

No. 46796-8-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

VICKIE ELLIOTT, an individual,

Appellant,

v.

WASHINGTON DEPARTMENT OF CORRECTIONS, an agency of the
State of Washington,

Respondent.

APPELLANT'S OPENING BRIEF

Christopher Lundberg
OSB No. 94108, *Pro Hac Vice*
Matthew E. Malsheimer
OSB No. 033847, *Pro Hac Vice*
Shay S. Scott
WSBA No. 23760
Haglund Kelley LLP
200 SW Market Street, Suite 1777
Portland, Oregon 97201
(503) 225-0777
Attorneys for Appellant

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	4
III. STATEMENT OF THE CASE	5
A. Debra Smith Subjected Vickie Elliott to Racial Harassment That Culminated in Ms. Elliott's Discharge	5
1. In the fall of 2009, Ms. Smith kicked Ms. Elliott.....	6
2. Ms. Elliott explained to Ms. Smith the racial significance of her actions	7
3. In 2010, Ms. Smith escalated her harassment of Ms. Elliott	8
4. Shortly after the second kicking incident, Debra Smith sent Ms. Elliott a racist email.....	10
5. In May 2010, Ms. Elliott was mocked by her coworkers over the kicking incidents	10
B. Debra Smith's Isolated Upbringing and her Father's Racism Informed her Treatment of Vickie Elliott.....	11
C. The DOC Failed to Investigate the Racial Component of Debra Smith's Harassment	12
D. Debra Smith was Angry Over Vickie Elliott's Internal Discrimination Complaint and Saw it as an Act of Reverse Discrimination.....	14
E. The DOC Overruled Supt. Vernell's Initial Termination Recommendation Because the DOC's Investigation Ignored the Racial Motivation of Debra Smith's Workplace Violence	14

F. Supt. Vernell Returned Debra Smith to the Kitchen to Work Alongside Vickie Elliott.....	16
G. Vickie Elliott Secured a Temporary Protection Order to Assure her Safety.....	17
H. Immediately After Ms. Smith and Ms. Elliott Were Forced to Work Together, Ms. Smith Perpetrated An Act of Retaliatory Workplace Violence	18
I. Even After the Final Assault, Supt. Vernell Refused to Place Ms. Elliott and Ms. Smith on Separate Shifts, Forcing Ms. Elliot to Resign her Position	19
J. Debra Smith's Racial Harassment of Vickie Elliott Was Part of a Larger Racial Problem at Larch	21
1. Vickie Elliott was a vocal opponent of the discrimination at Larch	21
2. Vickie Elliott suffered for her efforts to correct the discrimination at Larch	22
K. Vickie Elliott's Experience was Shared by Other African-American Employees at Larch.....	23
1. Sidney Clark	23
2. Delrico Humphries	24
3. Glenda Harris	24
IV. LEGAL ARGUMENT	25
A. Standards	25
B. Ms. Elliott's Retaliation Claim Should be Decided by a Jury	27
C. Ms. Elliott Suffered Under a Racially Hostile Work Environment that May be Imputed to the Washington Department of Corrections	28

1.	A juror could conclude that Ms. Smith was acting with a discriminatory motive.....	30
2.	A jury could conclude that Ms. Elliott was subjected to an objectively hostile work environment	33
3.	There was evidence from which a juror could conclude that the DOC failed to respond reasonably	37
D.	Ms. Elliott Was Subjected to a Constructive Discharge	41
E.	Ms. Elliott's Negligent Supervision Claims are not Barred by the Workers Compensation Laws.....	44
V.	CONCLUSION	46

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>Adams v. Able Bldg. Supply, Inc.</u> , 114 Wn. App. 291 (2002)	28
<u>Adler v. Walmart Stores, Inc.</u> , 144 F.3d 664 (10th Cir. 1998)	39
<u>Allison v. Housing Authority of Seattle</u> , 118 Wn.2d 79 (1991)	27
<u>Aman v. Cort Furniture Rental Corp.</u> , 85 F.3d 1074 (3rd Cir. 1996)	30
<u>Anthony v. County of Sacramento</u> , 898 F.Supp 1435 (E.D. Cal. 1995).....	36
<u>Campbell v. State</u> , 120 Wn. App. 10 (2005)	41
<u>Davis v. West One Automotive Group</u> , 140 Wn. App. 449 (2007)	26, 33
<u>Delahunty v. Cahoon</u> , 66 Wn. App. 829 (1992)	27
<u>Delashmutt v. Wis-Pak Plastics, Inc.</u> , 990 F. Supp. 689 (N. D. Iowa 1998).....	43
<u>Distasio v. Perkin Elmer Corp.</u> , 157 F.3d 55 (2nd Cir. 1998).....	38
<u>Ellison v. Brady</u> , 924 F.2d 872 (9th Cir. 1991)	29, 41
<u>Fischer v. Tacoma School Dist. No. 10</u> , 53 Wn. App. 591 (1989)	33

<u>Francom v. Costco Wholesale Corp.</u> , 98 Wn. App. 845 (2000)	28
<u>Glasgow v. Georgia-Pacific Corp.</u> , 103 Wn.2d 401 (1985)	37
<u>Goodman v. Boeing Co.</u> , 127 Wn.2d 401 (1995)	44
<u>Harris v. Forklift Sys., Inc.</u> , 510 U.S. 17 (1993).....	28, 29
<u>Haubry v. Snow</u> , 106 Wn. App. 666 (2001)	43
<u>Hollenback v. Shriners Hospital for Children</u> , 149 Wn. App. 810 (2009)	28
<u>Hotchkiss v. C.S.K. Auto, Inc.</u> , 918 F.Supp. 2d 1108 (E.D. Wash. 2013).....	37, 43
<u>Kahn v. Salerno</u> , 90 Wn. App. 110 (1998)	28, 33, 37
<u>Korslund v. Dyncorp Tri-Cities Srvcs., Inc.</u> , 121 Wn. App. 295 (2004)	43
<u>Loeffelholz v. University of Washington</u> , 175 Wn.2d 264 (2012)	37
<u>McGinest v. GTE Srvs. Corp.</u> , 360 F.3d 1103 (9th Cir. 2004)	<i>passim</i>
<u>Mockler v. Multnomah County</u> , 140 F.3d 808 (9th Cir. 1998)	38
<u>Oliver v. Pac. Nw. Bell Tel. Co.</u> , 106 Wn.2d 675 (1986)	26
<u>Patterson v. Hudson Area Schools</u> , 551 F.3d 438 (6th Cir. 2009)	39

<u>Perry v. Costco Wholesale Inc.</u> , 123 Wn. App. 783 (2004)	38, 40
<u>Phillips v. City of Seattle</u> , 111 Wn.2d 903 (1989)	45
<u>Reese v. Sears, Roebuck & Co.</u> , 107 Wn.2d 563 (1987)	45
<u>Rothwell v. Nine Mile Falls Schools Dist.</u> , 149 Wn. App. 771	45
<u>Scrivener v. Clark College</u> , 181 Wn.2d 439	25, 26
<u>Smith v. St. Louis University</u> , 109 F.3d 1261 (8th Cir. 1997)	39
<u>Swenson v. Potter</u> , 271 F.3d 1184 (9th Cir. 2001)	39
<u>Theno v. Tonganoxie Unified School Dist. No. 464</u> , 377 F.Supp.2d 952 (D. Kan. 2005)	39
<u>Torgerson v. City of Rochester</u> , 643 F.3d 1031 (8th Cir. 2011)	39
<u>Vance v. Southern Bell Tel. and Tel. Co.</u> , 863 F.2d 1503 (11th Cir. 1989)	29, 34, 37
<u>Wheeler v. Catholic Archdiocese of Seattle</u> , 65 Wn.App. 552 (1992)	44
Statutes	
RCW 49.60.020	26
RCW 49.60.210(1)	27
RCW 51.08.100	46

Other Authorities

CR 5625

ER 40132

WAC 296-14-300.....44

I. INTRODUCTION.

This case seeks this Court's affirmation of two key principles in every workplace discrimination case – namely that a court's analysis must always (1) consider the totality of the circumstances (particularly when there is a history of institutional discriminatory hostility, as exists in this case) and (2) view the facts through the lens of the victim's experience. The reason is simple but important: To ensure that real and hurtful forms of discrimination, which may seem only mildly offensive to a person who is not a member of the targeted group, are not overlooked by an adjudicator.

Plaintiff Vickie Elliott is African-American. She worked as a cook at the Washington State Department of Correction's (the "DOC") Larch Correctional Center. This prison had a long history of racial hostility, much of which was directed at Ms. Elliott. Ms. Elliot resisted this conduct, making reports and otherwise challenging it whenever and wherever she saw it. She always did so respectfully, at the lowest level possible and with a hope to open the minds of her colleagues and improve the racial environment at Larch.

Inevitably, her conduct triggered animosity among her colleagues, some of whom held extremely racially intolerant views. Her conduct also generated opportunities for Ms. Elliott to educate others around cultural diversity and racial tolerance. Ms. Elliott's openness around racial matters

was the foundation of her initially friendly relationship with her Caucasian colleague, Debra Smith, who had little cultural awareness.

Ms. Elliott and Ms. Smith worked together in the prison's kitchen as cooks. In a prison setting, it is important for employees to have a strong presence and the support and respect of their colleagues, who often rely on each other for safety. In this context, despite Ms. Smith's apparently amicable relationship with Ms. Elliott, Ms. Smith engaged in racially-charged conduct that the DOC recognized as "violent" and "humiliating" conduct that was "completely intolerable" in the institution. While in the presence of inmates, and in an apparent effort to elevate her status over Ms. Elliott's, Ms. Smith, in two separate incidents, kicked at Ms. Elliott's rear-end, shooing her away with a kick and the admonition to "Get," after Ms. Elliott approached Ms. Smith to offer her assistance. The second incident occurred *after* Ms. Elliott had told Ms. Smith that the act of kicking her in the behind and shooing her away was a racially-insulting act and that she should not do it again. Ms. Smith admitted to understanding this – but later kicked and shooed Ms. Elliott again in front of inmates. She then sent Ms. Elliott a distasteful, discriminatory email mocking Ms. Elliott and joked about Ms. Elliott's concerns with colleagues.

Naturally, Ms. Elliott experienced Ms. Smith's second-kicking conduct as racially hurtful. Other African American employees confirmed the same. Yet, the lower court did not, apparently viewing this incident merely as a mild offense with no racial component at all.

At the urging of Ms. Elliott's supervisor, she filed an Internal Discrimination Complaint ("IDC"), along with a Workplace Violence Complaint ("WVR"). However, the DOC failed to investigate, evaluate or finalize Ms. Elliott's IDC. In short, the discriminatory aspect of her reports essentially evaporated. This failure had serious implications because, by the DOC's own admissions, a finding of racial hostility would have aggravated the confirmed WVR and led to Ms. Smith's termination. Instead, Ms. Smith received only a ten-day suspension, which led to her and Ms. Elliott working together despite Ms. Elliott's requests for a schedule change and her securing of a Temporary Restraining Order against Ms. Smith. Ms. Elliott's reasonable concerns were, unfortunately, validated because on the very first day that they resumed working together, Ms. Smith tripped Ms. Elliott, sending Ms. Elliott to the emergency room.

As explained in more detail below, the lower's court summary dismissal should be reversed in its entirety because the record has sufficient facts to support each of Ms. Elliott's claim. In turn, and importantly, the trial court's decision should also be reversed because Ms.

Elliott's situation falls squarely within the objective set by Washington's Law Against Discrimination, which is to ensure that every person of color, among others, is treated as a full and equal member of the workforce. As the record illustrates, Ms. Elliott was not – and suffered as a result. Hence, a jury (rather than the court) should be allowed to decide whether the DOC's conduct violated the law.

II. ASSIGNMENTS OF ERROR.

Assignment No. 1: The trial court erred in dismissing Ms. Elliott's retaliation claim because there was sufficient evidence from which a jury could conclude that Ms. Elliott suffered retaliation for her protected reports of harassment.

Assignment No. 2: The trial court erred in dismissing Ms. Elliott's hostile work environment claim because there was sufficient evidence from which a jury could conclude that Ms. Elliott suffered under a racially hostile work environment that Defendant Washington Department of Corrections failed to properly remedy.

Assignment No. 3: The trial court erred in dismissing Ms. Elliott's constructive discharge claim because there was sufficient evidence from which a jury could conclude that Defendant Washington Department of Corrections intentionally created intolerable working conditions such that a reasonable person would have felt there was no other option but to resign.

Assignment No. 4: The trial court erred in dismissing Ms. Elliott's negligent supervision claim because it is not barred by Washington's Industrial Insurance Act.

III. STATEMENT OF THE CASE.

A. Debra Smith Subjected Vickie Elliott to Racial Harassment That Culminated in Ms. Elliott's Discharge.

Vickie Elliott is an African-American woman who worked for the DOC at Larch Correction Center ("Larch") as an Adult Corrections Cook ("AC Cook") from 2004 until her constructive discharge in October, 2010. CP 268-69 & 329-330. Ms. Elliott worked with another AC Cook at Larch, Debra Smith, who is a Caucasian woman. CP 333-34. As described below, Ms. Smith engaged in a series of increasingly offensive, racially motivated conduct, both verbal and physical, directed at Ms. Elliott. Racial harassment was not an isolated occurrence for Ms. Elliott. Rather, she had experienced racism throughout her career at Larch, an experience that was shared by many African-American employees at the institution. As the result of DOC's failure to take reasonable steps to eliminate the pervasive racism at the institution that allowed this type of harassment to recur, its failure to reasonably remedy the harassment that Ms. Elliott suffered at the hands of Ms. Smith, and its failure to take even minimal steps to protect Ms. Elliott from additional acts of retaliatory hostility by Ms. Smith, Vickie Elliott was left with no choice but to end her employment against her wishes.

1. In the fall of 2009, Ms. Smith kicked Ms. Elliott.

In the Fall of 2009, Debra Smith directed a racially charged gesture at Vickie Elliott. CP 283-85; 340 & 358-60. While the two women were supervising the inmates as they prepared a meal, Ms. Elliott said something that apparently offended Ms. Smith. CP 670, ¶ 3 & 340. Suddenly and without warning, Ms. Smith turned and kicked Ms. Elliott in the rear end. CP 670, ¶ 3.

While Ms. Elliott was not seriously injured, she was greatly embarrassed and humiliated. CP 284 & 288. The gesture recalled for Ms. Elliott the African-American experience of slavery when slaves were treated worse than dogs. CP 288-89 & 670, ¶ 3. Based on the teachings of her father, Ms. Elliott understood that being kicked by a Caucasian person was one of the "lowest" things that could be done to an African-American person. This is because, as her father relayed his experiences, it was how he had been treated as an African-American and it was the way Ms. Elliott's father "had seen his father treated in slavery times." *Id.* Additionally, the incident occurred in front of the inmates whom Ms. Elliott was supervising. *Id.* As Ms. Elliott explained, in a single moment, Ms. Smith's gesture "tore down everything" that she had "built in [her] work environment with those men." CP 288, lns. 17-18. Ms. Elliott felt that Ms. Smith's racially degrading gesture placed her "in a vulnerable, unsafe environment with the men I supervised every day." CP 290.

Unlike numerous DOC employees, including its Deputy Director Earl Wright, CP 28, ¶ 12; 500-03; 564-65; 630-33 & 669 ¶ 12, the DOC refused to see the racial implications of Debra Smith's actions. However, the DOC recognized Debra Smith's gesture, in part, as Ms. Elliott had experienced it – as a terribly humiliating and violent act. As Superintendent Vernell described it, "Kicking and kicking at a co-worker is not only a violent and threatening action, but it is also degrading and humiliating for the recipient." CP 399, Ins. 4-20 & 519, ¶ 1. Superintendent Vernell further acknowledged Ms. Elliott's concerns about how it had poisoned her work environment, noting that "[t]his kind of conduct, especially in a prison setting where staff depends so heavily on their co-workers for safety, is completely intolerable." *Id.*

2. Ms. Elliott explained to Ms. Smith the racial significance of her actions.

After the first incident, Ms. Elliott took Ms. Smith aside and explained to her the cultural significance of the kicking. CP 670, ¶ 3; 287, Ins. 7-11; & 342-43. As a result of that conversation, Ms. Smith understood that being kicked was deeply offensive to Ms. Elliott as an African-American woman. CP 343. Ms. Elliott also reported the incident and explained its significance to her immediate supervisor. CP 284-85.

Up until that incident, Ms. Elliott felt that she and Ms. Smith had a good working relationship and Ms. Elliott hadn't felt that her safety was

ever jeopardized by Ms. Smith. CP 152-53 & 155, lns. 12-14. However, after the first incident in the fall of 2009, everything changed for Ms. Elliott. CP 159. After that incident, she felt that her working relationship with Ms. Smith could not go back to normal because she had been "assaulted" and it was "different" between them. CP 159, lns. 6-11 & 162, lns. 15-22. Ms. Elliott testified that, "Even though I accepted her apology, it did not take away . . . what she did, and after that it seemed to me as if things progressed in her actions towards me. She treated me differently." CP 162, lns. 23-25 & 163, ln. 1.

3. In 2010, Ms. Smith escalated her harassment of Ms. Elliott.

Several months later, in March 2010, Ms. Smith's racial hostility towards Ms. Elliott escalated. CP 292-93. During the morning shift, Ms. Smith was working in the baking area, while Ms. Elliott was cooking in a separate area of the kitchen. Id. Ms. Elliott heard Ms. Smith shout to one of the inmates, "What are you doing !!" Id. Concerned for Ms. Smith's safety, Ms. Elliott hurried over and asked, "Is everything okay?" CP 293. In response, Ms. Smith shouted at Ms. Elliott in an aggressive manner, "What do you want? I got this. You go back to the other side of the kitchen where you belong. You go back over there where you belong. I got this." Id. & CP 366-67. Ms. Elliott was shocked at Ms. Smith's reaction, and responded, "I came over here to see whether you were okay. You don't have to talk to

me like that." CP 293. As Ms. Elliott turned to walk away, Ms. Smith said, "Yeah, get!" and attempted to kick Ms. Elliott in the behind. Id., Ins. 17-22. Ms. Elliott was able to avoid the kick, but the gesture was far more harmful than any physical pain would have been. Id.

Ms. Elliott reported this second incident to Superintendent Eleanor. CP 296; 298-99 & 669, ¶ 2. When Supt. Vernell heard about Ms. Smith's actions she responded with a look of shock and said, "She did what!?! " CP 669, ¶ 2. Ms. Elliott explained that the situation was not isolated, but that Ms. Smith had kicked her before in late 2009. CP 298-99 & 669, ¶ 2. Ms. Elliott told Supt. Vernell that, after the first incident, she had explained to Ms. Smith that she had been very embarrassed and humiliated by the gesture. Id. She also told Supt. Vernell that she had explained to Ms. Smith that, in her mind, kicking someone was one of the worst things that you could do to an African-American person because it recalled the experience of slavery when African Americans were treated worse than dogs. Id.

Supt. Vernell responded by saying: "Elliott, I know how you feel being discriminated against. I understand what you are going through, I went through it too." CP 669, ¶ 2. Supt. Vernell then went on to explain her experience as a young African-American woman coming through the ranks of the Department of Corrections. CP 298-99 & 669, ¶ 2. Supt. Vernell specifically recalled that when she had been promoted to the rank of Sergeant, she was the only African-American female Sergeant in the

institution and that she had received a lot of flak from people who believed she must have gotten the position because of her race. CP 387-88 & 669, ¶ 2. Supt. Vernell then suggested that Ms. Elliott file an IDC and a WVR. CP 294-96; 664; & 667-68.

4. Shortly after the second kicking incident, Debra Smith sent Ms. Elliott a racist email.

A little over a week later, on March 18, 2010, Ms. Smith sent Ms. Elliott an email entitled "ASS KICKIN' FROM A REAL VETERAN." CP 300 & 406 (emphasis in original). The email directed Ms. Elliott to "*Make sure you read #13*" which stated "*If you ever see anyone singing the national anthem IN SPANISH - KICK THEIR ASS.*" CP 301; 407 & 409. (emphases in original). Ms. Elliott was stunned to receive this email from the woman who had just publically humiliated her in a racial manner by attempting to kick her in the rear-end in front of a group of inmates. CP 300-03. Ms. Elliott could not believe that Ms. Smith "would have the audacity" to mock her in this manner. CP 303, Ins. 5-8. Ms. Elliott reported this email to Superintendent Vernell, who instructed Ms. Elliott to provide it to the IDC investigator. CP 304 & 28, ¶ 12.

5. In May, 2010, Ms. Elliott was mocked by her coworkers over the kicking incidents.

Subsequently, on May 22, 2010, Ms. Elliott was yet again mocked for her concerns over being treated in such a humiliating fashion by Ms. Smith. CP 670, ¶ 4. That morning, Ms. Smith was seated with two

correctional officers, COs Brown and Johnson, in the dining hall when CO Johnson made comments mocking Ms. Elliott's experience. CP 670, ¶ 4 & CP 46. Ms. Elliott felt as though her experience and her feelings around being kicked were being belittled and that she was again being subject to humiliation by her coworkers. Id. As with the other incidents of racial hostility, she also reported this incident. Id. & CP 46.

B. Debra Smith's Isolated Upbringing and her Father's Racism Informed her Treatment of Vickie Elliott.

The sudden change in Ms. Smith's attitude towards Ms. Elliott is partly explained by her raising. Debra Smith testified that she had never been around African-American people as a child. CP 335. Until she joined the Army in 1975, Ms. Smith had "never really ever met a black person," and aside from "seeing them on TV" she had "never really got to know anything about black people." CP 336-37. Ms. Smith's father was, in her own terms, "very prejudiced." CP 336. That prejudice manifested itself in her father referring to African-Americans as "niggers" and commenting when African-Americans were shown on television that "they just all need to be shot." CP 337. Ms. Smith shared these aspects of her childhood with Vickie Elliott. CP 336 & 282. In light of her experience with Ms. Smith, Ms. Elliott came to understand that Ms. Smith's raising influenced her actions. CP 282.

C. The DOC Failed to Investigate the Racial Component of Debra Smith's Harassment.

Based on Ms. Smith's actions, Ms. Elliott filed an Internal Discrimination Complaint ("IDC") with the DOC. CP 295-96 & 664-65. She also filed contemporaneously a Workplace Violence Report. CP 295-96 & 667-68. While the DOC claimed to begin an investigation of the IDC, it was never concluded. CP 422-27. Despite the fact that Ms. Elliott expressly stated that she believed she had been subjected to discrimination on account of her race and color, the DOC never considered – nor did it make any conclusions about – whether Ms. Smith's actions were racially motivated. CP 425, ¶ VII. Nowhere in the investigation is the issue of Ms. Smith's motivation even addressed. CP 422-24 & 392-93. The overtly discriminatory email sent by Ms. Smith to Ms. Elliott was written off as a "coincidence," and the May 22 harassment by CO Thompson was not even acknowledged. CP 425, ¶ VII. While the workplace violence investigation determined that the kicking incidents had occurred, the DOC officially erased the discriminatory component of those incidents by failing to fulfill its investigatory duties triggered by the IDC.

This failure violated the DOC's obligations to Ms. Elliott. Todd Dowler, the Labor Relations Manager for the Department of Corrections from 2008 to 2010, testified that the Department of Corrections is required to

investigate complaints of discrimination. CP 468-69 & 470. Mr. Dowler further testified that if there is an incident of racially motivated workplace violence that generates both a Workplace Violence Report and an IDC, then *both* investigations must be completed. CP 471, lns. 17-24. Mr. Dowler acknowledged that an act of workplace violence is aggravated if the motive is discriminatory, creating a more serious situation. CP 472.

The investigation was also long delayed; it was not initiated for more than two months after the precipitating incident and it was not concluded until nearly six months later. CP 533. During that time, despite Ms. Elliott's request to be separated from Ms. Smith, the DOC kept Ms. Smith working with Ms. Elliott until July 27, 2010, without any corrective steps or warnings. CP 304-06; 400 & 486. That delay, and the DOC's failure to address the issue with Ms. Smith in the interim, sent the clear message that the DOC did not care about making Ms. Elliott's workplace safe and free from discrimination and left Ms. Elliott exposed to Ms. Smith. CP 304-05. As a result, during the pendency of the investigation, Ms. Elliott felt that she was in a "toxic, unsafe, discriminatory environment" and that it had become "very hard for me to do my job with the same offenders that had viewed what [Ms. Smith] had done to me on numerous occasions." CP 307.

D. Debra Smith was Angry Over Vickie Elliott's Internal Discrimination Complaint and Saw it as an Act of Reverse Discrimination.

When she was finally placed on administrative leave on July 27, 2010, Ms. Smith responded to Supt. Vernell with a two-page rant in which she railed against Ms. Elliott's complaint, stating that she felt that she had been "humiliated, treated like a criminal and threatened with possible disciplinary action." CP 344 & 509-10. Ms. Smith also stated that she had been "under tremendous mental strain in the last six months which has taken [a] toll on my being able to sleep, mental concentration and maintaining a home environment I or my husband desire." CP 344 & 512. Unwilling to see her own culpability in the matter, Ms. Smith squarely put the cause of the "strain" she was under on Vickie Elliott. CP 512. She also believed that Ms. Elliott's complaints were "racially motivated" and that the discipline that she ultimately received was likewise "racially motivated." CP 509. Ms. Smith reached this conclusion because she believed that "all persons involved in the information gathering, preparation and initiating charges are black and I am Caucasian." Id.

E. The DOC Overruled Supt. Vernell's Initial Termination Recommendation Because the DOC's Investigation Ignored the Racial Motivation of Debra Smith's Workplace Violence.

In light of the totality of circumstances, Supt. Vernell initially recommended terminating Ms. Smith. CP 394 & 527. However, her

termination recommendation was overridden by the DOC's upper management at the direction of Todd Dowler. CP 473-78 & 533-34. Mr. Dowler's decision was based on a comparison of the kicking incident with another incident that he felt had "much more egregious facts but where the employee had been suspended for five days." CP 534.

However, in making his recommendation, Mr. Dowler had *no knowledge* that Ms. Smith's actions were motivated by race. CP 482. Mr. Dowler wasn't even aware of the "ASS KICKIN' BY A REAL VETERAN" email. CP 480. Mr. Dowler acknowledged that workplace violence incidents that are motivated by race are more serious than simple violence incidents. CP 472. Mr. Dowler testified that if he had known that the kicking incidents were racially motivated, and if there had been a finding from the IDC investigation that Ms. Smith's actions were racially motivated, it would have altered his decision and he would have supported Supt. Vernell's termination recommendation. CP 479; 481, Ins. 1-6; & 483, Ins. 2-18.

Ultimately, Supt. Vernell imposed a ten-day suspension on Debra Smith for both of the kicking incidents. CP 515. Because the investigation never considered Ms. Smith's discriminatory motives, Supt. Vernell's decision was based solely on a violation of the workplace violence policy. CP 517. Contrary to her initial response to Ms. Elliott, Supt. Vernell took the official position that "there had been no claim of

discrimination" and that race had "absolutely nothing to do with" Ms. Smith's actions. CP 392-93; Ins. 21-23 & 19-12; CP 523. Thus, the discipline of Ms. Smith finalized the official elimination of the discriminatory aspect of Debra Smith's actions that started with DOC's decision to ignore the central component Ms. Elliott's IDC – racial discrimination.

F. Supt. Vernell Returned Debra Smith to the Kitchen to Work Alongside Vickie Elliott.

Without warning, on September 23, 2010, Vickie Elliott learned that Debra Smith was returning to work the next day. CP 308-09 & 561-63. Later that day, Ms. Elliott told Supt. Vernell that she feared for her safety if Ms. Smith were to return and requested a shift change. CP 537. Supt. Vernell refused, claiming that the Collective Bargaining Agreement ("CBA") did not "allow [her] to create a new position on dayshift" for Ms. Elliott. Id. In response, Ms. Elliott reiterated that she felt her "safety and security in the workplace [were] in imminent danger" and renewed her request for a shift change. Id. She also noted that the CBA "allows management to reassign staff in 'assigned positions' based on institutional needs." Id.

Ms. Elliott's shift-change request was consistent with the prior practice of the Union and entirely consistent with the CBA. CP 561-63 & 574-77. At that time, the union was attempting to work with Supt. Vernell

to arrange just such a shift change for Ms. Elliott in order to ensure her security. CP 561-63; 574-75 & 596-98. There were other Larch employees who were willing to change shifts with Ms. Elliott. CP 562, lns. 22-24 & 582. Yet despite the ease with which the institution could have switched shifts to protect Ms. Elliott's safety, the history between Ms. Smith and Ms. Elliott, and Supt. Vernell's knowledge of Ms. Smith's anger over the proposed discipline, Supt. Vernell flatly refused to do so. CP 308-09; 512-13; 515-19; 537 & 562, lns. 18-22.

G. Vickie Elliott Secured a Temporary Protection Order to Assure Her Safety.

Because Supt. Vernell refused to take even minimal precautions to protect her, on September 28, 2010, Vickie Elliott secured a Temporary Protection Order from the Clark County District Court directing Debra Smith not to have any contact with her. CP 312 & 601-05. The next morning, September 29, 2010, was the first morning that Ms. Elliott was scheduled to work with Ms. Smith. That morning, before she went to work, Ms. Elliott arranged to have a co-worker serve Ms. Smith with the protective order. CP 313-14. Ms. Elliott provided a copy to Larch's HR department, to Supt. Vernell, and to her immediate supervisor, Christy King. CP 313. However, the restraining order did not alter Supt. Vernell's decision to require Ms. Smith and Ms. Elliott to work together; she viewed the restraining order as "a personal issue," not "a DOC issue." CP 348.

Shortly thereafter, Ms. Elliott had a conversation with Ms. King and CPM Caldwell in which they informed her that they were putting together a workplace safety plan. CP 315-16. The safety plan consisted of requiring Ms. Elliott and Ms. Smith to work alongside each other in the kitchen, but to stay on opposite sides of the kitchen and communicate with each other only through Ms. King. CP 339. However, this plan was simply unworkable. In fact, even Ms. Smith had concerns about her ability to comply with it, stating that both she and Ms. Elliott were being placed "in jeopardy." CP 347-348.

H. Immediately After Ms. Smith and Ms. Elliott Were Forced to Work Together, Ms. Smith Perpetrated An Act of Retaliatory Workplace Violence.

On September 29, 2010 – the very first day that she was back in the institution's kitchen – Debra Smith assaulted Vickie Elliott. Before starting her shift, Ms. Elliott was in the AC Cooks' office with Glenda Harris getting something to eat. CP 317-319. Ms. Elliott went to the kitchen to retrieve a bowl in which to heat her food. CP 319. Before she left the office, she made sure to survey the kitchen to see if Ms. Smith was present. Id. She did so in order to comply with her supervisors' directive and because she did not want to interact with Debra Smith. Id.

From where Ms. Elliott was in the AC Cooks' office, she did not see Ms. Smith. CP 319-20. Believing it to be clear, she walked into the kitchen. Id. As she did, she noticed an inmate in her periphery, which startled her

because they were not supposed to be in the kitchen at that time of day. CP 320. After her initial surprise, Ms. Elliott turned in the direction that she was walking and suddenly found Ms. Smith standing three to four feet directly in front of her. Id.

Ms. Smith gave Ms. Elliott a "mean stare" that startled and scared Ms. Elliott. Id. Wanting only to get past Ms. Smith, Ms. Elliott continued towards the dishwasher. Id. As Ms. Elliott passed, Ms. Smith continued to stare at her in an intimidating fashion and turned to follow her. Id. Then, as Ms. Smith turned, Ms. Smith tripped Ms. Elliott and she "went down." Id.

Glenda Harris, who was still in the AC Cooks' office, heard Ms. Elliott scream. CP 495. She immediately went out to see what had happened. CP 492-93 & 495. Once she got outside the office, Ms. Harris saw Ms. Elliott lying on the floor and heard her yell "she tripped me." CP 495. Ms. Harris ordered Ms. Smith to leave the kitchen and then called the nurse. Id. Ms. Harris then waited with Ms. Elliott until medical attention arrived. Id. Eventually, Ms. Elliott was transported to the emergency room where she was treated for acute thoracolumbar and cervical strains. CP 321; 611-23.

I. Even After the Final Assault, Supt. Vernell Refused to Place Ms. Elliott and Ms. Smith on Separate Shifts, Forcing Ms. Elliot to Resign her Position.

In the days following this assault, Ms. Elliott contacted Supt. Vernell about returning to work. CP 322-23. She specifically requested, again, that

Supt. Vernell change her shift so that she could return to work without being exposed to Ms. Smith. Id. Again, and despite the assault, Supt. Vernell refused to alter Ms. Elliott's schedule to ensure that she would not have to work with Ms. Smith. Id.

Shortly thereafter, on October 8, 2010, the Clark County District Court granted Vickie Elliott a permanent restraining order to prevent Debra Smith from having any contact with her. CP 358-59. In granting that Order, Clark County District Court Commissioner Sonya Langsdorf found that "when you're dealing with inmates and prisoners you need to have a . . . tough and strong persona" and that, when you are treated as Ms. Smith treated Ms. Elliott, "it creates problems for you at work, not only in your feeling of safety but also in how the prisoners are going to treat you." CP 359.

Ms. Elliott discussed the prospect of returning to work with her shop steward, Sidney Clark. CP 566. Mr. Clark encouraged Ms. Elliott to "hang on" but Ms. Elliott told him "I can't physically take it anymore. I have no support, I can't take this. It is out of control." Id. After that, Mr. Clark told Ms. Elliott to "do what you have to do to make yourself safe." Id. Subsequently, on October 12, 2010, Vickie Elliott submitted her letter of forced resignation. She cited management's "willful failure to meaningfully protect" her in light of a "racially abusive and increasingly violent work

environment" as the reason that she was forced to resign against her will. CP 330.

J. Debra Smith's Racial Harassment of Vickie Elliott Was Part of a Larger Racial Problem at Larch.

Vickie Elliott's harassment by Debra Smith was not the first discrimination that she had encountered at Larch. In that regard, Ms. Elliott experienced the following instances of racism at Larch:

- Being laughed at and called "Aunt Jemima" by two Caucasian co-workers. This occurred at a training session during Black History Month when Ms. Elliott was wearing traditional African attire. CP 280-81.
- Being called a "hood rat" by Sgt. Steven Thompson. CP 277.
- Being told by Sgt. Thompson, "I don't know why we're celebrating Martin Luther King Day. He didn't do nothing [sic] special. If we can celebrate his day, we can celebrate Robert E. Lee." CP 277-78.
- Being subjected to multiple discriminatory acts of hostility and threats by Susan Borgaard, a cook who worked in the Larch kitchen. CP 273-74 & 276-77.
- Having another co-worker in the kitchen, Susan Belland, refuse to go into the kitchen office where Ms. Elliott and a number of other African-American employees were seated because Ms. Belland was "afraid to come into the office because those black people were in there." CP 275-76.

1. Vickie Elliott was a vocal opponent of the discrimination at Larch.

Ms. Elliott was unwilling to simply tolerate these acts of discrimination. She reported every one of the discriminatory incidents

described above, and the DOC determined that every one of those incidents was founded. CP 275-281. Ultimately, those issues were resolved by way of a settlement agreement that the DOC executed with Ms. Elliott on June 4, 2009. Id. In addition to her individual acts of opposition to the discrimination she experienced, Ms. Elliott worked with the Diversity Committee and made great efforts to advance diversity at Larch, including advocating for more African-Americans to be hired. CP 324-326; 386-387 & 401-402.

2. Vickie Elliott suffered for her efforts to correct the discrimination at Larch.

Rather than receiving support or praise for her anti-discrimination efforts, Vickie Elliott was often met with hostility and retaliation. For example, Sgt. Thompson – the perpetrator of the "hood rat" comment and the suggestion that the institution celebrate "Robert E. Lee Day" – was extremely angry about the discipline that he received as a result of his comments. CP 586. Sgt. Thompson did not reflect on his actions or how they poisoned the work environment. CP 587. Instead, he openly directed his animosity towards Ms. Elliott and anybody who supported her. Id. Similarly, at a diversity meeting sponsored by the NAACP, a number of instances of discrimination reported by Ms. Elliott were the topic of discussion. CP 588-590 & 627-628. The response of many Larch employees in attendance was not to reflect on the concrete examples of

racism within the institution and how they might affect employees of color. Instead, many of Ms. Elliott's coworkers resented her for, in their minds, effectively forcing them to attend the meeting. CP 589-590.

K. Vickie Elliott's Experience was Shared by Other African-American Employees at Larch.

Vickie Elliott's experience with discrimination at Larch was not unique. Rather, it was one facet of the persistent experience of discrimination shared by many African-American employees, including Sidney Clark, Delrico Humphries, and Glenda Harris.

1. Sidney Clark.

Sidney Clark is an African- American Correctional Officer ("CO") who has worked at Larch for more than 16 years. CP 541-542. When Mr. Clark began in 1997, he was one of two African-American employees. CP 543-544. As Mr. Clark describes it, "[W]hen I came to Larch, I felt like I stepped back into the 50s and 60s in terms of the culture and attitude." CP 544. Mr. Clark experienced what he describes as "hatred that you could not imagine" and was often intimidated because of the color of his skin. CP 544. Mr. Clark explained that he experienced discrimination not only from line staff, but also from management officials. CP 545. Mr. Clark was routinely threatened and called "nigger." Id. In a chilling example of the racist hostility he experienced, Mr. Clark testified that he regularly found a "black doll" left for him "on the wall with pins stuck in the genital

area, in the eyeballs, and in the hands." Id. Occasionally, the doll would be facing the wall and have pins stuck "in the buttocks." Id. Early on, Mr. Clark made a commitment not to allow this discriminatory hostility to "run him off," and he became active in efforts to correct the discrimination at Larch. CP 545-46.

2. Delrico Humphries.

Delrico Humphries, another African-American employee who worked as an AC Cook at Larch from 2007-2011, testified that he also experienced racial discrimination in his workplace. CP 368-369. Mr. Humphries described Correctional Officers spreading negative rumors about him in an attempt to make him look bad in the eyes of his superiors on account of his race. Id. Mr. Humphries also witnessed the incident in which Sgt. Steven Thompson made statements to the effect that "this is not Martin Luther King day, it's Robert E. Lee day," and he recalled hearing another CO refer to Vickie Elliott as a "hood rat." Id.

3. Glenda Harris.

Glenda Harris, another African-American who worked as an AC Cook at Larch, CP 490-91, testified about her experiences of racial discrimination there. Ms. Harris testified about a number of incidents involving Susan Belland -- the same person who Ms. Elliott had reported being afraid to enter the kitchen office while there were African-American people present. CP 275-76. In one incident, Ms. Belland had a problem

with the way Ms. Harris was communicating with certain individuals. CP 496. However, instead of speaking with Ms. Harris directly, Ms. Belland went to their manager and told her "[I] can't talk to people like [her]" – meaning African-American people – and that she would "prefer" the manager to talk to Ms. Harris for her. Id. Ms. Harris stated that Ms. Belland had a reputation at Larch for being racist; co-workers told Ms. Harris to "be careful around" Ms. Belland because she "is racist but she don't know it." CP 497. Ms. Harris also testified that she had heard from many coworkers "white, black and Hispanic" that there were problems around race relations at Larch. CP 499. As she put it, "Everyone basically that works there said that there was a problem," and the employee concerns around racism "continue to this day." Id.

IV. LEGAL ARGUMENT.

A. Standards.

The Washington Courts of Appeal review a trial court's ruling on a summary judgment motion *de novo*. Scrivener v. Clark College, 181 Wn.2d 439, 444. A summary judgment is properly granted only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56; Scrivener, 181 Wn.2d at 444. In analyzing a summary judgment, the Court must consider all of the facts and make all reasonable inferences in the light most favorable to the non-moving party. Id. Unless the evidence supports a single, reasonable

conclusion in the defendant's favor, questions of fact must be decided by a jury. Davis v. West One Automotive Group, 140 Wn. App. 449, 456 (2007), rev. den., 163 Wn.2d 1040 (2008).

The Washington Legislature passed the Washington Law Against Discrimination ("WLAD"), in order to eliminate and prevent discrimination in the work place, recognizing that discrimination "threatens not only the rights . . . of [Washington] inhabitants, but menaces the institutions and foundation of a free democratic state." Scrivener, 181 Wn.2d at 441. Accordingly, the courts must construe the WLAD liberally in order to promote its remedial purpose. RCW 49.60.020; Scrivener, 181 Wn.2d at 441.

Consistent with that legislative directive, summary judgment for an employer is "seldom appropriate" in cases under the WLAD because of "the difficulty of proving discriminatory motivation." Scrivener, 181 Wn.2d at 445. When the record contains reasonable but competing inferences of discriminatory and non-discriminatory motives, the jury must decide the true motivation. Id. Washington Courts consider federal decisions interpreting Title VII as persuasive authority in deciding claims under the WLAD. Oliver v. Pac. Nw. Bell Tel. Co., 106 Wn.2d 675, 678 (1986).

B. Ms. Elliott's Retaliation Claim Should be Decided by a Jury.

Under the WLAD, it is unlawful for "any employer ... to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter [.]" RCW 49.60.210(1). In order to establish a prima facie case of retaliatory discharge, Ms. Elliott must prove that: 1) she was engaged in a statutorily protected activity, 2) the DOC took some adverse employment action against her, and 3) there is a causal link between the two. Delahunty v. Cahoon, 66 Wn. App. 829, 840-41 (1992) (internal citation omitted). In order to establish causation, Ms. Elliott must demonstrate that retaliatory motive was a "substantial factor" behind any retaliatory action. Allison v. Housing Authority of Seattle, 118 Wn.2d 79, 95-96 (1991).

There is no question that Ms. Elliott's retaliation claim should go to a jury. There is evidence from which a reasonable juror could conclude Debra Smith's final retaliatory assault would not have occurred but for Ms. Elliott's protected reports. First, there is evidence that Ms. Smith was outraged by Ms. Elliott's complaints and her resulting suspension. CP 508-13. Ms. Smith laid her anger squarely on the investigation that was precipitated by Vickie Elliott's report. Id. The final assault occurred on the very first day that the two women were working together, after Ms. Smith returned from administrative leave but before she was disciplined for her

misconduct. She had received the discipline notice the day before the final tripping incident. This close temporal proximity between Ms. Elliott's protected conduct and the final tripping, in light of Ms. Smith's expressed anger about Ms. Elliott's reports, are sufficient to support the conclusion that her tripping was retaliatory. Kahn v. Salerno, 90 Wn. App. 110, 130-31 (1998) (temporal proximity coupled with other evidence of improper motive gives rise to inference of retaliatory motive); Hollenback v. Shriners Hospital for Children, 149 Wn. App. 810, 824 (2009) (timing and other evidence that proffered reasons for adverse action were pretextual sufficient to submit retaliation claim to jury).

C. **Ms. Elliott Suffered Under a Racially Hostile Work Environment that May be Imputed to the Washington Department of Corrections.**

In order to establish her claim for a hostile work environment, Ms. Elliott must prove that she was subjected to: 1) unwelcome conduct; 2) based on her race; 3) that affected the terms and conditions of her employment; and 4) that may be imputed to the DOC. Francom v. Costco Wholesale Corp., 98 Wn.App. 845, 852-53, rev. den., 141 Wn.2d 1017 (2000). In assessing this claim, the Court considers the totality of the circumstances, including the frequency of the conduct, its severity, whether it was physically threatening or humiliating, and whether it unreasonably interfered with her ability to do her job. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993); Adams v. Able Bldg. Supply, Inc., 114

Wn.App. 291, 296 (2002). The totality of circumstances includes discriminatory conduct directed at other African-American employees as well as other incidents of harassment directed at Ms. Elliott by different perpetrators. McGinest v. GTE Srvc. Corp., 360 F.3d 1103, 1117 (9th Cir. 2004); Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503, 1511 (11th Cir. 1989), abrogated on other grounds, Harris, 510 U.S. 17.

In assessing Ms. Elliott's hostile work environment claim, the Court must view the harassment through the lens of a reasonable African-American. McGinest, 360 F.3d at 1115. This is because racially motivated actions "may appear innocent or only mildly offensive to a person who is not a member of the targeted group, but in reality be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group." McGinest, 360 F.3d at 1116. As the McGinest Court recognized, "the omnipresence of race-based attitudes and experiences in the lives of black Americans may cause even non-violent events to be interpreted as degrading, threatening, and offensive." Id. (internal citations omitted). A victim of even "relatively mild forms of harassment" may reasonably understand it to be a "prelude to greater violence." Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991). By adopting the perspective of a reasonable African-American, the Courts advance the remedial goals of anti-discrimination laws by recognizing forms of discrimination "that are real and hurtful," but that "may be

overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff." McGinest, 360 F.3d at 1116.

In granting Defendant's Motion for Summary Judgment against Vickie Elliott's Hostile Work Environment claim, the trial court made two fundamental errors. First, it viewed the evidence and drew all inferences in favor of the *DOC*, not Ms. Elliott. Second, the trial court failed to properly view the harassment by Debra Smith from the perspective of a reasonable African American. These errors led the Court to erroneously grant defendant's summary judgment, despite clear evidence supporting Ms. Elliott's hostile work environment claim.

1. **A juror could conclude that Ms. Smith was acting with a discriminatory motive.**

Ignoring a wealth of evidence to the contrary – including Ms. Smith's admission that her actions were racially charged – the trial court ruled that there was insufficient evidence of racial motivation for this case to go to a jury. When determining the intent of a harasser, there are no "talismanic expressions" that "must be invoked" to trigger liability under the anti-discrimination laws. McGinest, 360 F.3d at 1103 (quoting Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1083 (3rd Cir. 1996)). Rather, the particular words or gestures used by the harasser are important only as

evidence of intent. Id. Words and gestures that convey the message "that members of a particular race are disfavored" and thus are "not full and equal members of the workplace" are sufficient to permit a jury to draw a conclusion on the racial motivation of the speaker and give rise to liability. Id. Here, there is a wealth of evidence that Ms. Smith's actions were motivated by race.

First, Ms. Smith admitted that the kicking carried racial overtones; she admitted that after the first incident and Ms. Elliott's explanation, she understood that kicking her was a very degrading gesture from an African-American perspective. Smith Dep. at 58-60. Ms. Elliott had explained that the gesture recalled the experience of slavery when African-Americans were treated worse than dogs. CP 288-89 & 670, ¶ 3. In the second kicking incident, Ms. Smith amplified the racially hostile intention behind her gesture in light of Ms. Elliott's explanation by ordering Ms. Elliott to "Get!" as if she were a dog. CP 292-93, lns. 18-19.

The racial implications of the gesture were obvious to numerous African-American employees of the DOC, including its Deputy Director, Earl Wright, and two other Larch employees, Glenda Harris and Sid Clark. Deputy Director Wright testified that he understood why it would make Ms. Elliott feel "as if she were being treated like a slave," and that he understood her concerns that it was racially motivated, particularly in light of the subsequent racist email. CP 630-33. Mr. Clark recognized, based on his life

experience, that Ms. Smith's gesture was a "racial act" and that it "catered right into . . . stereotypes . . . about black folks[.]" CP 564-65. And Ms. Harris understood the racial overtones of Ms. Smith's kicking, particularly because it had been directed at an African-American person by a Caucasian person. CP 500-03. Even Supt. Vernell understood the racial dimension of Ms. Smith's actions; in response to hearing about them from Ms. Elliott, Supt. Vernell stated "Elliott, I know how you feel being discriminated against" and directed Ms. Elliott to file a discrimination complaint. CP 28, ¶ 12 & 669, ¶ 2.

Additionally, Ms. Smith had experienced an isolated upbringing where she was raised by a father who routinely used the term "nigger" and who expressed his opinion that African-Americans "just all need to be shot." CP 335-77. A reasonable juror could consider this evidence in deciding Ms. Smith's motive. ER 401. While Ms. Smith denied that her upbringing had affected her, her actions are evidence from which a juror could conclude otherwise. For example, a jury could conclude that Ms. Smith's kicking and shooing conduct was an impulsive act, reflecting her ingrained views of white supremacy. Also, almost immediately on the heels of the second kicking incident, Ms. Smith sent Ms. Elliott an overtly racist and threatening email that taunted Ms. Elliott about an "ASS KICKIN'." CP 73-88 & 480-81. That overtly racist message, which Ms. Elliott reported to the DOC in connection with her IDC Complaint, is

sufficient to give rise to an inference of discriminatory intent. Fischer v. Tacoma School Dist. No. 10, 53 Wn. App. 591, 597 (1989). Ms. Smith also joked about the incidents involving Ms. Elliott with other members of the kitchen staff on a regular basis, and had been heard making racist jokes. CP 504-05 & 581.

The message that Ms. Smith repeatedly sent was simple and clear - Ms. Elliott was not a "full and equal member" of the workplace at Larch. Plainly, under these facts, a reasonable juror could understand the racial implications of Ms. Smith's actions and could conclude that they were motivated by race. McGinest, 360 F.3d at 1103 (and authorities cited therein); accord, Davis, 140 Wn. App. at 457 (holding that a juror could conclude that an ambiguous term could be interpreted to carry racial overtones "as understood by [the plaintiff]"); Kahn v. Salerno, 90 Wn. App. 110, 124-25 (1998) (holding that ambiguous use of term "bitch" in context created jury question on discriminatory intent).

2. A jury could conclude that Ms. Elliott was subjected to an objectively hostile work environment.

The trial court similarly erred in ruling that there was insufficient evidence of an objectively hostile environment. On the contrary, there is abundant evidence persistent racism at Larch. As described above, over the years Ms. Elliott suffered from a wide variety of discriminatory incidents including:

- Being called "Aunt Jemima" by two Caucasian co-workers. CP 280-81.
- Being called a "hood rat" by Sgt. Steven Thompson. CP 277.
- Being told, again by Sgt. Thompson, that "I don't know why we're celebrating Martin Luther King Day. He didn't do nothing special. If we can celebrate his day we can celebrate Robert E. Lee and he's a Confederate." CP 277-78.
- Being subjected to multiple discriminatory acts of hostility and threats by Susan Borgaard, another cook in the Larch kitchen. CP 273-74 & 276-77.
- Having another co-worker in the kitchen, Susan Belland, refuse to go into the kitchen office where Ms. Elliott and a number of other African-American employees were seated because Ms. Belland was "afraid to come into the office because those black people were in there." CP 275-76.

Ms. Elliott's experience was not unique; numerous other African American employees also experienced similar racial discrimination. This extensive history of racial discrimination is important evidence of the totality of the circumstances within which Ms. Elliott experienced Debra Smith's harassment, and it is important evidence that a jury may consider in assessing the objective hostility of same. Vance, 863 F.2d at 1511 (holding that evidence "of instances of discrimination involving other employees . . . both before and during [plaintiff's] tenure" supported the plaintiff's hostile work environment claim); McGinest, 360 F.3d at 117 ("[I]f racial hostility pervades a workplace, a plaintiff may establish a

violation . . . even if such hostility was not directly targeted at the plaintiff.").

All of those incidents occurred in a correctional institution, where every employee depends upon her co-worker for protection from the inmate population. In such a work environment, discriminatory treatment raises the level of threat, and therefore the level of hostility, significantly. Within this context, Ms. Elliott was subjected to an ongoing and escalating pattern of physically threatening discrimination by Debra Smith. As Ms. Elliott explained, after the kicking incidents, she "never felt safe in that environment" because Ms. Elliott didn't know "what [Ms. Smith] was capable of after that." CP 310-11. She also felt that she was in a "vulnerable, unsafe environment" with the inmates that she had to supervise. CP 290-91. Ms. Smith's actions made it "very hard" for Ms. Elliott to do her job with the "same offenders" that had seen Ms. Smith's actions and "lowered everything that I built there in front of those men[.]" CP 305-06. Consistent with Ms. Elliott's explanation of the impact on her work, Commissioner Langsdorf – the Clark County Commissioner who granted Ms. Elliott a permanent restraining order against Ms. Smith – found that "when you are dealing with inmates and prisoners, you need to have a tough and strong persona," and when a coworker kicks another coworker as did Ms. Smith, "it creates problems for you at work," not only in terms of safety,

but "also in how the prisoners treat you." CP 359, lns. 5-10. Plainly, Ms. Smith's actions altered the conditions of Ms. Elliott's employment and interfered with her ability to do her job.

Furthermore, Ms. Smith's discriminatory treatment of Ms. Elliott escalated over time. It initially started as a simple kicking, then escalated to include verbally humiliating Ms. Elliott by speaking to her as if she were a dog and ordering her to "get!" CP 166, lns. 17-19 & 168-69, lns. 24-25 & 1-6. A little more than a week later, Ms. Smith again explicitly threatened Ms. Elliott in plainly racist terms by sending her the "ASS KICKIN' BY A REAL VETERAN" email. CP 300 & 406. Ultimately, Ms. Smith's harassment of Ms. Elliott culminated in a final workplace assault that required Ms. Elliott to seek medical attention in the emergency room. CP 319-21 & 611-23. As one Court has observed, "the most severe form of racism is racist violence[.]" Anthony v. County of Sacramento, 898 F.Supp 1435, 1448 (E.D. Cal. 1995). Defendant conceded that the kicking incidents were "violent and threatening" acts that were "degrading and humiliating," and that "particularly in a prison setting, where staff depends so heavily on their co-workers for safety" such incidents are "completely intolerable." CP 399, lns. 4-20 & 519, ¶ 1.

Even if such racial discrimination had occurred in a vacuum, without the prior history of racial discrimination and extensive atmosphere of hostility at the institution, these incidents would be sufficient evidence

of a racially hostile work environment to submit this case to a jury. E.g., Hotchkiss v. C.S.K. Auto, Inc., 918 F.Supp. 2d 1108, 1118-19 (E.D. Wash. 2013) (holding that four intimidating statements, without any physical contact, were sufficient to create a hostile work environment); Vance, 863 F.2d 1503, 1510 (holding that two threatening incidents in which a noose was hung over an employee's work station and other incidents of non-threatening harassment were sufficiently severe to create a jury question on a racial hostile environment); Kahn, 90 Wn. App. at 126-27. When considered against the background of the extensive atmosphere of racial hostility at Larch, it is even clearer that a juror could conclude Ms. Elliott suffered under a racially hostile work environment. Loeffelholz v. University of Washington, 175 Wn.2d 264, 73-75 (2012) (holding that a single threatening statement, in the context of a history of discriminatory hostility, is sufficient to state a hostile work environment claim).

3. There was evidence from which a juror could conclude that the DOC failed to respond reasonably.

Finally, the trial court erred in determining that the DOC's response to the hostile work environment reports by Ms. Elliott was sufficient to avoid liability. Under the WLAD, an employer may avoid liability for a hostile work environment only where it took reasonable remedial measures to end the harassment. Glasgow v. Georgia-Pacific

Corp., 103 Wn.2d 401, 407 (1985). The reasonableness of the remedy will depend on its ability to end the harassment and will be measured by the "twin purposes" of ending the current harassment and deterring future harassment by the same offender or others. Perry v. Costco Wholesale Inc., 123 Wn.App. 783, 793 (2004). The effectiveness of an investigation is a component of determining whether or not a response is reasonable, and an investigation that fails to uncover harassment "such that the remedy the employer chooses is inadequate" is evidence from which a jury could conclude that an employer failed to take adequate remedial measures. Id. at 795-96.

Here the evidence is clear that the DOC's investigation of the harassment reported by Ms. Elliott was ineffective because it failed to even consider the racial dimensions of the harassment, instead treating Ms. Smith's conduct as if it were simple workplace violence. That failure to investigate the racial motive behind Ms. Smith's harassment of Ms. Elliott was a violation of DOC's own policies, which the DOC's Labor Relations Manager, Todd Dowler, testified required a separate investigation. CP 470-72. The DOC's failure to follow internal investigative procedures in handling Ms. Elliott's discrimination complaint is evidence that its remedial measures were inadequate. Mockler v. Multnomah County, 140 F.3d 808, 813 (9th Cir. 1998); Distasio v. Perkin Elmer Corp., 157 F.3d 55, 65 (2nd Cir. 1998).

In addition, the DOC delayed the investigation for over six months and permitted Ms. Smith to remain in Ms. Elliott's work environment for three months with no remedial measures in place. The delay alone gives rise to a jury question as to whether the employers' remedial measures were adequate. Smith v. St. Louis University, 109 F.3d 1261, 1265 (8th Cir. 1997), abrogated on other grounds by, Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011). The continued exposure to one's harasser can constitute a hostile work environment and the failure to take adequate remedial steps, such as separating a harasser from the victim, during the pendency of an investigation is also evidence that the DOC's remedial measures were inadequate. Swenson v. Potter, 271 F.3d 1184, 1192-93 (9th Cir. 2001); Adler v. Walmart Stores, Inc., 144 F.3d 664, 676 (10th Cir. 1998).

Furthermore, the DOC failed to take reasonable steps to eliminate the overall atmosphere of racism within the institution. While it may have addressed particular instances of harassment in isolation, it failed to take remedial steps to eliminate the larger discriminatory pattern that flourished at Larch and that permitted the individual instances of discrimination to recur. That failure is additional evidence from which a juror could conclude that the DOC's remedial measures were unreasonable. Patterson v. Hudson Area Schools, 551 F.3d 438, 449-50 (6th Cir. 2009) (hostile educational environment claim under Title IX; holding that evidence that

the school district's "success with individual [harassers] did not prevent the overall and continuing harassment of [the plaintiff]" created a jury question on whether the school district's response was "clearly unreasonable."); Theno v. Tonganoxie Unified School Dist. No. 464, 377 F.Supp.2d 952, 965-66 (D. Kan. 2005) (same).

Finally, the elimination of race from that investigation led to a 10-day suspension, which by the DOC's own admissions was inadequate. As both Supt. Vernell and Mr. Dowler explained, had there been a finding that Ms. Smith's conduct was racially motivated, it would have justified termination. CP 394-96; 479; 481, lns. 1-6 & 483, lns. 2-18. As a direct result of the DOC's failure to terminate her, Ms. Smith was returned to the Larch kitchen where she was able to perpetrate yet another act of violence against Ms. Elliott. Furthermore, the DOC failed to provide Ms. Smith with any sort of reentry plan or guidance in handling the return to the workplace in order to resolve any lingering hostilities. Rather, defendants simply put the two women back together in the kitchen and hoped for the best, despite the requests from *both* women that they be kept separate. CP 308-09 & 347, lns. 7-17.

Remedial measures that fail to prevent additional acts of discrimination are evidence that they were ineffective. Perry, 123 Wn. App at 759-96. Likewise, the DOC's failure to give *any* regard to the impact that returning Ms. Smith to the workplace would have on Ms.

Elliott is evidence that its remedial measures were ineffective. Ellison, 924 F.2d at 883. Even Ms. Smith acknowledged that the DOC's delayed handling of the investigation and resolution of Ms. Elliott's complaint was unreasonable. CP 348-49. A reasonable jury could reach the same conclusion.

D. Ms. Elliot Was Subjected to a Constructive Discharge.

As with the other claims, the trial court erred in dismissing Ms. Elliott's constructive discharge claim. In order to establish a constructive discharge, Ms. Elliott must prove: (1) that the DOC deliberately made her working conditions intolerable, (2) that a reasonable person in her position would be forced to resign, (3) that she resigned solely because of the intolerable conditions, and (4) that she suffered damages. Campbell v. State, 120 Wn. App. 10, 23 (2005). Here, a reasonable juror could conclude that the DOC deliberately sought to induce Ms. Elliott's resignation.

In returning Ms. Smith to the kitchen to work with Ms. Elliott, the DOC refused to take any steps to separate the two individuals. This, despite the following facts:

- It was aware of the significant hostility that Ms. Smith felt towards Ms. Elliott as a result of her administrative leave and due to the reports of discrimination. CP 600-07;
- It was aware that Ms. Elliott feared for her safety. CP 308-10;

- Both employees requested that the DOC keep them separated. CP 308-09 & 347, Ins. 7-17;
- There were easy alternative scheduling arrangements that had been previously used to address precisely this sort of situation. CP 270-71; 272; 561-63 & 591-92; and
- Forcing the two women to work together ignored a lawfully entered protective order from the Clark County District Court.

There was also evidence that this manner of resolving personnel disputes was an unwritten management practice at Larch. CP 595. As one Larch employee testified, forcing the staff to work together was "the standard MO" that Larch management had "always taken . . . either it will work itself out or someone will quit." *Id.* It was precisely the "conflict resolution" strategy that Supt. Vernell's predecessor, Supt. Gorman, used to "resolve" a long-standing conflict between Ms. Elliott and Susan Borggaard. CP 607.

As for the reasonableness of Ms. Elliott's decision, it is difficult to imagine what more she should have done to remain in her position. In refusing to honor her restraining order and forcing her to work with Ms. Smith, which resulted in another assault, the DOC made it clear that it was unwilling to protect her safety in the face of repeated discriminatory threats. Even *after* the final tripping incident that sent Ms. Elliott to the hospital, when Ms. Elliott asked Supt. Vernell to allow her to return to work but to do so with a changed schedule so she could avoid Ms. Smith,

Supt. Vernell still refused. CP 322-23. Any employee in Ms. Elliott's shoes would have felt they had no alternative at that point. E.g., Delashmutt v. Wis-Pak Plastics, Inc., 990 F. Supp. 689, 703 (N. D. Iowa 1998) ("It is reasonably foreseeable that a person who finds all of her attempts to improve intolerable working conditions foreclosed will quit, rather than continue to suffer the intolerable conditions."); Haubry v. Snow, 106 Wn. App. 666, 677-78 (2001) ("The question of whether the working conditions were intolerable is one for the trier of fact, unless there is no competent evidence to establish a claim of constructive discharge.").

Ms. Elliott could not have fought any harder for her position or her rights. Rather than protect her, Larch management deliberately returned her to a situation that it knew (or should have known) would result in some form of injury. Plainly, this claim, too, must be decided by a jury. Korslund v. Dyncorp Tri-Cities Srves., Inc., 121 Wn. App. 295, 318 (2004), rev'd in part on other grounds, 156 Wn.2d168 (2005) (holding that nonthreatening reassignments and criticism were sufficiently "aggravated circumstances" to create jury question on constructive discharge claim); Hotchkiss, 918 F.Supp.2d at 1122-23 (four threatening comments over span of two months, with no physical acts, and employer's failure to remedy same, created jury question on constructive discharge claim).

E. Ms. Elliott's Negligent Supervision Claims are not Barred by the Workers Compensation Laws.

Finally, the trial court erred in dismissing Ms. Elliott's negligent supervision claim on the ground that it is barred by Washington's Industrial Insurance Act ("IIA"). That is because the IIA bar to civil liability is inapplicable where the injuries a plaintiff seeks recovery for are "separate and distinct" from the physical workplace injury. Goodman v. Boeing Co., 127 Wn.2d 401, 406-07 (1995). The Washington Administrative Code specifically excludes from IIA coverage "conditions and disabilities" resulting from "relationships with supervisors, co-workers, or the public;" "subjective perceptions of employment conditions or environment;" and "objective or subjective stresses of employment[.]" WAC 296-14-300. Relying on that provision, the Goodman Court held that the IIA does not bar recovery for emotional injuries arising from an employee's discriminatory harassment. Id. That principle includes emotional injuries that are not motivated by discriminatory hostility. Wheeler v. Catholic Archdiocese of Seattle, 65 Wn.App. 552, 565-68 (1992), rev'd on other grounds by, 142 Wn.2d 634 (1994).

The Goodman and Wheeler decisions recognize the longstanding principle that the IIA does not eliminate common law remedies for injured employees "without providing a substitute remedy." Goodman, 127 Wn.2d at 407 (internal citations omitted); Wheeler, 65 Wn. App. at 565.

Similarly, harms such as a termination that result from an employer's "deliberate behavior," rather than the workplace injury itself, are not barred by the IIA because the two are "distinct wrongs." Reese v. Sears, Roebuck & Co., 107 Wn.2d 563, 573-74 (1987), overruled on other grounds, Phillips v. City of Seattle, 111 Wn.2d 903 (1989). Such harms simply do constitute a workplace "injury" under the IIA, which defines that term as "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result . . . and such *physical conditions* as result therefrom." RCW 51.08.100 (emphasis added).

Here, Ms. Elliott's emotional injuries do not result from a single precipitating incident. Rather, they are the result of an ongoing pattern of harassment by Ms. Smith and her continued exposure to Ms. Smith in the workplace. As such, they do not arise from a single workplace "injury," and her emotional damages resulting from defendant's negligence supervision are not barred by the IIA. Rothwell v. Nine Mile Falls Schools Dist., 149 Wn. App. 771, 779-82.

Likewise, Ms. Elliott's constructive discharge was not the direct and immediate result of her workplace injury. The physical symptoms from the tripping incident did not prevent Ms. Elliott from returning to work at Larch. Rather, because the DOC refused to make her workplace safe and ensure that she would not be subjected to additional harassment and workplace violence, Ms. Elliott was forced into a constructive

discharge. Her loss of employment is due to the DOC's deliberate decision not to alter her schedule or otherwise ensure a safe environment, which is a "distinct wrong" from the tripping incident and the "physical conditions" it caused. RCW 51.08.100. As such, this aspect of her negligent supervision claim is also not barred by the IIA. Reese, 107 Wn.2d at 573-74.

V. **CONCLUSION.**

For all of the foregoing reasons, this Court should reverse the trial court's grant on summary judgment and remand this case with instructions that it must be decided by a jury.

Respectfully Submitted this 11th day of May, 2015.

HAGLUND KELLEY LLP

By: /s/ Christopher Lundberg

Christopher Lundberg, OSB No. 94108, *pro hac vice*

Matt Malmshemer, OSB 033847, *pro hac vice*

Shay S. Scott, WSBA No. 23760

200 SW Market Street, Ste. 1777

Portland, Oregon 97201

Telephone: (503) 225-0777

Fax: (503) 225-1257

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **APPELLANT'S OPENING BRIEF**, on the following parties:

TOROlYEF@ATG.WA.GOV

Laureld@atg.wa.gov

DariceW@atg.wa.gov

grace@atg.wa.gov

Attorneys for Respondent

By e-mailing said document on the dated stated below.

DATED this 11th day of May, 2015.

s/ Matthew E. Malsheimer

Matthew E. Malsheimer, OSB 033847, *Pro Hac Vice*
Attorney for Appellant

HAGLUND KELLEY LLP

May 11, 2015 - 4:03 PM

Transmittal Letter

Document Uploaded: 4-467968-Appellant's Brief.pdf

Case Name: Vickie Elliott v. Washington Department of Corrections

Court of Appeals Case Number: 46796-8

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Shay S Scott - Email: sscott@hk-law.com

A copy of this document has been emailed to the following addresses:

TOROllyEF@ATG.WA.GOV

Laureld@atg.wa.gov

DariceW@atg.wa.gov

grace@atg.wa.gov

clundberg@hk-law.com

mmalmsheimer@hk-law.com