

FILED
COURT OF APPEALS
DIVISION II

2014 DEC 19 AM 11:41

STATE OF WASHINGTON

BY 
DEPUTY

NO. 46157-9-II

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

DEZMOND EMESON,

Appellant,

v.

STATE OF WASHINGTON; DEPARTMENT OF CORRECTIONS,

Respondents.

**BRIEF OF RESPONDENTS
AMENDED**

ROBERT W. FERGUSON
Attorney General

Garth A. Ahearn
Assistant Attorney General
Washington State Bar No. 29840
1250 Pacific Avenue, Suite 105
PO Box 2317
Tacoma, WA 98401
(253) 593-5243
OID No. 91105

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTER-STATEMENT OF THE ISSUES.....6

1. Whether the trial court properly granted summary judgment on based on the doctrine of res judicata when Mr. Emeson already sued DOC based on the same nucleus of operative facts in federal court, the federal court dismissed the suit in full and the ruling is final?6

2. Whether the trial court properly granted summary judgment on Mr. Emeson’s race or national origin disparate treatment claim based on collateral estoppel when Judge Bryan’s ruling already dismissed this claim?6

3. Whether the trial court properly granted summary judgment on Mr. Emeson’s claims of race or national origin retaliation based on collateral estoppel when Judge Bryan’s ruling already dismissed this claim?.....6

4. Whether the trial court properly granted summary judgment on Mr. Emeson’s race or national origin based hostile work environment claim based on collateral estoppel when Judge Bryan’s ruling already dismissed this claim?6

5. Whether the trial court properly granted summary judgment based on the state of limitations for discrete incidents of discriminatory behavior prior to February 8, 2010?.....6

6. Whether the trial court properly dismissed Mr. Emeson’s failure to accommodate claim when he accepted the accommodation and his medical doctor approved of the position as a reasonable accommodation?.....6

7.	Whether the trial court properly granted summary judgment on Mr. Emeson’s invasion of privacy claim when (1) the claim is barred by the statute of limitations, (2) the alleged statement does not identify Mr. Emeson in a public forum and (3) because DOC is not vicariously liable for intentional actions committed outside the scope of an employee’s job?.....	6
8.	Whether Mr. Emeson’s appeal is moot when he has not assigned error or presented argument or authority addressing the court’s dismissal of his constructive discharge and wrongful discharge in violation of public policy claims because they are duplicative of his overall discrimination claims?.....	7
9.	Whether the trial court properly granted summary judgment on Mr. Emeson’s discharge in violation of public policy claim when he failed to establish the jeopardy element?.....	7
III.	FACTS.....	7
A.	Mr. Emeson Fails To Properly Perform Job Duties Including Arresting An Offender Without Cause Among Other Things	7
B.	Appellant Receives An Accommodation Which He Accepted And Was Approved By His Medical Provider	10
C.	Appellant Again Has Problems Performing His Job And Acting Appropriately In The Work Place	10
D.	Procedural Facts.....	13
IV.	LAW AND ARGUMENT.....	14
A.	The Trial Court Properly Dismissed All Of Mr. Emeson’s Claims Based On Res Judicata	15

1.	Res Judicata Applies Because The Federal Court Ruling Is A Final Judgment And There Is Identity/Privity Between The Parties.....	17
2.	Res Judicata Applies Because There Is Identity Of Claims.....	17
a.	Res Judicata Applies Because The Two Cases Are Based On The Same Nucleus Of Operative Facts	18
b.	DOC's Rights Or Interests Established In The Prior Judgment Would Be Destroyed Or Impaired By Prosecution Of This Action	20
c.	This Suit Involves the Infringement Of The Same Rights	20
d.	This Suit Is Based On the Same Subject Matter as the Federal Suit.....	21
B.	The Trial Court Properly Granted Summary Judgment Because Mr. Emeson's Retaliation and Disparate Treatment Claims Are Barred by Collateral Estoppel	23
1.	The Trial Court Properly Dismissed Appellant's Disparate Treatment Claims	26
2.	The Trial Court Properly Dismissed Appellant's Retaliation Claims	28
3.	The Trial Court Properly Dismissed Appellants Race And National Origin Hostile Work Environment Claims Because Judge Bryan's Ruling Binds Appellant And Precludes Him From Re-Litigating The Issue.....	29
C.	The Trial Court Properly Granted Summary Judgment Because Mr. Emeson's Claims Of Discrete Acts Of Discrimination Prior To February 2010 Are Time Barred	32

D. The Trial Court Properly Granted Summary Judgment On Mr. Emeson’s Failure To Accommodate Claims Because He Was Accommodated	34
E. The Trial Court Properly Dismissed Mr. Emeson’s Invasion Of Privacy Claim Because It Is Time Barred And DOC Is Not Liable For The Intentional Actions Of An Employee	37
F. The Trial Court Properly Dismissed Mr. Emeson’s “Actual Discharge” And Wrongful Discharge In Violation Of Public Policy Claim	41
1. The Trial Court Properly Dismissed Mr. Emeson’s Claims For Constructive Or Actual Discharge.....	42
2. The Trial Court Properly Dismissed Mr. Emeson’s Wrongful Discharge In Violation Of Public Policy Claim	43
V. CONCLUSION	48

TABLE OF AUTHORITIES

Cases

<i>Alcuntara v. Bowing Co.</i> , 41 Wn. App. 675, 705 P.2d 1222 (1985).....	16
<i>Antonius v King Cnty.</i> , 153 Wn.2d 256, 103 P.3d 729 (2004).....	33
<i>Atlantic Cas. Ins. Co. v. Or. Mut Ins. Co.</i> , 137 Wn. App. 296, 153 P.3d 211 (2007).....	16
<i>Brownfield v. City of Yakima</i> , 178 Wn. App. 316 P.3d 520 (2014).....	25
<i>Carver v. State</i> , 147 Wn. App. 567, 197 P.3d 678 (2008).....	26
<i>Cowiche Canyon Conservancy v Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	42
<i>Cripe v. City of San Jose</i> , 261 F.3d 877 (9th Cir.2001).....	34
<i>Danny v Laidlaw Transit Serv. Inc.</i> , 165 Wn.2d 200, 193 P.3d 128 (2008).....	43
<i>Dean v. Mun. of Metro. Seattle-Metro</i> , 104 Wn.2d 627, 708 P.2d 393 (1985).....	34, 35
<i>Dedman v. Pers. Appeals Bd.</i> , 98 Wn. App. 471, 989 P.2d 1214 (1999).....	34, 35
<i>DeYoung v. Cenex Ltd.</i> , 100 Wn. App. 885, 1 P.3d 587 (2000).....	17
<i>Dicomes v. State</i> , 113 Wn.2d 612, 782 P.2d 1002 (1989).....	44

<i>Doe v. Boeing Co.</i> , 121 Wn.2d 8, 846 P.2d 531 (1993).....	35
<i>Eastwood v. Cascade Broad Co.</i> , 106 Wn.2d 466, 722 P.2d 129 (1986).....	38
<i>Ellis v. City of Seattle</i> , 142 Wn.2d 450, 13 P.3d 1065 (2000).....	45
<i>Escude ex rel. Escude v King County Pub. Hosp. Dist. 2</i> , 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003).....	42
<i>Farnam v. CRISTA Ministries</i> , 116 Wn.2d 659, 807 P.2d 830 (1991).....	45
<i>Fisher v. Dept. of Health</i> , 125 Wn. App. 869, 106 P.3d 836 (2005).....	38
<i>Francom v. Costo Wholesale Corp.</i> , 98 Wn. App. 845, 991 P.2d 1182 <i>review denied</i> , 141 Wn.2d 1017 (2000).....	28, 40
<i>Gardner v. Loomis Armored, Inc.</i> , 128 Wn.2d 931, 913 P.2d 377 (1996).....	44
<i>Griffith v. Boise Cascade, Inc.</i> , 111 Wn. App. 436, 45 P.3d 589 (2002).....	42, 46
<i>Hanson v. City of Snohomish</i> , 121 Wn.2d 552, 852 P.2d 295 (1993).....	23, 24, 25
<i>Hill v. BCTI Income Fund</i> , 144 Wn.2d 172, 23 P.3d 440 (2001).....	27, 28
<i>Hisle v. Todd Pacific Shipyards Corp.</i> , 113 Wn. App. 401, 54 P.3d 687 (2002).....	15
<i>Hollis v. Garwall, Inc.</i> , 137 Wn.2d 683, n.4, 974 P.2d 836 (1999).....	42

<i>Hubbard v. Spokane Cnty.</i> , 146 Wn.2d 699, 50 P.3d 602 (2002).....	44
<i>Island County v. Muckie</i> , 36 Wn. App. 385, 675 P.2d 607 (1984).....	24
<i>Kale v. Combined Ins. Co. of America</i> . 924 F.2d 1161 (1st Cir. 1991).....	21
<i>Korlund v. DynCorp Tri-Cities Servs. Inc.</i> , 156 Wn.2d 168, 125 P.3d 119 (2005).....	44, 45
<i>Kuhlman v. Thomas</i> , 78 Wn. App. 115, 897 P.2d 365 (1995).....	16, 18, 19
<i>Landry v. Luscher</i> . 95 Wn. App. 779, 976 P.2d 1274 (1999).....	16
<i>Liberty Bank of Seattle, Inc v. Henderson</i> . 75 Wn. App. 546, 878 P.2d 1259 (1994).....	24
<i>Loveridge v. Fred Meyer, Inc.</i> , 72 Wn. App. 720, 864 P.2d 417 (1993), <i>aff'd</i> 125 Wn.2d 759, 887 P.2d 898 (1995)	15
<i>Lumpkin v. Jordan</i> , 49 Cal. App. 4th 1223, 57 Cal. Rptr. 2d 303 (1996).....	25
<i>MacSuga v. Spokane Cnty.</i> 97 Wn. App. 435, 983 P.2d 1167 (1999).....	35
<i>Manego v. Orleans Bd. of Trade</i> . 773 F.2d 1 (1st Cir.1985), <i>cert. denied</i> , 475 U.S. 1084, 106 S. Ct. 1466, 89 L. Ed. 2d 722 (1986).....	22
<i>Marino Prop. Co. v. Port Comm'rs</i> . 97 Wn.2d 307, 644 P.2d 1181 (1982).....	16
<i>Milligan v. Thompson</i> , 110 Wn. App. 628, 42 P.3d 418 (2002).....	28

<i>Mpoyo v. Litton Electro-Optical Sys.</i> , 430 F.3d 985 (9th Cir. 2005)	18, 19
<i>Natl Union Fire Ins Co. of Pittsburgh v. NW Youth Servs.</i> , 97 Wn. App. 226, 983 P.2d 1144 (1999).....	24
<i>Nielson v. Spanaway Gen. Med. Clinic, Inc.</i> , 135 Wn.2d 255, 956 P.2d 312 (1998).....	24
<i>Owens v. Kaiser Foundation Health Plan, Inc.</i> , 244 F.3d 708 (9th Cir. 2001)	16, 17
<i>Peck v. Siatt</i> , 65 Wn. App. 285, 827 P.2d 1108 (1992).....	40
<i>Pederson v. Potter</i> , 103 Wn. App. 62, 11 P.3d 833 (2000).....	23
<i>Pulcino v. Federal Express Corp.</i> , 141 Wn.2d 629, 9 P.3d 787 (2000).....	35
<i>Rains v. State</i> , 100 Wn.2d 660, 674 P.2d 165 (1983).....	47
<i>Reid v. Pierce County</i> , 136 Wn.2d 195, 961 P.2d 333 (1998).....	37
<i>Reninger v. Dep't of Corr.</i> , 134 Wn.2d 437, 951 P.2d 782 (1998).....	44
<i>Sedlacek v. Hillis</i> , 145 Wn.2d 379, 36 P.3d 1014 (2001).....	43, 45
<i>Selix v. Boeing Co.</i> , 82 Wn. App. 736, 919 P.2d 620 (1996).....	44
<i>Shoemaker v. City of Bremerton</i> , 109 Wn.2d 504, 745 P.2d 858 (1987).....	23
<i>Short v. Battleground School District</i> , 169 Wn. App. 188, 279 P.3d 902 (2012).....	29

<i>Smith v. Bates Technical Coll.</i> , 139 Wn.2d 793, 991 P.2d 1135 (2000).....	44, 47
<i>Snyder v. Medical Service Corp. of Eastern Wash.</i> , 98 Wn. App. 315, 988 P.2d 1023 (1999).....	35, 38
<i>Spurrell v. Bloch</i> , 40 Wn. App. 854, 701 P.2d 529 (1985).....	47
<i>Standlee v. Smith</i> . 83 Wn.2d 405, 518 P.2d 721 (1974).....	25
<i>Thompson v. Everett Clinic</i> , 71 Wn. App. 548 (1993), <i>review denied</i> , 123 Wn.2d 1027 (1994).....	40
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984).....	43, 45
<i>Trimble v. Wash. State Univ.</i> , 140 Wn.2d 88, 993 P.2d 259 (2000).....	14
<i>Tripati v. Henman</i> , 857 F.2d 1366 (9th Cir. 1988)	17
<i>Tyner v. Dep't of Soc. & Health Servs.</i> , 137 Wn. App. 545, 154 P.3d 920 (2007).....	47, 48
<i>Walsh v. Wolff</i> . 32 Wn.2d 285, 201 P.2d 215 (1949).....	16
<i>Washington v. Boeing Co</i> , 105 Wn. App. 1, 19 P.3d 1041 (2000).....	26
<i>West v. Thurston Cnty.</i> , 168 Wn. App. 162, 275 P.3d 1200 (2012).....	33

Statutes

42 U.S.C. § 1983.....	47
RCW 49.60	26
RCW 49.60.180	42
RCW 49.60.210	46
RCW 4.16.100	38

Regulations

WAC 162-22-045.....	34
---------------------	----

Other Authorities

14A Karl B. Tegland, <i>Washington Practice: Civil Procedure</i> § 35.33, at 479 (1st ed. 2007)	16
Philip A. Trautman, <i>Claim and Issue Preclusion in Civil Litigation</i> <i>in Washington</i> , 60 Wash. L. Rev. 805, 812-13 (1985)	23
<i>Restatement (Second) of Judgments</i> § 24 (1992).....	22
<i>Restatement (Second) of Judgments</i> § 27 (1980).....	25
<i>Restatement (Second) of Torts</i> § 652D (1977).....	37, 39

Rules

Fed. R. Civ. P. 41(a)(1)(A)(i)	14, 31
Fed. R. Civ. P. 59.....	31
RAP 10.3.....	41
RAP 10.3(a)(6).....	33

I. INTRODUCTION

The Respondent, State of Washington respectfully requests this Court to affirm the trial court's order granting summary judgment in its favor and dismissing this case in its entirety. Mr. Emeson originally sued the Department of Corrections (DOC) in federal court alleging he was subjected to disparate treatment, retaliation and a hostile work environment based on his race, national origin and mental condition by his supervisors at DOC after he was terminated from his position. DOC moved for summary judgment on a number of technical and substantive grounds. The federal court ruled as a matter of law Mr. Emeson failed to create an issue of fact regarding his claims and DOC was entitled to judgment as a matter of law. Mr. Emeson did not appeal the order and it is final.

Instead, Mr. Emeson refiled suit against DOC in State Court again alleging discrimination by his supervisors at DOC during the same time by the same people, based on the same nucleus of operative facts of his federal court suit. Additionally, he raised new legal theories of failure to accommodate, invasion of privacy, constructive discharge and discharge in violation of public policy. DOC again filed for summary judgment and summary judgment was granted. The trial court properly granted summary judgment in this case for the following reasons.

First, the trial court properly granted summary judgment on all of Mr. Emeson's claims because they are barred by the doctrine of res judicata. Claim splitting is prohibited in Washington and Mr. Emeson's latest suit is based on the same nucleus of operative facts raised in federal court. Allowing Mr. Emeson to re-litigate this case which is about the same actors, during the same time period, based on the same facts, would not only give him a second bite at the apple, it would destroy DOC's rights and interests established in the prior summary judgment order: the fact DOC did not discriminate against Mr. Emeson. As such, the trial court properly granted summary judgment based on res judicata and the ruling should be affirmed.

Second, the trial court properly dismissed Mr. Emeson's disparate treatment claims based on the doctrine of collateral estoppel. Mr. Emeson is bound by Judge Bryan's ruling which precludes Mr. Emeson from re-litigating the fact DOC had legitimate non-discriminatory reasons for its actions. As such, the trial court ruling should be affirmed.

Third, the trial court properly dismissed all of Mr. Emeson's retaliation claims due to collateral estoppel. Mr. Emeson is bound by Judge Bryan's ruling which precludes Mr. Emeson from re-litigating the fact DOC had legitimate non-retaliatory reasons for its actions. As such, the trial court's ruling should be affirmed.

Fourth, the trial court properly dismissed Mr. Emeson's race and national origin based hostile work environment claims due to collateral estoppel. Judge Bryan's ruling established as a matter of law the alleged harassment was not severe or pervasive. As such, the trial court's ruling should be affirmed.¹

Fifth, the trial court properly granted summary judgment on any allegations of discrete incidents of discriminatory behavior prior to February 8, 2010. Mr. Emeson's reliance on a continuing violation theory is misplaced. It is misplaced because to the extent Mr. Emeson's claims are based on any alleged discrete incidents of disparate treatment or alleged retaliatory acts which occurred prior to February 8, 2010; the trial court properly dismissed these claims because they are time barred.

Sixth, the trial court properly dismissed Mr. Emeson's reasonable accommodation claim because he was accommodated. Mr. Emeson's assertion the court erred in dismissing the claim is meritless because his argument is premised on a misrepresentation of the record.

As was pointed out to the trial court², the record plainly shows Mr. Emeson not only accepted the position but Dr. Corthell, Mr. Emeson's psychiatrist, approved the Tacoma Office Assistant 3 position as a

¹ The trial court also properly granted summary judgment on appellant's disability hostile work environment claim based on res judicata

² CP at 406.

reasonable accommodation. CP at 415-16. It is unclear why counsel continues to misrepresent these facts, but whether it is on purpose or by mistake, the fact remains the trial court properly granted summary judgment because Mr. Emeson was accommodated.

Seventh, the trial court properly granted summary judgment on Mr. Emeson's privacy claim. Mr. Emeson's claim the court erred is not supported by the law and is meritless. It is meritless because according to the Supreme Court, invasion of privacy claims are subject to a two-year statute of limitations. The alleged statement at issue was made in May of 2010, and this lawsuit was not filed until February 2013. As such, the trial court properly dismissed the claim because it is barred by the two-year statute of limitations.

Eighth, the trial court properly dismissed Mr. Emeson's privacy claim because his privacy was not invaded by DOC. The evidence is Ms. Phelps, a low level supervisor, made a statement, which does not identify Mr. Emeson by name, on her private Facebook account. The statement was not made in a newspaper or some other public forum by the Department. As such, the trial court properly granted summary judgment.

Ninth, the trial court also properly dismissed Mr. Emeson's privacy claim because regardless of whether the statement by Ms. Phelps invaded Mr. Emeson's privacy, which it did not, the statement was made

outside the scope of Ms. Phelps employment and is not imputable to DOC. DOC was not aware she made the statement until an employee complained, and there is no evidence in the record putting DOC on notice Ms. Phelps was going to make this posting on her private Facebook page. As such, the trial court properly granted summary judgment.

Tenth, the trial court's ruling dismissing Mr. Emeson's claims for constructive/actual discharge as well as his claim for wrongful discharge in violation of public policy should be affirmed because Mr. Emeson has failed to assign error to the court's ruling on these claims. Mr. Emeson has not specifically assigned error to the trial court's ruling on these claims and as such failed to properly raise the issue on appeal.

Mr. Emeson has abandoned these claims because he does not set forth argument or authority addressing a number of the grounds upon which the trial court's order was based. For example, Mr. Emeson fails to identify how his constructive discharge claim is not duplicative of his overall discrimination claims and fails to address the jeopardy element to establish a violation of public policy claim. As a result, Mr. Emeson's general assertion that the trial court erred in granting summary judgment is moot with respect to the trial court granting summary judgment on these claims because the trial court's order should be affirmed based on the grounds for dismissal which he has not appealed.

For all these reasons, as explained in detail below, the trial court properly granted summary judgment and this Court should affirm.

II. COUNTER-STATEMENT OF THE ISSUES

1. Whether the trial court properly granted summary judgment on based on the doctrine of res judicata when Mr. Emeson already sued DOC based on the same nucleus of operative facts in federal court, the federal court dismissed the suit in full and the ruling is final?
2. Whether the trial court properly granted summary judgment on Mr. Emeson's race or national origin disparate treatment claim based on collateral estoppel when Judge Bryan's ruling already dismissed this claim?
3. Whether the trial court properly granted summary judgment on Mr. Emeson's claims of race or national origin retaliation based on collateral estoppel when Judge Bryan's ruling already dismissed this claim?
4. Whether the trial court properly granted summary judgment on Mr. Emeson's race or national origin based hostile work environment claim based on collateral estoppel when Judge Bryan's ruling already dismissed this claim?
5. Whether the trial court properly granted summary judgment based on the state of limitations for discrete incidents of discriminatory behavior prior to February 8, 2010?
6. Whether the trial court properly dismissed Mr. Emeson's failure to accommodate claim when he accepted the accommodation and his medical doctor approved of the position as a reasonable accommodation?
7. Whether the trial court properly granted summary judgment on Mr. Emeson's invasion of privacy claim when (1) the claim is barred by the statute of limitations, (2) the alleged statement does not identify Mr. Emeson in a public forum and (3) because DOC is not vicariously liable for

intentional actions committed outside the scope of an employee's job?

8. Whether Mr. Emeson's appeal is moot when he has not assigned error or presented argument or authority addressing the court's dismissal of his constructive discharge and wrongful discharge in violation of public policy claims because they are duplicative of his overall discrimination claims?
9. Whether the trial court properly granted summary judgment on Mr. Emeson's discharge in violation of public policy claim when he failed to establish the jeopardy element?

III. FACTS

In April 2007, Mr. Emeson was hired by the Department of Corrections as a Community Corrections Officer 1 (CCO1). A CCO1 is primarily responsible for supervision of offenders on community custody, which is akin to parole.

A. **Mr. Emeson Fails To Properly Perform Job Duties Including Arresting An Offender Without Cause Among Other Things**

In April 2009, Suzann Braverman became plaintiff's supervisor. CP at 112. Ms. Braverman began noticing deficiencies in Mr. Emeson's work almost immediately after she began supervising him. CP at 112. For example, Ms. Braverman received information that Mr. Emeson had failed to provide discovery to the Pierce County Court Unit in a timely fashion and what was provided to the unit was incomplete. CP at 117-18. This is problematic because an offender was sitting in jail awaiting a hearing and the tardiness of the discovery could potentially raise a due

process issue. CP at 117-18. Ms. Braverman documented the concerns in a memorandum to Mr. Emeson dated April 14, 2009. CP at 117-18.

In that memo, Ms. Braverman also raised concerns about Mr. Emeson's failure to issue a warrant for an offender who had not reported in for over a week. CP at 117-18. DOC policy requires warrants to be issued within 72 hours after an offender fails to appear. CP at 117-18.

Mr. Emeson's response to these concerns was that he was suffering from a medical condition. CP at 117-18. Ms. Braverman advised him in the memo that if he had a condition requiring accommodation he needed to contact Human Resources, but that failure to follow policy creates potential liability for the Department. CP at 117-18. She further outlined expectations for CCOs. CP at 117-18.

Ms. Braverman continued to address Mr. Emeson's deficiencies and document them. On April 21, 2009, she sent him a second memo. In that memo she documented Mr. Emeson's failure to timely address an offender's violation of a court ordered condition. CP at 121-22. It is important that a CCO timely address an offender's failure to comply with court imposed conditions. CP at 121-22.

On May 8, 2009, Ms. Braverman had to issue Mr. Emeson a written reprimand for failing to comply with her direction to adhere to an

approved work schedule. CP at 124-25. Despite her direction, Mr. Emeson had worked on days that were not part of his approved schedule and had taken time off work without first submitting a leave slip among other things. CP at 124-25.

In the same time period, it was documented by Ms. Braverman that Mr. Emeson was threatening to issue warrants for offenders who were not in treatment, but were actively reporting to their CCO. CP at 127-28. Warrants are not to be used as a form of sanctioning. CP at 127-28.

Ms. Braverman tried to address the problems through an action plan. CP at 130-32. However, the problems escalated to the point where Mr. Emeson was placing offenders in jail that had not violated conditions of their probation. CP at 134-38. Due to the serious nature of his work deficiencies, an internal investigation was requested. CP at 140-48.

Mr. Emeson was also displaying inappropriate office behavior. This culminated in an incident on July 10, 2009, when Ms. Braverman and other DOC officers were attempting discuss the matters with Mr. Emeson. CP at 137-38. Mr. Emeson became visibly upset, raised his voice and spoke in an angry tone. CP at 137-38. Because of his inappropriate behavior and the serious nature of his work deficiencies, Mr. Emeson was then placed on administrative leave pending the outcome of the internal investigation. CP at 113 ll. 17-21.

In addition, a fit for duty assessment was requested and completed by Dr. Bill Ekemo. Dr. Ekemo opined, based on his examination of Mr. Emeson, that Mr. Emeson was not capable of performing the essential functions of his job. CP at 185-95.

B. Appellant Receives An Accommodation Which He Accepted And Was Approved By His Medical Provider

The DOC initially considered a disability separation, but decided to see if Appellant's issues could be accommodated. CP at 181 ll. 3-5. DOC Human Resources staff spoke to Mr. Emeson about the reasonable accommodation process. CP at 181 ll. 1-6.

A number of jobs were reviewed by DOC and Appellant's physician as possible reasonable accommodations. CP at 181. Ultimately, Appellant's doctor approved, and he accepted, a reasonable accommodation position as an Office Assistant in the Tacoma Community Justice Center (CJC). CP at 197.

C. Appellant Again Has Problems Performing His Job And Acting Appropriately In The Work Place

On April 26, 2010, Mr. Emeson started working as an Office Assistant in the Tacoma CJC as part of his reasonable accommodation. CP at 181 ll. 14-15.

Despite the reasonable accommodation, Mr. Emeson continued to have work place behavior and performance problems. On August 4, 2010,

it was reported he had an altercation with a volunteer. CP at 154-156. The volunteer reported Mr. Emeson yelled at her and became hostile after she asked him to provide proof he had been cleared by his supervisor to make a copy of a report. CP at 444.

Ms. Phelps documented Mr. Emeson's ongoing work performance and behavior problems in a review conducted in September 2010. CP at 158-60. In the review, she discussed Mr. Emeson's inability to manage multiple priorities, his inability to accept responsibility or criticism, and the multiple complaints from staff about lack of courtesy among other things. CP at 158-60.

Two weeks later, Mr. Emeson met with Ms. Phelps' supervisor, Karen Blatman-Byers, to discuss his review. CP at 173 ll. 13-18. He became hostile, raised his voice and pointed his finger in Ms. Blatman-Byers' face. Ms. Blatman-Byers felt this behavior was aggressive and intimidating. CP at 173 ll. 13-18. She told him to leave her office three times before he finally left. CP at 173 ll. 13-18.

On October 14, 2010, and October 15, 2010, Mr. Emeson filed two internal discrimination complaints against Ms. Phelps and Ms. Blatman-Byers, alleging an ongoing pattern of harassment and criticism. CP at 181, ll. 20-26. An internal investigation was conducted and could not substantiate his claims of discrimination. CP at 199-208.

Mr. Emeson continued to engage in unprofessional behavior. On October 29, 2010, Armando Mendoza, the Regional Field Administrator, met with Mr. Emeson to discuss the result of an investigation regarding his behavior during his altercation with a volunteer which occurred in August 2010. CP at 161, ll. 21-26. In a memo of concern, Mendoza gave Mr. Emeson the directive to remove himself from his duties to regain his composure if needed. CP at 165-66.

Less than 10 days later, Mr. Emeson was overheard in the reception areas making the comment, "I don't want to die!" and "[P]ut the cell phone away. I don't want to be killed." CP at 168. When Ms. Phelps addressed the issue with him, his response was "no comment" and he became visibly angry. CP at 169.

Mr. Emeson's behavioral problems came to a head in January 2011. On January 7, 2011, Ms. Phelps asked to schedule a weekly meeting to review his work performance. CP at 150 ll. 19-22. Mr. Emeson again became visibly tense and spoke in a low angry tone. CP at 150 ll. 19-22. Three days later, Ms. Phelps contacted Mr. Emeson about the feedback meeting. CP at 150 ll. 22-24. He yelled at Ms. Phelps claiming it was unethical to require him to attend the meeting. CP at 150 ll. 22-24.

Based on his continuing pattern of behavior, Armando Mendoza assigned Mr. Emeson to home. CP at 162 ll. 8-10. On January 27, 2011, Mr. Mendoza notified Mr. Emeson he was being separated from his Office Assistant 3 position. CP at 168-69.

D. Procedural Facts

On July 5, 2011, Mr. Emeson sued the Department of Corrections in federal court, alleging in his complaint DOC “failed to take reasonably adequate action to correct the pervasive and severe harassment based on race, national origin, and disability, hostile environment, and physically harmful and disparate treatment of an African-American employee of Nigerian descent who was terminated in retaliation for engaging in protected activity.” CP at 100.³

On June 1, 2012, DOC filed a summary judgment motion seeking to dismiss Mr. Emeson’s claims based on number of technical and substantive arguments. On June 21, 2012, four days before Mr. Emeson’s response to DOC’s summary judgment motion was due (June 25, 2012), Mr. Emeson’s counsel filed a motion to dismiss without prejudice. CP at 108. Mr. Emeson’s response to the summary judgment motion was simply he had filed a motion to dismiss. CP at 108.

³ Mr. Emeson made these allegations under Title VII and 42 U.S.C. § 1981 which prohibits race and national origin based discrimination.

In federal court a party may only dismiss a matter without a court order prior to a party serving an answer or a motion for summary judgment. Fed. R. Civ. P. 41(a)(1)(A)(i). Judge Bryan denied the motion to dismiss and granted DOC's motion for summary judgment. CP at 108.

The court specifically found that Mr. Emeson failed to carry his burden on summary judgment and that DOC has shown that it was entitled to a judgment as a matter of law. CP at 110-11. Further, the court noted pursuant to Western District of Washington Rule of Civil Procedure 7(b)(2) that Mr. Emeson's failure to file a meaningful response was construed as an admission that DOC's motion for summary judgment had merit and the matter was dismissed with prejudice. Mr. Emeson did not appeal the court's order. CP at 110-11..

On February 8, 2013, Mr. Emeson filed this suit in state court based on the same nucleus of operative facts. CP at 1-6.

IV. LAW AND ARGUMENT

A review of a trial court's ruling granting summary judgment is *de novo*. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 993 P.2d 259 (2000). This court should affirm the trial court's order granting summary judgment because (1) all of Mr. Emeson's claims are barred by the doctrine of res judicata, (2) his claims of discrete allegations of discrimination prior to February 2010 are barred by the statute of

limitations, (3) his claims are barred by the doctrine of collateral estoppel, (4) he was accommodated, (5) his privacy claim is time barred and not imputable to DOC and, (6) his constructive discharge and discharge in violation of public policy claims are moot.

A. The Trial Court Properly Dismissed All Of Mr. Emeson's Claims Based On Res Judicata

The trial court properly granted summary judgment in this case on all of Mr. Emeson's claims based on the doctrine of res judicata. Mr. Emeson's assertion the trial court erred is without merit because he previously sued the same parties based on the same facts in federal court and lost. He is not entitled to a second bite at the apple and as such the trial court's ruling should be affirmed.

Under the principles of federal supremacy, a federal judgment must be given full faith and credit in the state courts, including recognizing the preclusive effect of that judgment. *Loveridge v. Fred Meyer, Inc.*, 72 Wn. App. 720, 724, 864 P.2d 417 (1993), *aff'd* 125 Wn.2d 759, 887 P.2d 898 (1995). Recognition of the preclusive effect of prior lawsuits is necessary to "avoid repetitive litigation, conserve judicial resources, and prevent the moral force of court judgments from being undermined." *Hisle v. Todd Pacific Shipyards Corp.*, 113 Wn. App. 401, 410, 54 P.3d 687 (2002). The preclusive effect of a federal judgment is

determined by federal law. *Alcantara v. Bowing Co.*, 41 Wn. App. 675, 678, 705 P.2d 1222 (1985).

Under state and federal law, res judicata “bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action.” *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). “Filing two separate lawsuits based on the same event claim splitting are precluded in Washington.” *Landry v. Luscher*, 95 Wn. App. 779, 780, 976 P.2d 1274 (1999).

The doctrine of res judicata rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate in a former action in a court of competent jurisdiction should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings. *Marino Prop. Co. v. Port Comm'rs*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982) (quoting *Walsh v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d 215 (1949)). See 14A Karl B. Tegland, *Washington Practice: Civil Procedure* § 35.33, at 479 (1st ed.2007). *Kuhlman v. Thomas*, 78 Wn. App. 115, 120, 897 P.2d 365 (1995); *Atl. Cas. Ins. Co. v. Or. Mut. Ins. Co.*, 137 Wn. App. 296, 302, 153 P.3d 211 (2007).

The doctrine applies whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties.

Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001).

1. Res Judicata Applies Because The Federal Court Ruling Is A Final Judgment And There Is Identity/Privity Between The Parties

The trial court properly found that Judge Bryan's ruling is a valid and final judgment on the merits. A federal judgment is final even if the judgment is the subject of a pending appeal. *Tripati v. Henman*, 857 F.2d 1366, 1367 (9th Cir. 1988). Also, a court's order granting summary judgment is a valid basis for application of res judicata. *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 892, 1 P.3d 587 (2000).

Further, the trial court found that there is privity between the parties. Mr. Emeson sued DOC in federal court and state court.

As such, these two threshold requirements of res judicata are met in this case.

2. Res Judicata Applies Because There Is Identity Of Claims

The trial court properly dismissed Mr. Emeson's suit because there is identity of claims. Mr. Emeson's assertion the trial court erred because he did not sue DOC based on the exact same claims in state is meritless because the two suits arise out of the same nucleus of operative facts.

In determining whether the identity of claim requirement is met, federal courts “look at four criteria, which are not applied mechanistically: (1) whether the two suits arise out of the same transactional nucleus of facts; (2) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (3) whether the two suits involve infringement of the same right; and (4) whether substantially the same evidence is presented in the two actions.” *Mpoyo v Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005). This same test is used in Washington. *Kuhlman v Thomas*, 78 Wn .App. 115, 122. (1995).

a. Res Judicata Applies Because The Two Cases Are Based On The Same Nucleus Of Operative Facts

Most importantly, the trial court’s ruling should be affirmed because the two cases arise out of the same nucleus of operative facts. Mr. Emeson’s briefing before the trial court and this court does not squarely address the fact that the two cases arise out of the same nucleus of operative facts. The reason Mr. Emeson does not address this is straightforward, he cannot. His failure to address this matter is a tacit admission the two cases are based on the same nucleus of operative facts.

Not all factors are entitled to equal weight. The first factor whether the two suits arise out of the same transactional nucleus of facts is

often determinative of whether the identify element is met. *Mpoyo* at 987-88.⁴ Under this test, whether two events are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together. *See Mpoyo*, at 987-88 (affirming application of res judicata where both lawsuits concerned the same employment practices even though lawsuits were based on different statutes).

A quick review shows eight of the ten factual allegations contained in the state trial court amended complaint are exactly the same as the federal court complaint. The only paragraphs which are not copied verbatim from the federal court complaint are paragraphs 4.1 and 4.10. Paragraph 4.1 simply restates Mr. Emeson is alleging he was subject to a hostile work environment based on his protected status. This is the same thing he alleged in paragraph 1.1 of his federal complaint. Paragraph 4.10 is no different. Here, as in his federal complaint, Mr. Emeson is again alleging he was improperly terminated.

The fact the case is based on the same nucleus of operative facts as the federal court suit is sufficient in and of itself to establish identity of claims for purposes of affirming the trial court's ruling on res judicata. The identify element is satisfied even in circumstances where not all four

⁴ Similarly, under Washington it is not necessary that all four factors be present to bar a claim. *Kuhlman*, 78 Wn. App. at 122.

factors outlined are met. As such, the trial court properly granted summary judgment based on res judicata.

b. DOC's Rights Or Interests Established In The Prior Judgment Would Be Destroyed Or Impaired By Prosecution Of This Action

The identity of claims element is satisfied because DOC's rights and interests established in the prior judgment would be destroyed or impaired by prosecution of this action.⁵ A finding in favor of Mr. Emeson in this case could not be established without impairing the findings in the federal suit.

The federal suit established DOC did not discriminate against the Mr. Emeson. This finding would be impaired if Mr. Emeson were allowed to have another chance to litigate matters based on the same nucleus of operative facts. As such, res judicata applies, and the trial court properly granted summary judgment.

c. This Suit Involves the Infringement Of The Same Rights

The identify of claims element is also met because both suits involve the same overall harms and primary rights of the claims decided in the federal suit. In both cases, Mr. Emeson alleges disparate treatment, retaliation and hostile work environment.

⁵ Mr. Emeson's assertion that DOC did not address this issue before the trial court is meritless. Appellant's Opening Brief (Opening Bri.) at 56. DOC raised this issue in its opening summary judgment brief CP at 22.

Further, to the extent Mr. Emeson's suit before the trial court addresses different rights, res judicata still applies. The trial court properly applied res judicata because the state court suit is based on the same set of facts of the federal suit and for convenience should have been brought together in the federal suit.⁶

d. This Suit Is Based On the Same Subject Matter as the Federal Suit

The trial court properly recognized Mr. Emeson is premising his claims on substantially the same subject matter in both cases. Mr. Emeson's assertion that the trial court erred because he has plead different claims is baseless. This suit is based on the same subject matter and transaction as the federal suit.

A single cause of action can create an outpouring of different claims, based on varying federal statutes, state statutes, and the common law. See *Kale*, 924 F.2d 1161, 1166 (1st Cir. 1991); *Manego v Orleans Bd. of Trade*, 773 F.2d 1, 5 (1st Cir.1985), *cert. denied*, 475 U.S. 1084, 106 S. Ct. 1466, 89 L. Ed. 2d 722 (1986); see also *Restatement (Second) of Judgments* § 24 (1992).

⁶ Mr. Emeson could have sued the individual supervisors and co-workers who allegedly discriminated and retaliated against him under Chapter 49.60 RCW in federal court. See *Brown v. Scott Paper Co.*, 98 Wn. App. 349, 358, 989 P.2d 1187 (1999) (co-workers who discriminate are individually subject to suit under WLAD); see also RCW 49.60.210 (persons subject to suit for retaliation under WLAD). Accordingly, the Eleventh Amendment immunity of the State would not have prevented Mr. Emeson from pursuing his WLAD claims in federal court.

In this case, the trial court properly recognized the subject matter is the same. In the introductory paragraph of his federal suit Mr. Emeson stated he was subjected to disparate treatment, retaliation and a hostile work environment by his supervisors at DOC, based on his race, national origin and mental condition. His state court complaint mirrors this subject matter and shows he is raising claims based on the same subject matter.

The fact Mr. Emeson did not raise his state law claims in federal court does not mean the subject matter is different either. Mr. Emeson's claim it is "speculative" whether the federal court would have exercised jurisdiction over his state law claim is meritless. Because Mr. Emeson failed to bring the claim, he has no evidence on which to make that statement. Equally it is meritless because he chose the forum and claims splitting is prohibited.

Mr. Emeson had the opportunity in federal court to bring all his claims on the subject matter. As such, res judicata applies and the trial court properly granted summary judgment.

However, even if res judicata does not apply in this case, which it does, the trial court properly granted summary judgment because Mr. Emeson's disparate treatment, retaliation and hostile work environment claims are precluded under the doctrine of collateral estoppel.

B. The Trial Court Properly Granted Summary Judgment Because Mr. Emeson's Retaliation and Disparate Treatment Claims Are Barred by Collateral Estoppel

The trial court properly granted summary judgment based on collateral estoppel because Mr. Emeson is bound by United States District Court Judge Bryan's ruling, which held Mr. Emeson failed to create an issue of fact regarding his claims and DOC was entitled to judgment as a matter of law. Mr. Emeson's assertion the trial court erred because he has now plead WLAD claims is meritless. Judge Bryan's ruling bars Mr. Emeson from claiming that DOC lacked a valid non-discriminatory basis for its actions. As such the trial court's ruling should be affirmed.

The doctrine of collateral estoppel encompasses issue preclusion. *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). Collateral estoppel bars re-litigation of any issue that was actually litigated in a prior lawsuit. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993); *Pederson v. Potter*, 103 Wn. App. 62, 69, 11 P.3d 833 (2000); Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 812-13 (1985). One of the purposes of issue preclusion is to encourage respect for judicial decisions by ensuring finality. The question is always whether the party to be estopped had a full and fair opportunity to litigate the issue. *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312

(1998). That question turns on four primary considerations: (1) whether the identical issue was decided in a prior action; (2) whether the first action resulted in a final judgment on the merits; (3) whether the party against whom preclusion is asserted was a party to that action; and (4) whether application of the doctrine will work an injustice. *Hanson*, 121 Wn.2d at 562.

For collateral estoppel to apply, it is not necessary that the issue was previously determined through a trial. “[A] grant of summary judgment constitutes a final judgment on the merits and has the same preclusive effect as a full trial of the issue.” *Nat’l Union Fire Ins. Co. of Pittsburgh v. NW Youth Servs.*, 97 Wn. App. 226, 233, 983 P.2d 1144 (1999). Collateral estoppel applies even though the ultimate issues are different in the two suits. *Island County v. Mackie*, 36 Wn. App. 385, 391-92, 675 P.2d 607 (1984). A substantive difference between two legal schemes does not preclude the application of collateral estoppel. *See Liberty Bank of Seattle, Inc. v. Henderson*, 75 Wn. App. 546, 548, 559-60, 878 P.2d 1259 (1994) (federal court’s order dismissing race-based equal protection and due process claims based upon determination that employer’s actions were “eminently reasonable” precludes plaintiff’s state law wrongful interference with business relations claim); *see also Lumpkin v. Jordan*, 49 Cal. App. 4th 1223, 1231-32, 57 Cal. Rptr. 2d 303 (1996) (despite

substantive differences between federal and state anti-discrimination laws, collateral estoppel applies to federal court's determination that plaintiff was discharged for nondiscriminatory reasons). Rather, the central question is whether an issue essential to a claim has been actually litigated and decided in a prior final judgment. *See Restatement (Second) of Judgments* § 27 (1980). The two issues (not the claims) must be legally and factually identical. *See Hanson*, 121 Wn.2d at 573-74, 852 P.2d 295 (citing *Standlee v. Smith*, 83 Wn.2d 405, 518 P.2d 721 (1974)).

State courts also apply collateral estoppel to rulings rendered in federal courts. For example, in *Brownfield v. City of Yakima*, the court of appeals upheld the trial court's dismissal of a plaintiff's wrongful discharge in violation of public policy claim. The trial court found several of the federal court's rulings which found the plaintiff was not terminated for engaging in protected activity bound the plaintiff and precluded the jury from finding the plaintiff was terminated for purported whistleblowing activities. *Brownfield v. City of Yakima*, 178 Wn. App, 316 P.3d 520 (2014).

Finally, Washington courts have specifically rejected the argument that collateral estoppel does not apply to claims under WLAD, chapter 49.60 RCW. The Court of Appeals reasoned, "[t]he Legislature knows how to bar issue preclusion when it wants to do so. It has not chosen to do

so in the WLAD.” *Carver v State*, 147 Wn. App. 567, 574, 197 P.3d 678 (2008). Accordingly, the court concluded, “collateral estoppel may be applicable to an action brought under our anti-discrimination laws.” *Id.*

1. The Trial Court Properly Dismissed Appellant’s Disparate Treatment Claims

The trial court properly granted summary judgment on Mr. Emeson’s disparate treatment claim because Mr. Emeson is bound by Judge Bryan’s ruling. As such, the trial court’s ruling should be affirmed.⁷

Whether a prima facie case of disparate treatment is established turns on whether a plaintiff can show: (1) he or she is a member of a protected class; (2) that he or she was treated less favorably in the terms and conditions of his or her employment; (3) than a similarly situated non-protected employee; and that (4) he or she and the non-protected comparator were doing substantially the same work. *Washington v. Boeing Co.*, 105 Wn. App. 1, 16, 19 P.3d 1041 (2000).

Only if the plaintiff can establish a prima facie case does the burden of production shift to the employer to articulate a legitimate, non-discriminatory or non-retaliatory reason for the adverse employment

⁷ As discussed in below in section D, a large portion of Mr. Emeson’s claims are barred by the statute of limitations. However, even if they were not time barred, which they are, they are also barred by collateral estoppel.

decision. *Hill v. BCTI Income Fund*, 144 Wn.2d 172, 181-82, 23 P.3d 440 (2001). Once such a reason is identified, the burden of production shifts back to the employee to show that the proffered reason is pretext. *Id.* “If the plaintiff proves incapable of doing so, the defendant becomes entitled to judgment as a matter of law.” *Id.* at 182.

In this case the trial court properly granted summary judgment on Mr. Emeson’s disparate treatment claims based on collateral estoppel. The trial court ruling should be affirmed for two reasons.

First, the trial court ruling should be affirmed because Judge Bryan’s ruling is final and Mr. Emeson was a party to the prior action. There is no dispute on these two issues.

Second, the trial court ruling should be affirmed because Judge Bryan’s ruling binds Mr. Emeson from establishing a disparate treatment claim regardless of the alleged protected status. Mr. Emeson’s disparate treatment claims are precluded because Judge Bryan’s ruling established DOC has legitimate non-discriminatory reasons for its actions. Mr. Emeson failed to raise an issue of fact regarding his claims and determined DOC was entitled to judgment as a matter of law. Mr. Emeson is bound by the ruling and cannot attempt to re-litigate the issue.

Mr. Emeson is bound by the ruling and cannot attempt to re-litigate the issue. As such, the trial court properly dismissed Mr. Emeson's disparate treatment claims and the ruling should be affirmed.

2. The Trial Court Properly Dismissed Appellant's Retaliation Claims

The trial court properly dismissed Mr. Emeson's retaliation claims as well. Just like disparate treatment claims Judge Bryan's ruling again binds Mr. Emeson from establishing his retaliation claims because Judge Bryan's ruling establishes the actions of DOC as a matter of law were based on legitimate non-retaliatory reasons.⁸

Mr. Emeson is bound by that ruling and there for cannot re-litigate whether the actions of DOC were retaliatory under a WLAD based theory. As such the trial court properly dismissed Mr. Emeson's retaliation claims and the ruling should be affirmed.

3. The Trial Court Properly Dismissed Appellants Race And National Origin Hostile Work Environment Claims Because Judge Bryan's Ruling Binds Appellant And Precludes Him From Re-Litigating The Issue

⁸ Whether a prima facie case of retaliation turns on whether a plaintiff can show that (1) he engaged in statutorily protected activity, (2) adverse employment action was taken against him, and (3) there is a causal link between the activity and adverse action. *Milligan v Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002). citing *Francom v. Costo Wholesale Corp*, 98 Wn. App. 845, 862, 991 P.2d 1182, review denied, 141 Wn.2d 1017 (2000). Just like disparate treatment claims, the employer may overcome the prima facie case by articulating a legitimate, non-retaliatory reason for the adverse employment decision. *Hill*, 144 Wn.2d at 181-82. If the employee is incapable of establishing pretext, the defendant becomes entitled to judgment as a matter of law." *Id.* at 182.

The trial court properly granted summary judgment on Mr. Emeson's race and national origin based hostile work environment claims because Mr. Emeson is bound by Judge Bryan's ruling that he failed to create an issue of fact regarding his national origin and race based hostile work environment claim and DOC was entitled to judgment as a matter of law. Put another way, Judge Bryan's ruling established the alleged work environment harassment was not severe or pervasive and Mr. Emeson is estopped from re-litigating the issue.⁹

In this case, Judge Bryan's ruling collateral binds Mr. Emeson from litigating the issue of whether he was subjected to a hostile work environment based on race or national origin. Whether Mr. Emeson was subjected to severe and pervasive harassment which unreasonably interferes with his work performance based on his protected status was already resolved in the favor of DOC. As such the trial court properly granted summary judgment and the ruling should be affirmed.

4. The Trial Court Properly Granted Summary Judgment Because the Application Of Collateral Estoppel In This Case Does Not Render An Injustice

⁹ Mr. Emeson's disability hostile work environment claim is subject to res judicata. His analysis of *Short v Battleground School District*, 169 Wn App. 188, 279 P.3d 902 (2012), is unclear. As such, DOC did not respond to it. To the extent Mr. Emeson attempts to argue this matter in his reply brief DOC objects and the argument should be rejected.

The trial court also properly dismissed Mr. Emeson's disparate treatment, retaliation and race/national origin based hostile work environment claims because Mr. Emeson has failed to show dismissing his claims renders an injustice. Mr. Emeson's appeal is premised on the meritless assertion that applying collateral estoppel amounts to an injustice because Judge Bryan granted summary judgment after Mr. Emeson failed to respond to DOC's motion. Dismissal of Mr. Emeson's claims does not amount to an injustice and was appropriate for three reasons.

First, dismissal was appropriate because Judge Bryan's order was appealable. Mr. Emeson could have appealed the ruling but chose for whatever reason not to. Where Mr. Emeson let the prior decision stand, he should not now be heard to complain that being bound by it now works an injustice. Application of collateral estoppel was appropriate and the trial court's ruling should be affirmed.

Second, dismissal of Mr. Emeson's claims was proper because Judge Bryan's ruling was not manifestly erroneous. Mr. Emeson's assertion that the trial court erred because Judge Bryan ruled after Mr. Emeson failed to file a response is meritless. Mr. Emeson has never established Judge Bryan acted outside of his authority or applied the incorrect law when rendering his ruling. The reason Mr. Emeson has failed to do so is obvious, he cannot.

Mr. Emeson's attempts to imply Judge Bryan improperly exercised his authority by saying he ruled "sua sponte" is baseless. Judge Bryan had the authority to rule. In federal court a party may only dismiss a matter without a court order prior to a party serving an answer or a motion for summary judgment. Fed. R. Civ. P. 41(a)(1)(A)(i). Mr. Emeson requested dismissal only after DOC had filed its motion for summary judgment. Pursuant to federal procedure, Judge Bryan denied Mr. Emeson's belated request. Judge Bryan's ruling was proper, as was the trial court's reliance on it in applying collateral estoppel.

Third, the trial court properly granted summary judgment because there have not been any factual changes since the ruling in federal court. Contrary to any implication in Mr. Emeson's brief, the mere fact that he filed a response to DOC's summary judgment in the trial court does not establish that there have been factual changes. This assertion is meritless.

This case is not akin to a situation under Fed. R. Civ. P. 59 where an appellant became aware of new information that could not have been previously discovered despite due diligence. Mr. Emeson's failure to file a response in federal court is not evidence of due diligence. Nor does it establish that information which Mr. Emeson chose to present to the state court in this case was not available to him in the prior federal case. The

fact remains Mr. Emeson had the opportunity to litigate his claims in federal court. As such the trial court properly granted summary judgment.

Likewise, Mr. Emeson's assertion there is "new" evidence is also meritless. This not a situation where the parties have engaged in serial litigation and the underlying factual premises concerning the issues resolved by in the original suit have changed over time. Mr. Emeson was terminated in 2011. Just like in the federal suit, this suit is based on his termination and the alleged work environment leading up to his termination.

The facts have not changed since Mr. Emeson was terminated: he had the opportunity to litigate his case in federal court, Judge Bryan properly asserted his authority and as such the application of collateral estoppel in this case is appropriate.

C. The Trial Court Properly Granted Summary Judgment Because Mr. Emeson's Claims Of Discrete Acts Of Discrimination Prior To February 2010 Are Time Barred

The trial court properly granted summary judgment because Mr. Emeson's claims of discrete acts of discrimination prior to February 2010 are time barred. Mr. Emeson's assertions the trial court erred granting summary judgment on this basis are meritless because discrete incidents of alleged disparate treatment and retaliation are subject to a three year statute of limitation. As such, the trial court properly dismissed

all claims of discrete incidents of disparate treatment and retaliation prior to February 2010.

A complaint must be filed within three years of an alleged disparate and discrete employment practice. The statute of limitations applicable to discrimination claims is three years. *Antonius v King Cnty*, 153 Wn.2d 256, 261-62, 103 P.3d 729 (2004). Mr. Emeson filed this suit on February 8, 2013. Any claims based on discrete incidents of discrimination prior to February 8, 2010 are time barred.

Mr. Emeson argues that his national origin/race and/or disability harassment claims are not time barred, but does not identify what acts Mr. Emeson alleges were inside the statute of limitations. RAP 10.3(a)(6) requires that argument in support of issues presented for review be accompanied with “references to relevant parts of the record.” This requirement is not met by Mr. Emeson’s general directive that his claim is “evidenced by the above-referenced statement of facts.” Appellant’s Opening Brief (Opening Br.) at 71. This court should decline to assume the obligation to comb the record on Mr. Emeson’s behalf. *See West v Thurston Cnty*, 168 Wn. App. 162, 192, 275 P.3d 1200, 1216 (2012) (declining to consider assertions made without citation to the record, as required by RAP 10.3(a)(6)).

As such, the trial court properly granted summary judgment on all claims for discrete incidents which occurred prior to February 2010.

D. The Trial Court Properly Granted Summary Judgment On Mr. Emeson's Failure To Accommodate Claims Because He Was Accommodated

The trial court properly granted summary judgment because Mr. Emeson was accommodated. Mr. Emeson claims that his doctor rejected the Tacoma Office Assistant 3 position as a reasonable accommodation is inconsistent with the facts. The record shows that Mr. Emeson accepted the position and the position was in fact, approved by his medical provider. As such, the trial court ruling dismissing this claim should be affirmed.

The Washington Law Against Discrimination (WLAD) requires employers like the Department of Corrections to make reasonable accommodations for disabled employees. *Cripe v City of San Jose*, 261 F.3d 877, 881 (9th Cir.2001); *Dean v Mun. of Metro. Seattle-Metro*, 104 Wn.2d 627, 632, 708 P.2d 393 (1985). The WLAD's prohibition against disability discrimination does not apply if the disability prevents the employee from performing the essential functions of his or her position. *See* WAC 162-22-045; *Dedman v. Pers. Appeals Bd.*, 98 Wn. App. 471, 486, 989 P.2d 1214 (1999).

The requirement to accommodate, however, is not without limit. “An employer is not required ‘to offer the employee the precise accommodation he or she requests.’ or to create a job where none exists.” *Dedman*, 98 Wn. App. at 485 (quoting *Doe v. Boeing Co.*, 121 Wn.2d 8, 20, 846 P.2d 531 (1993)). The employer need not necessarily grant the employee’s request. It need only reasonably accommodate the disability. *Snyder v. Medical Service Corp. of Eastern Wash.*, 98 Wn. App. 315, 326, 988 P.2d 1023, 1030 (1999).

A plaintiff must, however, make an initial showing that he or she requested a specific accommodation that was both reasonable and available. *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 643, 9 P.3d 787, 795 (2000); *MacSuga v. Spokane Cnty.* 97 Wn. App. 435, 983 P.2d 1167 (1999). And this must happen at the summary judgment stage. *Dean*, 104 Wn.2d at 637.

In this case, the trial court properly granted summary judgment on Mr. Emeson’s reasonable accommodation claim for two reasons. First, at the threshold Mr. Emeson could not identify a specific accommodation that DOC allegedly failed to provide. Mr. Emeson’s assertion that DOC did not accommodate him is meritless in the face of his failure to identify any specific accommodation he was denied. CP at 73. As such, the trial

court properly granted summary judgment because Mr. Emeson has never identified any specific accommodation he was not provided with.

Second, Mr. Emeson's reasonable accommodation claim is based on an inaccurate interpretation of the factual record. The premise of Mr. Emeson's claim is that the Office Assistant 3 position he accepted as a reasonable accommodation was rejected by his medical doctor as a reasonable accommodation. This is factually inaccurate.

The record shows Dr. Corthell approved the Tacoma Office Assistant 3 position as a reasonable accommodation. CP at 438-40. Dr. Corthell confirmed this in deposition. In response to Mr. Emeson's questions about the position, Dr. Corthell responded as follows:

(Mr. Martin)

Q: And you your physician review of the accommodation for the office assistant position, you didn't have you agreed with it and just suggested he be given appropriate breaks or breaks when he needed them?

A: That's my recollection, yes.

CP at 415-16

It is unclear why appellant's counsel misstated the record to the trial court, but regardless of whether it was on purpose or a simply a mistake, the claim fails because DOC provided Mr. Emeson with an

accommodation.¹⁰ Dr. Corthell did not reject the Office Assistant 3 position as claimed. The trial court's ruling should be affirmed.

E. The Trial Court Properly Dismissed Mr. Emeson's Invasion Of Privacy Claim Because It Is Time Barred And DOC Is Not Liable For The Intentional Actions Of An Employee

The trial court properly dismissed Mr. Emeson's privacy claim. Mr. Emeson's assertion the court erred is without merit because the claim is barred by the statute of limitations and because DOC is not vicariously liable for intentional acts of its employees made outside the scope of their employment. As such, the trial court's ruling should be affirmed.

The common law tort of invasion of privacy requires publicizing the private affairs of another if the matter publicized would be highly offensive to a reasonable person. *Reid v Pierce County*, 136 Wn.2d 195, 205, 961 P.2d 333 (1998); *Restatement (Second) of Torts* § 652D (1977). As the Restatement explains, publicity in this context means communication to the public at large so that the matter is substantially certain to become public knowledge. A communication to a single person or a small group does not qualify. *Restatement (Second) of Torts* § 652D cmt. a (1977).

¹⁰ There is no admissible medical evidence in the record that Mr. Emeson needed every other Monday off as an accommodation for his disability. Mr. Emeson was offered a flex schedule with Thursday off and rejected it. CP at 441-42

Intentional tort's are subject to a two year statute of limitations. RCWA 4.16.100. Invasion of privacy by intrusion is an intentional act which intrudes into a person's private affairs. *Fisher v. Dept. of Health*, 125 Wn. App. 869, 106 P.3d 836 (2005) The Supreme Court has ruled invasion of privacy claims are subject to a two year statute of limitations. *Eastwood v Cascade Broad. Co.*, 106 Wn.2d 466, 722 P.2d 129 (1986).

A state agency cannot be held liable for the intentional torts committed by its employee. *Snyder v. Medical Service Corp.*, 145 Wn.2d 233, 35 P.3d 1158 (2001). An employer is not liable for the intentional torts of its employees acting outside the scope of employment. Washington law clearly rejects vicarious liability for intentional or criminal conduct outside the scope of employment. *Snyder*, 145 Wn.2d at 242-43, quoting *Niece v. Elmview Group Home*, 131 Wn.2d 39, 56, 929 P.3d 420 (1997).

In this case, the trial court properly dismissed Mr. Emeson's invasion of privacy claim for three reasons.

First, at the threshold the claim was properly dismissed because it is barred by the statute of limitations. The statement at issue in this case was made in May 2010 by Mr. Emeson's low level supervisor on her personal Facebook page. This suit case was not brought until February 11, 2013. As such, the claim is barred outright by the statute of limitations.

Second, the claim was properly dismissed because DOC did not invade Mr. Emerson's privacy. The evidence is that the statement at issue, which does not identify Mr. Emerson by name, was made by Ms. Phelps on her private Facebook account, not in a newspaper or some other public forum by DOC. This does not constitute "publicity" as defined for purposes of invasion of privacy. *Restatement (Second) of Torts* § 652D comt. a, at 384. Equally, even if it was invaded, which it was not, the statement was not made by DOC.

Third, the trial court properly dismissed the claim because the statement was not made in the scope of Ms. Phelps' employment. Ms. Phelps' job did not include posting statements on Facebook, and it certainly did not include engaging in activity which allegedly invades a person's privacy.

DOC is not vicariously liable for the intentional actions of Ms. Phelps. Mr. Emerson's suggestion that DOC is liable for intentional acts of Ms. Phelps that are outside the scope of her employment is without merit.

It is without merit because Mr. Emerson has not pled a negligent supervision claim. However, even if he had pled such a claim, it would fail because to the extent Mr. Emerson is relying on this incident as part of his discrimination claim, it is duplicative. When plaintiffs rely on the

same facts to support both discrimination and negligent hiring or supervision claims, the negligent supervision claims are duplicative and are properly dismissed by the trial court. *Francom v. Costco Wholesale Corp*, 98 Wn. App. 845, 866, 991 P.2d 1182 (2000).

Likewise, it is without merit because there is no evidence DOC knew or should have known about Ms. Phelps' intentional act. In limited circumstances, an employer may have a duty to protect potential victims from an employee where the employer has information that the employee is dangerous. *Peck v. Siau*, 65 Wn. App. 285, 288, 827 P.2d 1108, 1110 (1992). An employer's supervision of an employee is negligent only if the employer knows, or in the exercise of reasonable care should know, of the employee's dangerous or improper conduct, but does nothing to correct the situation. The "dangerous" employee's harmful acts must be foreseeable in order for the employer to be liable. *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555 (1993), *review denied*, 123 Wn.2d 1027 (1994).

The trial court properly granted summary judgment because there is no evidence DOC knew or should have known that Ms. Phelps was going to engage in this intentional behavior. The evidence in the record is DOC only became aware of the actions of Ms. Phelps when a complaint

was made by another co-worker. In addition, when DOC became aware it promptly addressed the issue.

In short, even if the claim was not barred by the statute of limitations, and Mr. Emeson had pled a claim of negligent supervision and the claim was not duplicative his claim would still fail because Ms. Phelps' intentional act was outside the scope of her employment and not imputable to DOC.

F. The Trial Court Properly Dismissed Mr. Emeson's "Actual Discharge" And Wrongful Discharge In Violation Of Public Policy Claim

Mr. Emeson did not assign error to the trial court's dismissal of his "actual discharge" and wrongful discharge in violation of public policy claims.¹¹ However, he did generally assign error to the trial court granting summary judgment. Given this ambiguity DOC is compelled to address the matter. DOC respectfully assert this assignment of error is inadequate because it does not identify any of the legal bases for the court's ruling as being erroneous in regards to these claims. "It is well settled that a party's failure to assign error or to provide argument and citation of authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error." *Escude ex rel. Escude v. King*

¹¹ Mr. Emeson did not provide any briefing in opposition to the dismissal of these claims at the trial court either.

County Pub. Hosp. Dist. 2, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003) (citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, n.4, 974 P.2d 836 (1999)); *Cowiche*, 118 Wn.2d at 809.

Even if Mr. Emeson did properly preserve these issues for appeal, which he did not, he did not present argument or authorities addressing any of the grounds on which the trial court based its dismissal of these claims. This amounts to a waiver of any appeal on these issues. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). That waiver renders any appeal of Mr. Emeson's "actual/constructive discharge" and wrongful discharge in violation of public policy claims moot and he may not resurrect these issues in his reply brief. *Id.*

1. The Trial Court Properly Dismissed Mr. Emeson's Claims For Constructive Or Actual Discharge

Mr. Emeson alleged a claim for constructive or actual discharge. DOC is unaware of any authority that would support such a claim.¹² Such a claim is properly analyzed under the disparate treatment analysis. The trial court properly dismissed the claim because it is subsumed within Mr.

¹² Mr. Emeson cannot premise a common law wrongful discharge claim on a violation of RCW 49.60.180, as a plaintiff who fails to establish a retaliation and/or discrimination claim cannot sustain a claim of wrongful discharge for alleged violations of public policies based on that alleged retaliation and/or discrimination. *See Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 445, 45 P 3d 589 (2002).

Emeson's disparate treatment claim. As a result, his claim for constructive or actual discharge should be dismissed.

2. The Trial Court Properly Dismissed Mr. Emeson's Wrongful Discharge In Violation Of Public Policy Claim

Mr. Emeson alleges that he was wrongfully discharged in violation of public policy by DOC for opposing unethical behavior. When deposed, Mr. Emeson was unable to articulate the exact basis of his claims, but they are essentially duplicative of his overall discrimination complaints.

Employers and employees can terminate their employment relationship at any time for any reason, without having to explain their action to a court. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 226, 685 P.2d 1081 (1984). The tort of wrongful discharge in violation of public policy is a narrow exception to this rule. *Sedlacek v. Hillis*, 145 Wn.2d 379, 385, 36 P.3d 1014 (2001). However, this exception must be applied cautiously. *Id.* The tort is not designed to protect an employee's purely private interests.

The Washington State Supreme Court has outlined the basic principles of wrongful discharge in violation of public policy. *See Danny v. Laidlaw Transit Serv. Inc.*, 165 Wn.2d 200, 193 P.3d 128 (2008). To establish this cause of action, a plaintiff must prove: (1) the existence of a

clear public policy; (2) that discouraging the conduct in which the employee engaged would jeopardize the public policy; and (3) that the public policy-linked conduct caused the dismissal. *Id.*; see also *Korshund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 178, 125 P.3d 119 (2005) (citing *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996)). The plaintiff must also prove; (4) that the employer cannot offer an overriding justification for the dismissal. *Korshund*, 156 Wn.2d at 178 (citing *Hubbard v. Spokane Cy.*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002)).

The question of what constitutes a clear mandate of public policy is one of law. *Dicomes v. State*, 113 Wn.2d 612, 625, 782 P.2d 1002 (1989). The plaintiff must be able to show that the employer's "misconduct" impacts society at large, not merely a matter of personal concern for the employee. *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 801, 991 P.2d 1135 (2000); *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 445, 951 P.2d 782 (1998); *Dicomes*, 113 Wn.2d at 618. The existence of the public policy must be clear. *Selix v. Boeing Co.*, 82 Wn. App. 736, 741, 919 P.2d 620 (1996).

"[I]t is significant that most Washington cases finding a public policy violation have identified a single statute that clearly sets forth the relevant policy." *Gardner*, 128 Wn.2d at 953 (Madsen, J., dissenting). To

determine whether a public policy is violated, the court should “inquire whether the employer’s conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.” *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 668, 807 P.2d 830 (1991) (quoting *Thompson*, 102 Wn.2d at 232). Though the court may also examine prior judicial decisions, “the Legislature is the fundamental source for the definition of this state’s public policy and [courts] must avoid stepping into the role of the Legislature by actively creating the public policy of Washington.” *Sedlacek*, 145 Wn.2d at 390.

In addition to identifying a clear public policy, plaintiff must also show that the wrongful discharge claim is the only way to vindicate the policy. In other words, plaintiff must prove that discouraging the conduct in which he engaged would jeopardize the public policy. *Korlund*, 156 Wn.2d at 181 (citing *Ellis v City of Seattle*, 142 Wn.2d 450, 460, 13 P.3d 1065 (2000)). In short, he “must show that other means of promoting the public policy are inadequate.” *Korlund*, 156 Wn.2d at 181-82. Thus, for example, if an adequate statutory remedy exists which would protect the public policy, and then the plaintiff cannot establish the “jeopardy” element of a wrongful discharge in violation of public policy claim. *Korlund*, 156 Wn.2d at 181-83. This also is a question of law for the court. *Korlund*, 156 Wn.2d at 182.

furnishing to the claims in this case, Mr. Emeson cannot premise his wrongful discharge claim on an allegation that his discharge was done in retaliation for filing a discrimination complaint. This is because Chapter 49.60 RCW provides an adequate means of protecting the public policy against discrimination by allowing individuals to file claims of retaliation when they believe they have been retaliated against for filing a discrimination complaint. *See* RCW 49.60.210; *Griffith v. Boise Cascade Inc.*, 111 Wn. App. 436, 445, 45 P.3d 589 (2002). As there exists adequate means to protect the public policy underlying the statutory scheme prohibiting discrimination within the scheme itself, Mr. Emeson cannot satisfy the jeopardy element. As a result, any wrongful discharge claim premised on Mr. Emeson's complaints of alleged discrimination is not legally cognizable and should be dismissed.

Mr. Emeson cannot claim his discharged violates the public policy favoring freedom of speech to the extent his discharge was based on his voicing objections to alleged discrimination. The reason he cannot make this claim is because any such claim is legally deficient for a number of reasons.

First, as already explained, an adequate remedy already exists in the form of a retaliation claim under RCW 49.60.210. As a result,

Mr. Emeson cannot establish the jeopardy element necessary to sustain a wrongful discharge claim.

Second, Mr. Emeson has not pled a 42 U.S.C. § 1983 claim. Thus, to the extent Mr. Emeson attempts to premise his claim on the First Amendment to the United States Constitution, the claim is not viable because he has not pled a 42 U.S.C. § 1983 claim. Nor could he because the State is the only named defendant and the State is not subject to suit under 42 U.S.C. § 1983. *See Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (1983).

Third, to the extent Mr. Emeson attempts to premise his claim on any State constitutional protection of free speech, violations of the Washington Constitution are not actionable. *See Spurrell v. Bloch*, 40 Wn. App. 854, 701 P.2d 529 (1985).

Finally, both federal and state law requires speech by a public employee to be on a matter of public concern, rather than a personal matter, in order to be protected and actionable. *See Tyner v. Dep't of Soc. & Health Servs.*, 137 Wn. App. 545, 154 P.3d 920 (2007); *see also Smith v. Bates Technical Coll.*, 139 Wn.2d at 801 (plaintiff must show that employers "misconduct" impacts society at large, not merely a matter of personal concern for the employee). In addition, in order to constitute a matter of public concern, it must be communicated in a public forum.

Tyner, 137 Wn. App. at 558. Because Mr. Emeson's speech was on a matter of purely personal concern, and was not communicated to the public, it does not implicate any constitutional protection and may not serve as the basis for a wrongful discharge claim.

V. CONCLUSION

Mr. Emeson had the opportunity to litigate this matter in federal court on the same nucleus of operative facts. The trial court properly granted summary judgment and that ruling should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of December,
2014.

ROBERT W. FERGUSON
Attorney General

s/Garth A. Ahearn
GARTH A. AHEARN
WSBA No. 29840, OID No. 91105
Attorney for Respondents
1250 Pacific Avenue, Suite 105
P.O. Box 2317
Tacoma, WA 98401
(253) 593-6136

CERTIFICATE OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Via e-mail
- Hand delivered

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

DATED this 19th day of December, 2014, at Tacoma, Washington.

/s/ Denise Holt

FILED
COURT REPORTS
DIVISION
2014 DEC 19 11:41
STATE OF WASHINGTON
BY ~~DEPUTY~~