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Cause No. 735462

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

JIMMIE R. GOODE

Appellants,

v.

TUKWILA SCHOOL DISTRICT 406

Respondents.

REPLY BRIEF OF APPELLANTS

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I. Response to District’s Counter Statement of Facts.

A. 2008 Suspension from Head Football Coaching Duties and Pressure to Resign.

The District asserts Mr. Goode “fails to submit any evidence to support this assertion [he could not attend the team banquet].” Respondent’s Brief¹, pg. 5. The notice of suspension CP 64-65 said he could attend the banquet and collect the equipment, but was rescinded. CP 252-55, 322-27. E-mails asking about being able to attend the banquet were ignored CP 325-26. The District pressed for resignation and celebrating when those efforts proved successful. CP CP 877, 892-95.

B. Absence from Work Due to Medical Condition.

The District asserts “Plaintiff without evidentiary support that, during the 2012-2013 school year, he was absent from work and ...Daryl Wright ... the Assistant Principal ...was told by someone at the District to check on the legitimacy of his medical condition.” DBr. Pg 8. Mr. Goode’s testimony reporting this occurrence CP 254 and the e-mail to the Administration from Mr. Wright about this unusual occurrence in which he raised concerns about Principal Griek treatment of Mr. Goode, concerns about racism, hostile work environment suffered by staff and students of color and pointing out the disparate treatment between Mr.

¹ Respondent’s Brief will hereinafter be abbreviated as “DBr.”

Goode and a white co-worker CP 914 are ignored. Nothing in the record states the scrutiny was a routine or did not happen.

C. Principal's "Rating of Mr. Goode.

The District asserts, "Aside from the hearsay statements Mr. Wright made to Mr. Goode, there is no evidence of this alleged "low rating." DBr. Pg. 8. Mr. Goode's interactions with Principal Griek, his recounting of the admissions of Principal Griek and Griek's comment "my bad" for making an evaluation unsupported by any factual observations are ignored. CP 255, 752. Mr. Griek admitted he had no evidence to support the low rating. CP 255, 750-51 The Union President present "vaguely" remembered the meeting CP 750-52 distinctly remembered Griek stating "my bad" as a classic example of his incompetence. CP 752-53. The assertion that Griek believed Goode needed some "professional development" is disingenuous because Mr. Griek had made no observations of Goode's performance to support that assertion.

D. Comments Attributable to Ethelda Burke.

The record is replete with evidence of racist remarks and disparaging comments made by the District Superintendent, Ethelda Burke. CP 256-258, 300-01, 303-04, 311, 459, 813-16. Ms. Burke noted the presence of three African American employees at Shoalwater middle school office with the comment: "Look at the slaves in master's quarters." CP 449-55,

567-69; 599;-600; 623-24; 660-63; 667; 693-98. This was reported to Mr. Goode as Ethelda had called the African American employees “my slaves.” CP 256-57, see also Complaint, ¶ 3.7. CP 3.

Ms. Burke told J.D. Hill that he was making the district look “too ghetto” by hiring too many African American bus drivers. Wooster Dec.¶ 7 CP 447, 503; 300, 1909. At a staff appreciation luncheon, Ms. Burke commented her daughter wanted a BMW, Burke remarked, “BMW stands for **Black Man Working.**” CP 450, 585.

Ms. Burke told another Showalter employee that she was a “big scary black woman.” CP 451, 615. Superintendent Burke told a black bus driver he was a “big, scary black man.” CP 1925. She said she was done with black men. CP 448-49, 486, 527, 555, 300.

Ignoring that Mr. Goode was sickened when the context of the comment of J. Dark or J. Darky was explained to him as a disparaging term used by both the District Superintendent and Human Resources Director CP 256, the District states Mr. Goode was not offended by Ms. Burke referring to Mr. Hill as J. Dark. DBr. at 10.

For the Superintendent’s many racially disparaging remarks, the District asserts “he does not allege that he actually heard these comments or that he was made aware, at the time they were made, of the comments. DBr. pg. 10. While largely true, the District’s blanket assertion cannot

withstand scrutiny. Mr. Goode was present on one occasion to observe the Athletic Director, J.D. Hill called J. Dark. Mr. Goode was present in the all staff meeting when Ms. Burke told disabled African American employee, “Giddy up Blackman” Wooster Dec. ¶ 9 CP 450, 580, 669-70 and the comment created a “buzz” in the room. Goode Dec. ¶31. CP 257. Because it was an all staff meeting, Mr. Goode was present when Burke called out African American staff for sitting together questioning if they needed help filling out a survey. CP 449, 563-567; 451, 626-28; 452, 656-59. 453, 687-92. The District’s assertion “It is beyond disingenuous for Plaintiff to allege that “some of Burke’s comments were made in front of [him],’ where there is no evidence in the record to support this assertion” DBr pg. 11 disregards the record, is insulting and denigrates Mr. Goode.

The District claims the African American employees did not speak among themselves about their collective experiences “until immediately before filing their lawsuit.” DBr. Pg. 11. However, the record reflects that Ms. Burke was placed on administrative leave in March of 2012 and resigned with a settlement agreement in in June 2012. CP 250. Yet the lawsuit was not filed until 2013 as reflected by the cause number 13-2-05262-8 CP 189 and the EEOC finding in November of 2013 that sufficient evidence indicates that the District subjected Mr. Goode and

others to an illegal, hostile work environment consisting of race and color harassment in violation of Title VII. CP 248, 274-280.

Superintendent Burke's expressed racial animus became public knowledge infecting the work environment. CP 256-58, 300-01, 303-04, 311, 448-55, 459, 486, 503, 527, 556, 567-69, 580, 585, 599-602, 615, 623-24, 628-31, 660-63, 669-70, 693-98, 813-16, 1909, 1925. The Superintendent's comments impacted Mr. Goode's work environment reinforcing Daryl Wright's repeated remarks that Ms. Burke did not like "niggers." CP 248-49.

E. Disparate Treatment from Shauna Briggs.

The District's brief compresses multiple events and fails to address key events in the disparate treatment between Mr. Goode and the co-worker who was placed into the Department Head position. DBr. Pgs. 11-12. The District asserts that Ms. Briggs was made Department Head "after Plaintiff expressly and admittedly declined to take the position. DBr. 11, citing to Ms. Brigg's testimony CP 168-70. However, Mr. Goode reported that he was told the Department Head position would be rotated each year. Goode Dec. ¶ 32. CP 258. Mr. Goode did indicate he did not want to be the Department Head once, CP 132 but thereafter it was not rotated.

The District states: "Nor was Mr. Goode able to support his claim that he was left out of [department] decision-making with citation to any

specifics.” DBr. Pg. 12. Again, the District ignores the record. Mr. Goode’s Declaration CP 258-62 outlined in some detail that he was cut out of the process and identified supporting e-mails CP 332-37 specifically addressing concerns about lack of meetings, no minutes of meetings, class size, how class sections are distributed, the addition of swimming to the curriculum and the impact of such a change given the high number of ELL (English Language Learners) students in the mix. Mr. Goode even raised the concern that this exclusion was related to his race and still he was ignored. CP 332. Mr. Wright raised concerns about Mr. Goode being excluded from departmental issues. CP 899-903.

Only Mr. Goode was required to teach in the dangerous environment created by damaged equipment and poor physical facilities in the weight room. Goode Dec. ¶¶ 52-53. CP 268-69, 425-34; 797, 801. The District claims there were no funds to make the needed repairs. DBr. Pg. 12. Yet they only cite to comments of the athletic director that there were fund raising efforts to get some equipment. CP 1917-18. Contrary to that claim, evidence showed there were “pockets of money” that had to be used or it would be lost CP 1934, and “hey, I’ve got money.” CP 1958. Mr. Goode was in fact the only person who had to teach in the weight room, although other persons used the room from time to time. CP 1962.

**F. Requests for Investigation into Shauna Briggs’
[Allegations]**

District did nothing to allow Mr. Goode to clear his name from allegation he had engaged in sexually inappropriate behavior toward Ms. Briggs. CP Goode Dec. ¶¶ 34-40. CP 259-62; 899-903. This allegation was known within Foster High School where Mr. Goode taught. Although untrue, the allegation damaged Mr. Goode’s reputation within Foster High School described as a funnel for gossip. CP 454-55, 725-26.

By contrast, a white teacher who made a racially discriminatory statement to Mr. Goode was allowed a prompt investigation and had his name cleared. CP 266-67, 408-413; 459.

The District alleges that Mr. Goode has “no documentation evidencing that Ms. Briggs ever made such a comment [alleging sexual harassment].” DBr. Pg. 13. Again, the District ignores the testimony of the Union President in the building CP 454-55, 725-26; and Daryl Wright raised concerns about this issue. CP 899-912. Mr. Goode’s requests for the District to look into the issue were ignored. CP 258, 339-45.

The District ignores Ms. Naganawa’s duties and the relationship between Mr. Goode and Ms. Briggs by referring to Ms. Naganawa as Ms. Briggs’ mentor. DBr. Pg. 13. In fact, Mr. Goode was Ms. Briggs’ mentor. Ms. Naganawa never spoke to Mr. Goode about the smothering or alleged

harrasment, though it was her job to facilitate mentor relationships between experienced teachers and new teachers. CP 261-62, 347-252. The District alleges that “the District offered to conduct an investigation, but Plaintiff declined CP 59-60.” DBr. Pg. 13. However, the record reflects no such offer was made until after Mr. Goode had retained counsel and his concerns had been ignored for over a year.

G. Reciept of Less Pay [and Firing When Pay Discrepancy Was Challenged].

The District set Mr. Goode’s pay lower than required by contract. CP 263, 265, 388-406. When he questioned the error, rather than fixing the error he was removed from his position. CP 388. The District alleges this issue is no more than an administrative “hiccup” and asserts Mr. Goode failed to identify other employees who were treated differently. Mr. Goode indicated that he was one of several coaches. The other coaches were not fired, nor did the District allege they were underpaid too. No evidence explains any non-discriminatory reason to explain why this “hiccup” was not race based.

H. Use of District Facilities.

The distinction between student use of facilities should be not broken down by the specific sport at issue.

I. Principal Search Team at Foster High School.

The District disregards a stated reason for Goode's exclusion from the evaluation team was his part in the controversial race discrimination claims. DBr. Pg. 15-16. CP 264-265, 778-779. A white woman highly critical of the race claims was placed on the panel CP 773-775, even suggesting Mr. Wright had no business applying for a leadership role if he was suing the District. Wooster Dec. ¶15. CP 445-57, 776.

J. "Other Issues."

The District renumbered and excluded many issues raised in the Appellant's Brief, pgs. 18-21 addressing seven of thirteen issues while ignoring completely or distorting the facts. DBr. Pg. 16-17.

For example, when describing the employee who would leave bodily waste in the toilet attached to Mr. Goode's private office CP 268, 418-19., the District states it was "urinary waste" and that it was "undisputed" the teacher was concerned with water conservation. DBr.pg. 16. That point is not conceded. Both Mr. Goode and the Athletic Director, J.D. Hill stated this employee left feces as well as urine in Mr. Goode's private bathroom. CP 268, 1923, 1930. In view of the many other available toilets, this teacher's choice of leaving unflushed waste in Mr. Goode's private bathroom makes his motive debatable.

II. Legal Discussion and Argument.

A. This Case Should Be Remanded for a Jury to Determine The Cumulative Impact of the Events Complained of Upon the Teacher’s Working Conditions.

1. Standard of Review.

Review of summary judgment is *de novo*. All “the facts and reasonable inferences from those facts [are viewed] in the light most favorable to the nonmoving party.” *Hubbard v. Spokane County*, 146 Wn.2d 699, 706, 50 P.3d 602 (2002) (internal citations omitted). Summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 617, 60 P.3d 106, 109 (2002).

Appellate courts are not suited for, and therefore not in the business of, weighing and balancing competing evidence. *See, e.g., No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc.*, 71 Wn.App. 844, 854 n. 11, 863 P.2d 79 (1993) Throughout the District’s Brief key facts are omitted. The District advocates for a benign interpretation of questionable conduct or claims events observed did not happen. Repeatedly, the District urges that Plaintiff’s declaration be disregarded as unworthy of credence and invites this court to weigh in on the credibility of witnesses. (“...Plaintiff continues to insist that he was not allowed to attend the team banquet, he still fails to submit any evidence to support this assertion.”) DBr. Pg. 6; (...Plaintiff asserts without any evidentiary support that, during the 2012-

13 school year...that ...Assistant Principal... was told to check on the legitimacy of his medical condition...Plaintiff has not, however provided any evidentiary support of this claim other than his own testimony”) DBr. pgs. 7-8; (“Plaintiff has submitted nothing but his own self-serving, yet unspecific and incredible, declarations in efforts to defeat summary judgment.”)² DBr. pg. 19.

An employee need only produce evidence that raises a genuine issue of material fact on whether the reasons given by the employer for the complained of actions are unworthy of belief or are mere pretext for what is in fact a discriminatory purpose. *Sellsted v. Wn. Mut. Savs. Bank*, 69 Wn.App. 852, 859, 851 P.2d 716 (1993). Conflicting reasons or evidence rebutting their accuracy or believability are sufficient to create competing inferences. *Id.* at 862-63, 851 P.2d 716. Such inconsistencies cannot be resolved at the summary judgment stage. *Id.* at 861, 851 P.2d 716 (citing *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 900-01 (3d Cir.) (*en banc*) (1987)). The employee is not required to produce evidence beyond that offered to establish the prima facie case, nor introduce direct or “smoking gun” evidence. *Sellsted*, 69 Wn.App. at 860, 851 P.2d Circumstantial, indirect, and inferential evidence will suffice to discharge the plaintiff's

² This comment ignores the hundreds of pages of corroborating deposition testimony reflecting the observations of at least fourteen separate witnesses attesting to the hostile work environment and corroborating many of Mr. Goode's observations. CP 483-844; 929-1967.

burden. *Sellsted*, 69 Wn.App. at 861, 851 P.2d 716. He must meet his burden of production to create an issue of fact but is not required to resolve that issue on summary judgment. “For these reasons, summary judgment in favor of employers is often inappropriate in employment discrimination cases.” *Sellsted*, 69 Wn.App. at 861, 851 P.2d 716.

The Court should disregard the District’s efforts to exclude Mr. Goode’s declaration.

2. A Hostile Work Environment Was Created By a Both Actions and the District’s Failure to Take Appropriate, Timely Action.

To establish a claim for a hostile work environment, a plaintiff must prove that harassment (1) was unwelcome, (2) was because he is a member of a protected class, (3) affected the terms and conditions of his employment, and (4) was imputable to his employer. To satisfy the third element, the harassment must be sufficiently pervasive so as to alter his employment conditions. *Broyles v. Thurston Cnty.*, 147 Wn. App. 409, 431, 195 P.3d 985, 996 (2008).

The harassment is imputed to the employer, where an owner, manager, partner or corporate officer personally participates in the harassment. To hold an employer responsible for the discriminatory work environment created by a plaintiff’s supervisor(s) or co-worker(s), the employee must show that the employer (a) authorized, knew, or should have known of the

harassment and (b) failed to take reasonably prompt and adequate corrective action. This may be shown by proving (a) that complaints were made to the employer through higher managerial or supervisory personnel or *by proving such a pervasiveness of harassment at the work place as to create an inference of the employer's knowledge or constructive knowledge of it* and (b) that the employer's remedial action was not of such nature as to have been reasonably calculated to end the harassment. *Glasgow v. Georgia-Pac. Corp.*, 103 Wn.2d 401, 407, 693 P.2d 708, 712 (1985) (emphasis supplied).

Whether harassment is sufficiently severe or pervasive is a question of fact. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Allegations of a racially hostile workplace must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1115 (9th Cir. 2004). If racial hostility pervades a workplace, a plaintiff may establish a violation of Title VII, even if such hostility was not directly targeted at the plaintiff. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1117 (9th Cir. 2004); accord *Alonso v. Qwest Commc'ns Co., LLC*, 178 Wn. App. 734, 739-55, 315 P.3d 610, 613-21 (2013). Here Superintendent Burke's poisonous remarks must be considered when evaluating the work environment even if they were directed at others.

Antonius v. King Cnty., 153 Wn.2d 256, 103 P.3d 729 (2004) adopted the analysis of *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) permitting suits based on acts that individually may not be actionable but together constitute part of a unified whole comprising a hostile work environment, including acts that occurred more than three years before suit was filed.

In *Broyles v. Thurston Cnty.*, 147 Wn. App. 409, 431, 195 P.3d 985, 996 (2008) the court found a variety of discrete acts contributed to a hostile work environment including failing to respond to the employees' requests for investigations, poor assignments, lack of communication and denial of promotions.

Mr. Goode's complaint concerning the posting of a racially defaced picture of the President done up in black face and money ears³ in a class room in which he was assigned to substitute teach went ignored. Goode Dec. ¶49. CP 267, 415. The District addresses this issue by asserting there was only a "single e-mail" posing a rhetorical question to the Assistant Principal. DBr. Pg. 24. The District's belief such a serious issue requires multiple e-mails and follow up exemplifies an administration tone deaf to employees' hostile work environment concerns.

³ The District ignores the monkey ears drawn on President Obama's head and just describes the defacement as "black face." DBr. Pg. 24.

The District's inaction is viewed in conjunction with the evidence that Mr. Goode's administrators stated Superintendent Burke did not like African Americans and nothing would come from his complaints. CP 248

A teacher was allowed to leave un-flushed urine and feces CP 1923, 1930 in the toilet attached to Mr. Goode's private office, even after Mr. Goode showed the person another area in which he could change and relieve himself demonstrating there were toilets not in Mr. Goode's private office available. Mr. Goode complained to administration yet the conduct continued. CP 268, 418-19. The employee was not disciplined. The District describes the toilet where this happened as "the publically accessible only private bathroom in the locker room area." DBr. 22-23. That ignores that the bathroom was attached to Mr. Goode's small private office and there were many other toilets available to the teacher. CP 268, 418-19. It was not publicly accessible; it was Mr. Goode's private office.

An employee who made racially offensive remarks to Mr. Goode, but was nevertheless exonerated of any racial animus, was not required to undertake cultural sensitivity training that Mr. Goode was told the employee would have to attend. CP 266-67, 408-413; 458-59, 458-89, 843-44. The witness reporting the event was never contacted by the District, this witness said it was like the event never happened. CP 458, 809-10.

The District failed to address why a person tasked with developing mentor relationships instructed a new teacher to stay away from her “mentor” [Mr. Goode], an African American teacher with over two decades of teaching experience holding advanced degrees, or why the Mentor Supervisor never discussed the issue with Mr. Goode despite her assigned job was training mentors. Goode Dec. ¶ P34-40. CP 259-62, 339-355. The District describes the person tasked with training mentors as Ms. Briggs’ mentor DBr.Pg. 13, where in fact Mr. Goode was supposed to be Ms. Briggs’ mentor. Goode Dec. ¶ P34-40. CP 259-62, 339-355; 902. The District claims that Mr. Goode refused the District’s offer to investigate this issue. DBr. Pg. 13 referencing CP 59-60. Rather than supporting the District’s position that reference only reinforces that repeated requests were made for the District to look into this issue not only by Mr. Goode, but by the Assistant Principal. CP 902. The District only investigated whether Mr. Goode actually complained. CP 59-60.

Mr. Goode raised this and issues in a meeting with the principal such as weight room safety, false allegations Mr. Goode had sexually harassed a teacher he was supposed to mentor, and Mr. Goode being excluded from department decisions. These issues were ignored by the District. CP 254-255, 455, 724-26, 728-29,736-43, 749, 750.

When Mr. Goode acted as a chaperone for the Prom his Principal ordered him to stand outside and guard the back door for the entire evening. Goode Dec. ¶ 58. CP 271. Allegations of a racially hostile workplace must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1115 (9th Cir. 2004)⁴. The District trivializes this incident. The back door assignment marginalized the only African American teacher at Foster High School sending a clear message Mr. Goode was not part of the group and blacks were not equal to others..

The District's conduct must be viewed against the backdrop of the racially charged atmosphere that led to other African American staff raising complaints and students marching in protest. CP 459, 813-16.

A jury must decide: Did these incidents create a hostile work environment?

3. The Treatment of the Teacher Amounted to An Adverse Impact.

Disparate treatment occurs when an employer treats some people less favorably than others because of race, color, religion, sex, or other protected status. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 354 n.

⁴ Because RCW 49.60 substantially parallels Title VII, federal cases interpreting Title VII are persuasive authority for the construction of RCW 49.60. *Estevez v. Faculty Club of Univ. of Washington*, 129 Wn. App. 774, 793, 120 P.3d 579, 587 (2005)

7, 172 P.3d 688 (2007). To establish a prima facie disparate treatment discrimination case, a plaintiff must show that his employer simply treats some people less favorably than others because of their protected status. *Johnson v. Dep't of Soc. & Health Servs.*, 80 Wn.App. 212, 226, 907 P.2d 1223 (1996). A plaintiff may establish a prima facie case by either offering direct evidence of an employer's discriminatory intent, or by satisfying the *McDonnell Douglas*⁵ burden-shifting test that gives rise to an inference of discrimination. *Kastanis v. Educ. Emps.' Credit Union*, 122 Wn.2d 483, 491, 859 P.2d 26, 865 P.2d 507 (1993).

The Defendant argued that Mr. Goode has had no “adverse employment action” to trigger a disparate treatment analysis. CP 214. In *Alonso v. Qwest Commc'ns Co., LLC*, 178 Wn. App. 734, 315 P.3d 610 (2013) the court held the creation of a hostile work environment was an adverse employment action. The “adverse employment action” requirement is interpreted broadly and may include reductions in compensation, a warning letter or negative review, undeserved performance evaluations, and transfers of job duties. *Fonseca v. Sysco Food Services of Arizona, Inc.*, 374 F.3d 840, 847 (9th Cir.2004).

⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

In *Davis v. W. One Auto. Grp.*, 140 Wn. App. 449, 458-59, 166 P.3d 807, 812-13 (2007) the Court found summary judgment inappropriate where the Plaintiff alleged just three examples of adverse employment action (1) his picture was not put in the paper when he was salesman of the month, as was custom; (2) he was treated less favorably than other similarly situated employees because he was not permitted to drive any car he wanted as salesman of the month, and (3) he was held to a higher standard than other employees; he was disciplined more harshly for missing work and being late than were his co-workers.

Mr. Goode suffered disparate treatment on several fronts. The white department head was permitted to make decisions about Department operations without any input from Mr. Goode despite complaints by both Mr. Goode and the Asst. Principal. CP 258, 332-337, 342-43, 900-03; Mr. Goode's Principal evaluated him as a low performing teacher without any observation to support that evaluation and admitting to that unsubstantiated assessment with the *mea culpa*, "My bad." CP 255, 752-53; Mr. Goode's absences for illness were closely scrutinized. CP 254, 272. He was treated differently than his white counterpart. Mr. Goode was denied participation in the principal selection committee because he was perceived as a "close associate" with the Asst. Principal, Daryl Wright who was a candidate and because Mr. Goode was involved in the

race discrimination lawsuits. CP 455-57. 769-71, 778, 782-83. By contrast a white citizen openly critical of the race discrimination suit was allowed full participation in the selection committee CP 773-775, even commenting Mr. Wright should not seek a leadership role when he was suing his employer. CP 445-57, 776.

Mr. Goode had been the Department Head at Foster High School. CP 258. Mr. Goode was told that they were going to rotate the responsibility of Department Head and Shauna Briggs became the new Department Head. CP 258. The duties of Department Head were not rotated. CP 258. When Mr. Goode reported unprofessional behavior by Ms. Briggs the issue was not addressed and the meeting turned into an attack upon Mr. Goode. CP 258-59. Ms. Briggs took actions affecting Mr. Goode and the Department without his input. Complaints that Mr. Goode was excluded from the decision making process were ignored. CP 258-62; 877-78; 899-903.

The weight room where Mr. Goode taught fell into disrepair creating an unsafe environment CP 268-69, 425- 34 described as a nightmare, horrifying, an accident waiting to happen. CP 455, 736- 41. Mr. Goode daily taught in that dangerous environment until he was injured when a piece of equipment failed. CP 268-69. Only after there was a complete upgrade did Ms. Briggs have to teach in that weight room. Goode Dec. ¶¶

52-53. CP 268-69, 425-34; 797, 801. The District alleges that when Mr. Goode suffered a severe injury requiring a hip replacement it was “the result of a weight plate falling off a weight bar, thus unrelated to the condition of the room itself...” DBr. 25. However, the ongoing disrepair of the weight lifting equipment was the subject of Mr. Goode’s complaints and request for action, not a poor paint job on the weight room walls or the torn and tattered carpeting. While other persons used the room from time to time, only Mr. Goode was assigned to regularly teach in that room as part of his job duties. Only after the room and its equipment were refurbished and replaced did his white co-worker have to teach in the weight room. CP 268-69, 425-34; 797, 801. The District produced no evidence supporting that the refusal to address Mr. Goode’s concerns was because of inadequate resources or that Mr. Goode’s concerns were ever even considered. Rather, the only inference is there were “pockets of money” available CP 1934, and “hey, I’ve got money.” CP 1958-59.

Ms. Briggs admitted that she was told by the District’s mentor supervisor, Ms. Naganawa to keep her distance from Mr. Goode. Wooster Dec. ¶ 16. CP 458, 790. Ms. Naganawa never spoke to Mr. Goode about the issue, though it was her job to facilitate mentor relationships between experienced teachers and new teachers and Mr. Goode was assigned to be

Ms. Briggs' mentor. CP 261-62, 347-352. This event is significant on many fronts, in addition to the District's refusal to investigate this issue.

Mr. Goode was an experienced teacher. CP 247 qualified as a teacher and administrator. CP 247. Ms. Naganawa told the person Mr. Goode was assigned to mentor to keep her distance from Mr. Goode, did not respond to Mr. Goode's request for information about his mentor relationship, and failed to provide any coaching or training to Mr. Goode contrary to Ms. Naganawa's District contract CP 348. She deprived Mr. Goode of valuable instruction and training to enhance his mentoring skills.

Mr. Goode's request for a name clearing hearing was ignored. Goode Dec. ¶ P34-40 CP 344, 259-62. By contrast, Tim Renz, a white teacher who made a racially discriminatory statement to Mr. Goode was allowed a prompt investigation and had his name cleared. Goode Dec. ¶¶47-48. CP 266-67, 408-413; CP 459. The District makes much of the fact that Mr. Goode never actually made a sexually inappropriate remark so no name clearing should have been necessary. DBr. Pg. 35. The District characterizes this as a "mythical sexual harassment complaint" *id.* and a "phantom claim of sexual harassment." DBr. at 22. Yet the Union president acknowledged the allegation was the subject of gossip at Foster High School. CP 454-55, 725. The District asserts the decision not to investigate was made by Goode's attorney. The issue had been ignored by

the District for over a year, except to determine if Mr. Goode and Mr. Wright had actually raised this concern CP59-60. Mr. Goode was placed under a cloud and the District refused to clear his name despite repeated requests. CP 258-62; 339-45, 899-903; 457-58; 899-912.

His immediate supervisor was sent to Mr. Goode's home, told Mr. Goode that he was sent to check to see if Mr. Goode was really sick and stated that this request was unusual. CP 254, 914. The message to Mr. Goode was that the District perceived him to be a malingerer. CP 254, 272.

Even the assignment to man the back door for the entire evening at the Prom is an example of disparate treatment. Since Mr. Goode was the only African American teacher at Foster High School CP 249, 730, it is a given that he was treated less favorably than the white teachers.

A person's protected classification need not be the sole factor in establishing discriminatory treatment, but only a substantial or significant factor. *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn. 2d 302, 306-09, 898 P.2d 284, 286-88 (1995). Once the record contains reasonable but competing inferences of both discrimination and nondiscrimination, it is the jury's task to choose between such inferences. *Boyd v. State, Dep't of Soc. & Health Servs.*, 187 Wn. App. 1, 21, 349 P.3d 864, 873-74 (2015)(internal citations omitted). This standard applies to claims of race

discrimination. *Capers v. Bon Marche, Div. of Allied Stores*, 91 Wn. App. 138, 955 P.2d 822 (1998). Plaintiff has provided sufficient examples of disparate treatment for the question to be put to the jury.

4. The Claims of Negligent Infliction of Emotional Distress Are Actionable.

The District's motion only addressed the sufficiency of medical evidence to support the claim. CP 217-219. The declaration of Plaintiff's treating doctor CP 845-46 should have defeated the defendant's motion. Negligent infliction of emotional distress may be a cognizable claim in the workplace when it does not result from an employer's disciplinary acts or its response to a workplace "personality dispute." *Chea v. Men's Wearhouse, Inc.*, 85 Wn..App. 405, 410, 932 P.2d 1261, 971 P.2d 520 (1997), *review denied*, 134 Wn.2d 1002, 953 P.2d 96 (1998). To the extent Plaintiff's claims for negligent infliction of emotional distress do not also establish claims of unlawful discrimination due to his race the claims are actionable.

5. The District's In Terrorem Demand for Attorney's Fees Must Be Rejected.

The District included a request for an award of attorneys' fees on the appeal pursuant to RAP 18.9. An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so

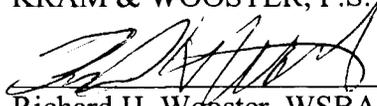
devoid of merit that there is no possibility of reversal, all doubts as to whether the **appeal** is **frivolous** should be resolved in favor of the appellant. *Advocates for Responsible Dev. v. W. Washington Growth Mgmt. Hearings Bd.*, 170 Wn. 2d 577, 580, 245 P.3d 764, 765 (2010). The Equal Employment Opportunity Commission which has special expertise in evaluating claims of discrimination determined the facts alleged by Mr. Goode established race discrimination. CP 274. The District's unwarranted demand for fees is frivolous in its own right.

III. Conclusion

The Order of Summary Judgment should be reversed. Disputed questions of fact make summary judgment inappropriate. Mr. Goode has provided sufficient evidence of a hostile work environment, disparate treatment and emotional distress for a jury to decide his claims.

RESPECTFULLY SUBMITTED this 28th day of October, 2015.

KRAM & WOOSTER, P.S.


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