

NO. 45606-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STEPHEN C. SIMMONS,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

APPELLANT'S OPENING BRIEF

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ORIGINAL

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*A glass ceiling is a political term used to describe "the unseen, yet unbreakable barrier that keeps minorities and women from rising to the upper rungs of the corporate ladder, regardless of their qualifications or achievements."*¹

I. INTRODUCTION

Appellant Steve Simmons submits this briefing in support of reversing the summary judgment dismissal by the trial court of this employment discrimination claim. Mr. Simmons is an African American employee of the State of Washington's Enterprise Risk Management Office (ERMO). Mr. Simmons joined the office in October of 2001. Since becoming a member of the office, Mr. Simmons has been the subject of ongoing discrimination, overtly hostile and racially derogatory conduct, and active disparate treatment in employment pay, benefits and reviews. By all accounts, an outstanding employee, Mr. Simmons has watched while the office was criticized for treating African American employees as substandard employees, as the office then continued to hire and pay white employees more, treated them better and gave them more benefits and less work, observed another African American employee filing a lawsuit over the racial discrimination, watched as the office internally scoffed at EEOC findings of discriminatory treatment, and paid

¹ Federal Glass Ceiling Commission: *Solid Investments: Making Full Use of the Nation's Human Capital*, Washington, D.C.: U.S. Department of Labor, November 1995, p. 4.

lip service to making changes which were never put into effect. Throughout his tenure in the office Mr. Simmons has tried to concentrate on his work when he was individually treated as an employee who was somehow less deserving of equal pay or promotion than white employees who were hired after him, with less experience.

By early 2010, Mr. Simmons felt that action had to be taken. He realized that he was being asked to take on more and more work within the department while not being paid equally, not receiving the same number of reviews, receiving less benefits and being treated as a man who was supposed to serve the others within the department and do the work of risk management for the state while other employees did much less work for more pay. Throughout all of this Mr. Simmons had realized that he had had to work harder than his white counterparts for the same treatment. When it became clear that he was being taken advantage of and being asked to do the department's work for his white counterparts for less pay he felt that he had to take this action. These proceedings followed.

II. ASSIGNMENTS OF ERROR

Assignment of Error No 1.: The Court erred in dismissing Mr. Simmons' disparate treatment claim at summary judgment in relation to performance reviews.

Issue 1: This Court should reverse the trial court's summary judgment dismissal of Mr. Simmons' disparate treatment claim in relation to having not received regular performance reviews as compared to similarly situated employees within the same workplace.

Assignment of Error No. 2.: The Court erred in dismissing Mr. Simmons' disparate treatment claim with regard to pay raises.

Issue 2: This Court should reverse the trial court's summary judgment dismissal of Mr. Simmons' disparate treatment claim in relation to having been subjected to a disparate pay raise standard within the same workplace.

III. STATEMENT OF THE CASE

Every witness to this case has offered testimony that Mr. Simmons is a devoted and impeccable employee.² No witness has appraised Mr. Simmons' performance as anything less than "excellent" at any point in time.³ The Attorney General's office actually could not represent the state in this action because so many members support Mr. Simmons and understand that he has been carrying many of the less experienced members of the department while receiving less pay and having less experienced people promoted over him. Over the last twelve (12) years,

² CP 126-334

³ *Id.*

Mr. Simmons has carried out his responsibilities as the DSHS Tort Claims Manager exceptionally and without exception.⁴ As the Tort Claim Manager, Mr. Simmons responsibilities included participating in the defense and evaluation all manner of tort lawsuits, including employment discrimination claims.⁵ On regular occasions, Mr. Simmons personally briefs the DSHS Secretary about the merits of pending tort lawsuits.⁶

Mr. Simmons' first day of being assigned to what is now referred to as the Enterprise Risk Management Office (ERMO) was on October 1, 2001.⁷ Prior to working in the ERMO, Mr. Simmons worked in other departments within DSHS.⁸ The first supervisor that Mr. Simmons worked under at the ERMO was Bernie Friedman, the Special Assistant Secretary for Risk Management and Loss Prevention.⁹ It was under Mr. Friedman's supervision that Mr. Simmons first encountered discriminatory treatment in the form of disparate pay raises, disparate treatment in the form of irregular performance reviews, and the creation of a hostile work environment in the form of disparaging statements about minorities: "I

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

have watched supervisors such as Mr. Friedman make hostile remarks about Asians, and management has done nothing.”¹⁰

To illustrate the disparate treatment that Mr. Simmons experienced, ever since beginning work in the ERMO, Mr. Simmons has been colleagues with Kristal Wiitala, the Public Records & Privacy Officer.¹¹ Up and until this lawsuit was filed and Mr. Simmons was reassigned, Mr. Simmons and Ms. Wiitala answered to the same supervisors.¹² Between 2001 and 2006, records reflect that under Mr. Friedman’s supervision, Ms. Wiitala received regular written reviews and 5% raises in 2002, 2004, and 2006.¹³ During that same timeframe, Mr. Friedman did not review Mr. Simmons, ever.¹⁴ Mr. Friedman also failed to provide Mr. Simmons with regular raises in the same manner as were received by Ms. Wiitala.¹⁵ As a result, Ms. Wiitala’s pay continually increased while Mr. Simmons’ salary stagnated.¹⁶

For a brief period in 2006, after Mr. Friedman departed the ERMO, Mr. Simmons supervisor was a woman, Liz Dunbar, the Deputy Assistant

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

Secretary.¹⁷ Under Ms. Dunbar’s supervision, Mr. Simmons received his first review, ever, since working in the ERMO.¹⁸ During that review process, Ms. Dunbar recognized that Mr. Simmons had been overlooked for raises over the last five (5) years, and she had Mr. Simmons pay adjusted, retroactively, to account for the lack of raises.¹⁹ As a result, Mr. Simmons received \$12,000 in back pay. In 2007, Mr. Simmons’ supervisor changed to a man named Joe Olson.²⁰ For that year, Mr. Olson did not provide any annual reviews or raises.²¹

On April 1, 2008, Stan Mashburn hired a new Chief Risk Officer, Kevin Krueger. Mr. Krueger became Mr. Simmons’ direct supervisor.²² Almost immediately after becoming Mr. Simmons’ supervisor, Mr. Krueger reviewed the current positions within the agency and hired two new employees, Steve Dotson and Mark Green, into the ERMO.²³ Based upon Mr. Krueger’s “appointing” authority, both of those employees were immediately paid the highest amount possible under the pay “banding” structure, \$78,000.²⁴ The pay “band” of authority for Mr. Simmons was

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

the same as for Mr. Dotson and Mr. Green: “\$60,550 to \$78,000.”²⁵ Mr. Simmons’ salary remained \$73,224.²⁶

During June of 2008, Mr. Krueger completed a written performance review of Mr. Simmons.²⁷ While the 2008 review has come up mysteriously missing, the following Memo dated June 18, 2008 documents the one time existence of the review and the internal actions taken in relation to the review and corresponding proposed 3% raise:

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

June 18, 2008

TO: Stan Marshburn

FROM: Kevin Krueger

SUBJECT: WMS Increase for Stephen Simmons, Tort Liability Manager

I am requesting a 3% increase for Stephen Simmons beginning July 1, 2008. Currently, Mr. Simmons makes \$73,224 annually. A 3% increase would increase his salary to \$75,420 which is within the range of consideration (\$60,550 to \$78,000) for his WMS Band 2 position. After consulting with Jay Minton in payroll, Mr. Simmons's last raise (non-COLA) was effective May 2004 (attached).

I am requesting this increase in consideration of internal salary relationships. Mr. Simmons' colleagues in ERMO received a non-COLA raise more recently. Kevin Doty received a non-COLA raise of 5% in September 2007, and Kristal Wiitala received a 5% non-COLA raise in July 2006 (attached).

I recently met with Mr. Simmons to review his responsibilities and completed a performance evaluation for the work he has done over the last year (attached).

Mr. Simmons has several years experience with the Early Resolution Program, and he represents the department's interests well in evaluating of the settlement costs and reputational risks to the department for tort claims and lawsuits. In the last month, I have participated with Mr. Simmons in three case evaluation conferences with representatives from the Attorney General's Office, Office of Financial Management, and relevant program staff from DSHS. He has demonstrated detailed knowledge of the background of each case.

If you have questions or concerns about my request, please contact me at your earliest convenience. Thank you.

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The events surrounding the 2008 review and raise are pivotal to this lawsuit. Mr. Krueger met privately with Mr. Simmons to discuss the review and proposed 3% raise.²⁹ Mr. Simmons describes being informed about the 3% raise and immediately confronting Mr. Krueger about being treated disparately as compared to his coworkers such as

²⁸ *Id.*

²⁹ *Id.*

Kevin Doty and Kristal Wiitala.³⁰ Mr. Simmons expressly opposed being treated unfairly and disparately from other employees within the ERMO.³¹ Mr. Krueger described the meeting as follows: “*He refused the raise that I was about to give him. He just refused. He was angry. He yelled at me. I wanted to have a discussion with him. He yelled at me and he left. We had no further discussion about it. I asked him, ‘What more did you do beyond your normal job? What was it that was -- that I can make a case for this?’*”³² As noted in the Memo dated June 18, 2008, other employees had been receiving 5% raises whereas Mr. Simmons was only being offered a 3% raise for the same and/or better performance.³³ Mr. Krueger also admits to having stopped providing Mr. Simmons with annual performance reviews.³⁴ According DSHS’s briefing, “*Mr. Krueger did not conduct another performance evaluation of Mr. Simmons primarily because Mr. Krueger had been taken aback by Mr. Simmons behavior during the 2008 review and was leery of conducting another evaluation.*”³⁵

³⁰ *Id.*

³¹ *Id.*

³² CP 90-125

³³ CP 126-334

³⁴ CP 26-52

³⁵ *Id.*

It is important to note that the Memo dated June 18, 2008 indicates that after the meeting with Mr. Simmons, Mr. Krueger still intended to process the raise.³⁶ In that regard, Mr. Krueger conveyed to his manager, Mr. Mashburn, that:

I am requesting a 3% increase for Stephen Simmons beginning July 1, 2008. Currently, Mr. Simmon's makes \$73, 224 annually. A 3% increase would increase his salary to \$75,420 which is within the range of consideration (\$60,550 to \$78,000) for his WMS Band 2 position. After consulting with Jay Minton in payroll, Mr. Simmon's last raise (non-COLA) was effective May 2004 (attached).

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Mr. Mashburn described what his role would have been in assisting Mr. Krueger to decide upon a course of action with regard to Mr. Simmons:

Q. Do you know why Mr. Krueger would have written a memo like this to you?

A. As I mentioned previously, Enterprise Risk Management Office was part of the Office of Financial Services administration, so I would have interest in how Kevin was doing personnel stuff and salary stuff to keep things comparable and reasonable within the organization, but I also don't believe I was the appointing authority.

So, you know, I think that he -- while he most likely had the authority to make this decision, he also needed to make sure that he was, you know, staying tucked in and being consistent with FSA, Financial Service Administration, practice and policy and department practice and policy.³⁸

³⁶ CP 126-334

³⁷ *Id.*

³⁸ CP 90-125

After Mr. Krueger discussed the matter with Mr. Mashburn, something changed. Mr. Krueger never processed the 3% raise, stopped giving Mr. Simmons' annual performance reviews, and the only existing review from 2008 has come up mysteriously missing.³⁹ The missing review from 2008 is the subject of an underlying motion for default that resulted in an adverse finding against the defense. A copy of the 2008 review was originally "attached" to the Memo that was conveyed to Mr. Mashburn.⁴⁰

In a letter dated November 7, 2007, Ms. Sweet put the sitting DSHS Secretary, Robin Arnold-Williams, on notice of the following:

I have continued to be a victim of illegal racial discrimination and retaliation in DSHS, FSA, OFR. In September 2007, EEOC charged DSHS, FSA, OFR; with an illegal, hostile environment, consisting of harassment based on race and retaliation under the leadership of Stan Marshburn, Chief Financial Officer; Don Mercer, Office Chief; Abi Aina, Program Manager; Davis Garbato, Human Resource Manager; Pam Vest, Human Resource Manager; Tim Gorden, Supervisor; and Keith Johnson, Supervisor. 41

Ms. Sweet described the discriminatory conduct specifically as follows:

³⁹ CP 57-89

⁴⁰ CP 126-334

⁴¹ *Id.*

Specifically, some of the illegal practices deemed by EEOC as discriminatory to me based on race and retaliation which continues are:

- Denying me professional growth and development
- Excessive interrogatory meetings meant to create a paper trail for my future unwarranted dismissal
- Many inconsistent instructions
- Soliciting and encouraging staff to make negative statements about me
- Inappropriate actions and harsh statements from staff
- Conflicting performance expectations
- Drawn out performance evaluation process which include extensive executive management level staff
- Collective bargaining agreement violation
- Extreme workplace banishment and isolation
- Stripping me of my lead worker and backup supervisory duties necessary for my position description as Financial Recovery Enforcement Officer 3

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This same pattern of discrimination “*under the leadership of Stan Mashburn*” was perpetuated as against Mr. Simmons via Mr. Krueger. In that regard, Mr. Simmons observes that “*Ever since I complained in the middle of 2008 to Mr. Krueger about being treated disparately in relation to raises as compared to my white colleagues and/or filed my formal internal complaint in early 2010, I have been retaliated against for having done so.*”⁴³

As examples, in early 2010, Mr. Krueger attempted to realign the ERMO and force Mr. Simmons to work under the supervision of a less experienced and much younger workplace colleague, Mr. Dotson.⁴⁴ In a humiliating fashion, Mr. Krueger announced the realignment during a

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

meeting with the ERMO managers.⁴⁵ When deposed, Mr. Dotson described the uncomfortable experience. Mr. Dotson testified to feeling embarrassed for Mr. Simmons: *“Because he was my friend and my colleague, and, you know, that's our team. That's our management team. We all get together once a week, and those are good meetings. It's a time for management to get together and to talk as managers, to get away from staff. And everybody in that room, you know, got along well, and it was -- I felt bad for him. I felt bad that he didn't know coming into a meeting like that that this organizational chart had been discussed.”*⁴⁶

Mr. Simmons was also treated differently with regard to leave authorization.⁴⁷ On January 19, 2010, Mr. Krueger drafted a Memo counseling Mr. Simmons in this respect.⁴⁸ In April of 2010, Mr. Simmons filed a formal internal complaint about the ongoing discriminatory conduct on the part of Mr. Krueger.⁴⁹ During the internal investigation, the investigator, Myron Toyama, inquired of Mr. Krueger about Mr. Simmons's performance review from 2008.⁵⁰ After multiple emails back and forth and a specific request for the review directed towards Mr.

⁴⁵ *Id.*

⁴⁶ CP 90-125

⁴⁷ CP 126-334

⁴⁸ *Id.*

⁴⁹ CP 556-62

⁵⁰ *Id.* at Page 2

Kruger, the 2008 performance review seems to have disappeared.⁵¹ Throughout the course of the investigation, Mr. Simmons was left under Mr. Krueger's supervision.⁵²

The internal investigation revealed that Mr. Krueger never processed Mr. Simmons' raise from 2008.⁵³ In that regard, on October 12, 2010, the human resources department provided Mr. Simmons with back pay to make up for the raise that had not been processed:

Effective October 1, 2010, your monthly salary is \$6,411/month based on the following:
• 3 percent salary increase retroactive to July 1, 2008. Due to administrative oversight, the salary increase was not processed. 54

To be clear, this was the same raise that Mr. Krueger intended to provide to Mr. Simmons until *after* conferring with Mr. Mashburn.⁵⁵ According to DSHS Senior Human Resources Director, Mr. Simmons current salary now "*includes a 3% raise that DSHS determined, in October 2010, had been offered to Mr. Simmons in 2008 and should have been processed notwithstanding Mr. Simmons' rejection of it. DSHS gave Mr. Simmons the raise in October 2010, retroactive to July 1, 2008.*"⁵⁶

⁵¹ *Id.*

⁵² CP 126-335

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ CP 13-25

Mr. Simmons filed this lawsuit on February 17, 2012. Two months later, on April 26, 2012, a large portion of Mr. Simmons primary job responsibilities were stripped and reassigned to another DSHS employee.⁵⁷ Later that same year, on November 21, 2012, the defense sent a letter suggesting that Mr. Simmons was violating his ethical obligations by prosecuting this discrimination claim.⁵⁸ Mr. Simmons felt very threatened by the correspondence.⁵⁹ Mr. Simmons contends that all of these acts were in retaliation for having pursued this claim and also contributed to a hostile work environment.

IV. DISPARATE TREATMENT: PERFORMANCE REVIEWS

Disparate treatment claims based on circumstantial evidence are evaluated according to the three-step, burden-shifting protocol articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); see also *Hill v. BCTI Income Fund-I*, 144 Wash.2d 172, 180, 23 P.3d 440 (2001). First, the employee bears the burden of making a prima facie showing of discrimination. *Hill*, 144 Wash.2d at 181, 23 P.3d 440. If this burden is met, then a “ ‘legally mandatory, rebuttable presumption’ of

⁵⁷ CP 126-335

⁵⁸ *Id.*

⁵⁹ CP 126-335

discrimination temporarily takes hold, and the evidentiary burden shifts to the defendant to produce admissible evidence of a legitimate, nondiscriminatory explanation for the adverse employment action sufficient to ‘raise[] a genuine issue of fact as to whether [the defendant] discriminated against the plaintiff.’ ” *Id.* (citation omitted) (alterations in original) (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254–55 & n. 7, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)). If the employer “meets this intermediate production burden, the *presumption* established by having the prima facie evidence is rebutted and ‘having fulfilled its role of forcing the defendant to come forward with some response, [the presumption] simply drops out of the picture.’ ” *Id.* at 182, 23 P.3d 440 (alteration in original) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510–11, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)). “Once the presumption is removed ... the plaintiff [is] then ... ‘afforded a fair opportunity to show that [defendant's] stated reason for [the adverse action] was in fact pretext.’ ” *Id.* (alterations in original) (quoting *McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. 1817).

Mr. Simmons has been treated disparately with regard to annual performance reviews. Annual performance reviews are mandated by WAC 357-37-030(2) and Administrative Policy No. 18.37. When

deposed, with regard to the absence of completed reviews for Mr. Simmons, Mr. Krueger testified as follows:

Q. So you stopped performing reviews on Steve Simmons in reaction to his reaction to you in 2008?

A. In part, and also we didn't have a system to remind me of when the evaluations were due. We didn't have any systematized way to look at the anniversary dates for us to remember when somebody's evaluations were due.

Q. So without systemization, the only person that you seem to have forgotten was Steve Simmons; is that right?

A. I did not do an evaluation for him for 2008 or '9 or at any time, yes.⁶⁰

Mr. Dotson, another employee under Mr. Krueger's supervision, testified that he received regular reviews and if he didn't, he "*would be baffled. It wouldn't make any sense to me. I'd be confused.*"⁶¹ Even Stan Mashburn noted that Mr. Krueger's explanation for treating Ms. Simmons disparately is not sufficient: "*Because the point of evaluations are to have uncomfortable conversations if they're necessary, and that doesn't mean you stop. That means you do them again...I mean, if there was a disagreement and it was a legitimate disagreement and the tension was there and that's appropriate and that's why you have those things and --*

⁶⁰ CP 90-125

⁶¹ *Id.*

*that elicits those responses. So having one tense situation doesn't absolve you of the responsibility to do it again.”*⁶²

There really is no debate but that Mr. Simmons was treated disparately with respect to annual performance reviews. This disparate treatment continued in 2008, and then past the statute of limitations threshold into 2009, and 2010. Mr. Krueger’s explanation for treating Mr. Simmons disparately, the lack of a calendaring system, does not hold water. As noted above, Mr. Krueger’s “calendar” worked to remind him to review the white employees, but not Mr. Simmons. We all know that Microsoft Outlook does not have a “*black people performance reviews off*” function. Mr. Dotson testified that he would be “*baffled*” had he not received annual performance reviews. And even Mr. Mashburn testified that Mr. Krueger’s explanation was not legitimate.

In this context, it is also important to note that, in accord with *Henderson v. Tyrell*, 80 Wn. App. 592, 910 P.2d 522 (1996), the trial court found that the defense had essentially spoliated one of Mr. Simmons performance reviews and that an adverse inference would be drawn in that respect: “*I am prepared to draw an adverse inference from the absence of*

⁶² *Id.*

the document.”⁶³ In addition to the other evidence rebutting Mr. Krueger’s purported explanations for treating Mr. Simmons disparately, this adverse inference should be drawn to conclude the existence of an unlawful discriminatory motive. *Id.* It was, and is, inconsistent to maintain that Mr. Krueger spoliated a key record, a performance review, but that he did not act with an unlawful intent. *Id.*

With regard to the purpose for annual performance reviews and the connection to raises, the head of Human Resources testified as follows: “*Well, it -- it's moved over time because of the economic crisis that we were in, in the state, for a number of years. So there was a hard freeze on any salary increases or anything. The typical process that we go through for salary increase as it changes is attached to a few items: growth and development of the employee, meaning making sure that the employee is able to develop their skills and hone their skills in their particular craft to a level that the supervisor and the employee can agree upon at the beginning of the reporting period or their review period. The other is if there needs to be some type of change for compression. If there's a salary increase for other employees that the individual happens to be a supervisor over, is there some compression issues that we need to address there. And the other one is if we have some type of an alignment issue,*

⁶³ Trial Court Oral Ruling, Page 79

where we have one individual who is way outside of the alignment of peers in a pay group.”⁶⁴

As a result of this discriminatory treatment, in addition to the negative feelings associated with being treated inferiorly, Mr. Simmons observed that his workplace colleagues have ascended within the agency:

In the pending motion for summary judgment, DSHS makes the argument that the performance reviews and development plans that are mandated by written policy and WAC 357-37-030(2) (“A permanent employee on an annual basis”) are of no consequence to career employment within DSHS. That could not be less true. Over the years, I have watched Ms. Wiitala receive regular performance reviews and correspondingly regular 5% raises as well dating all the way back to 2001 while my own paycheck fell behind. Mr. Dotson received regular reviews and has ascended to higher positions of responsibility now paying more (\$82,000 a year) than he was when we started working together in ERMO. Nadine Selene-Hait has been provided regular performance reviews, been offered other jobs within DSHS, and recently received a 7.5% raise which was authorized by Mr. Krueger. Mr. Green was hired directly into ERMO making more money than me (\$78,000) but he was not a lawyer and had no risk management experience. Mr. Furey received a 5% raise on August 1, 2008. Ms. Jenkins has presumably been provided regular reviews and received a 5% raise that was authorized by Mr. Krueger. Within DSHS, “excellent” non-minority employees that are provided performance reviews flourish. By comparison, “excellent” minority employees, such as me, get 3% raises. Regardless of our job titles or responsibilities, Mr. Dotson,

⁶⁴ CP 90-125

*Ms. Selene-Hait, Mr. Green, and Ms. Jenkins should all be treated the same with regard to opportunities for feedback, growth, and merit based advancement. In this regard, we are all “similarly situated” employees regardless of our titles or job functions.*⁶⁵

The notion that denying the only minority annual performance reviews does not have either a tangible and/or intangible impact is without merit. This pattern and practice, as experienced by Ms. Sweet, and now Mr. Simmons, the mechanism utilized to create a glass ceiling for minorities working for DSHS. Based upon the evidence of record, this matter should not have been dismissed at summary judgment.

V. DISPARATE TREATMENT: PAY RAISES

“To establish a prima facie case of racial discrimination due to disparate treatment, the employee must show (1) he belongs to a protected class, (2) he was treated less favorably in terms of conditions of his employment (3) than a similarly situated, nonprotected employee, and (4) he and the nonprotected ‘comparator’ were doing substantially the same work.” *Subia v. Riveland*, 104 Wash. App. 105, 112 fn8, 15 P.3d 658 (2001). In this regard, Mr. Krueger discriminated against Mr. Simmons by being willing to give 5% raises for “excellent” work to other employees, but not to Mr. Simmons. Mr. Kruger’s own testimony is the best evidence on this topic:

⁶⁵ CP 126-335

Q. And you had the power to give Mr. Simmons a 5 percent raise?

A. I did.

Q. Why didn't you?

A. Because I found his performance, while it was **excellent**, I think he was -- there wasn't anything **extraordinary**. And I looked at the criteria that we went over in the other document, and it looked like he was doing his job. I asked him, "Was there anything extraordinary or different or something unusual that was different?" And he said, "Go ask anybody." And I said, "Who?" And he said, "Betty Reed." I said, "I've asked her." "Ask Pam Anderson." "I've asked her, and they all say that you do a good job, but they couldn't think of anything extraordinary."

Q. What would have convinced you?

A. I was looking to Steven to help me answer that question, what it was, if there was some unique case or anything, and he wouldn't provide me the information.

Q. So your -- in your mind, there's a level of performance that's excellent and then there's a level above that that's extraordinary?

A. It's hard for me to say because I had two and a half months working with Mr. Simmons. I had observed him in mediations for maybe two times. I was looking for him to tell me what was unusual that year, what was -- what was meritis that year, what was surprising, or if there was something that he could point out that was different from this year rather than the previous year.

Q. Something even better than excellent?

A. I don't know about better than excellent. I was looking for something that was, you know, unusual, I guess, above

his normal duties. It seemed to me he was doing the job that he was in.

Q. Did you --

A. For that, I gave him a mid percentage range of 3 percent, and I looked at that criteria that we talked about in the other document.

Q. Could you have raised Steven's salary to \$78,000, if you wanted?

A. I believe I could have, if I had the justification in there, yes. I would have had to make the case for it, yes.⁶⁶

Mr. Krueger admits applying a different standard to Mr. Simmons as compared to other employees that received raises for "excellent" quality work:

Q. Have you ever given anybody a 5 percent raise in the time that you've been a manager or supervisor with DSHS?

A. Yes.

Q. How many occasions, do you think?

MR. BRUCE: This is other than as a chief risk officer or as chief risk officer or --

Q. (By Mr. Beauregard) Whatever comes to your mind.

A. Oh, boy.

MR. BRUCE: Be clear about what you're answering, please.

A. Yes. As chief risk officer, I've given a raise -- I believe I've given a raise to, perhaps, two or three people.

⁶⁶ CP 90-125

Q. (By Mr. Beauregard) Who?

A. Nadine Selene-Hait. But that was at the request of the secretary.

Q. That was 7 and a half percent?

A. Was it? Okay. I don't remember the percentage, but it was at the request of the secretary who asked us to construct something and send over for an exceptional cross through the governor.

Q. Okay. Who else?

A. Recently, Sherri Jenkins.

Q. What's Ms. Jenkins' job?

A. She does public disclosure and discovery for the financial services administration.

Q. And she got 5 percent on your authority?

A. Yes, she did.

Q. She had something -- was she an excellent employee?

A. She's an excellent employee, and as a result of a consolidation that occurred within financial services administration, where we are responsible for the consolidated institutional services, as well as consolidated maintenance operations, the number of documents and the number of people that she interacts with for public disclosure and discovery increased significantly when the consolidation happened under the financial services administration.

Q. So --

A. So her workload increased significantly.

Q. Is she **extraordinary** or **excellent**?

A. She's **excellent**.

Q. Extraordinary?

A. She's good at providing what she does. I believe, to keep up with the additional workload that she's been reassigned -- I mean, been assigned as a result of the consolidation, I think she's an **excellent** employee.⁶⁷

Mr. Krueger's own testimony is telling. Mr. Simmons performance to at least an "excellent" quality for the ERMO but does not qualify, in the eyes of Mr. Krueger, for a 5% raise. To get such a raise, Mr. Simmons needed to be superhuman. By contrast, other employees as noted above were readily given raises of 5-7.5% for performing "excellent" work. This is a pattern that started when Mr. Simmons first began working in the ERMO in 2001. Mr. Friedman gave Ms. Wiitalla successive 5% raises whereas Mr. Simmons was hardly ever considered for a raise. Mr. Krueger picked up where Mr. Krueger left off and, under the leadership to Mr. Marshburn, continued the pattern and practice of giving disparate raises to the only minority employee within the ERMO. Based upon this evidence, this claim should not have been dismissed at summary judgment.

⁶⁷ *Id.*

VI. EQUAL PROTECTION UNDER THE LAW

To be clear, as a governmental employee, DSHS was obligated by law, WAC 357-37-030(2), and Administrative Policy No. 18.37, to provide Mr. Simmons with regular performance reviews and an equally applied pay raise standard, but failed to do so. Other “similarly situated” employees within the same department under the same supervisors received regular performance reviews and raises while Mr. Simmons did not receive either. This is a classic case of systemic and institutional discrimination, with or without consideration of the racial motives on the part of the defendants. Mr. Simmons has been treated differently, and unfairly, in such a way that is not consistent with the law.

“Equal protection guarantees that persons similarly situated with respect to a legitimate purpose of the law receive like treatment.” *Schatz v. State; Department of Social and Health Services*, 178 Wash. App. 16, 314 P.3d 406, 411 (2013). Without or without a racially discriminatory motive, the law provides that Mr. Simmons cannot be treated differently than other employees within the same office without some rational basis for doing so. *Washington Public Employees Association v. Pers. Res. Bd.*, 127 Wash. App. 254, 110 P.3d 1154 (2005). Here, there is no rational basis for providing some employees regular reviews and a more favorable

pay raise standard and to provide Mr. Simmons with those same legally mandated benefits. Within Mr. Simmons' workplace, the application of WAC 357-37-030(2), and Administrative Policy No. 18.37 is either (1) unlawfully arbitrary, and/or (2) unlawfully discriminatory. Under either scenario, Mr. Simmons has properly stated a claim for violation of equal protection under the law.

VII. TRIAL COURT ERROR: SIMILARY SITUATED COMPARATORS

The trial court erred in ruling that Mr. Simmons could not maintain a disparate treatment claim in relation to (1) the disparate performance reviews, and (2) the disparate raises based upon a purported lack of an exact "comparator" against which to measure the defense's conduct. This was clear error in that the exact "comparator" analysis that wrongfully embraced by the trial court would only apply to circumstances such as disparate salaries and/or promotions. *See Ajayi v. Aramark Business Services, Inc.*, 336 F.3d 520 (7th Cir. 2003). In this regard, when ruling, the trial court relied upon the Seventh Circuit's holding in *Ajayi* which is not analogous as the case analyzes the failure to promote if a very different context. *Id.* It must be noted that the trial court indicated that "*It is still somewhat troubling to the Court that a plaintiff would have not comparators against whom he could compare and such that he could not*

have a claim of disparate treatment.”⁶⁸ By contrast, this case involves the application of a facially neutral employment policy of providing performance reviews and pay raises and was applied disparately by Mr. Krueger (and other prior supervisors such as Mr. Freidman and Mr. Olson) to Mr. Simmons.

With regard to disparate performance reviews and disparate raises, Mr. Simmons only needs to identify “similarly situated” employees that received more favorable treatment by comparison. *See Washington v. Boeing, Inc.*, 105 Wash. App. 1, 13, 19 P.3d 1041 (2001); *Johnson v. Department of Social and Health Services*, 80 Wash. App. 212, 907 P.2d 1223 (1996). This legal premise holds true even in the absence of a racially discriminatory motive *See e.g. Washington Public Employees Association v. Pers. Res. Bd.*, 127 Wash. App. 254, 110 P.3d 1154 (2005). Here, those “similarly situated” employees are others within the working environment such as Ms. Wiitala, Ms. Selene-Hait, Ms. Jenkins, Mr. Doty, and/or Mr. Dotson that were (1) subject to receiving performance reviews with the same regularity and (2) subject to the same pay raise standards under Mr. Krueger. As illustrated in *Johnson*, if it is unlawfully discriminatory to disparately discipline similarly situated employees, it must also be unlawfully to disparately provide performance reviews and

⁶⁸ Trial Court Transcript of Ruling, Page 71

pay raises. And as illustrated in *Washington Public Employees Association*, even in the absence of a racially discriminatory motive, it is unlawful to apply a differing standard for performance reviews and pay raises to Mr. Simmons alone. Based upon this evidence, a proper legal analysis of the treatment of “similarly situated” employees lends to only one conclusion: Mr. Simmons has a right to a trial on the merits in relation to the claims at issue.

VIII. TRIAL COURT ERROR: SPOILIATION & ADVERSE INFERENCE

As noted, the trial court cited and relied upon *Henderson v. Tyrell*, 80 Wn. App. 592, 910 P.2d 522 (1996), in finding that the defense had essentially spoliated a key piece of evidence being Mr. Simmons 2008 performance review: “*I am prepared to draw an adverse inference from the absence of the document.*”⁶⁹ To the extent that the trial court was prepared to draw an adverse inference from this missing evidence, it was error to conflictingly determine, as a matter of law, that Mr. Krueger’s purported explanations for treating Mr. Simmons disparately were non-discriminatorily. *Id.* On this record, and with all inferences drawn in Mr. Simmons’ favor in accord with CR 56, and most particularly all inferences

⁶⁹ Trial Court Oral Ruling, Page 79

about the spoliated performance review, the trial court should not have dismissed Mr. Simmons' disparate treatment claims at summary judgment.

IX. CONCLUSION

For the reasons set forth herein, the trial court's dismissal of these claims should be reversed and these matters remanded and set for trial.

DATED this 15th day of May, 2014.

Respectfully submitted

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

STEPHEN C. SIMMONS,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

No. 45606-1-II

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington, that she is now, and at all times materials hereto, a citizen of the United States, a resident of the state of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein.

I caused to be served this date the following:

- Appellant's Opening Brief

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