

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 JOEL HAVLINA

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF ISSUES ON APPEAL.....	6
	A. Whether Havlina’s hostile work environment sexual harassment claim is barred because there is no discriminatory conduct that occurred or was reported within the statute of limitations?.....	6
	B. Whether the facts, as alleged by Havlina, meet all the elements of a claim for hostile work environment sexual harassment?.....	6
	C. Whether Havlina identifies facts sufficient to support a claim for retaliation?.....	6
	D. Whether Havlina’s claims for constructive discharge and disability discrimination are precluded by the previous PAB ruling, affirmed by this court, and because Havlina did not appeal the order dismissing those claims?.....	6
	E. Whether Havlina can avoid summary judgment by altering his own sworn testimony in an affidavit in response to a summary judgment motion?.....	6
III.	STATEMENT OF THE CASE.....	7
	A. Background Information.....	7
	B. Havlina asserted in this litigation that he had emotional distress caused by comments made by Mark Brewster and Jim Leroue.	8
	1. The Connell lead tech Jim Leroue got angry over the Connell crew’s work performance.	8
	2. Havlina’s Complaints Against Mark Brewster were Initiated Due to Brewster’s Dissatisfaction with the Connell Crew’s Performance.	10

a.	Havlina complained to the OEO about a handful of joking sexual or rude comments occurring over a decade, and all occurring before 2001.	14
b.	Havlina added one complaint to his list in response to written interrogatories during the litigation.	16
c.	Havlina testified that four comments caused him emotional distress.....	17
d.	Sexual jokes and construction talk was not uncommon amongst the all male Connell crew.	18
e.	There were no reported sexual comments or jokes after 2001.	18
f.	In response to the summary judgment on the statute of limitations, Havlina asserted that one comment about spending “quality time” together occurred within the statute of limitations.....	21
g.	It is not disputed that no one ever reported to DOT management that the March 2004 “quality time” comment was purportedly sexual in nature or objectionable in any regard.....	25
C.	Facts Relating to Havlina’s Claim for Disability Discrimination.....	28
D.	Facts Relating to Havlina’s Claim of Retaliation.	28
1.	Havlina was never disciplined, and the one verbal counseling he received was appropriate.	29
2.	There is No Identifiable Change in Havlina’s Written Performance Evaluations.....	29
3.	There are no Facts That Any Employee was Given Preference Over Havlina for Spray Assignments.....	30

E.	Extraneous Issues Raised in Havlina’s Brief Not Related to His Claim for Gender Discrimination or Retaliation.	33
1.	Max Yager wore a t-shirt with a joke on it in 1994.....	33
2.	The Connell crew was sent to Pasco to work.	34
IV.	STANDARD OF REVIEW.....	35
V.	LAW/ARGUMENT	35
A.	Havlina’s Claims are Barred by the Statute of Limitations.	35
1.	The one innocuous March 2004 comment is not discriminatory in nature and cannot enable Havlina to avoid the application of the statute of limitations to the alleged untimely conduct.....	37
2.	The DOT disciplinary action in 2003 severs any connection to the asserted untimely acts.	42
B.	The Alleged Conduct Does Not Constitute a Hostile Work Environment.....	44
1.	The March 2004 Comment Is Not Related to Gender.....	44
2.	The Conduct Is Not Sufficiently Severe or Pervasive.....	47
3.	There is No Conduct Imputed to the Employer within the Statute of Limitations.	52
C.	Havlina Cannot Challenge his Disability Separation.....	55
D.	There are no Facts to Support a Claim for Retaliation.	56
E.	Havlina Cannot Create an Issue of Fact by Contradicting His Own Sworn Testimony.....	59
VI.	CONCLUSION	60

TABLE OF AUTHORITIES

Cases

<i>Adams v. Able Bldg. Supply, Inc.</i> 114 Wn. App. 291, 57 P.3d 280 (2002).....	passim
<i>Antonius v. King County</i> 153 Wn.2d 256, 103 P.3d 729 (2004).....	35, 36, 37, 56
<i>Arendale v. City of Memphis</i> 519 F.3d 587 (6th Cir. 2008)	51
<i>Baldwin v. Sisters of Providence in Wash., Inc.</i> 112 Wn.2d 127, 769 P.2d 298 (1989).....	60
<i>Brooks v. City of San Mateo</i> 229 F.3d 917 (9 th Cir. 2000)	52
<i>Broyles v. Thurston County</i> 147 Wn. App. 409, 195 P.3d 985 (2008).....	47
<i>Burkhart v. American Railcar Industries, Inc.</i> 603 F.3d 472 (8 th Cir. 2010)	40
<i>Campbell v. State</i> 129 Wn. App. 10, 118 P.3d 888 (2005).....	57
<i>Carrero v. New York City Housing Authority</i> 890 F.2d 569 (2d Cir. 1989)	47
<i>Cecil v. Louisville Water Co</i> 301 Fed.Appx. 490 (6 th Cir. 2008).....	49, 51
<i>Clark County School District v. Breeden</i> 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001).....	48
<i>Clarke v. State Attorney General's Office</i> 133 Wn. App. 767, 138 P.3d 144 (2006).....	45

<i>Coville v. Cobarv Servs., Inc.</i> 73 Wn. App. 433, 869 P.2d 1103 (1994).....	44
<i>Cox v. Oasis Physical Therapy, PLLC</i> 153 Wn. App. 176, 222 P.3d 119 (2009).....	36
<i>Craig v. M & O Agencies, Inc.</i> 496 F.3d 1047 (9th Cir. 2007)	44
<i>Davis v. West One Automotive Group</i> 140 Wn. App. 449, 166 P.3d 807 (2007).....	56
<i>Doe v. State, Dept. of Transp.</i> 85 Wn. App. 143, 931 P.2d 196 (1997).....	45, 58, 59
<i>Dolan v. U.S.</i> 2008 WL 362556, p. 15 (D. Or. 2008)	48
<i>Ellison v. Brady</i> 924 F.2d 872 (9th Cir. 1991)	54
<i>Estevez v. Faculty Club of University of Washington</i> 129 Wn. App. 774, 120 P.3d 579 (2005).....	57
<i>Fairley v. Potter</i> 2003 WL 403361 (N.D.Cal. Feb.13, 2003)	43
<i>Faragher v. City of Boca Raton</i> 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).....	48, 49
<i>Fuller v. City of Oakland, Cal.</i> 47 F.3d 1522 (9th Cir. 1995)	48
<i>Glasgow v. Georgia-Pacific Corp.</i> 103 Wn.2d 401, 693 P.2d 708 (1985).....	44
<i>Gross v. Burggraf Construction Co.</i> 53 F.3d 1531 (10th Cir. 1995)	49, 50
<i>Harris v. Forklift Systems, Inc.</i> 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).....	47, 48

<i>Havlina v. Washington State Department of Transportation</i> 142 Wn. App. 510, 178 P.3d 354 (2007).....	28, 55
<i>Hernandez v. Spacelabs Med., Inc.</i> 343 F.3d 1107 (9th Cir. 2003)	51
<i>Herried v. Pierce County Public Transp. Ben. Authority Corp.</i> 90 Wn. App. 468, 957 P.2d 767 (1998).....	46, 54
<i>Howley v. Town of Stratford</i> 217 F.3d 141 (2d Cir. 2000)	49
<i>In re Marriage of Maxfield</i> 47 Wn. App. 699, 737 P.2d 671 (1987).....	55
<i>Janson v. North Valley Hosp.</i> 93 Wn. App. 892, 971 P.2d 67 (1999).....	44
<i>Kahn v. Salerno</i> 90 Wn. App. 110, 951 P.2d 321 (1998).....	48
<i>Kirby v. City of Tacoma</i> 124 Wn. App. 454, 98 P.3d 827 (2004).....	56
<i>Lovelace v. BP Products North America, Inc.</i> 252 Fed.Appx. 33 (6 th Cir. 2007).....	39, 40, 51
<i>Loveridge v. Fred Meyer, Inc.</i> 125 Wn.2d 759, 887 P.2d 898 (1995).....	55
<i>Lucas v. Chicago Transit Authority</i> 367 F.3d 714 (7th Cir. 2004)	38
<i>Lybbert v. Grant County</i> 141 Wn.2d 29, 1 P.3d 1124 (2000).....	35
<i>Marthaller v. King County Hosp. Dist. No. 294</i> Wn. App. 911, 973 P.2d 1098 (1999).....	59
<i>McGullam v. Cedar Graphics, Inc</i> 609 F.3d 70 (2 nd Cir. 2010).....	37, 38

<i>Michelsen v. Boeing Co.</i> 63 Wn. App. 917, 826 P.2d 214 (1991).....	58, 60
<i>Morris v. Oldham County Fiscal Court</i> 201 F.3d 784 (6th Cir. 2000)	40, 49
<i>National R.R. Passenger Corp. v. Morgan</i> 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).....	passim
<i>Neview v. D.O.C. Optics Corp.</i> 382 Fed.Appx. 451 (6 th Cir. 2010).....	53
<i>O'Connor v. City of Newark</i> 440 F.3d 125 (3d Cir. 2006)	56
<i>Oncale v. Sundowner Offshore Services, Inc.</i> 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).....	45, 48, 52
<i>O'Rourke v. City of Providence</i> 235 F.3d 713 (1st Cir. 2001).....	49
<i>Panelli v. First American Title Ins. Co.</i> 704 F.Supp.2d 1016 (D. Nev. 2010).....	49
<i>Payne v. Children's Home Soc. of Washington, Inc.</i> 77 Wn. App. 507, 892 P.2d 1102 (1995).....	45, 46, 48
<i>Perry v. Ethan Allen Inc.</i> 115 F.3d 143 (2d Cir. 1997).....	47
<i>Pieszak v. Glendale Adventist Med. Ctr.</i> 112 F.Supp.2d 970 (C.D. Cal. 2000)	49
<i>Randall v. Potter</i> 366 F.Supp.2d 104 (D. Me. 2005)	43
<i>Sanford v. Walgreen Co.</i> 2009 WL 3152795 (N.D. Ill. 2009)	43
<i>Sangster v. Albertson's, Inc.</i> 99 Wn. App. 156, 991 P.2d 674 (2000).....	45

<i>Schonauer v. DCR Entertainment, Inc.</i> 79 Wn. App. 808, 905 P.2d 392 (1995).....	45
<i>Seven Gables Corp. v. MGM/UA Entertainment Co.</i> 106 Wn.2d 1, 721 P.2d 1 (1986).....	59
<i>Watson v. Blue Circle, Inc.</i> 324 F.3d 1252 (11th Cir. 2003)	43
<i>Williams v. City of Chicago</i> 325 F.Supp.2d 867 (N.D. Ill. 2004).....	42
<i>Yamaguchi v. United States Dept. of the Air Force</i> 109 F.3d 1475 (9th Cir. 1997)	54

Statutes

RCW 4.16.080(2).....	35
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Rules

RAP 5.2.....	55
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I. INTRODUCTION

Appellant Joel Havlina was a maintenance worker at the Connell shop for the Department of Transportation (“DOT”). The Connell shop housed six male employees (five maintenance techs and one lead tech) and no women, and no managers. When the Connell crew became disgruntled with two different lead techs that criticized their work, they made complaints to the DOT Office of Equal Opportunity (“OEO”) about those two lead techs, Mark Brewster and Jim Leroue. Havlina asserts that the hostile conduct of those two individuals caused him emotional distress.

In 2000, Joel Havlina initiated an OEO complaint regarding Jim Leroue, who had been the lead tech in Connell since 1994. A lead tech was a non-managerial lead worker who passed on directions from the Supervisor to the maintenance crew. The Connell crew complained that Leroue was being too hard on the crew relating to work issues and that he had a temper. It is undisputed that the complaints against Leroue had nothing to do with sexual comments, gender, race or any form of discrimination. In 2000, when Havlina raised complaints about Leroue, he did not make any complaints about anyone else at that time, despite the fact that the majority of Havlina’s later complaints against Mark Brewster related to conduct occurring before 2000.

In November of 2000, Mark Brewster, was promoted to a lead tech position in the Pasco shop. Mark Brewster was always employed in Pasco, and only occasionally worked with the Connell crew. Brewster was a hard worker and a perfectionist who was critical of the Connell crew's work performance.

After Brewster became a lead tech, he worked a job with the Connell crew in the spring of 2002. Brewster complained about the Connell crew being lazy and about the behavior of one of the Connell crew members, Jim Crownover. In response to Brewster's complaints about Crownover and the Connell crew, Havlina reported that between 1990 and 2001 Brewster used profanity and participated in jokes with sexual content with the all male crew. Havlina reported this information years after it occurred because he did not want to work under Brewster's criticism.

Another OEO investigation was initiated based upon the complaints against Brewster. The investigation revealed that sexual jokes and comments amongst the all male crew were not uncommon, but all individuals found to participate in crude or vulgar comments or conduct violated DOT standards of conduct. Brewster was disciplined for making a couple of inappropriate comments over a decade. Havlina and the other

members of the Connell crew all reported to the OEO investigator that the sexual jokes and comments stopped in 2001.

In September 2005, Havlina filed a lawsuit claiming he experienced a hostile work environment based upon a handful of sporadic sexual jokes and comments. Written discovery responses indicated all the conduct occurred outside of the statute of limitations. The DOT filed a motion for summary judgment including the defense that Havlina's claims violated the statute of limitations. Havlina testified that he did not know there was an applicable statute of limitations. In an effort to avoid summary judgment, Havlina generally asserted in an affidavit that the alleged sexual comments occurred "through the years" without identifying any instances occurring within the statute of limitations. The court found that the comment "through the years" could be interpreted to infer that the conduct continued into the statute of limitations. Havlina was deposed a second time to follow up on his new general assertion that conduct occurred "through the years." Havlina's testimony in his second deposition confirmed that he had previously been very thorough in documenting all of his complaints, and that none of them were within the statute of limitations. The only contact Havlina could identify with Brewster within the statute of limitations was that Brewster gave the whole Connell crew an assignment to go to Pasco to work for a week.

Havlina objected to the comment because he did not want to work in Pasco, and Brewster describing working in Pasco for a week as spending some “quality time” together offended him. Havlina admitted that there was no trouble working together for the week, but he felt the term “quality time” inferred that Brewster would be in charge. Although Havlina initially testified that he did not know whether the comment was sexual in nature, he later asserted that “quality time” could have meant something sexual in an effort to avoid the application of the statute of limitations.

No one else present in March 2004 saw any issue with the statements in March 2004 about having to work in Pasco for a week. No one ever reported any concern to the DOT about any conduct or comments occurring within the statute of limitations. The DOT was not aware of any offensive or objectionable conduct occurring after the OEO investigation and resulting discipline.

After Havlina’s second deposition clarifying that the only alleged comment within the statute of limitations was the “quality time” comment to the whole Connell crew in March 2004, another motion for summary judgment was filed. The trial court granted the second motion dismissing the hostile work environment claim based upon the finding that Havlina could not identify any alleged sexual comments or conduct that was ever reported or known to the DOT within the statute of limitations.

Havlina also made a claim for retaliation. However, he admitted in his deposition that he could not identify any facts of any negative employment action motivated by retaliation. The trial court dismissed the claim for retaliation because Havlina failed to identify any facts to support the claim.

In addition, Havlina brought claims for constructive discharge and disability discrimination. Both of these claims were determined to be without merit in two forums: 1) a prior summary judgment order in this case that Havlina did not appeal; and 2) in a Public Administrative Board (PAB) decision that was affirmed by this court. A PAB decision confirmed that Havlina was properly disability separated from his employment at the DOT because after a knee injury he was unable to perform the essential functions of his job.

Havlina appeals the summary judgment order dismissing his hostile work environment and retaliation claims. Although, Havlina does not appeal the trial courts dismissal of his disability discrimination or accommodation claim, Havlina generally infers in support of his retaliation claim that he was terminated from employment. Havlina argues that sexual jokes between male employees are actionable as discrimination regardless of whether it is motivated by gender because the comments were sexual in nature. Although there were no alleged sexual

comments reported or known to any DOT management within the statute of limitations, Havlina argues that his claim that retaliation occurred within the statute of limitations should allow his untimely hostile work environment claim to survive, or in the alternative, that Havlina's subjective impressions of the March 2004 comment can defeat the statute of limitations. The Department of Transportation (DOT) submits that the trial court properly dismissed all of Havlina's claims as required by law, and respectfully requests that the trial court decisions be affirmed.

II. STATEMENT OF ISSUES ON APPEAL

- A. Whether Havlina's hostile work environment sexual harassment claim is barred because there is no discriminatory conduct that occurred or was reported within the statute of limitations?
- B. Whether the facts, as alleged by Havlina, meet all the elements of a claim for hostile work environment sexual harassment?
- C. Whether Havlina identifies facts sufficient to support a claim for retaliation?
- D. Whether Havlina's claims for constructive discharge and disability discrimination are precluded by the previous PAB ruling, affirmed by this court, and because Havlina did not appeal the order dismissing those claims?
- E. Whether Havlina can avoid summary judgment by altering his own sworn testimony in an affidavit in response to a summary judgment motion?

III. STATEMENT OF THE CASE

A. Background Information.

On September 6, 2005, Joel Havlina filed a lawsuit against the DOT claiming he was subjected to a hostile work environment based upon sexually engendered comments and jokes made at work by a male co-worker. CP 1435, 1438. He further claimed he was subjected to retaliation for reporting the concerns, and claimed he was fired because of a handicap and union activity. CP 1435, 1438.

Havlina was a Maintenance Technician who worked out of the Connell shop for the DOT from 1987 through March 2005. CP 344, 875. The Connell shop typically operated during this time with four to five maintenance technicians and one lead tech, all of whom were male employees. CP 841, 844. There were no women and no managers stationed at the Connell shop. CP 765. The Connell crew and Connell lead tech were supervised by the "Supervisor" located in Pasco. CP 542, 686-687. The lead tech that Havlina worked with from March 2000 until he left in 2005 was appellant Roy Gilliam. CP 841. Prior to 2000, Jim Leroue was the Connell lead tech. *Id.* Mike Kukes was Havlina's supervisor from 1999 until February 2001, when Tom Lenberg took over as supervisor. CP 542 L. 6-13, 686-687.

The four male appellants in this lawsuit, including Havlina, worked out of the Connell shop, and they all participated in jokes and comments of a sexual nature, and never seemed offended by these jokes or comments. CP 1035-1036, 1078. Witnesses reported in the OEO investigation that Havlina, Delgado and Crownover all used foul language and made crude jokes and comments. It was more of a mutual exchange and was “in fun, just construction talk.” CP 1069, 1073, 1077-1078, CP 1081 (“things were different 10 years ago.”).

B. Havlina asserted in this litigation that he had emotional distress caused by comments made by Mark Brewster and Jim Leroue.

Havlina complained that two individuals made offensive comments that caused him emotional distress: 1) Jim Leroue, his prior lead tech in Connell; and 2) Mark Brewster, a co-worker out of the Pasco shop. CP 873 L. 13-17, CP 258, CP 309.

Havlina made the following complaints.

1. The Connell lead tech Jim Leroue got angry over the Connell crew’s work performance.

In 2000, Havlina complained about angry outbursts by his then Connell lead tech, Jim Leroue. CP 860. He also complained that Leroue talked down to the crew like they were worthless. CP 458 L. 16. The Leroue issues related to how Leroue expressed his anger and

dissatisfaction over the Connell crews performance. CP 401-406, 1019-1026. In February 2000, the Connell crew submitted a letter of complaint about Leroue being critical of their work, and acting angry and threatening. CP 863. Leroue was immediately placed on administrative leave and then transferred out of the Connell shop because of the Connell crew's complaints about his angry outbursts. CP 1025.¹ The Connell crew never worked with Jim Leroue after January 2000. CP 407, 1025.

It was undisputed that the problems with Leroue were caused by Leroue's personality, nothing else. CP 1028. The Leroue issues admittedly had nothing to do with gender, race, or any protected status. RP (January 15, 2008) at 29; CP 469 L. 13-15.² The appellants never alleged Leroue's conduct was discrimination. *Id.*³ The court found that the Leroue allegations were not relevant to the claims for discrimination because they occurred outside of the statute of limitations, and they did

¹ Prior to the OEO complaint, Havlina felt management provided an appropriate response by talking to Leroue about his temper. CP 458.

² The Court asked in reference to Leroue: I don't think any of these constituted either sexual or racial comments of any kind. We're talking about Mr. Leroue now?

Mr. Fearing: Correct. That would be correct. RP (January 15, 2008) at p. 29 L. 3-6.

³ Havlina alleged Leroue's conduct was "hostile." He attempted to argue that because the DOT had an anti-violence policy preventing profanity and intimidation regardless of whether it was based upon race or gender that the conduct should be actionable as a hostile work environment claim, regardless of whether it was motivated by gender or race. RP (January 15, 2008) at 30-31. Appellants relied upon a DOT policy that prevented: 1) "use of vulgar or profane language toward others" or 2) "disparaging, derogatory, or inflammatory comments or slurs." CP 544; 831-835.

not relate to any form of discrimination. RP (January 15, 2008) at p. 28-29.

2. Havlina's Complaints Against Mark Brewster were Initiated Due to Brewster's Dissatisfaction with the Connell Crew's Performance.

Mark Brewster was a maintenance technician who worked at the Pasco shop. CP 1059-1062. He became a lead tech in the Pasco shop on November 16, 2000. *Id.* Brewster was described as being a perfectionist who was very good at his job and who had high expectations for work performance. CP 1080.

The Connell crew only occasionally worked with members of the Pasco crew. Havlina Opening Brief p. 5, CP 3456, CP 447. The Connell crew complained that on occasions when they worked with Brewster, he would complain about or "nitpick" their work. CP 1047-1050. In the spring of 2002, Mark Brewster worked with the Connell crew for three days on a construction job. CP 345, 448, 450, 1080, 846-848, 1345-1346. As a result of working with the Connell crew, Brewster reported concerns about the Connell crew's work performance and the crew being lazy to the supervisor, Tom Lenberg.⁴ CP 847 L. 24, CP 562 L. 9-10. Brewster referred to the Connell crew as a "waste of breath." CP 864 L. 6. In the

⁴ As a lead tech in 2002, Brewster had no authority to discipline, but would report information to the supervisor who supervised both Brewster and the Connell crew. Brewster was not the boss of the Connell crew. CP 1346 L. 16.

spring of 2002, Brewster also reported that one of the members of the Connell crew, Jim Crownover, was creating a hostile work environment based upon his use of profanity and treatment of another crew member. CP 848 L. 2-4.⁵

In June 2002, Tom Lenberg came to Connell to talk to the Connell crew about Brewster's complaints. Havlina Opening Brief p. 19, par. 2. Joel Havlina and Jim Crownover, who were good friends, were both present. *Id.* In response to Brewster's complaints about Crownover and the Connell crew, in the June 2002 meeting, Havlina asserts that he told Tom Lenberg that he was confused about how Crownover's inappropriate language and conduct could be a hostile work environment when Brewster had used profanity and made inappropriate comments in the past.⁶ CP 867 L. 1, CP 448 L. 13-17, CP 1348-1350; Havlina Opening Brief p. 19, par.

⁵ The term hostile work environment was mistakenly used by DOT employees in reference to an anti-violence policy within the DOT that prevented intimidation or vulgar language, having nothing to do with discrimination. RP (January 15, 2008) p. 30-31; CP 831-835.

⁶ Havlina and Crownover admitted in the 2003 OEO investigation that no specific complaints were provided in the June 2002 meeting with Tom Lenberg. CP 1072. "Mr. Lenberg stated that Mr. Crownover shared that there had been some personal comments made (specifics weren't given) and Mr. Havlina made a similar comment." CP 1072. Tom Lenberg denied knowledge of any specific allegations of sexual comments, but the Connell crew generally complained about Brewster calling them to task or making them work. CP 699-700. Crownover and Havlina later claimed that the one comment regarding Crownover's daughter, and the alleged hip gyration in front of Havlina were reported in June 2002. CP 867 L. 1; CP 1065, CP 448 L. 17-18; CP 867 L. 1. Crownover's Opening Brief p. 20. Solely for the purposes of summary judgment, the DOT assumes plaintiffs' testimony is true and the earliest date a complaint of sexual comments by Brewster was reported was June 2002.

2.

It was undisputed that Brewster's complaints about Crownover and the Connell crew instigated Havlina making a complaint about Brewster. RP (January 15, 2008) at p. 63-64; CP 448 L. 13-20; CP 1348-1350. Crownover describes Brewster's spring 2002 complaint against Crownover as "that's pretty much what started all of this stuff." CP 1346 L. 1-3; CP 448 L. 13-20, CP 1349. Crownover did not recall raising any complaint about Brewster prior to Brewster accusing Crownover of creating a hostile work environment in the spring of 2002. CP 1349 L. 10-17. Even in 2002, Crownover testified that he did not raise the complaint, but he "just followed up after it got started when Joel [Havlina] brought it up." CP 1348 L. 9-16.

After the Connell crew became aware of Brewster's complaints against them at the June 2002 meeting, Havlina organized meetings with the Connell crew in an effort to document and come up with any and all complaints they could against Brewster because they did not want to have to work with him. CP 304-305, Havlina Opening Brief p. 27. Havlina wanted something done with Brewster, so he wanted to document and bring as much forward as possible. CP 304 L. 18-22. Havlina testified that he spent a lot of time and effort documenting his complaints about

Brewster, and his documented list was “as good as I could have done.”

CP 304 L. 23 – CP 305 L. 2.

On September 16, 2003, three Connell crew members, Joel Havlina, Jim Crownover, and Harold Delgado, came forward with their documented list of complaints against Brewster to their supervisor, Tom Lenberg, and the area superintendent, Tom Root. CP 1369. They asserted that Brewster allegedly made several “offensive comments and gestures of a sexual nature to or around them” between 1990 and 2001. CP 1369. Tom Lenberg turned the complaint over to the DOT Office of Equal Opportunity (OEO). CP 1065. On September 18, 2003, two days after the Connell crew member’s presented their list of complaints, OEO had a Human Resource Consultant, Julie Lougheed, initiate an investigation into the complaints. CP 1065.

Havlina admitted in the fall of 2003 when the Connell crew made their complaints that the only thing bothering him at that time about Brewster was his criticism of the Connell crew. CP 459-460.⁷

According to the OEO investigation, and DOT management, the only complaints made by the Connell crew prior to September 2003 were that they did not like working with Brewster because he made them work,

⁷ Q. You are telling me that Mark Brewster is being critical of the Connell crew members. And I’d like to know if there’s anything else that he was doing that bothered you in the fall of 2003?

A. I can’t think of anything at this time.” CP 460 L. 8-12.

nit-picked their work, or took them to task. CP 700; 1047- 1050, 1072, 1080.

In the 2003 OEO investigation, Julie Lougheed, the OEO investigator, encouraged the complainants to report everything. CP 1246 L. 8-10. Havlina, Crownover and Delgado all testified in their depositions that all of their complaints were reported to Julie Lougheed, the OEO investigator. CP 339 L. 22 – CP 340 L. 3; CP 514 L. 22-25; CP 513. Havlina admitted that he put his best effort into documenting and reporting his complaints about Brewster in the OEO investigation because he wanted something done. CP 304-304.

a. Havlina complained to the OEO about a handful of joking sexual or rude comments occurring over a decade, and all occurring before 2001.

Havlina admitted that he had a full opportunity to report any and all complaints to the OEO investigator. CP 477-478. Havlina reported six inappropriate comments by a coworker, Mark Brewster, occurring between 1990 and 2001 as follows: CP 1065-1082.⁸

1) Early 1990's - Brewster allegedly told members of the public to "get the f--- out of here" in response to a corn spill. CP 1073.

2) 1995 - in front of other all male Connell crew members, Brewster allegedly talked about the best piece of ass he had during a lunch

⁸ Also see timeline attached as Appendix B.

break. (Havlina reported this allegation in 2003, none of the asserted witnesses heard this statement). CP 1073-1074.

3) 1998 - Brewster allegedly asked Havlina, at a ditching operation, “where did you get those faggot glasses?” CP 1074. (no witnesses heard this statement). CP 1074.

4) 1998-1999 - Brewster allegedly gyrated his hips in the direction of Havlina when his sister was visiting him. (Havlina and his sister reportedly witnessed this). CP 1075.⁹

5) 2000 - Brewster allegedly joked that he (Brewster) was rated with a plus 3 disability because he had a short peter. CP 1075. (There were no witnesses). CP 1075.

6) Fall 2000 - Havlina claimed he was present when Brewster made an offensive comment to Crownover about Crownover’s daughter. CP 1066.

7) Spring 2001 - Havlina and Brewster disagreed and argued about the placement of a sign on a fatality accident and Havlina asserted that during the argument, Brewster asked him if he wanted to “go f--- in the pick-up.” CP 1076. (There were no witnesses). CP 1076.

⁹ Gilliam initially indicated that he witnessed this, but he later changed his story and acknowledged in the OEO investigation that he did not witness it. CP 1045-1046. Gilliam testified in his deposition that he never witnessed any offensive conduct by Brewster. CP 1075.

Havlina asserts without cite in his Opening Brief that many of the comments allegedly occurred in front of managers. Havlina Opening Brief at p. 39. As noted above, based upon Havlina's own report, none of the alleged comments reported occurred in front of any managers. CP 1073-1076. No managers worked in Connell, and even Roy Gilliam, the lead tech in Connell, never witnessed any offensive sexual comments by Brewster at any point in time. CP 514, 304-305, 765.¹⁰

b. Havlina added one complaint to his list in response to written interrogatories during the litigation.

It was undisputed that the last issue Havlina reported to OEO and DOT managers regarding Brewster was in 2001. CP 1073-1076. After filing this litigation, Havlina was asked to identify any and all alleged objectionable conduct. He admitted that he did "as good as he could" documenting all of his complaints in response to interrogatories in the litigation. CP 305. The last objectionable comment by Brewster identified by Havlina in written discovery was in June 2002. CP 256, 306-307. The June 2002 comment allegedly involved Brewster commenting about breaking in a new employee by the name of Darrin. CP 256, 307.¹¹

¹⁰ Gilliam was interviewed twice by the OEO and he did not report witnessing any sexual comments or conduct by Brewster. He did hear Brewster use the "F" word once in the early 1990's. CP 1073, 1075.

¹¹ Brewster allegedly walked into the shop and said "where's Darrin?" Tom Lenberg allegedly responded "You're going to have to get over that Darrin fixation."

This comment had no sexual content, but Havlina stated “I figured it was sexual in nature myself.” CP 307. It is undisputed that this alleged June 2002 comment was never reported as being objectionable, sexual, or gender related to any DOT management or the OEO. CP 304-305, 310-311, 1065-1082.¹² DOT policies required employees to immediately report any objectionable conduct. CP 833.

c. Havlina testified that four comments caused him emotional distress.

When asked in his deposition if any of Brewster’s comments caused him any emotional distress, Havlina responded that four of the comments caused him emotional distress. CP 477. The four he identified were: 1) the faggot glasses comment, 2) the comment about Crownover’s daughter, 3) the gesture in front of his sister, and 4) the lunchroom comment about the best piece of ass. CP 477. Havlina was asked on February 8, 2006 whether “anything else” caused him emotional distress, and Havlina replied, “I can’t think of anything at this time.” CP 477 L. 10-11.

And then, Brewster allegedly responded that “Well, you’ve got to break them in right. Been there, done that, right, Joel?” CP 307.

¹² Havlina’s counsel attempted to argue the Darrin comment was within the statute of limitations, but Havlina’s affidavit dates the comment as June 2002, and the court recognized that it fell outside of the limitations period. RP (July 7, 2008) p. 23, 37.

d. Sexual jokes and construction talk was not uncommon amongst the all male Connell crew.

It was noted by witnesses in the OEO investigation that Havlina, Delgado and Crownover all used foul language and made crude sexual jokes or comments in Connell, which the Connell crew did not dispute. CP 1069, 1073, 1077-1078, CP 1081 (“things were different 10 years ago.”). The joking sexual comments were described as more of a mutual exchange “in fun, just construction talk.” *Id.* This talk was a tendency “of people from the construction industry.” CP 1076. Gilliam, the lead tech from Connell, testified that sexually engendered comments and jokes were not uncommon amongst the all male Connell crew in the 1990’s, and no one seemed offended. CP 1035-1036. The joking between men went on a lot prior to 2000, but the DOT made people aware that it was an unacceptable practice to tell dirty jokes, and it stopped in 2000. CP 1076.

e. There were no reported sexual comments or jokes after 2001.

Eleven of the maintenance technicians who worked with Brewster on a daily basis in Pasco were all interviewed in the 2003 OEO investigation, and all of them “indicated that they have not heard Mr. Brewster make comments of a sexual nature.” CP 1080. Only the three Connell crew members, Crownover, Havlina and Delgado, made complaints, and all of their complaints related to conduct occurring before 2001. CP 1065, 1078. In the six years that Crownover worked with

Brewster, Crownover admitted that he only heard Brewster make one inappropriate comment, and he did not relate it to gender. CP 445, 139, 1344, 1347, 1349-52, 1358. In the eleven years Delgado worked with Brewster, the only joking exchange Delgado was aware of was described as a mutual joking exchange that occurred in 1999. CP 1078, 1253 L. 14-15, see also the Delgado Response Brief. Both Crownover and Delgado testified that they were not aware of any sexual comments occurring after 2001.¹³

Q. In the Lougheed investigation, Julie Lougheed reports that you, Joel Havlina, Harold Delgado and Roy Gilliam all reported that the sexually engendered comments or conduct had stopped in 2001. Can you identify any sexually engendered comments or misconduct after 2001?

A. No.

CP 1366 L. 1-7. The other three Connell crew members, Gilliam, Herron, and Yager, all indicated that they were never aware of any sexual comments by Brewster. CP 1072, 1075, 1080.

It was undisputed that there were no complaints made to the OEO of any sexual comments occurring after 2001. CP 1065-1082. No complaints were ever made to Tom Lenberg after he became the

¹³ Crownover testified in his 2007 deposition that other than the one alleged comment in the fall of 2000, he could not recall being present or ever hearing any other sexually engendered comments by Brewster. CP 1339, CP 1342 L. 24-CP 1343 L. 19. Delgado testified in his February 7, 2006 deposition that he was not aware of any sexual comments by Brewster after 1999. CP 1253-1254.

supervisor of both the Pasco and Connell crews in February 2001, relating to any alleged sexual comments or conduct that had occurred after he became supervisor. CP 1368-1386, CP 686, 696-697. The complaints made to Lenberg after 2002 were all talk of what happened back in the 1990's, nothing that had occurred under Lenberg's supervision. CP 696-697; CP 1065-1082.

Havlina asserted that he exhausted his complaints against Brewster in writing both to the OEO investigator and in response to written interrogatories. CP 339 L. 22-340 L. 3. Written interrogatories required the appellants, including Havlina, to identify any complaints that were not reported to the OEO investigator Julie Lougheed. CP 390-391. None were identified. *Id.*

Q. Is it safe to say as much time and effort as you were putting into trying to get together and take notes, that you felt pretty comfortable that you were trying to give Julie Lougheed all the information you had?

A. I believe so.

Q. And to your knowledge, did Julie Lougheed address all of the information you gave her?

A. Yes.

CP 305 L. 16-23.

Havlina was very thorough in documenting all of his complaints and none of the documented complaints occurred within the statute of

limitations. *Id.*, CP 1065-1082. Havlina never reported any complaint to any DOT manager relating to any sexual comment occurring after 2001. CP 339-340, 686, 696-697, 1065-1082.

f. In response to the summary judgment on the statute of limitations, Havlina asserted that one comment about spending “quality time” together occurred within the statute of limitations.

It was agreed that the statute of limitations cut off was July 6, 2002. RP (July 7, 2008) at p. 22. After the DOT’s motion for summary judgment was filed in November 2007, Havlina asserted that one comment occurred within the statute of limitations. CP 308, 1331-1333.¹⁴ Having previously failed to identify any timely conduct in his interrogatory responses or his first deposition, Havlina admitted that the only basis for the change in his testimony was that he found out about the statute of limitations.

Q. Did you have a fair opportunity to sit down and put in writing any and all complaints that you had when you responded to interrogatories?

A. Yes, I did, but I didn’t understand about the statute of limitations either.

Q. Okay. So you’re saying that when you went through the Loughheed investigation and when you went through the written responses in this litigation,

¹⁴ Prior to the motion for summary judgment, Havlina admitted in the OEO investigation and in response to the extensive written interrogatories in this case that he could not identify any sexual conduct or comments occurring within the statute of limitations. CP 1065, 304-305, 307.

you didn't understand that there was an applicable statute of limitations –

A. No, I didn't.

Q. -- is that correct?

A. Yeah, I didn't know until December [2007].

Q. Okay. Why would that change your testimony?

A. Because the other stuff was so – I thought it was such a good, what do you call it, proof or – I can't come up with the word for it, but pretty strong evidence.

Q. You thought you had enough?

A. Yes.

CP 307-308.

In opposition to the DOT's motion for summary judgment, Havlina filed an affidavit on December 4, 2007, generally claiming for the first time that Brewster's comments occurred "through the years" without identifying any specific conduct or the years included. CP 345.¹⁵ The trial court found that an inference could at least be drawn from the

¹⁵ The trial court questioned Havlina's counsel at the first summary judgment argument whether any specific comments could be identified within the statute of limitations. RP (January 15, 2008) at p. 79. Counsel responded that Havlina could not identify specific dates or conduct within the statute of limitations. RP (January 15, 2008) at p. 80-82. The affidavit did not specify what was meant by "through the years." CP 345. It certainly can be interpreted consistent with Havlina's prior testimony that the conduct occurred through the years 1990 to 2001. However, Havlina's counsel argued the affidavit meant "this continued all the time during the time that Mr. Havlina had contact with Mr. Brewster, including during – after 2002. And that's what he meant by through the years." RP (January 15, 2008) at p. 80-82.

affidavit that through the years could mean that conduct continued into the statute of limitations period, and therefore denied the first motion for summary judgment. RP (January 15, 2008) at 91.

After his prior discovery responses denying knowledge of any comments or conduct within the statute of limitations, the DOT requested further discovery to follow up on this new allegation that conduct occurred “through the years.” RP (January 15, 2008) at 92. Havlina was further deposed after the first summary judgment motion on March 6, 2008. CP 300. In his second deposition, Havlina testified that the only comment he could identify with Brewster within the statute of limitations was one general exchange in March 2004 about work needs. CP 308 L. 17-309 L. 1, CP 304-308. The March 2004 comment is described by Havlina as follows:

Well, the day we were burning weeds in I believe March of 2004, and Mark Brewster and Larry Wilhelm [the other lead tech in Pasco] came to Connell because we needed a fire hose brought from the Pasco shop. And he said we were to report to Pasco the next week, that Tom Lenberg would be gone, and we’d be able to spend some quality time together, and he’d bring us on board and give us his hand and bring us on board.

And I don’t know if that was sexually engendered, but I found it intimidating...

CP 308 L. 22- 309 L. 5. [emphasis ours]

Havlina testified that Delgado was present and he may also have been offended by the March 2004 comment. CP 308. However, Delgado testified that he was not aware of any offensive or sexual comments by Brewster after 1999. CP 1253-1254.¹⁶ Although Havlina initially admitted that he did not think the March 2004 comment was sexually engendered, he then argued that the term “quality time” could possibly have meant something sexual in nature taking all the past stuff into consideration. CP 309 L. 4-19. He explained that the “quality time” comment bothered him because he did not want to go to Pasco and work under certain people’s scrutiny due to a “lack of trust.” CP 310 L. 2-13. Havlina further explained that the statement about working in Pasco was intimidating because “it’s like he’s going to get us down there and show us whose boss.” CP 309 L. 23-310 L. 1. Havlina did not want to be around any of the people in Pasco. *Id.*

Havlina admitted that working with Brewster in Pasco for the following week in March 2004 went just fine.

Q. Did you go down to Pasco the following week?

A. Yes.

Q. Were there any problems?

A. I can’t think of any.

¹⁶ See also Delgado’s response brief.

Q. So it went smoothly as work operations should?

A. Yes ...

CP 310 L. 14-CP 311 L.21.

g. It is not disputed that no one ever reported to DOT management that the March 2004 “quality time” comment was purportedly sexual in nature or objectionable in any regard.

Havlina admitted that he never complained to any DOT management about the March 2004 comment. CP 256, 310-311, 313. The one person Havlina claims he told about the March 2004 exchange was Roy Gilliam.¹⁷ Gilliam had no idea that any comment after 2001 was sexual in nature, and Gilliam further testified that he never thought any of the conduct was related to gender. CP 312-313, 1035-1036, 1044-1046.

Havlina was aware that Gilliam had no supervisory authority over Brewster. CP 411 L. 4-6, CP 866 L. 2-5, CP 313 L. 21-23.¹⁸ Havlina claims that he told Gilliam, as a friend and a co-plaintiff, about the March 2004 comment. CP 312-314. However, he never asked Gilliam to do anything or to report the information to any manager in the DOT. CP 314. He had no information that the March 2004 comment was reported to any DOT management. CP 311-312.

¹⁷ Gilliam would be the first person Havlina would go to with a complaint. CP 411, 866, 313. Yet, Gilliam had no idea there was any complaint of sexual conduct occurring after 2001.

¹⁸ “The lead tech has no authority to discipline a worker.” CP 538 L.7.

Havlina obtained an attorney in the fall of 2003, the same time he went to OEO. CP 459-460.¹⁹ Despite having an attorney at the time of this alleged March 2004 comment, he never identified the March 2004 comment in response to written discovery requests or in his first deposition. CP 303-305. There was no information that anyone in management at the DOT ever became aware of any allegation relating to the March 2004 quality time comment by Brewster. CP 314.²⁰ On its face, the comment appears to be a normal work exchange. CP 308.

Havlina was well aware that Brewster was disciplined based upon his participation in sexual jokes in the 1990's, and that discipline would be progressive if any other similar events occurred. CP 313. Havlina was also aware of the DOT policy that provided that an employee "must immediately report" any prohibited act to "a supervisor, manager, the Safety Office, Office of Equal Opportunity (OEO) or their Human Resource Representative." CP 833. Despite this, he never reported any

¹⁹ Havlina consulted an attorney because he was concerned about the criticism of the Connell crews work. CP 459-460.

²⁰ Even Gilliam, a co-appellant and friend of Havlina's, clearly testified that he was not aware of any claimed sexual comments by Brewster occurring after 2001. CP 1035-1036, 1045. The only sexual comments by Brewster that Gilliam ever became aware of second hand, related to Crownover's one complaint about the comment about his daughter in 2000 and one complaint by Havlina about the hip gyrating in front of his sister in 1998. CP 1045. Gilliam became aware of these two complaints at the group meetings held by the Connell crew. CP 513 L. 15-20, 1045-46. In response to Brewster's complaint about the Connell crew in the spring of 2002, the whole Connell crew met and made a documented list of any and all complaints they could come up with against Brewster. CP 304-305. Gilliam had no complaints. CP 304.

alleged inappropriate conduct occurring after 2001. CP 311-314.²¹

Havlina testified that he could not recall making a report of any inappropriate conduct by Brewster after the Lougheed investigation. CP 478 L. 4-7.²² Havlina's counsel acknowledged in arguing the summary judgment motion that after 2001, "There's not specific comments about sexual comments." RP (January 15, 2008) at p. 129 L. 5-6.

In response to the second motion for summary judgment incorporating Havlina's March 6, 2008, deposition testimony, the trial court recognized that Brewster did not have any authority to take disciplinary action; therefore, the alleged discriminatory conduct needed to be brought to the attention of DOT management in order to meet the knowledge element of a hostile work environment claim.²³ The trial court found that there was no evidence that any conduct within the statute of limitations was "adequately brought to the attention of the employer," and

²¹ The trial court asked Havlina's counsel during the summary judgment argument to identify anything in the record that indicated that any sexual comment was reported relating to Brewster after 2001. RP (January 15, 2008) at p. 121 L. 3-4. He responds by identifying the comments reported in the 2003 OEO investigation that occurred before 2001. RP (January 16, 2008) at 121, 129.

²² Havlina reported during the OEO investigation that the alleged sexual comments or conduct stopped in 2001. CP 1066, CP 1253 L. 14-15, CP 304-305, CP 1065-1082, 1352.

²³ "The lead technician has no authority to discipline a worker." CP 352 L. 6. The trial court found Mark Brewster was not a manager, and knowledge needed to be established. RP (January 15, 2008) at p. 102 L. 24-25. Havlina concedes in his opening brief that knowledge of Brewster's alleged conduct needs to be established.

therefore, summary judgment dismissal was granted. RP (January 15, 2008) at p. 129 L. 10-12, p. 137.

C. Facts Relating to Havlina’s Claim for Disability Discrimination.

Havlina had a knee injury in 2004 that prevented him from maintaining the necessary licenses to operate the equipment, and he was indisputably “unable to perform the essential functions of his job or identify any available positions which he could perform from November 2004 to the date of his separation in June 2005.” (Appendix A, PAB Findings of Fact ¶ 2.5, 2.6, 2.7; *Havlina v. Washington State Department of Transportation*, 142 Wn. App. 510, 178 P.3d 354 (2007)). Havlina initially pled the same disability discrimination and accommodation issues addressed by the PAB in this lawsuit. CP 1435. These claims were dismissed on summary judgment by Judge Mitchell in November 2007. RP (July 7, 2008) at p. 10. Havlina did not appeal Judge Mitchell’s summary judgment order dismissing his accommodation, disability discrimination and constructive discharge claims.

D. Facts Relating to Havlina’s Claim of Retaliation.

Havlina claimed in his affidavit in opposition to summary judgment that he was retaliated against because: 1) Tom Lenberg verbally counseled him about his attitude, 2) his performance evaluations

“plummeted,” and 2) he was denied spray jobs. CP 255, 259, 868-869. Havlina also claimed that his disability separation from employment was motivated by retaliation for his complaints against Brewster, but he admitted that he had no facts to support that claim. CP 465-466. As noted above, Havlina’s disability separation was found to be lawful and necessary. The remaining issues are addressed below.

1. Havlina was never disciplined, and the one verbal counseling he received was appropriate.

Havlina was never subjected to any formal discipline. CP 473-475. Havlina was verbally counseled once for having a bad attitude. *Id.* Havlina testified in his deposition that it was not inappropriate for his supervisor, Tom Lenberg, to talk to him about his less than positive attitude. CP 476 L. 11-142. He further testified that he could not identify any facts of any negative action taken by Tom Lenberg. CP 327.

2. There is No Identifiable Change in Havlina’s Written Performance Evaluations.

In his deposition and responses to interrogatories or his brief in opposition to summary, Havlina did not identify any negative employment action or an identifiable change in his evaluations, who made the change or when the change was made. CP 259, 571, 868-869. Havlina does not identify the timing of the change or how it is allegedly related to his

complaints against Brewster. *Id.* His evaluations were in writing, and there is no change reflected in the written evaluations. CP 232-243.²⁴

3. There are no Facts That Any Employee was Given Preference Over Havlina for Spray Assignments.

After the DOT moved for summary judgment dismissal noting that no negative employment action was taken, Havlina asserted in an affidavit in response to summary judgment that: “After my reporting the conduct of Mark Brewster, Pasco management gave preference to Ryan Miller ... for spray jobs.” CP 869 L. 1. Havlina clearly stated in his deposition that he had no factual information to support this accusation in his affidavit that anyone was given preferential treatment on spray assignments over him. CP 322 ll. 3-10.

There was an overall reduction in spraying herbicides by the DOT across the state for environmental reasons. CP 315, 318; CP 274-276. The decrease in spraying started well before Havlina’s complaint regarding Brewster and has continued since Havlina left his employment with the DOT. *Id.*²⁵

²⁴ Havlina argued that Pasco management agreed that Havlina was a good worker. CP 543 L. 9.

²⁵ The DOT quarterly reports from March 2002 reflect the DOT’s commitment due to environmental concerns to reduce the spraying of herbicides. CP 283-284. The limitation was found to be necessary because in an “ecologically attuned world” use “should be minimized.” CP 284, 293.

Havlina admits there is nothing improper about other DOT work taking priority over spraying. CP 318, 320. Havlina simply wanted spraying to be a bigger priority for the DOT because he got premium pay for doing it. CP 321. Havlina had no idea who in management made the decision regarding the prioritization of spraying or when that decision was made. *Id.* Havlina could not identify any facts that would relate any change in the spray jobs to his complaints against Brewster. CP 322, 328.

Q. What if any factual information do you have that would indicate the DOT's priorities with regard to spray jobs or your specific assignment to available spray jobs was impacted in any way by a complaint you made?

A. I have no factual proof.

Q. Do you have any facts at all?

A. I just have what I figured out in my mind. I don't have any facts at all that I can prove, no.

CP 322 L. 3-10.

Q. Is there anything to indicate that anyone in management above Mr. Lenberg had any idea about any of the information that you complained about with regard to Mark Brewster or considered that in making those decisions?

A. Do I have any factual proof?

Q. Anything that would indicate that.

A. I can't think of anything at this time.

CP 328 L. 23- CP 329 L. 5.

Havlina claimed in his affidavit in opposition to summary judgment that Ryan Miller was given preference over him on spray jobs. CP 869 L. 1. Havlina was a spray tech in Connell, and Ryan Miller was a spray tech in Pasco. CP 315, 319, 323-325, 327-328. Both were trained and able to operate a vehicle to spray herbicides, and it was normal procedure to have the Connell crew spray the Connell area and have the Pasco crew spray the Pasco area. CP 319, 325. Since the mid-1990s, no one from Connell was assigned to spray the Pasco area instead of the Pasco personnel. CP 325-326.²⁶

Havlina admits that there was nothing different about the way DOT management assigned spray jobs after his complaint about Brewster in 2002. CP 326. Havlina just wanted more favorable assignments that he had never previously been given so he could make more money. CP 324-325, 327-328.²⁷ There was no basis for Pasco spray jobs to be removed from the Pasco sprayer, Ryan Miller, and reassigned to Havlina. CP 324, 327. Contrary to the assertion in his affidavit that Ryan Miller received preference on spray assignments, Havlina admitted in his deposition that

²⁶ Since the 1990s, the only time Connell maintenance technicians were brought to Pasco to spray was to be trained on a new spray truck. CP 325.

²⁷ Havlina asserted that when the spray jobs overall were reduced by the DOT, he wanted the Pasco spray jobs normally assigned to Ryan Miller to be removed from Miller, and re-assigned to him. CP 324-325, 327-328. No such reassignment had ever been done. *Id.*

no spray job was ever assigned to someone else that should have been assigned to him. CP 323.²⁸

E. Extraneous Issues Raised in Havlina's Brief Not Related to His Claim for Gender Discrimination or Retaliation.

1. Max Yager wore a t-shirt with a joke on it in 1994.

Havlina admits in his deposition that his alleged emotional distress at work was caused by two individuals, Mark Brewster and Jim Leroue. CP 873 L. 13-17, CP 258, CP 309. Despite this, Havlina mentions in his affidavit in opposition to summary judgment that a co-worker of his in Connell, Max Yager, wore a t-shirt with a sexual reference on it twice in 1994 in front of all DOT employees, both male and female. CP 462, 859. Havlina claims in his affidavit in opposition to summary judgment that he found the t-shirt offensive. *Id.* He does not identify how Max Yager wearing this shirt in 1994 is allegedly related to his gender discrimination claims against Mark Brewster. *Id.*

²⁸ During his employment with the DOT, Joel Havlina was the person who was assigned the majority of spraying in Connell both before and after his complaint. CP 316 ll. 7-15. The only spray job Havlina could ever identify in Connell that he did not get was one that occurred in the summer of 2004. CP 317. His co-appellant James Crownover got assigned one spray job in Connell because Havlina was away working on traffic control at Hanford due to a fire. CP 317. Havlina admits that it was appropriate to assign him to the fire for traffic control and allow Crownover to take over that one spray job in Connell during Havlina's absence. CP 317-318. A fire would legitimately take priority over spraying. *Id.* James Crownover complained about Brewster's conduct at the same time as Havlina, and he was a fellow plaintiff in this lawsuit. CP 1433. Havlina admits that there is nothing to indicate Crownover was given more preferential treatment than he was for spray jobs. CP 317-318. Nor can the one assignment of a spray job in Connell to Mr. Crownover be related in any way to the complaint against Brewster. *Id.*

Contrary to his affidavit asserting offense at his co-worker Max wearing a t-shirt, he testified in his deposition that he laughed when he first saw Max's t-shirt because he thought it was funny. CP 461, 467. He never asked Max not to wear the t-shirt. *Id.* Havlina never made any complaint or reported a problem relating to Max Yager wearing the t-shirt, and he never reported it in either of the OEO investigations he initiated. CP 836, CP 1065-1082. It occurred eleven years before Havlina filed his complaint in 2005.

2. The Connell crew was sent to Pasco to work.

Havlina claimed as addressed above that he wanted to work in Pasco more in place of Ryan Miller. However, his co-appellants claimed that the Connell crew being sent to Pasco to work more often was retaliation. See Crownover and Gilliam Response Briefs. Havlina did not identify being sent to Pasco to work as retaliation in his deposition, but he incorporated the other appellants' arguments and claims in his brief. To be clear, there was no information that the work needs in Pasco were in any way influenced by the complaint about Brewster. CP 1363-1364.²⁹

²⁹ The Connell crew was always required to work in Pasco throughout their employment with the DOT. CP 447. The road needs in Pasco have always been higher than the needs in Connell due to the volume of traffic. CP 1364-1365. The Connell crew began being sent to Pasco more frequently in 2000 or 2001. CP 843, 413. This change in the work needs requiring the Connell crew to work in Pasco was before Havlina's complaint about Brewster in June 2002. *Id.*

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, in the light most favorable to the nonmoving party, relying upon the same evidence presented to the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). 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.

V. LAW/ARGUMENT

A. Havlina's Claims are Barred by the Statute of Limitations.

Claims under the Washington Law Against Discrimination (WLAD) are subject to a three-year statute of limitations. RCW 4.16.080(2); *Antonius v. King County*, 153 Wn.2d 256, 261-262, 103 P.3d 729 (2004). In contrast to discrete discriminatory acts which always have to be within the statute of limitations to be actionable, a hostile work environment claim involves a series or pattern of the same or similar conduct whose combined effect results in discrimination on the basis of a protected status. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115-116, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). This makes the statute

of limitations more difficult to determine on a hostile work environment claim. However, a hostile work environment claim does not enable a plaintiff to have an unending statute of limitations simply by claiming a continuing pattern. *Antonius*, 153 Wn.2d at 271. “The Plaintiff must establish one or more acts based upon **the same discriminatory animus** within the statute of limitations.” *Antonius*, supra at 265 [emphasis ours]. Hostile work environment acts falling outside of the statutory period are barred by the statute of limitations when either: 1) the timely acts are not similar in nature or sufficiently related to the untimely acts; or 2) the employer takes intervening action between the timely and untimely acts. *Morgan*, 536 U.S. at 118; *Antonius*, 153 Wn.2d at 271; *Cox v. Oasis Physical Therapy, PLLC*, 153 Wn. App. 176, 195, 222 P.3d 119 (2009).³⁰

Under the statute of limitations, the “employee can not recover for the previous [untimely] acts, at least not by reference to [an unrelated timely act].” *Morgan*, 536 U.S. at 118.³¹ Either the untimely act being

³⁰ A continuing violation theory used to allow all claims asserted as part of a hostile work environment claim has specifically been rejected by the Washington Supreme Court with respect to a hostile work environment claim. *Antonius*, 153 Wn.2d at 271. Instead, Washington has adopted the U.S. Supreme Court’s analysis in *Morgan* that requires the various sexual harassment acts to be actually related to each other and not interrupted by an intervening event, such as disciplinary action. *Morgan*, 536 U.S. at 118.

³¹ “On the other hand, if an act on day 401 had no relation to the acts between days 1-100, or for some other reason, such as certain intervening action by the employer, was no longer part of the same hostile environment claim, then the employee cannot recover for the previous acts, at least not by reference to the day 401 act.” *Morgan*, 536 U.S. at 118. If “any act falls within the statutory time period,” we need “to determine

unrelated or intervening discipline by the employer would be fatal to Havlina's hostile work environment claim. In this case, both exceptions apply barring Havlina's claim for hostile work environment sexual harassment.

- 1. The one innocuous March 2004 comment is not discriminatory in nature and cannot enable Havlina to avoid the application of the statute of limitations to the alleged untimely conduct.**

The analysis under *Morgan* requires the court to assess the nature and relatedness of the timely and untimely conduct. *McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 76 (2nd Cir. 2010). When looking at the statute of limitations for a hostile work environment claim, the court must start by asking whether the plaintiff alleged any act motivated by discrimination within the limitations period, and then determine whether the untimely conduct was part of "the same actionable hostile work environment" that occurred within the statute of limitations. *Antonius*, 153 Wn.2d at 263-264; *Morgan*, 536 U.S. at 120-122; *McGullam, supra* at 76. In making this determination, courts must consider whether the acts "involved the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers." *Morgan*, 536

whether the acts about which an employee complains are part of the same actionable hostile work environment practice." *Id.* at 120.

U.S. at 120. Acts that are “so discrete in time or circumstances that they do not reinforce each other” do not constitute a single hostile work environment in order to defeat the statute of limitations. *Lucas v. Chicago Transit Authority*, 367 F.3d 714, 727 (7th Cir. 2004); *Morgan*, 536 U.S. at 118.

General comments that are simply unrefined, uncivil or even rude are not of the same nature as sexual comments. *McGullam*, supra at 76. In *McGullam*, the plaintiff asserted that she was exposed to various sexual remarks, jokes and comments directed at her. *Id.* She transferred departments, and then complained that she overheard a new male co-worker talking on the phone to a male buddy making comments that she considered offensive. *Id.* The court noted that the conduct was different in kind as it was not directed at the plaintiff, and the discrimination laws are not intended to be a civility code. *Id.* “Given these discontinuities, [the court had] no trouble finding insufficient relatedness” to the timely acts applying the *Morgan* analysis. *McGullam*, supra at 78.

Absent the relatedness required under *Morgan*, the court need not address whether the obscene, lewd, or even sexually suggestive conduct that occurred outside of the statute of limitations constitutes a hostile work environment. *McGullam*, 609 F.3d at 78. The untimely conduct cannot be

considered, and the timely conduct standing alone must be sufficient to support a hostile work environment claim. *Id.*

Havlina cannot simply take something innocuous out of context within the statute of limitations in an effort to salvage claims for untimely and unrelated conduct occurring outside of the statute. *Lovelace v. BP Products North America, Inc.*, 252 Fed.Appx. 33, 40 (6th Cir. 2007). The conduct within the statute must be of a discriminatory nature or summary judgment is warranted. *Id.*

The facts in *Lovelace* are analogous to the facts in this case. *Lovelace* complained about 12 comments related to race which the court described as in “poor taste and offensive.” *Lovelace*, supra at 40. After plaintiff complained, the employer investigated and responded. After the employer’s response, the plaintiff complained of a number of subsequent events which plaintiff found subjectively offensive. For instance, Lovelace complained that she was asked to remake a sandwich, a fellow employee gave her the cold shoulder, and other similar conduct. Although Plaintiff claimed this subsequent conduct was motivated by race discrimination, the court found:

Plaintiffs offer only their subjective beliefs that these incidents were racially motivated and interfered with their work. Such subjective and conclusory allegations are insufficient to create a genuine issue of material fact

regarding whether the work environment was racially hostile in violation of Title VII as defined by *Harris*.

Lovelace, 252 Fed.Appx. at 40. The plaintiff “taking the slightest offense” at later conduct does not enable the plaintiff to avoid the application of the statute of limitations for previously alleged discriminatory conduct to which the employer reasonably responded. *Id* at 40.

Similarly, in *Burkhart v. American Railcar Industries, Inc.*, 603 F.3d 472 (8th Cir. 2010), the plaintiff complained about sexual e-mails and comments that occurred outside of the statute of limitations and complained about being shunned, suspended and terminated within the statute of limitations. The plaintiff sought to claim that all of the conduct was part of one hostile work environment claim to include the sexual e-mails and comments. *Id*. The court rejected this argument because, like in this case, there was no evidence that the sexually explicit emails or comments continued. *Id*. Being shunned, suspended or terminated was conduct of a different nature and was more of a claim of retaliation and not considered to be sexual harassment warranting summary judgment. *Burkhart*, supra at 476; see also, *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 790-91 (6th Cir. 2000) (refusing to include alleged retaliatory conduct in the hostile work environment calculus because the conduct was not committed because of sex).

In this case, the only event reported within the statute of limitations by Havlina is a comment made by Mark Brewster to the whole Connell crew in March of 2004 that the crew would need to work in Pasco the following week. Describing a week of work as “quality time” or working together as bringing them “on board” does not reasonably and objectively allow a conclusion that the conduct is sexual in nature or motivated by gender discrimination. Havlina himself initially acknowledged that he did not know whether it was sexually engendered. He simply subjectively claimed offense because he did not want to work in Pasco. However, working with Brewster for the week went just fine.

It is incredibly telling in this case that Havlina failed to ever complain that the March 2004 comment was offensive or sexual, failed to identify it in response to written interrogatories or in his initial deposition, and that all other individuals present (mostly his co-appellants) had no idea the comment was improper or sexual. Havlina clearly only raised this claim after he became aware that he was facing dismissal based upon the statute of limitations. Even when his attorney was asked to identify the asserted gender related conduct within the statute of limitations, the response was that no specifics could be provided. As an alternative, an argument was asserted that retaliation occurred within the statute of limitations and that it should be treated collectively as one claim. No cite

is provided in support of this argument and it is directly contrary to the established law.

The purpose of the sexual harassment laws is to encourage employers to intervene and prevent conduct which can reasonably be considered discriminatory. The DOT could not reasonably discipline or take any action against Brewster because he advised the Connell crew that they needed to spend some quality time working in Pasco for a week, as is required by his job duties. This innocuous conduct is not similar in nature to the sexually charged statement in the 1990's, and it is not motivated by discrimination, as required under *Antonius* and *Morgan*. Asserting subjective offense to spending quality time working cannot prevent summary judgment dismissal. See *Lovelace* and *Burkhart*, *supra*.

2. The DOT disciplinary action in 2003 severs any connection to the asserted untimely acts.

Even assuming the March 2004 comment could possibly be construed as gender discrimination, the DOT took intervening disciplinary action that severs any connection to the prior acts. Intervening disciplinary action by the employer separates the prior untimely acts for the purposes of the statute of limitations, and the conduct is “no longer part of the same hostile environment claim.” *Morgan, supra* at 118; *Williams v. City of Chicago*, 325 F.Supp.2d 867, 873 (N.D. Ill. 2004);

Watson v. Blue Circle, Inc., 324 F.3d 1252, 1258-1259 (11th Cir. 2003). Once an employer takes corrective action, the causal link for an alleged continuing violation is no longer present. *Randall v. Potter*, 366 F.Supp.2d 104, 118 (D. Me. 2005). Therefore, summary judgment is warranted based upon the statute of limitations if the timely conduct alone cannot meet all of the elements of hostile work environment claim. *Id.*³²

In this case, Havlina did not report any alleged sexual comments or jokes until the 2002/2003 time frame. Once reported, an investigation was conducted, and Mr. Brewster was disciplined. The disciplinary action taken in 2003 severs any relationship to the prior conduct. Once disciplinary action is taken, the prior conduct “is no longer part of the same hostile work environment claim.” *Morgan*, 536 U.S. at 118. Therefore, the timely conduct must be able to support a claim for a hostile work environment on its own, and the claims outside of the statute of limitations must be dismissed. *Sanford v. Walgreen Co.*, 2009 WL 3152795 (N.D. Ill. 2009). As set out below, the one March 2004 comment made to an entire crew that they need to come to Pasco to work

³² *Watson*, 324 F.3d at 1258-59 (11th Cir. 2003)(intervening action by the employer renders the co-worker's conduct no longer part of the plaintiff's hostile work environment claim); *Fairley v. Potter*, 2003 WL 403361 (N.D.Cal. Feb.13, 2003)(the employer's adequate handling and investigation of the plaintiff's complaint constituted an intervening action).

“spending quality time” for a week cannot conceivably meet any of the elements of a hostile work environment claim.

B. The Alleged Conduct Does Not Constitute a Hostile Work Environment.

A hostile work environment claim involves an employee seeking to hold the employer responsible for a supervisor or co-worker's severe and pervasive “verbal or physical conduct” motivated by gender discrimination. *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 405, 693 P.2d 708 (1985); *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1055 (9th Cir. 2007).³³ To establish a hostile work environment claim based on sexual harassment, an employee must prove the following: (1) the action was unwelcome, (2) the action was because of gender, (3) the action was severe and pervasive enough to affect the terms or conditions of employment, and (4) the action is imputed to the employer. *Glasgow, supra* at 406-08.

1. The March 2004 Comment Is Not Related to Gender.

It is clear under the law that gender must be the motivating factor for the treatment in order for a hostile work environment to exist. *Coville v. Cobarc Servs., Inc.*, 73 Wn. App. 433, 438, 869 P.2d 1103 (1994).

³³ Because Washington's discrimination laws substantially parallel Title VII, Washington courts traditionally look to federal precedent for guidance in employment discrimination claims. *Janson v. North Valley Hosp.*, 93 Wn. App. 892, 900, 971 P.2d 67 (1999).

Plaintiff has to show that the conduct was motivated by animus toward his gender. *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 297, 57 P.3d 280 (2002); *Clarke v. State Attorney General's Office*, 133 Wn. App. 767, 138 P.3d 144 (2006). “Sex” in the context of a discrimination claim refers to gender, not just activity of a sexual nature. *Doe v. State, Dept. of Transp.*, 85 Wn. App. 143, 149, 931 P.2d 196 (1997). Plaintiff must show that “if [he] had been of the opposite gender, [he] would not have been so treated.” *Payne v. Children's Home Soc. of Washington, Inc.*, 77 Wn. App. 507, 515, 892 P.2d 1102, *review denied*, 127 Wn.2d 1012 (1995); *Schonauer v. DCR Entertainment, Inc.*, 79 Wn. App. 808, 820, 905 P.2d 392 (1995).

Comments made to a group of people and not specifically directed at a plaintiff because of his or her gender do not support a discrimination claim. *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 162, 991 P.2d 674 (2000) (comment on another female employee's figure to a group was not “because of sex” because it was not directed at the plaintiff). In addition, conduct which is merely tinged with offensive sexual connotations is not actionable unless it is directed at a person because of his or her gender. *Oncale 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*, 114 Wn. App. at 298.

Specifically, verbal abuse or harsh treatment by a supervisor towards an employee does not state a claim for hostile work environment because the behavior is not directed at the person because of their gender. *Payne*, 77 Wn. App. 507; *Herried v. Pierce County Public Transp. Ben. Authority Corp.*, 90 Wn. App. 468, 473, 957 P.2d 767 (1998), review denied 136 Wn.2d 1005, 966 P.2d 901 (1998). When the evidence does not support the contention that the conduct was motivated by gender, summary judgment is warranted. *Payne*, supra.

In this case, there is absolutely no evidence or inference that Brewster’s March 2004 comment to the Connell work crew that they needed to come to Pasco and work for a week was motivated by gender. Using the term “quality time” or bringing the crew on board in reference to a week of work does not identify any discriminatory conduct motivated by gender.³⁴ Havlina has the burden under *Antonius* and *Morgan* to prove a gender based act within the limitations period. *Broyles v. Thurston*

³⁴ Even the untimely conduct was not identified as being motivated by gender discrimination. General jokes and locker-room type comments between 1990 and 2001 between an all male work crew were admittedly mutually participated in by all the male members of the Connell crew in that time frame. Three of the four male appellants (all but Havlina) acknowledged the joking and sexual comments were not gender related. They occurred because 99% of the work force was male. The majority of the comments were not directed at Havlina at all, and were only allegedly offensive comments made to others that he overheard.

County, 147 Wn. App. 409, 437, 195 P.3d 985 (2008). The one timely comment in 2004 has no gender or sexual reference whatsoever.

2. The Conduct Is Not Sufficiently Severe or Pervasive.

Courts determine whether a plaintiff has proved a “hostile work environment” by looking at the totality of 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.” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). “The required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct.” *Id.* It is not sufficient that the conduct alleged is merely offensive. *Adams*, 114 Wn. App. at 296; *Harris*, 510 U.S. at 21. A hostile work environment claim requires plaintiff to demonstrate that a series of incidents motivated by gender were “sufficiently continuous and concerted” to alter the conditions of his working environment. *Perry v. Ethan Allen Inc.*, 115 F.3d 143, 149 (2d Cir. 1997)(quoting *Carrero v. New York City Housing Authority*, 890 F.2d 569, 577 (2d Cir. 1989)). Viewed as a whole, the environment must be objectively offensive, hostile, and abusive. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 118 S.Ct. 2275, 141

L.Ed.2d 662 (1998); *Fuller v. City of Oakland, Cal.*, 47 F.3d 1522, 1527 (9th Cir. 1995).

The assessment of whether an environment is objectively hostile “requires careful consideration of the social context in which the particular behavior occurs.” *Dolan v. U.S.*, 2008 WL 362556, p. 15 (D. Or. 2008), citing *Oncale*, 523 U.S. at 81. It is insufficient that the employer’s conduct is merely offensive or based on simple vulgarity. *Adams*, 114 Wn. App. at 296; *Kahn v. Salerno*, 90 Wn. App. 110, 118, 951 P.2d 321 (1998). “Casual, isolated, or trivial incidents do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law.” *Payne*, 77 Wn. App. at 515. A hostile work environment exists “[w]hen the workplace is permeated with discriminatory intimidation, ridicule and insult that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’” *Harris, supra.* at 21.³⁵ “[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to” a hostile work environment. *Faragher*, 524 U.S. at 788.

On a motion for summary judgment in a sexual harassment case, the court must distinguish between facts that merely add up to the

³⁵ Also See, e.g., *Washington v. Boeing Co.*, 105 Wn. App. 1, 9-10, 19 P.3d 1041 (2000). The conduct “must be so extreme as to amount to a change in the terms and conditions of employment.” *Clark County School District v. Breedon*, 532 U.S. 268, 270, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001).

“ordinary tribulations of the workplace, such as sporadic use of abusive language, gender-related jokes, and occasional teasing,” which can never support a discrimination claim, from suggestive “sexual remarks, innuendoes, ridicule, and intimidation” which are directly linked to gender and rise to the level of impacting the plaintiff’s ability to work. *O’Rourke v. City of Providence*, 235 F.3d 713, 729 (1st Cir. 2001); *Faragher*, 524 U.S. at 788.³⁶ Even comments that are “clearly inappropriate and in bad taste” do not meet the necessary severe and pervasive standard when “they occurred over a two-year period with relative infrequency.” *Panelli v. First American Title Ins. Co.*, 704 F.Supp.2d 1016 (D. Nev. 2010). Even fifteen to twenty different comments in reference to sex or gender over an eighteen-month period failed to constitute an objectively abusive workplace. *Pieszak v. Glendale Adventist Med. Ctr.*, 112 F.Supp.2d 970, 992 (C.D. Cal. 2000). In addition, the court should consider pertinent circumstances including the nature of the workplace. *Gross v. Burggraf Construction Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995). For example, in *Gross*, the court noted that the claim of gender discrimination must be

³⁶ Isolated incidents of inappropriate comments do not meet the severe and pervasive standard required. *Cecil v. Louisville Water Co.*, 301 Fed.Appx. 490 (6th Cir. 2008); See also *Morris*, 201 F.3d at 790 (holding that several dirty jokes, a verbal sexual advance, a one-time reference to plaintiff as “Hot Lips,” and comments about plaintiff’s state of dress were not sufficiently severe and pervasive). Single events are not sufficient to establish a severe and abusive environment, unless the event is so acute and extraordinary as to create an “intolerable alteration” of the working conditions. *Howley v. Town of Stratford*, 217 F.3d 141, 153 (2d Cir. 2000).

viewed in the context of a blue collar construction environment where crude language is commonly used by male and female employees. *Id.* at 1538 (“In the real world of construction work, profanity and vulgarity are not perceived as hostile or abusive.”).

In this case, considering the totality of the circumstances, the majority of the work crew, including the appellants, used profanity and made sexual jokes and references. No one seemed to mind the jokes or profanity, and no one reported them as offensive at the time they occurred.

The main complaint about Brewster was that after he became a lead tech in 2001, he was critical of the appellants’ work and he was bossy or a bully with all employees, male and female. Admittedly, no one heard a sexual comment from Brewster since he became a lead tech in 2001. Even taking the untimely conduct into consideration, Havlina reported that four comments caused him emotional distress: 1) the 1998 question “where did you get those faggot glasses?”; 2) a crude comment in 2000 to Crownover about his daughter, not directed at Havlina; 3) a hip thrust gesture in 1998; and 4) a 1995 lunch room comment about the best piece of ass, again not directed at Havlina (just something he overheard in a group setting). CP 477. This locker-room type conduct between all male employees does not meet the necessary element of being sufficiently severe and pervasive to impact the terms and conditions of work,

especially when given the fact that this was a male dominated work environment where joking was mutually participated in without objection. The Connell crew only worked with Brewster on occasion, and at best they could only identify a handful of crude or offensive joking comments. The sporadic and infrequent use of profanity and sexual jokes over a decade amongst all male co-workers does not meet the objective severe and pervasive standard under the law.

However, in this case, the DOT took disciplinary action relating to the reported profanity and sexual jokes. Therefore, the continuity is broken, and the court need only look at the one March 2004 comment. Telling the whole Connell crew that they need to spend some “quality time” working in Pasco for a week cannot reasonably be construed to constitute part of a continuous pattern of severe and pervasive gender related harassment that rises to the level of severe and pervasive. It is the only comment within the three-year period, and by content, it is nothing more than an ordinary work interaction, regardless of Havlina’s asserted subjective perception.³⁷

³⁷ The mere “conclusory allegations” or subjective claims of offense alone are insufficient to merit consideration. *Hernandez v. Spacelabs Med., Inc.*, 343 F.3d 1107, 1116 (9th Cir. 2003); *Lovelace*, 252 Fed.Appx. at 40; *Cecil*, supra at 500. (“[G]eneral, conclusory allegations of ‘open mockery and verbal abuse’ and ‘hostility’ that was ‘pervasive’ are also insufficient to survive summary judgment); *Arendale v. City of Memphis*, 519 F.3d 587, 605 (6th Cir. 2008) (conclusory assertions of continuous harassment are insufficient).

This case clearly warrants summary judgment, falling in line with the cases noting that the discrimination laws are not intended to be a code of civility in the work place. *Brooks v. City of San Mateo*, 229 F.3d 917, 924 (9th Cir. 2000).³⁸ Merely offensive conduct is insufficient to identify a hostile work environment claim. *Oncale.*, 523 U.S. at 81. Even assuming Havlina could subjectively contrive the one March 2004 comment into something offensive, which is questionable based upon his own testimony that “**I don’t know if that was sexually engendered**”, it cannot meet the necessary objective severe and pervasive standard as required by law. CP 308 L. 22- 309 L. 5.

3. There is No Conduct Imputed to the Employer within the Statute of Limitations.

Before an employee's actions are imputed to the employer, a plaintiff must demonstrate that the employer (1) authorized, knew, or should have known of the harassment, and (2) failed to take reasonably prompt and adequate corrective action. *Washington v. Boeing Co.*, 105 Wn. App. at 11. Summary judgment is warranted when an employee fails to establish knowledge on the part of the employer of the harassing

³⁸ *Adams*, 114 Wn. App. at 296-297 (A civil rights code is not a “general civility code.”); *Washington v. Boeing Co.*, 105 Wn. App. at 10-11, (even calling the plaintiff “sweet pea” and “dear” although subjectively offensive did not rise to the level of objectively severe and pervasive).

behavior. *Neview v. D.O.C. Optics Corp.*, 382 Fed.Appx. 451, 456 (6th Cir. 2010).

Appellant concedes that a lead tech has no authority to take any disciplinary action, and that knowledge by the employer of discriminatory conduct needs to be established. In this case, there is no evidence that the DOT had any knowledge of any alleged offensive or inappropriate conduct by Brewster after 2001. He was disciplined in 2003 for the handful of inappropriate comments that occurred over the past decade, but all appellants admit that no misconduct was reported after the OEO investigation.

Havlina claims he told his friend and co-appellant, Roy Gilliam, about the comment that the Connell crew had to spend a week of “quality time” in Pasco, but even his friend, and co-appellants did not perceive or know this comment was alleged to be offensive. There is no basis to argue that DOT management had any notice of any comments after 2001, and they certainly had no notice of any discriminatory conduct within the statute of limitations.

In addition to the requirement that Plaintiff establish knowledge of discrimination within the statute of limitations, employers retain additional protections beyond even this principle because distant acts alleged as part of a single hostile work environment also are “subject to waiver, estoppel,

and equitable tolling” defenses “when equity so requires.” *Morgan*, 536 U.S. at 121. In this case, the DOT policy required employees to immediately report the offending conduct. The OEO investigator encouraged appellants to report any problems. Despite this, Havlina fails to identify any notice to anyone within DOT management of any discriminatory conduct within the statute of limitations.³⁹ Havlina himself failed to identify the March 2004 conduct in response to interrogatories, after he put his best effort into identifying all of his concerns.

Equity requires that the DOT not be held liable for conduct to which no reasonable employer could have known. There is no evidence in the record that any gender related conduct occurred within the statute of limitations or was ever reported or known by DOT management.

Furthermore, an employer on notice of alleged harassment may avoid liability for such harassment by undertaking remedial measures “reasonably calculated to end the harassment.” *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991); *Yamaguchi v. United States Dept. of the Air Force*, 109 F.3d 1475, 1482 (9th Cir. 1997); *Herried*, 90 Wn. App. at 475.

³⁹ Havlina inaccurately claims that management witnessed many of the comments. There is no evidence in the record to support this contention. The majority of the reportedly offensive comments were not witnessed by **anyone**. The only comment allegedly witnessed was the innocuous 2002 comment about breaking in a new employee, Darrin, allegedly witnessed by Tom Lenberg. However, this was not a comment that Havlina ever complained about during his employment or that could reasonably be considered offensive.

Once an employer reasonably responds, harassment cannot be imputed to the employer. *Washington*, supra at 12. The DOT reasonably responded to any and all reported conduct. Both the legal requirements to impute knowledge to the employer and equitable principles warrant summary judgment dismissal of Havlina's hostile work environment claim.

C. Havlina Cannot Challenge his Disability Separation.

If a notice of appeal is not filed "within 30 days of entry of an appealable order, the appellate court is without jurisdiction to consider it." RAP 5.2, *In re Marriage of Maxfield*, 47 Wn. App. 699, 710, 737 P.2d 671 (1987). Havlina did not appeal Judge Mitchells' order dismissing his claims of constructive discharge, disability discrimination, and failure to accommodate. Furthermore, Havlina previously appealed the Public Appeal Board (PAB) decision dispositively finding that his disability separation was proper. *Havlina v. Washington State Dept. of Transp.*, 142 Wn. App. 510, 178 P.3d 354 (2007). *Res judicata* prevents relitigation of these claims and issues. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). There was no dispute in this case that Havlina

had to be disability separated because he was unable to perform the essential job functions of his job.⁴⁰

D. There are no Facts to Support a Claim for Retaliation.

Any claim for retaliation has to occur within the three year statute of limitations. “[E]ach retaliatory adverse employment decision constitutes a separate actionable ‘unlawful employment practice.’” *Morgan*, 536 U.S. at 113-114; *O'Connor v. City of Newark*, 440 F.3d 125, 127 (3d Cir. 2006).⁴¹ 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 (2004).

Once a legitimate reason is offered for an adverse employment action, the plaintiff has the burden to prove “the employer’s proffered

⁴⁰ Q. Do you have any information to show that you were separated from service for anything other than your inability to perform the essential functions of that job? A. I don’t know of anything at this time. CP 466 L. 6-9.

⁴¹ If the statute of limitations period has run, a lawsuit for that discrete act is barred, even if that act relates to others timely alleged in the charges filed. *Antonius*, 153 Wn.2d at 264 (citing *Morgan*, 536 U.S. at 108-13).

explanation is unworthy of credence.” *Estevez v. Faculty Club of University of Washington*, 129 Wn. App. 774, 800, 120 P.3d 579 (2005). 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 v. State*, 129 Wn. App. 10, 23, 118 P.3d 888 (2005).

Here, none of the asserted retaliatory actions can be related to any protected activity. As addressed above, Havlina was properly disability separated because he admittedly could not perform the essential functions of the job. The record reflects that Havlina was not subject to any discipline or negative employment action. He received one verbal counseling that he admitted was a reasonable response, by his supervisor Tom Lenberg, to his bad attitude. He fails to identify any change in his evaluations, when the change was made, who the change is attributed to or how it is related to any complaint he made. His performance evaluations are in writing, and no change is reflected in the evaluations. CP 232-243.

Although Havlina speculated in an affidavit that he lost spray jobs in retaliation, he admitted in his deposition that there were absolutely no facts to support that contention.⁴²

⁴² Spray jobs were reduced for environmental reasons across the state prior to his complaint. He could not identify any spray assignment that he should have received that he did not receive. He was the primary sprayer in Connell. He never lost any spray job

Q. What if any factual information do you have that would indicate the DOT's priorities with regard to spray jobs or your specific assignment to available spray jobs was impacted in any way by any complaint you made?

A. I have no factual proof.

CP 322.

Q. Was there a spray job in the Connell area that came up in 2003 or 2004 that you felt should have been assigned to you that was actually assigned to somebody else, other than the one you've talked about that was assigned to Jim Crownover because you were on the fire?

A. I can't remember any.

CP 323.

Havlina claims Mike Kukes and Tom Lenberg are the individuals he believes retaliated against him. CP 326-327. However, Havlina admits that he cannot identify any negative action by any specified DOT manager. CP 327-328.

Havlina cannot rely on conjecture or argument to defeat a motion for summary judgment. *Doe v. State, Dept. of Transp.*, 85 Wn. App. 143, 147, 931 P.2d 196, review denied, 132 Wn.2d 1012, 940 P.2d 653 (1997); *Michelsen v. Boeing Co.*, 63 Wn. App. 917, 920, 826 P.2d 214 (1991). He

to another employee. He asserts that he wanted to be treated more favorably than the Pasco spray tech, Ryan Miller, but Havlina admitted that giving Havlina the unjustified favorable treatment he was seeking was not consistent with DOT normal practices. Havlina got the spray jobs he was supposed to get.

has to identify specific facts. There are no facts that Havlina experienced any negative treatment in relation to some protected activity.

E. Havlina Cannot Create an Issue of Fact by Contradicting His Own Sworn Testimony.

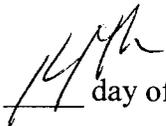
The law does not allow a witness to change his or her deposition testimony solely to defeat a Motion for Summary Judgment. “When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.” *Marthaller v. King County Hosp. Dist. No. 2*, 94 Wn. App. 911, 918, 973 P.2d 1098 (1999).

Havlina’s own deposition testimony clearly establishes that: 1) he could not identify any sexually harassing conduct within the statute of limitations; 2) he was separated from employment because he was unable to perform the job; 3) no negative employment action could be identified or related to his complaint. His self-serving argument and contradictions to his prior sworn testimony should not be considered.⁴³

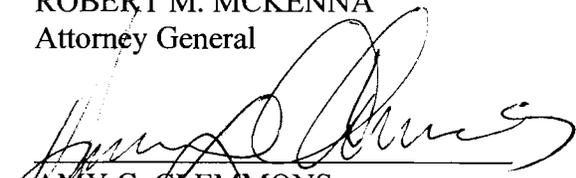
⁴³ The non-moving party cannot rely on speculation to defeat summary judgment. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). An opponent of a summary judgment motion must present specific facts and cannot rely on conjecture. *Doe v. Department of Transp.*, 85 Wn. App. at 147. Argumentative assertions of the existence of unresolved factual issues are not sufficient

VI. CONCLUSION

The only evidence in this case within the statute of limitations is that Havlina was asked to work in Pasco for a week in March of 2004, and he did not want to work in Pasco. He testified that he could not recall any comments of a sexual nature within the statute of limitations, and if any truly severe and pervasive conduct had occurred it would likely be recalled. Especially, since Havlina pain-stakingly documented all of his complaints from over a decade. He clearly testified that only four comments caused him emotional distress, and they all occurred before 2001. No facts are identified to support a claim for retaliation. Based upon the above, the DOT respectfully requests this court affirm the trial court's order dismissing Havlina's hostile work environment and retaliation claims on summary judgment.

RESPECTFULLY SUBMITTED this  day of March, 2011.

ROBERT M. MCKENNA
Attorney General



AMY C. CLEMMONS
Assistant Attorney General
WSBA #22997
Attorneys for Respondent

to defeat summary judgment. *Michelsen*, 63 Wn. App. at 920, (citing *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989)).

CERTIFICATE OF SERVICE

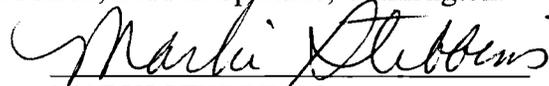
I certify under penalty of perjury in accordance with the laws of the State of Washington that the original of the preceding was hand delivered and filed at the following address:

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 STEBBINS

APPENDIX A

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MAY 01 2006

ATTORNEY GENERAL OFFICE
SPOKANE

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BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

JOEL HAVLINA,)	Case No. DSEP-05-0009
)	
Appellant,)	FINDINGS OF FACT, CONCLUSIONS OF
)	LAW AND ORDER OF THE BOARD
)	
v.)	
)	
DEPARTMENT OF TRANSPORTATION,)	
)	
Respondent.)	

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, BUSSE NUTLEY, Vice Chair, and GERALD L. MORGEN, Member. The hearing was held at the Department of Labor and Industries office, 4310 W. 24th Avenue, Kennewick, Washington, on March 2, 2006.

1.2 **Appearances.** George Fearing, Attorney at Law, represented Appellant Joel Havlina. Patricia Thompson, Assistant Attorney General, represented Respondent Department of Transportation.

1.3 **Nature of Appeal.** This is an appeal from a disability separation.

1
2 **II. FINDINGS OF FACT**

3 2.1 Appellant Joel Havlina was a permanent employee for Respondent Department of
4 Transportation. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the
5 rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the
6 Personnel Appeals Board on May 13, 2005.

7
8 2.2 Appellant became employed with the Department of Transportation (DOT) in 1993. During
9 his tenure with DOT, he held classification as a Maintenance Technician 1, 2 and 3. As a
10 Maintenance Technician 3, Appellant worked at the DOT maintenance offices in Pasco and
11 Connell. Appellant performed very physical work, including road maintenance and cleaning, lifting
12 heavy objects, digging ditches, and traffic control. The essential functions of the Maintenance
13 Technician 3 position also required Appellant to engage in repetitive movements, including
14 bending, kneeling, crawling, and twisting. Maintenance Technicians also operate a variety of
15 heavy equipment, like snow plows, front-end loaders, dump trucks, and trucks with clutches.

16
17 2.3 On March 4, 2004, Appellant injured his knee during a work-related training, and he was out
18 from work. Appellant subsequently underwent surgery to his knee and was released to work
19 effective May 17, 2004. Appellant was directed by his physician not to climb ladders, to avoid
20 squatting, bending, crawling, driving a clutch vehicle, and to avoid lifting anything heavier than 15
21 pounds. Consequently, the department accommodated Appellant's injury with light-duty desk work
22 performing paper and computer work.

23
24 2.4 In early November 2004, Appellant met with DOT staff to discuss his condition, ability to
25 return to work, and reasonable accommodation. The winter season is extremely busy for DOT
26

1 discretion. Appellant's physician did not provide a prognosis for how long Appellant would remain
2 unable to perform the essential duties of his position.

3
4 2.7 As a result, Casey McGill, Assistant Regional Administrator for Maintenance and
5 Operations, determined that separation due to disability was necessary based on Appellant's
6 inability to perform the essential functions of his position, with out without accommodation. As a
7 part of the department's accommodation process, Ms. Lougheed performed a search for vacant,
8 funded positions for which Appellant was qualified in the geographical area indicated by Appellant,
9 including positions that were clerical in nature. However, there were none available. Based on
10 Appellant's geographical limitations, the department was restricted in its ability to conduct a wider
11 job search. In addition, although Appellant met the minimum qualifications of several jobs, they
12 were higher classifications and were considered promotional opportunities which, based on the
13 department's policy, were not options that could be provided to Appellant. However, Appellant was
14 encouraged to apply for any promotional opportunities for which he was qualified.

15
16 2.8 On April 18, 2005, Mr. McGill formally notified Appellant of his separation due to
17 disability and the department's inability to accommodate his physical disability. The effective date
18 of the separation was at the end of his work shift on June 17, 2005. After the separation letter was
19 issued, Ms. Lougheed continued to search for vacant positions for a period of two months, however,
20 none became available.

21 22 **III. ARGUMENTS OF THE PARTIES**

23 3.1 Respondent argued that Appellant could not perform the essential functions of his position,
24 and asserts the department was unable to find an alternative position that met Appellant's
25 accommodation needs. Respondent argues that although Appellant indicated he could continue to
26

1 perform office work, there was insufficient work of that nature and further argues the department
2 was not required to create a job where none existed. Respondent argues that it has complied with
3 WAC 356-35-010 by making a good faith effort to accommodate Appellant's disability and that the
4 department's determination to separate Appellant should be affirmed.

5
6 3.2 Appellant does not dispute that he had a medical condition which precluded him from
7 performing all the duties of his position. Appellant contends, however, that he could have
8 continued to perform some of his position's tasks, such as vegetation spraying, litter patrol, and
9 computer and paperwork. Appellant argues that the department failed to perform a thorough search
10 to determine what other jobs were available to accommodate his disability. Appellant further argues
11 that the department assumed the accident that led to his knee injury was his fault and, therefore, did
12 little to help him find alternative positions.

13 14 IV. CONCLUSIONS OF LAW

15 4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

16
17 4.2 At a hearing on appeal of a disability separation, the appointing authority has the burden of
18 supporting the action that was initiated. WAC 358-30-170. Respondent has the burden of proving
19 that Appellant was unable to perform the duties of the position as specified in the letter of separation
20 and that reasonable accommodation cannot be provided. Smith v. Employment Security Dept.,
21 PAB No. S92-002 (1992).

22
23 4.3 The issue here is whether Respondent complied with the provisions of WAC 356-35-010
24 when it separated Appellant from his position as a Maintenance Technician 3 due to his disability.
25 WAC 356-05-120 defines a disability as "[a]n employee's physical and/or mental inability to
26

1 perform adequately the essential duties of the job class.” The department took the necessary steps
2 to determine whether Appellant could perform the essential duties of his position with or without
3 accommodation. Based on the conditions and limitations outlined by Appellant’s physician, the
4 department determined that Appellant was unable to perform the essential functions of his
5 Maintenance Technician 3 position and that there were no accommodations that could be made to
6 enable him to perform those essential functions. Therefore, Appellant’s condition meets the
7 definition of a disability.

8
9 4.4 WAC 356-35-010(1) provides, in part, that an appointing authority “may initiate a disability
10 separation of a permanent employee only when reasonable accommodations cannot be provided. . .”
11 Respondent undertook steps to accommodate Appellant; however, Respondent has met its burden of
12 proving that it could not make reasonable alterations, adjustments, or changes to Appellant’s
13 position. Furthermore, subsequent searches for alternative positions were unsuccessful, and the
14 department appropriately determined there were no other positions available for which Appellant
15 met the qualifications. Furthermore, the record does not support that Appellant’s separation was for
16 any reason other than his inability to perform the essential duties of his position and the lack of
17 available jobs that met his accommodation needs.

18
19 4.5 Respondent has met its burden of proving that Appellant’s separation due to disability
20 complied with the requirements of WAC 356-35-010, that Appellant could not perform the essential
21 duties of his position and that reasonable accommodation could not be provided. Therefore, the
22 appeal of Joel Havlina should be denied.

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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Joel Havlina is denied.

DATED this 28th day of April, 2006.

WASHINGTON STATE PERSONNEL APPEALS BOARD



Busse Nutley, Vice Chair



Gerald L. Morgen, Member

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FEB 08 2007

ATTORNEY GENERAL'S OFFICE

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

07 JAN 26 PM 2:46

BETTY A. SCOLL, CLERK

BY _____ DEPUTY *pn*

1 EXPEDITE
2 Hearing is Set
3 Date: January 26, 2007
4 Time: 2:00p.m.
5 The Honorable Anne Hirsch

7	SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY
8	JOEL HAVLINA,
9	Appellant,
10	v.
11	WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,
12	Respondent.

NO. 06-2-00955-7

ORDER TO DISMISS

14 THIS MATTER coming on for hearing on Appellant's Appeal of the Personnel Appeals
15 Board Order dated April 28, 2006, Respondent appearing by ROB MCKENNA, Attorney
16 General, and PATRICIA A. THOMPSON, Assistant Attorney General, and Appellant appearing
17 by and through George Fearing, LEAVY, SCHULTZ, DAVIS & FEARING, P.S., the court
18 having heard argument and considered the case records and files herein:

19 /
20 /
21 /
22 /
23 /
24 /
25 /
26 /

ORDER TO DISMISS

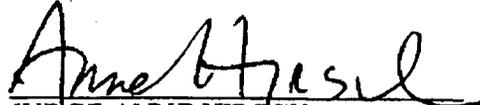
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ATTORNEY GENERAL OF WASHINGTON
Labor & Personnel Division
7141 Cleanwater Drive SW
PO Box 40145
Olympia, WA 98504-0145
(360) 664-4167

Scanned to OLG LTP & J. Kinney 2-8-07

1 IT IS HEREBY ORDERED that Appellant's Petition for Judicial Review is dismissed with
2 prejudice and the Decision of the Personnel Appeals Board dated April 28, 2006, is hereby
3 affirmed. All claims against the Department of Transportation and the Personnel Appeals
4 Board are dismissed with prejudice.

5 Dated this 26th day of January 2007.

6 
7 JUDGE ANNE HIRSCH

8 ANNE HIRSCH

9 
10 PATRICIA A. THOMPSON, WSBA No. 8035
11 Assistant Attorney General
12 Attorney for Respondent

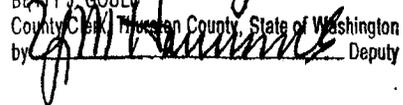
13 
14 Approved as to form and notice
of presentation waived:

15 *approved as to form*
16 *George Fearing*
17 GEORGE FEARING, WSBA No. 12970
Leavy, Schultz, Davis & Fearing, P.S.
18 Attorney for Appellant

19 STATE OF WASHINGTON
20 County of Thurston

21 I, Betty J. Gould, County Clerk and Ex-officio Clerk of the
Superior Court of the State of Washington, for Thurston County
holding sessions at Olympia, do hereby certify that the foregoing
is a true and correct copy of the original as the same appears on
file and of record in my office containing two pages,
22 IN WITNESS WHEREOF, I have hereunto set my hand and
affixed the seal of said court.

23 DATED: 5th February 2007

24 BETTY J. GOULD
County Clerk, Thurston County, State of Washington
25 by  Deputy
26

ORDER TO DISMISS

2

ATTORNEY GENERAL OF WASHINGTON
Labor & Personnel Division
7141 Cleanwater Drive SW
PO Box 40145
Olympia, WA 98504-0145
(360) 664-4167

SCANNED

APPENDIX B

HAVLINA

Date	Complaint	Reported	Witnesses
Early 1990	Tell people to get the "f" out of here at corn spill.	In September 2003	Gilliam
1991			
1992			
1993			
1994			
1995	Best piece of ass he ever had	In September 2003	None
1996			
1997			
1998	Where did you get those faggot glasses?	In September 2003	None
1998	Hip thrust	Possibly in June 2002/ definitely in September 2003	Havlina's sister
2000	Joke that Brewster was rated as a plus 3 because he had a short peter	In September 2003	None
Fall 2000	Comment to Crowmover about his daughter	Possibly in June 2002/ definitely in September 2003	Crowmover Don Shute, both maintained truth. (Shute denied that the comment happened as reported)
Spring 2001	Dispute over sign placement and told to go "F" in the pick up	In September 2003	None (despite a large work crew being present)
June 2002	Where's Darrin? Have to break them in right	First reported in 2006 Rog responses	Lenberg
November 2003	OEO Investigation	Reported sexual comments stopped in 2001	All witnesses agreed nothing after 2001
March 2004	Told going to work in Pasco for a week – spend some quality time together	First identified in December 2007 affidavit after SJ Motion. (Not reported to DOT, in 2006 interrogatory responses or in 2007 deposition)	Five witnesses present - none that support claim of any offensive comment

Havlina testified that these four events caused him to