

NO. 29043-3-III

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

JAMES CROWNOVER, HAROLD DELGADO, ROY GILLIAM,
JOEL HAVLINA, and KELLI GINN

Appellants,

v.

THE STATE OF WASHINGTON,
DEPARTMENT OF TRANSPORTATION,

Respondent

RESPONDENT'S RESPONSE BRIEF FOR HAROLD DELGADO

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I. INTRODUCTION

Harold Delgado claimed that he experienced a hostile work environment because of his gender based upon the exchange of a joking comment between male co-workers in 1999. In 2003, Delgado asserted the joke he heard in 1999 was offensive, but admitted the joking stopped in 1999. Both Delgado and the other male employees who participated in the joking in 1999 were disciplined for inappropriate conduct in the workplace. Delgado admits that he is not aware of any offensive sexual jokes occurring after 1999. Delgado did not identify any sexual conduct or comments within the statute of limitations, so his claims were dismissed on summary judgment.

Delgado's retaliation claim was dismissed on summary judgment because Delgado admitted that there was no negative employment action that was connected to any complaint. Delgado's remaining claims for race discrimination and disability discrimination proceeded to trial. Delgado voluntarily dismissed the claims being tried after a week of trial and prior to the closing of his case.

The notice of appeal only relates to the two claims dismissed on summary judgment, sexual harassment hostile work environment and retaliation. Delgado raises the race and disability claims in his briefing, but they are not subject to this appeal because Delgado voluntarily

dismissed those claims, pursuant to CR 41(a)(1)(B), after a week of trial before a jury. Under RAP 9.12, this court's review of the trial court's order granting summary judgment will only consider the issues and evidence called to the attention to the trial court at the time the summary judgment order was issued.

II. STATEMENT OF ISSUES ON APPEAL

- 1. Whether Delgado's Sexual Harassment Claim is Barred by the Applicable Statute of Limitations When the Only Conduct Alleged Occurred in 1999?**
- 2. Whether Delgado Identifies Any Facts to Support an Actionable Gender Discrimination Claim?**
- 3. Whether the Trial Court Properly Found that Delgado Failed to Identify Sufficient Facts to Support a Claim for Retaliation?**

III. STATEMENT OF THE CASE

A. Procedural Background

Harold Delgado ("Delgado") filed suit on September 6, 2005, against the Washington State Department of Transportation ("DOT") asserting claims for hostile work environment, retaliation, and handicap discrimination. CP1435-1436. The DOT moved for summary judgment dismissal of all of Delgado's claims. CP 1310-1332. The court granted summary judgment dismissal of Delgado's claims for retaliation based upon union activity, retaliation for reporting a hostile work environment,

and for sexual discrimination. CP 376-377. The court denied summary judgment dismissal of Delgado's claims for racial discrimination and failure to accommodate a disability. CP 377. Delgado proceeded to trial on the two remaining claims. After a week of trial, Delgado voluntarily dismissed his claims of race discrimination and disability discrimination pursuant to CR 41, but reserved his right to appeal his claims previously dismissed on summary judgment. CP 1471-1472. Delgado's Notice of Appeal limits his appeal to the January 11, 2008 Order on Summary Judgment. The arguments he raises regarding race and disability discrimination violate the terms of his agreement with the trial court at the time he voluntarily dismissed those claims and are irrelevant to the claims properly before this court.

B. Facts

1. Facts Relating to Delgado's Sexual Harassment Hostile Work Environment Claim.

Delgado was employed as a maintenance technician at the DOT from November 1993 through April 2005. CP 1210; CP 1105-1111. Delgado was assigned to the Connell crew. CP 1258. Mark Brewster became a lead tech in Pasco in November of 2000, and prior to that he was a maintenance technician in Pasco. CP 1062-1063. In his deposition

Delgado testified that he had worked with Brewster as a lead tech “several times” throughout his employment with DOT. CP 1256.

In 2002, when Brewster had to work with the Connell crew, he described the Connell crew as lazy, expressed dissatisfaction with their work, and described them as a waste of breath. CP 345, 448, 450.

Brewster accused James Crownover, one of the members of the Connell crew of creating a hostile work environment. CP 448, 450. In response to Brewster’s criticism, three members of the Connell crew (Joel Havlina, Crownover and Delgado) complained that Brewster in the past had engaged in several sexual jokes and used profanity between 1990 and 2001. CP 448, 1258. The DOT had the Office of Equal Opportunity (“OEO”) conduct an investigation of the complaints. *Id.*

OEO encouraged Delgado to report everything. CP 1246 L. 8-10. In the OEO investigation, Delgado complained that in 1999 he heard two to four sexual comments by Brewster and heard Brewster use the F word. CP 1259, 1261-1262, 1270-1271. Witnesses reported that Delgado mutually participated in the joking exchange in 1999, and that Delgado told the joke to others. CP 1270-1271. “It was a joking back and forth thing.” CP 1270-1271. It was described by the independent witnesses as being “in fun, just construction talk.” CP 1271. Delgado reported to the

OEO investigator that since 1999 “Mr. Brewster has not made any further comments to him.” CP 1270.

In his deposition, Delgado admitted that he participated in the sexual joke in 1999. CP 1253. It was not uncommon for the all male Connell crew to willingly participate in jokes of a sexual nature, and no one complained at the time of the joking or appeared to be offended. CP 513, 1035-1036. Both Delgado and Brewster were disciplined for the inappropriate joking exchange at work, but the joking exchange was not an OEO violation because it was not related to gender. CP 1262, CP 1253, CP 341-342.

In his deposition, Delgado admitted that after the joking exchange in 1999 with Brewster regarding a blow job “that he never did say that to me again.” CP 1253 L. 14-15. He further confirmed that he could not recall any sexual comments made “by anybody” after the discipline. CP 1254 L. 2-9.

2. Delgado Complained About Racial Jokes by a Co-Worker Max Yager

Delgado had the opportunity to try his race discrimination claims to a jury, although he dismissed those claims, pursuant to CR 41, after a week of trial. RP (January 15, 2008) at 163. Those claims are not properly before this court, since they were not determined by summary

judgment and were not identified in Delgado's Notice of Appeal. RAP 9.12.

But, since Delgado discusses these claims in his opening brief, DOT includes a clarification of Delgado's allegations in order to ensure the court has the full background for these non-reviewable claims.

In the spring of 2002, Delgado claimed that he reported several jokes or comments made by a co-worker Max Yager that were derogatory toward Mexicans. CP 1228. In his deposition, Delgado testified that Yager had made a total of between 5-7 comments or jokes which were derogatory toward Hispanics. CP 1232 L. 13-15. Mr. Yager received a letter of reprimand that reportedly controlled the problem. CP 1234-1235.

3. Facts Relating to Delgado's Retaliation Claim.

Delgado admits that the DOT never took any negative action against his employment. CP 1247-1248.

Q. Did one of your managers take some action against you that had a negative impact on your job? We've talked about the comments, we've talked about the attitude. What I am talking about is, did someone take some action to affect your job in a negative way?

A. I can't remember that. I don't remember.

CP 1247 L. 24- CP 1248 L. 5.

Delgado was never disciplined or reprimanded except for legitimate and appropriate reasons. CP 1240, 1250. On one occasion, in 2004, Delgado was spoken to because it was discovered that he was getting paid with state funds for 30 minutes of time when he was not at work. CP 1235-1240. Delgado agreed that being paid to work on state time when you are not actually working is something the supervisor should address. CP 1240. Delgado admitted that it was appropriate for his supervisor to talk to him about this. *Id.* Supervisor Tom Lenberg talked to Delgado about the misuse of his time and told Delgado that he had to stop and that was the end of it. CP 1238-1240.

In July 22, 2003, Lenberg also talked to Delgado about why a snow plow had not been picked up as directed for Connell. CP1243-1244. Delgado describes it as his supervisor was upset that Delgado did not complete the assigned task. CP 1243 L. 24- CP 1244 L. 1. Delgado was called into the office by his supervisor “to ask me why I hadn’t taken the snowplow to Connell.” CP 1243 L. 20-21. Delgado was not aware of his supervisor being upset or talking to him about that for any reason other than his failure to deliver the snow plow as requested. CP1243-1244. Appellant Roy Gilliam, the Connell lead tech, claimed that it was his fault that the order was not followed. CP 1295. Once the circumstances surrounding Delgado’s failure to follow the order were explained, it was

over. *Id.* Other than Mr. Lenberg asking some questions and Delgado explaining the circumstances, “no other action was taken.” CP 1239 L. 9-14.

After Delgado left his employment with DOT, he received a written letter advising him of a safety violation that had occurred where a burn site was not properly signed. CP 1249-1252. The other employees responsible for signing that job also received a letter about the safety violation. CP 1084. Lenberg was firm on safety issues, and there was no other reason identified for him addressing the errors in signing by the Connell crew. CP 1037-1040.¹

Delgado acknowledged in each incident that his supervisor was addressing work incidents at the time the work performance issue arose. CP 1240, CP 1249-1250. Delgado acknowledged that it was appropriate for management to address his misconduct. CP 1235, 1240. There was no contention that DOT management did anything wrong in addressing Delgado’s misconduct. CP 1240, 1243-1244. Delgado simply believed that Max Yager, a co-worker he complained about, was the person who instigated the conversations by making his supervisor, Tom Lenberg,

¹ Q. So you think Tom [Lenberg] wanted to be firm on these issues because he was newly promoted and wanted to set a tone that he was not going to tolerate this type of behavior?
A. Yes. ...
CP 1040 L. 8-14.

aware of Delgado's misconduct. CP 1244, CP 431-432. Delgado admitted that his supervisor Lenberg talking to him about the work issues was all there was to it. CP 1238-1239, 1243-1244.

IV. STANDARD OF REVIEW

The standard of review for cases resolved on summary judgment is a matter of well-settled law. This court considers those matters de novo, relying upon the same evidence presented to the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id.* If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id.* On review of an order granting a motion for summary judgment, an appellate court will consider only evidence and issues that have been called to the attention of the trial court. RAP 9.12. In Delgado's case, the evidence considered during the jury trial of his race and disability discrimination claims has no relevance to the issues identified in his Notice of Appeal. Generally, questions not raised before the trial court may not be raised for the first time on appeal. RAP 2.5(a); see *Lawson v. Helmich*, 20 Wn.2d 167, 179, 146 P.2d 537 (1944).

V. ARGUMENT

A. Delgado's Hostile Work Environment Claim Based upon Gender is Barred by the Statute of Limitations.

Claims under the Washington Law Against Discrimination (WLAD) are subject to the general three-year statute of limitations of RCW 4.16.080(2). RCW 4.16.080(2); *Antonius v. King County*, 153 Wn.2d 256, 261-262, 103 P.3d 729 (2004). "The Plaintiff must establish one or more acts based upon the same discriminatory animus within the statute of limitations." *Antonius*, supra at 265. All of the alleged sexually engendered comments asserted by Delgado accrued substantially more than three years before he filed suit.

Delgado filed suit on September 6, 2005. CP 1435. The only complaint of sexually engendered comments occurred in 1999. Delgado admitted there were no comments made to him after 1999. Delgado's sexual harassment claim relating to gender is barred by the statute of limitations.

The only response by Delgado to the statute of limitations defense was to assert that the court should apply a six year statute of limitations. RP (January 15, 2008) pp. 3-10. The trial court correctly found that a three year statute of limitations is applicable, and that there were no

identified incidents of sexual or gender related comments or conduct identified by Delgado after 1999. RP (January 15, 2008) pp. 10, 165.

B. Delgado's Claims Against Brewster Do Not Support a Claim for Hostile Work Environment.

Even if the alleged two to four jokes with a sexual reference occurred within the statute of limitations (which they did not), Delgado's claim fails to meet the necessary elements for a hostile work environment. To establish a prima facie hostile work environment claim, the employee must prove that: (1) "the harassment was unwelcome," (2) "the harassment was because of sex," (3) the conduct was so severe and pervasive that "the harassment affected the terms and conditions of employment," and (4) "the harassment is [imputable] to the employer." *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985); *Estevez v. Faculty Club of University of Washington*, 129 Wn. App. 774, 120 P.3d 579 (2005).

1. Two male co-workers willingly participating in a joke of a sexual nature does not identify conduct motivated by gender.

Delgado must prove the alleged conduct was motivated by gender.

RCW 49.60.180(3) provides, in relevant part:

It is an unfair practice for any employer ... {t}o discriminate against any person in compensation or in other terms or conditions of employment because of age, sex,

marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability.

Hostile work environment sexual harassment is a form of gender discrimination and requires the plaintiff to prove the conduct occurred because of gender. *Glasgow*, 103 Wn.2d at 405.² The employee has the burden of producing competent evidence that gender was the motivating factor for the harassing conduct. *Doe v. State, Dept. of Transp.*, 85 Wn. App. 143, 149, 931 P.2d 196 (1997).

Conduct which is merely tinged with offensive sexual connotations is not actionable unless it is directed at a person because of their gender. *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). “It is not sufficient to show that the employee suffered embarrassment, humiliation, or mental anguish arising from nondiscriminatory harassment.” *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 298, 57 P.3d 280 (2002).

Delgado’s claim that he willingly exchanged a joke with a male coworker involving a sexual subject matter does not identify conduct motivated by gender. The use of profanity at work in front of all co-

² *Kahn v. Salerno*, 90 Wn. App. 110, 118-119, 951 P.2d 321, review denied, 136 Wn.2d 1016, 966 P.2d 1277 (1998); *Campbell v. State*, 129 Wn. App. 10, 19, 118 P.3d 888 (2005). See also *Payne v. Children’s Home Soc. of Washington, Inc.*, 77 Wn. App. 507, 514, 892 P. 2d 1102 (1995); *Schonauer v. DCR Entertainment, Inc.*, 79 Wn. App. 808, 820, 905 P.2d 392 (1995); *Doe v. State, Dept. of Transp.*, 85 Wn. App. 143, 149, 931 P.2d 196 (1997).

workers also does not identify gender related conduct. When the evidence does not support the contention that the conduct was motivated by gender, summary judgment is warranted.

2. The conduct is not severe and pervasive.

Any harassment must be “sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment ... to be determined with regard to the totality of the circumstances.” *Glasgow*, 103 Wn.2d at 406-07. The totality of the circumstances includes taking into consideration the frequency and severity of the conduct. *Id.*; *Adams*, 114 Wn. App. at 296-97. The conduct cannot be merely “[c]asual, isolated or trivial manifestations of a discriminatory environment [which] do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law.” *Glasgow*, 103 Wn.2d at 406. A civil rights code is not a “general civility code.” *Adams*, 114 Wn. App. at 296-297, citing, *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (quoting *Oncale*, 523 U.S. at 81). (“The conduct must be so extreme as to amount to a change in the terms and conditions of employment.”).

The courts should “filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.” *Jernigan v.*

Alderwoods Group, Inc., 489 F.Supp.2d 1180, 1199 (D. Or. 2007), quoting *Faragher*, 524 U.S. at 787-88, 118 S.Ct. 2275. Merely offensive conduct is insufficient to identify a hostile work environment claim. *Washington v. Boeing Co.*, 105 Wn. App. 1, 10-11, 19 P.3d 1041 (2000). Male co-workers willingly exchanging a joking comment about a blow job on two to four occasions in 1999 does not rise to the level of severe or pervasive conduct intended to be protected by the law on discrimination.

3. The conduct cannot be imputed to the employer.

To impute liability to an employer for a co-worker's actions in a hostile workplace claim pursuant to RCW 49.60 et seq., the plaintiff has the burden of proving that the employer “(a) authorized, knew, or should have known of the harassment, and (b) failed to take reasonably prompt and adequate corrective action.” *Herried v. Pierce County Public Transp. Ben. Auth. Corp.*, 90 Wn. App. 468, 474, 957 P.2d 767 (1998) (quoting *Glasgow*, 103 Wn.2d at 407). Liability cannot be imputed to an employer who acts promptly with investigations and recommendations reasonably calculated to resolve the conflicts. *Herried*, 90 Wn. App. at 475; *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047 (9th Cir. 2007).

In this case, Delgado did not report the alleged 1999 comments until years later, after Brewster was critical of his work. Despite the delay in reporting or the motive for reporting at that time, the DOT conducted an

investigation and disciplined the individuals engaging in the inappropriate joking. No further sexual jokes or comments were reported to have occurred after the discipline. Action is presumed to be adequate when the conduct stops. Therefore, Delgado fails to establish a hostile work environment claim even if his claim was not barred by the statute of limitations.

C. Delgado Failed to Identify Any Facts that An Adverse Employment Action Was Taken Related to Any Complaint.

In order to establish a prima facie case of retaliation, the plaintiff must show (1) he engaged in a statutorily protected activity; (2) he was discharged or had some adverse employment action taken against him; and (3) retaliation was a substantial motive behind the adverse employment action. *Davis v. West One Automotive Group*, 140 Wn. App. 449, 166 P.3d 807, 813 (2007). Adverse employment actions include “a change in employment conditions that is more than an ‘inconvenience or alteration of job responsibilities.’” *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827. An adverse employment action must be “reasonably likely to deter employees from engaging in protected activity.” *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000). This standard, as described in *Vasquez v. County of Los Angeles*, 349 F.3d 634 (9th Cir. 2003), must be more than just a subjective “reasonable employee” approach. It must have

an objective component that the conduct is actually adverse and is “reasonably likely” to deter a protected activity. *Id.* at 646.

Delgado must be able to prove that retaliation for a protected activity was the substantial motive for the employment action that was taken. *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 420-421, 161 P.3d 406 (2007). Once a legitimate reason is offered for an adverse employment action, the plaintiff has the burden to prove “the employer’s proffered explanation is unworthy of credence.” *Estevez*, 129 Wn. App. at 800. When a court inquires as to retaliatory motive, it will take into account the “[p]roximity in time between the adverse action and the protected activity, along with satisfactory work performance.” *Campbell*, 129 Wn. App. at 23. Plaintiff must produce “specific, substantial evidence of pretext” in order to avoid summary judgment. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998); *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988).

In this case, Delgado does not identify any adverse employment action taken by any manager that is related to a protected activity. Delgado complained about Max Yager making racial jokes in the spring of 2001, and he complained about Mark Brewster making two to four sexual jokes in October 2003. Both of those individuals were reprimanded for

engaging in any inappropriate jokes in the workplace, and the conduct reportedly stopped.

Delgado admits that he cannot recall or identify any negative employment action taken against him. His performance was addressed on occasion by his supervisor, but he acknowledged that his supervisor appropriately addressed the conduct when it occurred.

In 2004, Delgado had been misusing state funds by claiming 30 minutes of work time when Delgado was not on work time. His supervisor told him the conduct had to stop. Delgado admitted that the misuse of state funds is a serious issue, and that it was appropriate and reasonable for his supervisor to address it with him. His supervisor did not do anything other than talk to him about it, and ask that it stop.

In 2003, he was told by his supervisor to pick up a snow plow in Pasco to have it on hand in Connell for safety reasons. Delgado failed to pick up and return the plow to Connell. His supervisor asked questions about why the orders had not been followed, nothing more.

After Delgado left his employment in May 2005, Delgado received a letter relating to a safety warning that a burn site was not properly signed. All of the individuals involved in that job received a letter. CP 1084. The only reason for the letter was because Tom Lenberg took safety

violations seriously, and the signing used by the Connell crew did create a safety hazard. CP 1037-1040.

These ordinary and normal work exchanges are not an adverse employment action. There is no evidence that these exchanges occurred for anything other than legitimate work reasons. By Delgado's own admission, his supervisor was addressing legitimate work performance issues with him at the time those issues arose.

D. Delgado's Race Discrimination and Disability Discrimination Claims Proceeded to Trial and are Not Subject to Appeal.

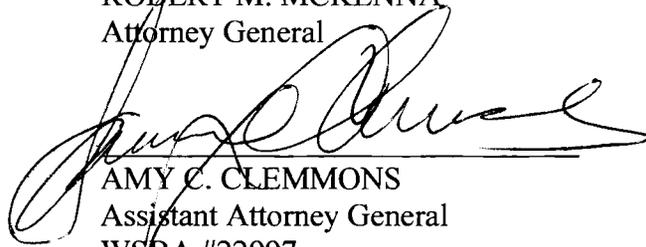
Delgado dismissed his race and disability discrimination claims, pursuant to CR 41, after a week of trial before a jury. At the time he voluntarily dismissed his claims, he expressly retained the right to appeal the two claims the trial court had dismissed on summary judgment (hostile work environment and retaliation). CP 1471-1472. His Notice of Appeal was properly limited to his hostile work environment and retaliation claims. RAP 9.12. The evidence related to Delgado's race and disability discrimination claims, as developed in his trial on those issues, is not relevant to the trial court's award of summary judgment on his hostile work environment and retaliation claims and is beyond this court's scope of review in this appeal. RAP 2.5(a); 9.12.

VI. CONCLUSION

DOT respectfully requests that this court affirm the trial court's award of summary judgment on Delgado's hostile work environment and retaliation claims. No admissible evidence supports either claim.

RESPECTFULLY SUBMITTED this 12th day of March, 2011.

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CERTIFICATE OF SERVICE

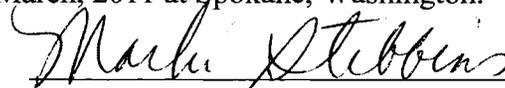
I certify under penalty of perjury in accordance with the laws of the State of Washington that the original of the preceding was hand delivered and filed at the following address:

Court of Appeals of Washington, Division III
500 North Cedar Street
Spokane, Washington 99201-2159

And that a copy of the same was served by First Class Mail on counsel for Plaintiff/Appellants at the following address:

George Fearing
Leavy, Schultz, Davis & Fearing, P.S.
2415 West Falls Avenue
Kennewick, WA 99336

DATED this 14 day of March, 2011 at Spokane, Washington.


MARKI STEBBIN