

NO. 45606-I-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STEPHEN C. SIMMONS,

Appellant,

v.

STATE OF WASHINGTON

Respondent.

RESPONDENT'S BRIEF ON APPEAL

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I. INTRODUCTION

The factual record and pertinent legal authorities amply support the Thurston County Superior Court’s summary dismissal of Stephen Simmons’ disparate-treatment discrimination claim against the Washington State Department of Social and Health Services (“DSHS”). We respectfully submit that this Court should affirm.

Mr. Simmons brought an assortment of claims in the trial court. On appeal, however, he challenges only the trial court’s dismissal of his claims for disparate-treatment discrimination based on the number of performance evaluations and the amount of a raise that his former supervisor gave him. Most of the factual allegations in Mr. Simmons’ appellate brief – for example, about events that purportedly occurred between 2001 and 2007 and about the hiring of other employees in mid-2008 (Simmons Brief 4-7) – have nothing to do with his arguments on appeal; they are in his brief only because the text of that document is largely cut and pasted from his revised opposition to DSHS’s motion for summary judgment (CP 746-70), and Mr. Simmons did not bother to delete the superfluous verbiage.¹ We will not address Mr. Simmons’

¹ Many of Mr. Simmons’ factual allegations that do ostensibly relate to his arguments on appeal were unsupported in the trial court, and remain so. Mr. Simmons provides no citation to the record for a number of his allegations. A particularly egregious example is his fictitious assertion that “[t]he Attorney General’s office actually could not represent the state in this action because so many members support Mr.

extraneous allegations in this brief,² but DSHS certainly denies that it treated Mr. Simmons differently than other employees and that it discriminated against Mr. Simmons in any way, at any time.

This brief demonstrates that there is no factual or legal support for the narrow disparate-treatment discrimination claim that Mr. Simmons is pursuing on appeal. As noted above, Mr. Simmons challenges the trial court's summary dismissal of his disparate-treatment claim based on performance evaluations and salary increases. With regard to performance evaluations, Mr. Simmons contends that his former supervisor, Kevin Krueger, gave him fewer evaluations than he gave other DSHS employees. DSHS does not dispute that those other employees were similarly situated to Mr. Simmons for the purpose of that particular analysis. But the record

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." (Simmons Brief 3.) Mr. Simmons purports to sustain other allegations with references such as "CP 126-334" – a plainly inadequate citation that does not comply with RAP 10.3(a)(5). It is well established that a party may not rely on uncited evidence in the hope that support for their assertions will be ferreted out by the court. For example, in *White v. McDonnell Douglas Corp.*, 904 F.2d 456, 458 (8th Cir. 1990), the court observed that it need not "speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." See also *Independent Towers of Washington v. State of Washington*, 350 F.3d 925, 929-30 (9th Cir. 2003) ("The art of advocacy is not one of mystery. Our adversarial system relies upon the advocates to inform the discussion and raise the issues to the court. . . . We require contentions to be accompanied by reasons."); *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (courts need not, and will not, "scour the record in search of a genuine issue of triable fact"); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

² For a more comprehensive rebuttal of allegations by Mr. Simmons that are not pertinent to the issues raised on appeal, see DSHS's motion for summary judgment and reply in support of the motion for summary judgment. (CP 817-50; CP 1176-91.)

does not support Mr. Simmons' contention that he was treated differently than they were. Even if it did, Mr. Simmons has not established a prima facie case because missed performance evaluations are not an adverse employment action that will support a disparate-treatment claim – particularly where, as here, Mr. Simmons has not identified any harm that he suffered due to the missed evaluations. And even if missed evaluations were an adverse employment action, Mr. Simmons has failed to rebut the legitimate, non-discriminatory reasons given by DSHS for why Mr. Simmons was not evaluated in 2009 and 2010.

With regard to salary increases, Mr. Simmons contends that Mr. Krueger gave him a smaller raise than two other DSHS employees subsequently received. However, Mr. Simmons has failed to establish a prima facie case because he has not produced evidence showing that those employees were similarly-situated comparators; his suggestion that the Court should relieve him of that burden (Simmons Brief 27-29) is unsupported and without merit. And even if Mr. Simmons had identified a similarly-situated comparator, he has not even attempted to rebut DSHS's legitimate, non-discriminatory reasons for its salary decisions.

In short, the limited disparate-treatment claim that Mr. Simmons is pursuing on appeal fails as a matter of law on multiple grounds. The trial court correctly entered summary judgment on all facets of Mr. Simmons'

disparate-treatment claim. Whether this Court agrees with the trial court's precise reasoning is immaterial, since this Court can affirm on any ground that is supported by the record. This Court should enter an order affirming the trial court's summary dismissal of Mr. Simmons' disparate-treatment claim based on performance evaluations and salary increases.

II. STATEMENT OF THE ISSUES

1. This Court should affirm the trial court's summary dismissal of Mr. Simmons' disparate-treatment discrimination claim based on his allegation that he did not receive regular performance evaluations as compared to other employees within his workplace.

2. This Court should affirm the trial court's summary dismissal of Mr. Simmons' disparate-treatment discrimination claim based on his allegation that he was subjected to a disparate pay raise standard.

III. STATEMENT OF THE CASE

A. Background Regarding DSHS and Mr. Simmons.

DSHS is Washington's primary social services provider. Each year more than 2.2 million children, families, vulnerable adults, and seniors request assistance from DSHS. With over 16,000 employees, DSHS is one of the largest employers in Washington. Its core mission is to improve the safety and health of individuals, families and communities.

Stephen Simmons' title is Risk Management Administrator. (CP 909, 7:6-7.) He has worked at DSHS for about 19 years, the last 13 of

which have been in his current position (although his responsibilities and title have evolved somewhat). (CP 3, ¶ 3; CP 14, ¶ 3; CP 947-64.)

Mr. Simmons is not a lawyer, but his primary job has nevertheless been, and remains, to manage tort lawsuits filed against DSHS. (CP 14, ¶ 3; CP 947-64.) He also answers occasional questions relating to the insurance that DSHS's providers must maintain. (CP 915, 41:1-19.) And he ensures that when DSHS employees are involved in car accidents, the proper paperwork is transmitted to and from CEI, a third-party company that manages accident claims and repairs for the department. (CP 914-15, 40:6-41:1.) Mr. Simmons has received positive reviews during his tenure with DSHS. (*E.g.*, CP 163-64; CP 182-83.)

Mr. Simmons' position is classified as a Washington Management Service ("WMS") position because the Risk Management Administrator exercises statewide management responsibilities under RCW 41.06.022. (CP 14-15, ¶¶ 4-5.) The other DSHS employees whom Mr. Simmons has identified as putative comparators in his discovery responses and briefing (Stephen Dotson, Kevin Doty, Mark Greene, Sherri Jenkins, Nadine Selene-Hait and Kristal Wiitala) also have held WMS positions at all relevant times. (CP 15-17, ¶¶ 8-10, 12, 15; CP 21-24.)

WMS is "a personnel system for civil service managers working in the State of Washington Government." (CP 14, ¶ 4.) The WMS

framework includes “a compensation system that provides flexibility in setting and changing salaries.” RCW 41.06.500(1)(b). WMS “embodies the concepts of a performance management work environment that recognizes competency-based appointments and compensation.” WAC 357-58-010. *See also* WAC 357-58-020(2).

Each WMS position is assigned a salary range, or “band.” (CP 14, ¶ 5.) Banding is determined for each position based on factors relating to the position’s management and policy role and responsibilities. (CP 14-15, ¶ 5.) The position of Risk Management Administrator is a Band II position eligible for a salary in a range of consideration between \$61,200 and \$81,600. (CP 15, ¶ 7.) Mr. Simmons’ annual salary was \$76,932 as of September 20, 2013, when DSHS moved for summary judgment. (*Id.*)

Under DSHS Administrative Policy No. 18.58(H)(6)(a), the department’s WMS employees are eligible for salary increases of up to ten percent per year “for growth and development, documented internal salary alignment or recruitment and retention problems, and temporary promotions.” (CP 1075. *See also* CP 743, 26:4-27:11.) The salaries earned by employees in WMS positions do not move in lockstep; to the contrary, the WMS framework for establishing and modifying compensation is designed to be flexible. (CP 743, 26:4-27:11; RCW 41.06.500(1)(b); WAC 357-58-010; WAC 357-58-020(2); CP 1075-76,

DSHS Administrative Policy No. 18.58(H)(6)(a)-(d).)

Mr. Simmons is correct that WAC 357-37-030(2) and DSHS Administrative Policy No. 18.37 (CP 731-33) establish an expectation that WMS employees be reviewed annually. In practice, however, this does not always happen, and DSHS's former acting Secretary and former Senior Director of Human Resources both testified below that the absence of performance evaluations in an employee's file does not impair the employee's ability to advance within the department. (CP 19, ¶ 18; CP 1038, 36:12-24; CP 1039-40, 68:4-69:16.) There is no competent evidence to the contrary.³

B. Mr. Simmons' 2008 Performance Evaluation and Salary Increase.

All of Mr. Simmons' arguments on appeal concern allegations of discrimination against him by his former supervisor, Kevin Krueger.

³ Mr. Simmons asserted in a lengthy declaration filed in the trial court that he believes there is a connection between the number of performance evaluations that DSHS employees receive and their ability to advance within the department. (CP 141-42, ¶ 26 (quoted in Mr. Simmons' brief at pages 20-21).) But this is just speculation, and moreover, as discussed below at pages 14-19, it is demonstrably incorrect. In fact, many of the "factual" allegations in Mr. Simmons' appellate brief are nothing more than conjecture derived from the same self-serving declaration. (CP 126-52.) DSHS moved to strike most of the declaration as improper and inadmissible on numerous grounds. (CP 1080-92; CP 335-64; CP 1110-19.) During the hearing on DSHS's motion to strike, the trial court observed that it could "understand why [DSHS had] brought the motion," "there were an exceptional number of problems with that declaration in terms of its admissibility," "[t]here was an inordinate amount of argument within that declaration," and the declaration was "objectionable in many ways." (Transcript of November 15, 2013 Hearing 80.) The trial court declined to strike the declaration because it was "able to review the declaration for what it [was], and reject that evidence that [was] inadmissible and view that evidence . . . in a way that made its evaluation to the summary judgment appropriate under the circumstances and under the law." (*Id.*)

(Simmons Brief 15-30.) Mr. Krueger is DSHS's Chief Risk Officer ("CRO") and oversees the department's Enterprise Risk Management Office ("ERMO"). (Simmons Brief 6; CP 26, ¶ 2; CP 290-92.)⁴ He supervised Mr. Simmons from April 1, 2008 until October 12, 2010. (CP 27, ¶ 3.)⁵

Mr. Simmons contends that during that time, Mr. Krueger gave him fewer performance evaluations than he gave his white WMS direct reports. (Simmons Brief 16-18.) He also contends that Mr. Krueger improperly gave him a three percent raise while subsequently giving larger raises to two other employees. (*Id.* at 21-25.) The record does not support these contentions.⁶

⁴ CP 293 depicts the unimplemented reorganization of ERMO that Mr. Simmons references in his brief at pages 12-13.

Mr. Simmons alleges that his "office" "was criticized for treating African American employees as substandard employees," "internally scoffed at EEOC findings of discriminatory treatment," treated white employees differently than black employees, and "paid lip service to making changes which were never put into effect." (Simmons Brief 1-2.) These allegations are unsupported by citations to the record. Moreover, although Mr. Simmons implies that they concern ERMO, in fact they do not, but instead relate to an entirely different DSHS office – the Office of Financial Recovery, where a woman named Vernetta Sweet was a Financial Recovery Enforcement Officer. (*Id.* at 11-12; CP 187-88; CP 193.) They also relate to events that occurred before Mr. Krueger became CRO. (*Id.*) DSHS denies that it discriminated against Ms. Sweet, and denies that allegations by or about Ms. Sweet have anything to do with Mr. Simmons' claims.

⁵ Since October 12, 2010, Mr. Simmons has reported directly to Mr. Krueger's superiors, including then-Chief Financial Officer ("CFO") Gary Robinson and then-Chief of Staff Tracy Guerin. (CP 992; CP 994.)

⁶ Nor does the record support Mr. Simmons' other factual allegations against Mr. Krueger – including his contentions that Mr. Krueger discriminated against him by proposing (but not implementing) a realignment of ERMO and by purportedly treating him differently with regard to leave authorization. (*Id.* at 12-13.) DSHS addressed those allegations in its summary judgment briefing (CP 815-50; CP 1176-91), and the trial court granted summary judgment on Mr. Simmons' claims arising out of them

As Mr. Simmons acknowledges in his brief, shortly after Mr. Krueger became CRO he met with Mr. Simmons and gave him a written performance evaluation. (Simmons Brief 7 (“During June of 2008, Mr. Krueger completed a written performance review of Mr. Simmons.”); CP 997-98, 34:11-35:9; CP 196.) The evaluation was positive, and Mr. Krueger offered Mr. Simmons a three percent raise. (Simmons Brief 7-8; CP 997-98, 34:11-35:9; CP 196; CP 1004-05, 58:8-59:8.) He offered the raise “in consideration of internal salary relationships”: As Mr. Krueger testified at deposition, he believed, based on his review of the compensation histories of his staff, that Mr. Simmons had received a three percent raise in 2006 whereas Kristal Wiitala and Kevin Doty had received five percent raises in 2006 and 2007, respectively. (CP 196; Simmons Brief 8; CP 1162-63, 57:4-58:7.)

Apparently thinking he should receive a five percent raise instead of a three percent raise, Mr. Simmons responded by yelling at Mr. Krueger, rejecting the raise, and refusing to sign the evaluation form. (CP 1004-05, 58:8-59:8; CP 771, ¶ 2.) Mr. Krueger was surprised and taken aback by Mr. Simmons’ unexpected reaction. (CP 999-1000, 40:3-41:14.) He testified at deposition that he did not thereafter conduct another

(Transcript of November 15, 2013 Hearing 59:13-73:8, CP 780-83). Mr. Simmons does not challenge that ruling. As for Mr. Simmons’ allegations concerning purported retaliation by Mr. Krueger and others (*e.g.*, Simmons Brief 12, 15), they have nothing to do with the issues raised on appeal.

evaluation of Mr. Simmons primarily because Mr. Simmons' loud and volatile behavior during his spring 2008 review had made him leery of trying again. (*Id.*) He also testified that he did not have in place a system to remind him when to conduct reviews. (CP 999, 40:14-19.) He testified that his failure to give Mr. Simmons a performance evaluation after spring 2008 "had nothing to do with him being African American." (CP 999-1000, 40:24-41:2.)⁷ And he testified that he did not process Mr. Simmons' three percent raise because Mr. Simmons had said he did not want it. (CP 1004, 58:8-16.) In October 2010, DSHS gave Mr. Simmons a three percent raise retroactive to July 1, 2008. (CP 15, ¶ 7.)

C. There Is No Evidence of Disparate Treatment.

1. Mr. Simmons received at least as many performance evaluations as the majority of his WMS colleagues.

Mr. Simmons asserts that Mr. Krueger gave him fewer performance evaluations than he gave other WMS employees under his supervision. (Simmons Brief 16-18.) Mr. Simmons does not allege that he was treated differently than other WMS employees in any other respect with regard to performance evaluations. He does not argue, for example, that Mr. Krueger gave him a less favorable evaluation than he gave other WMS employees; to the contrary, he asserts in his brief that "[n]o witness has appraised Mr. Simmons' performance as anything less than 'excellent'

⁷ Mr. Simmons was next evaluated on December 13, 2012 by his then-supervisor, DSHS Chief of Staff Tracy Guerin. (CP 1033-35.)

at any point in time.” (*Id.* at 3.) Mr. Simmons simply contends that Mr. Krueger evaluated other WMS employees every year, but did not annually evaluate Mr. Simmons. (*Id.* at 16-18.)

The evidence is to the contrary. Mr. Simmons acknowledges that Mr. Krueger “completed a written performance review” for him in June 2008. (Simmons Brief 7.) Mr. Krueger did not review any of his other WMS direct reports at that time. (CP 772-73, ¶ 6.) It is undisputed that between April 1, 2008 and October 12, 2010, when he stopped supervising Mr. Simmons, Mr. Krueger completed the following written evaluations of Mr. Simmons and the WMS employees whom Mr. Simmons identified as comparators in his discovery responses:

Date	Stephen Simmons	Stephen Dotson ⁸	Kevin Doty	Mark Greene	Nadine Selene-Hait	Kristal Wiitala
Spring 2008	6/08					
Summer 2008						
Fall 2008						
Winter 2008-09			12/30/08			
Spring 2009						
Summer 2009						
Fall 2009						
Winter 2009-10			12/31/09		12/22/09	
Spring 2010						4/30/10
Summer 2010						
Fall 2010						

⁸ Ms. Wiitala supervised Mr. Dotson from July 1, 2008 to July 1, 2009, and gave him a performance evaluation on June 30, 2009. (CP 1120, ¶¶ 2, 3.)

Mr. Krueger thus completed two evaluations for Kevin Doty. (*Id.*) He completed one evaluation each for Mr. Simmons, Nadine Selene-Hait and Kristal Wiitala. (*Id.*) And he completed *no* evaluations for Stephen Dotson and Mark Greene. (*Id.*; CP 1120-21, ¶ 3.) The record is silent regarding the number of evaluations (if any) that Mr. Krueger gave Sherri Jenkins. Based on the undisputed facts of record, Mr. Simmons therefore received *more* than the average number of evaluations that Mr. Krueger gave his WMS direct reports annually during the relevant time period.

2. There is no evidence that Mr. Simmons suffered any harm because of missed performance evaluations.

Mr. Simmons has not identified any negative consequence arising from Mr. Krueger's failure to give him a performance evaluation in 2009 and 2010. More specifically:

- It is undisputed that Mr. Simmons' salary was not decreased (except for a three percent reduction that the Washington State Legislature imposed on all WMS employees from July 1, 2011 to July 1, 2013). (CP 15, ¶¶ 6-7; CP 23.)⁹

⁹ Mr. Simmons' salary was \$3,051.00 semi-monthly (\$73,224 per year) between April 1, 2008 and June 30, 2008; \$3,142.50 semi-monthly (\$75,420 per year) from July 1, 2008 to August 31, 2008 (because of the raise that Mr. Simmons received on October 12, 2010 retroactive to July 1, 2008); and \$3,205.50 semi-monthly (\$76,932 per year) from September 1, 2008 to June 30, 2011 (because of a two percent cost-of-living adjustment that Mr. Simmons received on September 1, 2008). (CP 15, ¶¶ 6-7; CP 23.) All of DSHS's WMS employees received this two percent cost-of-living adjustment effective September 1, 2008. (CP 15, ¶ 6; CP 22-24.) Mr. Simmons' salary was \$76,932 per year as of September 20, 2013. (CP 15, ¶ 7.)

- It is undisputed that Mr. Simmons was not demoted or adversely transferred. In fact, since October 12, 2010 he has reported not to Mr. Krueger, but directly to Mr. Krueger's superiors, including DSHS's CFO (Mr. Krueger's boss) and the CFO's boss. (CP 992; CP 994.)

- There is no evidence that any gap in Mr. Simmons' performance evaluations affected the conditions or privileges of his employment with DSHS.

- In terms of whether Mr. Simmons was denied benefits or opportunities within or outside DSHS:

- In November 2008, DSHS implemented a department-wide freeze on salary adjustments for growth and development, after which Mr. Simmons was not eligible for such an adjustment. (CP 17-18, ¶¶ 15-16; CP 22-24.) Thus, he could not have been denied a raise because of his missed performance evaluations in 2009 and 2010. Mr. Simmons does not argue that he failed to receive a salary increase in 2008 due to a lack of evaluations; to the contrary, he concedes that he received an evaluation in 2008 and was offered a raise that year, and that he did not get the raise until October 12, 2010 (retroactive to July 1, 2008) only because Mr. Krueger did not process it. (Simmons Brief 7, 11. *See also* CP 1004, 58:8-16.)
- There is no evidence that Mr. Simmons unsuccessfully sought a promotion or applied for another position within or outside DSHS during the period when he reported to Mr. Krueger, or any time thereafter. Since Mr. Simmons did not seek advancement, he cannot have been denied advancement because of missed performance evaluations.¹⁰

¹⁰ Even if Mr. Simmons had unsuccessfully applied for a promotion or another position within or outside DSHS, there is no evidence (other than his own self-serving declaration testimony) that regular performance evaluations are necessary to obtain promotions or other jobs within DSHS or any other department of the Washington State

- Mr. Simmons received a positive evaluation from his then-supervisor, DSHS Chief of Staff Tracy Guerin, on December 13, 2012. (CP 1033-35.) There is no evidence that Mr. Simmons could not, if he wished to, presently use that positive evaluation (and any others he may have since received) to support an application for a promotion or another job within or outside DSHS.

3. There is no evidence that other WMS employees have benefited from more frequent performance evaluations.

Mr. Simmons suggests that several of Mr. Krueger's white WMS direct reports received larger salary increases than Mr. Simmons and ascended to higher positions within the Washington State Government because Mr. Krueger reviewed them more frequently than he reviewed Mr. Simmons. (Simmons Brief 20-21.) The record does not support this conjecture. More specifically:

- Mr. Simmons asserts that “[Kristal] Wiitala receive[d] regular performance reviews and correspondingly regular 5% raises.” (*Id.* at 20.) The undisputed evidence, however, is that during the period when Mr. Krueger supervised both Mr. Simmons and Ms. Wiitala (April 1, 2008 to October 12, 2010), Mr. Simmons and Ms. Wiitala each received one performance evaluation and Mr. Simmons received a three percent discretionary salary increase while Ms. Wiitala received none. (*Id.* at 7, 14; CP 15, ¶ 7; CP 851, ¶ 2; CP 771-72, ¶3; CP 23-24.)

Government. To the contrary, DSHS's former Acting Secretary and former Senior Director of Human Resources both testified below that regular performance evaluations are *not* necessary for career advancement. (CP 1039-40, 68:20-69:1; CP 19, ¶ 18.)

- Mr. Simmons asserts that “[Stephen] 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.” (Simmons Brief 20.) The undisputed evidence, however, is that during the period when Mr. Krueger supervised both Mr. Simmons and Mr. Dotson (July 1, 2009 to October 12, 2010), Mr. Krueger did not review Mr. Dotson at all,¹¹ and Mr. Dotson did not receive any discretionary salary increase. (CP 17, ¶ 15; CP 771-72, ¶ 3; CP 22-23.) As for Mr. Dotson’s “higher position[] of responsibility,” it is with the Health Care Authority, another department within the Washington State Government. (CP 876-77, ¶¶ 12-14.) Mr. Dotson applied for and was offered that position in spring 2013, two-and-a-half years after Mr. Simmons stopped reporting to Mr. Krueger. (*Id.*; CP 27 ¶ 3.) There is no evidence that Mr. Dotson obtained the position because he had more performance evaluations in his file than Mr. Simmons.

¹¹ Mr. Simmons implies in his Brief that Mr. Dotson was reviewed annually. (Simmons Brief 17.) This is not correct; Mr. Simmons disregards the following testimony by Mr. Dotson:

As I testified during my deposition, I received a written performance evaluation from Ms. Wiitala on June 30, 2009. During the period from July 1, 2009 to October 12, 2010, I did not receive a performance evaluation from Mr. Krueger. In fact, I did not receive a performance evaluation at any time in 2010. I testified during my deposition that I received an evaluation in 2010, but upon subsequent review of my files I confirmed that [I] was mistaken and that after my June 30, 2009 evaluation I did not receive another evaluation until October 31, 2011.

(CP 1120-21, ¶ 3.)

- Mr. Simmons contends that “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.” (Simmons Brief 20.) The record does not support these contentions. As of September 20, 2013, Ms. Selene-Hait’s title was Enterprise Business Liability Manager. (CP 16, ¶ 12.) The record is silent regarding her education, qualifications, experience and job responsibilities, as well as the work she performed at DSHS and how well she performed it. The undisputed evidence is that.

- As noted above, from July 20, 2008 to October 2, 2010, when Mr. Krueger supervised both Mr. Simmons and Ms. Selene-Hait as WMS employees (Ms. Selene-Hait was previously a civil service employee), Mr. Simmons and Ms. Selene-Hait each received one performance evaluation (Simmons Brief 7; CP 772-73, ¶ 6);
- Ms. Selene-Hait received a 7.5 percent raise effective January 5, 2011 because she secured a job offer from another State of Washington department (not another agency within DSHS) and DSHS raised her salary in order to retain her (CP 23; CP 17, ¶ 15);¹²
- DSHS increased Ms. Selene-Hait’s salary *over Mr. Krueger’s objection* (CP 772, ¶ 3); and
- Mr. Simmons, unlike Ms. Selene-Hait and Mr. Dotson, did not apply for another job or secure a job offer.

It is also undisputed that DSHS paid Mr. Simmons more than Ms. Selene-Hait. (CP 16, ¶ 12; CP 23.) There is no evidence that Ms. Selene-Hait

¹² Salary adjustments for retention purposes were a recognized exception to the salary freeze that was in place at the time. (CP 17, ¶ 15.)

received a job offer or a salary increase because she had more performance evaluations in her file than Mr. Simmons.

- Mr. Simmons asserts that “[Mark] Greene was hired directly into ERMO making more money than me.” (Simmons Brief 20.) This is not relevant to any of Mr. Simmons’ arguments on appeal. Moreover, the undisputed evidence is that Mr. Krueger never gave Mr. Greene a performance evaluation or a raise, and that Mr. Greene retired effective June 30, 2009. (CP 772, ¶ 6; CP 17, ¶ 15; CP 865, ¶ 2.)

- Mr. Simmons asserts that “[Jerry] Furey received a 5% raise on August 1, 2008.” (Simmons Brief 20.) The undisputed evidence, however, is that Mr. Krueger was not Mr. Furey’s supervisor in August 2008. (CP 772, ¶ 3.) And in any event, there is no evidence regarding why Mr. Furey got a raise, or that DSHS increased his salary because he had more performance evaluations in his file than Mr. Simmons.

- Mr. Simmons openly speculates that “[Sherri] Jenkins has *presumably* been provided regular reviews and received a 5% raise that was authorized by Mr. Krueger.” (Simmons Brief 20 (emphasis added).) The record does not support this guesswork. As of September 20, 2013, Ms. Jenkins’ title was Administrative Program Manager. (CP 23.) There is no evidence concerning when she may have received performance evaluations or from whom, but there is evidence explaining why she got a

raise. The Financial Services Administration (“FSA”) was reorganized in early 2013. (CP 772, ¶ 4.) Before the reorganization, Ms. Jenkins managed discovery and public disclosure for FSA when it included Budget, Enterprise Services and ERMO. (*Id.*) The reorganization merged the Operations Support and Service Division, Consolidated Business Services, Consolidated Maintenance Operations, and Regional Business Centers into FSA. (*Id.*) The merger significantly increased Ms. Jenkins’ responsibilities in terms of locating, redacting, and producing records for a much larger organization. (*Id.*) Reflecting that increase, her position was rebanded from a WMS Band I to a WMS Band II, and she received a five percent raise in May 2013. (*Id.*) The raise brought her compensation into line with the salaries earned by other public disclosure/discovery coordinators in other administrations within DSHS. (*Id.*) It is undisputed that DSHS paid Mr. Simmons more than Ms. Jenkins. (CP 23.) The record contains no other information regarding Ms. Jenkins’ education, qualifications, experience or job responsibilities, or the work she has performed for DSHS or how well she has performed it.

- As for Kevin Doty, the only WMS employee of DSHS to whom Mr. Krueger gave more performance evaluations (two, CP 772, ¶ 6) than he gave Mr. Simmons (one) between April 1, 2008 and October 12, 2010, the undisputed evidence is that Mr. Doty was paid a lower salary

than Mr. Simmons, did not receive a raise, and has not ascended to a higher position within or outside DSHS. (CP 16-17, ¶¶ 12, 15; CP 22-23.)

4. There is no evidence that Mr. Krueger treated Mr. Simmons differently than any similarly-situated DSHS employee with regard to salary increases.

As discussed above, notwithstanding Mr. Simmons' unsupported argument (at pages 20-21 of his brief) regarding the salary increases and other benefits supposedly earned by other WMS employees since April 1, 2008, the undisputed record establishes that since Mr. Krueger took over as CRO only Mr. Simmons and two other WMS employees reporting to Mr. Krueger – Ms. Selene-Hait and Ms. Jenkins – have received discretionary raises. (CP 15, ¶ 7; CP 23; CP 17, ¶ 15; CP 771-72, ¶¶ 3-4.) Mr. Simmons argues that Mr. Krueger treated him differently than Ms. Selene-Hait and Ms. Jenkins with regard to salary increases (Simmons Brief 21-25), but as discussed directly above and at pages 39-47, Mr. Simmons was not similarly situated to Ms. Selene-Hait or Ms. Jenkins, and each employee received his or her salary increase for a unique reason.

IV. ARGUMENT

A. Mr. Simmons Is Only Challenging Limited Aspects of the Trial Court's Summary Judgment Ruling.

In the trial court, Mr. Simmons asserted claims for disparate-treatment discrimination, disparate-impact discrimination, hostile work environment and retaliation, all purportedly in violation of the Washington

Law Against Discrimination (“WLAD”), RCW ch. 49.60. (CP 3-12; CP 746-770; CP 126-152.) The trial court granted summary judgment on Mr. Simmons’ disparate-treatment, disparate-impact and hostile-work-environment claims (Transcript of November 15, 2013 Hearing 59:13-73:8; CP 780-83), after which Mr. Simmons voluntarily nonsuited his retaliation claim (CP 775-77) and commenced this appeal.¹³ Mr. Simmons alleged in the trial court that DSHS had treated him differently than certain white employees in a number of ways. (CP 746-70.) The trial court dismissed Mr. Simmons’ disparate-treatment claim in its entirety. (Transcript of November 15, 2013 Hearing 72:1-73:8; CP 780-83.)

On appeal, Mr. Simmons challenges only two aspects of the trial court’s entry of summary judgment on most of his claims. He does not challenge the trial court’s dismissal of his claims for disparate-impact discrimination or hostile work environment. He does not challenge the trial court’s dismissal of his disparate-treatment claim based on, for example, the amount of his base salary or the size of his cubicle or the fact that he was asked to clean up his work space. He does not argue that he

¹³ On the same day that he nonsuited his claim for retaliation under state law and appealed the trial court’s summary judgment order, Mr. Simmons filed a new lawsuit in the United States District Court for the Western District of Washington asserting causes of action under both federal and state law arising from the same facts alleged in this case. *Simmons v. Arnold-Williams, et al.*, Case No. 3:13-cv-06023-BHS. Mr. Simmons’ apparent strategic purpose in jumping to federal court was to resurrect the right to trial by jury that he waived in state court by neglecting to file a timely jury demand. (CP 793-94; CP 803-16.) The U.S. District Court recently dismissed, under Fed. R. Civ. P. 12(b)(6), most of Mr. Simmons’ claims in his federal lawsuit. *Simmons v. Arnold-Williams*, 2014 WL 2198223 (W.D. Wash. May 27, 2014).

should be allowed to recover for alleged disparate treatment that supposedly occurred before he began reporting to Kevin Krueger on April 1, 2008. His only arguments on appeal are that the trial court erred in dismissing his disparate-treatment claim to the extent it was based on (1) the number of performance evaluations that Mr. Krueger gave him relative to Mr. Krueger's white WMS direct reports, and (2) the fact that Mr. Krueger authorized a three percent salary increase for Mr. Simmons but supposedly authorized larger increases for certain white WMS employees. There is nothing more to this appeal. As we discuss below, Mr. Simmons' limited arguments are entirely without merit because he has neither made out a prima facie case nor demonstrated that DSHS's legitimate, non-discriminatory explanations for its actions are pretext for discrimination.

B. Standard of Review.

This Court reviews de novo the trial court's order granting summary judgment for DSHS on Mr. Simmons' disparate-treatment claim. *Fulton v. State, Dep't of Soc. & Health Servs.*, 169 Wn. App. 137, 147, 279 P.3d 500 (2012). It should affirm "if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and . . . [DSHS] is entitled to judgment as a matter of law." *Id. Accord* CR 56(c). The Court may affirm "on any grounds the record adequately supports." *Fulton*, 169 Wn. App. at 147.

C. Summary Judgment and the McDonnell Douglas Framework.

1. Mr. Simmons' initial burden: establishing a prima facie case.

Mr. Simmons has no direct evidence that DSHS discriminated against him based on his race. Where such evidence is lacking, Washington courts follow the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973). *Kirby v. City of Tacoma*, 124 Wn. App. 454, (2004). Although this framework allows Mr. Simmons to attempt to prove his case through circumstantial evidence, the evidence on which he relies must be “specific and substantial” to overcome DSHS’s motion for summary judgment. *Coghlan v. American Seafoods Co. LLC*, 413 F.3d 1090, 1095 (9th Cir. 2005) (discussing claims under Title VII and the WLAD).

Under the *McDonnell Douglas* framework, Mr. Simmons must first establish a prima facie case of discrimination. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006); *Fulton*, 169 Wn. App. at 148; *Clarke v. State Attorney General's Office*, 133 Wn. App. 767, 788, 138 P.3d 144 (2006). To do this he must show that he is a member of a protected class, was doing satisfactory work, was treated differently than a similarly-situated comparator employee who is not in the protected class, and suffered an adverse

employment action. *Milligan v. Thompson*, 110 Wn. App. 628, 636, 42 P.3d 418 (2002). See also *Brownfield v. City of Yakima*, 178 Wn. App. 850, 873, 316 P.3d 520 (2014); *Kirby*, 124 Wn. App. at 468. He must “establish *specific and material facts* to support each element of his . . . prima facie case.” *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). *Accord Fulton*, 169 Wn. App. at 147; *Domingo v. Boeing Employees’ Credit Union*, 124 Wn. App. 71, 77-78, 98 P.3d 1222 (2004) This requires him to do more than show “some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed.2d 538 (1986). Conclusory, speculative testimony in affidavits is insufficient. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988) (plaintiff’s statement “that his job performance was not substandard” was insufficient to raise issue of material fact); *Fulton*, 169 Wn. App. at 147 (to survive summary judgment, “an employee ‘must do more than express an opinion or make conclusory statements’”) (*quoting Hiatt*, 120 Wn.2d at 65); *Thornhill Publ’g Co., Inc. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

If Mr. Simmons fails to establish each element his prima facie case, DSHS is entitled to summary judgment. *Fulton*, 169 Wn. App. at 148; *Clarke*, 133 Wn. App. at 788. Washington courts have not hesitated

to grant and affirm summary judgment in employment discrimination cases where the plaintiff does not meet his or her initial burden. *See, e.g., Domingo*, 124 Wn. App. at 80-81 (affirming summary judgment where plaintiff presented no evidence that she was treated differently than similarly-situated employee outside her protected class); *Clarke*, 133 Wn. App. at 789 (affirming summary judgment where plaintiff presented no evidence of disparate treatment); *Milligan*, 110 Wn. App. at 637-38 (affirming summary judgment where plaintiff established only “‘a weak issue of fact’ that DSHS discriminated against him”); *Kuyper v. State*, 79 Wn. App. 732, 739, 904 P.2d 793 (1995) (where plaintiff produces “no evidence from which a reasonable jury could infer that an employer’s decision was motivated by an intent to discriminate, summary judgment is entirely proper”).

2. DSHS’s burden: articulating a legitimate, non-discriminatory explanation.

If Mr. Simmons can meet his initial burden, DSHS must then “produce admissible evidence of a legitimate, nondiscriminatory explanation for the adverse employment action sufficient to raise a genuine issue of fact as to whether [DSHS] discriminated against [Mr. Simmons].” *Hill*, 144 Wn.2d at 181 (citation and internal quotation marks omitted). *Accord Fulton*, 169 Wn. App. at 149; *Milligan*, 110 Wn. App. at 636-37 (citations and internal quotation marks omitted). DSHS’s burden

“is not one of persuasion, but rather a burden of production.” *Grimwood*, 110 Wn.2d at 364. Determination of whether DSHS has met this burden “can involve no credibility assessment.” *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 509, 113 S. Ct. 2742, 125 L. Ed.2d 407 (1993). *Accord Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138, 1147 (9th Cir. 2005). DSHS need only “articulate reasons sufficient to meet the prima facie case.” *Grimwood*, 110 Wn.2d at 364.

3. Mr. Simmons’ ultimate burden: establishing pretext.

Once DSHS fulfills its burden of production, to create a genuine issue of material fact Mr. Simmons must show that DSHS’s articulated explanation is merely pretext for a discriminatory purpose. *Hill*, 144 Wn.2d at 182; *Grimwood*, 110 Wn.2d at 364; *Milligan*, 110 Wn. App. at 637. To demonstrate pretext, Mr. Simmons “must show that [DSHS’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*, 169 Wn. App. at 161.

DSHS is entitled to summary judgment if the record conclusively reveals a nondiscriminatory reason for DSHS’s actions, *Fulton*, 169 Wn. App. at 161-62; or if Mr. Simmons ““created only a weak issue of fact as

to whether [DSHS's] reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred," *id.* (quoting *Hill*, 144 Wn.2d at 184-85); or "if no rational trier of fact could conclude the action was discriminatory," *Domingo*, 124 Wn. App. at 78. *See also Milligan*, 110 Wn. App. at 637.

D. The Trial Court Properly Granted Summary Judgment on Mr. Simmons' Disparate-Treatment Claims Based on Performance Evaluations and Salary Increases Because Mr. Simmons Did Not Establish a Prima Facie Case or Demonstrate Pretext.

1. Performance Evaluations.

a. Mr. Simmons impermissibly argues for the first time that he identified comparators sufficiently similar to support a disparate-treatment claim based on performance evaluations.

Mr. Simmons argues that for the purpose of his disparate-treatment discrimination claim based on performance evaluations, a similarly-situated comparator exists. (Simmons Brief 27-29.) His reasoning is unclear, but his position may be that because there is an expectation that all WMS employees be reviewed every year, regardless of their education, qualifications, work experience, job performance or other considerations, those considerations are immaterial to the comparator analysis. The only WMS employee whom Mr. Krueger reviewed more frequently than Mr. Simmons from April 1, 2008 to October 12, 2010 is Kevin Doty; presumably Mr. Doty is Mr. Simmons' alleged comparator. Mr. Simmons did not make this argument in the trial court, and this Court need not

consider it. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992); *Bankston v. Pierce County*, 174 Wn. App. 932, 941-42, 301 P.3d 495 (2013). In any event, even if Mr. Simmons had made the argument in the trial court, as we discuss below Mr. Simmons' disparate-treatment claim based on performance evaluations fails as a matter of law for two other reasons.

b. Mr. Simmons' missed performance evaluations did not constitute an adverse employment action.

“[D]iscrimination requires an actual adverse employment action, such as a demotion or adverse transfer. . . .” *Kirby*, 124 Wn. App. at 465 (citation and internal quotation marks omitted). The adverse employment action must involve “more than an inconvenience or alteration of job responsibilities.” *Tyner v. State*, 137 Wn. App. 545, 564-65, 154 P.3d 920 (2007) (quoting *Kirby*, 124 Wn. App. at 465) (no adverse employment action where employee given alternate assignment was never subject to loss in pay or benefits). See also *McMillan v. Abbott Labs., Inc.*, 2013 WL 1003136, *6 (W.D. Wash. Mar. 13, 2013). It must have a “tangible impact” on the terms and conditions of the plaintiff’s employment. *Kirby*, 124 Wn. App. at 465; *Raines v. Seattle Sch. Dist. No. 1*, 2013 WL 496204, at *3 (W.D. Wash. Feb. 7, 2013).

Federal courts agree, requiring proof of an adverse action that “materially affects the compensation, conditions, or privileges of . . .

employment.”” *McMillan*, 2013 WL 1003136, at *6 (quoting *Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1126 (9th Cir. 2000)).¹⁴ As federal courts have cautioned, “not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that an employee did not like would form the basis of a discrimination suit.” *Porter v. City of Chicago*, 700 F.3d 944, 954 (7th Cir. 2012) (citation and internal quotation marks omitted).

If Mr. Simmons cannot show that he suffered an adverse employment action, then he cannot make out a prima facie case of disparate-treatment discrimination and summary judgment is appropriate. *Tyner*, 137 Wn. App. at 564-65; *Kirby*, 124 Wn. App. at 464-65; *McMillan*, 2013 WL 1003136 at *6; *Raines*, 2013 WL 496204, at *3.

As a matter of law, an employer’s failure to give performance evaluations for two years is not, in and of itself, an adverse employment action. In *Chen v. Salt River Project Agr. Improvement and Power Dist.*, 75 Fed. Appx. 678 (9th Cir. 2003), a retaliation case brought under Title VII, the Ninth Circuit held that “failing to timely issue performance evaluations is not an adverse employment action,” and thus affirmed the district court’s determination on summary judgment that the plaintiff had

¹⁴ Washington’s anti-discrimination laws substantially parallel federal Title VII, so Washington courts look to federal decisions for guidance. *Washington v. Boeing Co.*, 105 Wn. App. 1, 8, 19 P.3d 1041 (2000) (citing *Xieng v. Peoples Nat’l Bank*, 120 Wn.2d 512, 518, 844 P.2d 389 (1993); *Lewis v. Lockheed Shipbuilding and Const. Co.*, 36 Wn. App. 607, 613, 676 P.2d 545 (1984)).

not established a prima facie case. *See also Higgins v. Gonzalez*, 481 F.3d 578, 586-87 (8th Cir. 2007), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031, 1043 (8th Cir. 2011) (absence of mid-year evaluation was not adverse employment action); *Wojciechowski v. National Oilwell Varco, L.P.*, 763 F. Supp.2d 832, 857-58 (S.D. Tex. 2011) (failure to give performance evaluation is not itself adverse employment action that will support disparate-treatment claim); *Watkins v. Harvey*, 2007 WL 1861024, at *1 (D. Md. June 19, 2007) (“[T]he failure to provide a performance evaluation does not itself constitute an adverse employment action.”); *Boykin v. England*, 2003 WL 21788953, at *6-7 (D. D.C. July 16, 2003) (granting summary judgment on Title VII discrimination claim based on alleged withholding of performance evaluation where plaintiff did not demonstrate that evaluation would have led to monetary awards); *Gonzalez v. Florida Dep’t of Highway Safety and Motor Vehicles, Div. of Florida Highway Patrol*, 237 F. Supp.2d 1338, 1357-58 (S.D. Fla. 2002) (granting summary judgment on Title VII discrimination claim based on removal of commendation letters from plaintiff’s personnel file where plaintiff presented no evidence that absence of letters would prevent him from materially improving terms or conditions of his employment, especially since file still contained “a number of commendations . . . and a very positive evaluation”). Under

these authorities, if Mr. Simmons' claim is that he suffered an adverse employment action just because Mr. Krueger did not evaluate him in 2009 or 2010, it fails as a matter of law.

If Mr. Simmons' claim is predicated on the notion that he suffered some sort of harm resulting from Mr. Krueger's failure to evaluate him in 2009 or 2010, the claim fails as a matter of law under the authorities cited above because the record contains no evidence of any such harm: It is undisputed that Mr. Simmons' salary was not reduced (except for the cutback from July 1, 2011 to July 1, 2012 that affected all WMS employees). (CP 15, ¶¶ 6-7; CP 23.) He was not demoted or adversely transferred. (CP 992; CP 994.) There is no evidence of any change in the conditions or privileges of his employment with DSHS. After November 2008, neither he nor any other WMS employee was eligible for a raise for growth and development, and thus he could not have been denied a raise because of performance evaluations missed in 2009 or 2010. (CP 17-18, ¶¶ 15-16; CP 22-24.) There is no evidence that he unsuccessfully sought a promotion or applied for another position within or outside DSHS, and therefore he cannot have been denied advancement. And he received a positive evaluation on December 13, 2012, and could use that review today to support an application for a promotion or a different job. (CP 1033-35.) In short, there is no evidence that Mr. Simmons is in any way

worse off than he would have been if he had received evaluations in 2009 and 2010.

But demonstrating harm is not something that Mr. Simmons even attempts to do. Instead, he simply alleges that since April 1, 2008 white WMS employees within ERMO have received salary increases and ascended to higher positions within the Washington State Government while he has not, and imagines that this is because Mr. Krueger gave them more performance evaluations than he gave Mr. Simmons. (Simmons Brief 20-21.) Such speculation would be inadequate to survive summary judgment even if it were true. But it is demonstrably *not* true. As discussed above at pages 14-19:

- Mr. Krueger did *not* review Mr. Simmons less frequently than other WMS employees – except Mr. Doty, who earns less than Mr. Simmons, has not received a raise since before 2008, and has not been promoted. (Simmons Brief 7; CP 772-73, ¶ 6; CP 851, ¶ 2; CP 1120-21, ¶¶ 2-3; CP 16, ¶ 12; CP 22-23.)

- The few salary increases awarded since April 1, 2008 to WMS employees reporting to Mr. Krueger were given for reasons having nothing to do with the number of evaluations in their files: Mr. Simmons received a raise in October 2010 (retroactive to July 1, 2008) “in consideration of internal salary relationships.” (CP 15, ¶ 7; CP 196;

Simmons Brief 8; CP 1162-63, 57:4-58:7.) DSHS gave Ms. Selene-Hait a raise in January 2011 (over Mr. Krueger's objection) in order to retain her after she received a competing job offer. (CP 23; CP 17, ¶ 15; CP 772, ¶ 3.) And Ms. Jenkins received a raise in May 2013 in recognition of a substantial increase in her job responsibilities and the rebanding of her position, and to bring her salary into line with those of comparable employees elsewhere within DSHS. (CP 772, ¶ 4.)

- There is no evidence that the number of evaluations in Ms. Selene-Hait and Mr. Dotson's employee files had anything to do with their receiving job offers from other State of Washington departments.

In sum, Mr. Simmons' suggestion that others have succeeded where he has not because (he says) they received more evaluations than he did (Simmons Brief 20-21) is unsupported – indeed, demonstrably erroneous – speculation that creates no genuine issue of material fact and cannot justify denial of summary judgment for DSHS. *Grimwood*, 110 Wn.2d at 360; *Fulton*, 169 Wn. App. at 147; *Thornhill Publ'g Co.*, 594 F.2d at 738. To be adverse and actionable under the WLAD, an employment action must have had some “tangible impact” on the terms and conditions of Mr. Simmons' employment. *Kirby*, 124 Wn. App. at 465. There is no evidence whatsoever that Mr. Krueger's failure to give

Mr. Simmons a written performance evaluation in 2009 or 2010 had any such impact.¹⁵

For all the foregoing reasons and under the numerous authorities cited above, the gap in Mr. Simmons' performance evaluations did not constitute an adverse employment action, Mr. Simmons has failed to establish a prima facie case of disparate-treatment discrimination based on performance evaluations, and this Court should affirm the trial court's grant of summary judgment for DSHS on that claim.

c. There is no evidence that DSHS's legitimate, non-discriminatory explanations for Mr. Simmons' missed performance evaluations are pretext for discrimination.

Mr. Simmons has not established a prima facie case of disparate-treatment discrimination based on performance evaluations. But even if he had, his claim would fail because DSHS has provided a legitimate, non-discriminatory explanation for the gap in Mr. Simmons' evaluations, and Mr. Simmons' has no evidence that this explanation is pretextual.

¹⁵ To the extent Mr. Simmons is implying that he suffered an adverse employment action because the performance evaluations missed in 2009 and 2010 will limit his opportunities for advancement, it suffices to note that such a contention would be purely speculative, and subjective speculation about the impacts of an employer's actions on a plaintiff's career prospects is inadequate to avoid summary judgment. *E.g., O'Neal v. City of Chicago*, 392 F.3d 909, 912 (7th Cir. 2004) (affirming summary judgment on gender-discrimination claim under Title VII where plaintiff offered only her own speculation and presented no objective evidence that transfer impaired her opportunities for promotion); *Shelton v. University of Med. & Dentistry of New Jersey*, 223 F.3d 220, 227 (3d Cir. 2000) (affirming summary judgment on Title VII claim based on lateral transfer where plaintiff "offered only the generic speculation that lateral transfers may result in 'long-term economic consequences as to the employee's career prospects'").

Mr. Krueger testified at deposition that he did not formally evaluate Mr. Simmons after spring 2008 to avoid conflict: Mr. Simmons' loud and volatile behavior during his initial review made Mr. Krueger leery of trying again. (CP 999-1000, 40:3-41:14.)¹⁶ He also testified that he did not have in place a system to remind him when to conduct reviews. (CP 999, 40:14-19.) And he testified that his failure to give Mr. Simmons a performance evaluation after spring 2008 "had nothing to do with him being African American." (CP 999-1000, 40:24-41:2.) This evidence is plainly sufficient to meet DSHS's modest burden of production under *McDonnell Douglas*. *Grimwood*, 110 Wn.2d at 364 (employer meets its burden of production by merely "articulat[ing] reasons sufficient to meet the prima facie case"); *St. Mary's Honor Ctr.*, 509 U.S. at 509 (determination of whether employer has met burden of production involves no credibility assessment); *Lindsey*, 447 F.3d at 1147 (same).

Mr. Simmons argues that DSHS's explanation is pretextual (and Mr. Krueger must therefore have been motivated by racial animus) because "Mr. Krueger's 'calendar' worked to remind him to review the white employees, but not Mr. Simmons," and "Microsoft Outlook does not

¹⁶ It is not at all unusual for managers like Mr. Krueger to prioritize workplace harmony over strict adherence to performance evaluation procedures. *See, e.g.*, JOE BAKER, JR., CAUSES OF FAILURE IN PERFORMANCE APPRAISAL AND SUPERVISION 7 (1988) ("[P]erformance appraisal . . . is . . . capable of stirring strong feelings and conflict in the work place. . . . Because of this potential, a company's appraisal system is often allowed to function ineffectively, perhaps indefinitely, in order to avoid open conflict.")

have a ‘*black people performance reviews off*’ function.” (Simmons Brief 18.)¹⁷ As discussed above, however, the undisputed evidence does not support these contentions. Rather, it confirms that with only one exception (Mr. Doty, who is paid less than Mr. Simmons and has not received a salary increase or promotion since before 2008), Mr. Krueger

¹⁷ Mr. Simmons also argues that the trial court should have relieved him of the burden of proving his case by drawing an inference that Mr. Krueger intended to discriminate against him by losing his 2008 performance evaluation. (Simmons Brief 18-19, 29-30.) Mr. Simmons did not make that argument below. In the trial court, Mr. Simmons moved for a default judgment on liability on all of his claims because Mr. Krueger had lost his 2008 performance evaluation, the substantive contents of which were (and are) undisputed. (CP 71, 15:14-16.) In the alternative, Mr. Simmons asked the trial court to draw negative inferences that “Mr. Simmons qualified for the same raise [as Ms. Jenkins] for the same reasons and wasn’t given that raise,” and that “there was a deliberate or retaliatory motive behind this review coming up missing.” (Transcript of November 15, 2013 Hearing 17:14-16.) Mr. Simmons did not argue below, as he does now, that the trial court should draw from the misplaced 2008 evaluation an adverse inference that Mr. Krueger had acted with racial animus in failing to review Mr. Simmons in 2009 and 2010. This Court should therefore not consider Mr. Simmons’ new argument. *Hansen*, 118 Wn.2d at 485; *Bankston*, 174 Wn. App. at 941.

In any event, the argument makes no sense. DSHS vigorously opposed Mr. Simmons’ motion for default judgment. (CP 1093-1109.) But DSHS also stated that it did not object to the trial court drawing an inference that Mr. Simmons’ 2008 performance evaluation was positive, which DSHS has always acknowledged it was. (CP 789, ¶ 1; CP 1094, 2:21-25; CP 1102, 10:11-24; CP 1104-05, 12:15-13:6; CP 1107, 15:15-19.) At the hearing on the motion, the trial court denied Mr. Simmons’ request for a default judgment, but indicated that it was “prepared to draw an adverse inference from the absence of the document.” (Transcript of November 15, 2013 Hearing 79:15-16.) The trial court reserved until trial any determination regarding culpability or “the practical application of the adverse inference” – including whether the inference would simply establish a fact that DSHS did not dispute. (*Id.* at 79:21-80:4.) Even assuming the trial court made a finding of spoliation against DSHS (which is not apparent from the court’s comments during the hearing), spoliation is a term of art simply meaning “the intentional destruction of evidence.” *Henderson v. Tyrrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996) (quoting BLACK’S LAW DICTIONARY 1401 (6th Ed. 1990)). It does not mean “the destruction of evidence with discriminatory motive.” There would be no conflict, as Mr. Simmons suggests in his brief at 18-19 and 29-30, between a finding of spoliation of Mr. Simmons’ 2008 performance evaluation and the conclusion that Mr. Simmons failed as a matter of law to prove his discrimination claim. This Court should flatly reject Mr. Simmons’ attempt to leverage the court’s provisional statements made during the hearing on Mr. Simmons’ motion for default judgment into reversal of the trial court’s well-supported summary judgment rulings.

did not give *any* of his WMS direct reports more than one performance evaluation from April 1, 2008 to October 12, 2010. (CP 772-73, ¶ 6; CP 1120-21, ¶ 3.)

Mr. Simmons' argument also fails for two other related reasons. First, it is undisputed that promptly upon taking over as CRO on April 1, 2008, Mr. Krueger completed a written performance review for, and offered a salary increase to, one person and one person alone: Mr. Simmons. (Simmons Brief 7; CP 771-73, ¶¶ 3, 6.) Mr. Simmons did not receive his raise at that time only because he rejected it. (Simmons Brief 7, 11; CP 1004, 58:8-16.) It is also undisputed that Mr. Krueger did not review any of his other WMS direct reports at that time, and he did not request a raise for any of his other WMS direct reports until May 2013, three-and-a-half years after he stopped supervising Mr. Simmons. (CP 772-73, ¶ 6.)

There can be no reasonable inference that racial animus motivated any of Mr. Krueger's actions toward Mr. Simmons following the spring 2008 evaluation meeting. To the contrary, the facts compel the opposite inference, as in wrongful termination cases in which the same actor hires and then promptly fires the plaintiff. *E.g., Hill*, 144 Wn.2d at 189-90. In such cases "there is a strong inference that he or she was *not* discharged because of any attribute the decisionmakers were aware of at the time of

hiring”; and the plaintiff must “answer an obvious question: if the employer is opposed to employing persons with a certain attribute, why would the employer have hired such a person in the first place?” (*Id.*) If no adequate answer can be gleaned from the record, summary judgment is appropriate. (*Id.* at 190.) Similarly here, Mr. Simmons must answer an obvious question: If Mr. Krueger was opposed to giving reviews and raises to African Americans, why did he select Mr. Simmons alone for a review and a raise on assuming his new position? Mr. Simmons cannot answer this question.

Second, it is well-established that where the defendant treated in the same manner the plaintiff and other similarly-situated employees who did not share the plaintiff’s protected status, the plaintiff cannot show pretext. Put another way, at the pretext stage of the *McDonnell Douglas* analysis, a plaintiff cannot cherry-pick his comparators. For example, in *Fulton*, 169 Wn. App. at 162-63, a gender-discrimination case, the Court of Appeals held that the plaintiff could not show pretext where the defendant had not considered or hired the plaintiff and also had not considered or hired similarly-situated male employees. *See also Snead v. Metropolitan Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1094 (9th Cir. 2001) (in disability-discrimination case arising out of elimination of plaintiff’s position as part of reduction in force, plaintiff’s showing of pretext was

negated where similarly-situated white employee's position was also eliminated); *Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639, 646-47 (3d Cir. 1998) (to show pretext, plaintiff "can not pick and choose a person she perceives is a valid comparator who was allegedly treated more favorably, and completely ignore a significant group of comparators who were treated equally or less favorably than she"); *Jackson v. Foodland Super Market, Ltd.*, 958 F. Supp.2d 1033, 1145-46 (D. Haw. 2013) ("Evidence that a similarly situated employee was treated in a similar manner as a plaintiff negates a showing of pretext."); *Wade v. Solis*, 2009 WL 1186638, at *10 (N.D. Cal. May 4, 2009) ("The fact that others outside of [the plaintiff's] protected classes were treated similarly defeats the presumption of discrimination.").

The undisputed evidence establishes that Mr. Krueger did not regularly review any of the WMS employees who reported to him and whom Mr. Simmons has identified as comparators for the purpose of his disparate-treatment claim based on performance evaluations. (CP 772-73, ¶ 6; CP 1120-21, ¶ 3.) Between April 1, 2008 and October 12, 2010, Mr. Simmons thus received as many reviews from Mr. Krueger (one) as WMS employees and alleged comparators Nadine Selene-Hait and Kristal Wiitala, one *more* review from Mr. Krueger than Stephen Dotson and Mark Greene, and one fewer review than Mr. Doty, who earns less than

Mr. Simmons. (*Id.*) Because DSHS did not treat Mr. Simmons differently than the other employees he claims are similarly situated, Mr. Simmons cannot show pretext.

In sum, on this evidence and for the reasons stated above, no reasonable trier of fact could conclude that Mr. Krueger did not review Mr. Simmons in 2009 or 2010 because of Mr. Simmons' race. The trial court thus properly granted summary judgment for DSHS on Mr. Simmons' disparate-treatment discrimination claim based on performance evaluations, and this Court should affirm the trial court's ruling.

2. Salary Increases.

a. There is no evidence that Mr. Simmons was treated differently than any other similarly-situated employee in terms of salary increases.

Mr. Simmons argues that he was discriminated against because he received a three percent raise on October 12, 2010 retroactive to July 1, 2008, but subsequently Nadine-Selene-Hait received a 7.5 percent raise and Sherri Jenkins received a five percent raise. (Simmons Brief 21-25.) He maintains that he, Ms. Selene-Hait and Ms. Jenkins were similarly situated with regard to salary increases solely because they were "subject to the same pay raise standards under Mr. Krueger." (*Id.* at 28.) He does not argue that he should be allowed to continue to pursue any other claims against DSHS based on salary increases.

To make out a prima facie case of disparate-treatment discrimination based on salary increases, Mr. Simmons must show that he was treated less favorably than a similarly-situated employee outside his protected class. *Domingo*, 124 Wn. App. at 81; *Washington*, 105 Wn. App. at 13-14; *Ajayi v. Aramark Bus. Servs., Inc.*, 336 F.3d 520, 531-32 (7th Cir. 2003); *Gettings v. Building Laborers Local 310 Fringe Benefits Fund*, 349 F.3d 300, 305-06 (6th Cir. 2003); *McMillan*, 2013 WL 1003136, at *7. He must also show that he and the other employee were doing substantially the same work. *Domingo*, 124 Wn. App. at 81; *Washington*, 105 Wn. App. at 13; *Richardson v. Image Sensing Sys., Inc.*, 2011 WL 5588721, at *4 (W.D. Wash. Nov. 16, 2011); *Pineda v. City of Seattle*, 2006 WL 3386865, at *4 (W.D. Wash. Nov. 20, 2006). The comparator analysis under the WLAD is stringent: to prevent courts from second-guessing reasonable employment decisions, “the comparator must be nearly identical to the plaintiff.” *McMillan*, 2013 WL 1003136, at *7 (citation and internal quotation marks omitted).

Federal courts similarly hold that to make out a prima facie case of disparate-treatment discrimination under Title VII, the plaintiff must identify a comparator who is “directly comparable” to the plaintiff “in all material respects.” *Ajayi*, 336 F.3d at 531-32 (citation and internal quotation marks omitted). Relevant factors can include whether the

plaintiff and purported comparator had the same title; had similar job descriptions; were subject to the same employment standards; had the same supervisor; and had comparable experience, education, and other qualifications. *See id.* at 532; *Gettings*, 349 F.3d at 306; *McMillan*, 2013 WL 1003136, at *7.¹⁸

When the plaintiff in a disparate-treatment case fails to identify a valid comparator, summary judgment is appropriate. *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 978-79 (7th Cir. 2004) (where plaintiff's comparators had much more experience and qualifications than plaintiff, summary judgment was appropriate because comparators and plaintiff were not "directly comparable in all material respects"); *Gettings*, 349 F.3d at 306 (affirming summary judgment on disparate-treatment claim where plaintiff and purported comparators "each held different jobs, with different qualification requirements and duties, and thus had different compensation packages"); *Ajayi*, 336 F.3d at 531-32 (putative comparators were not similarly situated because they had different job descriptions and levels of experience than plaintiff); *LaCroix v. Sears, Roebuck, & Co.*, 240 F.3d 688, 693-94 (8th Cir. 2001) (putative comparator was not similarly situated because he had different position than plaintiff and was not in plaintiff's department); *Davis v. Alexander*, 978 F.2d 714, at *2 (9th Cir.

¹⁸ Again, Washington courts may look to federal Title VII decisions in analyzing claims under the WLAD. (*See supra* page 28, note 14.)

1992) (affirming summary judgment where “Davis could not show that he was singled out and treated less favorably than others similarly situated on account of race because Davis’ position as Tort and Sundry Claims representative was unique and dissimilar from all other jobs within his department”).

More specifically, it is well-established that to make out a prima facie case of discrimination based on allegedly-disparate salary increases, the plaintiff must show that as compared to an employee outside his protected class who received a larger raise than he did, he was similarly situated in all respects that were material to the employer’s salary decisions. For example, in *Hill v. Emory Univ.*, 346 Fed. Appx. 390 (11th Cir. 2009), the Eleventh Circuit held that two purported comparators were not similarly situated to the plaintiff because their jobs “involved different responsibilities,” and unlike the plaintiff they had “received salary increases when they presented their employer with evidence of a competing offer of employment.” *Id.* at 395. *See also Drake-Sims v. Burlington Coat Factory Warehouse of Alabama, Inc.*, 330 Fed. Appx. 795, 801, 803 (11th Cir. 2009) (affirming district court’s grant of summary judgment on disparate-pay claim for failure to establish prima facie case where alleged comparators had negotiated higher salaries as condition of leaving previous employers and one alleged comparator “had also

leveraged competing offers from other companies to secure further salary increases”); *Lockridge v. University of Maine Sys.*, 597 F.3d 464, 471 (1st Cir. 2010) (plaintiff professor who was denied salary increase on ground of unsatisfactory scholarship while other professor was given one despite having published less could not show pretext where she was on scholarly track and other professor was on non-scholarly track, and professors on scholarly track were expected to produce more scholarship than professors on non-scholarly track); *Lusk v. Senior Servs.*, 2013 WL 2634946, at *6 (W.D. Wash. June 12, 2013) (plaintiff who had not applied for position was not similarly situated to other employees who had); *Rodgers v. Union Pac. R.R. Co.*, 2006 WL 691980, at *4 (W.D. Wash. Mar. 13, 2006) (plaintiff denied promotion was not similarly situated to employees who obtained promotions because he had not taken exam that would have made him eligible for position, but they had).

Citing *Ajayi*, Mr. Simmons vaguely suggests that this Court should apply a looser standard of some sort. (Simmons Brief 27.)¹⁹ That suggestion is incoherent and wrong. The purpose of the rigorous comparator requirement is obvious: Liability in a disparate-treatment case ultimately “depends on whether the protected trait . . . actually motivated

¹⁹ Mr. Simmons also suggests that he need not show discriminatory animus, citing *Washington Pub. Employees Ass'n v. State*, 127 Wn. App. 254 (2005). (Simmons Brief 28.) But that case has no relevance whatsoever, as it involved equal protection claims, not claims for disparate-treatment discrimination.

the employer's decision." *Fulton*, 169 Wn. App. at 148 n.16 (citations and internal quotation marks omitted). The comparator requirement is designed to "eliminate other possible explanatory variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable – discriminatory animus." *Good v. University of Chicago Med. Ctr.*, 673 F.3d 670, 675 (7th Cir. 2012) (citation and internal quotation marks omitted). "All things being equal," the Seventh Circuit explained in *Good*, "if an employer takes an action against one employee in a protected class but not another outside that class, one can infer discrimination. The 'similarly situated' prong establishes whether all things are in fact equal." *Id.* (citation and internal quotation marks omitted).

In the context of performance evaluations where all WMS employees are expected to receive annual reviews, it can be argued that the only material variable is whether a particular employee was or was not within WMS and therefore subject to the expectation. But salary increases are different. As discussed above at pages 5-7, the pay raise standards applicable to WMS employees are designed to allow for flexibility in establishing and adjusting salaries. (CP 743, 26:4-27:11; RCW 41.06.500(1)(b); WAC 357-58-010; WAC 357-58-020(2); CP 1075-76, DSHS Administrative Policy No. 18.58(H)(6)(a)-(d).) Similarly-banded

WMS employees can be compensated very differently. Under Policy No. 18.58(H)(6)(a) , discretionary pay raises can vary between zero percent and ten percent per year, and are available to address a variety of circumstances – specifically “growth and development, documented internal salary alignment or recruitment and retention problems, and temporary promotions.” (CP 1075, DSHS Administrative Policy No. 18.58(H)(6)(a)-(d) .) Determining whether and how much of a pay raise a particular employee might deserve in a given year requires an analysis of all the circumstances surrounding that employee’s growth and development, if any (including whether the employee took on new responsibilities or enhanced his or her skills), and situation-specific factors relating to salary alignment, recruitment, retention and promotion. Mr. Simmons essentially contends that if any other WMS employee received a salary increase at any time, he was entitled to the same raise. But the record and basic common sense dictate otherwise.

Applying the strict comparator requirement that unquestionably governs Mr. Simmons’ disparate-treatment claim based on salary increases, it is beyond dispute that Mr. Simmons has failed to identify a similarly-situated comparator, and thus has failed to establish a prima facie case of disparate-treatment discrimination. He names Ms. Selene-Hait and Ms. Jenkins as his purported comparators. (Simmons Brief 21-

25.) But: Even after their respective pay raises they earned less than Mr. Simmons. (CP 15, ¶¶ 6-7; CP 16, ¶ 12; CP 23.) Mr. Simmons' job title was different than theirs. (CP 909, 7:6-7; CP 947; CP 953; CP 959; CP 963; CP 16, ¶ 12; CP 23.) There is no evidence that his job description was similar to theirs. Indeed, the record indicates that it was not. (CP 14, ¶ 3; CP 947-64; CP 16, ¶ 12; CP 23; CP 772, ¶ 4.) There is no evidence regarding the experience, education and other qualifications of Ms. Selene-Hait and Ms. Jenkins. And there is no evidence that Mr. Simmons performed "substantially the same work" as they did. *Washington*, 105 Wn. App. at 13; *Domingo*, 124 Wn. App. at 81; *Richardson*, 2011 WL 5588721, at *4; *Pineda*, 2006 WL 3386865, at *4. Again, the record indicates precisely the opposite. (CP 14, ¶ 3; CP 947-64; CP 16, ¶ 12; CP 23; CP 772, ¶ 4.)

In addition, the undisputed facts demonstrate that Mr. Simmons, Ms. Selene-Hait and Ms. Jenkins received their salary increases years apart and for very different reasons. Mr. Krueger offered Mr. Simmons a raise in spring 2008 "in consideration of internal salary relationships." (Simmons Brief 8; CP 196; CP 1162-63, 57:4-58:7.) There is no evidence of any enlargement of Mr. Simmons' job responsibilities at that time. Ms. Selene-Hait got a raise in January 2011 (over Mr. Krueger's objection) because she had received a competing job offer and DSHS wanted to

retain her. (CP 23; CP 17, ¶ 15; CP 772, ¶ 3.) And Ms. Jenkins got a raise in May 2013 for growth and development (her job responsibilities had increased substantially), because her position had been rebanded from a WMS Band I to a WMS Band II, and to align her salary with those of comparable employees elsewhere within the department. (CP 772, ¶ 4.)

Given that Ms. Selene-Hait and Ms. Jenkins earn less than Mr. Simmons; that Mr. Simmons' has completely failed to adduce evidence comparing his education, experience, qualifications, job responsibilities, workload and job performance with those of Ms. Selene-Hait and Ms. Jenkins; and the undisputed fact that Mr. Simmons, Ms. Selene-Hait and Ms. Jenkins received salary increases at different times and for different reasons, under the authorities cited above Mr. Simmons has not met his burden of producing evidence that he was treated differently than a similarly-situated comparator, and thus he has not made out a prima facie case of discrimination based on salary increases.

b. There is no evidence that DSHS's legitimate, non-discriminatory explanations for its decisions regarding salary increases are pretext for discrimination.

Mr. Simmons has not made out a prima facie case of race discrimination, but even if he had, his claim would fail because DSHS has provided legitimate, non-discriminatory explanations for its actions relating to salary increases. As explained above, DSHS gave Nadine

Selene-Hait a raise in January 2011 (over Mr. Krueger’s objection) to induce her to stay at DSHS after she received a competing job offer. (CP 23; CP 17, ¶ 15; CP 772, ¶ 3.) And DSHS gave Ms. Jenkins a raise in May 2013 because her job responsibilities had substantially increased, her position had been rebanded from a WMS Band I to a WMS Band II, and the raise would align her salary with those of other public disclosure/discovery coordinators in other administrations within the department. (CP 772, ¶ 4.) It is also undisputed that none of the other white WMS employees who reported to Mr. Krueger – including Stephen Dotson, Kristal Wiitala and Kevin Doty – received a salary increase at any time after April 1, 2008, when Mr. Krueger took over as CRO. (CP 771-72, ¶ 3; CP 17 ¶ 15; CP 22-24.) In fact, Mr. Simmons is one of the only WMS employees within ERMO who received a raise during that period. (*Id.*) These explanations plainly meet DSHS’s minimal burden of production under the *McDonnell Douglas* framework. *Grimwood*, 110 Wn.2d at 364; *St. Mary’s Honor Ctr.*, 509 U.S. at 509; *Lindsey*, 447 F.3d at 1147.

Mr. Simmons can only avoid summary judgment by producing “specific and substantial” evidence showing that DSHS’s stated reasons are merely pretext for race discrimination. *Hill*, 144 Wn.2d at 182; *Grimwood*, 110 Wn.2d at 364; *Fulton*, 169 Wn. App. at 161; *Domingo*, 124 Wn. App. at 78; *Milligan*, 110 Wn. App. at 637; *Coghlan*, 413 F.3d at

1095. He has produced no such evidence whatsoever. In fact, he has not even attempted to do so.

For all the foregoing reasons, the trial court properly granted summary judgment for DSHS on Mr. Simmons' disparate-treatment discrimination claim based on salary increases. This Court should affirm the trial court's ruling.

E. Mr. Simmons Did Not Assert an Equal Protection Claim in the Trial Court.

One of the parting shots in Mr. Simmons' appellate brief is a short section arguing that he "has properly stated a claim for violation of equal protection under the law." (Simmons Brief 26-27.) The point of this section is unclear, but perhaps Mr. Simmons wishes to obtain an order from this Court remanding his case to the trial court so he can pursue a claim under the Fourteenth Amendment to the U.S. Constitution. Whatever relief Mr. Simmons may be seeking, he is not entitled to it. He did not plead an equal protection claim. (CP 3-12.) He did not litigate an equal protection claim. (*E.g.*, CP 746-70.) And he did not articulate to the trial court at any time that he was pursuing or wished to pursue an equal protection claim. Whatever equal protection argument he might be trying to make now, he is raising it for the first time on appeal, and this Court should accordingly reject it. *Hansen*, 118 Wn.2d at 485; *Bankston*, 174 Wn. App. at 941.

V. CONCLUSION

Mr. Simmons' appeal – limited to the components of his disparate-treatment discrimination claim relating to performance evaluations and salary increases – is without factual or legal support, and has no merit. Mr. Simmons has not made out a prima facie case of discrimination, and has not rebutted DSHS's legitimate, non-discriminatory reasons for its actions. The trial court properly dismissed Mr. Simmons' disparate-treatment claim in its entirety, and this Court should affirm that ruling.

DATED: June 16, 2014.

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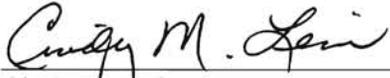
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I caused a true and correct copy of the attached document to be served via email/PDF on the following parties:

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