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DIVISION II
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STATE OF WASHINGTON
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No. 46543-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

VICTOR CELIS, a married man,

Appellant,

vs.

CITY OF LAKEWOOD, a municipal corporation and CITY OF
LAKEWOOD POLICE DEPARTMENT, a political subdivision, BRET
FARRAR and CINDY SALAZAR, Individually and as Chief of Police,
and as the marital community; MIKE ZARO and DEBORAH ZARO,
individually and as Assistant Chief of Police, and as the marital
community,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Appellant Victor Celis (hereinafter referred to as “Celis”) is a former Lakewood police officer who got drunk at an Oktoberfest party in Leavenworth, Washington; got into a fight with his wife; became belligerent with sheriff deputies who responded to the scene; pulled out his police badge and told all of the deputies he was a Lakewood cop; told deputies he was going to “kick all of your asses;” tried to prevent the deputies from talking to his wife during their investigation; and ultimately succeeded in getting preferential treatment and avoiding a criminal arrest because of he was a Lakewood police officer who had lost four fellow officers in a tragic shooting that had occurred the year prior. These facts are undisputed.

After this incident occurred, Lakewood Chief of Police, Bret Farrar, notified Celis in a pre-disciplinary meeting that he was considering terminating Celis’ employment. Celis decided to resign before he was terminated. He later brought suit against the City of Lakewood (hereinafter referred to as “the City”), Chief Farrar, and Assistant Chief Mike Zaro alleging constructive discharge and disparate treatment based on race under RCW 49.60. Celis’ claims were dismissed by the trial court on summary judgment and he now appeals the dismissal.

II. STATEMENT OF UNDISPUTED FACTS

A. Facts

Celis began working as a police officer with the Lakewood Police Department in August 2004. *CP 194*. While at the Lakewood Police Department, Celis had two sustained findings of misconduct involving improper use of his police authority for personal gain.

The first sustained finding occurred in October 2008. Ms. Hannah Rudnick complained to the Lakewood Municipal Court that Celis had been harassing her by repeatedly going to her office while in uniform and on duty to demand payment for off-duty security work he and other officers had provided to her company. *CP 265, CP 272-281*. She complained he retaliated against her for not paying him by pulling her over and giving her a speeding ticket. *CP 280-281*. At the end of the traffic stop, Celis asked Ms. Rudnick when he would receive the money she owed him. *CP 275-276*. The Department conducted an internal investigation and determined Celis had violated two City policies. The first was when he called Ms. Rudnick at least 17 times on his Department-issued cell phone, including at least 13 times while on duty, to demand that she pay the money. *CP 272-276*. The second policy violation occurred when he asked her for the money during the traffic stop while he was in his police uniform. *Id.* The internal investigation specifically

found: “As for the section covering personal conduct, while Officer Celis’ intent may have been simply to collect what was owed him, trying to collect money while in uniform can easily be perceived as using our legal authority to circumvent a civil process or intimidate Rudnick into compliance.” *Id.* Celis was given the corrective action of counseling for these sustained violations of policy to ensure he understood his conduct was wrong. *CP 272-273.*

The second sustained finding of misconduct resulted in 2010 when Celis was drunk and disorderly in public and used his police badge and status as a police officer to avoid being charged with a crime. *CP 283-316.* Multiple sheriff deputies and private security officers provided sworn statements detailing Celis’s misconduct that night; and Celis does not dispute the truth of any of these statements because he admits he was too drunk to remember what happened. *CP 294-316; CP 195-196.*

Celis and his wife were in Leavenworth for an Oktoberfest party and he became intoxicated, was yelling in public, smashed at least two glass beer mugs in the street, called a security officer a “dick” several times for cutting him off from purchasing more alcohol, threatened the deputies who responded to the altercation with violence, and was discourteous and disrespectful to deputies and security officers who were just trying to do their jobs. *CP 296-297, CP 299-301, CP 303-305, CP*

308-309, CP 310-311, CP 312, and CP 314-315. Celis was wearing his police badge on a chain around his neck even though he was not armed and was not attending a police function where it might have been appropriate to be wearing his badge. This was a violation of Lakewood Police Department policy regarding the use of police badges. CP 372.

The Chelan County Sheriff's deputies were initially summoned by people on the street to help stop a fight between two males. CP 296. When they ran over and questioned the witnesses, they learned that a group of men had attempted to intercede between Celis and his wife because Celis was yelling at his wife and the men were concerned for her safety. *Id.* Celis took offense to their interference and a verbal argument began. *Id.* During the course of his arguments with his wife and the men, Celis broke at least two glass beer mugs on the street. *Id.*

When the deputies tried to question Celis about the fight and breaking the beer mugs, he immediately pulled his badge out from under his shirt and identified himself as a police officer. CP 296, CP 300, and CP 314. Deputy Sean Duke asked Celis to put away his badge and provide them with his identification; but he pulled his badge out a second time. CP 300-301. After being asked again for his identification, Celis finally removed it from his wallet and handed it to the deputy. *Id.* Sergeant Mike Harris had never known an officer to carry his badge on a

chain when off-duty in an alcohol-drinking environment, so he contacted Lakewood Police Department to verify Celis was truly an officer and not just posing as one. *CP 296.*

Celis repeatedly lied to the deputies and denied that he had broken any beer mugs on the ground even though several witnesses saw him do this. *CP 300-301, CP 304, CP 308-309, CP 314.* He also belligerently threatened officers by making statements such as, “Is that all Sarge, anything else Sarge, and can I go now Sarge?” in an aggressive tone. *CP 297, and CP 301.* He also made statements about police brotherhood and looked directly at Deputy Duke and said, “Just wait until you all come over to the West side, you will be given the same treatment.” *CP 300, and CP 314.*

When the officers allowed the men who had tried to help Celis’ wife leave the area, Celis reprimanded them for letting the men leave. *CP 304, and CP 308.* He told Deputy Jeremy Mannin, “I should whip all of your asses.” *Id.* Deputy Mannin placed his hand on Celis’s shoulder and asked him why a fellow law enforcement officer would threaten to assault another. Celis just glared at him and pulled his shoulder back away from his hand. *Id.* Celis continued to be belligerent and uncooperative during the entire encounter. *Id.* When deputies tried to talk to Mrs. Celis to

determine if an assault had occurred, Celis improperly interfered and told them, “You are NOT talking to my wife.” *CP 297.*

The Lakewood Police Department conducted an internal investigation of this incident. The investigation concluded that not only was Celis disrespectful to the deputies, but his conduct bordered on criminal, with potential RCW violations of disorderly conduct (yelling in public and threatening violence), littering (breaking the mugs in the street), and obstructing a police officer (attempting to prevent the deputies from speaking to his wife while they were investigating a domestic violence situation). *CP 286.*

In addition, the evidence showed Celis made the situation worse by identifying himself as a Lakewood police officer and showing his badge with the intent of receiving special treatment for being a police officer.

1.1.2 Code of Conduct

Y. Identification/Badges

Members of the Lakewood Police Department shall only use their official identification cards, badges, and/or business cards in the performance of their duty. Sworn officers shall carry their identifications and badges on their person at all times while on duty (in the field) or while carrying a firearm off-duty under color of authority.

CP 372.

Sergeant Harris, who was the lead investigator from the Chelan County Sheriff's Office, told the City they did not charge Celis with any

crimes as a courtesy to Celis and the Lakewood Police Department, particularly since the Department had suffered the deaths of four of its police officers in a terrible shooting less than a year prior. *CP 285*. He stated that if Celis had been a civilian and not a police officer, he would have been arrested that night for disorderly conduct based on the way he acted. *Id.*

Celis admits he engaged in conduct unbecoming an officer during the Leavenworth incident. *CP 197-198*. However, he denies that he violated policy when he pulled out his police badge on the chain around his neck and identified himself to the investigating officers as a police officer while they were investigating his possible criminal conduct. *Id.* To this day, Celis believes it is an acceptable practice for police officers to identify themselves to other officers so “they will know who they are dealing with;” and to drive around with stickers on their cars identifying themselves as police officers to other officers who are doing traffic enforcement and policing on the road. *CP 198-199*.

At the conclusion of the investigation, Celis was notified of the findings and the potential discipline he could be facing, which included termination. *CP 283-284*. He was offered a pre-disciplinary meeting to give him an opportunity to present matters on his own behalf before a final decision was made. Celis attended this meeting with his union

representatives. *CP 197-198.* He presented a statement purportedly accepting responsibility for his actions, yet he did not believe he violated policy by displaying his badge while he was intoxicated and being investigated by police. *Id.* Chief Farrar believed Celis was just saying what he thought the Chief wanted to hear, but not expressing any true remorse for his actions. *CP 512-513.*

After the pre-disciplinary meeting, Celis's union representative, Officer Todd Bell, called Celis to let him know he believed the Chief was going to recommend termination. *CP 200-202.* Officer Bell advised Celis that if he resigned his employment instead of waiting to be terminated, he could preserve his police officer commission and try to get work at another department. *Id.* He told Celis that if he waited to be terminated, he might lose his commission, as well. *Id.*

Celis admits he did not explore his appeal options or his rights under the Lakewood Civil Service Commission rules. *CP 204.* Celis also did not raise a claim of involuntary resignation to the Civil Service Commission as he had the right to do. *CP 365.* Celis decided to resign his job instead of waiting for the Chief's recommendation on discipline because he wanted to keep his police officer commission. *CP 204.* He figured that if he kept his commission he would be able to find another job. *Id.* He testified that he resigned in order to receive a memorandum

from Assistant Chief Zaro indicating the Department would not seek to have his commission revoked by the state. *Id.* Celis came into the Department and Assistant Chief Zaro provided Celis with a memo indicating the Department would not seek to have his commission revoked. *CP 353.* Celis then submitted his resignation to Chief Farrar. *CP 318.*

Celis agrees it was appropriate to discipline him for the Leavenworth incident. *CP 205.* However, he believes termination would have been too harsh. Celis admits he resigned before he was actually disciplined or terminated. *CP 233.* He never spoke with Chief Farrar or Assistant Chief Zaro about a final disciplinary decision. *Id.* Neither the Assistant Chief nor the Chief has authority to terminate a police officer. *CP 355.* Only the City Manager can authorize a termination of an officer at the City of Lakewood. *Id.* The Chief makes a recommendation but the City Manager makes the final decision. *Id.*

B. **Alleged Comparators.**

Celis identified five officers who he believes engaged in equal or more severe misconduct than he did, yet were not recommended for termination by Chief Farrar. Celis admits the only information he has regarding the misconduct allegedly committed by these comparator officers is what he has heard from others at the department. *CP 209-210.*

He does not have any direct or personal knowledge of the incidents or the recommended discipline.

1. Joe Kolp.

Celis compares his own conduct with the conduct of Officer Joe Kolp, who was arrested for domestic violence. On September 16, 2007, Pierce County Sheriff's Deputies responded to a call for potential domestic violence involving Officer Kolp and his girlfriend. *CP 324-326.* Officer Kolp was arrested, but no criminal charge was filed against him. *Id.* Officer Kolp was not impaired by alcohol or drugs during the incident, was not belligerent, and did not attempt to interfere with the investigating officers. *Id.* Rather, he was completely cooperative, and he did not make any attempt to get preferential treatment during the incident based on his status as a police officer. *Id.* Larry Saunders was the Chief of Police at the time this incident occurred, so he made the disciplinary decision, not Chief Farrar or Assistant Chief Zaro. *CP 320-323.* After considering Officer Kolp's statements taking responsibility for what happened and his actions in voluntarily seeking counseling, Chief Saunders disciplined Officer Kolp with a three-day unpaid suspension. *Id.*

2. Chris Bowl.

Celis compares his own conduct with Officer Chris Bowl's arrest for domestic violence in the City of DuPont. Officer Bowl was arrested

for alleged domestic violence against his wife on September 30, 2009 by DuPont police. *CP 328-337*. However, no criminal charges were filed for this incident. *Id.* Officer Bowl called police to their home that night after his wife swallowed some prescription pills, sprayed an aerosol spray in her throat and tried to drink bleach. *Id.* He held her down to prevent her from drinking the bleach while waiting for police to arrive. *Id.* The incident was witnessed by their 17-year-old daughter, who fully corroborated Officer Bowl's statement. *Id.* Further, although his wife initially told police on the scene that Officer Bowl had hit her, his wife later admitted that was not true. *Id.* Instead of identifying himself as a police officer and trying to talk his way out of the clearly wrongful arrest; Officer Bowl calmly turned over his service weapon, remained cooperative, and accepted the arrest with no interference knowing it would be sorted out later during the investigation. *Id.* Once the circumstances of the incident were learned from the witnesses, the charge against Officer Bowl was dropped. *Id.* The internal investigation determined the suspected policy violation was unfounded, and no discipline was warranted. *Id.*

3. Shawn Noble.

Celis compares his own conduct with Officer Sean Noble's arrest for a DUI charge on October 22, 2011, one month before Celis resigned. However, during his arrest, Officer Noble did not interfere with the

investigation, he did not identify himself as a police officer to the arresting officers in order to try and get special treatment, and he was not belligerent or threatening toward the officers who arrested him. *CP 537*. Officer Noble pled guilty to first degree negligent driving. *Id.* He told the Chief he was ashamed of his actions and ashamed of the discredit he brought the Department. *CP 603-604*. Because he took full responsibility for his actions and the discredit he caused the Department, the Chief disciplined him with an 80 hour (14 day) unpaid suspension from duty. *Id.*

4. Jim Lofland.

Celis compares his own conduct with the conduct of Officer Jim Lofland who reported to work on December 21, 2008 while he was still impaired from drinking alcohol the night before. *CP 339-348*. When confronted about it at the Department, Officer Lofland agreed to be tested for alcohol, and fully cooperated with the Department's investigation. *Id.* He accepted responsibility for his actions and did not dispute the severity of his actions or the discipline. *Id.* Chief Farrar was going to recommend termination of Officer Lofland. The union and Officer Lofland negotiated a last chance agreement instead where Lofland received an 80-hour (14-day) unpaid suspension, he attended an alcohol treatment program, and was placed on probation under an employment contract for one year

following his return to work. *Id.* The contract provided that if he had one further incident, he would automatically be terminated without any right to grieve the discipline under his union contract. *Id.* He took complete responsibility for his actions, and had no further incidents. *Id.* Celis and his union representatives did not attempt to negotiate a similar type contract for Celis.

5. Brent Prante.

Celis compares his own conduct with the conduct of Officer Prante, who was arrested when he was on vacation in Las Vegas for being intoxicated and starting a fight. CP 539, *Id.*, 47:15-48:7. However, this incident occurred in 2012 – almost two years after Celis resigned and left the Department. Chief Farrar could not have treated Celis worse than Officer Prante when he recommended Celis for termination because Prante had not even engaged in any misconduct yet.

In addition, the Chief was considering recommending termination of Officer Prante, just as he had considered making that recommendation for Celis. *Id.* At his pre-disciplinary hearing, Officer Prante took full responsibility for all of his misconduct including identifying himself as an officer during the incident, even though he did not remember doing this. *Id.* Officer Prante acknowledged that he had embarrassed the Department, and called and apologized to the officer in Las Vegas who handled the

call. *Id.* Therefore, Chief Farrar decided to discipline him with a one day unpaid suspension and one year disciplinary probation instead of termination. *CP 640-641.* The Chief believed Officer Prante truly understood and acknowledged the negative impact of what he had done and wanted to repair the damage he had caused to the Department's reputation. *CP 539.* Celis never acknowledged the negative impact of his conduct or made any attempt to apologize to the deputies he threatened.

6. Chief Bret Farrar.

Celis comments that Chief Farrar wore his badge around his neck at a bar in Washington D.C. on one occasion, presumably to imply this conduct was a violation of policy. However, Chief Farrar testified he was wearing the badge with a black mourning band around it because he was attending an event for the Law Enforcement Memorial in Washington D.C. with other Lakewood police officers. *CP 515-518.* This was a police function and in compliance with City policy. Although the gathering was in a local bar, there is no evidence in the record that Chief Farrar drank any alcohol or became intoxicated while wearing his badge at the event.

C. Two Alleged Discriminatory Remarks at the Department.

Celis concedes that neither Chief Farrar nor Assistant Chief Zaro ever made any comments or remarks that were hostile or showed animus

toward Hispanics. *CP 217-218*. However, Celis alleges Assistant Chief Zaro was present on two occasions sometime in the last ten years when another police officer made inappropriate remarks. *Id.* Celis admits he does not know the year(s) when these two comments were made. *CP 218*. He admits they could have occurred as long ago as 2005. *Id.* Celis alleges Officer Dan Tenney once made a comment to the effect of, “shouldn’t you be mowing my lawn or something?” while they were sitting in the briefing room at the police station. *CP 218-219*. The second remark allegedly made by Officer Tenney was something to the effect of, “didn’t you swim over here from Mexico?” *Id.* Celis does not remember the exact comments that were made. *CP 221-224*. He also does not remember the dates, or the order in which they occurred. *Id.* He also does not remember exactly what he said to the Assistant Chief on each occasion. *Id.*

Celis alleges he did not react to Officer Tenney or say anything to him about the two comments when they were made. He claims he turned to Assistant Chief Zaro, who was also in the briefing room, and said, “Did you hear that? I want to make a complaint” in a matter of fact, conversational tone of voice. *CP 220*. Celis alleges Assistant Chief Zaro laughed and said something to the effect of “I didn’t hear anything” when he said that to him. *CP 220-221*. Celis admits he did not make it clear to Zaro that he was serious about being offended and wanting to make a

complaint. *Id.* Assistant Chief Zaro does not recall hearing this comment by Officer Tenney, or Celis saying he wanted to file a complaint. *CP 350.* Officers commonly gather and relax in the briefing room and exchange jokes and banter. *Id.* Assistant Chief Zaro does not believe that Celis ever came to him and indicated he wanted to make a complaint about inappropriate comments or actions by other officers. *Id.* If Assistant Chief Zaro had believed Celis was making a genuine complaint, he would have notified the Human Resources Department and ensured the complaint was investigated. *Id.*

Celis believes a similar exchange occurred when Officer Tenney made the second remark. *CP 222-223.* Again, he does not remember exactly what he said to Assistant Chief Zaro about making a complaint, or Zaro's response. *Id.* He admits he never made an actual complaint to anyone about the comment. *CP 224.* Celis admits he never reported the two comments to Chief Farrar, or to the City HR Department. *Id.* He admits he never raised the issue with any of his supervisors either. *Id.* Celis admits he commonly participated in joking and banter at the Department. *Id.* He admits it was a light-hearted atmosphere and it was common for officers to play jokes on each other; and he participated in this with others. *CP 225.*

D. **Procedural History**

Celis originally filed suit against the City of Lakewood, Chief of Police Bret Farrar, his wife Cindy Salazar, Deputy Chief of Police Mike Zaro, and his wife Deborah Zaro in Pierce County on October 12, 2012 alleging breach of contract, a due process violation, wrongful termination, discrimination in violation of RCW 49.60, and retaliation. *CP 236-241*. Because Celis filed a federal due process claim, the respondents removed this case to U.S. District Court. *CP 243-248*, and *CP 190*. Celis subsequently dismissed his due process claim and filed an Amended Complaint on November 14, 2012. *CP 243-248*. The federal court then remanded this case back to Pierce County Superior Court. *CP 190*.

On November 12, 2013, Celis filed a second lawsuit against the respondents. *CP 257-260*.¹ He alleged the same claims of disparate treatment, retaliation, and wrongful termination in violation of RCW 49.60; minus his breach of contract claim and due process claim. *Id.*

On December 13, 2013, Pierce County Superior Court Judge Jack Nevin granted Celis' motion for voluntary dismissal of his first lawsuit; dismissing all causes of action occurring prior to November 12, 2010 with prejudice as those claims were now barred by the statute of limitations.

¹ The Clerk's Papers appear to be missing a few pages of this Complaint. However, it is not pertinent to the issues on appeal.

CP 262-263. He dismissed Celis' claim of discriminatory discharge without prejudice. *Id.*

On May 21, 2014, the respondents filed a motion for summary judgment dismissal of Celis' remaining claim of wrongful constructive discharge and disparate treatment in violation of RCW 49.60. CP 163-185. On July 3, 2014, Pierce County Superior Court Judge Stanley Rumbaugh granted summary judgment and dismissed Celis' claim with prejudice as a matter of law. CP 685-686. Celis then filed this appeal.

III. ARGUMENT

A. **IT IS WELL ESTABLISHED IN WASHINGTON LAW THAT A RESIGNATION IS PRESUMED TO BE VOLUNTARY, EVEN WHEN SUBMITTED IN LIEU OF BEING TERMINATED FOR MISCONDUCT.**

Celis alleges the respondents constructively discharged him in violation of RCW 49.60. However, Celis opted to resign before he was subject to discipline, so this claim fails.

“An employee's voluntary resignation obviously will defeat a claim for wrongful termination. A resignation is presumed to be voluntary, and the claimant bears the burden of introducing evidence to rebut that presumption.” *Molsness v. City of Walla Walla*, 84 Wash. App. 393, 398-99, 928 P.2d 1108 (1996), citing *Sneed v. Barna*, 80 Wash. App. 843, 912 P.2d 1035 (1996); *Micone v. Town of Steilacoom Civil Serv.*

Comm'n, 44 Wash. App. 636, 642, 722 P.2d 1369 (1986), *review denied*, 107 Wash.2d 1010 (1986); *see Christie v. United States*, 518 F.2d 584, 587 (1975).

The presumption of voluntariness applies even where an employee is threatened with termination for cause and resigns instead, provided there is good cause for termination. *Travis v. Tacoma Pub. Sch. Dist.*, 120 Wash. App. 542, 551, 85 P.3d 959 (2004), citing *Nielson v. AgriNorthwest*, 95 Wash. App. 571, 576, 977 P.2d 613 (1999). Thus, a resignation is not rendered involuntary because an employee tenders his resignation to avoid termination for cause. *Molsness*, 84 Wash. App. at 399, 928 P.2d 1108 (emphasis added). And an employee's subjective belief that he had no choice but to resign is irrelevant. *Molsness*, 84 Wash. App. at 399 (emphasis added). In *Molsness*, the court held:

Mr. Molsness contends his resignation was not voluntary, but was coerced by Mr. Scroggins' threat of dismissal. The plaintiff in *Christie* made a similar argument, to which the court responded:

This court has enunciated a principle, now firmly established, for determining whether a resignation is voluntarily tendered. The element of voluntariness is vitiated only when the resignation is submitted under duress brought on by Government action.

... Duress is not measured by the employee's subjective evaluation of a situation. Rather, the test is an objective one. While it is possible plaintiff, herself, perceived no viable alternative but to tender her resignation, the record

evidence supports [the Civil Service Commission's] finding that plaintiff chose to resign ... rather than challenge the validity of her proposed discharge for cause. **The fact remains, plaintiff had a choice. She could stand pat and fight. She chose not to. Merely because plaintiff was faced with an inherently unpleasant situation in that her choice was arguably limited to two unpleasant alternatives does not obviate the voluntariness of her resignation.**

This court has repeatedly upheld the voluntariness of resignations where they were submitted to avoid threatened termination for cause. Of course, the threatened termination must be for good cause in order to precipitate a binding, voluntary resignation. But this “good cause” requirement is met as long as plaintiff fails to show that the agency knew or believed that the proposed termination could not be substantiated. *Christie*, 518 F.2d at 587-88 (citations omitted); see *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wash.App. 630, 638, 700 P.2d 338 (1985) (“Even when circumstances exist that would justify a finding of discharge, an employee's resignation may be voluntary if it was not prompted by the employer's oppressive actions.”).

Mr. Molsness' resignation is not rendered involuntary simply because he submitted it to avoid termination for cause, nor is it relevant that he subjectively believed he had no choice but to resign. Objectively, he did have a choice, as did the plaintiff in *Christie*, to “stand pat and fight.” His resignation was voluntary unless he can demonstrate that Mr. Scroggins knew or believed the threatened termination could not be substantiated. Mr. Molsness has failed to establish any genuine factual issue as to the basis of Mr. Scroggins' threat. Although his affidavit implies the threat was pretextual, Mr. Molsness does not directly dispute the allegation that he lacked the communication skills necessary for the position. His speculation is not enough to avoid summary judgment.

See Grimwood v. Univ. of Puget Sound, 110 Wash.2d at 360-61, 753 P.2d 517.

Molsness, 84 Wn. App. at 398-99 (bold added).

In *Travis v. Tacoma Pub. Sch. Dist.*, 120 Wash. App. at 551, the plaintiff did not dispute that he received two unsatisfactory evaluations, and these evaluations formed the basis of the school district's discontent with him. Thus, while the plaintiff may have subjectively believed he had to resign to avoid a nonrenewal of his contract, objectively under RCW 28A.405.220 he had the choice to remain in his current position and ask the decision-maker to reconsider. And the court noted that because he received a second year of unsatisfactory evaluations, the district had valid reasons to non-renew his contract.

Here, Celis had two sustained findings of misconduct during his time at the Lakewood Police Department; one in 2008 and one in 2010. Both of these involved poor judgment and misuse of his authority and Department equipment for personal gain. What's more, Celis concedes that he engaged in misconduct at Leavenworth, and that he deserved to be disciplined for his actions. He claims he believes termination would have been too harsh, but refuses to identify what other disciplinary action *would* have fairly addressed his pattern of misconduct and potentially criminal actions.

In Lakewood, only the City Manager has the authority to terminate a police officer.² The Chief of Police makes a termination recommendation, not the final decision. Not only did Celis resign before waiting to see what the Chief's final recommendation would be, he failed to "stand pat and fight" with regard to what discipline the City Manager would ultimately decide to administer. Instead, Celis decided to resign to protect his employment record and law enforcement commission so he could get a job somewhere else.

Even if Celis had waited to hear the final disciplinary decision – and if the City Administrator did in fact terminate him – Celis had three options for pursuing administrative remedies. He could have filed a grievance under Article 5 or Article 15 of his collective bargaining agreement, *CP 358-360*; he could have made an appeal to the Lakewood Civil Service Commission under Article 4, Article 15 and/or Article 18 of the Lakewood Civil Service Rules, *CP 362-367*; or he could have made an appeal to the City Administrator to reverse the disciplinary decision. He had several options to fight against a termination, yet he decided not to wait for a final discipline decision to be made, quitting before any adverse action was taken against him.

² *CP 355*, City Policy 26.1.7.

In sum, Celis admits he resigned before he was actually disciplined by the City in order to preserve his law enforcement commission and be able to find another police officer job. The well-established law in our state provides that a decision to resign instead of standing pat and fighting a termination is considered voluntary, not a constructive discharge. Celis has failed to cite any legal authority holding otherwise. Therefore, the Court should affirm the trial court's dismissal of the wrongful constructive discharge claim.

B. CELIS CANNOT SHOW HE WAS TREATED DIFFERENTLY THAN SIMILARLY SITUATED OFFICERS BASED ON HIS RACE.

Celis alleges the respondents "terminated" him while they treated other non-minority officers who were in worse circumstances more favorably. To establish a *prima facie* case of racial discrimination based on disparate treatment, a plaintiff must show his employer treats some people less favorably than others because of his race. *Domingo v. Boeing Employees' Credit Union*, 124 Wash. App. 71, 81-84, 98 P.3d 1222 (2004) citing *Johnson v. Dep't of Social & Health Servs.*, 80 Wash. App. 212, 226-27, 907 P.2d 1223 (1996). The plaintiff must show (1) he belongs to a protected class, (2) he was treated less favorably in the terms or conditions of his employment than a similarly situated, non-protected

employee, and (3) he and the non-protected “comparator” were doing substantially the same work. *Id.*

Once an employee proves his *prima facie* case, the employer must produce evidence that the employment action was based on legitimate, nondiscriminatory reasons to rebut the presumption of discrimination. *Riehl v. Foodmaker, Inc.*, 152 Wash. 2d 138, 150, 94 P.3d 930 (2004). This is a burden of production only, not a burden of persuasion. *Id.*

If the employer proffers a legitimate, nondiscriminatory reason for its employment action, then the employee must produce evidence indicating the employer’s reason is pretextual. *See, e.g., Ellingson v. Spokane Mortgage Co.*, 19 Wash. App. 48, 54, 573 P.2d 389 (1978); *see generally, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

In *Domingo v. BECU*, the plaintiff belonged to a protected class - her national origin was Filipino and her race was Asian. She claimed she was treated differently from Caucasian women at BECU. Among other claims, she contended Caucasian employees were treated less harshly than she was with regard to violent behavior. However, the court found the alleged bad behavior of the other employees was not comparable.

There were only two other allegations of violence in the record made against employees other than Domingo. In 1999, Domingo complained that a female hit her with the back of her chair. A BECU

supervisor investigated the complaint and concluded the female did not know Domingo was behind her and there was nothing to suggest the act was intentional. The second incident involved two Caucasian women - one supervisor and one employee. The supervisor allegedly chased the employee around the office and then punched and pinched the employee on the arm. Domingo presented no evidence that a complaint was filed over the incident, that the incident was not consensual horseplay, or that no action was taken. Because the allegations against Domingo were more serious than those in the other two situations, the coworkers were not “comparators” for purposes of proving disparate treatment.

Domingo offered no evidence that the investigations were different because of race or national origin. The court noted that the mere fact that Domingo's coworkers and supervisors were of a different race was insufficient to show discrimination. Domingo offered no evidence that her supervisors or coworkers made derogatory statements about her race or national origin, or otherwise treated her unfavorably because of her ethnicity. Therefore, the court ruled summary judgment on her disparate treatment claim was proper.

As a preliminary matter, Celis cannot establish the second element of this claim as he was not treated differently in the terms and conditions of his employment. He was not terminated – he voluntarily resigned. A

recommended action does not affect the terms and conditions of employment, only final action can do this. Celis has not cited to any case law that would support a theory that a mere recommendation can constitute an adverse action.

In addition, Celis has failed to establish that there were any similarly situated employees who were treated better than him. Celis has identified five comparators who he believes engaged in more serious misconduct than he did. However, the alleged misconduct of these officers was not comparable to that of Celis –several of the incidents he cites did not even occur until years *after* he resigned his employment and left the City – and the Chief did initially recommend termination for two of the officers.

Most importantly, not one of the five officers was investigated for interfering with a criminal investigation of domestic violence, abusing his authority and position as a police officer, threatening to assault police officers during a police investigation, and successfully “badging” his way out of a criminal arrest. The evidence is undisputed that Celis was wearing his police badge on a chain around his neck while he was out drinking in another part of the state and not on any type of police business or law enforcement-related event. It is also beyond dispute that when Celis was investigated by police, he immediately and repeatedly pulled out

his badge and told officers he was a Lakewood cop; threatened to “Kick all of your asses”; interfered and told the officers, “You are NOT talking to my wife;” talked about the brotherhood of police and told at least two officers, “Just wait until you all come over to the West side, you will be given the same treatment;” and repeatedly asked the lead investigating sergeant, “Am I free to leave, Sergeant?” in a derogatory tone with an aggressive look trying to get him to fight.

Sergeant Harris told the Lakewood Internal Investigations Sergeant that they would have arrested Celis that night if he had been a civilian. But because he was a Lakewood police officer, and because of the terrible tragedy of the four Lakewood officers who were shot and killed approximately a year prior to this incident, the deputies did not arrest Celis.

The Lakewood Code of Conduct specifically directs that officers shall only use their badges in the performance of their duty. Further, officers are only allowed to carry their badges off duty if they are carrying a firearm off duty under color of authority. Celis admits he was not armed on the night of the incident, yet he was wearing his badge on a chain around his neck. *CP 199. **To this day, Celis still does not see anything wrong with his actions in wearing his badge around his neck to a festival while he was drinking heavily, showing it to officers and***

identifying himself as a cop during their investigation of his criminal actions, and using his status as a Lakewood police officer to avoid a criminal arrest where a regular citizen would have been arrested for the same actions. In Celis's own words:

Q Did you agree that you had violated the policies that the investigation had determined you had violated?

A Excuse me. I think I -- I mean, obviously, I agreed that -- that I was wrong and I violated -- I think the policy was conduct unbecoming, or I think that's what it was if I'm not mistaken, and if there was another policy, I don't remember what it was in there, something about my identification of myself or something. I didn't always agree with that one.

Q Uh-huh.

A But I agreed that -- you know, that the incident was my responsibility.

Q Uh-huh. The policy regarding identification, was that the policy talking about proper use of your police badge?

A Yes.

Q And when you can utilize your police badge and when you can't?

A I'm not sure how the -- it's been awhile since I have read it, but I think that's the same policy, yes, that we're talking about.

Q Okay. What was your understanding of that policy?

A Well, is not identifying yourself as a law enforcement officer without lawful reason. I think, if I remember reading it, that's what I came away with.

Q And then is it your belief that you did not violate that policy?

A Yes.

Q Why?

A Because in our field, it's common practice that we readily identify ourselves to other officers on incidents and different situations without being asked or -- and that kind of thing, just so other officers know who -- who they're talking with. They know who -- you know, so they have some idea of the people that they're dealing with.

Q Uh-huh.

A So we -- you know, it's common. I mean, we -- we've done it for years, and we -- I mean, officers drive around with stickers on their car identifying themselves as officers so other officers will know.

Q And do you believe that that is an acceptable practice?

A Yes.

CP 197-199. Celis saw the investigation report, he was aware the deputies granted him a favor in not arresting him because he was a cop from Lakewood, yet not once did he express any remorse for this to the Chief, nor any understanding or acknowledgment as to why his actions in badging his way out of an arrest during the Chelan incident was wrong.

In addition, it is clear from the factual record that Celis has very little personal knowledge regarding the conduct and discipline of his alleged comparator officers. First, the disciplinary action regarding the

domestic violence arrest of Officer Kolp was taken by the former Chief of Police, Larry Saunders, not Chief Farrar.

The incident with Officer Prante being drunk and disorderly in Las Vegas happened two years *after* Celis left the Department. Obviously, without prescient awareness of the future, the Chief could not have intentionally discriminated against Celis by giving him a harsher punishment than what he would dole out to Officer Prante *two years later*.

Officer Bowl's arrest for domestic violence turned out to be a wrongful arrest in a situation where he was actually trying to stop his wife from drinking bleach and harming herself. She admitted she had lied when she told officers that night that he had hit her; and her 17 year old daughter gave a statement that night verifying Officer Bowl was just trying to help her mom, not hurt her. Yet despite the clearly erroneous arrest, Officer Bowl was fully cooperative with the officers that night – not belligerent – and he did not try to use his status as a police officer to get out of an arrest. There is no comparison to Celis' misconduct.

Similarly, Officer Lofland was fully cooperative when the Department suspected him of being impaired at work and asked for breath and blood tests to confirm this. He took full responsibility for his actions, and entered into a treatment program even before the investigation was concluded and discipline recommended. He was going to be

recommended for termination, but he and his union representative negotiated a last chance employment agreement which stipulated that if he engaged in any additional misconduct, he would be automatically terminated without the ability to grieve the termination. This agreement took away significant rights from Officer Lofland and he worked under the cloud of possible immediate termination for a year. Officer Noble's DUI arrest occurred right before Celis resigned his employment, and his discipline was not administered until after Celis left the City; thus, it is not relevant for comparison. Further, unlike Celis, Officer Noble fully cooperated with police when he was pulled over, was not belligerent, did not threaten the officers and did not identify himself as an officer or try in any way to get out being arrested for DUI. He pled guilty to negligent driving, took full responsibility for his actions, and nevertheless received a severe discipline of an 80 hour unpaid suspension and discipline probation. Officer Noble's second citation was merely for a noise complaint for making too much noise on his moored boat with friends. This conduct is not comparable with Celis' actions. He was not operating the boat, and he was not belligerent with officers and did not flash his badge to try and avoid receiving a citation. The incident also occurred nine months after Celis resigned his employment. Further, just like Celis, Officer Noble resigned before he was disciplined. He later

requested reinstatement and was reinstated by the City Administrator, not Chief Farrar. This situation was very different than Celis’.

C. CELIS’ DRUNK AND DISORDERLY CONDUCT AND ABUSE OF POLICE AUTHORITY WERE A LEGITIMATE, NONDISCRIMINATORY REASON FOR RECOMMENDING TERMINATION OF EMPLOYMENT.

Celis cannot deny that he committed all of the misconduct detailed in the deputies’ reports because he was too drunk to remember what happened. He concedes he engaged in misconduct and that some type of discipline was appropriate. He just believes that termination was too harsh. However, his opinion about his own performance is not an admissible fact, nor is it sufficient to dispute the legitimate reason for his termination.

An employee’s perception of himself is not relevant. It is the perception of the decision maker, not the plaintiff, which is relevant. *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988), quoting *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980). See also, *Chen v. State*, 86 Wn. App. 183, 191, 937 P.2d 612 (1997), holding an employee’s assertion of his own good performance to contradict the employer’s assertion of poor performance does not give rise to a reasonable inference of discrimination or raise genuine issues of

material fact on summary judgment. The City concluded that Celis' conduct in Leavenworth was a disgrace to the Lakewood Police Department and to police officers in general. His personal disagreement with his employer's evaluation of his performance is wholly irrelevant and insufficient to create an issue of material fact on summary judgment.

D. CELIS FAILED TO PRODUCE ANY EVIDENCE OF PRETEXT – OR EVIDENCE THAT DISCRIMINATION WAS A SUBSTANTIAL FACTOR IN THE DECISION TO RECOMMEND TERMINATION.

Celis cites case law setting out a plaintiff's shifting burden to produce evidence of pretext when attempting to establish a disparate treatment discrimination claim on pages 22 and 23 of his brief; but he fails to present any actual evidence or argument to try and demonstrate how the recommendation to terminate him in this case was pretextual. He leaves the Court and respondents to wonder whether he is even actually alleging the recommendation to terminate him was a pretext; and to wonder if he has any evidence whatsoever to support this allegation. In other words, he has failed to meet his shifting burden of proof to produce evidence to support a claim of pretext in the face of the respondents' highly legitimate, non-discriminatory reason for recommending he be terminated from his employment with the City.

In sum, Celis has failed to establish a prima facie case of disparate treatment because he has failed to show he was subjected to an adverse employment action, and failed to produce any similarly situated comparators who had engaged in the same type or degree of misconduct as he did at the time he was recommended for termination. The stark difference between Celis and the other officers he identified is that they all recognized the severity of their misconduct, they acknowledged it, and they took genuine steps to make up for it. In contrast, Celis *still* does not agree that he was wrong to use his badge and authority to avoid criminal charges.

The City had a legitimate, non-discriminatory reason to recommend termination of Mr. Celis. The details of his outrageous misconduct are not disputed. The burden was on Celis to produce evidence that this reason was somehow a pretext to cover up race discrimination. He has failed to make this showing. Therefore, the Court should affirm the trial court's dismissal of his disparate treatment claim as a matter of law.

IV. CONCLUSION

For the foregoing reasons, the respondents respectfully request the Court to affirm the decision of the trial court to dismiss Celis' claims of constructive discharge and disparate treatment in violation of RCW 49.60.

Respectfully submitted this 28th day of January, 2015.

KEATING, BUCKLIN & MCCORMACK,
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DECLARATION OF SERVICE

I declare that on January 28, 2015, a true and correct copy of the foregoing document was sent to the following parties of record via method indicated:

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