

NO. 44885-8-II

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

ELIZABETH DAVIS,

Appellant,

v.

STATE OF WASHINGTON; WASHINGTON STATE PATROL,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The Respondents, State of Washington and Washington State Patrol (State Patrol), respectfully request this Court to affirm the trial court's order granting summary judgment in their favor and dismissing this case in its entirety. The Appellant, Elizabeth Davis, sued the State Patrol claiming that she was terminated from the State Patrol Training Academy because of her race and her gender. The State Patrol dismissed Davis as a trooper cadet because she failed a series of practical exercises required as part of the training. Based on her performance in these exercises, the State Patrol training academy staff, collectively, believed that Davis would pose a risk to herself, fellow troopers, and the general public if graduated to become a trooper.

The State Patrol moved for summary judgment claiming that Davis was terminated from the Academy because of concerns for her safety and the safety of others. The trial court granted summary judgment on the grounds that the State Patrol had a legitimate business reason to terminate Davis and that Davis failed to respond with evidence showing that the State Patrol's reason was a pretext for discrimination. In addition, the trial court ruled that Davis's hostile work environment claim failed because the alleged derogatory comments were "stray comments" and because Davis failed to impute liability to the State Patrol in any event.

II. ISSUES PRESENTED

1. Whether Davis applied the correct standard of review for an employment discrimination case by abandoning the burden-shifting analysis set forth by the Washington State Supreme Court in *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172 (1973)?
2. Whether the record as a whole demonstrates the reason Davis was terminated from the Academy was because of concerns for her safety where the testimony of the State Patrol training instructors and Commander is undisputed?
3. Whether Davis failed to state a claim for hostile work environment?

III. REBUTTAL STATEMENT OF FACTS

A. Facts Pertinent To Davis's Termination From The Academy Because Of Performance Issues

Davis first started with the Washington State Patrol on July 16, 2007. On June 30, 2008, Davis was accepted into the WSP Training Academy as a Trooper Cadet. Davis was academically sound and above average in her grades. CP at 38, 46-47.

At Basic Training, Academy instructors are assigned a group of cadets at the start of each trooper basic training class. CP at 35-36. The instructors meet often – sometimes daily – to discuss their cadets and their

progress in various aspects of the training. Each cadet is evaluated on their physical fitness, their academic skills, their decision-making abilities and numerous other aspects of being a trooper. *Id.* Each cadet is also assigned a counselor, who is a member of the training staff. Corporal Laur was assigned as Davis's counselor. CP at 46-47. Graduation from the WSP Training Academy is contingent upon the cadet's performance during training. All cadets receive the same opportunities and must meet the same standards to become a WSP Trooper. CP at 42.¹

If concerns arose regarding one of the cadets, the instructors would bring those concerns to the attention of Lieutenant Gunkel. CP at 35-36. Lieutenant Gunkel's responsibilities included supervising three sergeants and other various staff, facility management and assistance with program management, and assisting with instruction at the Academy. CP at 35.

If, after this briefing, Lieutenant Gunkel had concerns, he would in turn brief the commander of the Academy regarding the concerns raised by training staff. In 2010, Captain Coral Estes was the commander of the Academy. CP at 31-32; 35-36.

Concerns regarding Davis arose when the practical exercises began in March 2010. On March 17, 2010, Corporal Laur was informed by

¹When she was a Trooper Cadet, Davis's last name was "Griffin", her maiden name. Because she was known as "Cadet Griffin" by Training Academy staff, the supporting declarations refer to her as "Griffin", although the plaintiff will be referred to as "Davis" in the briefing.

Corporal Prouty that Davis had difficulties with the building search exercise. According to Corporal Prouty, Davis was visibly shaking as if she was shivering from being cold and she appeared very nervous although the temperature in the cafeteria was normal room temperature and was not noticeably cold. Corporal Prouty reported that he had never seen any cadet that was physically shaking from nervousness or fear during the exercise in the three years he had been conducting the building search trainings. CP at 47-51.

One of the instructors assigned to the group which included Davis was Corporal Ryan Spurling. Spurling has been assigned to the WSP Academy since 1999. He was at that time the Chief Instructor for Control Tactics and Physical Fitness. CP at 56. He was also the WSP use of force expert and has been certified as an expert witness regarding the use of force in federal court multiple times for the WSP. Spurling instructed and tested cadets in various exercises including high-risk vehicle stop practical exercises and open skills testing for control tactics. Spurling also provided counseling and feedback to cadets to provide them with an environment conducive to learning and to prepare them for the job of being a WSP trooper. CP at 56-57.

On March 30, 2010, Corporal Spurling was the instructor assigned to Trooper Cadet Davis's high-risk vehicle stop practical exercise. CP at 57.

The high-risk vehicle stops and open skills testing practical exercises are designed to prepare cadets for real-life situations and to observe their skills under pressure. CP at 56. Davis did not pass the exercise because, according to Spurling, Davis did not demonstrate basic officer safety, did not use a command voice to control the scene, did not communicate with her partners, and ultimately disengaged from the exercise by taking off her helmet to breathe during the scene until she was ordered to re-engage. CP at 57. Davis failed to demonstrate any understanding of tactics needed to control a scene, was not able to take control of the scene, and ultimately disengaged from the scene. During this exercise she allowed the driver to approach her from 80+ feet away with a gun in his hand, did not see the gun although it was marked with a red training tip, was shot at multiple times until the gun was out of ammo, responded by pulling her taser though it wouldn't work from that distance, the secondary patrol car was stolen and ultimately Davis disengaged from the exercise by walking to the back of the patrol car and taking off her helmet while breathing hard. CP at 61-62. According to Spurling, Davis's performance was one of the poorer performances he had seen in ten (10) years of instruction, and Spurling had great concerns for her safety and ability to perform under any danger or pressure. CP at 57, 60-63.

Trooper cadets are encouraged to contact their counselor or instructors if they have any questions regarding their training or need assistance for improvement. On March 31, 2010, Spurling met with Davis regarding her performance on the high-risk vehicle stop exercise, and informed her that she needed to improve her officer safety, command presence and that she should not disengage during exercises. CP at 57. Davis informed Corporal Spurling that she had trouble role playing, but that she grew up in Lakewood and knew how to handle herself. CP at 57, 72-73.

Similarly, Lieutenant Huss, who participated in early practical exercises with Davis where cadets practice leaving a patrol vehicle and approach a suspect, observed Davis as being timid and walking on egg shells during these exercises. CP at 39. Lieutenant Huss also observed that as Davis transitioned through the practical exercises she continued to exhibit timid behavior, lacked the ability to accurately assess danger and exercise officer safety, and also lacked control and positive communications in stressful situations and confidence when there was a sense of urgency. CP at 39.

On March 31, 2010, Davis failed the Open Skills Testing for Control Tactics. According to Corporal Spurling, Davis demonstrated poor decision-making, poor verbal skills, used excessive force, and was unable to justify her use of force. CP at 57, 68-69.

On April 7, 2010, Spurling again counseled Davis on her performance and asked if she wanted to see the video of the first failed test from the March 30, 2010, exercise. Davis declined the opportunity to watch the video before her retest. CP at 58. Then, later on April 7, 2010, Davis was retested on the Open Skills Testing for Control Tactics. CP at 58. Corporal Spurling was an actor in this exercise while Corporal Tegard was the evaluator. Davis failed that retest by failing to demonstrate command presence, assess danger and control the situation, among other shortcomings. CP at 58, 71, 73.

Corporal Laur was aware Davis had failed the building search test, and high risk vehicle stop exercises by late March 2010. CP at 47. For each event that Davis failed, Laur counseled her regarding her performance and encouraged Davis to consult with the instructors giving the practical exercises to see where she was weak and how she could improve. Laur, too, felt that Davis was weak in her command presence; she lacked confidence and had a difficult time taking charge of dynamic situations with appropriate levels of force. CP at 47, 52-55.

By April 7, 2010, Lieutenant Gunkel had been briefed regarding Davis by members of Academy staff responsible for training Davis, which included Corporal Ryan Spurling and Corporal Deborah Laur. Lieutenant Gunkel understood that while Davis was performed well academically, the

instructors were concerned about her performance related to control tactics and weapons, poor decision-making, poor verbal skills, her excessive use of force and her inability to justify her use of force, her failure to understand or admit that she was not performing well during the practice exercises, and, most importantly, her lack of command presence. CP at 36.

Accordingly, Lieutenant Gunkel also observed the April 7, 2010, open skills test of Davis, which was recorded and later shown to Captain Coral Estes. According to Lieutenant Gunkel, Davis's performance at that testing led him to believe she would likely be fatally wounded if she was allowed to progress as a cadet. CP at 36.

On April 8, 2010, Corporal Spurling reviewed the tape and shared his concerns about Davis with Academy Commander Captain Coral Estes, Davis's counselor Corporal Laur, Lieutenant Gunkel, and other training staff at the Academy. CP at 36, 58. Corporal Spurling reported to Captain Estes that Davis was having issues regarding the practical exercises and stated that he was concerned that she was going to be injured or killed if she was allowed to continue on to become a WSP Trooper. According to Estes, Corporal Spurling is nationally recognized for training cadets and is empathetic with the goal to pass cadets. So when Corporal Spurling advised her he had concerns, Captain Estes "took note." CP at 32.

During this meeting, Estes learned that Davis had been counseled on how to improve, refused to watch the videotape of a failed test – which Estes found “alarming” – and that in addition, when questioned on her excessive use of force during the March 31, 2010, open skills testing, Davis was not able to explain her reasoning. When questioned by Lieutenant Gunkel and Corporal Spurling why she pulled her Taser, struck the suspect more than seven times with her baton and eventually sprayed him with pepper spray, she was not able to provide an answer. Also, Captain Estes learned that Davis did not take criticism well, and would challenge Corporal Spurling’s evaluation of her performance. CP at 32.

Captain Estes also viewed Davis in the March 30, 2010, practice exercises. Captain Estes believed that Davis lacked command presence in the exercise, and that Davis disengaged from the scenario, walked away, turned around and quit, until the instructors had to tell her to reengage in the exercise. According to Estes, command presence is one of the qualities trooper cadets must possess in order to graduate from the Academy because it is oftentimes all a trooper has while on duty to keep them safe. CP at 32-33.

On April 8, 2010, Davis was dismissed from the Academy. According to Lieutenant Gunkel, the decision to recommend termination of Davis was made after discussion amongst the training staff at the

Academy, and that this was a “tough decision” as Davis did so well in all other areas. CP at 36.

The decision to terminate a trooper cadet is not made by one instructor or counselor at the Academy. CP at 33. Meetings are held with the Academy staff involved in training and supervising a cadet on a daily basis. During these meetings, and others, a consensus was reached that Davis lacked command presence and decision-making skills, among other inabilities. CP at 33. Accordingly, after receiving documentation from Davis’s instructors and observing her practical exercise, Captain Estes determined that Davis should be terminated from the Academy and that to allow Davis to become a state trooper would have put at risk her safety, the safety of other law enforcement officials, and the safety of the general public. CP at 33. Estes then advised her Commander, Assistant Chief Lever, that she felt Davis should be terminated, explained her reasons and ultimately the termination paperwork was signed by Deputy Chief Karnitz. CP at 33.

On April 8, 2010, Lieutenant Huss spoke with Davis about remaining with the WSP but in some other position within the organization, because Davis had a great reputation at the training academy because she performed well academically. Huss felt that Davis could have reverted back to her communications position or she could have worked with the WSP

Human Resources division to find another position, but Davis declined. CP at 39.

Five cadets were dismissed from the 97th Trooper Basic Training Class, including Davis. CP at 42. The other four cadets were three Caucasian males and one Caucasian female. Two Caucasian male cadets failed the open skills test similar to Davis. Both cadets received retraining similar to Davis, and both passed the retest and graduated from the Academy. CP at 42.

B. Facts Pertinent To Davis's Hostile Work Environment Claim

Fairly put, Davis vaguely alleges relatively limited and sporadic comments in support of a claim for hostile work environment.

According to Corporal Laur, while Davis was part of the arming class, she approached Laur and claimed that some of the cadets were saying the only reason Davis was selected to be a trooper cadet was because of her race and gender. CP at 47-48. Corporal Laur volunteered to either contact the cadets who were making the remarks, do nothing or she could tell the cadets herself to stop making the comments, but Davis chose to let the issue drop and to wait and see if further comments would be made. Laur then reassured Davis her selection to the Trooper Basic Training Class was based on her performance. CP at 47-48.

Also, several weeks into the Trooper Basic Training Class, Davis contacted Laur regarding comments made by classmates. CP at 48. Academy staff randomly rearranged the seating so the cadets were able to interact with others not previously seated at the same table. Davis remarked that some of the cadets were joking the Academy staff put all of the “dark cadets” at one table. Corporal Laur told Davis those comments were unacceptable and reported the incident to Sergeant Marrs-Hayes, and Davis seemed satisfied that it was reported to the Academy staff. After that, the cadet seating assignments were changed shortly thereafter. CP at 48.

Finally, Davis’s assertion she was provided with ill-fitting equipment which caused problems in the various skills testing requires a response here. According to Corporal Spurling, the helmets provided are a one-size fits-all, fully adjustable, paintball helmet which can be used by both kids and adults. These helmets do in fact make it harder to see, hear, and breathe, but they do so for everybody and there are regular complaints about these helmets. Furthermore, according to Corporal Spurling, the helmets simulate the body’s reaction to stress, which, in addition to officer safety during the exercise, is another reason why they are used. CP at 441-42.

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IV. ISSUES PRESENTED

1. Whether Davis established she was discriminated against because of her race and gender?
2. Whether Davis established that the State Patrol's stated reasons for dismissing Davis from the Academy were a pre-text for discrimination when the undisputed evidence is that Davis was dismissed out of concerns for officer safety, including hers?
3. Whether Davis established a claim for "hostile work" environment based only on "stray remarks" and no involvement by upper management?

V. ARGUMENT

This court should affirm the trial court's order granting summary judgment because Davis 1) failed to demonstrate that the State Patrol's stated reason for her dismissal – officer safety – was a pretext for discriminatory motivation, and 2) failed to demonstrate the training academy was a "hostile work" environment because the comments were sporadic and Davis could not impute liability to an "alter ego" for the State Patrol.

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A. The Undisputed Evidence Is That The State Patrol Terminated Davis Because Of Concerns For Officer Safety, A Legitimate Business Reason

1. Standard of Review

This Court reviews summary judgment orders de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982). Trial courts properly grant summary judgment motions where the pleadings and evidence submitted to the trial court fail to show a genuine issue of material fact and the party moving for summary judgment is entitled to judgment as a matter of law. CR 56(c).

Under Washington's Law Against Discrimination (WLAD), an employer may not refuse to hire or terminate from employment anyone because of an individual's race or gender. RCW 49.60.180. When analyzing claims for discrimination and retaliation on a motion for summary judgment, Washington courts use the burden shifting protocol set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001), and *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988), among others.

Accordingly, the plaintiff bears the initial burden of setting forth a prima facie case of discrimination/retaliation. *Hill*, 144 Wn.2d at 181 citing *McDonnell Douglas*, 411 U.S. at 802. "If the plaintiff proves

incapable of doing so, the defendant becomes entitled to judgment as a matter of law.” *Id.* at 182. *Hill*, 144 Wn.2d at 181-82. Once the employee establishes a prima face case of discrimination, the burden of production shifts to the employer who must show a legitimate, nondiscriminatory reason for its conduct. If the employer meets its burden of producing a legitimate, nondiscriminatory reason for their employment decision, the employee/plaintiff must then show that the employer’s proffered reason was a mere pretext for discrimination. *Hill*, 144 Wn.2d at 181.

To show pretext, a plaintiff must show that the defendant’s articulated reasons 1) had no basis in fact, 2) were not really motivating factors for its decision, 3) were not temporally connected to the adverse employment action, or 4) were not motivating factors in employment decisions for other employees in the same circumstances. *Fulton v. Dep’t of Soc. & Health Servs.*, 169 Wn. App. 137, 161, 279 P.3d 500 (2012). In other words, pretext is not shown by evidence that the employer’s action or the reason for such action was incorrect or foolish. Rather, a plaintiff must show that an employer’s stated reasons are unworthy of belief. *Hill*, 144 Wn.2d at 182; *Griffith v. Schnitzer Steel Industries*, 128 Wn. App. 438, 447, 115 P.3d 1065 (2005).²

² Other jurisdictions put it more bluntly: Pretext is “a lie,” a phony reason. *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995); *Brill v. Lante Corp.*, 119 F.3d 1266, 1273 (7th Cir. 1997). “‘Pretext’ . means deceit used to cover one’s tracks.” *Clay*

Finally, even where an employee produces some evidence of pretext, the court must still consider whether additional factors undermine the employee's competing inference of discrimination, justifying dismissal as a matter of law. Those factors include the strength of the employee's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. *Hill*, 144 Wn.2d at 186-87 quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

Washington courts will dismiss the case where an employee's evidence of pretext is weak:

When the record conclusively revealed some other, non-discriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was *abundant and uncontroverted evidence* that no discrimination had occurred, summary judgment is proper.

v. Holy Cross Hosp., 253 F.3d 1000, 1005 (7th Cir. 2001). Even if an employer's reasons were "mistaken, ill-considered or foolish, so long as [the employer] honestly believed those reasons, pretext has not been shown." *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1175 (7th Cir. 2002). Summary judgment for an employer must be affirmed where plaintiff failed to introduce direct evidence, or specific and substantial circumstantial evidence of pretext. *Manatt v. Bank of America, NA*, 339 F.3d 792, 801 (9th Cir. 2003).

Milligan v. Thompson, 110 Wn. App. 628, 637, 42 P.3d 418 (2002), quoting *Reeves*, 530 U.S. 133, 148; *Hill*, 144 Wn.2d at 184-85 (emphasis added).

Accordingly, a trial court should submit a case to the jury only when it determines that all three facets of this burden-shifting analysis are met and that the parties have produced sufficient evidence supporting reasonable but competing inferences of both discrimination and nondiscrimination. *Fulton v. Dep't of Soc. & Health Servs.*, 169 Wn. App. 137, 161, 279 P.3d 500 (2012).

Rather than squarely address the trial court's decision using this burden-shifting analysis, Davis instead applied the Washington Pattern Instruction on discrimination and asserted that there was evidence that race and gender was a "substantial factor" in the decision to terminate Davis from the Academy. In fact, Davis goes so far as to say that it is not necessary to present evidence of "pretext", but rather argues that she need only provide some evidence that discrimination was a "substantial factor" in the termination. Appellant's Brief, p. 23.

Davis does not articulate why the burden shifting analysis set forth by the U.S. Supreme Court and the Washington State Supreme Court and applied in innumerable cases over the years does not apply when addressing discrimination claims on summary judgment. Instead

Davis simply asserts that summary judgments in employment discrimination cases are disfavored, that the policy underlying WLAD requires liberal construction, that the elements are straightforward and easy to prove, and then goes about applying the facts to the jury instructions applicable to each potential claim. Davis apparently relies on *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995) and *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 272 P.3d 865 *review denied*, 174 Wn.2d 1016 (2012) for the proposition that on summary judgment a plaintiff's burden is only to show that there is evidence that discrimination was a "substantial factor" in the employment decision. Davis misapplies these two cases.

In *Mackay*, the Supreme Court ruled that a trier of fact must use the "substantial factor" test, rather than the "determining factor" test, when deciding whether a plaintiff meets the burden of proof that discrimination played a wrongful role in an employer's decision to take an adverse employment action. This was the Supreme Court's decision regarding how to craft jury instructions for the trier of fact after the case has been submitted to the jury and therefore after the trial court has ostensibly conducted the burden shifting analysis. Here, Davis is attempting to apply the *Mackay* standard on summary judgment without citing authority or

articulating why there should be a change in law or why the trial court should or could sit as a trier of fact weighing the evidence.

Davis's reliance on *Rice* is also misplaced. In *Rice*, the court applied the burden shifting analysis. However, when addressing the last step in the three-part process, the *Rice* Court simply applied the *Mackay* "substantial factor" standard in determining whether or not the plaintiff produced sufficient evidence to raise an issue of fact that the employer's stated reason is unworthy of belief or are mere pretext for a discriminatory purpose. *Rice*, 167 Wn. App. at 89. Nothing about the *Rice* Court's analysis remotely supports the proposition that the burden-shifting analysis is not required. In fact, *Rice* essentially used the "substantial factor" language to articulate the burden and balancing of competing evidence needed to show pretext, which is the sort of analysis courts have been instructed to engage since *Hill* and *Milligan* when the court held that even if there was weak evidence of pretext, when compared to the other evidence, summary judgment may still be appropriate.

Mackay and *Rice* do not stand for the proposition that the burden shifting analysis, used for decades and applied in hundreds of cases, is no longer the law. See *Scrivener v. Clark College*, 176 Wn. App. 405, 309 P.3d 613 (2013). The correct standard of review for dispositive motions in

employment discrimination cases is set forth in *McDonnell Douglas* and *Hill et seq.*

2. Davis Failed To Establish a Prima Facie Case For Discrimination And Retaliation

a. Davis did not establish a prima facie case of discrimination.

To establish a prima facie case of racial discrimination based on disparate treatment, an employee must show that (1) she belongs to a protected class, (2) she was treated less favorably in the terms or conditions of her employment (3) she was treated less than a similarly situated, nonprotected employee, and (4) she and the nonprotected comparator were doing substantially the same work. *Washington v. Boeing Co.*, 105 Wn. App. 1, 13, 19 P.3d 1041 (2000).

Here, there is simply no evidence that Davis was treated less favorably than others similarly situated in the terms and conditions of employment. While it is obviously the case that Davis was dismissed from the Training Academy, the undisputed evidence is that there were a total of five cadets from the 97th Trooper Basic Training Class who were terminated, four were Caucasian males and another was a Caucasian female. Also not disputed by admissible evidence is that Davis failed the field testing and that these failures were recorded by multiple instructors and discussed collectively by the training staff.

There is no admissible evidence that Davis actually passed these tests, or that Davis was singled out based on her race or gender. Davis's only evidence that the dismissal was discriminatory is the fact of her race/gender and the fact of her dismissal. Davis failed to prove that she was treated less favorably than others based on her race and gender.

b. Davis did not prove retaliation.

Davis also asserts a claim of retaliation. To make out a prima facie case of retaliation, the plaintiff must show that (1) she engaged in statutorily protected activity, (2) adverse employment action was taken against her, and (3) there is a causal link between the activity and adverse action. *Milligan*, 110 Wn. App. at 638, citing *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 862, 991 P.2d 1182, *review denied*, 141 Wn.2d 1017 (2000).

Here, it is completely unclear what statutorily protected activity Davis was engaged in which could serve as the basis for a retaliation claim. Even assuming that Davis could articulate some statutorily protected action which preceded her termination from the Academy, Davis cannot establish a causal connection between that action and the termination. Davis was terminated because she would have posed a risk to herself and others had she become a State Trooper. That evidence is undisputed.

In addition, it is undisputed that State Patrol offered to keep Davis employed. Lieutenant Huss discussed with Davis the possibility of remaining with the Patrol in some other capacity because, according to Huss, Davis had a great reputation academically. This hardly indicates that the State Patrol was discriminating or retaliating against her by trying to find her a job she could successfully perform. The inference drawn from this undisputed fact is that the State Patrol was not retaliating against Davis, but rather did not feel she could be a trooper and should be part of the State Patrol in some other capacity.

3. It Is Undisputed That The State Patrol Had A Legitimate Non-Discriminatory, Non-Retaliatory Reason To Terminate Davis From The Academy

Even assuming, without conceding, that Davis has presented a prima facie case for discrimination and retaliation, the State Patrol articulated a legitimate business reason for the dismissal and Davis failed to present evidence that the State Patrol's stated reason for dismissal – officer safety – was a pretext for discriminatory motivation, or unworthy of belief.³

The State Patrol's reason for dismissing Davis from the training academy was, in no uncertain terms, out of a concern for her safety and her inability to perform as a trooper. The uniform consensus amongst the

³ This was the basis for the trial court's dismissal.

training staff was that Davis was lacking in critical areas necessary to being a trooper such as command presence, decision-making skills, use of force, and appeared overly nervous and timid. This consensus was formed among the entire training staff after several field tests were performed, and after Davis was counseled on how to improve, but yet Davis failed those field tests again and continued to demonstrate a lack of ability in those critical areas.

All of the pertinent facts necessary to affirm the summary judgment order are undisputed. It is undisputed that Academy staff had concerns over Davis's performance in the skills testing:

- On March 17, 2010, Corporal Prouty reported that in three years of running the building search exercise he had never seen any cadet that was physically shaking from nervousness or fear during the exercise as Davis. CP 51.

- Lieutenant Huss observed that as Davis transitioned through the practical exercises she continued to exhibit timid behavior, lacked the ability to accurately assess danger and exercise officer safety, and lacked control and positive communications in stressful situations and confidence when there was a sense of urgency. CP 39.

- On March 30, 2010, Davis failed the High Risk Vehicle Stops test because, according to Corporal Spurling, an instructor since 1999, and State Patrols' use of force expert, Davis did not demonstrate basic officer safety, did not use a command voice to control the scene, did not communicate with her partners, disengaged from the exercise and had to take her helmet off to breathe during the scene until she was ordered to re-engage, was also unable to demonstrate any understanding of tactics, was not able to take control of the scene, failed to see the suspect's weapon and she was shot at multiple times by the suspect. CP 57.

- According to Spurling, "This was one of the poorer performances I have scene (*sic*). I have great concerns for Cadet Griffin's safety and ability to perform under any danger or pressure." CP 61-63.

- On March 31, 2010, Davis failed the Open Skills Testing for Control Tactics. CP 57; 69.

- On April 7, 2010, Davis failed a retest by failing to demonstrate command presence, assess danger and control the situation, among other short-comings. Fellow cadets voted 9-2 that she failed the April 7, 2010, test. CP 58, 71, 73.

- Lieutenant Gunkel witnessed the April 7, 2010, open skills test of Davis, which led him to believe she would likely be fatally wounded if she was allowed to progress as a cadet. CP 36.

The evidence is undisputed that this decision was made by staff of the State Patrol dedicated to training trooper cadets to make our State's highways a safer place to travel. It is undisputed that the recommendation to dismiss Davis from the Training Academy came after the entire training staff discussed Davis's shortcomings, reviewed her performances during the various practical exercises, agreed that Davis simply lacked the abilities in critical areas to perform the tasks of a state trooper and shared all of the information with the Commander of the Training Division, Captain Coral Estes, and others up the chain of command. It is undisputed that after Captain Estes reviewed the documentation and viewed the practical exercises, she believed that Davis posed a risk to be killed in the line of duty or jeopardize the safety of fellow officers and members of the public.

Under the burden shifting analysis set forth in *Hill*, 144 Wn.2d at 181-82, Davis was required to demonstrate that the legitimate, non-discriminatory reasons set forth by the State Patrol were a pretext for the alleged discrimination/retaliation. That is, that the stated reason for Davis's dismissal are unworthy of belief. *Id.*

Davis failed to present any *evidence* to suggest that the stated reason for her termination – that there were “great concerns for” her “safety and ability to perform under any danger or pressure” – had no basis in fact, or was otherwise not worthy of belief. Instead, Davis asserted various conclusory arguments such as the practical exams were “subjective”, or that because she had made prior complaints regarding racial hostility the concerns for her safety uniform among the training staff were really made up to cover retaliatory motivation.

Davis’s response is essentially that she was doing great at the Academy, was at the top of her class, and it was not until the “subjective” exercises began – rather than the objectively graded classroom work – that she was criticized for her performance. According to Davis, the reason she began to receive criticism in late March and early April 2010, was because she had previously complained about discrimination at the Academy, so as soon as the “subjective” exercises started in late March 2010, Davis went from being at the forefront of her class to being terminated from the Academy.

This response is without merit. Davis offers no evidence of a nexus between the alleged retaliation (or discrimination) and the “subjective” results of the practical exercises. Davis’s subjective belief that her own performance was satisfactory is insufficient to create an inference of

discrimination or retaliation. Numerous cases have held that an employee's opinion of their performance is insufficient to show pretext. *See Hill*, 144 Wn.2d at 190 (age discrimination claim rejected where employee was hired and fired within a close proximity of time and where the only age-related evidence to refute the employer's reason for the decision to terminate – noncooperation which impacted students - was the age of the plaintiff; there was no evidence or testimony of ageist comments or otherwise discriminating conduct against other employees); *Grimwood*, 110 Wn.2d 355, 365 (age discrimination claim rejected where the employer's legitimate reason – noncooperation which caused a negative student reaction – were not factually challenged and met only with conclusory opinions that the underlying events were pretext or exaggerated); *Scrivener*, 176 Wn. App. 405 (plaintiff's subjective belief she was qualified or more qualified than the person hired was insufficient to demonstrate pretext given the other applicants were in fact qualified); *Fulton*, 169 Wn. App. 137, 161-62 (employee's claim rejected in part because employee's disagreement with the assessment of her managerial skills did not demonstrate pretext); *Griffith*, 128 Wn. App. at 453 (pretext not shown where employer's numerous articulated reasons for termination were either undisputed or challenged by plaintiff's irrelevant and subjective assessments and opinions of his own performance); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 467-68, 98 P.3d

827 (2004) (where employer failed to promote plaintiff because of prior contentious relationship with management structure, employee's response based on conclusory beliefs and opinions and reliance on "stray comments" to show discrimination was insufficient to establish pretext); *See Kuyper v. Dep't of Wildlife*, 79 Wn. App. 732, 738-39, 904 P.2d 793 (1995) (pretext not shown where "nexus" was missing between the hiring of a younger, qualified candidate and the alleged discrimination).

In this case, Davis's self-evaluation is especially insufficient as evidence to show pretext because the State Patrol's assessment of Davis's performance was uniformly shared among the training staff. That is, even assuming the State Patrol's testing was "subjective" in nature – which is insufficient to establish pretext – the assessment of Davis becomes very objective given the uniformity with which the entire training staff concurred in the assessment of Davis's lack of ability. Corporal Laur, Corporal Spurling, Captain Huss, Lieutenant Gunkel, and Training Division Commander Captain Estes, all submitted declarations they were in agreement with the decision to terminate Davis because of concerns for officer safety and Lieutenant Gunkle, after viewing one of Davis's exercises, thought she ran the risk of being killed in the line of duty. Davis's own classmates voted 9-2 that she failed one of the exercises. This testimony is

undisputed. Essentially, it is Davis's self-evaluation that she was doing well versus the entire Training Academy.

There is no testimony from any member of the training academy which would impeach or discredit the statements contained in the declarations and, more importantly, the assessments recorded in notes and evaluations of Davis which were created in March and April of 2010. *See Hill*, 144 Wn.2d at 190. There is no evidence or testimony to suggest, for instance, that Corporal Spurling's view that he had never seen a performance as poor as Davis's, or that Lieutenant Kunkle's testimony that Davis would be killed in the line of duty, or that Commander Estes's testimony of the same, had no basis in fact or was not a motivating factor for their respective beliefs that Davis should be terminated from the Academy.

Davis also argues that because she voiced complaints regarding various incidents of racism in the Academy, and also that she had filed a complaint in 2007 regarding discriminatory conduct, that termination from the Training Academy in 2010, was discriminator/retaliatory. There is no evidence that anybody associated at the Training Academy was even aware of that complaint, and no evidence tying the 2007 complaint with anybody at the Academy. Mainly, however, if this accusation were true, it meant that the State Patrol accepted Cadet Davis into the Academy with the intention of training her for upwards of six months and with the intention of then

terminating her from the Academy. This is, of course, as speculative as it is nonsensical. *See Hill*, 144 Wn.2d at 189 (when an employee is hired and fired within a close proximity, there is a strong presumption against discrimination).

Davis asserted in numerous places that she was unfairly judged, judged more harshly than others, was not given as many chances on re-testing, and held to a higher standard. She also asserted she was provided with ill-fitting equipment which made her testing difficult.⁴ Davis also claims she was told by other African-American officers that she would be held to a higher standard and that it was going to be difficult.⁵ At best, Davis offers an occasion and sporadic comments to show discrimination. But Davis provides no nexus between these “stray comments” and those who decided that she was unfit to be a State Trooper. Those “stray comments”

⁴ The assertion that Davis was provided ill-fitting equipment which caused problems in the various skills testing does not establish discriminatory motive. According to Corporal Spurling, the helmets provided are a one-size fits-all, fully adjustable, paintball helmet which can be used by both kids and adults. These helmets do in fact make it harder to see, hear, and breathe, but they do so for everybody and there are regular complaints about these helmets. Furthermore, according to Corporal Spurling, the helmets simulate the body’s reaction to stress, which, in addition to officer safety during the exercise, is another reason why they are used. CP 441-42.

⁵ These statements and assertions are all inadmissible. The statements regarding her performance versus that of others is conclusory and speculative, and there is no foundation for any of these assertions. Furthermore, the statements implicitly rely on hearsay, and therefore are inadmissible. Similarly, the statements attributed to other officers that making it through Basic Training would be difficult are plainly hearsay. Rather than argue a separate motion to strike and have the trial court rule on a formal motion to strike, the trial court (and this Court) have the discretion to simply ignore inadmissible conclusions and other inadmissible evidence. *See King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994).

are not sufficient to demonstrate discriminatory motive by the State Patrol command structure which uniformly agreed that Davis should not become a trooper. *See Scrivener*, 179 Wn. App. 405; *Kirby*, 124 Wn. App. at 467-68.

The only plausible explanation, based on the undisputed evidence, is that Davis failed the skills testing which is required to become a trooper. The conclusion she had failed was uniform amongst the training staff, from the corporals in charge of day-to-day instruction, right up through the chain of command to Academy Commander Estes.⁶

It is impossible to articulate a more legitimate business reason to explain why Davis was terminated from the Academy than staff fearing she would be killed in the line of duty because, among other things, she lacked command presence and demonstrated poor decision-making skills. There is no evidence rebutting or impeaching the undisputed testimony of the officers or any indication that their contemporaneous notes are unworthy of belief. Davis presents no evidence in the way of statements, testimony, records, or otherwise to create a competing inference that she was terminated because of her race or gender. The record conclusively reveals that the reason Davis was terminated from the Academy was that the State

⁶ Davis asserted at several points that her termination came as a surprise and it was never explained to her why she was being terminated. This is incorrect. As shown, Davis was repeatedly counseled by her Corporals Laur and Spurling. Specifically, in regards to the High Risk Vehicle Stop – which was one of the poorer performances ever seen by Spurling – Davis was counseled twice on this. CP 63.

Patrol feared for officer safety had she been passed on to Trooper status. The trial court's order on summary judgment should be affirmed.

B. There Is No Evidence That The Washington State Patrol Created Or Allowed A Hostile Work Environment

The trial court correctly dismissed Davis's claim for hostile work environment for two reasons. First, Davis does not establish that the treatment she allegedly received at the Training Academy was sufficiently extreme to amount to a hostile environment. Second, even if Davis could establish the requisite level of hostility, Davis failed to impute liability to the State Patrol because nobody sufficiently far up the rankings of State Patrol to be called the State Patrol's "alter ego" was involved in the alleged mistreatment.

The prima facie elements of a hostile work environment claim are (1) the alleged harassment was unwelcome; (2) the harassment was because of a protected category; (3) the harassment affected the terms or conditions of employment; and (4) the harassment can be imputed to the employer. *Haubry v. Snow*, 106 Wn. App. 666, 674, 31 P.3d 1186 (2001); *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 407, 693 P.2d 708 (1985).

Davis alleges she was subject to a hostile work environment because she was told, allegedly, she sounded "like a flight attendant", that

she was told she “acted like a high school girl”, and the like, and also was provided with ill-fitting equipment.

1. The alleged conduct is insufficient to demonstrate a hostile work environment which altered the terms and conditions of employment

To establish a prima facie case for hostile work environment, the harassing conduct must be *extreme* in order to alter the terms and conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). An employee does not establish discriminatory harassment simply by showing that he or she suffered embarrassment, humiliation or mental anguish. *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 297-98, 57 P.3d 280 (2002). Furthermore, “Workplace conduct is not measured in isolation; instead, whether an environment is sufficiently hostile or abusive must be judged by looking at all the circumstances, including the frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Clark County School Dist. v. Breeden*, 532 U.S. 268, 270-71, 121 S. Ct. 1508 (2001); *see also Glasgow*, 103 Wn.2d at 407 (“Whether conduct is sufficiently pervasive to create an abusive environment depends on the “totality of the

circumstances.”); *MacDonald v. Korum Ford*, 80 Wn. App. 877, 885, 912 P.2d 1052 (1996).

Washington courts do not recognize a cause of action simply for workplace conflict and unpleasantness. *Bishop v. State of Washington*, 77 Wn. App. 228, 889 P.2d 959 (1995). The laws against discrimination, including harassment, are not a code of “general civility.” *Adams*, 114 Wn. App. at 297-98; *Faragher*, 524 U.S. at 786-89. “Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law.” *Glasgow*, 103 Wn.2d at 407.

The case of *Washington v. Boeing*, 105 Wn. App. at 1, 9-13, is analogous. In that case, male co-workers and supervisors called the plaintiff “dear,” “sweet pea,” and the highly offensive “brillo head”, and teased the plaintiff after she objected to a “pin up” calendar. The Court of Appeals ruled that these statements were not pervasive enough to create an abusive environment and alter the conditions of employment. *Id.*, 105 Wn. App. at 10. These comments were relatively isolated incidents, and while being called a “brillo head” was highly offensive, it was not pervasive enough to alter the conditions of plaintiff’s employment.

Here, Davis did not present sufficient evidence of ongoing or pervasive harassment to demonstrate that she was subject to a hostile work

environment. Davis alleges that she was told that she sounded like a “flight attendant”, acted like a “high school girl”, that if she was his “wife or daughter he would not want me to be a trooper.” Davis also once again alleges the ill-fitting helmet provided as a basis for her hostile work environment claim.⁷

However, these statements are simply not sufficiently extreme to establish a hostile work environment. Nothing about these comments compare with being called a “brillo head” or “sweet pea”, nor are these comments physically threatening in nature. In addition, the statements complained of were made only sporadically – only two or three comments - and spread out over the course of the Academy. And there is no evidence that these alleged statements altered the terms and conditions of the training academy. Nor is there evidence that any of these statements were part of any alleged discriminatory intent. These sorts of stray comments having no bearing on the ultimate decision do not form the basis of liability. *See Kirby*, 124 Wn. App. at 467, n. 10.

It is important to note the State Patrol Training Academy is a military academy and the underlying events took place at Basic Training to become a Washington State Trooper. The case law is clear that the laws against discrimination do not create a general civility code and the

⁷ As shown above, the helmets in question were one-size fits all paintball helmets, which were provided to all cadets.

case law is also clear that whether an environment is hostile depends on the totality of the circumstances.

Part of the purpose of the State Patrol Training Academy is to teach cadets to deal with suspected criminals, some of whom become violent and require the use of take-down tactics. It should be noted that during the practical exercises, Davis was found to lack command presence.

Furthermore, there is no evidence that the alleged hostile statements were made to Davis because of her race or gender. Again, this is a military training academy used, in part, to teach cadets to deal with violent criminals. The discrimination laws do not create a code of general civility and some latitude is required under these circumstances.

The alleged statements are few in number and are not physically threatening. While it might be unpleasant or humiliating to be the recipient of such statements, such statements are not sufficient to create a hostile work environment. Under the totality of the circumstances, Davis failed to present alleged facts of a sufficiently extreme hostile environment which altered the terms and conditions of the Academy.

2. Liability cannot be imputed to the State Patrol

Furthermore, even if Davis could establish a pervasive hostile environment, liability cannot be imputed to the State Patrol. For

harassment to be imputed to an employer, Davis has the burden of establishing either a) that “an owner, manager, partner, or corporate officer personally participate[d] in the harassment,” or b) if the harassment was at the hands of “supervisor(s) or co-worker(s),” that the employer “authorized, knew, or should have known of the harassment” but “failed to take reasonably prompt and adequate corrective action.” *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 407, 693 P.2d 708 (1985). Davis can show neither in this case.

a. There are no allegations and no evidence that the alleged harassment came from an “alter ego” of the State Patrol.

Regarding the first path for proving imputation, there are no allegations or evidence made against a person who could be described as an “owner, partner or corporate officer” of the State Patrol. Whether a particular person is an “owner” sufficient to establish liability turns not on whether the alleged harasser’s title calls him or her a “manager,” but on whether the alleged harasser is of sufficient rank to be considered the employer’s “alter ego.” *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 855-56, 991 P.2d 1182 (2000) (noting that this standard is usually limited to the “high echelons of an employer’s officers” and does not apply to “mid-level” managers).

In *Francom*, the Court of Appeals held that a mid-level manager who supervised the plaintiff did not meet this standard. It held: “Mr. Hathaway was not a ‘manager.’ Although he supervised and even hired other employees, it is undisputed that Mr. Hathaway was simply a mid-level manager at one of Costco’s 200 warehouses. At that level, he clearly was not acting as Costco’s alter ego.” *Francom*, 98 Wn. App. at 856. Similarly, in *Washington*, the Court of Appeals held that harassment by “flight line managers” who supervised the plaintiff, were not “managers” because they did “not occupy sufficiently high level positions within Boeing to be considered its alter ego.” *Washington v. Boeing Co.*, 105 Wn. App. 1, 11-12, 19 P.3d 1041 (2000). The law is clear on this point: “supervisors” are not “managers” for the purposes of imputation. *Glasgow*, 103 Wn.2d at 407 (holding that different standards apply for “managers” and “supervisors”).

Instead of providing evidence that demonstrates harassment came from the State Patrol’s “alter ego”, Davis once again relied on a pattern jury instruction for authority for the argument that there is some evidence such that a jury could find that a “manager” was involved. Again, Davis is incorrectly asking this Court to sit as a trier of fact rather than apply the decisional case law governing whether the personnel at the training

academy were far enough up the chain of command to amount to the State Patrol's "alter ego".

The undisputed evidence is that the training staff had no authority to hire or affect the pay of a cadet. In fact, even though the frontline staff has the authority to discuss with their superiors the level of fitness of a proposed cadet, the decision to terminate a cadet is made at headquarters in Olympia and only after the Commander approaches and makes a recommendation.

Davis cannot demonstrate that any of the alleged harassing conduct came from a manager sufficiently high up the State Patrol chain of command to be considered the State Patrol's "alter ego". The alleged harassing and discriminatory comments came from other cadets or a frontline instructor. There simply is no evidence that the State Patrol's "alter ego" harassed Davis.

b. The Department may not be held liable under a negligence standard for alleged harassment that was not reported.

Alternatively, liability may be imposed under a negligence standard if an employer 1) authorized, knew, or should have known about a supervisor(s) or co-worker(s) harassment because it was open or obvious, and 2) failed to take reasonably prompt and adequate corrective action. *Glasgow*, 103 Wn.2d at 407; *Francom*, 98 Wn. App. at 991

(holding that mid-level manager was not acting as Costco's alter ego for purposes of imputing liability, but noting employer is liable if sexual harassment is brought to the attention of management and reasonable steps are not taken to address it); *Estevez v. Faculty Club of University of Washington*, 129 Wn. App. 774, 120 P.3d 579 (2005) (trial court properly dismissed sexual harassment claim where employer acted promptly in response to reports of hostile work environment).

Here, there is no evidence to support a claim that the hostility was so pervasive that it was open. Nor is there evidence that the State Patrol failed to take corrective action on those limited occasions when Davis complained. Each of the two or three times that Davis voiced concerns about comments based on gender made at the Academy, the State Patrol took action. There is no evidence that Davis was subject to a pervasive environment and that the State Patrol turned a blind eye to harassing conduct.

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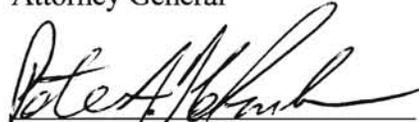
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VI. CONCLUSION

Based on the foregoing, respondents respectfully request that the trial court's order dismissing this case on summary judgment be affirmed.

RESPECTFULLY SUBMITTED this 27th day of November, 2013.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Peter J. Helmsberger", written over a horizontal line.

PETER J. HELMSBERGER,
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PROOF OF SERVICE

I certify that I served a copy of the *Brief of Respondent* on appellants' counsel of record on the date below via e-mail and personal service by Amy Kuja on Monday, December 2, 2013, as follows:

Thaddeus P. Martin
4928 109th Street SW
Lakewood, WA 98409

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

DATED this 2nd day of December, 2013, at Tacoma, WA.



CORIE SKAU, Legal Assistant


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