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DIVISION II

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STATE OF WASHINGTON

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No. 47823-4-II

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

DEMPSEY BENNETT

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS

Respondents.

APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

The dismissal of Appellant Dempsey Bennett racial discrimination case should be reversed. Appellant was subjected to a racially hostile environment, since starting his career at Washington Correction Center for Women at Purdy (Purdy). Appellant, who is an African American male corrections officer at Purdy, has literally faced over a decade of repeated racial disparate treatment, hostile work environment and retaliation which included numerous racial comments, constant bogus investigations and continued retaliation for his numerous complaints to the DOC, EEOC and general opposition to the unlawful racial behavior. Bennett was literally accused and investigated over a dozen times for such things as complaining that it was too hot, using cusswords in a prison, using the bathroom and for reading a newspaper. Plaintiff received baseless after baseless disciplinary actions that were then used against him in his quest to promote within DOC, which are all proven pre-textual because all of his performance reviews are exceptional for the last 15 years.

This Court should take substantial guidance provided by the new Washington Supreme Court' opinion in the case of *Scrivener v. Clark College*, 316 P.3d 495, 179 Wn.2d 1009 (2014.) In *Scrivener*, the Supreme Court held that in order to overcome summary judgment in an RCW 49.60 discrimination case when the employee is relying solely on

circumstantial evidence, a genuine issue of material fact can be created by either (1) showing that the employer's articulated reasons for its actions is pre-textual or **(2) that all the employer's stated reason is legitimate, discrimination nevertheless was a substantial motivating factor in the employment decision.** This is a new modification/clarification in the already liberal application of Washington's Law Against Discrimination, RCW 49.60. Bennett's case should have gone forward to the jury.¹

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred by misapplying summary judgment standards applicable to employment discrimination cases.

2. The Trial Court erred by dismissing Appellant's case based on Hostile Work Environment, Disparate Treatment, Retaliation and Outrage, due to race, when, at a minimum, there are unresolved questions of fact as to whether or not Plaintiff's race played a role in the adverse employment decisions which were taken against him.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

Did the Trial Court misapply the rules of summary judgment, when it dismissed on summary judgment grounds Appellant's claims for disparate treatment, retaliation, hostile work environment and outrage, all

¹ Appellant conceded dismissal of his claim for Negligent Infliction of Emotional Distress. Also, there is no claim for "racial discrimination," that is just a title for purposes of the complaint. The four claims that should have gone forward are Hostile Work Environment, Disparate Treatment, Retaliation and Outrage.

of which violate of the provisions of Washington's Law Against Discrimination (WLAD), RCW 49.60.01.001?

IV. FACTUAL BACKGROUND

Appellant started with the Department of Corrections in 1998. As a start, on October 15, 2001, Bennett reported to then Captain Douglas Cole that during a training exercise and appellant's Sergeant insisted on running a scenario where the team would pretend to be the Klu Klux Klan and Arian Nations and then this Sergeant (Cureen) looked at Bennett, (who is a dark complexion African American), and stated "obviously you do not fit that category, so you will have to think of something to represent." CP 279-281. In discussing the training, another officer stated without rebuke, "Let them know that we are here to get all of their Muslim inmates, we are the white race and white is the best race." *Id.* Another Sergeant put a bag on his head and started to walk around and state "I am the Imperial Wizard," imitating the KKK. CP 279-281. When Bennett approached Sergeant Cureen regarding his concerns with this exercise and how uncomfortable that he was as the only African American there, Sergeant Cureen stated, "I don't think the upper chain of command would mind." CP 282-286. On April 5, 2002, while Bennett was filling a temporary

sergeant position at Stafford Creek, he reported that someone left a letter in his folder about "buying beer, such as malt liquor." CP 287-299.

In retaliation, on August 20, 2002, Bennett was suspended from special teams based on false allegations against him, which he denied. CP 316-317. This discipline occurred after Bennett confronted Sergeant Barrett for not including him in emails. CP 318-320. In December 2002, after Bennett returned from a three-week vacation, he was summoned into the Captain's office, given an Employee Conduct Report (ECR), and falsely accused on using profanity and threats with offenders, using pat-down procedures as punishment months before. CP 300-308. Officer Bennett denied all of these false accusations and provided in great detail the actual events, which demonstrated that it was the inmates that were behaving badly, but it was obvious that his supervisors at Purdy waited until he was on vacation and approached these inmates to formulate these false allegations while he was on an extended vacation. CP 300-308. Bennett was placed on administrative leave to home, based on these false allegations that were set up while he was on vacation. CP 321-323. On January 6, 2003, Officer Bennett submitted to the DOC a 13-page letter outlining the racially hostile environment that he endured at Purdy, including differential racial treatment as the only African American on Special teams, the KKK/Arian Nation training, being rudely told to "get

out of my office” by a superior, and many other examples of disparate treatment. CP 324-337. Bennett denied all these allegations in detail to the hearing officers on January 21, 2003. CP 309-315. Officer Bennett received an adverse employment action when he was issued a letter of reprimand based on these false allegations on January 31, 2003; Purdy refused to remove this false reprimand from his file. CP 338-339.

On March 10, 2005, Bennett filed an EEOC charge of discrimination based on race related to three promotional opportunities he was denied and also alleged that the denials were related to retaliation for earlier racial complaints. CP 340-341; 822-823. In DOC’s response, it became clear that there were items in Bennett’s employment file, like the unsubstantiated letter of reprimand and other baseless allegations against Bennett that prevented his promotion or attainment of another position. CP 349-353. On April 25, 2006, Bennett complained in writing to DOC regarding how other officers were not being held to the same standard that he was being held to and that there was “cover and concealment” of other officers to cover over their failings for which he was routinely disciplined for. CP 832-835.

Bennett faced retaliation soon after, and on May 15, 2006, he was again falsely accused by inmates for having a loud voice level and getting into an inmate’s personal space, which is the job of a correctional officer

supervising convicted and incarcerated felons. CP 354-355. The inmate complained that Bennett was loud and made her feel stupid. CP 356-357. Bennett was accused of shaking his finger in another offender's face. CP 358-360. Essentially, Bennett was accused of "being rude" to convicted and incarcerated felons and again put under investigation. CP 361-373. Bennett denied the allegations and informed the investigator that as a correctional officer, he is not there to take "bull crap" from offenders. CP 361-373. On July 20, 2006, Bennett received notification that the DOC intended to take disciplinary action against him based on his duties being a correctional officer on May 15, 2006. CP 374-381. On July 31, 2006, Bennett was again reprimanded "for being rude" to offenders in the prison. CP 382-384. Bennett appealed this letter of reprimand, an adverse employment action, again denying the allegations in great detail and volunteering to take a polygraph test. CP 382-400. Bennett was again retaliated against on September 7, 2006, being investigated for allegedly leaving his post on August 18, 2006. CP 401-418. Bennett denied that he left his post and showed that he was engaged in the tasks of his post at the time of these allegations. CP 404-418.

On June 13, 2006, Bennett was commended for making strong suggestions in dealing with negative offender behavior, demonstrating leadership. CP 842-854. Bennett received another staff complaint for

going to the staff break room to pick up papers from a printer on July 3, 2006. CP 421-424. On July 31, 2006, Bennett received yet another reprimand for yelling at an inmate, "Now what? Do you understand?" CP 538-540. On August 2, 2005, this EEOC charge was settled by removing the letter of reprimand from Bennett's file, despite DOC's denial of the claim. CP 342-348; 824-829. On August 4, 2006, when Bennett had to urgently go to the bathroom and left his radio and handcuffs on the desk, staff turned him in to his supervisors for wrongful conduct. CP 419-420. On September 7, 2006, Bennett was again put under another investigation for "leaving his post" and for two miscellaneous and trivial allegations. CP 425-427. On October 17, 2006, Bennett again denied these frivolous allegations and provided detailed denials of these allegations and explaining that he merely picked up a work related document during his required 15-minute checks on inmates. CP 428-430; 434-447.

On October 22, 2006, Bennett was placed under another investigation alleging that he left his post and that he failed to sign a post order. CP 431-447. Officer Bennett again submitted a detailed denial the investigation, denying that he abandoned his post or engaged in any unprofessional conduct. CP 448-455. On December 22, 2006, DOC sent Bennett another letter stating that the DOC was considering taking disciplinary action against him again. CP 464-469. On December 26,

2006, Bennett responded to the allegations and requested representation from the Union to attend another pre-disciplinary meeting on December 27, 2006 with DOC. CP 456-459; 470-475. Bennett informed DOC that he was facing a pattern of false allegations against his performance. *Id.* No union representative was available and DOC pressured Bennett to go forward with the pre-disciplinary meeting without a witness or union representation. CP 460-463. At this pre-disciplinary meeting, Bennett informed DOC that the complaints are coming from the same people he has been complaining about for the past 5 years and that there was a pattern of supervisors and staff making false accusations against him; Bennett again denied the false allegations. CP 460-463.

On January 12, 2007, in an attempt to leave Purdy, Bennett applied for a non-permanent community correctional officer position with the Auburn Field Office and he was immediately considered. CP 541-546. On January 16, 2007, DOC communicated about disciplining Bennett for unauthorized phone calls, which were calls to his enlisted son who soon after died in combat in Iraq. CP 491-500. What is rather telling that the continued allegations were false is the fact that Bennett's performance review for 2006 is absolutely positive and has no negative feedback. CP 476-481. The positive performance review is dated January 19, 2007, and doesn't mention any of his Letters of reprimands from July or September

2006. CP 482-486. On the same day of this positive performance review, Bennett informed his chain of command that he had accepted the position as a Community Corrections Officer with the Auburn field office upon their approval. CP 547-555. Three days after Bennett's January 19, 2007 performance review, Bennett was officially awarded the new position in Auburn and on that same day, on January 22, 2007, DOC (Purdy) issues Bennett another letter of discipline and sanctioned him a 5% pay reduction, which caused the new job to be rescinded. CP 482-486; 556-561. On January 26, 2007, Auburn informed Bennett that it would not be hiring him based on the new discipline. CP 542-555.

Bennett filed another racial discrimination and retaliation complaint with the EEOC on April 28, 2007. CP 482-486; 495-500. On May 25, 2007, DOC "investigated", through their typical "in house" investigator, Bennett's EEOC complaint, that "in 2006 and 2007 my employer has continued to discriminate and retaliate against me by placing unwarranted letters of discipline in my file[.] My co-workers who have engaged in similar or worse conduct have not been similarly disciplined." CP 501-505; 562-564. Of Course, DOC denied that they discriminated or retaliated against Bennett, through their "in house" investigator Charles Southerland. CP 511-517.

On May 14, 2007, Bennett was again denied advancement to promote to the Burien field office. CP 838-841. On June 12, 2007, Bennett filed a Whistleblower complaint with the Washington State Auditor. CP 565-566. On July 25, 2007, DOC again worked out a settlement of the new race and retaliation EEOC claims. CP 482-486; 506-510; 518-537. As part of the settlement, DOC agreed to remove four reprimands, (7/14/06, 7/31/06, 9/5/06 and 1/22/07), that Bennett received in less than 6 months, but this was too late for the new job offer-the damage had been done. CP 487-490. In fact, Bennett had always received positive job performances, which shows that the disciplinary actions and constant investigations were pre-textual. CP 491-494. On December 6, 2007, Bennett was informed that he would proceed no further in his attempt to promote at a different facility, Monroe, because his responses to questions did not demonstrate an adequate level of knowledge- completely subjective standard. CP 836-837.

On October 3, 2008, Bennett was issued a Letter of Expectation regarding various issues. CP 855-857. Bennett was written up by a staff member on January 31, 2009 for complaining that the "room temperature was too hot" and faced another full investigation for commenting on the heat inside the room. CP 866-869. Bennett was given another Letter of Reprimand for complaining about the temperature of the room on August

19, 2009. CP 889-892; 893-895. On February 21, 2009, inmate Beckett began to discuss racial issues with Bennett and asked Bennett whether he was married to a black or white woman and Bennett responded that his wife was "black and beautiful" and for this, he received another incident report by a staff member and faced, yet again, another full investigation. CP 863-865; 870-876; 886-888. On February 27, 2009, Bennett was put on home administrative leave regarding these new allegations against him. CP 860-862. Bennett was restricted from working overtime on July 29, 2009. CP 907-908. On August 17, 2009, Bennett appealed this discipline regarding complaining about the temperature. CP 896-906. On August 29, 2009, plaintiff was given an expectation sheet on Leave Usage. CP 858-859.

What is perplexing is that DOC gave Bennett another positive performance review in 2009, despite the many false allegations and constant investigations he was subjected to. CP 909-917. In fact, on November 19, 2010, DOC acknowledged that Bennett's performance reviews from 2004 to 2009 were all positive evaluations. CP 959-961. On July 18, 2010, another incident report was filed against Bennett because he was allegedly reading a newspaper with his feet in the desk and used the word "bullshit" or other words out of frustration. CP 918-946. Bennett only admitted to perusing the Sunday paper, which was

there for officers to read. CP 947-949. On October 26, 2010, Bennett received another pre-disciplinary letter for "reading a newspaper." CP 950-952. Bennett was again disciplined for frivolous allegations and on December 17, 2010 he was suspended for two days for 'reading the newspaper' on July 18, 2010 and saying the word "bullshit." CP 953-958. On December 16, 2010, a mentally disturbed offender named Bassell, that was convicted of physically attacking a correctional officer at Purdy, again accused Bennett of misconduct. CP 962-963. These charges by Bassell were dismissed as unfounded on April 5, 2011, after plaintiff was forced to another full investigation. CP 964-965. Bennett applied to be on the Diversity Chair at Purdy on February 11, 2011. CP 974-978. When plaintiff asked for a copy of his personnel file on February 15, 2011, DOC responded "charge him .20 cents per page, that's what the Department charges offenders[.]" CP 1020-1021.

On September 15, 2011, Bennett was turned away from a promotional interview at Cedar Creek Corrections Center after submitting his resume and cover letter because he had not submitted an application, even though he had submitted his application two days before on September 13, 2011. CP 966-971. A Caucasian woman was hired instead. CP 972-973. On October 26, 2011, Bennett was again rejected from a promotion to a Corrections Specialist. CP 979-982.

On April 16, 2012, Bennett filed another substantial complaint related to offensive verbal statements and behaviors he was historically receiving. CP 729-734; 738-744; 983-988. On this same date, April 16, 2012, Bennett received another PREA allegation from an inmate accusing him of touching her on the shoulder. CP 750-752. On June 23, 2012, another officer refused to hold an exit gate open for Bennett and then referred to himself as the "Grand Poohbah," a high-ranking member of the KKK. CP 745-749; 755-756. The officer, Grable, admitted to making the statement referring to "the Grand Poohbah" to Bennett. CP 745-749.

On August 8, 2012, the EEOC filed another charge of racial discrimination and retaliation, which DOC received August 17, 2012, (DOC acknowledged the EEOC complaint before the charge on July 20, 2012.) CP 763-773; 830-831. Bennett specifically complained to the EEOC of DOC's systematic on-going harassment, discrimination and retaliation. CP 989-994. On August 22, 2012, the DOC denied plaintiff another promotional opportunity. CP 753-754. On September 18, 2012, November 2, 2012, November 30, 2012, December 10, 2012 and January 17, 2013, Bennett received a Supervisory Conference against his performance. CP 774-780. The DOC again denied racial discrimination to the EEOC on September 18, 2012. CP 757-762. Bennett joined the Purdy Diversity Committee in October of 2012. CP 781-782. DOC

acknowledged that Bennett filed several EEOC complaints against the DOC for racial discrimination. CP 785-796. On November 19, 2012, the DOC acknowledged Bennett's Right to Sue letter dated November 12, 2012, from the EEOC related to racial discrimination and retaliation. CP 735-737.

On January 26, 2013, Bennett was reported for a Prison Rape Elimination Act (PREA), for allegedly getting in an offender's face and using the word "fuck" when the offender was continually cussing at plaintiff using the word "fuck, fuck you and motherfucker." CP 567-568; 585-626; 699-701. Allegedly, Bennett stated to this inmate, "Ma'am, you got one more time to let 'fuck you' come out of your mouth and I'll make sure you get fucked out of this unit and over to Segregation." CP 696-698. After Bennett used the word "Fuck", the offender, known as "Mighty Mouth," told Bennett "You just fucked up" and then proceeded to report him for PREA. *Id.* Even the offender did not think this was a "true PREA" event. *Id.*, and CP 615-619. Yet, Bennett was again placed under investigation. CP 569-577. On March 23, 2013, Bennett requested more time to respond to the PREA investigation. CP 578-581. Even though the PREA was baseless, DOC was intent on disciplining Bennett for something, so he received another Letter of Reprimand for using the word "fuck" to inmate "Mighty Mouth," despite the fact that she was

continually using curse words against him over 50 times in two minutes. CP 582-584; 696-698; 707-709; 190-224. This PREA allegation was determined unfounded, it was baseless, but Bennett still was subjected to this baseless allegation. CP 627-628.

On April 3, 2013, Bennett filed his tort claim form or notice of intent to sue alleging racial discrimination from 2002-2012 and continuing (hostile work environment, retaliation, disparate treatment, etc.), which DOC acknowledged. CP 702-704. On April 9, 2013, after Appellant filed his tort claim form, when Bennett applied for an Acting Sergeant promotion, the DOC summarized his history with his letters of reprimands, and, of course, he was not chosen. CP 705-706; 721-728. It was only in April of 2013 that an African American at Purdy was promoted to Lieutenant, Lieutenant Simons. CP 797-816. Bennett withdrew his request for promotion in May 2013 because it was clear that the DOC would use its trumped up disciplinary history against him to deny him. CP 817-821. In an April 2, 2013 email, Bennett wrote “my decision to withdraw from the candidate pool for the correctional sergeant position was based solely on my recent experience when applying for a couple of positions within the organization recently.” CP 995-1008.

On June 16, 2013, another staff allegation was made against Bennett for “yelling at an officer,” which was then characterized as a

threat against the officer by Bennett. CP 633-636; 647-648; 678-695. Bennett denied these allegations and demonstrated that it was this officer that was yelling at Bennett, but plaintiff was again put under investigation. CP 637-639; 649-650; 664-665; 710-720. According to Bennett, it was the other officer, Orosco, that was yelling at him and when Bennett asked this officer to return back to her area; that was the “threatening behavior.” CP 651-657; 660-665; 670-675. On August 14, 2013, the allegations that Bennett was threatening Officer Orosco were dismissed as unfounded, but plaintiff had to endure the stress of another investigation. CP 658-659.

On July 15, 2013, Bennett was accused of driving in front of correctional officer Orosco near her neighborhood and “following her home” although he was driving in front of her on his typical route that she also took. (there are only two ways from Purdy to Tacoma; Highway 16 immediately and the other the back roads to the entrance near to narrows bridge and Bennett always took the back route.) CP 275-278; 629-630; 640-646; 666-667. Bennett was put on another investigation for this allegation. CP 631-632. This allegation was determined to be unfounded, although Bennett had to go through another investigation. CP 668-669; 672-677. On July 26, 2013, Bennett file a hostile work environment complaint regarding racial harassment from Orosco and his superiors. CP 1027-1033. On January 21, 2014, Bennett filed an Internal Discrimination

Complaint with DOC alleging Disparate Treatment and DOC would not even investigate his claims. CP 1034-1047. But any allegation made against plaintiff was fully investigated and he was disciplined for them, like the allegations made against him. On February 6, 2014, DOC started another investigation against Bennett, making six baseless allegations against him. CP 1069-1071. Appellant received another Memo of Concern on May 2, 2014 regarding these allegations. CP 1072-1074. On June 29, 2014, that he left his post or made inappropriate comments to offenders; he was investigated and reprimanded for these false allegations in retaliation. CP 1048-1068. Bennett had permission to leave his post and denied the allegations of inappropriate comments. *Id.* Bennett received another Memo of Concern regarding the June 29, 2014 allegations. CP 1075-1079.

The reason why all of these allegations are baseless and constitute pretext is that Bennett's 2014-2015 performance review was, again, exceptional. CP 1022-1026.

Purdy Sergeant Larry Belfour has worked with appellant since 2002 and confirms there have not been any promotions of any African American male corrections officers to sergeant at Purdy. CP 246, 4:20-5:15; 247, 6:19-8:15. Belfour had to transfer out to a different facility, Monroe, and only there was he promoted and the only other African

American male sergeant transferred into Purdy as a sergeant. *Id.*, CP 248, 10:9-18. Belfour testified that plaintiff is professional, a good communicator and skilled at his job. CP 248, 13:5-7; 249, 17:5-7, 23-25. Bennett is a skillful, fit and intelligent correctional officer. CP 250, 18:3-15.

Jennifer Infanse, a correctional officer of African descent, testified that there was a lot of unequal treatment for African Americans correctional officers, who are given the less desirable job tasks and spoken to more rudely. CP 268, 6:6-7:20. Infanse testified that correctional officers would regularly make fun of the fact that she was of African descent. CP 268, 8:1-25. Infanse reported this hostile environment to supervisors, but nothing changed until the new superintendent arrived at Purdy in 2013. CP 268, 9:1-18. Infanse observed an officer make a “fried chicken” joke about Bennett in the main public access area and she has also heard guards make other racial comments related to African Americans having “big lips” or living in the jungle and made fun of her accent. CP 269, 12-13:25. Infanse testified that racial discrimination was just something African Americans officers learned to live with at Purdy. CP 271, 19:22-24. Infanse testified that the former superintendent at Purdy through 2013, Doug Cole, would literally ignore African American

officers and not acknowledge to them and would only speak to Caucasians. CP 271, 20:24-22.

Kenny Napier, the former Adult Corrections Cook at Purdy, also African American, experienced frustration in trying to promote at Purdy, to the point that he left Purdy and got a position with another DOC office. CP 255, 7:18-10:11. Napier applied for a position and was told about an interview at the last minute before he could even prepare, and did not get promoted. *Id.* Napier was also a member, and then chair, of the diversity committee at Purdy and found that the diversity committee was not supported by the institution as a whole. CP 258, 21:3-18. Napier also experienced racial discrimination at Purdy and was approached by a Caucasian officer and asked what he was doing there when he showed up for work. CP 259, 22:1-10. Another incident when Napier waived at someone at work, a Caucasian booth sergeant interrogated Napier on who he was waiving at and was told "I got to keep an eye on you guys." CP 259, 22:20-23:9. Napier testified that there was a negative racial Stereotype at Purdy, that the African American males were more prone to sexual assault than the female prisoners. CP 259, 22:20-24:13.

III. ARGUMENT

A. Rules Applicable To Motion For Summary Judgment In Discrimination Cases.

When considering a motion for summary judgment all facts must be considered in a light most favorable to non-moving party and all facts submitted and all readable inferences should be construed in such manner. See *Rice v. Offshore Systems, Inc.* 167 Wn. App. 77, 88, 272 P.3d 865 (2012), citing two *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 160, 991, P.2d 675 (2010). Summary judgment should rarely be granted in employment discrimination cases. *Id.* In order to overcome a motion for summary judgment in a discrimination case there is no requirement that the aggrieved employee produced “smoking gun” evidence of a discriminatory and/or a retaliatory intent. See *Rice v. Offshore Systems, Inc.* 167 Wn App. at 89; *Selstead v. Washington Mutual Savings Bank* 69 Wn. App. 852, 860, 851 P.2d 716 (1993). Circumstantial, indirect and inferential evidence is sufficient to overcome an employer’s motion for summary judgment in a discrimination case. *Id.*²

²As Washington’s law against discrimination (WLAD) has a specific provision demanding liberal construction similar federal law is only persuasive. See RCW 49.60.020. This is because the statutory mandate of liberal construction requires that the courts view with caution any construction which would narrow the coverage of the law and which would undermine its statutory purposes of deterring and eradicating discrimination in Washington – a public policy of the highest priority. See *Lodis v. Corbis Holdings, Inc.* – Wn. App. – 292 P.3d 779 (2013). (Rejecting the federally recognized “same act or inference” as being inconsistent with the WLAD.” See *Frisino v. Seattle School District No. 1* 160 Wn. App. 765, 777, 249 P.3d 1044 (2011); see also *Martini v. Boeing Co.*, 137 Wn.2d. 357, 364, 971 P.2d 45 (1999); *Davis v. W. One Auto. Grp.*, 140 Wn. App. 449, 456, 166, P.3d 807 (2007).

New substantial guidance with regard to RCW 49.60 claims has recently been provided by the Supreme Court's opinion in the case of *Scrivener v. Clark College*, 316 P.3d 495, 179 Wn.2d 1009 (2014.) In *Scrivener*, the Supreme Court held that in order to overcome summary judgment in an RCW 49.60 discrimination case when the employee is relying solely on circumstantial evidence a genuine issue of material fact can be created by either (1) showing that the employer's articulated reasons for its actions is pre-textual or **(2) that all the employer's stated reason is legitimate, discrimination nevertheless was a substantial motivating factor in the employment decision.** Further, what the respondent appeared to be ignoring is the fact that appellant in this case has direct evidence of a discriminatory intent. Under Washington law discriminatory remarks made within the workplace are considered to be **direct evidence of a discriminatory intent.** See *Alonso v. Qwest Communication Co., LLC*, 178 Wn.App.734, 744, 315 P.2d 610 (2013), citing to *Johnson v. Express Rent and Own, Inc.*, 113 Wn.App.858, 862-63, 56 P.3d 567 (2002). Whether you are utilizing a circumstantial evidence test as outlined in *Scrivener* or when one is using a direct evidence to salvage discrimination as discussed in *Alonso* (or a combination of both) all that is necessary in order to defeat an employer's motion for summary judgment in a discrimination case is the acknowledgment that there exists a genuine issue of fact with respect to

whether or not an improper motive was a "substantial factor" in the adverse employment decision. In that regard the employee's burden on proper application of the law to overcome such a motion for summary judgment should be and is all but negligible. As set forth within *Scrivener*:

"Relatedly, summary judgment to an employer is seldom appropriate in the WLAD cases because of the difficulty of proving a discriminatory motive. **To overcome summary judgment, a plaintiff only needs to show that a reasonable jury can find the employee's protected trait was a substantial motivating factor in the employer's adverse actions.** (Citations omitted) (Emphasis added)."

The *Scrivener* opinion went on to provide:

"An employee does not need to disprove each of the employer's articulated reasons to satisfy the pretext burden of production. Our case law clearly establishes that it is the plaintiff's burden at trial to prove the discrimination was a substantial factor in the adverse employment action, not the only motivating factor. An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable under the WLAD."

Citing to *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1985).

In *Mackey*, Justice Madsen was the lone dissent and in her dissent, she explained her understanding of the full import of the majority's holding in *Mackey*:

"As I understand the majority opinion, this full panoply of relief is available if the plaintiff proves that the discriminatory reason was a substantial factor in the

employment decision. 'A substantial factor' is a standard which permits a trier of fact to find liability even if the employee would have been fired in any event for legitimate reasons." *Id.* 127 Wn.2d at 315.

As shown by *Scrivener*, it takes very little evidence to overcome an employer's motion for summary judgment and create a genuine issue of material fact as to whether or not a protected trait was a "substantial motivating factor in an employer's decision." In *Scrivener*, the evidence presented was nothing more than the fact that the articulated reasons for not hiring the plaintiff were vague and ambiguous combined with a discriminatory remark by the president of Clark College suggesting he hire a younger workforce was sufficient to overcome a motion for summary judgment in a case where age discrimination was alleged. At Footnote 3 of the *Scrivener* opinion, the court indicated that discriminatory remarks, even when not made in the context of an employment decision and uttered by non-decision makers, may be relevant circumstantial evidence of discrimination and simply cannot be dismissed as being "stray", citing to *Reid v. Google*, 50 Cal.4th 512, 538-46, 235 P.3d 988, 113 Cal.Rptr.3d 327 (2010).

B. Appellant Had Valid Claims For (1) Hostile Work Environment and (2) Disparate Treatment based on Racial Harassment.

The elements of plaintiff's hostile work environment claim are set forth in WPI330.23 which under the heading of "Workplace Harassment—Hostile Work Environment – Burden of Proof" provides the following:

"To prove his claim of harassment on the basis of race/sex plaintiff has the burden of proof to each of the following propositions;

- (1) That there was language or conduct concerning race and/or sex;
- (2) That this language or conduct was unwelcome in the sense that plaintiff regarded the conduct as undesirable and defensive and did not solicit it or incite it;
- (3) That this conduct or language was so offensive or pervasive as to alter the terms and conditions of plaintiff's employment; and
- (4) Either:
 - (a) The owner manager, partner or corporate officer of the employer participated in the conduct or language; or
 - (b) The management knew, through complaints or other circumstances, of the conduct or language and the employer failed to take reasonably prompt and adequate corrective actions reasonably designed to end it; or
 - (c) The management should have known of this harassment because it was so pervasive or through other circumstances; and the employer failed to take reasonably prompt and adequate corrective actions reasonably designed to end it

The hostile environment in this case consists of numerous acts of the most extreme racial conduct. DOC is a sophisticated employer and schemed to literally file complaints and incident reports against appellant for every thing it could, from appellant reading a newspaper, complaining that it was too hot, or saying a single cuss word to an inmate that just used dozens of cusswords against him. It is quite clear that respondent was solely focusing on appellant's written complaints, but he gave many verbal complaints, and predominately management was involved in the conduct regarding racial conduct regarding the hostile work environment. DOC placed appellant on continuous investigations for frivolous matters; in fact, it was rare for appellant to not be under investigation for one thing or another. The disciplinary actions were continuously used to "red light" every promotion appellant applied for and all these actions together created a racially hostile environment. Respondent DOC ignore the pervasive hostile work environment that Appellant had to suffer through, including the words stated, the disrespect shown and the behaviors and constant accusations exhibited. Also, it is not only the verbal comments being made by their peers and/or managers, but "other conduct", which created a hostile environment with respect to Bennett. The Trial Court clearly misunderstood that a hostile environment can be made up of multiple actors, stating:

It is a hostile environment when there are folks who are consistently creating a hostile environment. If six people completely independently of each other happen to complain about it with no kind of concert action and no kind of ongoing day-to-day kind of problem, that doesn't strike me as what we think of as a hostile environment. I guess that's my problem.

RP 19-20 (June 5, 2015 hearing). The Trial Court was plain wrong.

As discussed in appellant's factual support, not only were there racial comments made in the environment, but also substantial administrative harassment, including denial of promotions, constant investigations and reprimands and unfavorable work conditions. It is well documented that Bennett complained both verbally and in writing to the EEOC and DOC related to all non-supervisory and supervisory staff's racial and harassing actions or the actions were perpetrated from management. See *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 854, 991 P.2d 1182 (2000); *Delahunty v. Cahoon*, 66 Wn. App. 829, 836-37, 832 P.2d 1378 (1992), (Typically whether a person is a "manager" is a factual question).

The proof that DOC's constant investigations and disciplinary actions against Bennett were pre-textual and trumped up, is the evidence of his performance reviews, which always stated that his performance was excellent, met expectations and that he was professional. None of the constant investigations and false discipline was ever mentioned in his decade worth of performance reviews. The respondent simply misstated the facts

with respect to the Bennett's complaints and exercised "damage control" in denying the complaints. Under the terms of Washington's antidiscrimination law, as noted above, all that needs to be established in order to meet this element is that the employer knew or should have known of the alleged harassment and/or unlawful discriminatory behavior; or that it was perpetrated by managers. Respondent cannot credibly argue that it did not know that it had a toxic, unprofessional environment with respect to racial harassment.

On this issue the case of *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 792, 98 P.3d 1264 (2004) is instructive. In *Perry*, an employee filed a formal complaint of sexual harassment against a co-worker who was making inappropriate advances and comments towards her. Following such a complaint, the employer took low-level corrective action against the employee who had engaged in egregious harassment. Such "remedial" efforts included requiring that he transfer to a different shift than the plaintiff and that he undergo three hours of sensitivity training. In response, the employee ultimately initiated her own transfer away from her alleged harasser. Unfortunately, despite the plaintiff's efforts at Costco to get away from her harasser, he nevertheless continued to "stalk" her at her new worksite and would stare at her in an extremely uncomfortable manner. In *Perry*, the court found that the employer's efforts at remediation were

inadequate and upheld a Trial Court's determination and judgment in that regard. (See *Perry*, page 802).

Similarly, although once appellant filed formal complaints and there were investigations performed, these investigations did not stop the harassment or hold anyone accountable for the harassment, rather the investigations were used to further retaliate against Bennett. Like the Costco plaintiff, Bennett here, continued to be subjected to harassment and retaliatory actions, including disparate discipline, targeting, and retaliatory behaviors by managers, including constant reprimands for unsubstantiated trivial matters.³ Appellant's counsel previously deposed the DOC personnel that conduct these discrimination complaints and can confirm that the DOC has never found there to be a racially hostile environment in any of their hundreds of discrimination investigations. For example, Ms. Morton and her unit has been involved in investigating 200-300 discrimination complaints for the DOC in the past 7 years. CP 1013, 6:10-19. Out of the hundreds of investigations that the workplace diversity" unit of DOC has investigated, Ms. Morton could not recall any investigations where the unit had actually found there to be a discriminatory or hostile environment based on race or discrimination within the DOC. CP 1013, 6:24-8:1. Ms. Morton agrees that

³ The burden under the WLAD on the employer is to take remedial action against the harasser and not the person that complains. An individual who's a victim of unlawful harassment under the terms of the WLAD has the right to "stand their ground" and should not be forced to leave what is otherwise a desirable position due to the illegal conduct of another.

it is rare or very occasional for the DOC to conclude through its internal investigations that discrimination had, in fact, occurred. CP 1013, 8:8-21. According to Ms. Morton, she would need four to five witnesses to verify discrimination before there is a positive finding of discrimination. CP 1013, 9:10-18. She acknowledges that harassers, who discriminate, without being surrounded by witnesses, typically deny all wrongdoing. CP 1014, 10:1-7.

In *Alonso v. Qwest*, 178 Wn. App 734, 748, 315 P.3d 610 (2013) opinion. Division II recognized that creating a hostile work environment can be "**disparate treatment**". In this case, the Court should recognize the opposite, i.e. that disparate treatment also can contribute to the presence of a hostile work environment. This Court is well aware that in analyzing appellant's hostile work environment claim, the Court should not rely only on the comments and statements that were made in the work environment without examining the "totality of the circumstances," including all the other conduct. See *Glasgow v. Georgia Gas Pacific Corp.*, 103 Wn. 2d 401, 406, 693 P.2d 708 (1985); *Schonauer v. DCR Entertainment Inc.*, 79 Wn. App. 808, 820, 905 P.2d 392 (1995).

Here, not only are there derogatory and offensive racial comments and conduct being made to or forced on appellant or in his presence, but there is a corporate state of mind of disrespect for African American males at DOC and at Purdy, including failure to promote and retaliation. As the

detailed facts demonstrates such disparate treatment, which included derogatory racial comments, constant investigations, discipline based on frivolous claims and disrespectful behavior, was not "isolated" and a reasonable fact finder could find that, "under the totality of the circumstances", Bennett was the victim of a racially hostile work environment. See *Alonzo, supra*. (whether or not the discriminatory environment affects the terms and conditions of employment involve questions of fact). This is especially true and screams of pretext when considering that DOC always gave Bennett extremely positive performance reviews.

Management was involved in the discriminatory conduct or were told of the discriminatory conduct and failed to take proper remedial actions, for imputation of liability purposes under RCW 49.60. As discussed in *Alonso*, whether or not someone is a "manager", under RCW 49.60, depends on whether or not the individual had the authority and power to affect the hours, wages and working conditions of the employer's workers. See *Robel v. Roundup Corp.*, 148 Wn. 2d at 48 n. 5. Here, the involved supervisors and managers had hierarchy within DOC and clearly had the ability to impact and affect Bennett's working conditions and had that power on a daily basis, and to deny Bennett promotional opportunities.

Finally, the law clearly does provide for a "negligence" standard for imputation of liability purposes when the claim involves a violation of RCW 49.60. See *Glasgow*, 103 Wn. 2d at 407, *Francom*, 98 Wn. App. at 991. It is simply not prompt remedial action to merely investigate allegations or even discipline a harasser, when the discipline is ineffective and permit the hostile work environment to continue.

Under the totality of these circumstances, a reasonable jury could conclude that the disparate treatment suffered by the appellant, the racially hostile comments made within this environment, perpetrated both by their peers and people in management positions, created an actually hostile work environment. See *Schonauer v. DCR Entertainment, Inc.* 79 Wn. App. 808, 820, 905 P.2d 392 (1995) (hostile work environment based on gender- based on 3 incidents); see also *Davis v. West One Automotive Group, supra* (hostile environment based on race).

1. Continuing Harm-Appellant's Claims Go Beyond 3 Years.

The WLAD does not contain its own statute of limitations. But generally discrimination claims must be brought within three years under the general statute of limitation applicable for personal injury in the State of Washington. See *Antonius v. King County* 153 Wn.2d 256, 261-62, 103 P.3d 729 (2004); RCW 4.16.080(2). For discreet discriminatory acts or

retaliatory acts, such as a termination, the limitation period begins to run from the date of the alleged wrongful act. *Antonius* 153 Wm.2d at 264. If the limitation period is run, a cause of action arising from the discreet act is barred. *Id.*

Hostile work and current environment claims are different. A hostile work environment occurs over a series of days or perhaps years and such claims are based on the cumulative effect of the individual acts. *Antonius* 153 at 264. Because of the unique nature of a hostile work environment claim in *Antonius*, the Supreme Court allowed a plaintiff to recover for all related conducts straddling the statute of limitation period. *Id.* Under the terms of *Antonius* and assessing the statute of limitations for a hostile work environment claim, "a court's task is to determine whether the acts about which an employee complains of are part of the same actual hostile work environment practiced, and if so, whether any act falls within the statutory time period." In *Antonius*, a sufficient link was established even though the harassment was perpetrated by multiple persons, at multiple facilities and even though there was a significant break in the harassment and the plaintiff was assigned to a different facility. All that is necessary is that one act contributing to the claim occurs within the statutory time period for the entire hostile environment to be actionable. *Broyles v. Thurston County*, 147 Wn. App 409, 431, 195 P.3d 985 (2008).

The standard for linking discriminatory acts together in the hostile work environment context is not particularly high. "The acts must have some relationship to each other to constitute part of the same hostile work environment claim." See *Antonius* 153 Wn.2d at 271. See also *Cox v. Oasis Physical Therapy, PLLC* 163 Wn. App. 176, 195-96, 222 P.3d 1119 (2009)⁴. As evidenced by the above-referenced statement of facts, most of appellant's claims of racial harassment, disparate treatment, retaliation and hostile environment straddle both sides of the three-year time frame, otherwise applicable to claims brought pursuant to RCW 49.60, et. seq. As all such claims involving racial claims suffered by appellant from 2002, is at a minimum a question of fact as to whether or not the conduct alleged by the Bennett is part and partial of the same hostile work environment claim. As indicated, establishing that one or more of these acts was based on the same discriminatory animus is not intended to be a particularly onerous requirement and given the harassment in this matter is being perpetrated by the same individual such a determination can easily be made. As indicated by *Antonius* at 268, the Supreme Court disfavors the notion of trying to parse a hostile work environment claim into its

⁴ Even outside of the hostile work environment context evidence of discriminatory treatment occurring before the limitation period is admissible to show a pattern of the illegal conduct, purpose or motivation with regard to independent violations that occurred after the limitation period or to continuing violations that began before and continued after the limitation period. See *Henderson v. Penwalt Corp.* 41 Wn.App. 547, 553, 704 P.2d 1257 (1985).

component parts for statute of limitation purposes. Here, even though different actions were commenced on different time frames, they all involved the same work place, which constituted highly offensive and wrongful conduct.

In this case, the Court should find that none of Bennett's claims related to hostile work environment are time barred or at least there is a question of fact with such issue. Even if the claims were limited to 2007 forward, all the facts that occurred from 2002 are still relevant to show the corporate state of mind and the historical context of the discrimination. The jury could be instructed to just consider from 2007 forward, but this does not relate to the history of incidents from 2002 forward, which give context to appellant's claims. It is all relevant evidence.

C. Appellant Subjected to Adverse Employment Actions.

For the purposes of the anti-retaliation provision set forth in RCW 49.60.210, "adverse employment actions" have been defined to mean any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. See *Ray v. Henderson*, 217 F.3d at 1242-43, relying on EEOC Compliance Manual Section 8 (1998). As discussed in *Ray*, not only can an adverse action come in the form of tangible loss of employment benefits such as which occurs when someone is terminated, demoted and the like, but

also it can include retaliatory on-the-job harassment which is reasonably likely to deter protected opposition activities. *Id.* See also *Harrell v. Washington*, 170 Wn.App. 386, 398, 285 P.3d 159 (2012) (a demotion or adverse transfer, or a hostile work environment may amount to an adverse employment action, citing to *Kirby v. City of Tacoma*, 124 Wn.App. 454, 465, 98 P.3d 827 (2004). Stated another way, adverse employment action means a tangible change in employment status such as “hiring, firing, failing to promote, reassignment with significant different responsibilities or a decision causing a significant change in benefits” as well as a “hostile work environment”. *Id.*, and see *Crownover v. State*, 165 Wn.App. 131, 148, 265 P.3d 971 (2011). Whether or not something is an “adverse employment action” should be judged from the perspective of a reasonable person in the appellant’s position. *Tyner v. State*, 137 Wn.App. 545, 565, 154 P.3d 920 (2007).

In this case, a reasonable jury should have little difficulty in finding that the appellant was subject to a hostile work environment as a form of retaliation because of his opposition activity and subjected to repeated allegations, investigations and disciplinary actions. These adverse actions included also being denied permanent promotion, being denied preferred days off, being denied opportunities to grow, being subjected to frivolous

complaints and being subjected to a continued racially hostile environment without managerial intervention.

DOC's managerial and supervisory staff increased the hostile environment against appellant after Bennett's numerous objections and complaints, as well as complaints made to the EEOC, of the racial conduct that occurred regularly, as described above. This conduct independently constitutes a hostile work environment and this continued hostile work environment does constitute an adverse employment action under Washington law, as well as the constant disciplinary actions and the burden of constantly being investigated for trivial matters. What is particularly telling is that the very individuals who the appellant had previously complained about with respect to racial harassment, perpetuated such behaviors.

D. A Plaintiff in a Discrimination Claim Pursuant to RCW 49.60. et seq. can Defeat a Motion for Summary Judgment by Presenting Evidence as to Whether or Not a Discriminatory/Retaliatory Animus at Least in Part Motivated Adverse Employment Decisions and Hostile Environment.

It's been well recognized within Washington case law that even if a plaintiff has insufficient evidence to establish a "hostile work environment," comments and language which is indicative of bias or stereotyping is nevertheless "relevant evidence" with regard to bias within an employer's decision making process. See, for example *Bennett v. Hardy*, 113 Wn. 2d

912, 916, 784 P.2d 1258 (1990) (derogatory comments relevant to disparate treatment claims); see also *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn. 2d 302, 898 P.2d 284 (1995); *Scrivener v. Clark College, Supra*. This Court has the benefit and guidance of a recent opinion of the Court of Appeals, Division 2, in the case of *Alonso v. Quest Communications, Co., LLC* [Wn. App.], 315 P.3d 610 (12/31/13).

As clarified in *Alonso*, the issue for summary judgment purposes is whether or not there is sufficient evidence by which a reasonable jury could conclude:

- a. "Discriminatory motive was a significant or substantial factor in the employment decision relating to [plaintiff]". In order to defeat a motion for summary judgment "a plaintiff need only produce evidence that supports a reasonable inference that [is protected class status] was the motivating factor for the [adverse employment decision ...]", citing to *Doe v. Department of Transp.*, 84 Wn. App. 143, 149, 931 P.2d 196, review denied, 132 Wn. 2d 1012, 940 P.2d 653 (1997).

Such an analysis is consistent with what is required under the terms of WPI 330. et. seq. According to *Alonso*, appellant may establish a discriminatory motive either by "direct evidence" (which would include derogatory remarks directed toward a protected status), or by utilizing the burden shifting test initially adopted by the United States Supreme Court in

McDonnell Douglas v. Green, 41 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973),⁵ (which has now been modified by *Scrivener v. Clark County*.

The *Mackey* standard was intended to be "strong medicine" in our fight against discrimination within our society and workplace.⁶ As noted in *Mackey* at 310, "Washington's law against discrimination contains a sweeping policy statement strong and condemning many forms of discrimination". By requiring a plaintiff to prove "pretext" at the summary judgment stage would be inconsistent with "Washington's disdain for

⁵ In *Alonso* the court clarified the derogatory comments or slurs indicative of bias, constitute "direct evidence" of a discriminatory motive. Thus according to *Alonso* once such derogatory comments are submitted into evidence a plaintiff need only establish that (1) the defendant employer acted with a discriminatory motive and (2) the discriminatory motive was a significant or substantial factor in the employment decision. Citing to *Kastanis v. Educ. Employment Credit Union*, 122 Wn. 2d 483, 491, 859 P.2d 26, 865 P.2d 507 (1993). For what it's worth plaintiff respectfully disagrees with that aspect of the *Alonso* analysis. It is respectfully suggested that to some degree anything short of an admission by the employer that an inappropriate factor came into play in the employment decision would constitute "circumstantial evidence" as opposed to "direct evidence". The reason is because if derogatory or bias comments were made even by the ultimate decision maker which are reflective of an illegal motivation the fact that such comments were made, without more, does not provide "direct" proof that an illegal factor came into the employment decision. Nevertheless it is extremely **strong circumstantial evidence** of a discriminatory intent, particularly when such comments are made by individuals involved in the adverse employment decision either directly or indirectly, such as occurred here. Obviously, such direct statements (admissions) rarely if ever occur. See *de Lisle v. FMC Corp.*, 57 Wn. App. 79, 786 P.2d 839 (1999); see also *Sellstad v. Washington Mutual*, 69 Wn. App. 852, 864, 851 P.2d (1993) citing *Loeb v. Textron*, 600 F.2d 1003, 1014 (1st Cir. 1979).

⁶ The reason why such an approach defies common sense is because of it is inconsistent with command that RCW 49.60. et. seq. be subject to liberal construction. See RCW 49.60.020. As has been repeatedly recognized by Washington's Appellate Courts, because of such a command of liberal construction summary judgment is rarely appropriate in discrimination cases. See *Frisino v. Seattle School Dist. No. 1*, 61 Wn. App. 765, 249 P.2d 1044 (2011); *Johnson v. Chevron. U.S.A., Inc.*, 159 Wn. App. 18, 244 P.3d 438 (2010). Similarly, because of the statutory mandate of liberal construction appellate courts should be extremely reticent to construe this statute in a manner, which would narrow its coverage and undermine its important purposes. *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 292 P.2d 779 (2013); see also RCW 49.60.010. In other words under a "substantial factor" test a discrimination victim may nevertheless prevail, even if, there were legitimate grounds for alleged harassment, disparate treatment or retaliation, so long as a "substantial factor" was an impermissible motive.

discrimination," and it would be an action, which could reduce it to "mere rhetoric".⁷

It is again noted that the appellant presented proof that could be characterized as both "direct" and circumstantial. In order for the plaintiff to establish a "prima facie case of disparate treatment" they must show (1) that they belonged to a protected class, (2) that they were treated less favorably in the terms and condition of his employment than similarly situated employees, and (3) they engaged in substantially similar work as non-protected class employees. *Domingo v. BECU*, 124 Wn. App. 71, 81, 93 P.3d 1222 (2004).

In order to establish "pretext" under Washington case law a plaintiff **can** show that the defendant's articulated reasons (1) have no basis in fact, (2) were not really motivating factors for the decision, (3) were not temporally connected to the adverse employment action, or (4) were not motivating factors in the employment decision for other employees in similar

⁷ Though the plaintiff's case involved both "direct" and "circumstantial" evidence it is noted that the burden of establishing a prima facie case of disparate treatment is not onerous. *G. Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L. Ed. 2d 207 (1981). "The requisite degree of proof necessary to establish a prima facie case ... is minimal and does not even need to rise to a level of preponderance of the evidence. *Fulton v. DSHS*, 169 Wn. App. at 152, quoting, *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994). The fact that the *McDonnell Douglas* case at its burden shifting approach involves a burden of production versus a burden of persuasion is an insufficient basis to apply a different approach at the summary judgment stage that otherwise then would be applicable at time of trial. Under any set of circumstances, a plaintiff in response to a summary judgment always has an obligation to create a genuine issue of fact with respect to the existence of an improper motive. It simply makes no sense that in order to meet that task a victim of discrimination must present proof different than that which otherwise would be presented at time of trial.

circumstances. *Fulton v. DSHS*, 169 Wn. App. at 161; *Scrivener*, 176 Wn. App. at 412.

Here, if the constant investigations and discipline were based in fact, then why would appellant receive constant highly positive performance reviews from the DOC for 15 Years?

Further, the fact that there were negative and derogatory comments made in the work environment is relevant to establish the existence of a “corporate state of mind.” See *Conway v. Electro Switch Corp.* 825 F.2d 593, 597, (1st Cir. 1987). Appellant was treated differently. His peers were given opportunity after opportunity or had their shortcomings overlooked. A marked contrast to Bennett’s performance was subject to strict scrutiny. He was ridiculed for every action possible, even reading a newspaper or picking up documents from a printer. (Disparate scrutiny can be indicia of an improper motive). See *Eldaghar v. City of New York* WL 2971467 (S.D.N.Y. 2008), citing to *Cross v. N.Y. City Transit Authority* 417 F.3d 241, 250 (2d Cir. 2005). Additionally, the “corporate environment” was sprinkled with derogatory racial comments that simply cannot be ignored. Beyond appellant’s cogent evidence of disparate treatment compared to their non-ethnic minority peers, the evidence also suggests that the proffered reasons for the respondent to create a retaliatory/hostile environment were pre-textual.

A fact is an event, an occurrence or something that exists in reality. See *Grimwood v. University of Puget Sound, Inc.*, 110 Wn. 2d 355, 360, 753 P.2d 517 (1988). Appellant, in opposition to respondent's motion for summary judgment submitted detailed evidence with supporting documentation setting forth very specific **facts** which establish at least a question of fact as to whether or not they were a victim of disparate treatment discrimination, retaliation, and/or a hostile work environment. The evidence goes well beyond speculative and/or conclusory assertions.⁸ This evidence is based on their personal observations and experiences, thus meets the personal knowledge standards of ER 602. Further, while DOC may complain that some of the information provided here are inadmissible "hearsay", appellant does not agree with such assertions. See *Lamon v. McDonnell Douglas Corp.*, 91 Wn. 2d 345, 352, 855 P.2d 1346 (1979); *Mithoug v. Apollo Radio of Spokane*, 128 Wn. 2d 460, 463, 900 P.2d 261 (1996). Hearsay is often an improper objection in employment discrimination cases because the relevant inquiry is the employer's state of mind. See *Hollingsworth v. Washington Mutual*, 37 Wn. App. 386, 681 P.2d 845 (1984). The existence of racially derogatory comments and racial conduct in a work environment are relevant to plaintiff's emotional damages

⁸ Given the disparity in the parties' positions on the facts, this creates a "genuine issue of material fact" that needs to be resolved at time of trial by the appropriate fact finder.

and the impact of such an environment when the totality of the circumstances was "hostile" to be actionable.⁹

Because employers rarely will reveal that they were motivated by retaliation, a plaintiff ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose. One factor supporting a retaliatory motive is in close proximity in time between the protected activity and the employer's actions. (Citations omitted); see also *Renz*, 114 Wn. App. 611, 618, 16 P.3d 106 (2002); *Delahunty*, 66 Wn. App. 829, 839 – 41, 832 P.2d 1378 (1992).

Given the hostile work environment, in which the appellant had to suffer through for years and years, and the evidence establishing the existence of such a hostile work environment, it reasonably can be inferred that the reason for such actions was the fact that Bennett is an African American male, and in retaliation for his previous complaints for what they viewed as being a racially hostile work environment and disparate treatment.

⁹ See *Henderson v. Tyrrell*, 80 Wn. App. 592, 620, 910 P.2d 522 (1996) (Under "statement" if offered to show the affect on the listener regardless of his truth is not hearsay if the listener's state of mind is relative to some material fact); see also *MacDonald v. Korum Ford*, 80 Wn. App. 877, 885-86, 92 P.2d 1052 (1996) (Workplace conduct is measured by both the subjection and objective tests in light of the totality of the circumstances). See also *Robel v. Roundup Corp.*, 103 Wn. App. 75, 86, 10 P.3d 1104 (2002), *aff'd* in part and *rev'd* in part, 148 Wn. 2d 35, 59 P.3d 611 (2012). See *Lam v. University Hawaii*, 40 F.3d 115 (9th Cir. 1994) (When a decision making process is used and where individuals rely on input from another if there is any discriminatory animus in that process liability may attach).

E. Appellant Has Valid Retaliation Claims.

As discussed above, appellant filed repeated EEOC complaints, Internal Discrimination Complaints directly to the DOC or sent memos complaining discrimination and differential treatment to his superiors. Bennett complained constantly. And for this, Bennett was literally continuously under investigation, disciplined for trivial matters and this discipline was then used to sabotage his efforts to promote and leave Purdy. Obviously such disparate scrutiny, based on timing alone, simply reeks of a discriminatory animus. Despite such complaints, Bennett continued to be barraged with racially derogatory remarks and continued disparate treatment. A reasonable jury, when confronted with this fact pattern, would have little difficulty in finding a retaliatory intent. RCW 49.60.210 provides under the heading of “Unfair practices – discrimination against a person opposing unfair practice – retaliation against whistle blowing” the following:

(1) It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified or assisted in any proceeding under this chapter.

In other words, liability can be imposed when the statutorily protected activity was “a substantial factor” in the employer’s adverse

employment decision. In order for an employee to establish that they have engaged in protected opposition activity, under the terms of the statute, all that is necessary is that the employee establish that they had a good faith basis to believe that discrimination was occurring and it is unnecessary for the employee to establish actual discrimination or an actual violation of the law prior to being afforded the protection of this statute. See *Renz v. Spokane Eye Clinic*, P.S. 114 Wn.App. 611, 60 P.3d 106 (2002). What is or is not protected “opposition” activity, is broadly defined under the WLAD. See *Lodis v. Corbs Holdings, Inc.*, 172 Wn.App. 835, 850, 292 P.3d 779 (2013). Internal complaints are sufficient to trigger the protection of the opposition clause. See *Renz v. Spokane Eye Clinic, Supra*. See also *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000), (making formal complaints to supervisor is protected opposition under federal law).

It is well recognized that employers rarely openly reveal that they have a retaliatory motive for their adverse employment actions. See *Renz v. Spokane Eye Clinic*, P.S. 114 Wn.App. at 621, citing to *Kahn v. Salerno*, 90 Wn.App. 110, 130, 951 P.2d 321 (1998). Circumstantial or indirect evidence in and of itself is sufficient. See also *Rice v. Offshore Systems, Inc.*, 167 Wn.App. at 89. One factor in supporting a retaliatory motive is the close proximity in time between the protected activity and the adverse employment actions. See *Hollenback v. Shriners Hospital*, 149 Wn.App.

810, 823-24, 206, 337 (2009). When the record contains reasonable, but competing inferences, both with respect to retaliatory and non-retaliatory reasons for the employer's actions then there's a question of fact, which much be decided at the time of trial. Appellant has produced evidence of retaliation, including constant investigations and discipline for trivial matters and sabotage of his promotional opportunities. We know that the investigations and discipline were trivial and false because Bennett's performance reviews were always great.

F. Appellant Has Valid Claims of Outrage.

Claims brought by employees for "outrage", based on actions occurring within their employment, are controlled by the Supreme Court's opinion in *Robel v. Roundup Corp.* 148 Wn. 2d 35, 59 P.3d 611 (2002). In that case, the Supreme Court found that there was at a minimum a question of fact as to whether or not an employee who had suffered on-the-job injury could bring an outrage claim based on the harassment perpetrated by her co-workers as a result of her injuries. In that case, following an on-the-job injury, the plaintiff's coworkers, including mid-management personnel, ridiculed her and called her names because she had filed a workers' compensation claim. In holding that an employee could bring an outrage claim directly against their employer for coworker

actions, under circumstances far less egregious than which have occurred here, the Supreme Court provided as follows:

"To prevail on a claim of outrage a plaintiff must prove three elements: '(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff. The first elements require proof that conduct was 'so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.'

Dicomes v. State, 113 Wn. 2d 612, 630, 782 P.2d 1002 (1989), quoting *Grimsby v. Samson*, 85 Wn. 2d 52, 59, 530 P.2d 291 (1975).

Although the three elements are fact questions for the jury, this first element of the test goes to the jury only after the court 'determines if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability. *Id.* Here, the Trial Court entered factual findings in Robel's favor on the three elements, but the court of appeals reversed determining it is a matter of law that 'reasonable minds cannot differ on whether the conduct was so extreme as to result in liability. While the standard for an outrage claim is admittedly high (by which we mean the conduct supporting the claim must be appallingly low, we disagree with the court of appeals on the threshold legal question and conclude that reasonable persons could deem the employer's conduct, as

set forth in the challenged findings, sufficiently outrageous to trigger liability.

In some context, perhaps the language directed at Robel could be dismissed as merely 'rough' and 'insulting' as the court of appeals characterized it, but we believe that reasonable minds (such as the one exercised by the trial judge) could conclude that in light of the severity and context of the conduct it was 'beyond all possible bounds of decency ... atrocious and utterly intolerable in a civilized community'. This court has recognized that in an outrage claim, the relationship between the parties is a significant factor in determining whether liability should be imposed.' *Contreras v. Crown Zellerbach Corp.* 88 Wn. 2d 735, 741, 565 P.2d 1173 (1977). The *Contreras* court emphasized that 'added impetus' is given to an outrage claim 'when one in a position of authority actual or apparent, over another has allegedly made racial slurs and jokes and comments.' *Id.* See *White v. Monsanto*, 585 So. 2d 1205, 1210 (La. 1991) (stating that plaintiffs' status as an employee may entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger'). Robel was called in her workplace names so vulgar that they have acquired nicknames such as 'the c word,' for example, ... thus, on the threshold question of law, we conclude that reasonable minds could differ on whether the conduct was sufficiently

extreme to warrant the imposition of liability on the employer. The claim was properly before the finder of fact and the trial court unchallenged factual findings on the elements of intentional infliction of emotional distress are verities on appeal." (Citations omitted.)

Additionally, in *Robel*, the Supreme Court found that the employer could be held directly liable under vicarious liability principles even though a claim of outrage could be characterized as an "intentional tort". This is because, an employer will be held vicariously liable for actions of its employees, which fall within the employee's "scope of employment". *Id.* In order to fall outside an employee's scope of employment the employee's conduct must be different in kind from that authorized as part of their employment and far beyond the authorized time or space limits of the employment or must be extremely attenuated from the employment. *Id.* citing to a Restatement Second of Agency § 228 (2002) (1958).

In this case, as in *Robel*, the actions of DOC's employees, supervisors and managers, which were not corrected or controlled by the defendant employer, should be viewed as "outrageous". This case involves everything from the continued reference to the Klu Klux Klan to employees to the appellant being turned in for complaining it was too hot. These racial comments directed toward the subordinate African American

male employee should be viewed as being "intolerable" in a work environment.

As this conduct was occurring, during what otherwise should have been the normal performance of their job duties, the defendant employer can be subject to various liability under the principles set forth in *Robel*.¹⁰

V. CONCLUSION

The dismissal of this case on summary judgment should be reversed. For the reasons stated above, the Trial Court's dismissal of Plaintiff's lawsuit should be subject to reversal in this case and remanded back for trial. The Trial Court did not appropriately apply the rules applicable to motions for summary judgment. The Trial Court went beyond its role in deciding a motion for summary judgment and decided facts as opposed to making a determination as to whether or not genuine issues of material facts existed.

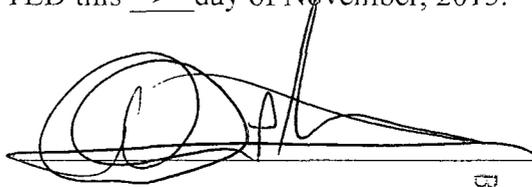
In doing so, it respectfully suggested that the Trial Court failed to provide the Plaintiff with the benefit of having the facts viewed in a light most favorable to her claims. At a minimum there was and is outstanding factual

¹⁰ Additionally, it is noted that if the court is not inclined to find that DOC's employees, supervisors and managers were operating within the "scope of his employment" when engaging in this outrageous actions, alternatively the employer nevertheless can be independently subject to liability under a negligent supervision theory. See *Wheller v. Catholic Archdiocese of Seattle*, 65 Wn. App. 552, 565, 829 P.2d 961 (1992), reversed on other grounds, 124 Wn. 2d 634, 880 P.2d 29 (1994). Here, based upon the above-cited facts, there is simply no question that there is an issue of fact as to whether or not the defendant employer knew or should have known that DOC's work environment presented a risk of harm to this plaintiff, and whether or not the harm suffered by plaintiff was due to DOC's racially and retaliatory actions. See generally *Niece v. Elmsdale Group Home*, 131 Wn. 2d 39, 48-51, 929 P.2d 420 (1997); *Herriod v. Pierce County Public Transit*, 90 Wn. App. 468, 475, 957 P.2d 767 (1998).

issues as to whether or not the Plaintiff was a victim of disparate treatment, subject to unlawful retaliation, and/or was a victim of a racially-hostile work environment.

The issues presented by this case should be resolved by a jury following remand of this case. Clearly there are questions of fact and the Trial Court did not apply the proper standards.

RESPECTFULLY SUBMITTED this 13 day of November, 2015.



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CERTIFICATE OF SERVICE

I hereby certify that I am not a party to this action and that I placed for service of the foregoing document on the following parties via email, followed by hand delivery:

Garth Ahearn, 1250 Pacific Ave, Ste 105, Tacoma, WA 98402

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Lakewood, Washington on the 13th day of November, 2015.


Kara Denny, Legal Assistant