

NO. 46796-8-II

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

VICKIE ELLIOTT, an individual,

Appellant,

v.

STATE OF WASHINGTON acting through its DEPARTMENT OF
CORRECTIONS,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. RESTATEMENT OF THE ISSUES ON APPEAL.....3

III. RESTATEMENT OF THE CASE.....4

 A. Plaintiff and Co-Worker Debra Smith Had a Cordial Working Relationship for Over Four Years Prior to the Alleged Kicking Incidents4

 B. The Alleged Kicking Incidents And DOC’s Investigation.....5

 C. The September 2010 Tripping Incident And Plaintiff’s Resignation11

IV. SUMMARY OF ARGUMENT.....15

V. ARGUMENT15

 A. The Retaliation Claim Fails as a Matter Of Law Because Elliott Has Alleged No Adverse Employment Action Taken By DOC.16

 B. Elliott’s Hostile Work Environment Claim Fails Because There Is No Evidence Smith’s Conduct Was Motivated by Race, Smith’s Conduct Was Not Sufficiently Severe or Pervasive So as to Alter Elliott’s Workplace, and DOC Conducted a Reasonable Investigation18

 1. Elliott Was Not Singled Out On Account Of Her Race19

 2. Smith’s Actions Were not Sufficiently Severe or Pervasive so as to Alter the Conditions of the Workplace and Did not Create an Abusive Working Environment23

 a. Even viewed through the lens of a “reasonable plaintiff” of the protected class, Elliott’s claims

| | |
|--|----|
| still fail as a matter of law because the incidents she complains of do not constitute severe or pervasive conduct..... | 25 |
| b. Elliott cannot sustain her claims by resurrecting complaints against DOC that have been settled and are otherwise not at issue in this lawsuit in order to show pervasiveness. | 28 |
| 3. Smith’s Conduct Cannot Be Imputed To DOC Because DOC Took Reasonable Corrective Measures Following Elliott’s Complaint..... | 31 |
| C. Elliott’s Constructive Discharge Claim Based on Race Fails Because She Voluntarily Quit Her Job and Because She Cannot Show DOC Deliberately Made Working Conditions Intolerable..... | 37 |
| D. Ms. Elliott’s Negligent Supervision Claim Fails Because It Is Either Barred by the Industrial Insurance Act or Duplicative of Her Discrimination Claims | 40 |
| VI. CONCLUSION | 46 |

TABLE OF AUTHORITIES

Cases

| | |
|--|------------|
| <i>Adams v. Able Bldg. Supply, Inc.</i> , 114 Wn. App. 291, 57 P.3d 280 (2002)..... | 23 |
| <i>Adler v. Wal-Mart Stores, Inc.</i> , 144 F.3d 664 (10th Cir. 1998) | 34 |
| <i>Allison v. Hous. Auth. of City of Seattle.</i> , 118 Wn.2d 79, 821 P.2d 34 (1991)..... | 17 |
| <i>Alonso v. Qwest Commc 'ns Co., LLC</i> , 178 Wn. App. 734, 315 P.3d 610 (2013)..... | 18 |
| <i>Barrie v. Hosts of America, Inc.</i> , 94 Wn.2d 640, 618 P.2d 96 (1980)..... | 16 |
| <i>Birklid v. Boeing</i> , 127 Wn.2d 853, 904 P.2d 278 (1995)..... | 41 |
| <i>Briggs v. Nova Servs.</i> , 135 Wn. App. 955, 147 P.3d 616 (2006)..... | 40 |
| <i>Campbell v. State</i> , 129 Wn. App. 10, 118 P.3d 888 (2005)..... | 37 |
| <i>Clarke v. State Attorney General's Office</i> , 133 Wn. App. 767, 138 P.3d 144 (2006)..... | 23, 24, 28 |
| <i>Crownover v. State ex rel. Dep't of Transp.</i> , 165 Wn. App. 131, 265 P.3d 971 (2011)..... | 17, 22 |
| <i>Delashmutt v. Wis-Pak Plastics, Inc.</i> , 990 F. Supp. 689 (N.D. Iowa 1998)..... | 39 |
| <i>Distasio v. Perkin Elmer Corp.</i> , 157 F.3d 55 (2nd Cir. 1998) | 33 |

| | |
|--|----------------|
| <i>Domingo v. Boeing Employees' Credit Union</i> , 124 Wn. App. 71, 98 P.3d 1222 (2004) | 21 |
| <i>Ellison v. Brady</i> , 924 F.2d 872 (9th Cir. 1991) | 26 |
| <i>Fisher v. Tacoma Sch. Dist. No. 10</i> , 53 Wn. App. 591, 769 P.2d 318 (1989)..... | 35, 36, 45 |
| <i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998)..... | 40 |
| <i>Francom v. Costco Wholesale Corp.</i> , 98 Wn. App. 845, 991 P.2d 1182 (2000)..... | 17, 41, 44, 46 |
| <i>Glasgow v. Georgia-Pacific Corp.</i> , 103 Wn.2d 401, 693 P.2d 708 (1985)..... | passim |
| <i>Goodman v. Boeing Co.</i> , 127 Wn.2d 401, 899 P.2d 1265 (1995)..... | 42, 43 |
| <i>Haubry v. Snow</i> , 106 Wn. App. 666, 31 P.3d 1186 (2001)..... | 39, 44, 45 |
| <i>Henson v. Crisp</i> , 88 Wn. App. 957, 946 P.2d 1252 (1997)..... | 41 |
| <i>Herried v. Pierce Co. Public Transp. Benefit Authority Corp.</i> , 90 Wn. App. 468, 957 P.2d 767 (1998)..... | 43, 44, 46 |
| <i>Hollenback v. Shriners Hosp. for Children</i> , 149 Wn. App. 810, 206 P.3d 337 (2009)..... | 18 |
| <i>Hotchkiss v. CSK Auto Inc.</i> , 918 F. Supp. 2d 1108 (E.D. Wash. 2013)..... | 39 |
| <i>Kahn v. Salerno</i> , 90 Wn. App. 110, 951 P.2d 321 (1998)..... | 16, 18, 24 |
| <i>Knuth v. Beneficial Wash., Inc.</i> , 107 Wn. App. 727, 31 P.3d 694 (2001)..... | 29 |

| | |
|--|------------|
| <i>Korslund v. Dyncorp Tri-Cities Svcs., Inc.</i> , 121 Wn. App. 295, 88 P.3d 966 (2004), <i>rev'd in part on other grounds</i> , 156 Wn.2d 168 (2005)..... | 39 |
| <i>Le Bire v. Dep't of Labor & Indus.</i> , 14 Wn.2d 407, 128 P.2d 308 (1942)..... | 29 |
| <i>Loeffelholz v. Univ. of Wash.</i> , 175 Wn.2d 264, 285 P.3d 854 (2012)..... | 25 |
| <i>McBride v. Walla Walla Cnty.</i> , 95 Wn. App. 33, 975 P.2d 1029 (1999)..... | 16 |
| <i>McGinest v. GTE Service Corp.</i> , 360 F.3d 1103 (9th Cir. 2004) | 25, 26, 27 |
| <i>Mills v. Brown & Wood, Inc.</i> , 940 F. Supp. 903 (E.D.N.C. 1996) | 22 |
| <i>Mockler v. Multnomah Cnty.</i> , 140 F.3d 808 (9th Cir. 1998) | 33 |
| <i>Molsness v. City of Walla Walla</i> , 84 Wn. App. 393, 928 P.2d 1108 (1996)..... | 37, 38 |
| <i>Patterson v. Hudson Area Schools</i> , 551 F.3d (6th Cir. 2009) | 31 |
| <i>Perry v. Costco</i> , 123 Wn. App. 783, 98 P.3d 1264 (2004)..... | 32 |
| <i>Phillips v. King Cnty.</i> , 136 Wn.2d 946, 968 P.2d 871 (1998)..... | 15 |
| <i>Ray v. Henderson</i> , 217 F.3d 1234 (9th Cir. 2000) | 27 |
| <i>Reese v. Sears, Roebuck & Co.</i> , 107 Wn.2d 563, 731 P.2d 497 (1987)..... | 42, 43 |

| | |
|---|--------|
| <i>Rothwell v. Nine Mile Falls Sch. Dist.</i> , 149 Wn. App. 771, 206 P.3d 347 (2008)..... | 44 |
| <i>Scrivener v. Clark College</i> , 181 Wn.2d 439, 334 P.3d 541 (2014)..... | 16 |
| <i>Smith v. St. Louis University</i> , 109 F.3d 1261 (8th Cir. 1997) | 34 |
| <i>Swenson v. Potter</i> , 271 F.3d 1184 (9th Cir. 2001) | 33, 34 |
| <i>Theno v. Tonganoxie Unified School Dist. No. 464</i> , 377 F.Supp.2d 952 (D. Kan. 2005)..... | 31 |
| <i>Travis v. Tacoma Public Sch. Dist.</i> , 120 Wn. App. 542, 85 P.3d 959 (2004)..... | 38 |
| <i>Vance v. Southern Bell Tel. & Tel. Co.</i> , 863 F.2d 1503, (1989)..... | 27 |
| <i>Washington v. Boeing Co.</i> , 105 Wn. App. 1, 19 P.3d 1041 (2000)..... | 19, 39 |
| <i>Wheeler v. Catholic Archdiocese of Seattle</i> , 65 Wn. App. 552, 829 P.2d 196 (1992), <i>rev'd</i> , 124 Wn.2d 634, 880 P.2d 29 (1994)..... | 44 |

Statutes

| | |
|-----------------|---|
| RCW 49.60 | 2 |
|-----------------|---|

Rules

| | |
|---------------|----|
| CR 56 | 16 |
| CR 56(c)..... | 2 |
| CR 56(e)..... | 16 |

I. INTRODUCTION

This is an employment lawsuit arising out of Larch Corrections Center, a facility of the Department of Corrections (DOC). For over four years, Vickie Elliott, an African-American, and Debra Smith, a Caucasian, worked well together as cooks in the kitchen at the prison. A co-worker described them as “two peas in a pod.” Despite their cordial relationship, Ms. Elliott claims Ms. Smith suddenly targeted her because of her race beginning in late 2008.

In October 2008, Smith lightly “touched the buttock” of Elliott with Smith’s foot. Elliott told her direct supervisor but requested that he not pursue the issue. By Elliott’s own admission, the kick was not malicious nor did it cause any injury, but Elliott found the kick offensive. For the next 14 months, there were no incidents and in fact Elliott and Smith were on good terms. Then, in March 2010, during a verbal altercation Smith made a kicking motion toward Elliott while sharply telling Elliott to get out of the immediate area. Elliott also received a distasteful email at home from Smith’s personal email account that same month. Elliott reported the incidents to Superintendent Eleanor Vernell, an African-American. Vernell had the matter investigated by DOC’s Workplace Diversity Programs Administrator, Harrison Allen III, an African-American. Following the investigation, Smith was suspended for

her behavior but Superintendent Vernell did not find Smith's actions to be racially motivated based on Allen's report. After the March 2010 incidents, Elliott and Smith again worked together without incident until September 2010.

On September 29, 2010, Elliott claims that Smith tripped her in the kitchen. Smith and an inmate who witnessed the incident claimed that Elliott faked the incident. The alleged tripping incident took place within an hour after Superintendent Vernell announced that Larch was closing due to budget cuts. DOC was not able to fully investigate the matter because Elliott quit her job and refused to speak to the DOC investigator. Shortly thereafter, Elliott brought this lawsuit in which she alleges (1) hostile work environment based on race, (2) constructive discharge on account of race, (3) retaliation, and (4) negligent supervision.

At best, the evidence shows that she and Smith had a falling out. This is not the type of event about which the Washington Law Against Discrimination (WLAD), RCW 49.60, is concerned. The trial court properly dismissed this lawsuit in its entirety pursuant to CR 56(c) because there is no evidence that Smith's behavior was motivated by race or that Smith's conduct was either severe or pervasive, and because DOC properly investigated Elliott's allegations and disciplined Smith. This Court should affirm that result.

II. RESTATEMENT OF THE ISSUES ON APPEAL

1. Whether the trial court properly dismissed Elliott's retaliation claim as a matter of law on the grounds that Elliot failed to show that DOC took an adverse action against her, an essential element of a retaliation claim.

2. Whether the trial court properly dismissed, as a matter of law, Elliott's hostile workplace claim where Elliott failed to set forth evidence showing that the complained-of incidents were racially motivated, that the incidents affected the terms and conditions of her employment, and that DOC failed to take reasonable investigatory and remedial measures.

3. Whether the trial court properly dismissed, as a matter of law, Elliott's constructive discharge claim where Elliott presented no evidence that DOC had intentionally created intolerable working conditions.

4. Whether the trial court properly dismissed Elliott's negligent supervision claim because it is barred as a matter of law by Washington's Industrial Insurance Act.

III. RESTATEMENT OF THE CASE

A. **Plaintiff and Co-Worker Debra Smith Had a Cordial Working Relationship for Over Four Years Prior to the Alleged Kicking Incidents**

Elliott and Smith worked together as cooks at Larch. Their job duties included preparing meals and supervising offenders who worked in the kitchen. Up until December 31, 2008, Elliott and Smith were supervised by Bob Andrews, an African-American. Clerk's Papers (CP) at 109. When Andrews retired, Christy King, a Caucasian, became the food service manager. CP at 29.

Elliott and Smith had an amiable working relationship for over four years. CP at 148, 193. A co-worker described Elliott and Smith as "two peas in a pod. They were always talking and laughing and joking." CP at 222. Not only did Elliott and Smith work well together, the two socialized on occasion. CP at 148. Smith would include Elliott on friendly group emails outside of work from time to time. CP at 149-50. Smith also wrote Elliott a character reference, describing Elliott as an "honest, hardworking person." CP at 151-52. Smith even testified on Elliott's behalf during a temporary restraining hearing involving a dispute between Elliott and another co-worker. CP at 151.

By Elliott's own admission, Smith was known by staff and offenders as a nice person and did not have a reputation for violence. CP

at 154-55. However, Elliott also testified that Smith would “hit people a lot” and that she had “seen Ms. Smith punch officers playing, you know.” CP at 152, 200. Elliott admitted that she did not feel her safety was at risk from observing Smith “hitting” other employees. CP at 153.

B. The Alleged Kicking Incidents And DOC’s Investigation

Elliott alleges that in late 2008, Smith kicked her while working in the kitchen.¹ Elliott testified that Smith kicked her hard enough that she felt the impact but it did not cause her any pain. CP at 156. Smith immediately apologized after realizing she offended Elliott. CP at 156. The kick embarrassed Elliott because it took place in front of offenders.

¹ Some documents in the record erroneously state that the first kicking incident occurred in October or November 2009, and Elliot’s briefing before this court persists in that error. *See e.g.* Appellant’s Opening Br. at 6; CP at 7 (paragraph 17 of the Complaint). Counsel for both parties frequently miscited the year 2009 during depositions. *See e.g.* CP at 283-85, 340, 358-60. However, there can be no dispute that the first incident occurred in 2008 because Elliott reported the incident to her supervisor at the time, Bob Andrews. CP at 7 (paragraph 18 of the Complaint). Andrews retired on December 31, 2008. CP at 109. Elliott’s discovery responses contain a letter from Andrews in which he states that the incident “happened around Nov or Dec of 2008 ([t]he incident happened shortly before my retirement Dec 2008).” CP at 228. Finally, a letter from Elliott’s attorney dated November 12, 2010 references the first incident as taking place in 2008. CP at 230.

But even if there can be a dispute about the date of the first incident, it is not a material dispute. Elliott admits that regardless of the date, there were at least several months between the first and second incident, Appellant’s Opening Br. at 8, and that relations during that time between the women were not strained. For example, Elliott admitted that after the first kicking incident, Smith put Elliott in touch with Smith’s daughter so that Smith’s daughter might assist Elliott with home mortgage issue. CP at 163.

Elliott told her supervisor, Bob Andrews, but she insisted that it not be formally investigated. CP at 156-57.

In deposition testimony, Elliott claimed that Smith kicked her because of Elliott's race. CP at 157. But in her sworn testimony during an October 8, 2010, court hearing, Elliott testified that Smith was not a "malicious person" at the time of the first kick and that "she may not have understood" that the first incident was degrading. CP at 195-97. Elliott acknowledged during her deposition that she did not fear Smith following the first kicking incident. CP at 164.

For over a year following the first kicking incident, Elliott and Smith got along well. For example, at some point in 2009, Smith put Elliott in contact with Smith's daughter to assist Elliott with obtaining a home mortgage. CP at 163.² And in January 2009, Smith provided statements in support of Elliott in a dispute Elliott had with a supervisor. CP at 137. During this time period, however, Elliott did confront Smith on several occasions because Elliott felt that Smith was too friendly toward inmates. Elliott reported Smith when she witnessed Smith providing Tylenol to an offender, which is a violation of policy. CP at

² As noted, regardless of when the first incident was, it is undisputed Smith put Elliott in touch with Smith's daughter after the first kicking incident. CP at 163.

159-62. As a result of Elliott's report, DOC disciplined Smith. Elliott testified that Smith's perception toward her changed after this. CP at 162.

The second incident involving Smith occurred on March 9, 2010. CP at 165. Upon hearing Smith speaking in an elevated voice to an inmate, Elliott says she hurried over to Smith's side of the kitchen to see what was wrong. CP at 165-66. Smith told Elliott to get back to her side of the kitchen and made a kicking motion toward Elliott, but did not make contact. CP at 166. Smith realized she offended Elliott and immediately apologized. CP at 166. Elliott reported the incident to Superintendent Vernell but asked Vernell not to formally investigate the incident. CP at 170. Vernell insisted on investigating the matter and contacted the DOC Workplace Diversity Programs Administrator, Harrison Allen III, who is also African-American. CP at 29-30. Vernell also confronted Smith and requested that she provide a statement to respond to Elliott's allegations. CP at 29-30.

On March 18, 2010, Elliott received an email on her personal email account from Smith's personal email account. CP at 174. The email was sent and received outside of work hours. CP at 176. Smith claimed that her husband sent the email from their joint email address. CP at 207. The email subject was titled "Fw: Ass Kickin from a Real Veteran." CP at 73. The email, which appears to be a distasteful forward,

contained “rules for the non-military” and stated “for those of you who can’t join [the military] . . . here are a few of the areas we would like your assistance.” CP at 74. It listed a number of statements, including one that said “when you witness, firsthand, someone burning the American flag in protest – kick their ass.” CP at 74. The email also included a number of photographs of historical military figures and short military stories. Elliott focused on one statement from the 15-page email which stated, “if you ever see anyone singing the national anthem in Spanish – kick their ass.” CP at 76. Though she speaks very little Spanish, Elliott claims that she took this statement as targeting her as an African-American. CP at 175. The following day, Elliott brought a print-out of the email to Vernell, who told Elliott to provide the email to the DOC investigator. CP at 30.

Allen, the Workplace Diversity Programs Administrator, decided to handle the investigation of Elliott’s allegations himself. CP at 59. Allen had worked with Elliott in the past on diversity issues, and even wrote her a letter of commendation for her work on the diversity committee in December 2009. CP at 113.

Allen began his investigation by reviewing the two reports filed by Elliott: a workplace violence report and an internal discrimination complaint (IDC). CP at 59, 63-107. On the workplace violence report form, Elliott checked off “Yes” when asked if weapons were involved and

wrote in “legs” as the type of weapon. CP at 70. On the IDC, Elliott checked off “race” and “color” as the basis for the complaint. CP at 69. She attached the same written statement for both the workplace violence report and the IDC. CP at 71. In her statement, Elliott did not claim to be in fear of Smith nor did she describe Smith’s actions as particularly violent. She stated in part as follows:

As I was walking away, [Smith] lifted her foot toward my buttocks as if to kick me in the rear.

I would like to add that this is not the first time Mrs. Smith has left [sic] her foot to my buttocks, before about several months ago in the kitchen in front of inmates she actually kick [sic] and touched my buttock with her foot. I talk [sic] with her and told her at [sic] that what she did was very degrading to me and please never do that again.

CP at 71.

Due to scheduling issues and Elliott’s failure to submit the proper paperwork and sign her complaints, Allen was not able to interview the parties until May 20, 2010. CP at 115-26. Elliott provided Allen with the March 18 email, told him about the kicking incidents, and told him that all the incidents involving Smith “were racist.” CP at 173. In the course of investigation into the workplace violence and discrimination claims, Allen also reviewed statements from several co-workers in support of Smith. CP at 68, 91-107.

In June 2010, Elliott emailed Vernell and stated that Smith had brought homemade salsa into the facility and given the salsa to an offender. CP at 30, 44. Vernell asked her second-in-command, Norm Caldwell, an African-American, to investigate the allegations as staff is prohibited from bringing personal items to offenders. CP at 31. Smith admitted to giving salsa to a number of offenders and Caldwell reported his findings to Vernell. CP at 31.

On July 26, 2010, Vernell received Allen's final investigation report regarding Elliott's workplace violence and discrimination complaints. CP at 31. Allen recommended that Smith be sanctioned, noting that Smith acknowledged her actions were disrespectful and degrading. CP at 31, 66. Allen reported that Smith told him that she did not send the email to Elliott but that her husband had sent the email from their joint account, and her husband was not aware of the dispute between Elliott and Smith. CP at 64-65. Smith told Allen that she did not intend any disrespect toward Elliott and that she attempted to apologize to her on several occasions. CP at 64-65. As noted, included in Allen's investigation were 16 letters in support of Smith, mostly from co-workers. CP at 91-107. One co-worker who wrote a letter in support of Smith was Delrico Humphries, an African-American cook who Elliott listed as witness to the March 2010 kicking incident. CP at 223.

On August 2, 2010, Smith was placed on home assignment because Vernell was considering terminating Smith. CP at 31. Vernell was more concerned with Smith's pattern of crossing proper boundaries with offenders than the incidents involving Elliott. CP at 31. Vernell did not find any basis to conclude Smith's actions toward Elliott were motivated by race, but found that Smith had acted inappropriately and in a demeaning manner toward Elliott. CP at 31. Vernell did not consider the March 18, 2010 email as a basis for termination because it had been sent to Elliott's personal email account outside of work hours and there was no way to confirm Smith (rather than her husband) had sent the email. CP at 31. Vernell wanted to terminate Smith but ultimately decided on suspension after consultation with the Human Resources Department. CP at 33. DOC's attorney recommended suspension instead of termination, opining that a termination would not be upheld by an arbitrator in the event Smith or her union challenged it. CP at 129.

C. The September 2010 Tripping Incident And Plaintiff's Resignation

On September 23, 2010, after learning that Smith would be returning to work from home assignment, Elliott sent Vernell an email stating that she feared for her safety. CP at 33. Elliott requested that her schedule be changed to the morning shift. CP at 177. Vernell consulted

the Human Resources Department which advised her that the Collective Bargaining Agreement did not allow Vernell to unilaterally change an employee's shift without both employees' consent. CP at 33. Vernell told Elliott that she could switch shifts with another employee if the other employee agreed. CP at 33. Vernell also told Elliott that Christy King and Norm Caldwell would meet with her to develop a safety plan to address her concerns about Smith returning to work. CP at 34.

On September 27, 2010, Elliott again emailed Vernell and claimed she was in "imminent danger" if she did not change to morning shift. CP at 34. Elliott testified that her fear was based solely on the 2008 kicking, the March 2010 attempted kicking and Veteran email she received six months earlier. CP at 179. There were no allegations that Smith threatened Elliott or acted aggressively toward her following the March 2010 incident and the two had worked together for six months without incident. CP at 178. Moreover, Elliott acknowledged that the morning shift overlaps with the afternoon shift, so even if her shift were changed, she would not avoid working in the kitchen with Smith for at least 1.5 hours per shift. CP at 180, 34.

In any event, on September 28, 2010, Elliott obtained an *ex parte* temporary restraining order which stated that Smith and Elliott were to stay at least 10 feet away from each other. CP at 181. The following

morning at around 10:30 am Elliott had a co-worker serve the restraining order on Smith. Elliott and Smith brought the restraining order to Christy King's attention. King instructed Smith and Elliott to stay on the opposite sides of the kitchen of each other while King consulted management and Human Resources to determine what needed to be done. CP at 182. Vernell instructed King and Norm Caldwell to develop a safety plan. CP at 34. King and Caldwell discussed a safety plan with Elliott that morning. CP at 182.

Around the same time Smith was served with the order, Vernell received a phone call from DOC headquarters that Larch was slated for closure due to the budget crisis. CP at 34. Vernell called an all-staff meeting for 11:00 am, where she informed staff that Larch would be closing. CP at 34. Elliott attended the meeting while Smith worked in the kitchen during the offenders' 11:00 am lunch hour. CP at 35.

Elliott headed to the kitchen just prior to noon. A cook from the morning shift, Glenda Harris, was working on the computer in the office adjacent to the kitchen when Elliott arrived. Despite her proclaimed fear of Smith, and despite being told to stay away from Smith, Elliott did not ask Harris where Smith was located. CP at 186-87. Elliott walked from the office into the kitchen to "retrieve her bowl" and warm up her lunch at the opposite side of the kitchen, even though staff bowls and the

microwave are kept in the office. CP at 184-85, 213-218. According to Elliott, Smith suddenly appeared in front of her and tripped her. CP at 184-85. Smith and an inmate who was working in the kitchen claim that Elliott faked the fall. CP at 204, 35.

Elliott left work and never returned following this incident. She filed a workers' compensation claim and she received benefits. CP at 188. On October 8, 2010, Elliott obtained a restraining order against Smith stating that the two needed to remain at least 250 feet apart. CP at 36. In her sworn testimony before a court commissioner, Elliott stated that she believed Smith was upset with Elliott because she reported Smith's inappropriate behavior toward offenders, and that this is what gave Smith "motive" to trip her. CP at 198-99. On October 12, 2010, Elliott's attorney wrote Vernell, stating that Elliott was "constructively discharged." CP at 35. The same day, Elliott's doctor released her to work. Elliott refused to meet the DOC investigator looking into the September 2010 incident, electing only to provide a written statement through her attorney. CP at 230-34. She filed a tort claim about one month later.

On May 3, 2011, Elliott filed this lawsuit against DOC. Her employment lawsuit is primarily based on her falling out with co-worker Smith. However, she also appears to be attempting to re-litigate issues

unrelated to Smith that were resolved by a June 4, 2009, settlement agreement, which is addressed in Section IV(B)(2)(b), *infra*.

IV. SUMMARY OF ARGUMENT

As will be more fully explored in the Argument section of this brief, summary judgment in DOC's favor was proper for the following reasons:

1. The retaliation claim is barred as a matter of law because there is no evidence that DOC took any retaliatory action against Elliott.
2. The hostile work environment claim is barred as a matter of law because (a) there is no evidence Elliott was targeted based on her race, (b) Smith's actions were not sufficiently pervasive or severe so as to alter the conditions of the workplace and did not create an abusive working environment, and (c) DOC conducted a reasonable investigation into the allegations.
3. The constructive discharge claim is barred as matter of law because Elliott chose to immediately quit her job and did not allow DOC to fully investigate her allegations, and in any event, Elliott's resignation had nothing to do with her race.
4. The negligent supervision claim is barred as a matter of law because it is either barred by the Industrial Insurance Act or is duplicative of her discrimination claims.

V. ARGUMENT

Summary judgment is proper when consideration of the admissible evidence establishes the absence of a genuine issue of material fact. *Phillips v. King Cnty.*, 136 Wn.2d 946, 956, 968 P.2d 871 (1998). A material fact is one upon which the outcome of the litigation depends.

Barrie v. Hosts of America, Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980). “An adverse party may not rest upon mere allegations or denials, but must instead set forth specific facts showing the existence of a genuine issue for trial.” *McBride v. Walla Walla Cnty.*, 95 Wn. App. 33, 36, 975 P.2d 1029 (1999); *see Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998); *see* CR 56.³ Under CR 56(e), “supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”⁴

A. The Retaliation Claim Fails as a Matter Of Law Because Elliott Has Alleged No Adverse Employment Action Taken By DOC.

Elliott claims that DOC retaliated against her for engaging in protected activity. CP at 13. To establish retaliation, a plaintiff must show that (1) she engaged in statutorily protected activity, (2) an adverse employment action was taken, and (3) there is a causal link between her

³ The recent decision in *Scrivener v. Clark College*, 181 Wn.2d 439, 334 P.3d 541 (2014) does not change the applicable standard on summary judgment. While that case cautioned that summary judgment is “seldom appropriate” under WLAD, *id.* at 445, that discussion occurred in the context of a plaintiff’s burden to prove that discrimination was a substantial factor in an employer’s adverse employment action for the purposes of proving a race-based disparate treatment claim. *Id.* Hence, the claim at issue in *Scrivener* was different than the claim Elliott presents under WLAD concerning a hostile work environment.

⁴ Below, DOC objected to much of the evidence presented by Elliott in opposition to summary judgment as violative of CR 56(e). *See* Supplemental Clerk’s Papers at 796-803. DOC renews that objection here and urges this court to disregard the record Elliott built on summary judgment to the extent it is based on speculation, hearsay, or would otherwise be inadmissible at trial.

protected activity and the employer's adverse action. *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 862, 991 P.2d 1182 (2000).

An adverse employment action is an employment action or decision *taken by the employer* that constitutes a significant change in employment status, such as hiring, firing, failing to promote or reassignment with a significant change in benefits. *Crownover v. State ex rel. Dep't of Transp.*, 165 Wn. App. 131, 148, 265 P.3d 971 (2011). A change that is simply an inconvenience to the employee or an alteration of job responsibilities is not an adverse action. *Id.* The plaintiff must establish that retaliation was a substantial factor motivating the adverse employment decision. *Allison v. Hous. Auth. of City of Seattle.*, 118 Wn.2d 79, 96, 821 P.2d 34 (1991).

Elliott's retaliation claim here patently fails as a matter of law because she makes no claim that DOC took a retaliatory action, nor could she. Her entire retaliation claim is premised on her assertion that the retaliatory act occurred when Smith allegedly tripped Elliott. Appellant's Opening Brief (Appellant's Opening Br.) at 27. Smith is not Elliott's employer. As a matter of law, even if it is assumed for the purposes of summary judgment that Smith did indeed trip Elliott, a co-worker's actions toward another co-worker are not an adverse employment action constituting retaliation. *Alonso v. Qwest Commc'ns Co., LLC*, 178 Wn.

App. 734, 753-54, 315 P.3d 610 (2013) (a prima facie case of retaliation requires a showing that the “*employer* took an adverse employment action against” the plaintiff) (emphasis added); *Kahn*, 90 Wn. App. at 128 (explaining that WLAD forbids “any employer” from retaliating against an employee); *Hollenback v. Shriners Hosp. for Children*, 149 Wn. App. 810, 821, 206 P.3d 337 (2009) (explaining that “employer’s adverse action” must be causally connected to protected activity).

B. Elliott’s Hostile Work Environment Claim Fails Because There Is No Evidence Smith’s Conduct Was Motivated by Race, Smith’s Conduct Was Not Sufficiently Severe or Pervasive So as to Alter Elliott’s Workplace, and DOC Conducted a Reasonable Investigation

Elliott’s primary discrimination claim is that co-worker Smith created a hostile work environment and that DOC failed to adequately address her complaint. CP at 12-13. To establish a race-based hostile work environment claim, a plaintiff must prove that: (1) she was “singled out” for harassment that she would not have experienced if she had been a different race, (2) the harassment was unwelcome, (3) the harassment was sufficiently severe or pervasive “so as to alter the conditions of employment and create an abusive working environment,” and (4) either (a) a manager personally participated in the harassment or (b) the employer “authorized, knew, or should have known of the harassment and...failed to take reasonably prompt and adequate corrective action.”

Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 406-407, 693 P.2d 708 (1985); *Washington v. Boeing Co.*, 105 Wn. App. 1, 12-13, 19 P.3d 1041 (2000) (applying *Glasgow* elements to hostile work environment claim based on race). The trial court properly dismissed Elliott's hostile work environment claim because Elliott failed to prove these elements for the following three independent reasons stated below.

1. **Elliott Was Not Singled Out On Account Of Her Race**

Although Elliott is a member of a protected class, she has failed to meet her burden to show that Smith targeted her because of her race. To establish the first element of a hostile work environment claim, Elliott must prove that, if she was a member of a different race, she would not have suffered the alleged harassment. *Glasgow*, 103 Wn.2d at 406. Elliott cannot meet this burden by merely showing she was offended in the workplace. *Id.* (an employer does not have a duty to maintain a pristine working environment).

DOC agrees that the October 2008 and March 2010 kicking incidents were inappropriate workplace behavior.⁵ Smith was suspended for this behavior. But Elliott has offered no evidence to establish that

⁵ DOC also acknowledges that if Elliott's version of the September 2010 tripping were correct, tripping a co-worker obviously constitutes employee misconduct. However, Smith and an offender stated that Elliott faked the incident and Elliott immediately quit, preventing DOC from conducting an adequate investigation or otherwise handling the matter.

Smith kicked Elliott because of Elliott's race. Elliott and Smith were friendly for over four years, worked well together, and Smith even supported Elliott in her disputes with other co-workers. They may have had a falling out, but there is simply no basis for Elliott's contention that Smith suddenly decided to harass Elliott because of her race.

Elliott offers speculative statements and evidence to support her claim. She testified that she felt Smith kicked her based on her race because "[t]he way [Smith] did it and the way it made me feel," and because Elliott's father told her that kicking is one of the lowest things a person can do. CP at 158, 169. Elliott suggests that a genuine issue of fact exists as to Smith's motives because Smith's father was racist. Appellant's Opening Br. at 30. Not only is this "apple does not fall far from the tree" argument baseless in its own right, Smith also testified that she disagreed with her father's offensive views. CP at 338.

Elliott claims that Smith "admitted that the kicking carried racial overtones." Appellant's Opening Br. at 31. But the portions of Smith's deposition to which Elliott cites for this proposition reveal that Smith and Elliott had a conversation following the March 2008 incident, in which Elliott explained that "from an African-American cultural perspective" the kicking gesture was degrading. CP at 343. Smith admitted to understanding this was Elliott's perspective, but this admission is not an

admission by Smith that she was motivated by racial animosity when she made the March 2010 kicking motion toward Elliott.

Elliott's claim that the March 2010 email is evidence of racism is also speculative. The 15-page email forward, sent outside of work hours and between personal computers, did not reference Elliott's race, but Elliott felt the one reference to Spanish speakers somehow targeted her as an African-American, although Elliott herself speaks little to no Spanish. CP at 175. While the email may be distasteful, it is not evidence that Smith kicked Elliott on account of her race.

Moreover, Elliott testified during a court hearing following the September 2010 tripping incident that Smith may have been motivated by the fact that Elliott had on multiple occasions reported Smith's violations of DOC policy in dealing with offenders, an issue that has nothing to do with Elliott's race. CP at 198-99.

Courts frequently reject hostile work environment claims similar to Elliott's claim. For example, in *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 98 P.3d 1222 (2004), the court upheld dismissal of a plaintiff's hostile work environment claim based on allegations that a co-worker struck the back of her chair. Like Elliott, the plaintiff made bare assertions that her co-worker targeted her on account of her race. The

court concluded that the plaintiff's testimony was speculative and not sufficient to survive summary judgment. *Id.* at 84-85.

In *Crownover*, 165 Wn. App. 131, the court rejected a hostile work environment claim where the plaintiff alleged co-workers made crude statements based on her gender. While the court agreed the statements were crude, it nonetheless concluded that there was insufficient evidence to connect the statements to the plaintiff's gender because the worker had made similar statements to other workers. *Id.* at 145-46. Similarly, here Elliott testified that Smith also "hit" other employees in jest. CP at 152, 200. While Smith may have exhibited a pattern of inappropriate behavior toward co-workers, Elliott fails to show that Smith was motivated by race.

Finally, in *Mills v. Brown & Wood, Inc.*, 940 F. Supp. 903 (E.D.N.C. 1996), a federal district court rejected a hostile work environment claim similar to Elliott's claim. Dismissing the claim, the court found that "the plaintiff offers no evidence to show that [the manager] instructed [the co-worker] to kick Plaintiff *because she was a woman*. A kick in the buttocks, without more, is battery, not sexual harassment." *Id.* at 907 (emphasis in original). The same holds true in this case: Smith's kick does not constitute harassment based on race.

Accordingly, Elliott's hostile work environment claim should be dismissed because she failed to meet her burden of showing Smith's conduct was motivated by Elliott's race.

2. **Smith's Actions Were not Sufficiently Severe or Pervasive so as to Alter the Conditions of the Workplace and Did not Create an Abusive Working Environment**

The second independent basis for dismissal of Elliott's hostile work environment claim is that she fails to establish that Smith's conduct was sufficiently severe or pervasive so as to alter the conditions of the workplace and create an abusive working environment. To establish this element, Elliott is required to show more than "casual, isolated or trivial manifestations of a discriminatory environment." *Glasgow*, 103 Wn.2d at 406. Whether harassment in the workplace is sufficiently severe and persistent and serious to meet this standard is determined by the totality of the circumstances. *Id.* "It is not sufficient that the conduct is merely offensive." *Clarke v. State Attorney General's Office*, 133 Wn. App. 767, 785, 138 P.3d 144 (2006) (citing *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 296, 57 P.3d 280 (2002)).

Here, none of the alleged conduct meets this standard. The two kicking incidents—spaced several months apart—were isolated events that did not alter the conditions of Elliott's employment. She speculates that her authority over the inmates was somehow compromised as a result of

the incidents, *see, e.g.*, CP at 288, 291, but there is no evidence in the record bearing out this assertion. Elliott did not even consider the first incident serious enough to warrant requesting an investigation. CP at 284-85. In the time period between the two incidents, Elliott and Smith were on good terms. Smith put Elliott in contact with her daughter to assist Elliott with a home purchase, and Smith supported Elliott in claims against another co-worker. CP at 290. Even after the March 2010 kicking incident, Elliott initially asked Vernell only to “talk to” Smith and not to conduct a formal investigation. CP at 296-97.

The email forward, meanwhile, was not sent to Elliott’s work email address; it was sent outside of work hours to her personal email address. Conduct that takes place outside the workplace is not workplace harassment. *Clarke*, 133 Wn. App. at 786 (the plaintiff “could not have been subjected to a hostile work environment if she was not at work”).⁶ But even if this incident were considered part of the hostile work environment that Elliott claims, it does not render the conduct here either severe or pervasive under the totality of the circumstances.⁷

⁶ Elliott did not cite, much less attempt to distinguish, this authority in her opening brief, despite it having been cited by DOC at summary judgment.

⁷ The paucity of the evidence supporting Elliott’s claim that the complained of conduct rises to the level of a hostile work environment is thrown into stark relief when compared to the authority she cites in which hostile work environment claims went forward to a jury. Appellant’s Opening Br. at 36-37. For example, in *Kahn*, 90 Wn. App. at 126-27, the plaintiff was subjected to

Elliott offers two main challenges to the trial court’s determination that as a matter of law she cannot meet this element of her claim. First, she argues that the trial court ignored the proper “reasonable person” standard in a hostile work environment claim, which focuses on what a reasonable person of the plaintiff’s protected class would perceive as hostile when asking whether a work environment was objectively hostile. *See* Appellant’s Opening Br. at 1, 30 (arguing that the trial court failed to “view the facts through the lens of the victim’s experience.”); *McGinest v. GTE Service Corp.*, 360 F.3d 1103 (9th Cir. 2004). Second, she complains that the trial court ignored evidence of incidents and events outside of those perpetrated by Debra Smith. Appellant’s Opening Br. at 33-37. Elliott’s challenges cast no infirmity on the trial court’s ruling, and this brief will address each challenge in turn.

a. Even viewed through the lens of a “reasonable plaintiff” of the protected class, Elliott’s claims still fail as a matter of law because the incidents she complains of do not constitute severe or pervasive conduct

In arguing that the trial court neglected to employ the correct standard in reviewing Elliott’s claims below, Elliott principally relies on

abusive and gender-based harassment over a three-year period. In *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 285 P.3d 854 (2012), the plaintiff was subjected to months of ill-treatment by a supervisor after he told her not to “flaunt” the fact that she was gay. *Id.* at 268-70.

McGinest v. GTE, 360 F.3d 1103. There are two reasons why Elliott's reliance on *McGinest* fails to undermine the trial court's ruling.

First, contrary to Elliott's claims, nothing in the record below suggests the trial court ignored this standard; it was before the trial court. CP at 700. Second, even assuming the trial court did view the facts through the lens of a "reasonable African American," as it likely did, Elliott's claims would still fail because this lens does not change the conclusion that the complained-of conduct was neither severe nor pervasive. Demonstrating one of these factors is an essential showing of a hostile work environment claim, even when viewed through the lens of the victim's perspective. *See Glasgow*, 103 Wn.2d at 406-407; *McGinest*, 360 F.3d at 1113. The *McGinest* court properly recognized that at summary judgment, those factors influence the conclusion that conduct was objectively hostile: the "required level of severity or seriousness [to sustain a hostile work environment claim] varies inversely with the pervasiveness or frequency of the conduct." *McGinest*, 360 F.3d at 1113; *see also Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (explaining that severity and pervasiveness is analyzed through the lens of the victim's perspective).

The *McGinest* court's discussion of the "reasonable African American" occurred in the context of evaluating the significance of

myriad “extreme racial insults, as well as more subtle taunts, by supervisors and coworkers.” *Id.* at 1115. The *McGinest* court cautioned that “[a]lthough it is clear that ‘[n]ot every insult or harassing comment will constitute a hostile work environment,’ ‘[r]epeated derogatory or humiliating statements can constitute a hostile work environment.’” *Id.* (citing *Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir. 2000)).

In other words, a reasonable plaintiff of a protected class may reasonably take offense at certain words or actions—those actions may even be motivated by the plaintiff’s protected class—but that does **not** automatically mean those actions will be severe or pervasive enough to constitute a hostile work environment. On the other hand, one or two events in the work place can be so severe that they will constitute a hostile work environment despite the absence of the pervasiveness factor. *See e.g., McGinest*, 360 F.3d at 1116 (affirming that the use of the n-word will “quickly alter the conditions of employment and create an abusive working environment.”); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1511 (1989) (explaining that courts must consider the gravity of events as well as their frequency, and concluding that two instances in which a noose was placed on an African American employee’s work station raised a genuine issue of material fact concerning race-based hostile work environment). Washington law recognizes that the presence

of severity or pervasiveness is the touchstone of the inquiry into a hostile work environment claim. *Glasgow*, 103 Wn.2d at 406-07.

Here, even viewed through the lens of the victim’s perspective, reasonable minds must agree that the conduct Elliott complains of lacks the severity or pervasiveness necessary to establish a hostile work environment. Three momentary incidents (the two “kicking” incidents and the email), spaced several months apart with the intervening months characterized by a cordial relationship between these two women, do not constitute pervasive behavior. And the incidents themselves lacked the kind of obvious racial animosity—the severity—that causes an infrequent act to rise to the level of a hostile work environment, *even if* viewed through the lens of a “reasonable African American.”⁸ As a matter of law, these few incidents cannot sustain a hostile work environment claim.

b. Elliott cannot sustain her claims by resurrecting complaints against DOC that have been settled and are otherwise not at issue in this lawsuit in order to show pervasiveness.

Elliott attempts to circumvent her inability to meet the “severe or pervasive” threshold, and thus attack the trial court’s summary judgment ruling, by arguing that these two or three incidents perpetrated by Smith

⁸ Hence, Elliott’s citations to the depositions of other persons of color who agreed that a kick in the rear that was racially motivated would be offensive do not create a genuine issue of material fact. *See* Appellant’s Opening Br. at 31-32. Offense is not enough to survive summary judgment on a hostile work environment claim. *Clarke*, 133 Wn. App. at 785.

should not be viewed in a vacuum, but rather in the context of the “abundant evidence of persistent racism at Larch.” Appellant’s Opening Br. at 33. This argument was inappropriate below and continues to be inappropriate before this court.

As evidence of this “persistent racism,” Elliott resurrects a number of unrelated allegations here (as she did below). She lists a number of incidents that she claims demonstrate the pervasive discrimination she suffered at Larch. Appellant’s Opening Br. at 34 (bulleted list). These allegations were covered by a settlement agreement Elliott and DOC reached on June 4, 2009, and therefore cannot be appropriately connected to the present claim.⁹ Res judicata, or claim preclusion, prevents a party from bringing a claim that has already been litigated or a claim that could have been litigated in a prior action. *Knuth v. Beneficial Wash., Inc.*, 107 Wn. App. 727, 731, 31 P.3d 694 (2001). A settlement agreement between two parties “is no less effective as a bar or estoppel than is [a judgment] which is rendered upon contest and trial.” *Le Bire v. Dep’t of Labor & Indus.*, 14 Wn.2d 407, 418, 128 P.2d 308 (1942). Here, Elliott is barred from re-litigating alleged wrongs that occurred prior to June 4, 2009, and

⁹ Allegations that are barred by the settlement agreement are in the introduction of the Complaint and the following paragraphs of the Complaint: 9, 10, 11(a), 12, 13, 14, and 15. CP at 1-15.

any claims arising from such allegations were properly dismissed by the trial court.

In addition, the allegations were not only resolved by a settlement agreement, but also were investigated by DOC. The investigations resulted in the termination of one employee, a suspension of another employee, and a third employee received a 5 percent reduction in pay. CP at 108-10. Moreover, the alleged conduct has nothing to do with the incidents involving Debra Smith, which are the crux of Elliott's current lawsuit. In fact, Smith supported Elliott in several of those disputes, and even testified in court on Elliott's behalf. CP at 151.

Nor does the alleged conduct have anything to do with Superintendent Vernell, who ordered the investigation into Elliott's allegations against Smith. Vernell did even not arrive at Larch until January 2010. After Vernell arrived, she worked actively with the NAACP to address concerns about hiring practices. CP at 29. She also encouraged Elliott and others to participate in diversity events. CP at 189. For example, in June 2010, Elliott's direct supervisor, Christy King, and Vernell approved Elliott's request for a shift change so she could attend a diversity event at DOC headquarters in Olympia. CP at 29. The same month, Vernell nominated Elliott as a co-chair of the diversity committee. CP at 29.

The allegations of employee misconduct prior to Vernell's arrival at Larch were investigated by DOC, resulted in employee discipline, and were resolved by Elliott's prior settlement agreement. And there is no connection between those allegations and Elliott's current allegations involving Smith. Elliott's attempts to invoke these incidents as evidence of a pattern, or part of the "totality of the circumstances," here fails as a matter of law.¹⁰

In sum, dismissal of Elliott's hostile work environment claim is proper for the second independent reason that Elliott failed to establish that Smith's conduct was sufficiently severe or pervasive so as to alter the terms and conditions of the workplace such that it created a hostile work environment.

3. Smith's Conduct Cannot Be Imputed To DOC Because DOC Took Reasonable Corrective Measures Following Elliott's Complaint

The third independent basis for dismissal is that Elliott cannot establish the imputation element. This element requires her to prove that either (a) a manager personally participated in the harassment, or (b) the employer authorized, knew, or should have known of the harassment and

¹⁰ For these reasons, Elliott's citations to *Patterson v. Hudson Area Schools*, 551 F.3d 438 (6th Cir. 2009), and *Theno v. Tonganoxie Unified School Dist. No. 464*, 377 F.Supp.2d 952 (D. Kan. 2005), are inapposite. Moreover, there is no indication that federal case law concerning Title IX is applicable to WLAD claims.

failed to take reasonably prompt and adequate corrective action. *Glasgow*, 103 Wn.2d at 407. Adequate corrective action is action that is reasonably calculated to end the harassment and deter future acts of harassment. *Id.*; *Perry v. Costco*, 123 Wn. App. 783, 793-94, 98 P.3d 1264 (2004).

There are no allegations that any manager participated in any harassment as Smith was not in a supervisory position. Instead, Elliott's main contention is that DOC did not take reasonable steps following her complaints about Smith. This conclusory allegation cannot survive summary judgment.

The undisputed evidence establishes that DOC promptly investigated and addressed Elliott's entire complaint. Elliott's main contention, that the investigation "failed to even consider the racial dimensions of the harassment," is flatly unsupported by the record. Vernell insisted on an investigation into Elliott's complaint and the matter was assigned to Harrison Allen, the DOC Workplace Diversity Programs Administrator. By Elliott's own representations, Allen is a specialist in discrimination investigations, and was proactive in advising Vernell upon her arrival at Larch to get a handle on whatever diversity struggles Larch faced prior to Vernell's arrival. CP at 694. Moreover, Elliott's internal discrimination complaint was included in and referenced by Allen's investigation report. CP at 63. To suggest that Allen, as the head of the

division which handled diversity initiatives, ignored Elliott's complaints of race discrimination stretches the bounds of credulity. While Elliott disagrees with DOC's conclusion that Smith's conduct was not motivated by racial animosity, the conclusion does not negate the thoroughness of the investigation. Even if DOC's conclusion were in error, "[o]bviously, the employer can act reasonably, yet reach a mistaken conclusion as to whether the accused employee actually committed harassment." *Swenson v. Potter*, 271 F.3d 1184, 1196 (9th Cir. 2001).

Likewise, there is no support for Elliott's claim that DOC "failed to follow internal procedures" in the investigation. Appellant's Opening Br. at 38. This assertion is based on Elliott's faulty premise that DOC failed to investigate the race discrimination complaint.¹¹ Nor is there evidence of delay in the investigation. Following the March 2010 kicking incident, Superintendent Vernell acted aggressively to investigate the complaint even after Elliott asked her not to investigate but only to "talk" to Smith. CP at 170-71. At Vernell's request, Allen conducted an investigation and interviewed Elliott and Smith just over a month after the complaint was made, CP at 422-23, a lapse in time that is indisputably related to the vagaries of scheduling issues, including Elliott's own work

¹¹ Elliott's authority supporting this proposition, *Mockler v. Multnomah Cnty.*, 140 F.3d 808, 813 (9th Cir. 1998); and *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 65 (2nd Cir. 1998), is therefore irrelevant to this discussion.

schedule, and the fact that Elliott initially failed to sign the proper paperwork despite requests from Allen. CP at 115-26.¹²

Contrary to Elliott's assertions, Appellant's Opening Br. at 39, 40, as a matter of law DOC acted reasonably in allowing Smith to continue working in the kitchen during the pendency of the investigation, and in returning Smith to the kitchen following a 10-day suspension. An "employer is not required to separate the complainant and the accused pending the outcome of the investigation." *Swenson*, 271 F.3d at 1193 n. 8.

Moreover, the level of discipline an employer chooses following an investigation does not inform the reasonableness of its remedial actions. "As a matter of policy, it makes no sense to tell employers that they act at their legal peril if they fail to impose discipline even if they do not find what they consider to be sufficient evidence of harassment." *Id.* at 1196; *see also Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 678 (10th Cir. 1998) (explaining that court must "balance the victim's rights, the employer's rights, and the harasser's rights," and cautioning against

¹² In *Smith v. St. Louis University*, 109 F.3d 1261 (8th Cir. 1997), the court reversed a summary judgment dismissing a plaintiff's discrimination that was based in part on the trial court's belief that the University's investigation took place on a reasonable timeline. The circuit court disagreed, concluding it was a question of fact. *Id.* at 1265. But there, the defendant had not offered reasons on summary judgment for the delay, and the plaintiff was prepared to dispute those preferred reasons. *Id.* Here, Elliott does not dispute the reasons for the timeline of the investigation unfolding as it did.

“excessive discipline.”). The fact that Smith was suspended rather than terminated, and returned to the kitchen rather than elsewhere in the facility, does not create a genuine issue of material fact about the reasonableness of DOC’s remedial action.

Elliott further argues that “remedial acts that fail to prevent additional acts of discrimination are evidence that they were ineffective.” Appellant’s Opening Br. at 40. Elliott appears to be arguing that the claimed tripping incident was an additional act of discrimination that plainly rendered DOC’s remedial actions ineffective, and which would not have occurred if Smith had been disciplined for the March 2010 kicking incident with termination rather than suspension.

Elliott’s claims are similar to claims rejected in *Fisher v. Tacoma Sch. Dist. No. 10*, 53 Wn. App. 591, 769 P.2d 318 (1989). In that case, the court found that a school district investigation similar to DOC’s was reasonable and that the plaintiff had not presented sufficient evidence to impute liability to the employer. *Id.* at 597. Like Elliott, the plaintiff in *Fisher* complained that she was harassed on account of her race by co-workers. Similar to DOC, the school district investigated the allegations and concluded that the conflict between the plaintiff and co-workers “reflected nothing more than typical personnel and personality problems.” *Id.* at 593. After the investigation was completed, the plaintiff found a

note which she felt proved the previous complained-of conduct was in fact motivated by racial animus. *Id.* at 594. Because she did not bring it to the school district's attention, however, the court concluded that the school district could not be liable because there was no opportunity to investigate. *Id.* at 597.

Here, like the plaintiff in *Fisher*, Elliott never allowed DOC the opportunity to investigate or take corrective action following the September 2010 tripping incident because she immediately quit and refused to meet with the DOC investigator. Assuming for the sake of summary judgment that the tripping incident occurred, it is not evidence that DOC failed to take reasonable steps to correct the complained of conduct.

Finally, unable to raise a genuine issue of material fact going to DOC's investigatory and remedial actions concerning Smith's conduct, Elliott argues vaguely that DOC "failed to take reasonable steps to eliminate the overall atmosphere of racism within the institution." Appellant's Opening Br. at 39. This argument is based on Elliott's impermissible attempt to resurrect previously settled claims, as described above.

Accordingly, Elliott's hostile work environment claim should be dismissed for the third independent reason that she failed to impute

Smith's conduct to DOC. Moreover, as explained above, Elliott cannot prove any of the elements necessary to sustain a claim of hostile work environment. The trial court properly granted summary judgment on this claim in DOC's favor.

C. Elliott's Constructive Discharge Claim Based on Race Fails Because She Voluntarily Quit Her Job and Because She Cannot Show DOC Deliberately Made Working Conditions Intolerable

Elliott also claims that when she quit her job in September 2010, she was "constructively discharged" on account of her race. CP at 12-13.

To establish a constructive discharge claim, a plaintiff must prove (1) the employer deliberately made the employee's working conditions intolerable, (2) a reasonable person would be forced to resign, (3) the employee resigned solely because of the intolerable conditions, and (4) the employee suffered damages. *Campbell v. State*, 129 Wn. App. 10, 23, 118 P.3d 888 (2005). A resignation is presumed to be voluntary and the plaintiff bears the burden of introducing evidence to rebut that presumption. *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 398, 928 P.2d 1108 (1996). A plaintiff's subjective belief is not determinative of whether working conditions are intolerable. *Id.* When a plaintiff resigns and does not "stand pat and fight," the resignation is considered

voluntary. *Id.*; *Travis v. Tacoma Public Sch. Dist.*, 120 Wn. App. 542, 552, 85 P.3d 959 (2004).

Here, Elliott cannot rebut the presumption that her resignation was voluntary. She quit her job immediately after the September 2010 tripping incident. She never provided DOC an opportunity to fully investigate her allegation that Smith tripped her, nor did she allow DOC the opportunity to develop a safety plan to accommodate a restraining order she obtained against Smith after the tripping incident. Her suggestion that DOC refused to honor her restraining order, Appellant's Opening Br. at 42, is not supported by the record. There is no evidence that DOC's instruction that the women stay on opposite sides of the kitchen did not accommodate Elliott's first 10-foot restraining order, and DOC was not given a chance to work within the bounds of the second 250-foot order, which could have required the reassignment of one of the women. Like the plaintiffs in *Molsness* and *Travis*, Elliott did not stand pat and fight; she quit. As a result, her constructive discharge claim fails as a matter of law.

Even if Elliott could show that she did not voluntarily quit, there is no evidence that DOC deliberately made the working environment intolerable on account of her race. Smith's actions cannot be imputed to DOC, unlike the offensive actions in the authority cited by Elliott. *See* Appellant's Opening Br. at 43, *citing Haubry v. Snow*, 106 Wn. App. 666,

671, 31 P.3d 1186 (2001) (offensive conduct perpetrated by employer) (2001). In any event, DOC took reasonable action in suspending Smith and could not have anticipated that Elliott would ignore instructions to stay away from Smith or that Smith would attempt to actually injure Elliott, as Elliott has alleged. *Washington*, 105 Wn. App. at 15-16 (2000) (a co-worker's harassment could not be imputed to the employer, and the conduct did not constitute the type of "aggravating circumstances" or "continuous pattern of discriminatory treatment" necessary to sustain a constructive discharge claim).

And, as explained, DOC was not given the opportunity to investigate or remedy the tripping incident. Unlike the employers in authority cited by Elliott, DOC cannot be said to have made Elliott's working conditions deliberately intolerable. *See* Appellant's Opening Br. at 43, *citing Delashmutt v. Wis-Pak Plastics, Inc.*, 990 F. Supp. 689 (N.D. Iowa 1998); *Korlund v. Dyncorp Tri-Cities Svcs., Inc.*, 121 Wn. App. 295, 88 P.3d 966 (2004), *rev'd in part on other grounds*, 156 Wn.2d 168 (2005); and *Hotchkiss v. CSK Auto Inc.*, 918 F. Supp. 2d 1108 (E.D. Wash. 2013). The trial court properly dismissed Elliott's constructive discharge claim as a matter of law.

D. Ms. Elliott’s Negligent Supervision Claim Fails Because It Is Either Barred by the Industrial Insurance Act or Duplicative of Her Discrimination Claims

The trial court properly dismissed Elliott’s negligent supervision claim as a matter of law. A negligent supervision claim requires the plaintiff to show that “(1) an employee acted outside the scope of his or her employment; (2) the employee presented a risk of harm to other employees; (3) the employer knew, or should have known in the exercise of reasonable care that the employee posed a risk to others; and (4) the employer’s failure to supervise was the proximate cause of injuries to other employees.” *Briggs v. Nova Servs.*, 135 Wn. App. 955, 966-67, 147 P.3d 616 (2006).

As DOC argued on summary judgment below, the Industrial Insurance Act (IIA) bars Elliott’s negligent supervision claim to the extent the claim is based on injuries she suffered as a result of alleged tripping incident. “Generally, the IIA allows injured workers speedy, no-fault compensation for injuries sustained on the job, and employers are given immunity from civil suits by employees.” *Folsom v. Burger King*, 135 Wn.2d 658, 664, 958 P.2d 301 (1998). Our state supreme court has made it clear that a worker generally cannot recover in a civil suit for damages arising from a workplace incident that is compensable under the workers’

compensation system. *Birklid v. Boeing*, 127 Wn.2d 853, 871-72, 904 P.2d 278 (1995).¹³

Faced with the IIA bar, Elliott was forced to concede in her response to DOC's summary judgment argument that she cannot recover for injuries flowing from the tripping incident under a negligent supervision theory. Consequently, she argued that she did not premise her negligent supervision claim on injuries sustained from the tripping, but rather on the "emotional injury" she suffered because of Smith's allegedly discriminatory actions, and because of the alleged constructive discharge. CP at 711. She also acknowledged that she cannot bring a negligent supervision claim based on the same allegations as her hostile work environment claim because such a claim would be duplicative. She explained below that she pled her negligent supervision claim in the alternative, and that it would only go forward if her hostile work environment claim failed. CP at 712 n.3; *Francom v. Costco*, 98 Wn. App. 845, 865-66, 991 P.2d 1182 (2000) (dismissing a negligence supervision claim because it was duplicative of the plaintiff's harassment claim).

¹³ The IIA bars recovery for emotional harm sustained as a result of the physical work place injury, i.e. the tripping incident, under Elliott's negligent supervision claim. Emotional harm flowing from the occupational injury itself should be compensated under the IIA. *See, e.g., Henson v. Crisp*, 88 Wn. App. 957, 959-60, 946 P.2d 1252 (1997) (worker recovered emotional distress workers' compensation benefits).

As an initial matter, before this court Elliott appears to have abandoned her theory that her negligent supervision claim is pled in the alternative, as she does not argue it in the alternative. But she continues to argue that “the IIA bar to civil liability is inapplicable where the injuries a plaintiff seeks recovery for are ‘separate and distinct’ from the workplace injury.” Appellant’s Opening Br. at 44. As was the case below, the separate and distinct injury she claims here is the emotional harm she suffered as a result of the alleged work place harassment and the constructive discharge—not as a result of the work place injury caused by the tripping. Appellant’s Opening Br. at 45.

In other words, in an attempt to preserve her negligent supervision claim in the face of the bar under the IIA, Elliott has divorced the claim from the harm she suffered, both physical and emotional, from the alleged tripping. Instead, she implicitly asks this court to hold that the factual events comprising her WLAD claims may also support her negligent supervision claim. This she cannot do.

Elliott relies on *Goodman v. Boeing Co.*, 127 Wn.2d 401, 899 P.2d 1265 (1995), and on *Reese v. Sears, Roebuck & Co.*, 107 Wn.2d 563, 731 P.2d 497 (1987), arguing that these cases hold that the “IIA does not bar recovery for emotional injuries arising from an employer’s discriminatory harassment.” Appellant’s Opening Br. at 45. Elliott is correct about the

holdings in *Goodman* and *Reese*, but that fact does not help her because the holdings are inapposite here. In those cases the employer argued, incorrectly, that the plaintiffs' WLAD claims were barred by the IIA. Here, DOC has not opposed Elliott's discrimination claims under WLAD as barred by the IIA. *See supra*, V(B).

While Elliott's negligent supervision claim is not barred *by the IIA* to the extent that it is premised on the emotional harm arising from her claimed WLAD discrimination, her negligent supervision claim *is* nevertheless barred as matter of law. This is because she cannot bring a claim of negligent supervision that is premised on the same facts as her WLAD claims. In *Herried v. Pierce Co. Public Transp. Benefit Authority Corp.*, 90 Wn. App. 468, 957 P.2d 767 (1998), this court concluded that because the plaintiff had failed to prove "that she was the subject of gender-based discrimination, she c[ould] not claim that [the employer] was negligent in supervising an employee who allegedly discriminated." *Id.* at 475. *Herried* explained that what remained as a basis for the plaintiff's negligent supervision claim was her allegation of an assault not alleged to be a result of discrimination. *Id.*

Here, Elliott's negligent supervision claims arise from the same facts as her discrimination claims, so there is no basis remaining for her negligent supervision claim if her WLAD claims fail as a matter of law.

And if she were to prevail on her WLAD claims, her negligent supervision claim would necessarily be struck as duplicative. *Francom*, 98 Wn. App. at 865-66.¹⁴

In response, Elliott may attempt to rely on *Wheeler v. Catholic Archdiocese of Seattle*, 65 Wn. App. 552, 829 P.2d 196 (1992), *rev'd*, 124 Wn.2d 634, 880 P.2d 29 (1994). In *Wheeler*, a Division One case, a trial court allowed a plaintiff's WLAD claim to go to a jury along with a purported negligent supervision claim. *Id.* at 560. Elliott may try to argue this poses a conflict with *Herried*. But *Wheeler* explains that the trial court treated the negligent supervision claim as synonymous with a claim for negligent infliction of emotional distress. *Id.* at 564, n.3. Subsequent to *Wheeler*, Division One later concluded that like a negligent supervision claim, a claim for negligent infliction of emotional distress fails if its factual basis is the same as a plaintiff's factual basis for her WLAD claim. *Haubry*, 106 Wn. App. at 678. Hence, Elliott cannot successfully rely on *Wheeler* for the proposition that the same facts can support both a discrimination claim under WLAD and a negligent supervision claim.

¹⁴ Hence, Elliott's citation to *Rothwell v. Nine Mile Falls Sch. Dist.*, 149 Wn. App. 771, 206 P.3d 347 (2008), is irrelevant. Even if it is true Elliott's claimed emotional injuries are the result of an ongoing pattern, and therefore not susceptible to the IIA definition of "injury" under *Rothwell*, that does nothing to address the bar posed by *Herried* and *Francom*.

The fact that these two claims are mutually exclusive makes good analytical sense, because a discrimination claim requires that the complained-of actions occur *within* the scope of employment while a negligent supervision claim requires that the actions occur *outside* the scope of employment. A WLAD hostile work environment claim requires the plaintiff to allege that a co-worker's discriminatory acts may be imputed to the employer. *Glasgow*, 103 Wn.2d 406-07. That is, the plaintiff is required to allege that the harassing co-worker's conduct arose in the course of employment in order for liability to attach to the employer under the theory of *respondeat superior*. See e.g., *Fisher*, 53 Wn. App. at 598 n.8 (explaining that imputing a co-worker's conduct to an employer in a hostile work place claim requires facts to be viewed "in light of the law of *respondeat superior*."). Having taken such a position, it would be unfair to allow a plaintiff to make an about face and argue this same set of fact arose outside the harassing co-worker's scope of employment, an essential element of negligent supervision. See *Haubry*, 106 Wn. App. at 670 (explaining that a claim for negligent supervision "is entirely independent of the liability of the employer under the doctrine of *respondeat superior*.").

In sum, Elliott's negligent supervision claim must fail as a matter of law. She concedes it is not premised on injury sustained as a result of

the alleged tripping, because if it were it would be barred by the IIA. But her attempt to package her negligent supervision claim with the same facts she alleges under her WLAD claim must fail under *Herried* and *Francom*.

VI. CONCLUSION

For the foregoing reasons, DOC respectfully requests that this Court affirm the trial court's summary judgment in favor of DOC.

RESPECTFULLY SUBMITTED this 6th day of July, 2015.

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