Lastly, the scores are tallied. This is a two part score sheet

with seven categories (listed above) in the first part and Integrity standing alone in the second part. *Id.* To pass, a candidate must receive a minimum of 44 points from each of at least two of the three evaluators in the first part, and a minimum of 2 points from each of at least two of the three evaluators in the second part. *Id.*; *see e.g.* CP 561 and 581.

Plaintiff took the structured oral board on November 30, 2007. He did not receive a passing score. CP 561.

Craig Adams gave Plaintiff low scores in the categories of Professional Impact, Interpersonal Sensitivity, Reasoning/Problem Solving, and Integrity. *Id.* CP 528. The following summarizes Mr. Adams' reasons for low scores given. Mr. Adams observed that Plaintiff had a very flat affect and was somewhat monotone. CP 528. Plaintiff did not smile much, nor did he engage the board with any personality. *Id.* His writing sample did not communicate much information and was very superficial. *Id.* Mr. Adams found Plaintiff unapproachable and quite rigid in his thinking; a person who sees the world in black and white. *Id.* Mr. Adams opined that Plaintiff is the type of individual that needs heavy structure, such as the military or jail atmosphere, and that he is not an independent worker or thinker, as required for a deputy sheriff. *Id.* Of concern in this regard as well was the fact that Plaintiff had been fired from the U.S. Postal Service for failing to perform adequately. *Id.* Regarding Plaintiff's

integrity, Mr. Adams noted that Plaintiff did not want to answer all of the questions asked and that the Board members had to pry information out of him. *Id.* Mr. Adams also had concerns about Plaintiff changing stories on one of the prior questions, along with concerns about inappropriate rationalization of wrongful behavior. *Id.*

Undersheriff Bisson, a 26 year veteran of the Sheriff's Department, gave Plaintiff passing scores in all categories except for Reasoning/Problem Solving. CP 561; 50-53. Like Mr. Adams, the Undersheriff noted that they had "to prod him to get information out of him." CP 50. She observed that Plaintiff seemed to interpret the questions differently than the Board. *Id.* She thought that Plaintiff came across as if on autopilot because he had no inflection or change in his voice throughout the oral board. CP 51. She also noted that he bought a gun as a juvenile because he thought it was "cool". CP 52.

Captain Smith, a 24 year veteran of the Sheriff's Department, scored Plaintiff the lowest of the three Board members, giving him low scores in all categories, except for appearance. CP 561. At some point during the Oral Board, Captain Smith had to admonish Plaintiff to answer the Board's questions without having to be prodded. CP 551. Captain Smith observed that Plaintiff did not appear to be confident. CP 84. Like Undersheriff Bisson, Smith noticed that Plaintiff did not seem to grasp the

intent of the questions. *Id.* He found Plaintiff's writing sample to be very simplistic; not expressive or detailed. CP 81-82. Captain Smith observed that, in his opinion, Plaintiff lacks presence, does not have an approachable demeanor, and lacks confidence. CP 85. He gave Plaintiff a score of zero for integrity. CP 86. He based this score on Plaintiff's prior gun possession as a juvenile and his admitted participation in a drive-by shooting. CP 79. Plaintiff admitted that he purchased a .25 pistol from a cousin for \$40 because he wanted to be cool. CP 78; CP 556-57. A friend of his asked if he could use the gun. *Id.* Plaintiff gave him the gun and drove the friend to the house where Plaintiff heard shots fired. *Id.* The friend told Plaintiff he shot into the air. *Id.* He was put on house arrest for three months for reckless handling of a firearm. *Id.*

Captain Smith was astounded that Plaintiff was hired as a Corrections Deputy given his participation in the drive-by shooting. CP 80. Captain Smith felt that anyone involved in a drive-by shooting should be disqualified from the application process. CP 79. Captain Smith further felt it was "questionable" that Plaintiff was being truthful with the board. CP 86.

Plaintiff again appealed to Civil Service seeking reinstatement to the hiring register. CP 539. The Chief Examiner, Ms. Pietz, again investigated and again found no evidence of racial discrimination in Plaintiff's

Oral Board. CP 784. Based on her review of the oral board interview, she declined to grant relief. *Id.* Plaintiff then filed an amended EEO complaint alleging that his oral board panel was not “normal.” *Id.*

The EEO investigator concluded, inter alia:

1. That “there does not appear to have been a reason(s) based on color/race for the initial disqualification or the subsequent disqualification of Officer Haley from the deputy hiring process.”
2. While color/race does not appear to be a factor in the make-up of the oral board, the Background Sergeant had input into to the make-up of the oral board. It is possible that retaliation was a conscious or unintended factor in the selection of the panel members, thus tainting Officer Haley’s remedy.
3. Statistical data and a review of some past files do not reveal clear disparities in deputy-hiring based on race/color.

CP 540.<sup>1</sup>

**4. Plaintiff Failed His Second Structured Oral Board.**

The Sheriff followed the suggestion of the EEO investigator and provided Plaintiff with a second Oral Board interview that was “carefully crafted so that the Background Unit is not involved, and where the oral board’s makeup is one that is more typical.” CP 540. This Oral Board,

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<sup>1</sup> This information is inadmissible and is not offered in support of this motion, but as background only.

Plaintiff's second, was administered on January 23, 2009. Plaintiff again failed. CP 581.

Undersheriff Bisson again selected the Board members. CP 48.

Neither Sgt. Perry nor his unit had any input in this selection. CP 765.

The Undersheriff testified:

Q: Now, when you say it's your belief that Mr. Haley had a fair oral board in 2009, what is that based on?

A: The individuals that were chosen for that board were hand-picked by me based on their experience level in terms of oral boards, positions they held within the department, their work experience, and their behavior, integrity within the department.

CP 48. For the Administrator role, she chose Lt. Larry Bauer; for the Supervisor role, she chose Det/Sgt. Teresa Berg; and for the Peer role she chose Deputy Brian Anderson. CP 581. None of these people had any information about Plaintiff when they sat on his oral board. Lt. Bauer testified: "[P]rior to the oral board, I knew absolutely nothing about [Plaintiff]." CP 143. Det. Berg testified: "You know, I think there was something mentioned that he had been through something and we were redoing, but other than that, I don't think so, and I don't know him at all, so..." CP 115-16. Det. Berg further testified that she had heard no rumors about him. CP 116. When Deputy Anderson was asked whether he had prior knowledge of Plaintiff, he responded, "No, no, the Undersheriff – even the

day of the board, she just said, 'Okay. Go over and sit on an oral board,' and that's all the information I had." CP 102.

Plaintiff was administered his second structured oral board on January 23, 2009. Again, Plaintiff did not receive a passing score. CP 581. The oral board process did not change from Plaintiff's first oral board in November 2007. *Compare* CP 545-61 (records from first oral board) to CP 563-81 (records from second oral board). The basic format, the oral board questions asked by Peer, Supervisor, and Administrator, the guiding questions on the evaluator score sheet, the situational scenarios, the writing sample questions, and scoring format were the same as Plaintiff's first oral board. *Id.*

Lt. Bauer, a 29 year veteran of the department, gave Plaintiff a passing score on the first sections, but gave him a failing score on the integrity section. CP 581. Lt. Bauer's Evaluator Score Sheet has notations only under two categories, Appearance and Writing Skills. CP 149-151. Lt. Bauer's notes reflect that he found Plaintiff's writing sample to have "minimal content." CP 145; 150. Lt. Bauer testified that he cannot be specific with regard to his scoring of Plaintiff because he took very few notes and does not remember the specifics of Plaintiff's oral board. CP 146; 147-48.

Det./Sgt. Berg, a 24 year veteran with the Sheriff's Department,

gave Plaintiff a passing score in the first seven categories, but, like Lt. Bauer, she also gave him a failing score on integrity. CP 581. Det./Sgt. Berg noted that Plaintiff was “very tight” and that he did not answer questions in a clear and direct fashion. CP 118; 121. Det./Sgt. Berg, who has a degree in English, found Plaintiff’s writing sample marginal because it contained very little information. CP 119; 120. Berg had doubts as to Plaintiff’s approachability and sincerity. She noted that Plaintiff described himself as someone who others think is mean, based on his appearance. CP 123. She testified, “I had doubts about some of his truthfulness. I didn’t think he was as open and honest as he should be.” CP 122. She did not “get the feeling from him that he was – had laid it out for us [like] we were asking him to do.” CP 124. For example, during the oral board, Plaintiff was asked the standard question by Lt. Bauer:

3. Tell us **everything** you may have stolen, failed to return, or given away without authorization from a place of employment or military service.

CP 574 (emphasis added). Plaintiff answered: “Nothing.” *Id.* The Board confronted him, asking, “Well, what about the boot camp incident?” CP 125. Plaintiff then admitted to stealing \$100 out of someone’s wallet during boot camp. *Id.* Plaintiff’s involvement in a drive-by shooting was also cause for concern, especially since he was not as forthcoming about it as he should have been. CP 126. Det./Sgt. Berg did not feel that Plaintiff

was owning up to the behavior and she felt as though she was “doing a suspect interview with my candidate. I want him to just tell me...” CP 126-27. Plaintiff also admitted lying to his Lieutenant while he was still on probation by calling in sick when he was not. CP 138; 573. Det./Sgt. Berg could not tell if Plaintiff had changed from his past poor judgments. She did not see that he was remorseful, but rather that he was defensive. CP 129.

Det./Sgt. Berg noted that deputies new to the department do not sit on oral boards. CP 130. In the oral board process the evaluators rely on their judgment. *Id.* She explained that she is a trained detective with a lot of experience. *Id.* During the course of her criminal investigations, she interviews daily; that is her expertise and what she brings to evaluate a candidate on an oral board. *Id.* Det./Sgt. Berg explained that she was the fifth female to be hired on to the Sheriff’s Department. CP 131-33. She was not welcomed. *Id.* She was the victim of discrimination by certain *individuals* who are gone. *Id.* She never experienced it from the department itself. *Id.* If discrimination were taking place during Plaintiff’s oral board, she would have picked up on it, and she would not have tolerated it. *Id.* When asked if racial bias played a role in Plaintiff’s oral board, Det./Sgt. Berg responded: “Absolutely not.” CP 132.

Deputy Anderson, who has been with the Sheriff’s department for

16+ years, gave Plaintiff a failing score both on the multiple category section and on the integrity section. CP 581. Thus, all three evaluators failed Plaintiff for his lack of integrity. *Id.*

Deputy Anderson found that Plaintiff's writing sample did not contain much information and that the answer primarily consisted of repetition of the question itself. CP 108. Deputy Anderson also scored Plaintiff low for his professional impact noting that Plaintiff comes across as unapproachable. *Id.* He was very closed off, providing only short answers. *Id.* The interaction of the candidate with the Board is important to Deputy Anderson in his evaluation of that person and their suitability to be a deputy sheriff. CP 104-05. Based on Plaintiff's inability to engage with the Board, Deputy Anderson interpreted him to be unapproachable, on edge, and guarded. CP 104.

On the integrity section, Deputy Anderson gave Plaintiff a score of zero. CP 109. He based this on two factors. First, Plaintiff admitted to lying to a supervisor regarding calling in sick when he was not. *Id.* Second, Plaintiff "lied on question 3 of the Administrator section. Then he said he misunderstood the question." *Id.*; see CP 574. (This is the same portion of the oral board that Det./Sgt. Berg had concerns about. CP 125.) Deputy Anderson was pressed in his deposition on this issue. He testified:

A: I believe he understood the question and when he an-

swered “nothing,” he meant nothing and that he was making a conscious – that was my impression, and that’s why I gave him a zero on that.

Q: ...you believe that he was making a conscious decision to deceive the Board?

A: I did.

CP 106.

### **5. Similarly Situated Employees.**

During the time frame that Plaintiff was applying for promotion to deputy sheriff, the Sheriff promoted eight other correctional deputies to deputy sheriff. CP 541; 901. Five of these individuals were white males, two were an African American males, and one was an Asian American male. *Id.* All eight of these successful applicants passed the structured oral board. *Id.*

#### **C. PLAINTIFF’S ERRORS REGARDING THE FACTS AND RECORD BELOW.**

Plaintiff’s “Statement of the Case” contains many facts not supported by the record, as well as facts contradicted by the record. Appellant’s Opening Brief (“AOB”), p. 3-23. The most egregious of those are as follows:

First, Plaintiff incorrectly states that the Background Unit of the Sheriff’s Department “determines whom to hire,” makes job offers, and “is almost solely responsible for determining promotions to sheriff’s dep-

uty.” AOB at 7. This is not supported by the record. Plaintiff cites to the deposition testimony of Officer Mock who actually testified that “if they [applicants] are chosen **by the department** to be hired” the Background Unit makes the phone call to offer the job. CP 30 (emphasis added). In fact, every decision and recommendation the Background Unit makes is subject to review. CP 757.

Second, Plaintiff inaccurately asserts to this Court that when Sgt. Perry learned of the welfare check incident, “he immediately decided to disqualify him, without further investigation and without even bothering to discuss it with Mr. Haley.” AOB at 14. Sgt. Perry did speak to Plaintiff and based on Plaintiff’s position, Sgt. Perry put Plaintiff’s disqualification “on hold” and agreed to investigate even further. The testimony of both Sgt. Perry and Plaintiff bears this out. CP 64; 68; 70; 668. Plaintiff also mischaracterizes the facts by stating that Sgt. Perry threatened and yelled at Plaintiff. AOB at 7-8. The testimony indicates that Sgt. Perry yelled out an answer *to one question*. CP 667. There is no mention of any threat. In fact, when asked what Sgt. Perry meant, Plaintiff did not indicate he felt threatened. He testified: “I really didn’t - - I figured he was just gonna get to the bottom of it.” CP 668.

Third, Plaintiff falsely states that the Background Unit was “forced to reconsider Haley for promotion”, and that Sgt. Perry of the Background

Unit “remained in control of Mr. Haley’s candidacy.” AOB at 14; 16. Plaintiff cites to CP 43, deposition testimony of Undersheriff Bisson, which not only does not support this false assertion, but does not even address a topic related thereto. *See* CP 43. The record below actually shows that after Plaintiff was disqualified, Sgt. Perry had no further decision making authority over Plaintiff’s candidacy. CP 44-45; 796. Once Plaintiff had been returned to the register, Defendant decided that the next step in the process, the oral board, should be done by people not in the Background Unit. CP 44-45. Additionally, when a new addition to the Background Unit performed Plaintiff’s preoral interview, which precedes the Oral Board, he found so many discrepancies in Plaintiff’s disclosures that he recommended that Sgt. Perry disqualify Plaintiff.<sup>2</sup> CP 752-53. Sgt. Perry advised him that it was out of their hands. CP 753.

Fourth, Plaintiff again mischaracterizes the record by stating that Sgt. Perry “personally selected and recruited two of the three panelists” for Plaintiff’s first Oral Board. AOB at 16. As support of this factual assertion, Plaintiff cites to an unsworn statement contained in Kent Nakamura’s report, which is inadmissible hearsay, and therefore cannot be considered on summary judgment. CR 56(e); ER 801(c); ER 802. Plaintiff did not

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<sup>2</sup> Significant inconsistencies during the process subject the candidate to removal from the register (disqualification) under Civil Service Rule 8 3(k). CP 594 (last paragraph).

depose nor procure an affidavit from Nakamura. Plaintiff also cites to Undersheriff Bisson's deposition testimony at CP 45. Sgt. Perry had some input regarding the selection of the panel members for the first Oral Board, but he did not make the decision. CP 45. Undersheriff Bisson testified:

Q: Can you tell me how that board came to be composed of the people that were on it? How were those people selected to be on the board?

A: It was a - - I had a conversation with Sandy Pietz [Chief Civil Service Examiner], and she - - we were aware that Jason was back on the list, so he was continuing through the process, and the next step was the oral board, and **we wanted to make sure that he had a fair and objective board.**

Normally, the board is made up of folks within the background unit, and since there had been this issue of the background unit initially disqualifying him from the register, we felt it was important to find someone outside the folks that were in the background unit.

I had sat on hiring oral boards for probably 20 years at various stages in my career, as had Craig Adams and as had Ed Smith.

Ed Smith was just getting ready to go from his position within - - whatever his position was, he was going to supervise the background [and] training unit, so that's the reason we picked him for that position, and again, Craig Adams had just about as much experience as I did in sitting on oral boards.

CP 44-45 (emphasis added).

Sgt. Perry testified:

A: ... In the first [Oral Board], the Undersheriff indicated she was going to be on it, and **we went through a variety of**

**people.** We were talking about the potential of variety of people who would be sitting on it. In the finish, it was determined - - **she determined** that it - -

Q: “She” being Undersheriff Bisson?

A: The Undersheriff determined it was going to be Captain Smith<sup>3</sup> and legal advisor, Craig Adams, that they were going to be the ones - - they were names that we discussed and talked about.

CP 72 (emphasis added). The record does not support the impression Plaintiff is trying to make on this Court.

Fifth, Captain Smith did not “misrepresent” the firearm incident as claimed by Plaintiff. AOB at 18, n. 6. Plaintiff was an accomplice to a drive-by shooting: By his own admission, Plaintiff purchased a firearm when he was 16 years old. CP 468; 556-57; 575.<sup>4</sup> For about two months, he kept it in the glove box of the car he drove. CP 468; 556. His friend was angry because he “got jumped” and wanted to borrow Plaintiff’s gun to go “shoot up a house”. CP 468; 575. Plaintiff provided the firearm to

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<sup>3</sup> Plaintiff improperly asserts that Smith was a “tough grader” who had been “banned” from oral boards. AOB at 16, n. 4. This inflammatory note is hearsay within hearsay. ER 805. The alleged statement is contained in Nakamura’s report, which is hearsay, by an **unknown declarant**. This rank hearsay cannot be considered on summary judgment. CR 56(e).

<sup>4</sup> Plaintiff made these disclosures in his Oral Boards and the statements are admissible evidence. The statements are documented in the official files of the Pierce County Sheriff’s Department, which are admissible under the business records exception to the hearsay rule, the foundation for which is set forth by the testimony of Undersheriff Bisson. CP 536-37; RCW 5.45.020. Plaintiff’s statements within these documents are not hearsay, by definition, ER 801(d)(2)(i).

his angry friend and drove him to the house where he heard shots fired.

CP 556. The friend told Plaintiff that he fired into the air. CP 556.

In his brief, Plaintiff creates the impression that he merely loaned the gun to someone. AOB 18. Although he did not actually fire the shots himself, he provided the firearm, knowing how it would be used, transported the shooter and firearm to the scene where shots were fired, and he regained possession of the firearm after the shooting. Under Washington law, these facts constitute the crime of drive-by shooting, a Class B felony. RCW 9A.36.045; RCW 9A.08.020(3)(a)(ii). This crime is classified as a violent offense. RCW 9.94A.030(54)(a)(xii). Although the commission of this crime while a juvenile is not an automatic disqualifier (“DQ”) under the Hiring Standards, there is nothing prohibiting the Department from considering it, contrary to Plaintiff’s assertion. *See* CP 594; AOB 19, n. 6.

Lastly, Plaintiff wrongfully asserts that Ms. Pietz, Chief Civil Service Examiner, “believes there may be racial bias in the hiring process for sheriff’s deputy.” AOB 22. This is extremely misleading. Ms. Pietz’s testimony clearly indicated that she saw no racial discrimination against Plaintiff:

**Q: Okay. Did you have any concerns with regards to Jason Haley?**

A: **No, not on racial bias.**

CP 488-89 (emphasis added).

### III. ARGUMENT

This Court reviews the trial court's granting of summary judgment de novo. *Kahn v. Salerno*, 90 Wn.App. 110, 117, 951 P.2d 321 (1998); *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The moving party has the initial burden to show that no genuine issue of material fact exists. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). This burden can be met by showing **the absence of evidence** from which the nonmoving party can make out a prima facie case. *Young*, 112 Wn.2d at 225; *see also Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 394-395, 823 P.2d 499 (1992). In the employment law context, "[t]o defeat summary judgment, the employee must establish **specific and material facts** to support each element of his or her prima facie case." *Kahn v. Salerno*, 90 Wn.App. 110, 117, 951 P.2d 321 (1998) (emphasis added).

A. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S CLAIM OF DISPARATE TREATMENT/RACE DISCRIMINATION.

Plaintiff alleges he was the victim of disparate treatment in the County's failure to promote him to deputy sheriff. He raises his claim under the Washington Law Against Discrimination (WLAD), RCW 49.60 et

seq. Both Federal and Washington courts apply the three part *McDonnell Douglas* burden-shifting analysis to disparate treatment claims. *Pottenger v. Potlatch Corp.*, 329 F.3d 740, 745 (9th Cir. 2003); *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 185-186, 23 P.3d 440 (2001). Part 1: Under this analysis, plaintiff must first make a prima facie case of discrimination. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9th Cir. 2000). Part 2: The burden of production then shifts to defendant to articulate a legitimate, non-discriminatory reason for its action. *Id.* Part 3: The burden shifts back to plaintiff to show that the alleged non-discriminatory reason is a pretext for a discriminatory motive. *Id.* Despite the burden shifting, the ultimate burden of proof remains on the plaintiff to show the employer **intentionally discriminated** because of his race. *Id.* Plaintiff cannot make a prima facie case of disparate treatment. The trial court properly dismissed this baseless claim.

**1. Plaintiff Cannot Establish a Prima Facie Case.**

To establish a prima facie case of race-based disparate treatment for failure to promote under the WLAD, an employee must show he was: (1) a member of the protected class; (2) applied and was qualified for an available promotion; (3) not offered the position; and (4) the promotion went to someone outside the protected class. *Kuyper v. State of Washington Dept. Wildlife*, 79 Wn.App. 732, 735, 904 P.2d 793 (1995); *Grimwood*

v. *University of Puget Sound, Inc.*, 110 Wn.2d 355, 362-64, 753 P.2d 517 (1988).

For purposes of this motion, Pierce County does not dispute the first and third elements. Plaintiff cannot show the second element because he was disqualified from the hiring process due to his failure to obtain a passing score on an oral board. As such, he was not qualified for promotion. Plaintiff cannot show the fourth element because the County promoted two African American correctional deputies, applicants not outside Plaintiff's protected class.<sup>5</sup> CP 541; 901. When two members of Plaintiff's race were selected for the position he sought, he cannot show that the reason for his rejection was based on race. *See Kuyper*, 79 Wn.App. at 735.

Plaintiff argues that he can show evidence of racism because Lt. James-Hutchison offered a *personal* opinion that racism played a role in the sheriff's department's hiring process with respect to the hiring of deputy sheriffs. AOB at 29. However, this testimony is inadmissible for three reasons. First, for lack of personal knowledge because Lt. James-Hutchison has never seen Plaintiff's background file, she has never par-

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<sup>5</sup> One other position was filled with another non-Caucasian minority male. CP 541. The five remaining positions were filled with Caucasian males. *Id.* All eight employees selected for the Deputy Sheriff promotion successfully passed all phases of the selection process, including the structured oral board interview. *Id.*; CP 901.

ticipated in the background or hiring process for deputy sheriffs, nor was she present for either of Plaintiff's oral boards. CP 732-33; ER 602. Second, the testimony is irrelevant because opinion and conclusory statements are insufficient to show discrimination. *Kahn v. Salerno*, 90 Wn.App. at 117. Third, a supervisor's personal opinion that Plaintiff should have gotten the job cannot negate that fact that Plaintiff failed to pass the structured oral board, the criteria utilized by the County. *See Kuyper v. State of Washington*, 79 Wn.App. at 737. Affidavits submitted at summary judgment must be based on personal knowledge, must set forth such facts as would be admissible in evidence, and must show that the affiant is competent to testify in the matters stated therein. CR 56(e). Lt. James-Hutchison's deposition testimony satisfies none of these criteria.

Similarly, Plaintiff's attack on the successful Caucasian candidates is based on inadmissible evidence. ER 801; 802; 805. Even if Plaintiff's distorted presentation of the Caucasian candidates backgrounds were accurate and admissible, Plaintiff offers it to prove the department's preference for Caucasian candidates, which is contradicted by who the department actually promoted:

**5 Caucasians** ~ Deputies B, C, D, E, G  
**2 African Americans** ~ Deputies A, H  
**1 Asian American** ~ Deputy F

This irrefutable evidence negates Plaintiff's assertion that Defendant gave preference to Caucasian applicants. Plaintiff cannot make a prima facie case under WLAD.

**2. Defendants Had Legitimate, Nondiscriminatory Reasons for Plaintiff's Disqualification(s).**

Even if Plaintiff could somehow establish a prima facie case, Pierce County had legitimate, nondiscriminatory reasons for disqualifying Plaintiff from the promotional process. These reasons are summarized as follows:

**(a) The Background Unit Disqualified Plaintiff Due To Performance Issues of this Still-Probationary Corrections Deputy.**

Although the jail command staff ultimately chose to handle the improper welfare check as a training issue, and the Background Unit initially accepted Schultz's first version of the issue, does not show discrimination. "The law is clear that, even if a ... claimant did not in fact commit the violation with which he is charged, an employer successfully rebuts any prima facie case of disparate treatment by showing that it honestly believed the employee committed the offense." *Jones v. Ferwens*, 874 F.2d 1534, 1540 (11<sup>th</sup> Cir.1989). The Background Unit had a good faith reason to believe that Plaintiff had been derelict in his duty based on their interviews with Sgt. Schultz, the training records of Plaintiff showing he had

been properly trained, and the policy and procedural manual which documents the proper method.

Aside from the welfare check incident, the Background Unit discovered that Plaintiff had deficiencies at all levels: field training, probation, and peer review. Field Training was extended due to Plaintiff's failure to respond to training in the areas of Stress Conditions; Non-Stress Conditions; Problem Solving/Decision Making; Adaptability; and Officer Safety. CP 543. During probation, Plaintiff failed to bring his duty weapon to work, he had to be counseled by his supervisor for sick leave abuse (taking vacation days in conjunction with Holidays/days off), he lied to his supervisor by calling in sick when he was not, and he failed to meet a supervisor's deadline for goal setting. CP 71; 537. In August 2007, as part of the background investigation, Sgt. Perry made inquiry regarding Plaintiff's performance and reputation in the jail. All three of the corrections deputies he spoke to gave consistent information: Direct observation that Plaintiff does only what he needs to in order to get by in his job; that Plaintiff has a reputation as a weak performer; and one other negative perspective on work performance. CP 796.

All of the above show legitimate, non-discriminatory reasons for rejecting a candidate, especially one who was still on probation as a corrections deputy at the time he sought promotion to deputy sheriff. *See*

*Cotton v. City of Alameda*, 812 F.2d 1245, 1250 (9<sup>th</sup> Cir.1987) (in employment discrimination case, it is irrelevant that a background investigation did not discover all there was to know about the applicant).

**(b) Plaintiff Failed His First Oral Board Interview.**

Plaintiff's request to be put back on the list was granted and he sat for a structured oral board interview on November 30, 2007. CP 561. In summary, Plaintiff failed for the following reasons: He participated in a drive-by shooting as a juvenile; he had been fired from the U.S. Postal Service for inadequate performance; the Board had to prod him for information; he did not appear approachable or confident; he was rigid in his thinking; he did not understand the intent of the questions; he appeared to require a structured environment; and they had doubts about his truthfulness. CP 47-53 (Bisson); CP 76-90 (Smith); CP 527-35 (Adams). For a more detailed summary of the evaluators impressions and conclusions, *please see* Section II(B)(3) herein.

**(c) Plaintiff Failed His Second Oral Board Interview.**

To avoid any suggestion of possible retaliatory taint or unfairness, the department voluntarily afforded Plaintiff the opportunity to have a second structured oral board interview, which took place on January 23, 2009. CP 581.

In summary, Plaintiff failed for the following reasons: His writing sample contained minimal content; he participated in a drive-by shooting; he was very tight and unapproachable; he was not as forthcoming as he should have been; his truthfulness was very much in doubt, one evaluator finding that Plaintiff had made a conscious effort to deceive the Board. CP 102-11(Anderson); CP 115-39 (Berg); CP 142-53 (Bauer). For a more detailed summary of the evaluators impressions and conclusions, *please see* Section II(B)(4) herein.

### 3. Plaintiff Cannot Show Pretext.

Pierce County had a legitimate, non-discriminatory reason for not promoting Plaintiff: he did not pass the oral board examination. The burden accordingly shifted back to Plaintiff to show pretext. *Coleman*, 232 F.3d at 1282. **Plaintiff's burden here is heavier** than at the prima facie stage, and he must now provide "**specific, substantial evidence of pretext**" to meet his burden of showing that defendants **intentionally discriminated** against him based on his race. *Coleman*, 232 F.3d at 1282. He did not meet this burden.

Plaintiff argues that his satisfactory performance evaluations show he is qualified for the position he sought.<sup>6</sup> However, this argument that

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<sup>6</sup> Not all of Plaintiff's supervisors have such a high opinion of Plaintiff. For example, his

different criteria should have applied to the promotion decisions is invalid under *Cotton v. City of Alameda*, 812 F.2d 1245, 1249 (9<sup>th</sup> Cir. 1987). In *Cotton*, the plaintiff had 24 years of experience in law enforcement and argued he was passed over for positions by people with no experience. The court rejected his claim of age discrimination: "The primary criterion used by [the employer] was the applicant's score on the structured oral examination. It is irrelevant that some other criterion, such as experience, might more accurately indicate someone's law enforcement abilities." *Cotton*, 812 F.2d at 1249. Under *Cotton*, "the question is not whether [plaintiff] in the abstract had better qualifications than the other candidates. The question is whether the other candidates are more qualified with respect to the criteria that [the employer] actually employs." *Cotton*, 812 F.2d at 1249. Under *Cotton*, any argument that the County should have focused on different criteria in selecting the successful candidates should be rejected.

Further, the two jobs, correctional officer and deputy sheriff, require two distinct skill sets. CP 493. As Captain Smith explained:

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current Lieutenant recently testified that she rates Plaintiff as a marginal-to-adequate performer in the jail. CP 504. As a former Training Officer, Lt. Jackson has sat on deputy oral boards (unlike Lt. James-Hutchison), and therefore knows the qualities needed for that position. CP 505. In her opinion, Plaintiff is not suitable for the position of deputy sheriff. CP 505-06.

...[W]e have found in the past because we have hired correctional officers and hired them to be deputies and then have them fail in that process because of the difficulties making the transition. **The differences between the two jobs are so large, that they would not succeed as a deputy where they had been very successful as a correctional officer;** two different job sets, two different skills.

CP 493-94 (emphasis added).

Plaintiff further argues that the structured oral board is too subjective. AOB at 28. However, while a subjective evaluation system can be used as cover for illegal discrimination, subjective evaluations are not unlawful per se and “their relevance to proof of a discriminatory intent is weak.” *Sengupta v. Morrison-Knudsen Co., Inc.*, 804 F.2d 1072, 1075 (9th Cir.1986). Even so, Pierce County was not the only law enforcement agency to reject Plaintiff for this position. Plaintiff testified that his application for law enforcement officer was rejected by at least five other law enforcement agencies: Kent Police Department, Tacoma Police Department, King County Sheriff, Fife Police Department, and Auburn Police Department. CP 469-70; 471. According to Plaintiff’s testimony, King County disqualified him for poor work history, which Plaintiff thought was likely due to having been fired from the U.S. Postal Service for inadequate performance. CP 470.

Because Plaintiff has not presented evidence from which a reasonable jury could infer that Pierce County’s decision was **motivated by an**

**intent to discriminate**, the trial court properly granted summary judgment. *See Kuyper v. State of Washington Dept. Wildlife*, 79 Wn.App. at 735.

B. PLAINTIFF'S RELIANCE ON INADMISSIBLE OPINION EVIDENCE CANNOT DEFEAT SUMMARY JUDGMENT.

Plaintiff cites to the deposition testimony of Sandra Pietz, Lt. Charla James-Hutchison, and the report of Kent Nakamura, calling it direct evidence of discrimination. AOB at 29. Evidence of discrimination is not considered direct evidence unless a racial motivation is explicitly expressed. *Amini v. Oberlin College*, 440 F.3d 350, 359 (6<sup>th</sup> Cir.2006). He claims that "several people besides Haley perceived race discrimination in the promotion process in general and with respect to Mr. Haley in particular." *Id.* This is blatantly false with regard to Ms. Pietz and Kent Nakamura, and is without basis with regard to Lt. James-Hutchison.

With regard to Ms. Pietz, her testimony clearly indicated that she saw no racial discrimination in the promotion process regarding Plaintiff. CP 488-89.

"To defeat summary judgment, the employee must establish **specific and material facts** to support each element of his or her prima facie case." *Kahn v. Salerno*, 90 Wn.App. 110, 117, 951 P.2d 321 (1998). Opinion and conclusory statements are insufficient to show discrimina-

tion. *Id.* As previously discussed herein, Lt. James-Hutchison's biased, unsupported opinion is not sufficient. She participated in no part of Plaintiff's process. *See* CP 732; and Section III(A)(1) herein. Even if admissible, this evidence does not negate the fact that two African Americans were hired out of Plaintiff's own applicant pool.

Plaintiff's arguments are self-defeating. He attempts to mislead this Court regarding the testimony from the Civil Service Examiner to show racial bias when she, after full review of the case, found none. He also offers the investigation report of the EEO investigator, Kent Nakamura, using bits and pieces of that inadmissible report to support his case, all the while ignoring the fact that Mr. Nakamura found no racial discrimination. CP 640. Nakamura's report is hearsay and the statements of others contained therein present yet another layer of hearsay. ER 805. None of this is competent evidence, direct or circumstantial, of discrimination.

C. PLAINTIFF'S RELIANCE ON INADMISSIBLE STATISTICAL EVIDENCE ALSO FAILS.

Plaintiff cites to Work Force Analysis statistics, but fails to provide adequate basis and foundation for admissibility. Both the author and accuracy of these statistics are unknown. AOB at 30. The compiling and analysis of statistics requires expertise and expert testimony, which Plain-

tiff's trial counsel has not provided. These statistics are inadmissible hearsay. ER 801.

Even if properly supported by foundation and expert witness testimony, the Work Force Analysis statistics cannot defeat summary judgment. Because overall statistics have little bearing on intent in specific employment decisions, they will rarely suffice to rebut an employer's non-discriminatory reasons for a particular action. *Bullington v. United Airlines, inc.*, 186 F.3d 1301 (19<sup>th</sup> Cir. 1999).

Additionally, statistical evidence which fails to properly take into account nondiscriminatory explanations does not permit an inference of pretext. *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1456 (10<sup>th</sup> Cir.1994). Plaintiff's proffered statistics do not show the racial make-up of the applicant pool from which the current work force was selected. *See* CP 590-93. Therefore the statistics are meaningless. If, for example, there was historically a very low number of African American applicants for the position of deputy sheriff, compared to a much higher number of African Americans applicants for the position of corrections officer, the disparity would not be the result of discrimination. Therefore, Plaintiff's statistical data is flawed because it fails to take into account this type of non-discriminatory reason for disparities, and thus is insufficient to raise a jury question. *See Furr v. Seagate Technology, Inc*, 82 F.3d 980, 987 (10<sup>th</sup>

Cir.1996).

D. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S CLAIM OF RETALIATION.

1. **Plaintiff failed to establish a prima facie case of retaliation.**

To establish a prima facie case for retaliation, Plaintiff must show that (1) he engaged in statutorily protected activity; (2) an adverse employment action was taken, and (3) there is a causal link between the employee's activity and the employer's adverse action. *Estevez v. Faculty Club of UW*, 129 Wn.App. 774, 797, 120 P.3d 579 (2005); *Francom v. Costco*, 98 Wn.App. 845, 861-62, 991 P.2d 1182 (2000) (*citation omitted*). Plaintiff need not show that retaliation was the only cause of the adverse employment action, but he must establish that it was at least a **substantial factor**. *Id.*

Regarding the first element, Plaintiff cannot show that he reasonably believed his disqualification was based on racial discrimination because a month or two before Plaintiff's complaint, Plaintiff's co-worker from the jail, Deputy A, and African American, had gone through the same background process as Plaintiff, with the same decision makers, and received a promotion to Deputy Sheriff. CP 184.

Regarding the second element, Plaintiff contends that the "make-up of his oral board" (the evaluators chosen for his first oral board, Un-

dersheriff Bisson, Captain Smith and Craig Adams), amounts to an adverse action by Pierce County. CP 170 (Plaintiff's Answer to Interrogatory #11). It is clear that Undersheriff Bisson made the determination of who would be the evaluators on that board. CP 44-45. *See* Section III (B)(3) herein. Her decision was not an adverse employment decision. Plaintiff cannot show the second element.

Lastly, Plaintiff cannot show the third element because there is no causal link between Plaintiff's protected activity and the make up of his oral board and subsequent failure thereof. The Undersheriff independently investigated and concurred with the determination of Ms. Pietz, Chief Civil Service Examiner, that it was correct to put Plaintiff back on the list, which would allow him to continue on with application process. CP 42-43. She further agreed that it would be important to use evaluators not within the background unit in order to achieve "a fair and objective board." CP 44. Hence, she had no motive to retaliate against him. Sgt. Perry had no authority over this Oral Board. CP 44-45; 796. There is no evidence whatsoever that undermines Undersheriff Bisson's goal of providing Plaintiff with a fair and objective board. CP 44. Nor is there *any* evidence that she had any motive other than to select "folks that were – who [she] felt were – did a good job within the oral boards, and/or were very familiar with the background process." CP 45-46. There is no evi-

dence of retaliation being even a minor factor, let alone a substantial factor, as Plaintiff is required to show. *See Francom v. Costco*, 98 Wn.App. 845, 861-62, 991 P.2d 1182 (2000). Therefore, there is no causal link between Plaintiff's activity and the Undersheriff's selection of evaluators. Plaintiff fails to meet his burden of making a prima facie case.

Even if Plaintiff were able to make a prima facie showing, the above legitimate, non-discriminatory reasons cause the burden to shift back to Plaintiff to show that the County's reasons were pretext. *See Kahn v. Salerno*, 90 Wn.App. at 129, n.5. Under the burden shifting analysis, Plaintiff must meet a heavier burden by presenting specific and substantial evidence that the reasons stated for the selection of the oral board evaluators was pretextual. *See Coleman*, 232 F.3d at 1282.

Using inadmissible evidence in the form of hearsay, speculation and conjecture, Plaintiff attempts to show that *Sgt. Perry* had a retaliatory motive. However, this is of no avail to Plaintiff because *Sgt. Perry* had no decision-making authority at this stage of Plaintiff's process. CP 44-45; 796. He did discuss potential evaluators for the first oral board with the Sheriff and to that extent had input, but he did not ultimately decide. CP 72. Plaintiff apparently assumes that *Sgt. Perry's* alleged retaliatory motive influenced the Undersheriff so that she too became retaliatory in her actions. This conjecture is belied by the relative ranks of the individuals

involved in this para-military organization: Perry is merely a sergeant with the Department. He would hardly have influence over the Undersheriff who (1) substantially outranks him; (2) disagreed with his disqualification decision and concurred in its being overturned; (3) and gave Plaintiff a passing score on his first oral board. Nor would he have influence over Smith, a recently promoted Captain. Similarly, Perry has no power over Craig Adams, a Deputy Prosecuting Attorney, who serves as Legal Advisor to Sheriff Pastor and has for the last 18 years. CP 527. Additionally, Mr. Adams testified that prior to sitting on Plaintiff's first Oral Board, "I did not have any information about Plaintiff or the circumstances of his disqualification by the Background Unit."<sup>7</sup> CP 527.

Further, Captain Smith and Craig Adams both provided numerous, well-expressed reasons for giving Plaintiff low scores: Drive-by shooting, fired from the post office, unapproachable, rigid in his thinking, did not understand the intent of the questions, was not forthcoming, doubts about his truthfulness. CP 84-90; 528-35; Plaintiff cannot show these reasons were pretextual. Nor can he show the requisite causal link between his protected activity and his low scores.

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<sup>7</sup> Plaintiff cites to an unsworn transcribed interview of Perry in Nakamura's investigation wherein Perry claimed without any elaboration or basis that Adams knew what was going on. This is inadmissible evidence. First, the interview is hearsay. Second, a witness cannot testify to what another witness knew. ER 602. Only Adams' testimony is admissible on this point.

Regarding Plaintiff's second oral board, the results conclusively demonstrate that he failed this test due to his inability to demonstrate that he possessed the necessary attributes to perform well as a deputy sheriff. CP 581. Sgt. Perry had no input whatsoever. CP 72; 796. The evaluators were completely in the dark. CP 102 (Anderson); CP 143 (Bauer). Detective Berg testified that she thought they were doing something over, but that is that most any of these evaluators had on the process. CP 115-16 (Berg). There is no evidence that they had contact with Sgt. Perry directly or indirectly or that they had any idea that Plaintiff had engaged in a statutorily protected activity.<sup>8</sup> Their reasons for failing Plaintiff were well-documented and not dissimilar for the reasons he failed his first Oral Board. Over a year elapsed between Plaintiff first oral board and his second oral board. *See* CP 561 and 581.

To this day, Plaintiff remains a corrections officer with the Pierce County Sheriff's Department – Corrections Bureau. Plaintiff made his racial discrimination complaint in mid-2007. The summary judgment motion was held on March 14, 2011. He has presented no other evidence of retaliation for the 3 ½ year period he continued in Defendant's employ-

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<sup>8</sup> Plaintiff argued below that Sgt. Perry's stray "punk" remark may have created an inference that the second oral board was tainted. RP 20. However, as the trial court noted, that is nothing more than speculation. *Id.* Further, that remark was made at a social gathering to one individual (not an evaluator) on a date unknown.

ment. This clearly demonstrates the lack of the requisite motive. Plaintiff blames his failure of the structured oral board in the testing phase on Defendant's retaliation. However, Defendant properly took multiple steps to insure that anyone with a bias or possible motive was excluded from the decision-making process. Plaintiff's two-time failure can only be attributed to his responses to the questions asked and how he conducted himself at the oral boards. There is no evidence of retaliation. The trial court properly granted summary judgment dismissal of this claim.

**2. This Court should not consider arguments made for the first time on appeal.**

An appellate court generally will not review a claimed error the appellant did not raise in the trial court unless it falls under an enumerated exception. RAP 2.5(a); *Regan v. McLachlan*, \_\_\_ Wn.App. \_\_\_, 257 P.3d 1122 (2011); *In re Marriage of Wallace*, 111 Wn.App. 697, 705, 45 P.3d 1127 (2002) (appellant waived an appearance of fairness claim by not raising the issue below).

In the present case, Plaintiff's Response to Defendant's summary judgment motion gave only passing treatment to his retaliation claim. CP 873-74 (Plaintiff's Response and Opposition to Defendant's Motion for Summary Judgment). He devoted less than one page of his 44 page brief to this issue, and cited to only one case as authority. *Id.* Plaintiff argues

for the first time on appeal that (1) Plaintiff had a reasonable belief in his accusation of racial discrimination; (2) *Sgt. Perry's* alleged retaliatory intent formed the basis for Plaintiff's claim of retaliation by Bisson, Smith, Adams, Berg, Bauer and Anderson; (3) there was a rebuttable presumption of retaliation; (4) the legitimate nondiscriminatory reasons given for the make up of Plaintiff's oral boards and failing scores thereon were pretextual. *See* CP 873-74. Plaintiff asserts these additional arguments for the first time on appeal. However, contentions that were neither raised by the parties nor considered by the trial court at summary judgment will not be considered for the first time on appeal. *Ferrin v. Donnellefeld*, 74 Wn.2d 283, 285, 444 P.2d 701 (1968); *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn.App. 408, 413, 814 P.2d 243 (1991); RAP 9.12 ("On review of an order granting ... a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court."). Therefore, Plaintiff's new arguments are not properly before this Court.

Should this Court decide to review these arguments, they will be seen to be without merit. First, as discussed previously, Plaintiff cannot show that he reasonably believed his disqualification was based on racial discrimination because a month or two before Plaintiff's complaint, Plaintiff's co-worker from the jail, Deputy A, had gone through the same back-

ground process as Plaintiff, with the same decision makers, and received a promotion to Deputy Sheriff. Deputy is within Plaintiff's protected class. CP 184.

Second, Plaintiff's position is based on inaccurate facts. He incorrectly states:

Mr. Haley complained of race discrimination in August 2007. CP 613.<sup>9</sup> Sergeant Perry was aware of this complaint. *Id.*, CP 766-77. His unit then rejected Haley for promotion in November 2007. CP 561.

AOB 35-36. Neither Sgt. Perry or his unit participated in this oral board and therefore could not have rejected him for promotion at that time. Sgt. Perry made none of these decisions. Therefore, Sgt. Perry's alleged retaliatory motive cannot constitute the causal link between Plaintiff's protected activity and the allegedly adverse action, the third element. Plaintiff offers no motive for the actual decision makers, nor can he show that they based their decisions on Perry's influence, statements, or decision. Nor does Plaintiff cite to any authority for his theory of imputed motive, which he has raised for the first time on appeal.

Third, Plaintiff did not offer evidence to rebut his two-time failure at his oral boards. AOB at 37. The only evidence Plaintiff introduced was

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<sup>9</sup> The report of Kent Nakamura is inadmissible hearsay. ER 801; ER 802; ER 805. *See also* CP 898 (Motion to Strike).

his performance evaluations for his job as correctional officer, which cannot substitute for the criteria used by the Department. Plaintiff presented no evidence to rebut the facts that (1) that he attempted to deceive the board about the stolen money at boot camp; (2) he had to be admonished to answer questions in a forthright and open manner; (3) that he had difficulty understanding the intent of the questions. Plaintiff, himself, provided the facts that amount to a drive-by shooting, that he had been fired from the post office, that people think he is “mean” based on his appearance.

In the present case, Plaintiff’s argument is weak and supported almost entirely by inadmissible evidence. Conversely, the record conclusively shows other legitimate reasons for Defendant’s actions and there is abundant uncontroverted evidence that no retaliation occurred. As in *Milligan*, the granting of summary judgment here was proper.

#### **IV. CONCLUSION**

For the foregoing reasons, Respondent respectfully requests that

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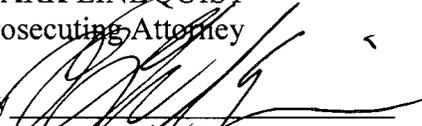
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this Court affirm the trial court's Order Granting Defendant's Motion for Summary Judgment.

DATED: September 8, 2011

MARK LINDQUIST  
Prosecuting Attorney

By 

P: GRACE KINGMAN

Deputy Prosecuting Attorney

Attorneys for Respondents

Ph: (253)798-6721 / WSB # 16713

COURT OF APPEALS  
DIVISION II

NO. 41948-3-II

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STATE OF WASHINGTON

BY ~~DEPUTY~~

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

JASON HALEY, Appellant

v.

PIERCE COUNTY, et al., Respondents

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**DECLARATION OF SERVICE**

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MARK LINDQUIST  
Prosecuting Attorney

By  
P. GRACE KINGMAN  
Deputy Prosecuting Attorney  
Attorneys for Respondents

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Tacoma, WA 98402  
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I, Chandra Zimmerman, 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 8<sup>th</sup> day of September, 2011, I filed in Court (original and one copy) and served true and correct copies of Respondent's Opening Brief on the following in the manner listed below:

Daniel Johnson  
Breskin Johnson Townsend  
1111 Third Avenue, Suite 2230  
Seattle, WA 98101

Via messenger by ABC Legal Services.

Dated this 8<sup>th</sup> day of September, 2011.

  
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CHANDRA ZIMMERMAN