

NO. 47823-4

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

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DEMPSEY BENNETT,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS,

Respondents.

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**RESPONDENT'S OPENING BRIEF**

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## I. INTRODUCTION

The Respondents, State of Washington and Department of Corrections respectfully request this Court to affirm the trial court's order granting summary judgment in their favor and dismissing this case in its entirety. The trial court properly granted summary judgment in this case for the following reasons.

First, the trial court ruling should be affirmed because all of Mr. Bennett's claims based on incidents alleged to have occurred prior to 2007 are barred by a binding settlement. The settlement agreement holds DOC harmless from any claim prior to 2007. As such, the trial court properly granted summary judgment on any claims based on any incidents which allegedly occurred prior to July 11, 2007.

Second, the trial court's ruling should be affirmed because Mr. Bennett's claims based on discrete incidents of alleged discriminatory behavior prior to 2011 are barred by the statute of limitations.<sup>1</sup> This suit was filed January 6, 2014. Discrete incidents of discrimination are subject to a three year statute of limitations. As such, the trial court properly granted summary judgment because any discrete incident of alleged discrimination prior to January 6, 2011, is time-barred.

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<sup>1</sup> This also applies to Mr. Bennett's outrage claim the extent it is based on behavior which allegedly occurred prior to 2011.

Third, the trial court properly granted summary judgment because Mr. Bennett failed to create a question of fact regarding discrete allegations of misconduct within the statute of limitations. Since 2011, Mr. Bennett has applied for four permanent promotional opportunities at WCCW and was not selected for the positions either because he did not meet the minimal qualifications for the position, he did not properly apply for the position, he voluntarily withdrew from the selection process, or was not deemed the most qualified candidate. The trial court ruling should be affirmed because Mr. Bennett either failed to establish a prima facie case of retaliation or disparate treatment regarding these promotions, and/or failed to create an issue of fact on pretext. Therefore, the trial court properly dismissed Mr. Bennett's claims.

Fourth, the trial court properly granted summary judgment because plaintiff failed to establish a hostile work environment claim. Since 2011, the record contains two incidents concerning co-workers allegedly making statements Mr. Bennett felt were racially hostile.<sup>2</sup> The first is an incident where a co-worker allegedly used the term "Grand Poohbah" among other words and an unreported incident where a co-worker made an alleged statement regarding "fried chicken." Even assuming for the sake of argument these two separate incidents amount to hostile language, these

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<sup>2</sup> Plaintiff cites to no case law establishing DOC is liable for any acts committed by inmates in the context of this case.

two incidents are insufficient to create a hostile work environment claim given the holdings in *Washington v. Boeing Co.*, 105 Wn. App. 1, 13, 19 P.3d 1041 (2000) and *MacDonald v. Korum Ford*, 80 Wn. App. 877, 912 P.2d 1052 (1996). Further, Mr. Bennett failed to establish a continuing violation theory under *Antonius* and so the trial court properly granted summary judgment.

Finally, the trial court properly granted summary judgment because the tort of outrage is not cognizable against the State since it is an intentional tort requiring proof of conduct that per se is outside the scope of the State employee's job. As such, the trial court properly dismissed Mr. Bennett's outrage claim.

## **II. COUNTER-STATEMENT OF THE ISSUES**

1. Whether the trial court properly granted summary judgment when any claim based on incidents prior to 2007 is barred by a settlement agreement which holds DOC harmless?

2. Whether the trial court properly granted summary judgment based on the statute of limitations for discrete incidents of alleged discriminatory behavior prior to January 2011?

3. Whether the trial court properly granted summary judgment when Mr. Bennett either failed to establish a prima facie case of disparate

treatment/retaliation and/or failed to establish DOC's actions were pretextual?

4. Whether the trial court properly granted summary judgment on Mr. Bennett's hostile work environment claim when the alleged actions of co-workers are not severe or pervasive, they are not imputable to the department, and Mr. Bennett failed to establish the alleged incidents were part of a continuing violation theory under *Antonius*?

5. Whether the trial court properly dismissed Mr. Bennett's outrage claim when the tort of outrage is not cognizable against the State because it is an intentional tort requiring proof of conduct that per se is outside the scope of the State employee's job?

### III. FACTS

Mr. Bennett filed suit in January 6, 2014, raising allegations which cover a 12-year period stretching back to 2002. Discrete incidents of alleged discrimination under the Washington Law Against Discrimination (WLAD) are governed by the general three-year statute of limitations for personal injury actions. *Antonius v. King Cnty.*, 153 Wn.2d 256, 103 P.3d 729 (2004); RCW 4.16.080(2). As such, the following factual section focuses on Mr. Bennett's post 2011 allegations. The remainder of Mr. Bennett's allegations are addressed in the argument section of this brief starting at page 11.

**A. Since January 2011, Mr. Bennett Applied for Four Permanent Positions at WCCW.**

Mr. Bennett is an African American male who works at the Washington Corrections Center for Women (WCCW) located in Purdy. He works as a relief officer. CP at 126-27.<sup>3</sup> Since January 2011, he has applied for four permanent positions at WCCW. Mr. Bennett was not ultimately selected for the positions either because (1) he did not meet the minimal qualification for the position, (2) he voluntarily withdrew from the selection process (3) he failed to properly apply for the position or (3) he was not the most qualified candidate.

The first position Mr. Bennett applied for in August 2011, was a Corrections Specialist Three position. CP at 39. Mr. Bennett was selected as a potential candidate for the position and his name was forwarded to the interview panel. CP at 39.

The interview for the Corrections Specialist position was conducted by a panel of three DOC employees. The person who ultimately was selected for the position scored the highest during the interview process and was qualified. CP at 50. Ms. Parnell, the

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<sup>3</sup> The relief officer fills correctional officer positions as needed throughout the institution when someone calls in sick or is unable to report for work for some other reason. CP at 126-27. As a relief officer, his job assignment and location can change daily. CP at 126-27.

superintendent appointed the highest rated candidate to the position. CP at 50.

The second permanent position Mr. Bennett applied for at WCCW was a Lieutenant position. CP at 93. Mr. Bennett filled out the standardized questionnaire which all applicants were required to submit. CP at 93. The questionnaire was scored by the Department's computerized system, Neo-Gov. CP at 93. The score did not rate high enough to be selected as a candidate for the interview portion of the selection process. CP at 93.

The third position Mr. Bennett applied for was a WCCW sergeant position. CP at 93. He was selected as a candidate to interview for the position. Mr. Bennett was contacted to set up a date for his interview but withdrew his application before the interview could be conducted. CP at 104.

The fourth permanent position Mr. Bennett applied for at WCCW was a CCS 3 position in 2013. CP at 106. The application portion of the recruitment required the applicant to submit a letter of interest. CP at 106. Mr. Bennett did not supply the required letter as part of his application so his application was rejected. Mr. Bennett was notified electronically that his application was deficient but he never rectified the problem. CP at 93.

**B. Since 2011, Mr. Bennett Has Been Reprimanded for Yelling Obscenities at an Offender and Received a Memo of Concern for Failing to Follow Senior Staff Directions**

Since 2011, Mr. Bennett has acted unprofessionally in a number of instances at work. As a result of this behavior, Mr. Bennett received a letter of reprimand for yelling obscenities at an offender. In addition, he received a memo of concern for failing to follow the direction of senior staff.

**1. Mr. Bennett Was Reprimanded After DOC Investigated a Complaint Alleging That He Told an Offender "I'm Going to F\*\*K You Hard"**

On January 26, 2013, DOC received a confidential incident report claiming a correctional officer identified as Mr. Bennett told a female offender "I'm going to f\*\*k you hard." CP at 54-55. The offender believed she was being subjected to harassment and Mr. Bennett was attempting to abuse his position of power. CP at 50.

DOC policy prohibits staff sexual misconduct. Sexual misconduct includes any sexual act between an employee and an offender. CP at 50. The policies definition of sexual misconduct includes language of a sexual nature. CP at 50.<sup>4</sup> Additionally, DOC core competencies states all employees are expected to consistently treat

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<sup>4</sup> All offenders and DOC employees, are informed on the law concerning sexual misconduct and the Department's policies prohibiting sexual misconduct between DOC employees/volunteers and offenders. CP at 50.

everyone with respect and courtesy, even when the other person is discourteous or unreasonable. CP at 50.<sup>5</sup>

Evidence gathered during the investigation shows a female offender made Mr. Bennett angry when she yelled and cursed at him. CP at 50. Mr. Bennett admittedly told the offender “Ma'am, I tell you what, you got one more time to let f\*\*k you come out your mouth and I'll make sure you get f\*\*ked out of this unit over to Seg.” CP at 50-51.

While it was concluded Mr. Bennett's statement was not sexualized in nature, Superintendent Parnell found Mr. Bennett's behavior to be inappropriate and Mr. Bennett received a letter of reprimand for engaging in unprofessional behavior when dealing with an offender. CP at 58. His pay was not docked nor did he receive a demotion for engaging in this behavior. CP at 51.

## **2. Mr. Bennett Is Given a Memo of Concern After He Refused to Do His Job on Two Occasions**

Prison operations are structured into a quasi-military chain of command to promote security and ensure the safety of the inmates and correctional staff. CP at 70. Correctional officers follow the directions of sergeants; who in turn follow the directions of Lieutenants; who in turn follow of the directions of Captains; and so forth.

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<sup>5</sup> DOC has a zero tolerance policy for sexual misconduct so once DOC receives an allegation, the allegation is reviewed and investigated. CP at 50.

In January 2014, within the stretch of two days, Mr. Bennett twice refused to comply with the directions of senior staff. CP at 70. The matters were investigated and ultimately Mr. Bennett was given a memo of concern due to his failure to comply with the directions of senior staff. CP at 70.

The first incident occurred on January 17, 2014, when Mr. Bennett refused to assist processing visitors for visitation. Mr. Bennett was working as the Public Access Officer (POA). CP at 70. Mr. Bennett was contacted by Sergeant Kapsch and instructed to clear all the visitors waiting to proceed to the visit room. CP at 70. Officer Bennett claimed it was not within the scope of his job duties. He was wrong. The Public Access Officer Manual states in part that the PAO will assist the visit officers with searches of visitors as needed. CP at 70.

Two days later on January 19, 2014, Mr. Bennett again refused to do his assigned duties. CP at 70. Lt. Simmons stated he received a report that Mr. Bennett and another staff member were arguing in the unit. CP at 70. Lt. Simmons discussed the report with Mr. Bennett and the other staff member. During the discussion, Lt. Simmons told Mr. Bennett he was going to work in the booth. Mr. Bennett refused and stated he was going home sick. As noted in the memo of concern,

it is the agency expectation he work at his assigned post as directed in a professional manner. CP at 51.

**C. Procedural Facts**

On January 6, 2014, Mr. Bennett sued the Department of Corrections alleging a number of claims under WLAD based on his race in addition to a number of other claims. On April 24, 2015, DOC moved for summary judgment. Defendant objected to plaintiff's evidence at summary judgment plaintiff's counsel's declaration contained inadmissible hearsay, lacked foundation and many of the exhibits were not cited to in plaintiff's brief. CP 1115.<sup>6</sup>

On June 5, 2015, the trial court heard oral argument. After listening to oral argument, the trial court requested additional briefing focusing on incidents post 2011. On July 10, 2015, the trial court heard oral argument for a second time and granted summary judgment in full.

**IV. ARGUMENT**

The trial court properly granted summary judgment in this case because Mr. Bennett's suit is based on a host of allegations that are either barred by a settlement agreement, barred by the statute of limitations, fail

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<sup>6</sup> Respondents renew these same objections. Evidence supplied in opposition to a summary judgment motion must be submitted in an admissible format. To the extent Mr. Bennett's evidence is not admissible it should be disregarded by this court. CR 56(e).

to establish a prima facie case, don't establish pretext and do not amount to hostile work environment. As such, the trial court granting of summary judgment should be affirmed.

**A. Standard of Review**

Orders granting summary judgment are reviewed de novo. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65, 837 P.2d 618 (1992). Any time a non-moving party cannot prove an essential element of the party's case, summary judgment should be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d. 265 (1986).

**B. Mr. Bennett's Claims Based on Incidents Alleged to Have Occurred Prior to 2007 Are Barred by a Settlement Agreement**

The trial court properly granted summary judgment on all of Mr. Bennett's claims based on incident(s) alleged to have occurred prior to 2007 because Mr. Bennett entered into a binding settlement agreement with DOC. CP at 146-49. The agreement signed by Mr. Bennett releases DOC from any claim for acts occurring prior to 2007. So for example, any claim he was subjected to a hostile work environment at McNeil Island during a security drill where the scenario was based on a white supremacist group taking over the prison is barred by the settlement. His

complaint to the EEOC in 2005 that he was denied two promotions due to retaliation is barred as well.<sup>7</sup>

As such, the trial court properly granted summary judgment because any claims based on any incident(s) alleged to have occurred prior to 2007 have been resolved pursuant to the settlement agreement.

**C. Mr. Bennett's Claims Premised on Any Discrete Conduct Occurring Prior to January 2011 Are Barred by the Statute of Limitations**

The trial court also properly granted summary judgment because Mr. Bennett's claims premised on any discrete conduct occurring prior to January 2011 are barred by the statute of limitations. Mr. Bennett's reliance on a continuing violation theory in an attempt to get around the statute of limitations is misplaced. The trial court properly granted summary judgment because discrete incidents of alleged discrimination under the Washington Law Against Discrimination (WLAD) are governed by the general three-year statute of limitations for personal injury actions. *Antonius v. King Cnty.*, 153 Wn.2d 256, 103 P.3d 729 (2004); RCW 4.16.080(2).

Disparate treatment and retaliation claims are, by their very nature actionable as soon as the adverse employment action occurs. *Antonius*

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<sup>7</sup> These are just two examples of incidents Mr. Bennett alleges to have occurred prior to the 2007 settlement agreement. These allegations do not amount to discriminatory behavior, but even if they did, which they do not, they are barred from being re-litigated here under the terms of the agreement.

distinguishes claims for a hostile work environment, which is based on a series of acts, from discrimination claims based on a single, discrete act such as termination, failure to promote, refusal to hire, etc. *Antonius*, 153 Wn.2d at 264 (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 108–13, 122 S.Ct. 2061, 153 L. Ed. 2d 106 (2002)). Hostile work environment claims “ ‘are different in kind from discrete acts’ and ‘[t]heir very nature involves repeated conduct.’ “ *Antonius*, 153 Wn.2d at 264 (quoting *Morgan*, 536 U.S. at 115). For claims based on a discrete act the statute of limitations clearly runs from the date the act occurred. *Antonius*, 153 Wn.2d at 264.

Here, Mr. Bennett filed suit on January 6, 2014. CP at 1-12. Therefore, any claims based on discrete acts occurring prior to January, 6, 2011, are barred by the statute of limitations. CP at 1-12. By way of example, Mr. Bennett complains he was given a letter of reprimand for an incident in January of 2009 where it was alleged he acted unprofessionally in front of offenders. CP at 884. He also complains about being placed on home assignment in February of 2009 regarding an incident which occurred in the WCCW clinic. CP at 864-865. It was alleged by an African American female Correctional Officer that Mr. Bennett was talking with a pregnant offender about the offender’s sex life outside of the facility among other things. CP at 864-865. The African American

female co-worker describes in her report how Mr. Bennett claimed other African American women working at the institution are “scared of him,” “not on his level,” and “not far past the ghetto.” CP at 864-865. Again, even if these two incidents amounted to a prima facie case of disparate treatment or retaliation, which they do not, they are discrete incidents which are barred by the statute of limitations.<sup>8</sup>

Mr. Bennett’s assertion of a continuing violation theory in his harassment claim, which fails for the reasons detailed in section E below, does not toll the statute of limitations for discrete incidents of misconduct. As such the trial court’s granting of summary judgment should be affirmed.

**D. The Trial Court Properly Dismissed Mr. Bennett’s Claims for Retaliation and/or Disparate Treatment Because He Either Failed to Establish the Prima Facie Elements of a Claim and/or Establish Pretext**

The trial court properly granted summary judgment on Mr. Bennett’s disparate treatment/retaliation claims which are not barred by the settlement agreement and/or the statute of limitations, as well. Since 2011 Mr. Bennett has applied for four permanent promotional opportunities at WCCW. Specifically, in 2011 he applied for a CCS

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<sup>8</sup> At page 11 of Mr. Bennett’s opening brief, Mr. Bennett describes these two events by claiming he was reprimand for claiming it was hot and placed on home assignment for stating his wife was “black and beautiful.” At best, this is an abbreviated version of what occurred in both incidents. CP at 864-865. In any event, it warrants a close reading of the record.

position, in 2012 he applied for a Lieutenant position, in 2013 he applied for another CCS position and a permanent sergeant position. He was not selected for the positions either because he did not properly apply, he did not meet the minimal qualifications for the position, he voluntarily withdrew from the selection process, or was not deemed the most qualified candidate after a competitive interview process. As such, the trial court properly granted summary judgment because Mr. Bennett either failed to establish a prima facie case of disparate treatment or relation, and/or failed to create a question of fact on the issue of pretext.

**1. Analytical Framework for Discrimination and Retaliation Claims**

Our Supreme Court clarified and modified the correct standard of review for dispositive motions in employment cases in *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001). Under *Hill*, Washington courts continue to follow the basic evidentiary burden-shifting protocol established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Hill*, 144 Wn.2d at 180-81. In the typical case, the employee must satisfy the first intermediate burden by producing the facts necessary to support a prima facie case. *Id.* Unless a prima facie case is set forth, the employer is entitled to prompt judgment as a matter of law. *Id.*

Disparate treatment requires an individual to be singled out and treated less favorably on account of race, disability, color, religion, sex or national origin, than other similarly situated employees. *Shannon v. Pay 'N Save Corp.*, 104 Wn.2d 722, 726, 709 P.2d 799 (1985); *Jauregui v. City of Glendale*, 852 F.2d 1128, 1134 (9th Cir. 1988). To establish a prima facie case of disparate treatment based on race, plaintiff must show: (1) he or she is within the statutorily protected group; (2) he applied and was qualified for an available promotion; (3) he was not offered the position; and (4) the promotion went to a non-protected comparator. *Kuyper v. State Dep't of Wildlife*, 79 Wn. App. 732, 735, 904 P.2d 793 (1995), *review denied*, 129 Wn.2d 1011, 917 P.2d 130 (1996).

To make out a prima facie case of retaliation, the plaintiff must show that (1) she engaged in statutorily protected activity, (2) adverse employment action was taken against her, and (3) there is a causal link between the activity and adverse action. *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002), citing *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 862, 991 P.2d 1182, *review denied*, 141 Wn.2d 1017 (2000).

To show the requisite causal link, the plaintiff must present sufficient evidence that the protected activity was the likely reason for the

adverse employment action. Essential to a causal link is evidence the decision maker was aware that the plaintiff had engaged in the protected activity. *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir.1982) *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (causation sufficient to establish third element of prima facie case may be inferred from the employer's knowledge that the employee engaged in protected activity and the proximity in time between the protected action and the allegedly retaliatory employment decision.).

Only if the plaintiff can establish a prima facie case does the burden of production shift to the employer to articulate a legitimate, non-discriminatory or non-retaliatory reason for the adverse employment decision. *Hill*, 144 Wn.2d at 181-82. Once such a reason is identified, the burden of production shifts back to the employee to show that the proffered reason is pretext. *Id.* “If the plaintiff proves incapable of doing so, the defendant becomes entitled to judgment as a matter of law.” *Id.* at 182.

## **2. Plaintiff Failed to Make a Prima Facie Case of Disparate Treatment**

The trial court properly granted summary judgment because Mr. Bennett failed to establish a prima facie case of disparate treatment regarding the selection process for the four permanent positions he applied

for at WCCW post 2011. Summary judgment was proper because Mr. Bennett failed to show he was treated differently than a non-protected comparator.

The first position Mr. Bennett applied for in August 2011, was a Corrections Specialist Three position. CP at 39. The person who ultimately was selected for the position scored the highest during the interview process and was qualified. CP at 50.

The trial court properly granted summary judgment based on this promotional opportunity because Mr. Bennett's counsel failed to argue to the trial court that the process was discriminatory or provide any analysis establishing a prima facie case of disparate treatment.<sup>9</sup> CP at 163, CP at 178-179. As such the trial court properly granted summary judgment.

The second permanent position Mr. Bennett applied for was a WCCW Lieutenant position. CP at 93. Mr. Bennett's questionnaire score did not rate high enough to be selected as a candidate for the interview portion of the selection process. CP at 93. Mr. Bennett again failed to supply evidence a non-protected comparator was treated differently by the computer during the rating process or that the person

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<sup>9</sup> Any belated claim to the contrary should be rejected because Mr. Bennett's brief to this court and the trial court does not address the hiring process concerning this position. RAP 2.5(a).

who was ultimately selected for the position was a non-protected comparator. As such, the trial court properly granted summary judgment.

The third position Mr. Bennett applied for was a permanent WCCW sergeant position, but withdrew his application before the interview could be conducted. CP at 104. Mr. Bennett failed to supply evidence a non-protected comparator was treated differently during the process. How could he? He failed to participate in the process and, as such, the trial court properly granted summary judgment.

The fourth permanent position Mr. Bennett applied for at WCCW was a CCS 3 position in 2013. CP at 106. The application portion of the recruitment required the applicant to submit a letter of interest. Mr. Bennett did not supply the required letter as part of his application so his application was rejected. Mr. Bennett was notified electronically his application was deficient but he never rectified the problem. CP at 106. Again, the trial court properly granted summary judgment in regard to this process because Mr. Bennett failed to supply evidence that a non-protected comparator was treated differently during the process or selected for the position.

**3. Plaintiff Failed to Show He Suffered an Adverse Employment Action**

The trial court properly granted summary judgment because Mr. Bennett failed to show he was subject to an adverse employment action regarding the hiring process for two of the permanent positions he applied for at WCCW. Specifically he failed to establish he suffered an adverse employment action regarding the 2013 CCS 3 position and the 2013 permanent sergeant's position because it is entirely speculative to claim discrimination when you do not participate in the selection process. As such, the trial court properly granted summary judgment.

**4. Bennett Failed To Offer Any Evidence Creating a Question of Fact on the Issue of Pretext**

The trial court properly granted summary judgment because Mr. Bennett failed to offer any evidence which created a question of fact on the issue of pretext regarding the four permanent positions he applied for at WCCW. As such the trial court's ruling should be affirmed.

A plaintiff cannot create an issue of pretext without some evidence that the articulated reason for the employment decision is unworthy of belief. *Sellsted v. Wash. Mutual Sav. Bank*, 69 Wn. App. 852, 859, 851 P.2d 716 (1993). To do this, a plaintiff must show, for example, that the reason has no basis in fact, it was not really a motivating factor for the decision, it lacks a temporal connection to the decision or was not a

motivating factor in employment decisions for other employees in the same circumstances. 69 Wn. App. at 859-60, n.14. The plaintiff may also satisfy the pretext prong by presenting sufficient evidence that discrimination nevertheless was a substantial factor motivating the employer. *Scrivener v. Clark College*, 181 Wn.2d 439, 334 P.3d 541 (2014).

For example, in *Scrivener*, the plaintiff was able to create a question of fact by presenting circumstantial evidence that age played a role in its decision not to hire the plaintiff. *Id.* The plaintiff was able to present evidence the decision maker had made a number of statements endorsing the desire to hire individuals outside a protected class (people under 40). *Id.* The Supreme Court held this was sufficient evidence to create a question of fact regarding the decision maker's hiring of two individuals under the age of forty. *Id.*

In this case, the trial court properly granted summary judgment regarding the four permanent positions plaintiff applied for at WCCW because he failed to offer any evidence creating a question of fact on the issue of pretext. As noted earlier, the trial court properly granted summary judgment regarding the permanent sergeant and the 2013 CCS 3 position because Mr. Bennett, due to his own actions, was not considered for the two positions. He therefore cannot establish either

of the hiring decisions were pretextual when he was not part of the process.

The trial court also properly granted summary judgment because Mr. Bennett failed to establish pretext regarding the department actions in the 2011 WCCW CCS recruitment or the Lieutenant recruitment. Taking the 2011 WCCW CCS 3 position first, the trial court properly granted summary judgment because Mr. Bennett failed to engage in any analysis or argue the decision was pretextual.

The reason why he failed to do so is straightforward. The decision was made after a competitive interview process. There is no evidence the candidates were rated based on different criteria and the successful candidate received a higher rating in the interview portion of the process. Mr. Bennett points to no evidence establishing the decision maker was aware of Mr. Bennett engaging in any specific protected activity remotely close in time to her decision in 2011. Further, unlike in *Scrivener*, Mr. Bennett did not produce any statements by the decision maker which would create a question of fact regarding her explanation for promoting the highest rated candidate was pretextual.

Moving to the Lieutenant position, Mr. Bennett cannot show the decision to not select him for the interview portion of the process was pretextual either. His questionnaire was scored by a computer and the

computer determined his answers did not meet the requisite cut-off to be interviewed. Mr. Bennett cannot show the computer's calculations were based on any animus or provide any evidence the questionnaire was drafted with any discriminatory animus directed towards Mr. Bennett. As such, his disparate treatment and/or retaliation claim based on the Lieutenant Position fails as well.

**5. The Trial Court Properly Dismissed Mr. Bennett's Disparate Treatment and Retaliation Claims**

Mr. Bennett's opening brief makes a number of allegations about investigations of work place disputes and other instances within the statute of limitations which do not amount to an adverse employment action, fail to establish a prima facie case, and/or don't establish pretext as well. As such, they deserve to be addressed here.

**a. Allegations in 2011 Do Not Establish a Claim**

In Mr. Bennett's Opening Brief (Opening Br.) at 12, Mr. Bennett cites to four incidents he alleges to be evidence of discrimination in 2011. The allegations are: 1) he sent a letter to the superintendent of WCCW regarding the Diversity Chair position, 2) he was charged 20 cents for a copy of his personnel file, (3) his interview at Cedar Creek was reset and 4) he was not selected for two positions. Again, the trial court properly granted summary judgment because these allegations do not establish a disparate treatment or retaliation claim either.

Taking the voluntary diversity position first, Mr. Bennett presumably points to his letter as some evidence of disparate treatment or retaliation. CP at 974-78. However, this is insufficient to establish a prima facie case because the decision to re-advertise affected all persons who were interested in the position and the decision did not result in a dock in pay or a demotion. He did not even provide evidence a non-protected comparator was ultimately selected for the position or that the position was even filled.

He does not identify an alleged protected activity he engaged in which he believes was the basis for any alleged animus by the decision maker who is unidentified either. Mr. Bennett does not even establish the unidentified person at headquarters who made the decision to re-advertise knew he was interested in the position. More to the point, it certainly is not evidence of an adverse employment action when the evidence in the record shows Mr. Bennett ultimately became a member of the board. CP at 781-82. An actionable adverse employment action must involve a change in employment conditions that is more than an "inconvenience" *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004). His failure to meet his burden is fatal to his claim.

Being charged for a copy of your employment file is not an adverse employment action as well. A close look at the email attached as

to plaintiff's declaration shows the employee contract allows the department to charge a fee. CP at 1020. Again, Mr. Bennett did not show other non-protected employees where treated differently under the same or similar circumstances. *Washington v. Boeing Co.*, 105 Wn. App. at 13.

Additionally, the two promotional opportunities to which Mr. Bennett applied and which were outside of WCCW in 2011 do not establish a claim of disparate treatment or retaliation either. Contrary to what Mr. Bennett claims, the record does not show he timely submitted his application for the position at Cedar Creek and does not show other non-protected persons who failed to properly submit their application were treated differently. CP at 967-71. A close reading of the email chain shows there was a misunderstanding on his behalf about what needed to be submitted which resulted in his interview being postponed, not cancelled. . CP at 967-71.

More importantly, Mr. Bennett's citation to CP at 972-73 does not establish the successful applicant for the Cedar Creek position was a non-protected comparator or the successful applicant was hired to the Cedar Creek position based on pretext. The letter does not even establish the decision maker knew Mr. Bennett or had knowledge of Mr. Bennett's engaging in protected activities. How could it? A close look at the letter shows it is not even about a position at Cedar Creek.

Finally, Mr. Bennett citation to CP at 980 and CP at 982 as evidence of discrimination do not establish a prima facie case either. These two letters are from Mission Creek and Cedar Creek in 2011. Neither letter establishes the selected person was a non-protected comparator nor does it show the decision was based on any pretext. It also does not show the decision makers were aware of Mr. Bennett engaging in any protected activity. Mr. Bennett has failed to show the decision makers in both these positions even knew Mr. Bennett.

In short, Mr. Bennett's claims based on any actions of DOC in 2011 fail because he fails to establish a prima facie case or show the actions of DOC were pretextual. As such, the trial court's ruling should be affirmed.

**b. Allegations in 2012 Do Not Establish a Claim**

Starting at p. 14 of Mr. Bennett's Opening Brief, Mr. Bennett cites to a number of allegations he claims occurred in 2012. The main allegations being he 1) wrote a letter to the superintendent, 2) an offender claimed she was going to make a PREA complaint against him, 3) a co-worker referred to himself as "the Grand Poohbah," 4) he filed a complaint to the EEOC, 5) he was denied a promotion opportunity and 6) he received a supervisory conference among other things. The trial court

properly granted summary judgment because these allegations fail to establish a prima facie claim for two reasons:

First, reports to the EEOC, writing a letter to the superintendent, a threat of an inmate making a complaint and a co-worker referring to himself as “the Grand Poohbah” and undergoing a supervisory conference are not evidence of an adverse employment action.<sup>10</sup> The term “Grand Poohbah “ is not racial, but instead a reference to a haughty character in Gilbert and Sullivan’s *The Mikado* who holds numerous exalted offices.

Second, Mr. Bennett only identifies his failure to be selected for the Washington Correction Center for Women (WCCW) Staff Accountability position as an adverse employment action. Opening Br. at 12-13; CP at 753. The problem with this allegation is the position was filled in 2011 not 2012. CP at 1196-1202. It is unclear if this was done on purpose or was an oversight but it certainly is not evidence of any disparate or retaliatory treatment in 2012 as Mr. Bennett suggests. Even if it was, which it is not, he again engages in no analysis or points to any facts to establish a prima facie case of disparate treatment of retaliation in 2012.

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<sup>10</sup> Mr. Bennett describes the supervisory conference being against his performance but nothing in the conference documents indicates Mr. Bennett was being reprimanded for any behavior. More to the point, Mr. Bennett provides no evidence showing the person performing the conference was acting with any discriminatory animus or that the conferences led to an adverse employment action such as a dock in pay or a demotion. CP 775-776.

**c. Allegations in 2013**

Starting at p. 14 of Mr. Bennett's Opening Brief, Mr. Bennett lists a set of allegations he claims occurred in 2013. The allegations are 1) he was investigated concerning a PREA matter where he allegedly told an inmate "I'm Going to F\*\*K You Hard", 2) he was investigated concerning allegations made by a female co-worker, 3) he withdrew from being considered for a permanent sergeant position, and 4) he was not selected for a temporary sergeant position. The trial court properly granted summary judgment because these allegations fail to show he was subjected to disparate treatment or retaliation in 2013.

Mr. Bennett's withdrawal from the permanent sergeant selection process was addressed previously, so it will not be re-addressed in this section. However, it bears repeating that claiming discrimination about a process you did not participate in is meritless.

Moving on to the PREA investigation, DOC is required by law to investigate PREA complaints so the investigation itself cannot be an adverse employment action. There is no evidence the investigation was prompted by a co-worker who was aware Mr. Bennett had filed an EEOC complaint and after the department conducted an investigation Mr. Bennett was absolved of staff sexual misconduct.

While he was given a memo regarding his admitted behavior, that does not amount to an adverse employment action either. Mr. Bennett was never suspended, nor had his pay docked. (Employment events that were correctional or investigatory in nature did not constitute adverse employment actions where there were mere inconveniences that did not have a tangible impact on the plaintiff's workload or pay). *Kirby*, 124 Wn. App. at 465.

Mr. Bennett attempts to side-step these facts when he states other non-protected employees engaged in similar behavior and were not disciplined. However this argument misses the point. While it is certainly possible correctional officers have used inappropriate language in a prison setting and Mr. Bennett may have observed the behavior and not reported it, Mr. Bennett does not provide any evidence that when offenders complained about other non-protected employees engaging in similar behavior the Department did not investigate the allegations or reprimand the non-protected employee for similar behavior. His failure to provide actual evidence of non-protected comparators not being reprimanded after being investigated for similar behavior is dispositive.

Moving to the next allegation, the investigation concerning his interactions with a fellow co-worker, Ms. Orosco, does not establish a disparate treatment or retaliation claim either. CP at 633-36.

Discrimination laws are not a code of general civility. The fact he may not get along with a co-worker does not establish a discrimination or retaliation claim. There is no evidence Ms. Orosco's report that Mr. Bennett was following her home was based on Mr. Bennett's race or that she was even aware Mr. Bennett had ever engaged in protected activities. Even if such evidence was in the record, which it is not, once again, he was never suspended, nor had his pay docked. The investigation was unfounded. So this incident does not amount to an adverse action under *Kirby*.

Mr. Bennett also failed to establish a prima facie claim of disparate treatment and retaliation regarding the temporary sergeant position. He failed to provide evidence he was treated differently compared to other non-protected employees during the review process or that the person selected for the position was a non-protected comparator. Additionally, he provides no evidence of who the decision maker was regarding the position and whether the decision maker was even aware of any alleged protected activity that Mr. Bennett claims he engaged in close in time to the decision. It is pure speculation to infer that because one person may have knowledge of an employee's protected activity, an unidentified

decision maker is aware of the protected activity.<sup>11</sup> As such, the trial court properly dismissed Mr. Bennett's claims.

**d. Allegations in 2014**

Starting at page 16 of Mr. Bennett's Opening Brief, Mr. Bennett identifies the allegations he claims occurred in 2014. The allegations are 1) no investigation was conducted regarding his internal discrimination complaint, 2) he was investigated for an incident where he refused to do his job and 3) he was investigated for leaving his post. These allegations fail to show he was subjected to disparate treatment or retaliation in 2014 as well for primarily two reasons.

First, the claim that no investigation was conducted regarding his complaint is simply inaccurate. A cursory review of the record shows the department conducted a full investigation regarding the circumstances surrounding complaints of his failure to follow directions from senior staff in January of 2014. In fact, when he spoke to an internal DOC investigator regarding his concerns about the incidents, an email submitted by Mr. Bennett states "he did not mean for his concerns to be discriminatory." CP at 1035. Further, Mr. Bennett was interviewed and presented his side of the story regarding the incidents. CP at 1038-1047.

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<sup>11</sup> See *Clover v. Total Systems Services Inc.*, 176 F.3d 1346, 1355 (11th Cir.1999) (concluding that "could have told" is not the same as "did tell."). *Newton v. Meier Stores Ltd. P'ship*, 347 F. Supp. 2d 516, 524 (N.D. Ohio 2004) (absent "specifics facts" establishing actual knowledge, summary judgment was proper).

The interview summary and Mr. Bennett's own letter describe common work place disagreements regarding staffing and training, not discriminatory behavior. CP at 1038-47. While Mr. Bennett may not like the result of the investigation, an investigation was done regarding these incidents and he was not subjected to any adverse employment action such as a dock in pay or a demotion. CP at 1176-90.

Second, Plaintiff has failed to show that either the memo of concern he received regarding not doing his job in January 2014 or the memo of concern he received after not following prison procedure is evidence of disparate treatment or retaliation. While both of these incidents occurred after plaintiff filed an EEOC complaint in 2012, his complaint does not allow him to act inappropriately in the work place nor does it establish causation. There is no nexus between Bennett's EEOC complaints in 2012 and the memos of concern almost two years later. *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 863, 991 P.2d 1182, *review denied*, 141 Wn.2d 1017 (2000). The court in *Francom* noted that 15 months had passed between the plaintiff's complaint and an adverse employment action when it declared a connection unlikely. *Francom*, 98 Wn. App. at 863.

Third, Mr. Bennett has provided no evidence the individuals complaining about his behavior in January 2014, or in June 2014 had

some type of discriminatory animus towards Mr. Bennett or that the authors of the two memos of concern based their decision on any retaliatory motive. Further, he has not provided any evidence that other non-protected employees were not subject to being written up for the same behavior. Once again, there is also no evidence the memos amounted to an adverse action under *Kirby*. As such, the trial court properly granted summary judgment.

**E. The Trial Court Properly Dismissed Mr. Bennett's Hostile Work Environment Claim**

Mr. Bennett's hostile work environment claim fails because he failed to establish 1) that he was subjected to harassment; 2) that the harassment was severe and pervasive; 3) that it altered the terms and conditions of his employment and 4) the harassment was imputed to the employer.

To establish a prima facie case for a hostile work environment based on a protected class membership, plaintiff must establish: 1) the harassment was unwelcome; 2) the harassment was because of his race; 3) the harassment affected the terms or conditions of employment; and 4) the harassment is imputed to the employer. *Washington v. Boeing Co.*, 105 Wn. App. 1, 13, 19 P.3d 1041 (2000).

Whether workplace harassment is sufficiently severe and pervasive to seriously affect the emotional and psychological wellbeing of an employee and, thus, to create an abusive working environment, is assessed under the totality of the circumstances. *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985); *Payne v. Children's Home Soc'y of WA, Inc.*, 77 Wn. App. 507, 515-16, 892 P.2d 1102 (1995):

Workplace conduct is not measured in isolation; instead, whether an environment is sufficiently hostile or abusive must be judged by looking at all the circumstances, including the frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

*Clark Cnty Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71, 121 S. Ct. 1508 149 L. Ed. 2d 509 (2001).

To overcome an employer's summary judgment motion, the employee must do more than express an opinion or make conclusory statements. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). The employee has the burden of establishing *specific and material facts* to support each element of his or her prima facie case. *Hiatt*, 120 Wn.2d at 66, 837 P.2d 618 (emphasis present).

The alleged conduct must be extreme in order to change the terms and conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-89, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). Statutes prohibiting discrimination and harassment were not intended as codes of general civility. *Id.*

For example, in *Washington v. Boeing*, plaintiff alleged she was subjected to a hostile work environment because of sex and race. Her male co-workers and supervisors called her “dear,” “sweet pea,” and even “brillo head.” After she objected to a “pin up” calendar, others teased that she might file a complaint, and a male co-worker refused to assist her. *Washington*, 105 Wn. App. at 10-11. The trial court granted summary judgment in favor of the employer and the Court of Appeals, Division I, affirmed. The described events did not unreasonably interfere with plaintiff’s work performance and were not sufficiently pervasive and workplace-altering to be actionable harassment. *Washington*, 105 Wn. App. at 9-13.

Another useful example is *MacDonald v. Korum Ford*, 80 Wn. App. 877, 886-87, 912 P.2d 1052 (1996). In *MacDonald*, the trial court granted summary judgment in favor of the employer where one manager kissed plaintiff and another manager made a number of offensive comments to plaintiff including comments about her ability

to make sales due to her having breasts and placed his hands on her back. *Id.*

**1. Mr. Bennett Failed to Show He Was Subjected to Extreme Ongoing Behavior That Is Imputable to DOC**

In this case, the trial court properly granted summary judgment because post 2011, the record contains two incidents were Mr. Bennett claims co-workers allegedly made statements he felt were racial in nature.<sup>12</sup> This is insufficient to establish he was subjected to ongoing or pervasive harassment at WCCW. The first incident alleges a co-worker in 2012 used the term “Grand Pooh-Bah” and allegedly stated it was a “White man’s world.” The second unreported incident occurred sometime in late 2013 or early 2014 when an unidentified employee allegedly made some statement concerning fried chicken and watermelon.

These two incidents by co-workers over a three year period are not enough to establish a hostile work environment claim. They are not evidence of the sort of pervasive and “extreme” conditions such as

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<sup>12</sup> Mr. Bennett’s letter in 2012 to the superintendent about an offender’s inappropriate behavior does not establish a hostile work environment either. A close reading of the letter shows Mr. Bennett was not alleging DOC or other DOC employees were subjecting him to a hostile work environment. CP at 730-34. In addition, the letter also acknowledges the lieutenant in charge that day spoke to the offender after the incident and Mr. Bennett did not claim in the letter or now that this was an unreasonable response or improper corrective action given the offender’s behavior. Further, it was arguably his job to address the offender’s behavior by making an onsite adjustment or counseling the offender. WAC 137-28-230. So, even if offenders could be considered DOC’s alter ego, which they cannot, Mr. Bennett has failed to show or even allege DOC failed to act appropriately in regards to the offender’s behavior. As such, the trial court properly granted summary judgment because DOC is not liable for the behavior of the offender and the behavior does not establish a hostile work environment claim.

ongoing jokes, posters or comments which establish a hostile work environment.

Further, even if these two events over a three-year period amount to a pervasive environment, which they do not, a second independent basis for dismissing Mr. Bennett's harassment claims is liability cannot be imputed to the employer. This imputations element requires Mr. Bennett 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 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 Wholesale Inc.*, 123 Wn. App. 783, 793-94, 98 P.3d 1264 (2004). Here, the trial court properly granted summary judgment because Bennett failed to show the actions were imputable to DOC.

First, there are no allegations that any manager participated in harassment of Bennett. The two statements alleged to be harassment were by fellow correctional officers. There simply is no evidence that these correctional officers are DOC's "alter ego."

Second, the trial court properly granted summary judgment because Mr. Bennett was unable to establish DOC 1) authorized, knew,

or should have known about a supervisor(s) or co-worker(s) harassment because it was open or obvious, *Glasgow*, 103 Wn.2d at 407. DOC only learned about the “Poohbah” incident when DOC began investigating an allegation Mr. Bennett had threatened another employee. CP at 746. The complaining party and Mr. Bennett were interviewed and DOC records indicate neither reported any hostile work environment issues. CP at 746. The matters were investigated and the allegations were not substantiated. *Estevez v. Faculty Club of Univer. of Wash.*, 129 Wn. App. 774, 120 P.3d 579 (2005) (trial court properly dismissed sexual harassment claim where employer acted promptly in response to reports of hostile work environment). While Bennett may not agree with the conclusions of the investigation, his subjective beliefs do not negate the thoroughness of the investigation. Further, even if DOC’s conclusions 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).

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 “excessive discipline.”). The fact DOC was unable to substantiate Bennett’s allegations regarding the “Poohbah” incident, does not create a genuine issue of material fact about the reasonableness of DOC’s remedial action.<sup>13</sup>

The trial court also properly granted summary judgment because Mr. Bennett failed to show DOC failed to take prompt action concerning the alleged “fried chicken” statement. He failed to report it, he did not take advantage of the union grievance process, he did not report the incident to any of his supervisors, nor did he take advantage of DOC’s own internal discrimination process.

Bennett’s claims based on this alleged incident 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 plaintiff found a note which she felt

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<sup>13</sup> It should be noted Bennett takes exception to the fact DOC investigators will not conclude an incident did or did not occur unless there is supporting evidence. It is worth noting because he has been the benefactor of this on multiple occasions when it has been alleged he has acted inappropriately but there was no other witness than the person making the report. An example of this is the circumstances regarding Ms. Orosco. It was her word against his concerning whether he was purposefully following her home. While certainly not dispositive, it underscores the fact many of plaintiff’s claims are based on subjective beliefs with no supporting evidence.

proved her 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*, Bennett never allowed DOC the opportunity to investigate or take corrective action regarding the alleged "fried chicken" statement because he never reported it. Assuming for the sake of summary judgment that the incident occurred, it is not evidence that DOC failed to take reasonable steps to correct the complained of conduct.

As such, he cannot claim DOC failed to take prompt action when he cannot show DOC was even placed on notice of this alleged unreported incident.

**2. Mr. Bennett Failed to Prove his Allegations Prior to 2011 Were Not Time Barred.**

The trial court properly granted summary judgment because the two events alleged by Mr. Bennett post-2011 are insufficient to create a hostile work environment claim. Mr. Bennett's attempt to get around this by relying on a continuing violation theory is misplaced. The trial court properly granted summary judgment because the litany of allegations

starting in 2002 and running till 2011 do not establish a hostile work environment claim either.<sup>14</sup>

All actions brought under RCW 49.60 are subject to a three-year statute of limitations. *Goodman v. Boeing Co.*, 75 Wn. App. 60, 77, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995). In *Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729 (2004), our Supreme Court articulated the rule for determining when the statute of limitations bars a claim based on a series on discriminatory acts<sup>3</sup> by adopting the analysis in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002):

Under *Morgan*, a “court’s task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and, if so, whether any act falls within the statutory time period.” *Morgan*, 536 U.S. at 120. The acts must have some relationship to each other to constitute part of the same hostile work environment claim, and if there is no relation, or if “for some other reason, such as certain intervening action by the employer” the act is “no longer

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<sup>14</sup> At page 31 of Mr. Bennett’s opening brief, Mr. Bennett argues an ongoing violation theory but does not identify in his argument section what alleged acts establish an ongoing violation theory. RAP 10.3(a)(6) requires that argument in support of issues presented for review be accompanied with “references to relevant parts of the record.” This court should decline to assume the obligation to comb the record on Mr. Bennett’s behalf. *See West v. Thurston Cnty.*, 168 Wn. App. 162, 192, 275 P.3d 1200, 1216 (2012) (declining to consider assertions made without citation to the record, as required by RAP 10.3(a)(6)).

part of the same hostile environment claim, then the employee cannot recover for the previous acts” as part of one hostile work environment claim. *Morgan*, 536 U.S. at 118; *Antonius*, 153 Wn.2d at 271.

The *Antonius/Morgan* exception to the statute of limitations for hostile work environment claims only applies when certain criteria are met. *Antonius*, 153 Wn.2d at 264 (citing *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 108 -13, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)).<sup>15</sup> Those criteria are not met in this case and, as such, the trial court properly granted summary judgment.

Under *Antonius/Morgan*, pre-statute of limitations conduct is not barred by the statute of limitations if (1) those older acts are not “discrete” acts of discrimination, (2) those older acts are sufficiently related to post-January 2011, acts to be considered part of the same hostile work environment, and (3) there is no reason, such as intervening action by the employer, that the older acts are no longer part of the same hostile work

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<sup>15</sup> *Antonius* distinguished claims for a hostile work environment, which is based on a series of acts, from discrimination claims based on a single, discrete act such as termination, failure to promote, refusal to hire, etc. *Antonius*, 153 Wn.2d at 264 (citing *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 108–13, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002)). Hostile work environment claims “ ‘are different in kind from discrete acts’ and ‘[t]heir very nature involves repeated conduct.’ ” *Antonius*, 153 Wn.2d at 264 (quoting *Morgan*, 536 U.S. at 115). For claims based on a discrete act the statute of limitations clearly runs from the date the act occurred. *Antonius*, 153 Wn.2d at 264.

environment.<sup>16</sup> As with all statute of limitations exceptions, plaintiff bears the burden of demonstrating that these criteria are met.<sup>17</sup>

Here, the trial court properly granted summary judgment because *Antonius* does not apply in this case. It does not apply for seven reasons.

First, it does not apply because the settlement agreement entered into by the parties in 2007 releases the Department from any claims based on any alleged incidents which occurred prior to that time period. Allowing Mr. Bennett to reach back to these incidents as a basis for recovery would undermine the very purpose of the hold harmless agreement. Essentially, DOC would be deprived of any benefit of that agreement if the court allowed Mr. Bennett to reach back and re-litigate those actions. As such, the trial court properly granted summary judgment.

Second, the trial court properly granted summary judgment because the pre-2007 actions alleged by Mr. Bennett do not establish a hostile work environment claim either. Mr. Bennett's briefing before the trial court has never identified with any specificity what non-discrete conduct he alleges as amounting to a hostile work environment claim.

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<sup>16</sup> *Antonius v. King County*, 153 Wn.2d 256, 263, 271, 103 P.3d 729 (2004).

<sup>17</sup> *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008) (holding that plaintiffs bear the burden of establishing applicability of exceptions to statute of limitations); *Sanders v. City of Phoenix*, No. CV-06-1644-PHX-GMS, 2010 WL 1268152, at \*5 (D. Ariz. Mar. 30, 2010) (holding that plaintiffs bear the burden of establishing applicability of *Morgan*).

However, a close review of the record shows the only allegations of alleged non-discrete conduct made by Mr. Bennett prior to the 2007 settlement agreement concerns a training scenario conducted in 2002 at McNeil Island, where the corrections officers were pretending a racist group of offenders took over the prison and a letter he received during the same time period which he alleges made statements about “malt liquor.”

While Mr. Bennett may subjectively been offended by the training scenario, DOC has a legitimate business purpose for conducting such exercises. Further, while it is unclear if an anonymous letter referencing malt liquor is both subjectively and objectively racially hostile, the anonymous statement is not imputable to DOC. More to the point, even if the training scenario and the letter were objectively inappropriate, two incidents which occurred almost 13 years ago at different institutions, with different employees, are not sufficient to establish an ongoing pervasive environment at WCCW where he currently works. The remainder of the allegations pre-2007 either concern failed promotional opportunities (discrete incidents) or investigations concerning his inappropriate workplace behavior which do not constitute adverse employment actions. *Kirby*, 124 Wn. App. at 465.

Third, the change in environment from Stafford Creek and McNeil Island to WCCW is an intervening act which severed the relationship

between any hostile conduct in 2002 and conduct post-2011. This nine-year gap in the alleged hostile work environment also weighs against the applicability of *Antonius/Morgan*.<sup>18</sup>

Fourth, the evidence cited to in plaintiff's factual section of his briefs from 2007-2011 does not create an ongoing claim either. The allegations cited by plaintiff are discrete incidents of alleged misconduct such as being suspended for inappropriate work place behavior or failed promotional opportunities which once again are subject to the statute of limitations even if they amounted to a prima facie claim. The brief does not cite to a single joke or comment let alone a series of jokes or racially motivated comments made by co-workers which constitute the basis of a hostile work environment claim during this time period.

Fifth, there is also no indication that the alleged harassment he claims to have received in 2002 was related to any alleged harassment he received after 2011. Not only are the statements in 2002 made by different people, at different institutions, the two incidents which are alleged to have occurred post 2011 are not enough to establish a pervasive environment either. Casual, isolated, or trivial manifestations of a discriminatory, harassing, or hostile environment do not affect the terms or

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<sup>18</sup> *McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 78 (2d Cir. 2010) (applying *Morgan* and holding that a nearly one year "incident-free interval . . . renders less plausible" the contention that events are part of the same hostile work environment).

conditions of employment to a degree sufficient to violate the law. *Washington v. Boeing Co.*, 105 Wn. App. at 13.

For example, in *Bolden v. PRC Inc.*, 43 F.3d 545, 549-52 (10th Cir. 1994), the court dismissed a hostile work environment claim involving use of terms “n\*\*\*\*r” and “honky” and a racist cartoon and holding that “[i]nstead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments.” So in this case, even if the statements alleged to have occurred post 2011 are found to be objectively racially hostile, two incidents over a three year period regarding different employees is not enough to show the environment was pervasively hostile given the holding in *Washington* and *Korum Ford*.

Sixth, the deposition testimony of Ms. Ifanse and Mr. Napier are irrelevant to the issue of what allegedly happened to Mr. Bennett. Mr. Bennett has the burden to provide admissible evidence concerning his allegations, not the allegations of others; *Roberts v. Atlantic Richfield Co.*, 88 Wn.2d 887, 893-94, 568 P.2d 764 (1977) (affirming exclusion of evidence about what happened to non-party co-employees in an age discrimination suit because it “would have a tendency to mislead, distract, waste time, confuse or impede the trial, or be too remote either as to issues or in point of time.”) *See also, Lords v. Northern Automotive Corp.*,

75 Wn. App. 589, 610, 881 P.2d 256 (1994) (in accord); *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 155-57 (6th Cir. 1988) (same).

Even if such evidence is relevant to his claim, under ER 404, prior “bad acts” cannot be admitted for purposes of showing action in conformity therewith. “It is the general rule, of course, that in a civil action, evidence concerning similar acts, conduct, or representations is inadmissible for the purpose of proving the act charged in the complaint.” *Calbom v. Knudtson*, 65 Wn.2d 157, 168, 396 P.2d 148 (1964). ER 404 codifies this general rule, providing that character evidence is not admissible in civil cases for the purpose of proving action in conformity therewith, including evidence of other crimes, wrongs, or acts. The only character evidence that may be admissible, and only in very limited circumstances, is a witness’s character for truthfulness or untruthfulness (i.e., credibility). ER 608. Thus the testimony of Ms. Ifanse and Mr. Napier regarding their alleged personnel experience is not admissible to establish what Bennett claims occurred.<sup>19</sup>

Seventh, the actions post-2011 are not imputable to the department either. Mr. Bennett never reported the “fried chicken” comment so it is

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<sup>19</sup> The testimony of Ms. Ifanse also severely undermines Bennett’s claims WCCW is a racially hostile environment where the management fails to address workers concerns. According to Ms. Ifanse’s testimony, the environment at the prison has changed since Ms. Parnell became the superintendent. *See Ifanse Dep. p. 7, l. 20*. She described an incident which happened in the past which she claims was not addressed. When asked if this continues to happen, her response was: “When Ms. Parnell came, no. Like I said, everything changed.” *See Ifanse Dep. p. 9 ll. 6-8*. Her statement is particularly relevant because at least by 2011, Ms. Parnell was the superintendent of WCCW.

hard to claim DOC should have known about this incident. Likewise, DOC only learned about the “Grand Pooh-Bah” incident when DOC began investigating an allegation that Mr. Bennett had acted inappropriately. The alleged statements were made by a low level employee and when Mr. Bennett reported the “pooh bah” matter it was investigated. *Estevez*, 129 Wn. App. 774 (the trial court properly dismissed a sexual harassment claim where employer acted promptly in response to reports of hostile work environment). As such, summary judgment is appropriate because the matters are not imputable to DOC.

**F. The Trial Court Properly Dismissed Mr. Bennett’s Claims for Intentional Infliction of Emotional Distress/Outrage**

The trial court properly dismissed Mr. Bennett’s Outrage claim because the facts alleged by Mr. Bennett do not meet the threshold showing required to state a claim for outrage. General workplace disputes and indignities do not give rise to a claim of outrage absent extreme circumstances. Further, a state agency cannot be held liable for the intentional torts committed by its employees. *Snyder v. Medical Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 35 P.3d 1158 (2001). As such, the trial court properly granted summary judgment.

To state a claim for the tort of outrage, a plaintiff must show: “(1) extreme and outrageous conduct; (2) intentional or reckless

infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress.” *Snyder*, 145 Wn.2d at 242. Outrageous conduct is conduct “which the recitation of the facts to the average member of the community would arouse his resentment and lead him to exclaim ‘outrageous’.” *Hope v. Larry Mkts.*, 108 Wn. App. 185, 196, 29 P.3d 1268 (2001). Moreover, “[t]he conduct in question must be 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.” *Snyder*, 145 Wn.2d at 242.

The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability. *Hope*, 108 Wn. App. at 196. As a general proposition, workplace disputes and indignities do not give rise to a claim of outrage absent extreme circumstances. *Dicomes v. State*, 113 Wn.2d 612, 630-31, 782 P.2d 1002 (1989); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 483-74, 98 P.3d 827 (2004). *But cf. Robel v. Roundup Corp.*, 148 Wn.2d 35, 51-55, 59 P.3d 611 (2002).

In the present case, Mr. Bennett did not allege any facts which would constitute the tort of outrage. His complaints amount to workplace disputes, none of which are so extreme or outrageous so as to cross the

bounds of civilized society. Consequently, the trial court properly dismissed Mr. Bennett's claims for outrage.

**V. CONCLUSION**

The Pierce County Superior Court properly granted summary judgment in favor of the State of Washington and Department of Corrections. The order granting summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 13 day of January, 2016.

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**PROOF OF SERVICE**

I certify that I had served a copy of the Brief of Respondents on appellant's counsel of record on the date below by having it served by e-mail and by hand-delivery at the office of:

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

DATED this 13<sup>th</sup> day of, January, 2016, at Tacoma, Washington.

  
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KATHERINE KERR, Legal Assistant

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