

NO. 45606-1-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STEPHEN C. SIMMONS,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

APPELLANT'S REPLY BRIEF

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ORIGINAL

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | REPLY | 1 |
| II. | DISPARATE TREATMENT: PERFORMANCE REVIEWS | 3 |
| III. | DISPARATE TREATMENT RE: PAY RAISES | 10 |
| IV. | EQUAL PROTECTION, DIVERSITY, AND HYPOCRISY | 21 |
| V. | CONCLUSION | 22 |

TABLE OF AUTHORITIES

Cases

| | |
|---|------------|
| <i>Byrd v. Ronayne</i> , 61 F.3d 1026, 1032 (1st Cir.1995) | 18 |
| <i>Ercegovich v. Goodyear Tire & Rubber Co.</i> , 154 F.3d 344, 351-52 (6th Cir. 1998)..... | 17, 18, 20 |
| <i>Holifield v. Reno</i> , 115 F.3d 1555, 1562 (11th Cir.1997)..... | 18 |
| <i>Johnson v. Department of Social and Health Services</i> , 80 Wash. App. 212, 907 P.2d 1223 (1996)..... | 16 |
| <i>Kirby v. City of Tacoma</i> , 124 Wn. App. 454, 98 P.3d 827 (2004)..... | 5 |
| <i>McGuinness v. Lincoln Hall</i> , 263 F.3d 49, 51 (2d Cir. 2001)..... | 19 |
| <i>Mitchell v. Toledo Hosp.</i> , 964 F.2d 577 (6th Cir.1992)..... | 18 |
| <i>Neuren v. Adduci, Mastriani, Meeks & Schill</i> , 43 F.3d 1507, 1514 (D.C.Cir.1995)..... | 18 |
| <i>Pierce v. Commonwealth Life Ins. Co.</i> , 40 F.3d 796 (6th Cir.1994)... | 18, 19 |
| <i>Schatz v. State; Department of Social and Health Services</i> , 178 Wash. App. 16, 314 P.3d 406, 411 (2013)..... | 21 |
| <i>Subia v. Riveland</i> , 104 Wash. App. 105, 15 P.3d 658 (2001)..... | 15 |

Statutes

| | |
|---------------------|--------------------|
| RCW 41.06.022 | 12, 13 |
| RCW 41.06.500 | 13 |
| RCW 49.60.180 | 13, 14, 17, 21, 22 |

Regulations

| | |
|-------------------------|--------|
| WAC 357-37-030(2) | 6 |
| WAC 357-58..... | 12, 13 |
| WAC 357-58-010..... | 13 |
| WAC 357-58-045..... | 13 |
| WAC 357-58-065(16)..... | 12 |

I. REPLY

Appellant Stephen Simmons submits this briefing in reply to the State of Washington's responsive submission. The extremely long and convoluted response brief that was filed by the State of Washington does very little other than highlight the extremely factually rich nature of this claim and the reality that it should not have been decided as a matter of law. The evidence establishes that Mr. Simmons was not provided with regular performance reviews for over a decade. The lack of performance reviews translates into a lack of feedback and mentoring. The result of the lack of feedback and mentoring is resultant employment impediments such as inferior raises and career advancement. In relation to Mr. Simmons, this means receiving 3% pay raises under circumstances wherein other employees within the same workplace receive 5% pay raises. This disparate treatment directly and *tangibly* impacts Mr. Simmons' employment prospects and rate of pay.

The defense has also failed to offer legitimate non-discriminatory reasons for the disparate treatment of Mr. Simmons. Mr. Simmons' other workplace colleagues, such as Steve Dotson and Stan Mashburn, have both testified that the explanations that were offered by Kevin Krueger are not plausible. Exactly how much better evidence could there possibly be in this context to rebut Mr. Krueger's assertions besides other employees

from within the same workplace recognizing that the explanations do not comport with non-disparate normal expectations? Mr. Dotson testified that he would be “*baffled*” if Mr. Krueger had not provided him with annual performance reviews. Mr. Krueger’s one time supervisor, Mr. Mashburn, testified that Mr. Krueger’s explanation of just wanting to avoid confrontation with the only minority employee within the office was not accepted practice.

This is a very important case in that the crux of the matter is that the State of Washington is asking this Court to set precedent that it is acceptable to lock minority employees out of the mainstream. Our own government is asking this Court to declare that is perfectly tolerable to single out the sole black man in the office and to not provide him with performance feedback and the associated mechanisms for advancement. This proposition is not consistent with the laws designed at extinguishing discrimination. The premise at issue is flat out un-American. Law and equity does not support the result that has been obtained thus far in this litigation.

Stephen Simmons is a proud employee of the State of Washington and has been treated differently, disparately, than his workplace colleagues. Mr. Simmons has watched other employees receive regular and mandated feedback in the form of performance reviews and those

other employees have resultantly achieved higher raises and better positions of authority. These occurrences, as experienced by Mr. Simmons, provide a text book example of institutionalized racism. The workplace environment that has been created and perpetuated by managers such as Mr. Krueger has caused Mr. Simmons to file this claim. Based upon the evidence that was presented during the proceedings below, Mr. Simmons deserves his day in Court. The trial court's dismissal cannot stand.

II. DISPARATE TREATMENT: PERFORMANCE REVIEWS

In relation to Mr. Simmons' disparate treatment claim, DSHS artificially attempts to narrow the scope of the evidence to that which only involves Kevin Krueger's supervision over Mr. Simmons. In this case, the breadth of relevant evidence is much more encompassing. Prior Mr. Krueger assuming supervision of Mr. Simmons in 2008, other employees such as Kristal Wiitala were provided with routine performance review whereas Mr. Simmons was only reviewed once -- by a temporarily assigned woman supervisor in 2006 who noticed that none of Mr. Simmons other male supervisors had been fulfilling this obligation. After 2008, all of the other employees within the ERMO received performance reviews other than Mr. Simmons including Stephen Dotson, Kevin Doty,

Mark Green, Nadine Selene-Hait and Ms. Wiitala. DSHS has conceded that it “does not dispute that those other employees were similarly situated for the purpose of that particular analysis.”¹

As a result of the lack of professional mentoring and feedback, other employees advanced at an accelerated rate within the same workplace as compared to Mr. Simmons:

DSHS’s purported purpose of providing employee feedback and guidance is to allow for “excellent” employees to advance and become greater assets to the organization. It is somewhat shocking to me that the DSHS supervisors and managers that are responsible for providing these reviews are now disclaiming their legitimacy and importance to an employee’s career. What has happened to me over the last twelve (12) years by comparison to Ms. Wiitala, Mr. Dotson, Ms. Selene-Hait, Mr. Green, Mr. Furey, and Ms. Jenkins is living proof that employees who are provided regular reviews, feedback, and supervisory guidance receive better pay and access to job opportunities within DSHS. I did not receive regular reviews. And according to Mr. Krueger, as of 2008, my performance was “excellent” but not “extraordinary” in such a way that justified the 5% raises that I had watched my white peers receive over the years. If Mr. Krueger truly believed that I had room for improvement to achieve his standard of being “extraordinary,” he would have provided me regular performance reviews and development plans. Instead, Mr. Krueger continued the pattern that started with Mr. Friedman and Mr. Olson.²

¹ Appellee Brief, Page 2; DSHS fails to explain why Mr. Simmons purportedly needs to identify exact comparators for purposes of the disparate pay raise standard claim but not for the disparate performance review claim.

² CP 126-335

The evidence in the form of Mr. Simmons' seasoned observations over the years is clear: performance reviews and the associated mentoring and guidance are a key to advancing within DSHS. For over (12) twelve years, Mr. Simmons was repeatedly described as an "excellent" employee and watched others co-workers that were provided performance reviews and mentoring ascend. This is a classic case of institutionalized racism. Even though this particular type of injury might not fit neatly within the exact parameters of the existing case law and/or normal expectations does not mean that this is not the sort of discriminatory conduct for which the law should provide no remedy.

Moreover, the discriminatory conduct with regard to performance reviews and a lack of mentoring *has* resulted in tangible adverse employment actions against Mr. Simmons. *See Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004) (tangible employment action actionable to include "reducing an employee's workload and pay..."). The tangible injury comes in the form of disparate pay raises and resulting inferior salary and career advancement. Based upon a lack of employment feedback, Mr. Simmons has been offered and/or paid less than his workplace counterparts over the years. Repeatedly, employees such as Mr. Wiitala have received 5% raises whereas Mr. Simmons only

received 3%. This pay disparity is a direct result of the disparate treatment with regard to performance reviews:

...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. Mr. 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, 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.³

At trial, a finder of fact could easily conclude that these disparities in pay are caused by the lack of proper performance evaluations. Mr. Simmons' has suffered a tangible injury in relation to the lack of performance

³ CP 126-335

evaluations in the form of disparate pay raises and an ultimately inferior salary to which is deserved and has been earned.

In relation to discrediting DSHS and Mr. Krueger's purported non-discriminatory explanation for treating Mr. Simmons disparately, the following testimonial evidence rebuts DSHS's assertions:

My colleagues and former managers have recognized the irregularities pertaining to Mr. Krueger's treatment towards me. Mr. Dotson, a comparator by job position, testified that he received a review every year: "So I would have received a review in 2009, and then one in 2010, 2011, and then one just in 2012." When asked how Mr. Dotson would feel if he had not received annual reviews, he indicated that: "I would be baffled. It wouldn't make any sense to me. I'd be confused. As a manager and former acting DSHS Secretary, Stan Mashburn noted that Mr. Krueger's explanation for treating me disparately is not sufficient: "Q. Would the explanation "I didn't review Mr. Simmons after 2008" -- in your capacity as a manager -- "I didn't review him after 2008 because he was so displeased about our interactions in 2008," would that be a sufficient explanation? A. No. Q. And can you tell me why not? A. 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 -- that elicits those responses. So having one tense situation doesn't absolve you of the responsibility to do it again."

It is important to note that Ms. Mashburn, Mr. Krueger's former supervisor and a former acting DSHS Secretary, does not find Mr. Krueger's purported non-discriminatory explanation for failing to provide me with regular reviews as facially acceptable. Mr. Dotson testified that if the same

thing happened to him, he would be “baffled” by the occurrence. Moreover, Mr. Krueger testified under oath that one of the main reasons that he forgot about my reviews, the only minority under his direct supervision, was based upon the lack of a calendaring apparatus. This is an exceptionally incredible claim in that Mr. Krueger’s “calendar” worked to remind him to review everyone else, the white employees, under his supervision after 2008 to be reviewed besides me. This, coupled with the fact that my written review from 2008 has mysteriously disappeared at the hands of Mr. Krueger, leads to the conclusion that his explanation for not providing me with reviews is illegitimate. I firmly believe that Mr. Krueger did not provide me with regular performance reviews as an act of retaliation after I complained about only being offered a 3% raise when all of my non-minority peers had been receiving 5% raises for the same quality of performance. For over three (3) years thereafter, Mr. Krueger retaliated against me for complaining about disparate treatment with respect to raises.⁴

There is other circumstantial evidence of discriminatory motive on the part of Mr. Krueger. In relation to Mr. Simmons’ missing performance review from 2008, the evidence of record establishes the following:

Mr. Krueger is the Chief Risk Officer for the largest government agency responsible for overseeing multi-million dollar litigation and ensuring the preservation of evidence in that regard. Mr. Krueger acknowledged these responsibilities when he was deposed on April 10, 2013. Mr. Krueger also testified that he knew as early as mid 2010 that my 2008 performance review was relevant evidence to these proceedings. But Mr. Krueger has purportedly been unable to locate my 2008 on the network

⁴ CP 126-335

*(H) drive whereas he has been unable to find reviews for all of my contemporaries.*⁵

On this evidence, it is fair to infer that Mr. Krueger has taken deliberate action to extinguish Mr. Simmons' performance review from 2008. The trial court actually ruled that an adverse inference would be drawn in relation to this mysteriously missing review: "*I am prepared to draw an adverse inference from the absence of the document.*"⁶ This evidence most certainly creates a question of fact as to the credibility of Mr. Krueger's explanations for treating Mr. Simmons disparately.

The defense attempts to muddle these issues by filing a very long (and factually rich brief) contending that Mr. Simmons cannot make out a case if disparate treatment in relation to performance reviews. As noted, Mr. Simmons' own workplace colleagues, including Mr. Dotson and Mr. Mashburn, do not accept the explanations that have been provided in relation to the lack of mandated performance reviews. The testimony of Mr. Dotson and Mr. Mashburn, coupled with the observations of Mr. Simmons, present a plethora of evidence from which the fact finder would likely conclude that the purported explanations for treating Mr. Simmons disparately with regard to performance reviews are not legitimate. This

⁵ CP 126-335

⁶ Trial Court Oral Ruling, Page 79

discrimination claim should not have been dismissed at summary judgment. Mr. Simmons deserves a full day in court.

III. DISPARATE TREATMENT RE: PAY RAISES

DSHS accurately notes that Mr. Simmons disparate pay related claim is based solely upon the differing pay raise standard applied by Mr. Krueger; Mr. Simmons admittedly “*does not argue that he should be allowed to continue to pursue any other claims against DSHS based on salary increases.*”⁷ The trial court wrongfully dismissed Mr. Simmons’ claim for lack of identifying purportedly precise comparators. When making this ruling, the trial court noted 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.*”⁸ In this regard, the trial court misapplied the law.

The issue and the analysis of this disparate pay raise standard claim is not nearly as convoluted and complex as urged by the defense. On this point, the defense attempts to recast Mr. Simmons’ disparate pay “raise” claim into a disparate “salary” claim and devotes most of the corresponding arguments towards blurring this important distinction. By contrast, the nature of Mr. Simmons’ pay raise claim is rather simple: Mr.

⁷ Response Brief, Page 39

⁸ Trial Court Transcript of Ruling, Page 71

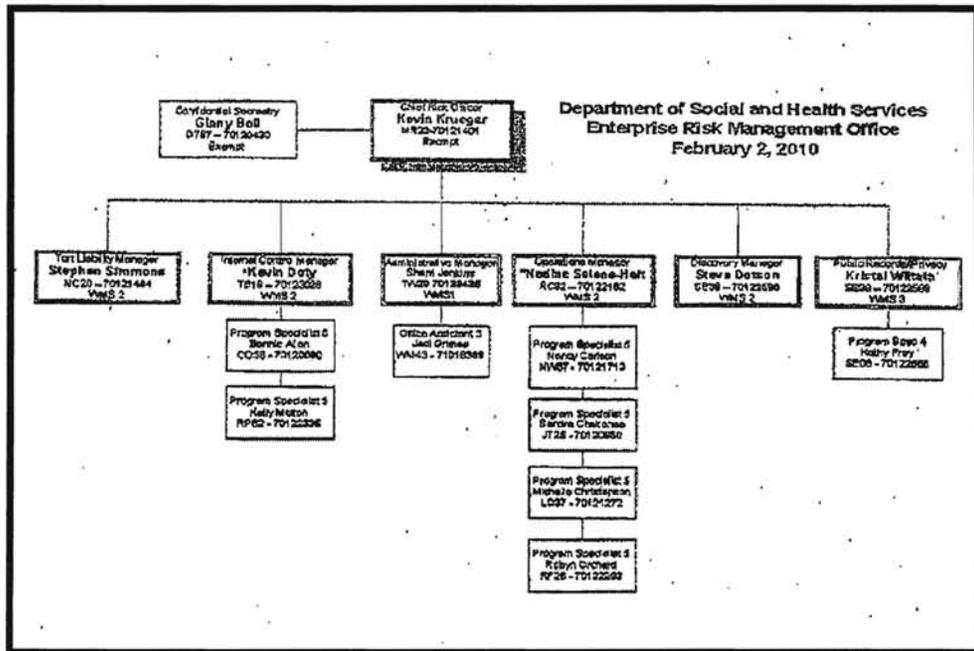
Krueger applied a differing pay raise standard (“*excellent*” versus “*extraordinary*”) to differing employees under supervision within the ERMO. Via declaration, Mr. Simmons explained the following to the trial court:

By Mr. Krueger’s own admission, I had to demonstrate being “extraordinary” to receive a 5% pay raise whereas others only needed meet the standard of being “excellent” to have their pay increased by that same amount. This is a clear and demonstrable double standard that cannot be denied at this point in these proceedings. DSHS has offered no viable non-discriminatory explanation for Mr. Krueger’s racially motivated double standard. When it comes to receiving raises, DSHS has a pattern and practice of giving other employees, such as Sherri Jenkins subsequent to 2008, and Kristal Wiitala in 2002, 2004, and 2006 raises of 5% for “excellent” performance whereas I am required to be “extraordinary.” Under the laws protecting against discrimination, all employees must be treated the same with regard to performance standards regardless of their job titles.⁹

It is true that Mr. Simmons cannot identify an exact comparator. Nobody with the ERMO does exactly the type of work as does Mr. Simmons. However, the law does not and should not require should a stringent standard when dealing with a circumstance such as is presented by this case. The exact comparator argument might make sense if Mr. Simmons was making out a disparate salary claim – but he is not.

The workplace organization chart assists in illuminating the proper comparators with regard to Mr. Simmons:

⁹ CP 126-335



10

The above cited chart illustrates that Mr. Simmons and Mr. Jenkins both answer directly to Mr. Krueger. Under Mr. Krueger’s supervision, in order to earn a 5% raise of better, Mr. Simmons needs to be “extraordinary” whereas Ms. Jenkins only needs to be “excellent” to earn the same pay raise.¹¹ Ms. Wiitala repeatedly received 5% pay raises

¹⁰ CP 126-335; Exhibit 27, Page 167

¹¹There are two types of employees within Washington State government agencies: Washington General Service (WGS) and Washington Management Service (WMS). First, WGS: “WGS is the system of personnel administration that applies to classified employees or positions under the jurisdiction of chapter 41.06 RCW which do not meet the definition of manager found in RCW 41.06.022.” WAC 357-58-065(16). Second, WMS: “Washington management service is the system of personnel administration that applies to classified managerial employees or positions under the jurisdiction of RCW 41.06.022 and 41.06.500.” *Id.* at (17). RCW 41.06.022 defines a manager or managerial employee as the incumbent of a position that:

throughout the early 2000s.¹² This type of disparate pay raise not standard is not equal treatment and violates RCW 49.60.180.

Under the supervision of Mr. Krueger, Mr. Simmons was required to demonstrate “*extraordinary*” work in order to receive even a 5% raise

“(1) Formulates statewide policy or directs the work of an agency or agency subdivision; (2) Administers one or more statewide policies or programs of an agency or agency subdivision; (3) Manages, administers, and controls a local branch office of an agency or an agency subdivision, including the physical, financial, or personnel resources; (4) Has substantial responsibility in personnel administration, legislative relations, public information, or the preparation and administration of budgets; and/or; (5) Functions above the first level of supervision and exercises authority that is not merely routine or clerical in nature and requires the consistent use of independent judgment.”

RCW 41.06.022.

All WMS positions are governed by WAC 357-58. “Chapter 357-58 WAC applies only to managers and does not apply to classified employees in the Washington general service.” WAC 357-58-045. Furthermore, “The purpose of chapter 357-58 WAC is to establish a system of personnel administration called the Washington management service (WMS). Chapter 357-58 WAC comprehensively covers the personnel matters relating to WMS positions.” WAC 357-58-010. And, most importantly, “[t]he WMS embodies the concepts of a performance management work environment that recognizes competency-based appointments and compensation.” WAC 357-58-010.

Indeed, “[t]he efficiency and effectiveness with which government services are delivered to the citizens of Washington state depends largely on the quality and productivity of state employees. Each manager has the unique and critical responsibility to foster the building of a performance-based culture that will enable workforce success.” WAC 357-58-005. And, “[e]ach agency has the overall responsibility for effectively managing and properly budgeting for salaries based on performance management and job required competencies for its WMS positions.” WAC 357-58-070.

Mr. Simmons works in the Enterprise Risk Management Office (ERMO) as “Risk Management Administrator,” which is classified as a WMS position. All comparators (Stephen Dotson, Kevin Doty, Mark Greene, Sherri Jenkins, Nadine Selene-Hait and Kristal Witala) (1) work in the ERMO, (2) hold WMS positions within ERMO, and (3) are supervised by Kevin Krueger. It must be the case that all ERMO managers supervised by Kevin Krueger are similarly situated for the purposes of an employment discrimination claim arising from disparate treatment *by* Kevin Krueger.

¹² *Id.*

whereas other employees only needed to demonstrate an inferior level of performance for the same pay raise. This is fundamentally unfair and not consistent with the laws prohibiting discrimination under RCW 49.60.180. The law against discrimination was designed to prevent disparate treatment which is not based upon some rationale explanation. *Id.* As noted in the record, in this instance, Mr. Krueger has failed to offer such an explanation:

As of October 12, 2010, even after having been put on notice of Mr. Krueger's disparate treatment, and after DSHS conducted an internal investigation about my concerns, I was still being paid under a different standard for raises than that of my peers. Regardless of the job functions that employees within my organization held, it is against the law to force minorities to work harder and perform better to get the same level of recognition and pay. In this regard, we are all "similarly situated" employees. Mr. Krueger has never provided a legitimate non-discriminatory reason why Mr. Jenkins, Mr. Furey, and any other employees receiving 5% raises for "excellent" work and I are held to a different standard. And this practice continues to this very day as Mr. Krueger testified that Ms. Jenkins was provided her latest 5% raise while this lawsuit was pending in the spring of 2013.¹³

Moreover, the notion that Mr. Simmons needs to identify an "exact" comparator makes no sense in this context. This precise comparator exercise serves no purpose on these facts. In this context, it should not be necessary to find another employee *exactly* like him in relation to job duties, skills, tenure, and the like in order to prove that Mr.

¹³ CP 126-335

Krueger makes the only black person within the office achieve a higher standard of excellence in order to receive the same proportionate raise. The factors that define a “comparator” must have some rational relationship to the type of discriminatory conduct that is being addressed. *See e.g. Subia v. Riveland*, 104 Wash. App. 105, 15 P.3d 658 (2001). In instance, the proper comparators are the other employees under Mr. Krueger’s supervision within the ERMO.

The principles at issue are illustrated in case law such as *Subia*, 104 Wash. App. 105. In *Subia*, the plaintiff brought a claim to demonstrate a disparate standard with regard to workplace punishments more misbehaviors: “the issue was whether DOC engaged in disparate treatment and had a racially discriminatory purpose in placing Subia on administrative leave pending investigation...” *Id.* at 114. “Subia established a prima facie case of disparate treatment by showing that he, a Native American-Hispanic corrections officer, with an otherwise exemplary record, had been placed on administrative leave pending an investigation of sexual misconduct; in contrast at least one Caucasian officer accused of sexual misconduct was not placed on administrative leave.” *Id.* at 112.

The *Subia* Court did not engage in an analysis as to whether or not Mr. Subia identified a precise comparator with the exact same job

responsibilities. Mr. Subia's claim was premised upon disparate workplace standards that did not require that sort of an analysis. It was held in that case, and Mr. Subia even prevailed once to verdict at trial, that the disparate treatment claim was properly submitted to the jury.

Another example of the appropriate standard for similarly situated comparators as they relate to employment discrimination is found in *Johnson v. Department of Social and Health Services*, 80 Wash. App. 212, 907 P.2d 1223 (1996). *Johnson* stands for the idea that summary judgment should rarely be granted in employment discrimination cases. "Even if the defendant articulates a legitimate, nondiscriminatory reason for the challenged employment decision, thus shifting the burden to the plaintiff to prove that the articulated reason is pretextual, summary judgment is normally inappropriate." *Id.* at 229. "This is because pretext may be demonstrated by direct or indirect evidence, including evidence presented as part of the prima facie case." *Id.* "Turning summary judgment on such a narrow questions as the distinction between the behavior of the comparator and Johnson defeats the fundamental concept of allowing discrimination claims to be decided on the merits." *Id.* at 230. In this case, the same principle should apply, and summary Judgment should not be granted on such a narrow issue as splitting hairs between the resume and qualifications of WMS managers who all report to the *same* supervisor;

especially when, as in this case, that supervisor is the one accused of the discriminating behavior.

Here, the result should be no different. Mr. Simmons is subjected to a differing pay raise standard than other employees within the office under the supervision of Mr. Krueger. It is fundamentally unfair and in conflict with RCW 49.60.180 to allow Mr. Krueger to hand out larger raises to white employees for the same quality of performance. That is the definition is unlawful discrimination. *Id.* For purposes of Mr. Simmons' pay raise claim, the proper comparators are the other non-minority employees under Mr. Krueger's supervision. Under the law, Mr. Simmons is not required to identify and exact comparator in all respects.

Federal case law supports the preservation of Mr. Simmons claim and that the "similarly situated" requirement only relates to the "relevant" portions of the comparators jobs. In *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 351-52 (6th Cir. 1998) a case where Plaintiff's claims were initially dismissed on summary judgment, the appellate court reversed. There,

"Ercegovich claims that at the time of his termination, he was qualified for at least two available positions within the Goodyear Corporation, one in Detroit and one in Washington, D.C., and that Goodyear failed to offer him either position. Relying on our decision in *Mitchell v. Toledo Hosp.*, 964 F.2d 577 (6th Cir.1992), the district court concluded that Ercegovich was not similarly-situated

to either Evert or Cohn, neither of whom performed the same job functions as Ercegovich, and thus plaintiff failed to identify a similarly-situated employee outside the protected class receiving more favorable treatment. J.A. at 26–27 (Dist. Ct. Order at 12–13). We believe the district court misconstrued this circuit's precedent in applying an exceedingly narrow reading of the *Mitchell* decision.”

Id. at 351-52 (6th Cir. 1998). The Court further explained that:

“We explained in *Mitchell* that when the plaintiff lacks direct evidence of discrimination, “the plaintiff must show that the ‘comparables’ are similarly-situated in all respects,” absent other circumstantial or statistical evidence supporting an inference of discrimination. *Id.* at 583. Although this statement appears to invite a comparison between the employment status of the plaintiff and other employees in every single aspect of their employment, *Mitchell* has not been so narrowly construed. In *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir.1994), this court explained that the plaintiff was simply “required to prove that all of the *relevant* aspects of his employment situation were ‘nearly identical’ to those of [the non-minority's] employment situation.” *Id.* at 802 (emphasis added); see also *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir.1997) (citing *Mitchell* in support of the proposition that “[t]o make a comparison of the plaintiff's treatment to that of non-minority employees, the plaintiff must show that he and the employees are similarly situated in all *relevant* respects” (emphasis added)); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C.Cir.1995) (quoting *Pierce*); *Byrd v. Ronayne*, 61 F.3d 1026, 1032 (1st Cir.1995) (“A disparate treatment claimant bears the burden of proving that she was subjected to different treatment than persons similarly situated in all *relevant* aspects.” (quotation omitted)). *Pierce*, 40 F.3d at 802 (explaining that the distinction in supervisory status between plaintiff and non-minority employee also accused of sexual harassment was relevant because company's liability under Title VII for sexual harassment could depend on employee's status).

Id. “The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered “similarly-situated;” rather, as this court has held in *Pierce*, the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in “all of the *relevant* aspects.” *Pierce*, 40 F.3d at 802 (emphasis added). *Id.* at 352.

In *McGuinness v. Lincoln Hall*, 263 F.3d 49, 51 (2d Cir. 2001), the Court of Appeals overturned a decision that dismissed Plaintiff’s claims of race discrimination on summary judgment on the basis that in order to establish a similarly situated comparator, employee “*must* have reported to the same supervisor as the plaintiff, *must* have been subject to the same standards governing performance, evaluation and discipline, and *must* have engaged in conduct similar to Plaintiff [] without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it.” Moreover, “[a]n employee must be similarly situated in all *material* respects—not in *all* respects.” *McGuinness v. Lincoln Hall*, 263 F.3d at 53. “A plaintiff is not obligated to show disparate treatment of an *identically* situated employee. To the contrary . . . it is sufficient that the employee to whom plaintiff points be similarly situated in all material respects.” *Id.* “In other words, where a plaintiff seeks to establish the minimal prima facie case by making

reference to the disparate treatment of other employees, those employees must have a situation sufficiently similar to plaintiff's to support at least a minimal inference that the difference of treatment may be attributable to discrimination.” *Id.*

DSHS all but concedes in the appellate briefing that other employees within the ERMO were proper comparators explaining that Mr. Krueger originally offered the 3% pay rise in 2008 “*in consideration of internal salary relationships*” within the department.¹⁴ Here, both DSHS and Mr. Krueger have admitted that the pay raise standard was employed in comparison to other employees within the ERMO who did not share Mr. Simmons’ exact job duties. The evidence of record establishes that the pay raise standard within the ERMO is office wide and not reliant upon a comparison of precise job duties. The pay raise policy is standardized – or at least it is supposed to be.

Moreover, with regard to the purported non-discriminatory explanation for treating Mr. Simmons disparately, Mr. Krueger has not offered any valid explanation. Mr. Krueger testified clear as a bell that Mr. Simmons must be “extraordinary” in order to receive a 5% raise whereas other employees only need to be demonstrate lesser performance – excellence. At this point, this testimony cannot be ignored and has not

¹⁴ Appellee Brief, Page 9

been sufficiently rebutted. Mr. Krueger admittedly applies a different pay raise standard to Mr. Krueger as compared to other employees within the same workplace.

The proper comparators are those employees that are similarly situated in “*relevant*” and/or “*material*” respects. *See e.g. Ercegovich*, 154 F.3d 344; *McGuinness*, 263 F.3d 49. In this instance, in relation to disparate pay raise standard, the “relevant” comparators employees are those the fall under the supervision of Mr. Krueger. It is a violation of RCW 49.60.180 for Mr. Krueger to require Mr. Simmons, the only minority employee within the office, to achieve a higher level of performance in order to be given the same pay raise as other employees within the ERMO. Based upon the evidence of record, most notably Mr. Krueger’s admitted disparate pay raise standard, summary judgment was improperly granted and should be reversed.

IV. EQUAL PROTECTION, DIVERSITY, AND HYPOCRISY

“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). DSHS challenges Mr. Simmons have raised the issue of “equal protection” under the laws as purported never having been

argued until this appeal. This is not a fair statement. This entire case is about equal protection. It is based upon the principle that citizens, and particularly government employees, are not supposed to be subject to differing standards in the workplace for the same level of performance. Minority employees are not supposed to be denied access to advancement. This is not the American way. This is not what equal protection under the law allows.

What's more is that DSHS publishes all sorts of anti-discrimination policies, "retention" policies, "cultural competency" policies, and other "diversity" based policies, but then fails to follow them. According to DSHS, it is just fine to single out the sole minority (with a great employment history) and to isolate that individual by not providing professional feedback and applying a disparate pay raise standard. This is not equal protection under the law. This is not the sort of workplace behavior that DSHS claims is supposed to be permitted within the workplace. Equal protection under the law, including under RCW 49.60.180, mandates that Mr. Simmons be treated fairly. This case should be reversed and remanded for a determination on the merits. Anything less will prove an injustice.

V. CONCLUSION

For the reasons set forth herein, Mr. Simmons respectfully requests that this Court reverse this matter and remand it for a trial on the merits. Mr. Simmons deserves his day in Court.

DATED this 29th day of July, 2014.

Respectfully submitted

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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 Reply Brief

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DATED this 29th day of July, 2014.

Vickie Shirer

Vickie Shirer
Paralegal to Lincoln C. Beauregard