No. 87793-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

BENJAMIN DANIELSON,
Respondent,

v.

SEATTLE CHILDREN'S HOSPITAL,
Appellant.

RESPONDENT'S BRIEF

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INTRODUCTION

Seattle Children's Hospital hired Dr. Danielson to be the leader—and the face—of the Odessa Brown Children's Clinic. The hospital touted its commitment to equity, putting Dr. Danielson on its brochures and sending him out to fundraise from major donors.

But behind closed doors, the reality was different. As one doctor put it, the hospital was a "poisoned well of racism." Ex. 163 at 1. The hospital excluded and demeaned Black employees. Dr. Danielson faced colleagues who assumed that he was less capable because he is Black. A leader of the hospital called Dr. Danielson the n-word and suffered no consequences. Black patients—*children*—were routinely called drug-seeking and denied medication; and over and over again, the hospital called security on Black families who posed no threat. Donors, staff, and community members were concerned that the hospital treated the clinic, which serves a largely Black population, differently from the rest of the hospital, which serves a mostly white population. When Dr. Danielson reported this concern to the board of trustees, rather than address the issue, the hospital demoted him.

After weeks of testimony and days of deliberation, the jury found that the hospital had subjected Dr. Danielson to a hostile work environment and retaliated against him for reporting his concern to the board. Despite a record demonstrating that Dr. Danielson labored for years in the hostile environment that the hospital created, the hospital asks this Court to overturn the jury's decision. The hospital's rationale: It's not our fault; it didn't happen to Dr. Danielson; and it wasn't that bad anyway. The jury rejected these arguments. And there is more than sufficient evidence in the record to support its decision.

First, the evidence showed that the hospital created and condoned the hostile work environment. *Hospital* employees treated Dr. Danielson differently because of his race; a *hospital* leader used racial slurs, and the *hospital* did nothing; the *hospital* knew for years that its staff was discriminating against Black families and allowed that discrimination to continue; and the *hospital* demoted Dr. Danielson. The jury did not hold the hospital liable for free-floating systemic racism endemic to our society; it held the hospital liable for its own actions in creating and perpetuating a racist, hostile work environment within its walls.

Next, the jury had more than enough evidence to conclude that Dr. Danielson "personally experienced" the hostile work environment. Op. Br. 2. Dr. Danielson "personally" had to work with colleagues who treated him as less-than because of his race; he "personally" had to come to work each day knowing the hospital's leadership used racial slurs or condoned their use by doing nothing about it; he "personally" witnessed Black patients being treated as drug addicts and Black families having security called on them unnecessarily; he "personally" supported many other families through those experiences; and he "personally" was demoted because he raised a concern about equity.

The hospital argues that its mistreatment of Black patients shouldn't count in considering whether Dr. Danielson faced a hostile work environment. But as courts have repeatedly explained, a work environment poisoned by discriminatory conduct may be hostile to Black workers even if the discrimination isn't targeted at the plaintiff. That's especially true here: Because of Dr. Danielson's role as liaison to the community served by the Odessa Brown clinic, families who suffered racism at the hospital came to him. And as he witnessed each family's suffering, it became increasingly clear to him that the hospital—the institution he worked for day after day—was perpetuating the racist incidents, rather than ending them.

Finally, the jury was not required to accept the hospital's claim that its discrimination had little impact. Dr. Danielson testified that it was "psychically torturing." RP 664. It impacted his ability to eat and to sleep. It affected the nature of his job itself: He spent much of his time trying to shield Black families from the hospital's racism or support them after an incident, taking on the burden of fighting back against an institution that refused to change. And eventually, the hospital demoted him for speaking up about inequity. Although the hospital claimed that its discrimination was neither severe nor pervasive, the jury was entitled to conclude otherwise.

Ultimately, the hospital is unable to offer any convincing justification for this Court to override the jury's conclusion that it perpetuated a hostile work environment. Nor should this Court reverse the jury's verdict that the hospital retaliated against Dr. Danielson for voicing concern at a board meeting that the hospital's treatment of the Odessa Brown clinic was inequitable. Demotion is a paradigmatic form of retaliation. And the hospital offers no lawful reason for demoting Dr. Danielson. Instead, the hospital claims that he wasn't demoted at all. But after conducting a fishing expedition into all aspects of Dr. Danielson's leadership, the hospital informed him that his role would become advisory and that it was hiring another medical director to take over clinic operations. The jury was entitled to conclude that was a retaliatory demotion.

This Court should affirm.

STATEMENT OF THE CASE

A. Seattle Children's Hospital hired Dr. Danielson to lead the Odessa Brown Children's Clinic.

Dr. Benjamin Danielson is an award-winning pediatrician with more than twenty-five years of experience. CP 2, 4; Ex. 122 at 2. After graduating from medical school, he began his career as a resident at Seattle Children's Hospital, working at the main hospital campus in Seattle. RP 626-27; CP 190. Seven years later, the hospital re-hired Dr. Danielson as the medical director of the Odessa Brown Children's Clinic—a satellite pediatric primary care clinic that it owns and operates. RP 627; CP 1-2. The role also included regular rotations as an attending physician at the main hospital. RP 638.[1]

The Odessa Brown clinic is named for a "Black woman who fought to bring quality healthcare with dignity to children in Seattle's Central District." CP 173. During Dr. Danielson's tenure, approximately "40 percent or so of the families that came to the clinic were African American or Black," compared to only 6 percent at the rest of the hospital. RP 632; Ex. 167 at 19. "[F]our out of five of the families" served by the clinic "were on Medicaid" or were "low income." RP 633. Dr. Danielson wanted to work at the "legendary clinic" because of its "legacy of connection" to "civil rights and helping low-income communities." RP 627.

The hospital hired Dr. Danielson not just to oversee medical care, but to "provide leadership for a clinic that serves the African-American community" and "bring the community perspectives and needs into the space of health care." RP 508, 662; Ex. 140 at 1. The hospital sent Dr. Danielson to speak with donors about the great work at Odessa Brown, used his image on its

[1] Unless otherwise specified, all internal quotation marks, alterations, and citations are omitted from quotations throughout.

brochures, and quoted him in its promotional materials. RP 668-69; Ex. 107 at 2. It held Dr. Danielson and the Odessa Brown clinic out as evidence of the hospital's commitment to serving marginalized communities and advancing health equity, lauding him for his deep involvement with the community. *See* RP 1444, 1491, 1529; Ex. 128 at 2.

B. The hospital refused to address racism targeted at Dr. Danielson and his Black colleagues.

Leading Odessa Brown was Dr. Danielson's "dream job." RP 753. But it quickly became clear that the reality of working for the hospital did not match the image the hospital sought to portray.

1. From the outset of his employment, Dr. Danielson was treated differently than his white colleagues. RP 507. Dr. Danielson faced colleagues who "didn't think [he] was very smart," "were amazed that [he would] have the right answer" to a question, or "thought [he] was somehow cheating" because of his race. RP 507. Even at trial, the hospital's former chief medical officer—Dr. Danielson's boss—testified that for some reason, he assumed that Dr. Danielson would not have had privileges to treat patients at the hospital. RP 1702-03. But Dr. Danielson had privileges and routinely treated patients at the hospital. RP 638, 1703.

And that wasn't the worst of it. Dr. Danielson learned that Jim Hendricks—a senior leader at the hospital—had called him the n-word. RP 302, 495, 1138. Dr. Hendricks walked into a meeting with Brenda Majercin, a hospital employee who reported to him, and said "Ben Danielson is [a n*****]." RP 303, 310-11. Dr. Hendricks, "clearly angry," continued: "There are [n******] like Ben Danielson who are from Harvard and think they know—they know it all." RP 311. But, Dr. Hendricks said, there are other types of "Black people" like "Willie Austin, … a Black man who owned a gym downtown." *Id.* "[T]hose kind of Black people," he said, "were fine." *Id.*

This was not the first time Majercin had heard Hendricks use the n-word. He'd previously said that "the [n******] [in New Orleans] are different than they are here." RP 307. And he'd used other slurs too. RP 306, 323.

Although she was initially afraid to do so, Majercin eventually reported these incidents to the hospital's human resources department. RP 312-13. But the hospital wrote them off as merely "not appropriate." Ex. 12 at 2. Perplexingly, the hospital concluded the incidents were not "discrimination." RP 500. At trial, the hospital was unable to provide any documentation proving they had investigated the incident at all, beyond merely interviewing Majercin. RP 2340-41.

When Dr. Danielson heard what Dr. Hendricks had said, he was "stunned." RP 495. He felt "really alone" and "ashamed." RP 496-97. He was "shocked" and "deeply traumatized." RP 1144-46. And he started asking himself "what did I do to receive that?" RP 496. The incident, he testified, "was really devastating." RP 1145.

After learning of the incident, Dr. Danielson reported it to his direct supervisor, David Fisher, the hospital's chief medical officer. RP 498, 1702. Dr. Danielson said that he was "deeply disturbed" by Dr. Hendricks's comments. *Id.* But Dr. Fisher did not express concern. *Id.* Instead, he abruptly "stopped" the conversation and changed the subject. RP 498-99.

Neither Dr. Fisher nor anyone else from the hospital followed up with Dr. Danielson about his report. But Majercin told Dr. Danielson that the hospital had concluded that the comments were not discriminatory. RP 500. Dr. Danielson was "very surprised" and "disappointed." *Id.* The outcome suggested that "leadership has reviewed and endorsed this behavior," and that the hospital was "a place where these conversations" can happen "behind [his] back." RP 500-01. Dr. Danielson was "scared" and felt "a further sense of isolation." RP 501.

Years later, after Dr. Danielson resigned, the hospital hired the law firm Covington & Burling to complete a thorough assessment of racial equity at the hospital and to produce a report. Ex. 5. As part of the investigation, Covington conducted hundreds of interviews and reviewed thousands of documents. RP 1897. The Covington report found that the hospital "did not adequately investigate or address" the incident. Ex. 1. As Dr. Danielson testified—and the Covington Report makes clear—that incident was only the most egregious example of "an environment that exclude[d] and undervalue[d]" Black employees. Ex. 1 at 2; RP 503-04, 665-66.

2. Dr. Danielson's treatment reflected an environment that was hostile to Black employees. White employees were consistently given higher performance ratings than other employees. RP 1047, 1049. And Black employees "regular[ly]" sought out Dr. Danielson to discuss the racist treatment they were experiencing at the hospital. RP 665-66 (Dr. Danielson's testimony); RP 539-40, 552 (testimony by another Black doctor).

For example, Dr. Corrie Anderson, was hired as the director of Pediatric Pain Medicine. RP 537. But the physicians he was charged with supervising did not want him to be their boss because he is Black. RP 554-56. Dr. Anderson raised the issue with Dr. Lynn Martin, his direct supervisor. RP 562-63. But instead of investigating the racist treatment, Dr. Martin ordered that *Dr. Anderson* submit to a leadership evaluation, called a 360 review, and work with a coach. RP 563-64. Dr. Martin then told Dr. Anderson that he "wanted [Dr. Anderson] to step down" as director of Pediatric Pain Medicine. RP 565. If he did not "resign," Dr. Martin said, he was "going to fire [him]." *Id.*

Dr. Anderson then approached the hospital's chief medical officer, Dr. Fisher, and told him that he "thought this was racist that [he] was being let go." RP 566. Just as Dr. Fisher had ignored Dr. Danielson's concerns that he had been called the n-word by a colleague, Dr. Fisher dismissed Dr. Anderson's concerns, insisting that Dr. Martin was not racist. *Id.*

Several years later, Dr. Martin eventually apologized to Dr. Anderson for acting based on "bias." RP 612-13. But it was too late: Unable to get the hospital to challenge his racist treatment, Dr. Anderson was forced to resign his leadership position. RP 565.

3. Though both Dr. Danielson and Dr. Anderson repeatedly reported the racist treatment they faced to the hospital, the hospital failed to take action. RP 566, 498-99, 1117-18. The hospital knew that it struggled to retain Black employees. Ex. 167 at 22, 26. But still, the hospital did not improve conditions for those employees because leadership "push[ed] back on engaging in this work." *Id.* at 13, 22. There was not even consensus that racism "is something we can and should talk about." RP 900; *see* Ex. 167 at 14.

C. The hospital routinely mistreated Black patients and their families.

The hospital's racism was not limited to its employees.

1. The racial disparities were reflected in the buildings themselves. Although the main hospital—which served very few Black patients—was "beautiful" and "well maintained," Odessa Brown, which served largely Black patients, was "broken down and decrepit." RP 349, 632, 643; Ex. 167 at 20. The hospital had plenty of money, yet the clinic "had leaky windows, where there was fear of mold," "warp[ed]" floors, and a broken HVAC system. RP 349, 643, 1681. Odessa Brown was "treated like a second-class clinic" compared to other clinics run by the hospital; it "looked like the unwanted stepchild of Seattle Children's." RP 1295.

2. And when Black patients had to go to the main hospital, they faced difficulty getting treatment. RP 647-48. Black families "waited a lot longer than anyone else," "were treated brusquely," and weren't "listened to." RP 645. The parents of Black children reported that they were "not treat[ed] … with respect." RP 901 (testimony of hospital vice president). Black parents worried that if they "voice[d] concerns or questions" they would be "labeled an 'angry parent' and their child would receive worse care." Ex. 167 at 15. After their "terrible experience[s]" in the hospital, Black parents were "nervous" to return, even if their child needed to go to the emergency room. RP 649.

Hospital medical staff forced Black children with sickle cell anemia to suffer "terrible, excruciating pain." RP 548-49, 646, 833. Although sickle cell is known to be incredibly painful, Black children were labeled "drug seeking" and given insufficient medication. RP 548-49, 551, 617. Even when the hospital's pain specialists prescribed pain medication, other staff would refuse to dispense it, insisting that the children didn't "really need" it. RP 551. Parents experienced severe "distress[] … know[ing] that their child [was] in pain" that was not being addressed. RP 646.

The hospital knew about this disparity but allowed it to continue for years. RP 541-42, 552, 833. The Covington report, commissioned in the wake of Dr. Danielson's resignation, found that there was a "widespread perception" among hospital employees "that patients receive[d] disparate treatment on the basis of race." Ex. 1 at 2.

3. And even apart from their medical care, Black families endured mistreatment at the hands of the hospital. For example, throughout Dr. Danielson's tenure, the hospital disproportionately—and unnecessarily—subjected Black families to what was called "Code Purple." RP 651. Code Purple was "an alert and call for help in response to a situation where an individual's behavior" purportedly "pose[d] an emergent danger." Ex. 38 at 1. In response to a call, security would force the patient or their family member to leave, restrain them, or "stand[] guard as a show of power." *Id.* This separated Black parents from their children receiving care. *See id.* And it left Black families feeling "embarrassed, demoralized, and … like they [were] being treated like criminals and … disempowered." *Id.*; *see* RP 652, 655; Ex. 167 at 7.

Regularly, hospital staff called security on Black parents, even though the "[s]ame behavior by a white parent/patient would not prompt" a call. Ex. 167 at 7. For example, hospital staff called security on one Black father after he advocated for the use of a particular needle ordered by the physician to minimize his child's pain during a blood draw. Ex. 38 at 1. The father said: "[A]s a black man, being escorted away from my very sick child by a security officer left me powerless, embarrassed, and seen in the eyes of other families on the unit as a criminal." *Id.*

In an incident between a Black patient and a white patient, the Black patient was physically restrained while the white patient was "gently escort[ed]" back to her group session. Ex. 185 at 1. And after a "seemingly minor dispute between [another] black father and the mostly white [hospital] team members," hospital staff called the police who took the father to jail. Ex. 186 at 2. Similar incidents happened "every single week of every single month." *Id.*

4. For years, the hospital knew that Black families were being restrained, guarded, and subjected to law enforcement unnecessarily. RP 656; Ex. 38 at 1. Yet it did not meaningfully address the problem. RP 659; Ex. 167 at 19.

As early as 2003 or 2004, parents and community members voiced concern that security was being called disproportionately on Black families. RP 652. Dr. Danielson therefore worked with the community to begin tracking Code Purple calls. RP 652-53. A review of the calls made to security from 2008 to 2011 found "a tremendous disparity in Code Purple calls based on race." Ex. 38 at 1. According to a 2013 report, "black patients [were] more than twice as likely to have a Code Purple called than white patients" and were more likely to be flagged for "parental confrontation" or for being "non-compliant to commands." *Id.*

The report urged that the disparity "be recognized for what it is: Institutional Racism." Ex. 38 at 2. The hospital, it said, had "an obligation to address this disparity immediately." *Id.* Although the report was presented to the chief medical officer, Dr. Fisher, the hospital's board of trustees, and other hospital leadership, the hospital did nothing to fix the problem. RP 138, 141-42, 1722.

Although the board wanted to "form a standing committee" to work on "issues of diversity and inclusion," including Code Purple, the hospital refused: According to the CEO, it was "not necessary." RP 142. And the disparity in Code Purple calls continued unabated. RP 139-40, 659 (data in 2017 or 2018 demonstrated that disparity persisted).

In 2019, a second Code Purple working group found that "clear [racial] disparities" in the use of Code Purple persisted, caused by "institutional and interpersonal racism and implicit bias." Ex. 167 at 18-19, 22. That working group wasn't even told that there had been a prior report. RP 880. And once again the hospital refused to solve the problem. The hospital "rejected" the Code Purple working group's recommendations and told the group that they "should avoid discussing race because it causes more harm than good." Ex. 164 at 2. Lacking "organizational support" from the hospital, the working group cancelled its future meetings. Ex. 164 at 1-2.

Dr. Shaquita Bell, a member of the second Code Purple working group, wrote at the time that the hospital was a "poisoned well of racism." Ex. 163 at 1. A second member of the working group remarked that "[n]o one ever wants to talk about equity at [the hospital]." *Id.*

The Covington report ultimately found that the hospital "ha[d] known about significant racial disparities in Code Purple calls since at least 2013, but senior leadership did not meaningfully act to mitigate these disparities until 2020," after Dr. Danielson had resigned. Ex. 1 at 2; RP 2113.

5. Because his role was to serve as the liaison between the Odessa Brown clinic and the community it served, families suffering from the hospital's racism came to Dr. Danielson. RP 662. Dr. Danielson repeatedly had to witness his patients denied pain medicine or have security called on them because they were Black. RP 1190-92. And over and over again, Black families confided in him about the racist treatment they experienced. RP 646, 651, 656, 1368 (estimating about 100 times).

Working to support families "who were struggling and suffering from" racist treatment at the hospital became "a very big job" for Dr. Danielson both "in terms of the magnitude" and "the amount of time" required. RP 662. Dr. Danielson started "trying to get to the hospital early in the morning" before going to the clinic and went "back to the hospital afterwards to try to support families." *Id.*

Over time, this advocacy took "a toll" on Dr. Danielson. RP 663. He wondered if he was "contributing to something good or something that was good and harmful at the same time." *Id.* He felt "emotionally distress[ed]" and "deeply, deeply affected" by witnessing his patients experience racist treatment. RP 663-64. As the years passed without any progress, Dr. Danielson experienced not just frustration, but anger. RP 664. He was told repeatedly that things were going to change but they never did. *Id.* He testified that working in that environment "wears you down" and "gets into your soul." *Id.* The experience, he said, was "psychically torturing." *Id.*

D. Dr. Danielson raised concerns about the inequitable treatment of Odessa Brown.

1. By 2019, the hospital was in the midst of a fundraising campaign, seeking to raise more than a billion dollars. RP 682. One arm of that campaign asked donors to contribute to Odessa Brown. RP 674-75, 681-82. And "Dr. Danielson was the face" of that campaign—literally. RP 996. "[H]e was on all kinds of documents, brochures," and "fundraising requests." RP 996-97. He was "front and center for all big donor conversations." RP 353. He built relationships with major funders, including Steve Ballmer, the former CEO of Microsoft; the Bezos Family Foundation; and the Lenny Wilkens Foundation. RP 679-82. His efforts were tremendously successful: The campaign brought in $125 million. RP 691. Donors "saw the importance of the role [Odessa Brown] played in the community" and "wanted to get behind it." RP 355; *see also* RP 681-82 (funders donated to support the projects the community asked for in the redevelopment of the clinic).

As the campaign went on, however, donors, employees, and board members expressed concern about how the hospital was treating the clinic, and the money it was raising supposedly on its behalf. Donors raised questions about the hospital's commitment to the clinic and the community it served. RP 149, 352, 678-79, 690. Employees and board members were more pointed: They worried that the hospital was requiring the clinic to rely on donations to fund its building, while the hospital itself funded other buildings. RP 2018; Ex. 25 at 6. They were concerned that money pledged to Odessa Brown, which served largely Black patients, was being redirected to other parts of the hospital, which served far fewer. RP 153-54, 363-64, 690. And they noted that the hospital's funding seemed to be contingent on benchmarks the clinic's population could not meet. RP 698.

Dr. Danielson and two other members of the fundraising team met with the hospital CEO and CFO to discuss these concerns. RP 692, 2018. The meeting went "[b]adly." RP 693. The CFO was "very offended" and "upset." RP 2019. She became "visibly intense and irate." RP 693. She said that the hospital did not consider "equity" when it was making "financial decisions." RP 1413. And then the CFO said: "I don't believe in institutional racism." RP 357, 693. Though the hospital's CEO, Jeff Sperring, was in the meeting, he said nothing in response. RP 693, 2020. Dr. Danielson felt "disconcert[ed]," "deflat[ed]," and "upset[]." RP 693-94.

2. Dr. Danielson and the fundraising team escalated their concerns to the board of trustees. In the fall of 2019, Dr. Danielson attended a meeting with the board, the CEO, COO, and other hospital leadership. RP 168, 692. Unlike several other construction projects, the COO said, the hospital would only pay half of the costs of building the new clinic, and the clinic would have to rely on donations for the rest. RP 168-69, 247-48. He also said that the clinic would have a reduced operating budget—$2 million less than what had initially been promised. RP 701-02, 2022.

The board members had several questions about the presentation: Why and how was it decided that the hospital would only contribute half of the capital budget, even though the hospital was funding two other construction projects in full? RP 169, 247-48. If the hospital was projecting a significant increase in the number of patients that would be visiting Odessa Brown, why was there not a proportional increase in the budget? RP 169-70. Was the hospital really committed to the communities served by Odessa Brown? Ex. 42 at 3.

The conversation was "very tense." RP 173, 704. A board member asked Dr. Danielson directly: Did he have "any concerns about the level of commitment of the hospital to th[e] project"? RP 702. Dr. Danielson said he was "increasingly concerned about the hospital backing off on its commitments" to Odessa Brown and the community it served. RP 703. Families walking into a clinic "with one third of the space not built out," and without the programs the hospital had promised, Dr. Danielson worried, "would make a strong negative statement regarding how much we value them." Ex. 19 at 3.

Several board members shared his concerns. One board member, for example, expressed concern that requiring Odessa Brown to rely on donations for "a building that served the largest population of people of color that the hospital served," while other buildings were fully funded by the hospital, was racial inequity. RP 248. The community, she said, would see that the hospital was making funding decisions "based on race." RP 177.

E. After Dr. Danielson criticized the hospital, the hospital investigated and demoted him.

After Dr. Danielson criticized the hospital in front of the CEO, other senior leadership, and the entire board, his relationships with hospital officials soured, and the hospital looked for a reason to push Dr. Danielson out. RP 703, 742-43, 750, 1744-45. It seized on a minor mistake that Dr. Danielson made in the earliest days of the COVID-19 pandemic, used that to investigate every facet of his leadership, and then demoted him. RP 742-44, 748-50 As Dr. Danielson testified, the only rationale that could explain those actions was retaliation. RP 743.

1. In early 2020, COVID-19 hit Odessa Brown "like a freight train." RP 716. But the clinic stayed open. RP 718. Dr. Danielson was "strict," requiring anyone entering Odessa Brown to have their temperature taken and follow other precautions. RP 718. In mid-March 2020, Dr. Danielson learned that two security officers who worked in Odessa Brown's building had contracted COVID. *Id.* Concerned about a potential outbreak, Dr. Danielson shared that information with other Odessa Brown staff to try to prevent the disease from spreading. RP 719, 1248.

Though the security officers had posted on Facebook that they had COVID, the hospital told Dr. Danielson that the disclosure was being investigated as a potential privacy violation. RP 720-21. In contrast to the hospital's cursory inquiry into Dr. Hendricks's use of the n-word, the hospital conducted a lengthy investigation of this COVID disclosure. It convened a meeting of nine senior officials including five vice presidents supposedly to "discuss [the] concern and initiate [the] investigation," interviewed seventeen of Dr. Danielson's colleagues, and spent one month investigating. Ex. 225 at 4.

Dr. Danielson was also interviewed. RP 721. But the investigators did not just ask him about the COVID disclosure. *Id.* During the interview, Dr. Danielson was informed that the hospital was also "look[ing] into any other aspects of [his] leadership." *Id.* The interviewer proceeded to ask Dr. Danielson a barrage of questions—seemingly looking for something to justify disciplining him. *Id.* Dr. Danielson was "concerned and upset." RP 742.

At the time, the hospital did not tell him why the investigation had expanded. RP 720-21. And the reason they ultimately offered was dubious: Two related Odessa Brown employees had complained about Dr. Danielson after he reported that they had improperly allocated money from the clinic's emergency funds to their own family member. RP 711-13, 1360.

2. That summer, the CEO and a senior vice president met with Dr. Danielson to discuss the investigation. RP 721-22. They presented him with a letter, signed by the CEO, which stated that Dr. Danielson had improperly disclosed the COVID-positive status of two individuals, a concern that Dr. Danielson understood. RP 723-24; Ex. 32 at 1-2.

But the letter also criticized Dr. Danielson for minor infractions. Ex. 32 at 2. When discussing a plan to ensure the safety of clinic staff distributing food at the beginning of the pandemic, Dr. Danielson had told an employee—one of the two who had improperly taken money from the clinic's fund— "I only want to hear yes." *Id.*; RP 740-41. And the letter criticized Dr. Danielson for once walking into someone's office while they were on the phone. Ex. 32 at 2; RP 741. Despite the broad scope of the investigation, the hospital could not find any other evidence that Dr. Danielson had acted improperly. *See* Ex. 32.

Dr. Danielson had many questions about "the content and details" of the investigation. RP 743. But neither the CEO nor the senior vice president could provide him with any information. *Id.* The CEO testified that he was not typically involved in that type of meeting and that he had not been involved in the investigation. RP 1579, 1831. Likewise, the senior vice president testified that she was not involved with the investigation, nor had she seen any of the documents. RP 1008-09.

Despite that lack of knowledge, the senior vice president authored two more letters for Dr. Danielson: one doling out punishment, and a second demoting him. Ex. 33; Ex. 34. In response to the COVID disclosure, Dr. Danielson was told to complete online "modules" about patient privacy. Ex. 33 at 2. And he was happy to do so. RP 745. But Dr. Danielson was also told that he would undergo a "360 review of [his] leadership," and work with "an external executive coach." Ex. 33 at 2. Dr. Danielson was concerned about these requirements because he had seen the hospital use them as "tools" "to push [employees] out" of their jobs. RP 745-46.[2]

The second letter informed Dr. Danielson that he was being demoted to an "advisory role." Ex. 34 at 1; RP 748-49. Both letters were signed by the senior vice president and dated the same day. Ex. 33 at 2; Ex. 34 at 2. Until that point, Dr. Danielson's job as medical director was not advisory. RP 748-49. He "had a direct

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[2] As explained above, the hospital did this to Dr. Anderson. And it treated Brenda Majercin similarly. After Majercin reported that a hospital vice president had assaulted one of her employees, the hospital chose not to discipline the VP. RP 362, 415, 2233-34. Instead, it put Majercin on a "performance improvement plan," required her to work with a coach, and took away her role supervising a team of employees. RP 362, 415. Majercin ultimately resigned. RP 363.

role" in "program planning and the community health and advocacy work." RP 749; RP 1608 (CEO's testimony that he held regular one-on-one planning meetings with Dr. Danielson); RP 1666 (VP's testimony that Dr. Danielson assisted with the hospital's budgeting process).

But the letter informed him that, to provide "clarity" about "who makes which decisions," his role would become advisory, and the hospital was going to hire a new medical director to handle operations at Odessa Brown. Ex. 34 at 1-2; RP 1584-85. The hospital provided no reason for the demotion, except to insist that it wasn't a demotion at all. RP 961-62.

Dr. Danielson concluded that the disproportionately expansive investigation and the unexplained demotion could only have been "in retaliation" for raising concerns at the board meeting that the hospital was treating Odessa Brown inequitably. RP 750.

3. Dr. Danielson was profoundly affected by the racism and retaliation he faced at the hospital. CP 390; RP 1168. In his words:

> Racism from Seattle Children's Hospital has damaged my sense of my own dignity, has harmed my … wellness, has created a sense of long-term anxiousness, has undermined aspects of my work and my career, has caused secondary trauma-based harm by

> watching it being inflicted on other people who are black and brown, has caused me great mental strain. … [It has] caused me numerous physical symptoms, changes in the way my heart functions, changes in the way I sleep and eat.

CP 390; RP 1168. Dr. Danielson was not alone. Dr. Anderson likewise testified that he was harmed by racism at the hospital. RP 540. Dr. Bell wrote in an email that the environment at the hospital was a "poisoned well of racism," and called on the hospital to adopt new policies such as "suspensions during investigation of racist situations" and ensuring "[r]acist and discriminatory treatment of our patients and families [would not be] tolerated." Ex. 163 at 1; Ex. 186 at 2.

A few months after he was demoted, Dr. Danielson resigned. RP 755. Because of his experiences at the hospital, Dr. Danielson gave up both his license and his career as a pediatrician. RP 1403-04.

4. After Dr. Danielson resigned, he published an op-ed discussing the racism and retaliation he had endured at the hospital. Ex. 237. Facing mounting public pressure, the hospital hired the law firm Covington & Burling to assess racial equity at the hospital.

Exs. 3, 5. Covington conducted hundreds of interviews and reviewed thousands of documents. RP 1897; Ex. 3.

Ultimately, its report found that the hospital had known about racial disparities and repeatedly failed to address them. The Covington investigators concluded that the hospital "did not adequately investigate or address" Dr. Hendricks's use of the n-word. Ex. 1 at 2. They found that the hospital had "known about significant racial disparities in Code Purple calls since at least 2013," but failed to "act to mitigate [those] disparities until 2020." *Id.* And they found that the hospital perpetrated an environment which "exclude[d] and undervalue[d]" Black employees. *Id.* The hospital's board "accepted" all the findings in the Covington report. RP 1602.

F. Procedural history

Dr. Danielson sued Seattle Children's Hospital alleging that the hospital had violated the Washington Law Against Discrimination by subjecting him to a hostile work environment and retaliating against him. *See* CP 6-7.

Trial lasted sixteen days. *See* CP 1365-90. Twelve witnesses testified including Dr. Danielson, hospital leadership, and several employees. *See id.* The jury deliberated for nearly fifteen hours over the course of three days. *See* CP 1387-89. It then returned a verdict: The jury found that Dr. Danielson had proved both his hostile work environment claim and his retaliation claim. RP 2460. The jury awarded Dr. Danielson $21 million in damages. RP 2461.

ARGUMENT

I. The hospital offers no basis for this Court to override the jury's verdict that it created a hostile work environment.

A. The evidence is more than sufficient to support the finding that the hospital created a hostile work environment.

After days of careful deliberation, the jury found that what the hospital's own witness had described as a "poisoned well of racism" constituted a hostile work environment. Ex. 163 at 1. Under the Washington Law Against Discrimination, an employer may not "discriminate against any person in compensation or in other terms or conditions of employment because of … race." RCW § 49.60.180. Subjecting an employee to a racially hostile work environment is discrimination. *Antonius v. King County*, 153 Wn.2d 256, 261 (2004).[3]

The hospital now asks this Court to overturn the jury's verdict. But "[o]verturning a jury verdict is appropriate only when it is clearly unsupported by substantial evidence." *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08 (1994). To satisfy this standard, the hospital must demonstrate that, taking all evidence and reasonable inferences in the light most favorable to Dr. Danielson, there was no "evidence that, if believed, would support" the jury's conclusion. *Gorman v. Pierce Cnty.*, 176 Wn. App. 63, 87 (2013).

The hospital cannot do so. The evidence at trial demonstrated that Dr. Danielson suffered for years as he worked with colleagues who did not believe he could be a capable doctor because of his race. RP 507. He worked under hospital leadership that used racial slurs, including the n-word, or chose to ignore them. RP 310-11, 498-501. Black employees were challenged, demeaned, and

[3] A hostile work environment claim has four elements: (1) "the conduct was unwelcome"; (2) "the conduct was because of [race]"; (3) "the conduct affected [the employee's] terms or conditions of employment"; and (4) "the conduct is imputable to the employer." *Schonauer v. DCR Ent., Inc.*, 79 Wn. App. 808, 820-21 (1995). On appeal, the hospital only disputes the second and third.

excluded because of their race. Ex. 1 at 2; RP 554-57. He saw Black children in the hospital, wracked with excruciating pain from sickle-cell anemia, labeled drug-seeking. RP 549, 646. He supported patients and their families, who had been restrained or dragged out of the hospital by security because they were Black. RP 650-52, 662. And the hospital eventually demoted him for raising inequity with the board. RP 750.

Courts regularly hold that far less is sufficient for a reasonable juror to find a hostile work environment. *See, e.g.*, *Loeffelholz v. University of Washington*, 175 Wn.2d 264, 275-77 (2012) ("considering the totality of the circumstances," supervisor's statement that employee "was going to come back a very angry man from Iraq" was sufficient); *Matewos v. National Beverage Corp.*, 2022 WL 13763262, at *8 (Wash. Ct. App. 2022) (unpublished) (even "a single incident of racist conduct can create a hostile work environment"); *Sharp v. S&S Activewear, LLC*, 69 F.4th 974, 981 (9th Cir. 2023) (misogynist music).

B. The jury held the hospital liable for its own conduct, not systemic racism generally.

The hospital's lead argument is that it may not be held liable for racism that is "ever present" in our society. Op. Br. 1, 59-61. But the jury did not hold the hospital liable for free-floating, societal racism. It held the hospital liable because the hospital created a hostile work environment. The jury's verdict was based on evidence that *hospital* employees treated Dr. Danielson differently because he's Black; a *hospital* leader used the n-word, and the *hospital* did nothing; the *hospital*'s Black patients suffered at the hands of *hospital* staff, while the *hospital* steadfastly refused to take meaningful action; and the *hospital* demoted Dr. Danielson for raising concerns about funding equity.

1. According to the hospital, though, that's not enough. Because of the prevalence of racism in our society, the hospital contends (at 59), an employee must prove that an employer's conduct was "motivated by discriminatory animus." The hospital never says exactly what it means, but its argument seems to be that a plaintiff must prove animosity—a conscious desire to create a hostile work environment. But that is not the law.

By its terms, WLAD prohibits all employment discrimination "because of … race," not just discrimination motivated by invidious intent. RCW § 49.60.180(3). Thus, this Court has long held that WLAD does not require discriminatory intent. *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 498-99 (2014) (citing cases); *see also Murray v. UBS Securities, LLC*, 601 U.S. 23, 34 (2024) ("[A] lack of animosity is irrelevant to a claim of discrimination under Title VII.").

Laws that punish "discriminatory acts committed 'because of' the victims' protected status" do not punish discriminatory thoughts; they punish "the *act* of discriminating." *State v. Talley*, 122 Wn.2d 192, 206 (1993). Their purpose is "to guard against employment practices that operate as built-in headwinds for minority groups." *Id.* The "absence of discriminatory intent," therefore, "does not redeem discriminatory employment practices." *Id.*

If an employee faces a hostile work environment "because of" a protected characteristic, that's discrimination—regardless of the employer's motivation. *See, e.g.*, *EEOC v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 845 (9th Cir. 2005) ("The district court erred in holding that the 'because of … sex' element of the action requires that the behavior be … motivated by sexual animus."); *Fuller v. Idaho Dep't of Corr.*, 865 F.3d 1154, 1164 n.10 (9th Cir. 2017) ("It is not necessary that the [employer] either intended to discriminate or knew that its conduct created a hostile work environment."); *Burns v. Johnson*, 829 F.3d 1, 13 (1st Cir. 2016) ("[U]nlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus."). A workplace littered with pornography or that has sexist or racist music blaring may well be a hostile work environment, even if the employer did not stop to consider the effect it might be having on its workers. *See, e.g.*, *Sharp*, 69 F.4th at 981; *Patane v. Clark*, 508 F.3d 106, 114 (2d Cir. 2007) (per curiam).

The hospital offers almost no justification for its contrary view. The legislature has directed courts "to liberally construe WLAD to eradicate discrimination." *Floeting v. Grp. Health Coop.*, 192 Wn.2d 848, 852 (2019). The hospital does not explain how that mandate can be consistent with its request that this Court add an invidious intent requirement that is nowhere found in the statute's text. The best it can do is cite a couple, outlying cases. But even those cases—though they use the terms animus or motivated by discrimination—ask whether the discrimination occurred because of the employee's protected characteristic, not whether there was invidious intent. *See, e.g.*, *Crownover v. State ex rel. Dep't of Transp.*, 165 Wn. App. 131, 146 (2011) (whether "the conduct would not have occurred had the employee been of a different gender"); *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 298 (2002) (whether the plaintiff would have been "subjected to harassment if she had been a man").

2. Regardless, even if "intentionally discriminatory conduct" were necessary, Op. Br. 59-60, there's more than enough evidence in the record to satisfy any such requirement. The jury could have concluded that the hospital leader who repeatedly used the n-word, for example, or the staff who called security on Black families who posed no threat intentionally created a racially hostile environment. And whatever any individual employee's motivations, over and over again, the hospital itself made the specific and intentional choice to ignore repeated complaints that its staff was discriminating against Black employees and Black patients—the hospital itself thus intentionally perpetuated a hostile work environment.[4]

That's not the necessary result "of implicit bias in our country's chronically underfunded health care system." Op. Br. 68. Nor is it "discrimination result[ing] from factors other than" the hospital's actions. *Arroyo v. Pacific Maritime Ass'n*, 26 Wn. App. 2d 779, 809 n.22 (2023). That's an intentional choice to "condone" and "tolerate" a racist work environment. *See Fried v. Wynn Las Vegas, LLC*, 18 F.4th 643, 652 (9th Cir. 2021). That's discrimination under any standard.

C. The hospital offers no basis to overturn the jury's conclusion that the hostile work environment was severe or pervasive enough to affect Dr. Danielson's employment conditions.

The jury concluded that the hostile work environment was sufficiently "severe or pervasive" to "alter the conditions of [Dr. Danielson's] employment." *Haubry v. Snow*, 106 Wn. App. 666, 675

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[4] Contrary to the hospital's assertion (at 60), Dr. Danielson did not testify that the hostile work environment at Children's "did not result from any intentionally discriminatory conduct." He talked about emergency-room staff that were "trying to do their best," even when the hospital made it difficult for them to do so. RP 649.

(2001). The hospital offers no convincing justification for this Court to overturn that conclusion.

1. Whether discrimination is "sufficiently severe or pervasive is a question of fact" to be evaluated "under the totality of the circumstances." *Adams*, 114 Wn. App. at 296. The Supreme Court and this Court have held that conduct is "sufficiently severe or pervasive" where it "seriously affect[s] the emotional or psychological well being of an employee." *Glasgow v. Georgia-Pac. Corp.*, 103 Wn.2d 401, 406 (1985); *see Coles v. Kam-Way Transp.*, 2017 WL 3980563, at *5 (Wash. Ct. App. 2017)

(unpublished) ("Humiliation, emotional distress, absence from work, or friction with other employees are sufficient."); *Davis v. W. One Auto. Grp.*, 140 Wn. App. 449, 457-58 (2007) (relying on similar factors).

The hospital argues (at 68) that Dr. Danielson suffered nothing more than frustration at the impact on his patients of "our country's chronically underfunded health care system." That assertion cannot be squared with the record. Dr. Danielson had to work with colleagues who believed he was not a capable doctor because of his race. RP 507. He was "shocked," "devastat[ed]," and "deeply traumatized" that a hospital leader had called him the n-word. RP 1144-46.

And having reported the incident to the chief medical officer, who did nothing, Dr. Danielson was left to continue working in an environment where leadership seemed to "endorse[]" that behavior. RP 501; *cf. Banks v. General Motors, LLC*, 81 F.4th 242, 266 (2d Cir. 2023) ("[P]erhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as [the n-word]." (collecting cases)); *Matewos*, 2022 WL 13763262, at *8 ("A single use of the "N word" may be adequately severe.").

That work was itself "psychically torturing." RP 664. In his role as liaison to the community served by the clinic, Dr. Danielson had to repeatedly witness the harm that the hospital caused to Black families, knowing that the hospital's refusal to take meaningful action meant that it would happen again to another family and another and another. RP 662-64. Dr. Danielson testified to the toll of working in that environment, wondering if, by staying, he was "complicit[ ]" in harming the community to which he "was bonded and connected." RP 662-64, 754.

And in addition to "seriously affect[ing]" his "well being," the hospital's discrimination affected Dr. Danielson's day-to-day work. *Glasgow*, 103 Wn.2d at 406. He worked "early in the morning" and late at night "trying to support families" harmed by the hospital's racism. RP 662. He advocated on their behalf to hospital leadership, facing resistance at every turn. RP 662, 664. Dr. Danielson's advocacy for equity at the board meeting caused friction with his colleagues and resulted in his demotion. RP 750, 1744-45.

Over time, the hospital's hostile environment eroded Dr. Danielson's dignity. CP 390; RP 1168. He felt anxious, ashamed, and alone. RP 496-97, 754, 1168, 1201; CP 390. It impacted his ability to sleep and eat. RP 664, 1168; CP 390. Eventually, Dr. Danielson was so severely affected that he not only resigned; he gave up his medical career. RP 755, 1403-04.

2. The hospital cannot seriously argue that there is no evidence from which the jury could have reasonably concluded that its discrimination was severe or pervasive enough to alter Dr. Danielson's working conditions. Instead, it repeatedly intones that an employment discrimination plaintiff must prove "harassment." *See, e.g.*, Op. Br. 61-63. But as the hospital eventually admits (at 62 n.11), "harassment" is simply "conduct an employee finds offensive." *See Glasgow*, 103 Wn.2d at 406 ("In order to constitute harassment, the complained of conduct must be unwelcome in the sense that the plaintiff-employee did not solicit or incite it, and in the further sense that the employee regarded the conduct as undesirable or offensive."). There's no serious dispute that Dr. Danielson found the hospital's racism offensive. So the hospital's insistence on repeating the word "harassment" does nothing to bolster its contention that this Court should override the jury's verdict.

D. This Court should decline the hospital's request that it ignore the evidence.

Unable to seriously argue that the jury's verdict is unsupported by the evidence that it heard, the hospital tries to pick off some of that evidence—asking this Court to disregard it or consider it in isolation, apart from the rest of the hospital's discriminatory conduct. This Court should reject its request.

1. A reasonable juror could have found that Seattle Children's mistreatment of its Black patients contributed to the hostile work environment that Dr. Danielson experienced.

According to Seattle Children's, its consistent, repeated mistreatment of Black patients and their families—and its refusal to meaningfully address that mistreatment—couldn't possibly have contributed to a hostile work environment for Dr. Danielson personally because it wasn't specifically directed at him. But the record shows otherwise. It was "tortur[ous]" for Dr. Danielson to witness the harm the hospital caused Black families, while carrying on each day knowing that the hospital refused to meaningfully change. RP 664.

As courts across the country have recognized, employees can suffer from a "working environment [that] is poisoned by discriminatory conduct," regardless of whether that conduct is specifically directed at them. *Goode v. Tukwila Sch. Dist. No. 406*, 2016 WL 3670590, at *4 (Wash. Ct. App. 2016) (unpublished). Indeed, the first federal case to recognize a hostile work environment claim "held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele." *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986).

As the U.S. Supreme Court explained, it doesn't matter that the discrimination isn't targeted at the employee; "a work environment heavily polluted with discrimination" may still be a hostile work environment "because of the deleterious effects of such an atmosphere on an employee's well-being." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 767 (1998). Indeed, it is not difficult to "envision" such an environment "destroy[ing] completely the emotional and psychological stability of minority group workers." *Vance v. Ball State Univ.*, 570 U.S. 421, 426 (2013).

Courts, therefore, routinely hold that juries evaluating hostile work environment claims may rely on evidence of discrimination that is not targeted at the plaintiff. *See, e.g.*, *Goode*, 2016 WL 3670590, at *4; *Matewos*, 2022 WL 13763262, at *8; *Coles*, 2017 WL 3980563, at *2; *Patino v. Birken Mfg. Co.*, 41 A.3d 1013, 1028 (Conn. 2012); *Okonowsky v. Garland*, 109 F.4th 1166, 1182 (9th Cir. 2024); *Reynaga v. Roseburg Forest Prods.*, 847 F.3d 678, 687 (9th Cir. 2017); *Reeves v.*

C.H. Robinson Worldwide, Inc., 594 F.3d 798, 807 (11th Cir. 2010); *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 150-51 (2d Cir. 1997).[5]

The jury was entitled to do so here.

2. A reasonable juror could have found that the hospital's treatment of the Odessa Brown clinic contributed to a hostile work environment.

Next, the hospital claims (at 68-71) that this Court may not consider its treatment of the Odessa Brown clinic as compared to its treatment of the rest of the hospital, which served far fewer Black patients. The hospital argues for a per se rule that "[m]anagement decisions about budgetary or staffing matters are not actionable." Op. Br. 69. But the only case it cites does not say that. To the contrary, the decision held that a staffing decision that applied only for "a single weekend" *could* constitute discrimination, but affirmed the trial court's finding that, standing alone, it was insufficient to create a hostile work environment. *Blackburn v. State*, 186 Wn.2d 250, 261 (2016).

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[5] Indeed, "[e]ven statements made to others not in an employee's presence are actionable when the employee is aware of the conduct taking place behind his back." *Patino*, 304 Conn. 679, 700-01 (2012) (collecting cases).

Here, the hospital's treatment of Odessa Brown does not stand alone. Nor was it limited to a single weekend. Throughout Dr. Danielson's tenure, the hospital treated its only clinic that served a largely Black community as an "unwanted stepchild," "a second-class clinic." RP 1295. The hospital claims that there's no evidence from which the jury could have found that its funding decisions were discriminatory. But four witnesses testified about exactly that concern. RP 692-93 (Dr. Danielson's testimony); RP 357 (Majercin's testimony); RP 2018-20 (testimony of member of fundraising team); RP 177, 248 (board member's testimony).

And in response to Dr. Danielson and the fundraising team raising the issue, the CFO got angry and said: "I don't believe in institutional racism." RP 357, 693. When Dr. Danielson escalated the issue to the board, he was demoted—a quintessential change in employment conditions. The hospital offers no authority for the proposition that an employer's longstanding treatment of the only part of an organization that serves a largely Black population as an "unwanted stepchild"—and its demotion of those who complain about it—cannot contribute to a hostile work environment for Black employees who work there.

3. The jury properly considered evidence that a senior hospital official called Dr. Danielson a racial slur.

Finally, the hospital argues (at 73) that the statute of limitations should have barred the jury from considering evidence that a senior leader called Dr. Danielson the n-word. But the very "nature of [a] hostile work environment claim strongly indicates that it should not be parsed into component parts for statute of limitations purposes." *Antonius*, 153 Wn.2d at 256, 268. A hostile work environment is "collectively one unlawful employment practice" that is "based on the cumulative effect of individual acts" over time. *Id.* at 269-70. Thus, acts that might otherwise be time-barred may be alleged as part of a single, timely alleged hostile work environment claim.

There's no dispute that Dr. Danielson's hostile work environment claim is timely. So, as long as the acts related to the n-word "constitute part of [that] same hostile work environment," the jury was permitted to consider them. *Id.* at 271. The standard for "linking discriminatory acts together in the hostile work environment context is not high." *Loeffelholz*, 175 Wn.2d at 276. It requires only "some relationship." *Antonius*, 153 Wn.2d at 271. To excise hospital leadership's use of the n-word and the hospital's years-long refusal to do anything about it, the hospital would have to demonstrate that it had "no relation" to the rest of Dr. Danielson's claim. *Id.* at 271.

It cannot do so. The hospital perpetuated a racially hostile environment by engaging in a long pattern of condoning discriminatory conduct. Refusing to discipline a leader who used the n-word was but one example of many. *See, e.g.*, *supra* 7-29 (describing numerous other examples including forcing the director of pain medicine out of leadership, rather than addressing racism in the department; refusing to meaningfully address disparities in the treatment of Black patients; and demoting Dr. Danielson instead of investigating concerns about the inequitable treatment of Odessa Brown). Several instances even involved the same chief medical officer who refused to address the racial slurs, Dr. Fisher. *See supra* 9, 11, 16. The hospital cannot demonstrate that there is "no relation" between its refusal to address the use of the n-word and its consistent refusal to address other discriminatory conduct. *Cf.*, *e.g.*, *Gratton v. United Parcel Serv.*, *Inc.*, 2024 WL 1724771, at *8 (W.D. Wash. 2024) (holding wide-range of discriminatory conduct perpetrated by different people were sufficiently related); *Marshall v. State*, 2023 WL 3191451, at *26 (W.D. Wash. 2023) (same).

Indeed, the only authority that the hospital cites for its contrary position are cases in which the plaintiff "fail[ed] to identify *any* discriminatory conduct within the statute of limitations." *Hoover v. Badger*, 2018 WL 4586383 (Wash. Ct. App. 2018) (unpublished) (emphasis added); *Crownover v. State ex rel. Dep't of Transp.*, 165 Wn. App. 131, 142-43 (2011). That's not the case here.

The hospital attempts to salvage its argument by contending (at 74) that the n-word incident is too remote in time from the rest of the hospital's discrimination. But the hospital does not—and cannot—dispute that Dr. Danielson witnessed and experienced discriminatory treatment regularly, "from day one all the way through 2020." RP 663; *see supra* 7-29.

II. The evidence also supports the jury's verdict that the hospital retaliated against Dr. Danielson.

Washington law "prohibits employers from retaliating against employees who oppose discriminatory practices." *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 411 (2018) (citing RCW § 49.60.210(1)). An employee asserting a retaliation claim "must show three things: (1) the employee took a statutorily protected action, (2) the employee suffered an adverse employment action, and (3) a causal link between the employee's protected activity and the adverse employment action." *Id.*

Here, there's no dispute that Dr. Danielson was engaged in statutorily protected action when he informed the hospital's board of trustees of his concern that the hospital was diverting funds from the Odessa Brown Clinic—which serves a disproportionate number of the hospital's Black patients—to other projects, which serve primarily white patients. Rather than investigate his concern, the hospital responded with a wide-ranging investigation into *Dr. Danielson*. It then demoted him—the senior medical director of the clinic—to an advisory role. That's precisely the kind of retaliation WLAD prohibits.

In arguing to the contrary, the hospital makes the same arguments to this Court that it made to the jury. According to the hospital, it was right to initiate an investigation. Never mind that the investigation sprawled far beyond its initial impetus, searching for anything and everything that might implicate Dr. Danielson. Never mind that when the hospital was informed of serious misconduct—the use of the n-word, for example, or workplace violence—there is little investigation to be found. But when at the height of COVID, Dr. Danielson tried to ensure the safety of his staff, that warranted in-depth scrutiny of every aspect of his leadership. And, according to the hospital, Dr. Danielson wasn't ever demoted. The position of senior medical director, it says, was always advisory. Dr. Danielson somehow just wasn't aware of it.

The jury rejected these arguments, and there was more than sufficient evidence for it to do so. This Court should not overturn its verdict.

A. The jury reasonably found that the hospital's investigation and demotion of Dr. Danielson were adverse employment actions.

The hospital contends that it took no adverse action against Dr. Danielson. But the jury found otherwise. The evidence of a sprawling, intrusive investigation into Dr. Danielson, followed by his demotion, is more than sufficient to support the jury's conclusion.

1. An adverse employment action is one that "is harmful to the point that it would dissuade a reasonable employee from making complaints." *Jin Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171*, 189 Wn. 2d 607, 619 (2017); *see Burlington N. & Santa Fe Ry. Co. v.*

White, 548 U.S. 53, 68 (2006). "[A]dverse actions can come in many shapes and sizes." *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996); *see also, e.g.*, *Sidibe v. Pierce Cnty.*, 2020 WL 5797901, at *3 (Wash. Ct. App. 2020) (unpublished) (rejecting a "bright line rule"). "[C]ontext matters in analyzing the significance of any given act of retaliation because an act that would be immaterial in some situations is material in others." *Boyd v. State*, 187 Wn. App. 1, 13 (2015). And an employer's actions "need to be considered both separately and in the aggregate, as even minor acts of retaliation can be sufficiently substantial in gross as to be actionable." *Hicks v. Baines*, 593 F.3d 159, 165 (2d Cir. 2010); *see Boyd*, 187 Wn. App. at 14. Whether an employer's action "would be viewed as adverse by a reasonable employee is a question of fact appropriate for a jury." *Boyd*, 187 Wn. App. at 13-14.

2. There was more than sufficient evidence to support the jury's adverse-action finding here. The hospital responded to Dr. Danielson's objection about discriminatory funding not by addressing his concerns, but by subjecting him to a sprawling and burdensome investigation—one that purportedly began as a privacy inquiry but soon expanded to review all "aspects of [his] leadership." RP 721. The investigator interviewed more than a dozen of Dr. Danielson's colleagues and asked a barrage of questions that far exceeded the investigation's scope, in an apparent fishing expedition designed to uncover a reason for discipline. *See* Ex. 225 at 4; RP 721. And following the investigation, the hospital ordered him to undergo a 360 review and coaching, which would enable the hospital to continue its effort to find something to use against him. Ex. 33 at 2; RP 746. That alone is enough for a jury to find an adverse action here. "[U]nusually intrusive investigations … may constitute adverse actions." *Bailey v. Metro Ambulance Servs., Inc.*, 2019 WL 13289498, at *16 (N.D. Ga. 2019); *see Szeinbach v. Ohio State Univ.*, 493 Fed. App'x 690, 695-96 (6th Cir. 2012). So can "biased investigation[s]." *Sharpe v. Utica Mut. Ins. Co.*, 756 F. Supp. 2d 230, 245 (N.D.N.Y. 2010).

And if that weren't enough, the evidence shows that Dr. Danielson was demoted at the conclusion of the hospital's investigation. Ex. 34; RP 748-49. Such a "demotion" is a paradigmatic example of an "adverse employment action." *Alonso v. Qwest Commc'ns Co., LLC*, 178 Wn. App. 734, 746 (2013); *see Campbell v. State*, 129 Wn. App. 10, 22 (2005); *Passer*, 935 F.2d at

331. Dr. Danielson testified that being demoted was "isolating and painful and shaming" and that he was "increasingly feeling hopeless" after he was stripped of a "significant" portion of his responsibilities. RP 748, 754. That dramatic redefinition of Dr. Danielson's role was not a "mere inconvenience"; it was a major loss of responsibility and authority. *See Crady v. Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993).

Indeed, courts have found adverse employment actions in much milder forms of discipline. *See, e.g.*, *Alonso*, 178 Wn. App. at 747 (losing access to newer van, workstation preference, and cell phone); *Bittner v. Symetra Nat'l Life Ins. Co.*, 32 Wn. App. 2d 647, 666 (2024) (written reprimand); *German v. Univ. of Wash.*, 2024 WL 1256365, at *6 (Wash. Ct. App. 2024) (unpublished) ("Even if … the counseling memo carried no negative consequences to German's employment status or career, it would dissuade a reasonable employee in German's position from making complaints."); *Hollis v. Snohomish Cnty. Med. Exam'rs Off.*, 2019 WL 2177117, at *3 (Wash. Ct. App. 2019) (unpublished) (undeserved performance evaluation).

In arguing otherwise, the hospital misleadingly strings together snippets of *Kirby v. City of Tacoma*, asserting that it stands for the proposition that "[e]ven internal investigations that result in subsequent disciplinary action 'do not constitute adverse employment actions' absent 'a tangible impact on [the plaintiff's] workload or pay.'" Op. Br. 78 (quoting 124 Wn. App. 454, 465 (2004)) (alterations in brief). But *Kirby* does not say that. *Kirby* says that adverse employment actions include actions "*such as* reducing an employee's workload and pay." *Kirby*, 124 Wn. App. at 465 (emphasis added). Another example of an adverse action listed in *Kirby*: "demotion"—precisely what happened here. *Id.*; *see also Sidibe*, 2020 WL 5797901, at *3 (explaining that *Kirby* does not "establish a bright line rule that internal investigations can never constitute an adverse employment action," but rather that a court "must consider the impact of the investigation").

3. Unable to seriously argue otherwise, the hospital claims that Dr. Danielson wasn't demoted. The hospital contends (at 79) that it "merely clarified what his roles and responsibilities at Odessa Brown had always been." But Dr. Danielson testified that as the senior medical director, he previously "had a *direct* role" in "program planning and the community health and advocacy work"—not an advisory one. RP 748-49 (emphasis added). Other employees, too, testified that Dr. Danielson had broad responsibilities. RP 1608, 1666. And not only did the hospital tell Dr. Danielson he was being demoted, they also told him that a new "medical director" would be appointed to take responsibility for the "day-to-day" operational issues he had previously overseen. RP 1584-85. Even the hospital concedes (at 78) that "reassignment with significantly different responsibilities" qualifies as an adverse employment action. *Crownover*, 165 Wn. App. at 148. Given this evidence, the hospital offers no convincing reason to overturn the jury's conclusion that its actions would dissuade a reasonable employee from complaining of discrimination in the future.

B. The jury reasonably found that Dr. Danielson's complaint to the board was a substantial motivating factor for the hospital's action.

Falling back, the hospital argues that the jury could not have reasonably found a causal link between Dr. Danielson's complaint to the board and the otherwise inexplicably broad investigation into him followed by an unexplained demotion. But, again, there was more than sufficient evidence to support the jury's conclusion.

1. To establish a causal link between an employee's protected activity and the adverse employment action, the employee must show that protected conduct was a "substantial factor" motivating the employer's actions. *Boyd*, 187 Wn. App. at 17. "Because employers rarely will reveal they are motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose." *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 746-47 (2014).

Here, just months after Dr. Danielson spoke to the board, the hospital seized on the opportunity to transform minor, narrow, and (in one case) dubious complaints into a sprawling fishing expedition. The hospital argues (at 77) that it "had an obligation to investigate those complaints." But the investigation it launched bore no relationship to the complaints that instigated it. And it bore no resemblance to the hospital's reaction to far more serious complaints. When faced with complaints that a hospital leader had used racial slurs and that another leader had physically attacked a hospital employee, there is no record of the hospital performing any genuine investigation. *See supra* 9. But when Dr. Danielson identified employees with COVID in an effort to protect his staff, the hospital launched a month-long, full-scale investigation into every aspect of his leadership. Ex. 225 at 4.

The hospital's justification for this mismatch is that employees whom Dr. Danielson had caught using hospital funds for their own family members had complained about him. RP 711-13, 1360. But the jury was free to disbelieve that the hospital would have undertaken such a large-scale investigation, interviewing more than a dozen of his colleagues about his leadership, just on the complaint of an employee accused of misconduct. *See* Ex. 225 at 4. As the hospital acknowledges (at 77), an employer's departure from standard procedures can support a finding of pretext. *See Smith v. City of Seattle*, 2023 WL 8372399, at *8 (Wash. Ct. App. 2023) (unpublished); *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1117 (9th Cir. 2011); *Johnson v. Lehman*, 679 F.2d 918, 922 (D.C. Cir. 1982).

And that is not all the jury had to rely on. Not only did the hospital undertake an investigation that was far more intrusive than it undertook for much more serious concerns, it sought to use on Dr. Danielson the very tools it had previously used to push out another Black doctor who complained of racism. RP 563-65, 745-46. And Dr. Danielson's discipline was meted out by one hospital leader who was unfamiliar with the details of the investigation and another—the CEO—who testified he did not ordinarily participate in doing so. RP 1008-09, 1579, 1831.

Moreover, the hospital offered the jury no explanation at all for the demotion except to claim that it didn't happen. RP 1583. But the jury was free to find otherwise, and to credit the *only* explanation it was offered about why the hospital would have demoted Dr. Danielson: retaliation.

2. The hospital argues (at 82) that its actions could not possibly have been retaliatory because Dr. Danielson had previously spoken publicly about racial inequities. It is true that Dr. Danielson, an established practitioner and community figure, often spoke "in the community" about "health inequities" generally. RP 971-72. But Dr. Danielson's complaints about the hospital's failure to equitably fund Odessa Brown were different in kind—they were directly targeted at the hospital's leadership and repeated in front of the hospital's entire board. RP 702-04. His meeting with the hospital's CEO and CFO went "[b]adly" when the CFO became "very offended." RP 693, 2019. The CFO denied considering "equity" in funding decisions, asserting that "I don't believe in institutional racism." RP 357, 693. And when Dr. Danielson escalated these concerns to the board of trustees, the meeting became "very tense." RP 704.

As Dr. Danielson explained to the jury, there was not "much else [he] could have interpreted" the hospital's actions to be in this context except "retaliation for [him] speaking up at [the] board meeting." RP 750. The jury was entitled to agree.

3. Finally, the hospital contends that absent more, the six months between Dr. Danielson's statements at the board meeting and the hospital's investigation "preclude[s] a retaliation claim as a matter of law." Op. Br. 81-82 (citing case where fifteen months—nearly three times as long as here—had passed). But courts have found a causal link despite much longer delays between the protected activity and the adverse action. *See, e.g.*, *Robinson v. Se. Pa. Transp. Auth.*, 982 F.2d 892, 894-95 (3d Cir. 1993) (nearly two years); *Muhl v. Davies Pearson, PC*, 2015 WL 6441849, at *11 (Wash. Ct. App. 2015) (unpublished) (one year). Indeed, six months "is easily within a time range that can support an inference of retaliation." *Coszalter v. City of Salem*, 320 F.3d 968, 977 (9th Cir.

2003) (three to eight months); *see Allen v. Iranon*, 283 F.3d 1070, 1078 (9th Cir. 2002) ("[A]n eleven-month gap in time is within the range that has been found to support an inference that an employment decision was retaliatory."); *German v. Univ. of Washington*, 2024 WL 1256365, at *1, *6 (nine months).

"Retaliation often follows quickly upon the act that offended the retaliator, but this is not always so." *Coszalter*, 320 F.3d at 978. After all, "a person harboring a desire to retaliate against someone opposing protected activity might wait for time to pass to disguise their true motives." *Muhl*, 2015 WL 6441849, at *11. Whether an adverse action is retaliatory is always a question of fact determined in light of the surrounding circumstances. *Coszalter*, 320 F.3d at 978. As explained above, the jury could easily have found—and apparently did—that following Dr. Danielson's board report, the hospital bided its time until the COVID complaints provided it cover to retaliate. There is thus no basis for questioning the jury's verdict here.

III. The jury was properly instructed on the elements of Dr. Danielson's hostile work environment claim.

The Washington Pattern Jury Instructions on harassment and hostile work environment claims provide that a plaintiff "has the burden of proving" four elements. 6A Wash. Prac., WPI 330.23 (7th ed.). The trial court instructed the jury exactly that, setting forth the four elements verbatim. CP 1410; RP 2319-20. The hospital's only objection is that in doing so, the court should have called Dr. Danielson's claim a "harassment" claim rather than a "hostile work environment" claim. That objection fails three times over: The hospital did not preserve it; there is no error in the court's instruction; and the hospital cannot demonstrate any prejudice.

1. To preserve an objection to a jury instruction, a party must not only object; it must give the trial court "the opportunity to know and clearly understand the nature of the objection." *State v. Goff*, 2024 WL 4948789, at *5 (Wash. Ct. App. 2024) (unpublished); *see* Civ. R. 51(f) ("The objector shall state distinctly … the grounds of counsel's objection."). The hospital did not do so.

Although the hospital objected to calling Dr. Danielson's claim a hostile work environment claim, rather than a harassment claim, it never explained why. RP 2308. It did not make the argument that it now makes on appeal that calling the claim what both parties had called it throughout the trial somehow changed Dr. Danielson's burden of proof, nor did it challenge the instructions in its post-trial motions. The law has long been clear that an argument for challenging a jury instruction that was not presented to the trial court "will not be considered on appeal." *Stewart v. State*, 92 Wn.2d 285, 298 (1979). That alone is sufficient to dispose of the hospital's challenge.

2. Even if the objection had been preserved, it is meritless. "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *Terrell v. Hamilton*, 190 Wn. App. 489, 499 (2015). Here, the hospital does not dispute that the pattern jury instructions on harassment and hostile work environment satisfy this standard. Nor does it dispute that the trial court offered those instructions verbatim, with one exception: calling Dr. Danielson's claim a hostile work environment claim.

The court did not commit reversible error by calling the claim exactly what it is. The hospital has never contested that Dr. Danielson's claim *is* a hostile work environment claim. That's what both parties called it throughout trial. *See, e.g.*, RP 42, 65, 505, 1892, 2326, 2416 (Dr. Danielson); RP 107, 120, 596, 866, 984-85, 1114, 1129, 1138, 1588, 1591, 2369 (the hospital). Nevertheless, the hospital argues (at 83-87) that by calling it that in the jury instructions, the court somehow altered the burden of proof and misled the jury. But calling a claim a "hostile work environment" claim does not change what's required to prove that claim. The court required Dr. Danielson to prove exactly the elements that the hospital agreed should be required.

The pattern instruction, to which the hospital did not object, says: "To establish [his] [her] claim of harassment on the basis of [(describe protected status)], (name of plaintiff) has the burden of proving each of the following propositions." WPI 330.23. It then lists four requirements. *Id.* The jury instructions here said, "To establish his claim of hostile work environment on the basis of race, Dr. Danielson has the burden of proving each of the following propositions." CP 1410. The court then listed each of the same requirements exactly as provided in the pattern instructions. *Compare id. with* WPI 330.23. In other words, the trial court did not alter a single word of what Dr. Danielson was required to prove. It did not relieve him of any burden he would otherwise have. All it did was call Dr. Danielson's claim what it was, and what the parties—both Dr. Danielson and the hospital—had called it throughout trial. The hospital cites no authority for the proposition that simply calling a claim by a name already familiar to the jury, without altering any of its elements, is somehow legal error.

3. Unable to identify any error in calling the claim by its name, the hospital argues that there was a problem with the elements. According to the hospital, "the jury here was instructed that it could find that Dr. Danielson established a hostile work environment by proving only—in the passive voice—'[t]hat there was language or conduct concerning race.'" Op. Br. 85-86. That's just not true. The jury was instructed that to establish his hostile work environment claim, Dr. Danielson had to establish all four requirements listed in the pattern instruction—requirements that, again, the hospital agreed were correct. *One* of those requirements is "[t]hat there was language or conduct concerning [race]." WPI 330.23(1); CP 1410. But that requirement, like the others on which the court instructed the jury, was taken verbatim from the pattern instruction that the hospital has never objected to.

The hospital repeatedly complains that Dr. Danielson should have been required to "prov[e] 'harassment' as *part* of his hostile work environment claim." *E.g.* Op. Br. 88 (emphasis added). It's not entirely clear what the hospital means. Harassment is not an independent element of a hostile work environment claim. "Proving harassment" simply means satisfying the four elements listed in the pattern instructions. *See* WPI 330.23. Again, those are the same four requirements listed in the jury instructions here. To the extent the hospital is arguing that more is required, that argument is—as explained above—wrong on the law. And it is waived: The hospital never objected to the elements required to prove a hostile work environment claim, just the name.

In a last-ditch effort to demonstrate error, the hospital cites (at 86-88) a hodgepodge of unrelated things that happened during the trial. For example, it cites jury questions about the term "conditions of employment" and the meaning of an "act." But the hospital cannot meaningfully explain how those questions have anything to do with what the court called Dr. Danielson's claim. And the hospital did not object to the court's instructions on the elements that include those terms. Ultimately, the hospital cannot point to any error in just calling Dr. Danielson's claim what it was.

4. Nor has it demonstrated any prejudice. Even an incorrect jury instruction is not reversible unless it "prejudices a party." *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 849 (2015). The hospital offers no reason to believe that calling Dr. Danielson's claim a hostile work environment claim somehow "affect[ed] the outcome of the trial." *Goodman v. Boeing Co.*, 75 Wn. App. 60, 68 (1994). Its only argument is that it wasn't able to argue that Dr. Danielson hadn't "proven the elements of his" claim. Op. Br. 89. But the trial court never prevented the hospital from arguing that Dr. Danielson hadn't proved the elements of his claim. All it did was instruct the jury on those elements—the same elements that the hospital agreed should be required.

IV. The hospital's evidentiary challenges fail.

In a last-ditch effort to undermine the jury's verdict, the hospital again tries to exclude the n-word incident, this time asserting that the trial court abused its discretion in admitting it under Rule 403 and failing to give a jury instruction about the Covington report. The hospital is wrong on both counts.

1. As a preliminary matter, this Court should decline to consider these arguments (at 89-92) because the hospital did not meet its "burden of providing an adequate record" under Rule of Appellate Procedure 9.2(b). *State v. Sisouvanh*, 175 Wn.2d 607, 619 (2012). Though the hospital challenges the trial court's rulings on two motions in limine, it failed to include in the record the report of proceedings from the hearing at which the parties argued those motions and the trial court issued its ruling. *See* CP 1358, 1360-61 (clerk's minutes indicating that the trial court ruled on the admissibility of the Hendricks incident and the Covington report at a pretrial hearing on November 18, 2024). This Court "need not consider alleged error when the need for additional record is obvious, but it has not been provided." *In re Marriage of Ochsner*, 47 Wn. App. 520, 528 (1987) (refusing to consider trial court's denial of attorney's fees because record did not include report of proceedings from attorney's fees hearing).

2. If this Court nevertheless considers the hospital's arguments, it should affirm because "the incomplete record … fails to affirmatively establish an abuse of discretion." *Sisouvanh*, 175 Wn.2d at 619. A trial court abuses its discretion only "if no reasonable person would take the view adopted by the trial court." *State v. Jennings*, 199 Wn.2d 53, 59 (2022).

First, the hospital insists (at 90-91) that ER 403 barred the admission of evidence that Dr. Hendricks called Dr. Danielson the n-word. But "[b]ecause of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion." *Carson v. Fine*, 123 Wn.2d 206, 226 (1994). The trial court's decision here falls well short of that high bar. *See Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1257 (11th Cir. 2014) (holding "evidence of racial slurs that an employee" heard secondhand are "relevant and not overly prejudicial"). As explained, the Hendricks incident and the hospital's subsequent failure to investigate are not distinct from the rest of Dr. Danielson's evidence, much of which hinged on the hospital's pattern of ignoring discriminatory conduct against Dr. Danielson, other Black employees, and Black patients. *See supra* Part I.D.3.

Next, the hospital challenges (at 91-92) the admission of the summary of findings excerpted from the Covington Report without a limiting instruction. To be clear, the hospital expressly "d[id] not object to admitting Covington's Summary of Findings and Recommendations into evidence." CP 1118, 1341. The "sole relief" the hospital asked for was "a limiting jury instruction" pursuant to ER 407, which bars the admission of subsequent remedial measures to prove culpable conduct. CP 1341.

The trial court did not abuse its discretion in declining to give a limiting instruction because the Covington summary of findings is not a subsequent remedial measure. "Remedial measures are those actions taken to remedy" a problem. *Dow Chem. Corp. v. Weevil-Cide Co.*, 897 F.2d 481, 487 (10th Cir. 1990). "Post-event" investigative "reports" intended "to discover what might have gone wrong" are not subsequent remedial measures. *Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron*, 805 F.2d 907, 918 (10th Cir. 1986). The Covington summary of findings looks backwards and analyzes the environment at the hospital before Dr. Danielson's resignation. It does not remedy that environment.

V. The trial court's denial of the hospital's motion for remittitur was not an abuse of discretion.

The hospital asks this Court to overturn the jury's verdict, arguing that it was not supported by sufficient evidence and that it was the product of passion or prejudice. But the district court did not abuse its discretion in denying the hospital's motion to remit the verdict. *Bunch v. King Cnty. Dep't of Youth Servs.*, 155 Wn.2d 165, 176 (2005) (holding a trial court's denial of a remittitur motion is reviewed for abuse of discretion). The damages award reflects the jury's determination that Dr. Danielson experienced profound emotional harm. That verdict should not be upset.

Jury awards are not easily overturned. "Respect for the jury's role in our civil justice system is rooted in Washington's constitution, which grants juries the ultimate power to" determine "the amount of damages in a particular case." *Coogan v. Borg-Warner Morse Tec Inc.*, 197 Wn.2d 790, 810 (2021) (citing, inter alia, Const. art. I, § 21). Accordingly, Washington courts "strongly presume the jury's verdict is correct." *Bunch*, 155 Wn.2d at 179. That is even more true where, as here, the jury plays an "essential" role in "determining noneconomic damages." *Id.* Moreover, "[a] trial court's denial of a remittitur" further "strengthens the verdict," *id.* at 180, so "appellate courts owe even greater deference to the judgment of the jury," *Coogan*, 197 Wn.2d at 811.

The hospital (at 93) insists "there is no evidence or reasonable inference from the evidence to justify the verdict." *Coogan*, 197 Wn.2d at 811. But Dr. Danielson provided extensive testimony about the "psychically torturing" experience of witnessing, experiencing, and combatting racism over more than twenty years working at the hospital. RP 664; *see* RP 503-04, 662-65, 752-55, 1168; CP 390. He explained how the racist environment at the hospital "created a sense of long-term anxiousness," "caused [him] great mental strain," and caused "numerous physical symptoms," including "changes in the way [his] heart functions," and "changes in the way [he] sleep[s] and eat[s]." CP 390; RP 1168. The emotional harm from Dr. Danielson's experience at the hospital was so serious that he gave up his medical license and his career as a pediatrician. RP 1403-04.

The jury credited that testimony and relied on it in determining the amount of damages to award—a "determination … primarily and peculiarly within the province of the jury." *Cox v. Dep't of Social and Human Servs.*, 2023 WL 2983116, at *25 (Wash. Ct. App. 2023) (unpublished). And the trial court, having "observed the appearance and bearing of the witnesses and their manner of testifying," declined to upset that judgment. *Coppo v. Van Wieringen*, 36 Wn.2d 120, 124 (1950). That should be the end of the matter. *See Coachman v. Seattle Auto Mgmt., Inc.*, 787 Fed. App'x 416, 416-17 (9th Cir. 2019) (affirming $4.7 million jury award in

WLAD case based on a singular act of discrimination); *Cox*, 2023 WL 2983116, at *25-28 (reinstating a $98 million noneconomic damages jury award).

The hospital also argues (at 94-95) that the jury's verdict was the result of improper passion or prejudice or an attempt to award punitive damages. But "[t]he size of [a] verdict alone cannot be proof that it was based on passion, prejudice, or any other improper consideration." *Coogan*, 197 Wn.2d at 813. Instead, a verdict can only be overturned if the hospital can point to "something in the record showing that the jury's verdict was improperly influenced by untoward incidents of such extreme and inflammatory nature that the court's admonitions and instructions could not cure or neutralize them." *Id.* at 814. Here, the hospital does not even attempt to cite to anything allegedly improper in the record, much less to something it objected to during trial. *See Collins v. Clark Cnty. Fire Dist. No. 5*, 155 Wn. App. 48, 96 (2010) (refusing to consider a remittitur argument based on a comment made during closing arguments because the defendant "failed to object or to request a curative instruction"). Instead, the hospital merely retreads its previous legal and evidentiary challenges. That failure is fatal to its argument here.

Finally, because this Court should not disturb the jury's award, there is no reason to reverse the fee award.

CONCLUSION

This Court should affirm the judgment.

I certify under RAP 18.17 that this brief contains no more than 14,328 words, excluding the parts of the document exempted from the word count by RAP 18.17(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I caused the foregoing brief to be served via Filing Portal and email to the last known address of all counsel of record.

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

October 24, 2025 *<u>/s/ Jennifer D. Bennett</u>*
Jennifer D. Bennett

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

BENJAMIN DANIELSON, *Respondent*, v. SEATTLE CHILDREN'S HOSPITAL, *Appellant*.	No. 87793-3-I RESPONDENT'S APPENDIX

The following unpublished authorities are cited in the Brief of Respondent, pursuant to GR 14.1 and FRAP 32.1:

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Bataski BAILEY, Plaintiff,
v.
METRO AMBULANCE SERVICES, INC., d/b/a, American Medical Response, Inc., Defendant.

CIVIL ACTION FILE NO. 1:16-cv-4440-WMR-JKL
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Signed January 15, 2019

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FINAL REPORT AND RECOMMENDATION

JOHN K. LARKINS III, United States Magistrate Judge

***1** This in an employment discrimination and retaliation case brought under 42 U.S.C. § 1981 ("Section 1981") and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). The case is before the Court on (1) Defendant's motion for summary judgment, seeking the dismissal of all of Plaintiff's claims against it, and (2) Plaintiff's motion for partial summary judgment, requesting that judgment be entered in his favor on his claims for retaliation under Title VII and Section 1981. [Docs. 58, 59.] For the following reasons, the Court **RECOMMENDS** that Defendant's motion for summary judgment be **GRANTED**, and that Plaintiff's motion for partial summary judgment be **DENIED**.

I. BACKGROUND

A. Plaintiff's Complaint

In his Complaint, Plaintiff Bataski Bailey ("Plaintiff") claims that after being hired as a paramedic by Defendant Metro Ambulance Services, Inc., doing business as American Medical Response, Inc. ("Defendant"), he was discriminated against for being Rastafarian when he was denied an accommodation with respect to his hair and beard and forced to work in a non-emergency capacity. [Doc. 1 ¶¶ 10-22.] He also contends that he was retaliated against when, after complaining about the purported discrimination, Defendant investigated him without justification, forced him to submit to an unnecessary drug test, and fired him for allegedly falsifying his employment application. [*Id.* ¶¶ 23-34.] Based upon these allegations, Plaintiff asserts claims for race discrimination and under Section 1981, race and religious discrimination under Title VII, and retaliation under both statutes. [*Id.* ¶¶ 35-61].

B. Consideration of Facts

The Court draws many of the facts from the uncontested portions of Defendant's Statement of Uncontested Material Facts ("DSMF") [Doc. 59-2] and Plaintiff's Statement of Undisputed Material Facts ("PSMF") [Doc. 58-2]. It has also considered Plaintiff's response to Defendant's Statement of Uncontested Material Facts ("R-DSMF") [Doc. 65-1] and Defendant's response to Plaintiff's Statement of Undisputed Material Facts ("R-PSMF") [Doc. 63], as well as Defendant's Statement of Additional Material Facts ("DSAMF") [Doc. 65], Plaintiff's Statement of Additional Material Facts ("PSAMF") [Doc. 65-2], and the attachments and responses thereto [Docs. 69-1, 71].

The facts are presented in the light most favorable to the non-moving party—primarily Plaintiff in this instance—and the Court accepts as true the non-moving party's evidence where there is a conflict. *See Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 809 (11th Cir. 2004); *see also Ruiz de Molina v. Merritt & Furman Ins. Agency, Inc.*, 207 F.3d 1351, 1356 (11th Cir. 2000) ("If there is a conflict between the plaintiff's and the defendant's allegations or in the evidence, the plaintiff's evidence is to be believed and all reasonable inferences must be drawn in his favor."). Where the party responding to a statement has neither refuted nor stated valid objections to the material facts as set forth in the statement, those facts are deemed admitted by operation of law. LR 56.1B(2), NDGa.; *Reese v. Herbert*, 527 F.3d 1253, 1267-69 (11th Cir. 2008). In those instances where a party denies a statement of fact (in whole or in part), the Court has reviewed the record to determine whether it is disputed and, if so, whether any dispute is material.

Additionally, the Court includes some facts drawn from its independent review of the record. *See* Fed. R. Civ. P. 56(c)(3). The Court has also excluded assertions of fact by either party that are immaterial or presented as arguments or legal conclusions, as well as assertions of fact unsupported by a citation to evidence in the record, stated as a legal conclusion, or asserted only in the party's brief and not the statement of facts. *See* LR 56.1B(1), NDGa; *see also* *Chapman v. AI Transp.*, 229 F.3d 1012, 1051 n.34 (11th Cir. 2000) (en banc) (subjective perceptions, conclusory allegations, or allegations that are otherwise unsupported by record evidence do not create genuine issues of material fact to withstand summary judgment); *Holifield v. Reno*, 115 F.3d 1555, 1564 n.6 (11th Cir. 1997) (same).

C. Factual Summary

1. Plaintiff's Rastafarian Beliefs

***2** Plaintiff began practicing Rastafarianism around 1999, and sincerely adheres to the Rastafarian religion and practices. (DSMF ¶ 15; PSMF ¶ 11; *see also* DSMF ¶ 18.) According to Plaintiff, those who practice Rastafarianism believe that hair, including facial hair, is sacred; even so, Rastafarianism allows a range of grooming decisions, and allows that hair may be cut "within boundaries" pursuant to spiritual guidance. (DSMF ¶ 17; R-DSMF ¶ 17; PSMF ¶¶ 12, 15.) At his deposition, for example, Plaintiff wore his facial hair in a thin mustache and goatee only, explaining that he had it cut in that manner to enable him to perform his duties as an emergency paramedic with Grady Ambulance—specifically, to use an N95 or HEPA mask (a "safety mask") with a complete seal. (Dep. of Bataski Bailey ("Pl. Dep.") [Doc. 60] at 23-24; PSMF ¶ 14.)

2. Plaintiff's Education and Prior Employment

Plaintiff was trained and certified as an emergency medical technician ("EMT") through Chattahoochee Tech around 2005, and since then has been employed as a paramedic with a number of emergency medical service providers in Georgia. (Pl. Dep. at 8-16; PSMF ¶ 7.) Plaintiff worked as an EMT for Metro Atlanta Ambulance before transitioning into a paramedic position with them. (PSMF ¶ 8.) Before applying for employment with Defendant, Plaintiff also worked as an emergency paramedic for Rural Metro Ambulance ("Rural Metro"), Care Ambulance, and Advanced Ambulance. (Pl. Dep. at 11-16.) Plaintiff's employment with two of the emergency service providers—Rural Metro and Care Ambulance—had been terminated involuntarily by the employer; though in both instances, Plaintiff asserted that his discharge was improperly motivated by discriminatory or retaliatory animus. (Pl. Dep. at 12-19; Dep. of Nykia Moore Banks, Defendant's Rule 30(b)(6) Designee ("30(b)(6) Dep.") [Doc. 55] at 70, 164, Ex. 11 [Doc. 55-1 at 56].)[1]

3. Defendant's Business

Defendant is a private company that provides ambulance services for municipalities in Georgia, including DeKalb County, with which it had a written contract. (DSMF ¶ 1; PSMF ¶ 1.) In DeKalb County, Defendant's operations are divided between the emergency side, which handles responses to 911 calls, and the non-emergency side, which primarily handles scheduled transport runs, such as transferring individuals to and from hospital or hospice facilities. (30(b)(6) Dep. at 7-9; PSMF ¶ 1.) In DeKalb County, the bulk of Defendant's business consists of emergency-side transports. (30(b)(6) Dep. at 7-10.) There are significantly fewer trucks operating on the non-emergency side as compared with the emergency side. (PSMF ¶ 5.)

4. Plaintiff's Application

Plaintiff applied for work with Defendant in mid-2014. According to Defendant, at that time, it did not use or accept paper applications. (30(b)(6) Dep. at 72-73.) Nevertheless, Plaintiff testified that even though he first submitted an electronic application online around July 2014 (Pl. Dep. at 32, 58, Ex. 1 [Doc. 60 at 116-22] (electronic application forms maintained by Defendant); *see also* DSMF ¶ 5), he also recalled filling out and submitting paper application forms at his interview with Human Resources manager, Nykia Moore, on October 23, 2014, (Pl. Dep. at 32-33, 37-38, 68-69). Defendant admits that Plaintiff submitted at least one form—related to credit reporting and background checks—in paper form. (30(b)(6) Dep. at 74-76.)[2]

***3** In relation to the application information forms maintained electronically by Defendant, Plaintiff testified that he did not "feel comfortable to attesting [that] any of the information" in them was correct, because (1) it appeared that someone with Defendant appeared to have added dates pertaining to his acceptance and hire that post-dated his actual application, and (2) rather than responding "no," as forms indicated, Plaintiff said he responded "yes" to the question of whether he had ever been fired or asked to resigned from previous employment. (Pl. Dep at 34-35, Ex. 1.) There appears to be no evidence to dispute, however, that the electronic forms that Defendant maintained for Plaintiff do indicate "no" in response to the question, "Have you ever been fired or asked to resign from any job?" (Pl. Dep. at Ex. 1 at 6; *see also* Dep. of Scott Rowekamp ("Rowekamp Dep.") [Doc. 56] at 25-26.)[3]

5. Plaintiff's Interview, Offer, and Initial Screening

As noted above, on October 23, 2014, Plaintiff interviewed with Defendant's Human Resources manager, Nykia Moore. (DSMF ¶ 19; PSMF ¶ 18.) While it appears that Plaintiff may have applied for a generic paramedic position, he testified that he expressed an interest in emergency-side work, and Defendant admitted that it assumed most applicants would work on the emergency side.[4] Defendant extended Plaintiff an offer of employment as an emergency paramedic in October 2014, but because Plaintiff requested a January 2015 start date in order to take a vacation, Defendant set January 12, 2015 as his start date. (DSMF ¶ 20; Pl. Dep. at 42.)

Defendant requires all potential employees to take drug tests after receiving an offer of employment and before beginning work. (DSMF ¶ 22; *see also* PSMF ¶ 20.) Employees are typically given a specific 48-hour window of time to complete the drug screening, and Plaintiff was scheduled to have completed his by October 29, 2014. (DSMF ¶ 22; PSMF ¶ 21; R-PSMF ¶ 21.) Plaintiff testified that he was drug tested within a week of his interview, that he left all documentation with the screening company, and that he was told by the screening company that his results would be forwarded to Defendant. (Pl. Dep. at 42-43.)[5]

6. Grooming Requirements for Emergency Paramedics Working in DeKalb County

***4** At the time of Plaintiff's hiring and employment, DeKalb County had grooming requirements for emergency paramedics servicing the County.[6] (30(b)(6) Dep. at 47-48.) Specifically, DeKalb County's policy prohibited "beards, chin whiskers, or goatees," but allowed for mustaches that did not breach the inner seal of safety masks and facial hair below the lip that did not exceed a half-inch in any direction and did not breach the inner seal of the safety masks. Dep. at (30(b)(6) Dep. at Ex. 9 at 23.) The County's grooming policy was more restrictive than Defendant's own grooming policy, which did permit goatees. (DSMF ¶ 28.) Thus, the requirements for emergency paramedics working in DeKalb County were based upon Defendant's contract with the County. (PSMF ¶ 24; R-PSMF ¶ 24.)[7]

7. Issues Arise Over Grooming Requirements Once Plaintiff Begins Orientation with Defendant

Plaintiff started working for Defendant on January 12, 2015, beginning immediately with orientation. (PSMF ¶ 22.) On the first day of orientation, after reviewing the employee handbook, Plaintiff observed that his goatee was not compliant with the grooming requirements for emergency paramedics in DeKalb County. (DSMF ¶ 25.)

Upon discovering that his facial hair violated the grooming requirements for emergency-side paramedics, Plaintiff spoke with field operation supervisor, Maurice Lavallee; the field training officer, Ms. Jackson; and another supervisor. (Jackson Dep. at 11-12; 30(b)(6) Dep. at 94.) Mr. Lavallee reportedly offered to move Plaintiff to the non-emergency side, which Plaintiff refused. (Jackson Dep. at 19-20.) Later in the day on January 12, 2015, Plaintiff emailed Ms. Moore and told her that he had—in consultation with his spiritual leader—already shaved in a manner that he believed was sufficient "to safely function as a paramedic" and "to safely and securely use a [safety] mask and any other respirator type device with no complications." (DSMF ¶ 32; PSMF ¶ 29; Pl. Dep. at Ex. 4 [Doc. 60 at 127-29] (January 12 email).) Plaintiff added that he had "explained this to every company I've ever worked with and it was either readily accepted or the EEOC stepped in on my behalf to rectify the situation." (DSMF ¶ 33.) He asserted that Defendant's policy was "clearly a violation" of the EEOC's guidelines on religious discrimination and indicated that he wished to resolve the issue "with no further action." (DSMF ¶ 33; PSMF ¶ 33.) He asked Defendant to "deviate from this requirement," and asked Ms. Moore to provide Defendant's "official stance." (Pl. Dep. at Ex. 4.) The next morning, on January 13, Ms. Moore asked Plaintiff if he wished his email to serve as his "grievance request," or he would "like to submit something different." (*Id.*) Plaintiff replied that his email would "suffice." (*Id.*) The parties agree the January 12 email was a request for religious accommodation. (PSMF ¶ 31.) Because Plaintiff had threatened to file an EEOC claim for religious discrimination, Ms. Moore forwarded Plaintiff's email to Defendant's in-house Senior Labor and Employment Counsel, Scott Rowekamp. (PSMF ¶ 35.)

During follow-up conversations with Plaintiff about his January 12 email, Ms. Moore continued to offer—as an accommodation of his religious beliefs concerning grooming—that he could work as a non-emergency paramedic, which would not require him to change his facial hair (so long as the safety mask was secure over his goatee), since the DeKalb County contract did not have the same grooming requirements on the non-emergency side. (Pl. Dep. at 55-61; 30(b)(6) Dep. at 98-100, 111-13, 124-25; *see also* PSMF ¶ 42; R-PSMF ¶ 42 (noting that on January 21, Ms. Moore told Plaintiff he could keep his current facial hair if he worked on the non-emergency side).) Ms. Moore had presented the idea to Defendant's Human Resources Director, Kate Demitrus, and Mr. Rowekamp, beforehand, and they had concurred that it would work as an accommodation. (30(b)(6) Dep. at 111-13, 124-27.) Ms. Moore testified that she had also reached out to the operations manager who worked with DeKalb County, who was reportedly "adamant about the fact that [Defendant] adhere to the DeKalb County grooming guidelines, no exceptions." (30(b)(6) Dep. at 114-15.) Ms. Moore, therefore, did not contact the County to find out if they would grant a special exemption to their grooming policy. (30(b)(6) Dep. at 114-15; *see also id.* 59-60, 107.)[8]

***5** According to Ms. Moore, after she communicated the option to Plaintiff, "he wasn't happy with the thought," and "[i]t wasn't something that he was willing to do." (30(b)(6) Dep. at 117.) Along similar lines, Ms. Jackson said that when Plaintiff was told during orientation that he could move to the non-emergency side if he could not meet the grooming policy requirements, Plaintiff said that he would only do emergency work and would refuse non-emergency work. (Jackson Dep. at 19-20.) Plaintiff testified he "d[id]n't feel like [he] should have to settle for th[e non-emergency] position," and that he "chose not to accept [ ] what [he] considered a lesser position and, you know, [ ] an ultimatum." (Pl. Dep. at 50-51, 55-59.) Plaintiff believe the non-emergency side was a form of "segregation," a step down from emergency-side work, and a hinderance to his employment opportunities. (PSMF ¶ 43; R-PSMF ¶ 43.) On January 21, 2015, Plaintiff emailed Ms. Moore expressing his dissatisfaction with Defendant's proposed accommodation and stating his intention to "pursue a complaint with the EEOC as well as all other appropriate Federal agencies." (DSMF ¶ 51; *see also* PSMF ¶ 46 ("[Plaintiff] told Defendant that he filed a complaint with the EEOC [that day.]").)[9]

8. Emergency and Non-Emergency Paramedic Positions

Emergency paramedics and non-emergency paramedics receive the same hourly rate of pay. (DSMF ¶ 38.)[10] Ms. Moore testified that the same number of shifts would have been available to Plaintiff whether he worked for Defendant as either an emergency paramedic or non-emergency paramedic. (30(b)(6) Dep. at 117-19.)[11] Even so, Plaintiff testified that working in a non-emergency capacity would limit him in (1) his "interact[ions] with the community," (2) his "ability to gain knowledge in emergency medicine," and (3) his overall "options for hours." (Pl. Dep. at 50.) Plaintiff also testified that because most supervisory positions require three years of emergency-side experience, non-emergency work would limit this opportunity for advancement. (Pl. Dec. ¶ 7.)

Ms. Jackson testified that the work done by non-emergency paramedics was just as important as that done by an emergency paramedics because non-emergency work involved more paramedic truck runs by a wide margin and required a higher demand skill set, since non-emergency work always involves transporting sick or infirm patients, whereas most emergency calls do not even require an ambulance (even though one is sent). (Jackson Dep. at 20-22.) Ms. Moore similarly testified that non-emergency paramedic work required a high degree of skill and ability to manage stress, since the transportation involves critically ill patients requiring continuous monitoring and interventions (*e.g.* patients on ventilators, sedated patients, patients with spinal cord or brain injuries, as well as high risk obstetric and pediatric patients). (Moore Dec. ¶ 6.) Plaintiff nevertheless felt that the emergency side was more challenging and required more skill because of the stress and unknown factors involved in emergency calls, whereas non-emergency work "involves the same mundane routine – day-in and day-out." (Pl. Dep. at 26-28, 51; Pl. Dec. ¶ 6.)

9. Legal Counsel Runs a Google Search of Plaintiff's Name and Discovers Prior Discharges

***6** When an employee threatens to file an EEOC claim, Ms. Moore's standard practice is to consult with Defendant's legal counsel for guidance and direction. (DSMF ¶ 43.) As noted above, Ms. Moore interpreted Plaintiff's January 12 email as a threat to file an EEOC charge; therefore, she forwarded the email to Human Resources Director Demitrus and Senior Labor and Employment Counsel Rowekamp on January 13, 2015, seeking guidance and direction on how to proceed. (DSMF ¶ 44.) Based on nearly two decades' worth of experience as an attorney, Mr. Rowekamp anticipated possible litigation. (DSMF ¶ 45; *see also* Rowekamp Dep. at 26-34; Rowekamp Dec. [Doc. 64-1] ¶ 6.)

As part of fact-gathering and diligence in response to Plaintiff's complaint, Mr. Rowekamp ran a Google search using Plaintiff's name. (Rowekamp Dep. at 25-26, 31, 46-47, 83.) Mr. Rowekamp testified that on many prior occasions, he had performed similar diligence when an employee had indicated he or she might initiate legal proceedings, and that in searching Plaintiff's name through Google, he had not intended to find any justification to terminate Plaintiff's employment. (Rowekamp Dec. ¶¶ 7-8.)

In any event, the first result of Mr. Rowekamp's Google search was a link to a document from the lawsuit in which Plaintiff had sued his former employer, Rural Metro. (DSMF ¶ 47; DSAMF ¶ 5.) Mr. Rowekamp then searched for the lawsuit on PACER to obtain more information about the case, and found a declaration Plaintiff provided in which he admitted that he had been terminated by Rural Metro on April 10, 2008. (DSMF ¶ 48; DSAMF ¶ 6.)[12] Mr. Rowekamp made Ms. Moore aware of the declaration. (Rowekamp Dep. at 37; *see also* 30(b)(6) Dep. at 158.) Ms. Moore discussed the information with Mr. Rowekamp and Ms. Demitrus, both of whom instructed her to place Plaintiff on administrative leave to investigate the possible falsification of his job application. (30(b)(6) Dep. at 160-62.)

Prior to Mr. Rowekamp's involvement, nothing on Plaintiff's application had raised red flags warranting an investigation into falsification. (PSMF ¶ 37.) Rather it was Plaintiff's complaints mentioning prior EEOC claims with prior employer, that led to a concern about the circumstances of such claims; and that investigation led to the discovery of his termination from Rural Metro, which in turn "sparked the inquiry as to whether or not he disclosed that to on his application" with Defendant. (30(b)(6) Dep. at 136-37.)[13]

10. Drug Testing at Orientation

As noted above, Plaintiff was scheduled to take a drug test by October 29, 2014, and Plaintiff testified he was tested. The screening company, Quest Diagnostics, however, reported Plaintiff was a "no show" for a testing appointment window that expired on October 29, 2014. (30(b)(6) Dep. at 75-78, Ex. 7 [Doc. 55-3 at 2] (Quest Diagnostics report).) Ms. Moore received a notification that Plaintiff did not have drug screening test results on file at the time of his orientation in January 2015, so on January 22, 2015, she removed Plaintiff from orientation and personally drove him to Quest to complete one. (30(b)(6) Dep. at 78, 80-86; PSMF ¶ 47.) Ms. Moore did not recall asking Plaintiff whether he had already taken a drug test and did not recall Plaintiff volunteering that he had done so. (30(b)(6) Dep. at 79.) Ms. Moore testified that she had driven at least two other employees to drug screenings, though she admitted it was a "rarity." (30(b)(6) Dep. at 79-80, 85-87.)[14] In any event, Plaintiff passed the drug test conducted at the time of his orientation. (PSMF ¶ 49.)

11. Plaintiff's Discharge

***7** Defendant's standards of conduct provide that falsification of an employment application is a terminable offense. (DSMF ¶ 53.) Defendant takes falsification of any company document very seriously, in part, because it bills the government through Medicare and Medicaid programs and must ensure that its employees are accurately and truthfully documenting their work. (DSMF ¶ 54.) Defendant has terminated numerous individuals for lying on their job application, including falsifying their termination status with a previous employer. (DSMF ¶ 55.)[15] Although Defendant has, on a case-by-case basis, hired employees who have disclosed involuntary discharges from previous positions, it has not allowed anyone who falsified application documents to continue employment. (DSMF ¶ 58; R-DSMF ¶ 58; 30(b)(6) Dep. at 68-70; Rowekamp Dep. at 82.)

Based upon their inquiry into whether Plaintiff had disclosed being fired from Rural Metro, Mr. Rowekamp and Ms. Demitrus made the decision to terminate Plaintiff's employment, and directed Ms. Moore meet with Plaintiff. (30(b)(6) Dep. at 24-25, 127-28; *see also* PSMF ¶¶ 40, 64.)[16] The three consulted and prepared a script for Ms. Moore's meeting with Plaintiff. (30(b)(6) Dep. at 37-38, 155-57, Ex.

11 [Doc. 55-3 at 56] (meeting script); PSMF ¶ 59; *see also* Rowekamp Dep. at 54-55 (discussing creation of script).)

On January 30, 2018, Ms. Moore met with Plaintiff and advised him that he was being placed on unpaid administrative leave pending the completion of the investigations into his complaints about discrimination and the falsification of his prior employment status. (PSMF ¶¶ 50, 59; see also 30(b)(6) Dep. at 37-38, 129-30, 160-61, 170, Ex. 8 [Doc. 55-3 at 3] (Jan. 30 email noting meeting and “unpaid suspension,” and complaining of retaliation).) Ms. Demitrus decided to place Plaintiff on unpaid leave because he refused to do non-emergency side work, and his facial hair violated the emergency-side grooming policy, so “essentially there was nowhere for him to go.” (30(b)(6) Dep. at 129-32.)

During the meeting, Ms. Moore confronted Plaintiff with the declaration from his lawsuit against Rural Metro, and suggested that Plaintiff had falsified his application when he answered “No” to the question, “Have you ever been fired or asked to resign from any job.” (PSMF ¶ 50.) Ms. Moore testified, that based upon the script, she would have handed Plaintiff a copy of the electronic forms pertaining to his application showing “No” in response to the question of whether he had been involuntarily discharged before, along with a copy of the declaration from PACER admitting he had been terminated, and asked him to review everything. (30(b)(6) Dep. at 157-58, Ex. 11 (script); *see also* Pl. Dep. at 65-67.) According to Plaintiff, after Ms. Moore gave him the documents, he told her that the matter was pending and that he disputed the termination, and gave her his attorney's information. (Pl. Dep. at 65-67.) Plaintiff also wrote on Ms. Moore's copy of the script, noting that he had taken legal action against his prior employer for wrongful termination, and provided contact information for his attorneys for related paperwork. (30(b)(6) Dep. at 164-64, Ex. 11; PSMF ¶ 55.) Even so, Plaintiff separately testified that he did not recall telling anyone that he had disclosed his prior terminations in his employment application forms. (Pl. Dep. at 69). After being placed on unpaid leave, Plaintiff emailed Defendant to allege that the action was taken as a “thinly veiled attempt to terminate [his] employment” in retaliation for complaining to the EEOC. (PSMF ¶ 61; *see also* 30(b)(6) Dep. at Ex. 8 (Jan. 30 email).)

***8** Ms. Moore never contacted Plaintiff's attorneys or Rural Metro, and was not aware of anyone with Defendant who did. (30(b)(6) Dep. at 164-66.) She explained that once the Human Resources Director and legal counsel were involved, the matter was “sensitive” and “above [her],” and that she would have relied upon them to “validate whatever claims.” (*Id.* at 166-68.) Mr. Rowekamp likewise testified that he did not contact the attorneys or anyone involved in the Rural Metro litigation, nor did he know of anyone who did. (Rowekamp Dep. at 56, 66-67.) Indeed, the parties seem to agree that no one involved in the termination decision contacted Plaintiff's attorneys or sought additional information regarding his termination status with Rural Metro. (PSMF ¶ 56.) Regardless, Ms. Moore testified that after meeting with Plaintiff and hearing what he had to say about the end of his prior employment, she still believed discharge was appropriate for falsifying the status of his separation. (30(b)(6) Dep. at 181-82.)

It appears that Plaintiff's employment was officially terminated on February 4, 2015, prior to his first shift as a paramedic. (PSMF ¶ 64; *see also* DSMF ¶ 60; R-DSMF ¶ 60.) Plaintiff testified that he did not recall the date of his termination, and did not recall having any specific conversations about it. (Pl. Dep. at 69-70.) According to Ms. Moore, Plaintiff was to be terminated because the declaration discovered on PACER contradicted the information in his application, (30(b)(6) Dep. at 15-16, 182), and Mr. Rowekamp concurred that Plaintiff's discharge was based upon the falsification of his application, evidenced by the discrepancy between his application and the declaration, and that there was no evidence that his voluntary discharge from Rural Metro had been overturned.[17] (Rowekamp Dep. at 63-66.) Mr. Rowekamp testified that the only job application information he reviewed in making the decision to terminate Plaintiff's employment was contained in the electronic forms discussed above, and that he was not aware of any other employment applications or application forms submitted by Plaintiff. (Rowekamp Dec. ¶¶ 10-12; *see also* Pl. Dep. at Ex. 1 (electronic application forms maintained by Defendant).)

12. Plaintiff's EEOC Charge

Plaintiff sent a complaint letter to the EEOC on January 21, 2015. (Pl. Dep. at Ex. 5 [Doc. 60 at 130].) The EEOC responded it was in receipt of his correspondence, but that Plaintiff's letter was insufficient to initiate a charge and investigation, and that Defendant had not been notified of Plaintiff's complaint to the EEOC. [Docs. 65-16, 65-17.] On February 11, 2015, Plaintiff's prepared an EEOC charge of discrimination, the operative charge in this case. [Doc. 59-8.] In it, he alleged the he was denied a religious accommodation relative to Defendant's grooming policies and asserted that he was discriminated on the basis of his religion and retaliated against for complaining about being denied an accommodation. [*Id.*] Plaintiff did not check the box for discrimination on the basis of race, and the charge contains no mention of race discrimination. [*Id.*]

II. PROCEDURAL HISTORY

November 30, 2016, Plaintiff filed the present action. [Doc. 1.] Following discovery extensions, on June 25, 2018, Defendant filed its motion for summary judgment on all of Plaintiff's claims, and Plaintiff moved affirmatively for partial summary judgment with regard to his claims of retaliation. [Doc. 58, 59.] The parties have filed their oppositions in response [Docs. 62, 65], as well as replies in support [Docs. 69, 70]. The motions are now ripe for resolution.

III. DISCUSSION

In its motion for summary judgment, Defendant first argues that Plaintiff's race discrimination claims under Title VII are barred because Plaintiff failed to exhaust his administrative remedies when he did not assert race as a basis of discrimination before the EEOC. [Doc. 59-1 at 3-4.] Defendant next contends that Plaintiff's race discrimination claims under both Section 1981 and Title VII, as well as any disparate treatment religious discrimination claim under Title VII, fail because he cannot make out a prima facie case of discrimination. [*Id.* at 5-11.] Defendant then argues that Plaintiff cannot make out a claim against it for failing to accommodate his religious beliefs under Title VII because it in fact offered Plaintiff a reasonable accommodation by allowing him to work as a non-emergency paramedic. [*Id.* at 11-15.] Finally, Defendant argues that even if Plaintiff could make out a prima facie case of discrimination or retaliation[18] under either statute, it had legitimate nondiscriminatory reasons for the actions culminating in Plaintiff's discharge,[19] namely the apparent falsification of his employment application forms, and that Plaintiff's evidence does not show that that reasons are untrue, or that they were pretext for unlawful discrimination or retaliation under the Section 1981 or Title VII. [*Id.* at 15-20.]

***9** In his response, Plaintiff either withdraws or abandons his race discrimination claims, but argues that genuine issues of material fact preclude summary judgment in favor of Defendant on his religious discrimination claim under Title VII and his retaliation claims under Section 1981 and Title VII. [Doc. 65.] Moreover, Plaintiff argues in his motion for partial summary judgment that he is affirmatively entitled to summary judgment on his retaliation claims under Section 1981 and Title VII because Defendant's investigation into Plaintiff, which resulted in his discharge, amounted to unlawful retaliation. [Doc. 58.] In making his arguments, Plaintiff spends considerable time arguing that due to the historical entanglement of the Rastafarian religion with specific racial, ethnic, and ancestral characteristics (which Plaintiff also embodies), his retaliation claim falls within Section 1981's protections, even if he never separately complained of racial discrimination. [*Id.*]

In response to Plaintiff's motion and in reply in support of its own, Defendant largely reiterates the arguments made for summary judgment in its favor, and argues that Section 1981 does not protect against retaliation for making complaints pertaining to purported religious discrimination, and since Plaintiff never made complaints pertaining to race discrimination, Section 1981's protections simply do not apply. [Docs. 62, 70.]

A. The Summary Judgment Standard

A court should grant summary judgment when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The movant bears the initial burden of showing that it is entitled to summary judgment. *Id.* ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact."); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) (holding that *Celotex* did not change the rule that the movant bore the initial burden, and stating, "Even after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial"). The movant may carry its burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.

"Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark*, 929 F.2d at 608. The nonmovant is then required "to go beyond the pleadings" and to present competent evidence in the form of affidavits, answers to interrogatories, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quotation omitted); *see* Fed. R. Civ. P. 56(c). "[M]ere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005). Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In evaluating a summary judgment motion, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant's] favor." *Id.* at 255.

B. Race Discrimination

In response to Defendant's motion for summary judgment, Plaintiff affirmatively withdraws his race discrimination claim under Title VII, and states that his opposition addresses "only the religious discrimination and retaliation claim under Title VII and the [Section] 1981 retaliation claim...." [*See* Doc. 65 at 1 n.1.] Nowhere in any of his summary judgment briefs does Plaintiff argue that summary judgment should not be granted with regard to any race discrimination claim under Section 1981, or otherwise present any evidence that he was in fact discriminated against based upon his race (as opposed to his Rastafarian beliefs and practice). To the extent that Plaintiff asserted a separate cause of action for race discrimination under Section 1981, then, he has also abandoned that claim. *See, e.g., Resolution Tr. Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) ("[T]he onus is upon the parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned." (citing *Road Sprinkler Fitters Local Union No. 669 v. Indep. Sprinkler Corp.*, 10 F.3d 1563, 1568 (11th Cir. 1994))); *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1322 (11th Cir. 2001) (finding claim abandoned when argument not presented in initial response to motion for summary judgment); *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1326 (11th Cir. 2000) (failure to brief and argue issue at the district court is sufficient to find the issue has been abandoned). Accordingly, Defendant's motion for summary judgment should be **GRANTED** as to Plaintiff's claims for race discrimination under both Section 1981 and Title VII.

C. Religious Discrimination

***10** In his complaint, Plaintiff contends that Defendant violated Title VII when it "subject[ed him] to different terms and conditions of employment ... on the basis of his religion," but does not specify any particular actions taken by Defendant, instead, simply re-alleging by reference the prior allegations in the complaint. [*See* Doc. 1 at ¶¶ 46-51.][20] Defendant argues that summary judgment should be granted as to Plaintiff's religious discrimination claim under Title VII because (1) it provided a reasonable accommodation of his religious grooming practice when it offered him a non-emergency paramedic position, and (2) Plaintiff has not presented other evidence that he was treated less favorably due to his religion. [Doc. 59 at 9-15; *see also* Doc. 70 at 4-10.] Plaintiff counters that the non-emergency side paramedic position did not constitute a reasonable accommodation. [Doc. 65 at 7-14.] Plaintiff also argues, in conclusory fashion and entirely by reference to his arguments pertaining to alleged retaliation, that his religious discrimination claim also survives under the "convincing mosaic" framework, but fails to identify any specific evidence to support that he was discriminated against on the basis of his religion. [*Id.* at 4-7 (citing *id.* at 16-25 and Doc. 58-1 at 14-24 for the otherwise unexplained contention that "suspicious timing evidence [ ] would allow a reasonable jury to infer pretext" with regard to his religious discrimination claim).]

Under Title VII makes it unlawful for an employer to discriminate against an employee on the basis of his religion. 42 U.S.C. § 2000e-2(a)(1). Congress amended the term "religion" in 1972 to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 42 U.S.C. § 2000e(j)). Thus, an employer may not take an adverse employment action against an employee due to that person's religious practice, unless the employer demonstrates that it is unable to reasonably accommodate that practice without undue hardship. *See E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, ––– U.S. ––––, 135 S. Ct. 2028, 2034 (2015) (Alito, J., concurring). Thus, "Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not [take adverse employment actions] because of such individual's religious observance and practice." *Abercrombie*, 135 S. Ct. at 2034 (Scalia, J. delivering opinion of the Court).

In order to advance a religious discrimination claim, then, a plaintiff may utilize two theories: a standard showing of disparate treatment based upon the plaintiff's religion or by demonstrating that the employer failed to accommodate the plaintiff's religious practice. *See Rice v. U.S.F. Holland, Inc.*, 410 F. Supp. 2d 1301, 1308 (N.D. Ga. 2005); *see also Breech v. Ala. Power Co.*, 962 F. Supp. 1447, 1456 (S.D. Ala. 1997), *aff'd*, 140 F.3d 1043 (11th Cir. 1998).

1. Religious Accommodation

Religious accommodation cases follow a burden-shifting framework "akin" to the traditional framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) for standard discrimination cases. *Camara v. Epps Air Serv., Inc.*, 292 F. Supp. 3d 1314, 1326 (N.D. Ga. 2017) (citing *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1293 (11th Cir. 2012)). In order to establish a prima facie case of failure to accommodate, a plaintiff must present evidence sufficient to prove that (1) he had a bona fide religious practice that conflicted with an employment requirement; and (2) his inability to comply with requirement—that is, his need for an accommodation—motivated an adverse employment decision. *Abercrombie*, 135 S. Ct. at 2033; *see also Dixon v. The Hallmark Cos.*, 627 F.3d 849 (11th Cir. 2010). This showing is not onerous. *Walden*, 669 F.3d at 1293. If a plaintiff successfully establishes a prima facie case, the burden then shifts to the employer to show either (1) that it offered the plaintiff a reasonable accommodation of his religious practice, or (2) that an accommodation of the plaintiff's practices would result in undue hardship to the employer. *See Patterson v. Walgreen Co.*, 727 F. App'x 581, 585 (11th Cir. 2018) (citing *Walden*, 669 F.3d at 1293; 42 U.S.C. § 2000e(j)); *see also Camara*, 292 F. Supp. 3d at 1326 (citing *Mathewson v. Fla. Game & Fresh Water Fish Comm'n*, 693 F. Supp. 1044, 1050 (M.D. Fla. 1988), *aff'd*, 871 F.2d 123 (11th Cir. 1989)). "A court does not address undue hardship if the employer offers [a] reasonable accommodation." *Camara*, 292 F. Supp. 3d at 1326-27 (citing *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986)).

***11** The parties agree that Plaintiff can establish the first prong, but disagree about the second. Plaintiff argues without any citation to evidence that he can establish the second a prima facie case because "he was fired for a failure to follow company policy that categorically refused to accommodate anyone on the emergency side who had a facial hear on their chin." [Doc. 65 at 8-9.] Defendant responds that the undisputed facts show that Plaintiff's termination resulted from the investigation showing Plaintiff falsified his employment application, and was unrelated to his need for an accommodation. [Doc. 59-1 at 12.] Because neither party spends more than a few sentences addressing the issue, and because Plaintiff's position is specifically premised on his contention that he was not offered a reasonable accommodation, the Court assumes without deciding that Plaintiff could establish a prima facie case, and turns to the issue of proposed accommodation in this case.

The term "reasonably accommodate" is "not defined within the language of Title VII," and as a result, "the precise reach of the employer's obligation to its employee is unclear under the statute and must be determined on a case-by-case basis." *Beadle v. Hillsborough Cty. Sheriff's Dep't*, 29 F.3d 589, 592 (11th Cir. 1994). As the Supreme Court has explained, however, a reasonable accommodation is one that "eliminates the conflict between employment requirements and religious practices." *Philbrook*, 479 U.S. at 70. Typically, then, an accommodation either (1) alters the working conditions of an employee's current position, or (2) allows the employee to transfer to another reasonably comparable position where conflicts are eliminated or less likely. *Camara*, 292 F. Supp. 3d at 1327 (citing *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 500 (5th Cir. 2001)). If a reasonable accommodation is offered by the employer, the "inquiry ends ... regardless of whether the accommodation is one which the employee suggested," since the employee has a "duty to make a good faith attempt to accommodate his religious needs through the means offered by the employer." *Beadle*, 29 F.3d at 592; *see also Philbrook*, 479 U.S. at 68 (recognizing an employee's duty of "bilateral cooperation" with the employer to reconcile his religious needs with the employer's business needs); *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1324 n.7 (11th Cir. 2007) (noting that because employer had reasonably accommodated the employee's religious practices, it was unnecessary to discuss the "undue hardship" prong).

While there is no dispute that Plaintiff was offered an accommodation, there is a dispute about whether Defendant's proposed accommodation—having Plaintiff work as a non-emergency paramedic—was reasonable. Plaintiff contends that the offer was not reasonable because the offered position (1) "constructively [ ] forced [him] to accept a path of limited forward mobility," since career advancement usually required three years of emergency-side experience; (2) "limited his options for hours" since there were fewer non-emergency side shifts; and (3) was less desirable, because non-emergency work involved less skill, less community involvement, and tasks Plaintiff generally considered "mundane." [Doc. 65 at 10-14.] Defendant responds that the positions were reasonably comparable because they involved the same hourly rate of pay, had the same number of available shifts, and involved comparable skill sets. [See. Doc. 59-1 at 12-15; *see also* Doc. 70 at 5-10.]

As an initial matter, the Court rejects Plaintiff's general contention that under Title VII, any accommodation must be net-favorable to an employee,[21] and that if an accommodation "involves an[y] adverse employment action instead of favorable treatment," is automatically unreasonable, along with his further conclusion that if a "person faced with the choice would prefer one position over another," the less preferred position cannot constitute a reasonable accommodation. [Doc. 65 at 9-11.] In making this argument, Plaintiff relies entirely on authority discussing the materiality of adverse employment actions for purposes of disparate treatment claims, and none of the opinions stand for proposition that an employee's mere preference determines the materiality of any employment action, much less Plaintiff's apparent suggestion that an employee's preference determines the reasonableness of an offered accommodation. [*See id.* (citing *Abercrombie*, 135 S. Ct. at 2033 (religion-based disparate treatment); *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 916 (11th Cir. 2018) (race-and national origin-based disparate treatment); *Worley v. City of Lilburn*, 408 F. App'x 248, 249 (11th Cir. 2011) (same); *Hinson v. Clinch Cty. Bd. of Educ.*, 231 F.3d 821, 825-26 (11th Cir. 2000) (sex-based disparate treatment)).] As the Eleventh Circuit has stated in no uncertain terms, "an accommodation may be reasonable even if it adversely impacts the employee to some extent," including in some instances a "significant reduction in pay." *Walker v. Indian River Transp. Co.*, 741 F. App'x 740, 747 (11th Cir. 2018) (citing *Bruff*, 244 F.3d at 502 n.23); *see also* *Morrissette-Brown*, 506 F.3d at 1324 n.6 (acknowledging that an "employer's reasonable accommodation may impose costs on the employee," such as loss of benefits or reduction in salary). Accordingly, just because a proposed accommodation might amount to a materially adverse employment action in the context of a disparate treatment claim, it does not follow that it would be unreasonable as a religious accommodation.

***12** Turning to the offered accommodation in this case, the Court concludes that it was reasonable. First, the relaxed grooming requirements for non-emergency paramedics "eliminate[d] the conflict between [Plaintiff's] employment requirements and [his] religious practices." *Morrissette-Brown*, 506 F.3d at 1322 (internal quotation marks omitted); *see also* *Walker*, 741 F. App'x at 747. Second, despite Plaintiff's arguments to the contrary, the emergency and non-emergency paramedic positions are sufficiently comparable. As courts here have explained, so long as they are "reasonably comparable" positions, "transfers to jobs of a different nature[and] transfers to lower-paying jobs ... are reasonable accommodations," *Camara*, 292 F. Supp. 3d at 1329.

In this case, there is no genuine dispute that the actual pay rate, benefits, and available standard working hours were the same between the emergency and non-emergency positions, and Defendant's concerns pertaining to career advancement, shift availability, and desirability do not render the offer unreasonable. With regard to Plaintiff's first concern about being "constructively forced" onto "path of limited forward mobility," Plaintiff states in his declaration that supervisory positions typically require three years of emergency-side paramedic work, and argues that Defendant's proposed accommodation would therefore have prevented him from moving into such a supervisory role. However, Plaintiff testified that prior to his employment with Defendant he already had two to three years of experience as an emergency paramedic with Care Ambulance and five years of experience as an emergency paramedic with Advanced Ambulance, along with some additional amount of time with Metro Atlanta Ambulance and Rural Metro. (Pl. Dep. at 11-15, 25-26.)[22] Moreover, Plaintiff testified that he was in fact a paramedic supervisor with Six Flags, an amusement park, where he worked on a part-time, seasonal basis—approximately ten months each year—between 2011 and 2016. (*Id.* at 71-72.) As such, it seems apparent that he already had the necessary experience for advancement prior to working with Defendant. Moreover, since his discharge from Defendant, Plaintiff testified that he had been working as a paramedic on a "part time as needed" basis with Grady Ambulance for between a year and a half and two years,[23] but had never inquired about full time work since he was first hired and was just "happy to have a job." (*Id.* at 15-16.) Along these lines, then, the proposed accommodation would not have limited Plaintiff's advancement; and, in any event, Plaintiff has admitted that he has not since sought full-time emergency paramedic work, much less advancement to more senior positions, and therefore has not been "forced" into a path of limited forward mobility.[24]

With regard to Plaintiff's second concern over shift availability, Ms. Moore testified that the same number of shifts would have been available to Plaintiff whether he worked for Defendant as either an emergency paramedic or non-emergency paramedic. (30(b)(6) Dep. at 117-19.) While Plaintiff recalled being advised that it would be more difficult to schedule training rides during orientation on the non-emergency side, and has submitted an orientation scheduling chart showing fewer ride-along slots on the non-emergency side (Pl. Dep. at 52-54; Pl. Dec. ¶ 5, Ex A), Ms. Moore specifically explained that Defendant's hiring and scheduling practice was such that the relative number of shifts available to workers on each side of the business was equivalent (30(b)(6) Dep. at 9, 117-18). In the absence of evidence to contradict Ms. Moore's testimony, Plaintiff's speculation based upon his orientation experience, does not create a genuine issue of fact.[25] Regardless, when an offered accommodation involves reassignment of routes and shift schedules, that certain schedules "happen[ ] to pay less ... is insufficient to render the accommodation unreasonable." *Walker*, 741 F. App'x at 747-48; *see also* *Bruff*, 244 F.3d at 502 n.23 (fact that non-counselor position offered to plaintiff would have required her to take "a significant reduction in salary" did not, standing alone, make the accommodation unreasonable).

***13** Lastly, Plaintiff's desire for the skill and experiences involved in emergency work does not make the offer of non-emergency work unreasonable. While Plaintiff has stated in conclusory terms that non-emergency work "is not desirable since it involves the same mundane route – day-in and day-out," (Pl. Dec. ¶ 6), he also admitted that [b]ecause [he] ha[d]n't done a whole lot of" of non-emergency work, he "couldn't within reason answer [ ] question[s] effectively" about the medical treatment scenarios that arise during non-emergency transportation with Defendant, (Pl. Dep. at 27-28), and has not offered any evidence to contradict Ms. Moore and Ms. Jackson's testimony that non-emergency work with Defendant in fact required as much, if not greater, skill and was much more likely to involve critical medical care and intervention than emergency work, which often involved responses to non-critical 911 calls, (Jackson Dep. at 20-22, 37-38; Moore Dec. ¶ 6). Thus, while the "duties assigned [might have been] of a different nature, the job was [still] reasonably comparable." *Camara*, 292 F. Supp. 3d at 1329. Similarly, Plaintiff's desire for more community interaction[26] does not render the non-emergency paramedic position any less comparable for the present analysis. *See id.* at 1324-25, 1329 (holding that a transfer was a reasonable accommodation of plaintiff's religious practice of wearing hijab when plaintiff's "main disagreement with the transfer appeared to be her perception that the [offered] position was 'beneath her' and that it would not give her any customer engagement"); *see also* *Birdi v. UAL Corp.*, No. 99 C 5576, 2002 WL 471999 (N.D. Ill. Mar. 26, 2002) (holding that employer's transfer of a frontline employee whose religious expression conflicted with the company's appearance policy to a position that did not involve customer contact was a reasonable accommodation).

In sum, Defendant offered Plaintiff a reasonable accommodation by offering him a comparable position on the non-emergency side with the same pay and hours and equivalent (even if not identical) skill and experience. Plaintiff's "apparent preference for a job that was more in line with what [ ]he perceived [ ] to be [more exciting] is immaterial." *Camara*, 292 F. Supp. 3d at 1330. As a result, summary judgment should be **GRANTED** in favor of Defendant on Plaintiff's religious discrimination claim based upon a failure to accommodate his religious practices.

2. Religious Disparate Treatment

As noted above, in his response to Defendant's motion, Plaintiff does not separately address any religious discrimination disparate treatment claim, does not identify any adverse actions that were purportedly taken on the basis of his religion, or even clearly explain that he still maintains a disparate treatment claim separate from his failure to accommodation and retaliation claims. Summary judgment is warranted based upon this failure alone. *See* *Resolution Tr.*, 43 F.3d at 599; *Marijuana Prohibition*, 219 F.3d at 1326. Regardless, because Plaintiff has failed to present any evidence that he was discharged (or suffered any other adverse employment action) because of his religion —as opposed to complaining about Plaintiff's proposed accommodation—he cannot meet his burden in establishing even a prima face case of religious discrimination. In particular, Plaintiff has not offered any direct evidence of discriminatory intent, *Hamilton v. Southland Christian School, Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012), nor shown that Defendant treated any similarly-situated, non-Rastafarian employees more favorably than Plaintiff, *see* *MackMuhammad v. Cagle's Inc.*, 379 F. App'x 801, 804 (11th Cir. 2010). Accordingly, summary judgment should be **GRANTED** in favor of Defendant on any religious disparate treatment claim that Plaintiff may have asserted in this case.

D. Section 1981 and Title VII Retaliation

Plaintiff finally alleges that Defendant retaliated against him for complaining that Defendant's grooming requirements were discriminatory and that its proposed accommodation was unreasonable when it "investigated his background," required him to submit to an "unjustified drug test," and terminated his employment, all in violation of Section 1981 and Title VII. [Doc. 1 ¶¶ 41-45, 52-61.] In support of summary judgment, Defendant's primary argument is that it had legitimate nondiscriminatory reasons for each of those actions, in that Plaintiff had, respectively, threatened litigation, been reported as a "no show" to his original drug test, and included an apparent falsification in his employment application forms. [Doc. 59-1 at 15-20; *see also* Doc. 70 at 10-15.] Plaintiff contends, however, that he is affirmatively entitled to summary judgment on his retaliation claims because Defendant's investigation into Plaintiff after he complained about the grooming policy amounted to unlawful retaliation, as did his discharge, and that the asserted justification for the termination of his employment was simply pretext for retaliation. [Doc. 58 at 8-24; Doc. 65 at 14-25.]

1. Retaliation Under Section 1981

***14** As a threshold matter, Plaintiff asserts retaliation claims under both Section 1981 and Title VII. Defendant argues that that Section 1981—which only prohibits race discrimination and retaliation for opposing race discrimination—does not serve to protect against retaliation for opposing religious discrimination, and since Plaintiff only made complaints pertaining to Rastafarianism, Section 1981's protections simply do not apply. [Doc. 62 at 2-5.] Plaintiff counters that the authority cited by Defendant is not binding on this Court, and because the Rastafarian religion is "tied inextricably" to ethnic characteristics and ancestry, Section 1981 should protect against discrimination on the basis of Rastafarianism.

Defendant has the better argument here. As written, Section 1981 provides that all persons in the United State shall have the same right to make and enforce contracts as is enjoyed by "white citizens," and the right is protected against impairment. 42 U.S.C. § 1981. Although Section 1981 does not itself use the word "race," the Supreme Court has construed it to forbid all "racial" discrimination in the making of private as well as public contracts, including those for employment, *Runyon v. McCrary*, 427 U.S. 160, 168 (1976); and it has likewise held that Section 1981 "encompasses claims of retaliation," *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008). Importantly, in *Saint Francis College v. Al-Khazraji*, the Supreme acknowledged modern race theory and criticism of dated racial classifications by biologists and anthropologists, but held that Congress, in passing Section 1981, "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics," as they were understood in 1866, such as "distinctive physiognomy," regardless of how modern science or theory defined race. 481 U.S. 604, 613 (1987). Further, the Court specifically stated that Section 1981 did not protect against discrimination based upon a person's "place or nation of origin" or religion. *Id.*

Plaintiff provides no support for the proposition that Rastafarians were at any point understood as an identifiable race or had distinct ancestry or ethnic characteristics as described in *Saint Francis College*, such that it would be protected under Section 1981. Indeed, Plaintiff's authority makes clear that the Rastafarian tradition "only emerged in the 1930s," many decades after Section 1981 was enacted. *See* Derek O'Brien & Vaughan Carter, *Chant Down Babylon: Freedom of Religion and the Rastafarian Challenge to Majoritarianism*, 18 J.L. & Religion 219, 224 (2002). Moreover, Plaintiff's argument, tying Rastafarianism geographically to Jamaica and culturally to pan-African culture and spiritualism, fails to explain how Rastafarianism amounts a distinctive race as set forth in *Saint Francis*, and in fact acknowledges that presently, "race-based requirement[s for admission in the religion have] g[i]ve[n] way to having the appropriate African spirit." Julius H. Bailey, *Down in the Valley: An Introduction to African American Religious History*, 132 (2016). Thus, based upon Plaintiff's own position, the Court cannot conclude that Rastafarians are a separate racial class protected by Section 1981. Additionally, the Court is persuaded by authority cited by Defendant that because Section 1981 protects against discrimination solely based on one's race, ancestry, and ethnic characteristics, where there are no facts establishing intentional discrimination on the basis of such characteristics, asserting discrimination on the basis of a "religion [that] is part of his ethnic characteristics or ancestry ... does not transform said discrimination [in]to race-based discrimination within the meaning of Section 1981." *Abdallah v. Allegheny Valley Sch.*, No. CIV. A. 10-5054, 2011 WL 344079, at *5 (E.D. Pa. Feb. 1, 2011).

***15** Turning back to retaliation claim at issue, in order to state a claim for retaliation under Section 1981, the “protected activity” must relate to racial discrimination prohibited by Section 1981, not just discrimination under any statute. *See CBOCS West, Inc.*, 553 U.S. at 451-52; *see also Bryant v. Jones*, 575 F.3d 1281, 1301 (11th Cir. 2009). In the present case, Plaintiff complained only that his religious grooming practices were not being appropriately accommodated, but never asserted that he was being treated differently based upon his race, ancestry, or ethnic characteristics. (*See, e.g.*, DSMF ¶ 33; PSMF ¶ 33 (Plaintiff complaining only that the grooming policy was “clearly a violation” of the EEOC's guidelines on religious discrimination).) Because Plaintiff only complained about religious discrimination, he cannot establish a claim for retaliation under Section 1981. *See Jones v. Scott Davis Chip Mill*, No. 7:15-CV-00661-TMP, 2017 WL 5127717, at *11 (N.D. Ala. Nov. 6, 2017) (collecting cases) (“[A]n employee's complaint must reasonably convey that [ ]he is opposing discrimination based specifically upon race, versus some other type of discrimination or injustice generally.”); *see also Doe v. Sizewise Rentals, LLC*, No. CIV.A. 09-3409, 2012 WL 1191944, at *6 (D.N.J. Apr. 10, 2012), *aff'd*, 530 F. App'x 171 (3d Cir. 2013) (granting summary judgment in favor of employer when plaintiff only complaining about being discriminated against for being Muslim, despite plaintiff's later contentions that he was also discriminated against on the basis of being Arab).

Based upon the foregoing, Plaintiff's Section 1981 retaliation claim fails as a matter of law, and summary judgment should **GRANTED** in favor of Defendant. But, even if the Court were to assume Plaintiff could maintain a Section 1981 claim, because retaliation claims under Section 1981 and Title VII are analyzed in the same way, *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1277 (11th Cir. 2008), and because Plaintiff's Title VII retaliation claim also fails for the reasons explained below, summary judgment would be appropriate for that additional reason.

2. Retaliation Under Title VII

Title VII forbids an employer from discriminating against an employee “because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a); *Anduze v. Fla. Atl. Univ.*, 151 F. App'x 875, 878 (11th Cir. 2005); *McShane v. United States Attorney Gen.*, 144 F. App'x 779, 787 (11th Cir. 2005). A plaintiff may establish a prima facie case by either direct or circumstantial evidence. *See Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999). In this case, Plaintiff contends that he has both direct and circumstantial evidence of retaliation.

a. Direct Evidence of Retaliation

Direct evidence of retaliation is “evidence, which if believed, proves the existence of fact in issue without inference or presumption. Evidence that only suggests [retaliation], or that is subject to more than one interpretation, does not constitute direct evidence.” *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1189 (11th Cir. 1997); *see also Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 642 (11th Cir. 1998) (“Direct evidence, by definition, is evidence that does not require ... an inferential leap between fact and conclusion.”). In contrast, evidence “that only suggests [retaliation] or that is subject to more than one interpretation does not constitute direct evidence.” *Taylor v. Runyon*, 175 F.3d 861, 867 (11th Cir. 1999) (internal citation and quotation omitted); *see also Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004) (“If the alleged statement suggests, but does not prove, a [retaliatory] motive, then it is circumstantial evidence.”). Thus, under Eleventh Circuit precedent, “only the most blatant remarks [or conduct], whose intent could mean nothing other than” retaliation constitute direct evidence of the same. *Wilson*, 376 F.3d at 1086 (internal citation and quotation omitted); *see also Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1095 (9th Cir. 2005) (clarifying that direct evidence can be either “statements or actions by the employer”).

16** Plaintiff contends that he has direct evidence of retaliation in this case because, in response to his complaints about religious discrimination, Mr. Rowekamp “engaged in a fishing expedition to find a reason to terminate” him. [Doc. 58 at 21-24.] Although Plaintiff describes Mr. Rowekamp's inquiry as a “sham investigation,” designed to “ ‘lead[ ] to the desired outcome,’ ” [*id.* (quoting *Harden v. Marion Cty. Sheriff's Dep't*, 799 F.3d 857, 862 (7th Cir. 2015))], he offers no evidence establishing without inference that Mr. Rowekamp's intent in searching Plaintiff's name via Google was retaliatory, much less evidence that Mr. Rowekamp began his investigation in order to justify terminating Plaintiff's employment. Indeed, the cases cited by Plaintiff are inapposite to his argument and make clear that only ***after other facts demonstrate that an investigation was a sham would the fact that an investigation had occurred support an inference—as opposed to direct evidence—of retaliatory motive or pretext. *See Harden*, 799 F.3d 864-65 (finding that no reasonable jury could conclude that an investigation was pretextual when there was no additional evidence of retaliatory intent, such as fabrication, misrepresentation, selective enforcement, or other impropriety); *see also Thompson v. Quorum Health Res.*, LLC, 485 F. App'x 783, 791 (6th Cir. 2012) (in False Claims Act case, finding it merely permissible for a jury to "have inferred" that an investigation was pretextual based upon other circumstantial evidence of improper intent).[27] In this case, Plaintiff has offered no evidence other than timing that Mr. Rowekamp's search of his name in Google was a sham or motivated by retaliatory intent. The Court also rejects Plaintiff's unsupported contention that any investigation of an employee in response to a threat of litigation amounts to unlawful retaliation. As discussed in the preceding paragraph, Plaintiff's cited authority merely allows that other evidence could establish that an investigation following an employee's protected activity was to pretext for retaliatory motive; none of those cases suggest that any investigation whatsoever of an employee following protected activity is per se retaliatory.[28]

Along these lines, the Court is not persuaded that Mr. Rowekamp's search of Plaintiff's name in Google, was even an adverse action. "[N]ot all conduct by an employer negatively affecting an employee constitutes [an] adverse employment action." *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1238 (11th Cir. 2001). To make out a claim of retaliation, a plaintiff must show that he suffered an action which a reasonable employee would find "materially adverse," such that it would "dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). Thus, "[a] challenged action must do more than merely affront a 'plaintiff's unusual subjective feelings' and cannot be a trivial harm that offends 'a general civility code for the American workplace.' " *Manns v. City of Atlanta*, No. 1:06-CV-0609-TWT, 2008 WL 150699, at *8 (N.D. Ga. Jan. 11, 2008) (quoting *Burlington N.*, 548 U.S. at 68). To determine whether an action is materially adverse, the Court considers the particular circumstances of the case. *Burlington N.*, 548 U.S. at 68.

Although unusually intrusive investigations or investigations involving unjustifiable pre-investigation punishment may constitute adverse actions, *see, e.g., Williams v. Guilford Tech. Cmty. Coll. Bd. of Trs.*, 117 F. Supp. 3d 708 (M.D.N.C. 2015) (employee was secretly recorded and subject to particularly harsh scrutiny); *Szeinbach v. Ohio State Univ.*, 493 F. App'x 690, 695-96 (6th Cir. 2012) (two-year whistleblower investigation that prevented career advancement); *Sharpe v. Utica Mut. Ins. Co.*, 756 F. Supp. 2d 230, 245 (N.D.N.Y. 2010) ("biased investigation" involving "close monitoring of plaintiff," pre-drafted investigation notes, and no feedback to plaintiff, all in conspiracy designed to place employee on probation and ultimately fire her),[29] this Court cannot conclude that a simple Internet search of a person's name would dissuade reasonable employee from making a complaint of discrimination. Indeed, courts in this Circuit have found that straightforward investigations resulting from complaints of discrimination—which uncover truthful derogatory information—are not themselves retaliatory (nor evidence of pretext) in the absence of other inculpatory evidence, *see Carrio v. Apollo Grp.*, No. 1:07-CV-1814-BBM, 2009 WL 2460983, at *3 (N.D. Ga. Aug. 7, 2009) (holding that "being placed on paid administrative leave pending an investigation[into plaintiff's complaints of sexual harassment] did not constitute an adverse employment action pursuant to well-established law," and that the investigation was not pretext for his later discharge); *Chambers v. Walt Disney World Co.*, 132 F. Supp. 2d 1356, 1368-70 (M.D. Fla. 2001) (holding that investigation of plaintiff following complaints of discrimination was not an adverse action, and in the absence of other evidence showing investigation's results were false, plaintiff's discharge based upon result of the investigation was not pretext for retaliation).[30] Here, Plaintiff complained that Defendant's grooming requirements violated EEOC policy; affirmatively referenced his prior employment, stating that he had previously been accommodated; and threatened to file a charge of discrimination with the EEOC. That in response, Mr. Rowekamp took the simple step of searching Plaintiff's name in a common internet search engine, was not unusually intrusive or unjustifiable, and a reasonable employee would not be dissuaded from making such a complaint of discrimination as a result.[31] To the extent Plaintiff maintains that the search was unreasonable or unjustified, he has offered no facts or legal authority in support.

***17** For all the reasons discussed above, Plaintiff's contentions—that Mr. Rowekamp's decision to search Plaintiff's name was either in and of itself retaliatory, or that it was direct evidence of retaliatory intent—is without merit. Moreover, to the extent that Plaintiff asserts a claim for retaliation based solely on that search, summary judgment should be **GRANTED** on such a claim in favor of Defendant.

b. Circumstantial Evidence

In the absence of direct evidence, claims of retaliation pursuant to Title VII typically follow the *McDonnell Douglas* burden-shifting framework. *Jackson v. Geo Grp., Inc.*, 312 F. App'x 229, 233 (11th Cir. 2009); *see also* *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1277 (11th Cir. 2008) (applying the same three-part test to retaliation claims under Section 1981 and Title VII). To make out a prima facie case of retaliation, a plaintiff must show that (1) he engaged in protected activity; (2) he suffered an adverse employment action by the defendant simultaneously with or subsequent to such protected activity; and (3) a causal connection exists between the protected activity and the adverse employment action. *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action. *Id.* Finally, assuming the defendant does so, the burden shifts back to the plaintiff to establish those reasons were pretext for retaliation. *Id.*

With regard to Plaintiff's drug testing and discharge, Defendant largely concedes that Plaintiff can establish a prima face case of retaliation. [Doc. 59-1 at 16-17.][32] As a result, Defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. *McCann v. Tillman*, 526 F.3d 1370, 1375 (11th Cir. 2008). This burden is one of production, not persuasion, and is "exceedingly light." *Turnes v. AmSouth Bank, N.A.*, 36 F.3d 1057, 1061 (11th Cir. 1994); *Perryman v. Johnson Prods. Co.*, 698 F.2d 1138, 1141 (11th Cir. 1983).

Defendant has done so here. First, Defendant has presented evidence that Plaintiff was reported as "no show" for his initial testing appointment that expired on October 29, 2014. (30(b)(6) Dep. at 75-78, Ex. 7.) Because Defendant needed to complete a drug screening test to complete orientation (and because Plaintiff did not volunteer that he had already taken one), Ms. Moore drove Plaintiff to a drug test, as she had with at least two other employees. (30(b)(6) Dep. at 79-80, 85-87.)

***18** Second, Defendant has presented evidence that Mr. Rowekamp's search of Plaintiff's name, and review of the public documents that the search uncovered in PACER, showed that Plaintiff had been discharged from his prior employment. (Rowekamp Dep. at 25-26, 31, 46-47, 83; DSMF ¶¶ 47-48; DSAMF ¶¶ 5-6.) Because the electronic forms pertaining to his application showed that he had indicated he had not been discharged, and because falsification of an employment application is a terminable offense, Mr. Rowekamp and Ms. Demitrus made the decision to terminate Plaintiff's employment based upon the apparent falsification. (30(b)(6) Dep. at 24-25, 127-28; PSMF ¶¶ 40, 64; DSMF ¶ 53.)

The burden therefore shifts back to the Plaintiff to show that the stated reasons for drug testing him and terminating his employment were pretext for retaliation. *See* *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1193 (11th Cir. 2004). A plaintiff raises a genuine issue of material fact concerning pretext if he casts sufficient doubt on the defendant's proffered non-discriminatory reason to permit a reasonable factfinder to conclude that the proffered reasons were not actually what motivated its conduct and that retaliation was. *Brooks v. Cty. Comm'n of Jefferson Cty.*, 446 F.3d 1160, 1163 (11th Cir. 2004). This may be accomplished either by directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *Id.* In doing so, the court evaluates whether the plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns, Inc.*, 106 F.3d 1519, 1538 (11th Cir. 1997). A reason is not pretext for discrimination "unless it is shown both that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). Thus, where the reason given for the adverse employment action is one that might motivate a reasonable employer, a plaintiff must meet the reason "head on" and not simply quarrel with the wisdom of the reason. *Chapman*, 229 F.3d at 1030; *see also* *Redd v. United Parcel Serv.*, 615 F. App'x 598, 604 (11th Cir. 2015); *Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1206 (11th Cir. 2013).

Plaintiff presents several arguments in an attempt to show that the City's stated reasons were pretext for retaliation. With regard to his drug test, Plaintiff notes only that there was no reasonable suspicion for it, as required by Defendant's general policy statement. However, Plaintiff does not dispute that Defendant separately requires that all new hires take a drug test, that Ms. Moore received a report that Plaintiff was a "no show" for his initial appointment, and that in other similar circumstances, Ms. Moore had driven new hires to obtain drug tests; moreover, there is no evidence to contract Ms. Moore's testimony that she honestly believed Plaintiff had not taken a drug test—in fact, there is no evidence indicating that at that time, Plaintiff claimed to have already taken one. (30(b)(6) Dep. at 79-87, Ex. 7.) What matters in the present pretext analysis is whether the employer gave an honest explanation for its behavior. *See Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). If the employer acted on an honestly held belief, even if that belief was mistaken, no retaliation exists. *See id.*; *see also Chavez v. URS Fed. Tech. Servs., Inc.*, 504 F. App'x 819, 823 (11th Cir. 2013) ("Whether an employment decision was 'prudent or fair' is irrelevant, because an employer is free to choose whatever [ ] it wants, so long as it is not [retaliatory]."). Here, the only evidence indicates that Ms. Moore provided an honest explanation—even if mistaken—for why she required Plaintiff to submit to drug test during orientation.

***19** With regard to his discharge, Plaintiff contends that Defendant's stated reason is pretextual because (1) he could not attest to having provided the information contained in the online application forms maintained by Defendant; (2) he in fact answered yes to the question on his application asking if he had been fired; (3) there were no valid safety concerns about his facial hair, yet he was not allowed an exception to the grooming policy; (4) Defendant "dug-up" dirt on him after he complained; (5) and Defendant did not contact his attorneys or Rural Metro to learn more about the circumstances of his discharge when Plaintiff indicated the termination was wrongful. [Doc. 65 at 16-25; *see also* Doc. 58-1 at 14-24; Doc. 69 at 4-15.]

Two of these items have already been addressed. First, in relation to Plaintiff's argument that he should have been granted the particular accommodation he requested, as discussed above, Defendant's only obligation was to provide a reasonable accommodation, not the one desired by Plaintiff. Defendant met that obligation, and there is no other indication that Defendant otherwise acted in a discriminatory fashion. Further, on a more fundamental level, Plaintiff fails to explain how the accommodation decision in any way pertains to his claim of retaliatory discharge.

Second, the Court has explained in detail that an employer's investigation of an employee is not an adverse action or evidence of pretext unless there is actual evidence that the investigation was unjustified, unreasonably intrusive, involved a pre-ordained punishment or result, or otherwise constituted a sham. Plaintiff's repeated exclamation that Mr. Rowekamp's Google search was sham designed to dig up dirt on Plaintiff does not transform it into one, and Plaintiff has offered no evidence that it was unreasonable in light of the circumstances.[33] *Cf. Ponce v. Cingular Wireless, L.L.C.*, No. CIV 03-21939, 2005 WL 5454213, at *3 (S.D. Fla. Nov. 17, 2005) (actual testimony admitting that supervisor engaged in a "campaign of hatred" to "dig up dirt" on plaintiff was evidence of pretext).

Accordingly, the Court is left with Plaintiff's testimony that he did not recall completing an application form indicating he had never been fired by a prior employee and that he instead filled out paper application forms disclosing he had been fired; along with the fact that Defendant discharged him without contacting his attorneys or Rural Metro about his discharge. The Court concludes that this does not meet Plaintiff's burden to show pretext, since Plaintiff provides no evidence to attack Mr. Rowekamp's, Ms. Demitrus's, and Ms. Moore's beliefs about whether he falsified his application, and simply quarrels with the wisdom of the Defendant's decision to discharge him without contacting his attorney or prior employer. As outlined above, the pretext analysis focuses on whether the employer gave an honest explanation for its behavior, *see Elrod*, 939 F.2d at 1470, and if the undisputed evidence shows that the employer acted on an honestly held belief that the employee engaged in misconduct warranting discharge—even if that belief was mistaken—a plaintiff cannot establish pretext. *Nix v. WLCY Radio/Rahall Commc'ns*, 738 F.2d 1181, 1187 (11th Cir. 1984) ("The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.").

***20** Here, Defendant has presented undisputed evidence that the application forms reviewed by Mr. Rowekamp, Ms. Demitrus, and Ms. Moore show that Plaintiff specified that he had never been discharged. There is no evidence that Plaintiff ever challenged the authenticity of those forms prior to his discharge, nor is there evidence suggesting that the forms were manufactured to justify his termination. Thus, while Plaintiff has offered evidence—namely, his own testimony—questioning the veracity of the information contained in the forms, he has not offered evidence contradicting Defendant's honest belief that the information was correct at the time it made its decision to terminate Plaintiff's employment. Indeed, there is no evidence that, when presented with those forms by Ms. Moore prior to his discharge, Plaintiff ever suggested he had in fact previously disclosed his firing by Rural Metro. (Pl. Dep. at 69.) As a result, Plaintiff's testimony simply does not create a triable issue of fact regarding pretext. *See Usry v. Liberty Reg'l Med. Ctr., Inc.*, 560 F. App'x 883, 890 (11th Cir. 2014) (holding that evidence that the results of an investigation were wrong and that the employer made a poor decision in discharging plaintiff did not support a finding of pretext, even combined with comparator evidence that other employees were treated more favorably, when evidence failed to attack the honesty of the employer's stated reason).

Moreover, it is also undisputed that Defendant's policy on application falsification called for his discharge; that Defendant has discharged multiple individuals for lying on their job application, including falsifying their termination status with a previous employer; and that Defendant has never allowed anyone it discovered had falsified application documents to continue his or her employment. (DSMF ¶¶ 55, 58; 30(b)(6) Dep. at 16-20, 68-70; Rowekamp Dep. at 82.) Plaintiff points to nothing that suggests Defendant was required to obtain greater detail about the circumstances of his discharge from Rural Metro,[34] or otherwise levy a more modest sanction before discharging him, and there is certainly no legal requirement that an employer do so. As Ms. Moore explained, even after Plaintiff described his discharge from Rural Metro as wrongful, she still believed that he had falsified its status in his application and that his termination was appropriate. (30(b)(6) Dep. at 181-82.)[35] Ultimately, the "pretext inquiry focuses on the honesty of the employer's explanation; raising a question about the correctness of the facts underlying that explanation without impugning the employer's honest belief, fails to create a triable pretext issue." *Dawson v. Henry Cty. Police Dep't*, 238 F. App'x 545, 549 (11th Cir. 2007). While Plaintiff has offered testimony that Defendant relied on incorrect information and might have taken additional steps to make a better informed decision, Plaintiff has nevertheless failed to meet his burden of showing there is a genuine issue of material fact that Defendant honestly believed he falsified his application and discharged him as a result.

c. Convincing Mosaic

Lastly, Plaintiff contends that even if his claims fail under the *McDonnell Douglas* framework, there is still sufficient circumstantial evidence to create a jury issue on retaliation. [Doc. 65 at 6-7, 16-17; *see also* Doc. 58 at 22-24.] In certain cases, a "convincing mosaic of circumstantial evidence" may be sufficient to allow a jury to infer that retaliatory intent motivated an employment decision. *See Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328-29 (11th Cir. 2011); *see also Calvert v. Doe*, 648 F. App'x 925, 929 (11th. Cir. 2016) (applying the "convincing mosaic" standard to a Title VII retaliation claim). In *Smith v. Lockheed-Martin Corp.*, the Eleventh Circuit stated that "the *McDonnell Douglas* framework is not, and never was intended to be, the *sine qua non* for a plaintiff to survive a summary judgment motion in an employment case," and that a plaintiff can survive summary judgment if he "presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." 644 F.3d at 1328. Typically, it is utilized in circumstances when a plaintiff lacks comparator evidence because there are no other similarly situated individuals, and allows the plaintiff to bypass the presentation of a prima facie case, *see Banks*, 661 F. App'x at 644; *Rioux v. City of Atlanta*, 520 F.3d 1269, 1277 (11th Cir. 2008), so when a plaintiff can otherwise establish a prima facie case, it is not clear that the "convincing mosaic" approach differs from standard the pretext analysis, *see El-Saba v. Univ. of S. Ala.*, 738 F. App'x 640, 647-48 (11th Cir. 2018) (holding that plaintiff's "failure to rebut [defendant]'s asserted legitimate, nondiscriminatory reason for his termination is fatal to his "convincing mosaic" theory); *see also Connelly v. WellStar Health Sys.*, Inc., ––– F. App'x ––––, 2019 WL 140823, at *3 n.2 (11th Cir. Jan. 9, 2019) (holding that district court did not err in declining to consider "convincing mosaic" theory because when "the district court assumed without deciding that [plaintiff] could set out a prima facie case of [ ] retaliation, the *McDonnell Douglas* framework had no ill effect—regardless of the standard used").

***21** In any event, following *Lockheed-Martin*, the Eleventh Circuit has recognized three categories of circumstantial evidence that may be relevant under the convincing mosaic approach: "(1) suspicious timing, ambiguous statements, similar behavior directed at other members of the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn; (2) systematically better treatment of those outside the protected class; and (3) pretext in the employer's justification." *Smith v. City of New Smyrna Beach*, 588 F. App'x 965, 976 (11th Cir. 2014) (citing *Lockheed-Martin*, 644 F.3d at 1328). Plaintiff's offering here, however, falls short of *Lockheed-Martin.* Plaintiff merely regurgitates his pretext arguments [*see* Doc. 58 at 23-24], which are not convincing for all the reasons detailed above. Moreover, contrary to Plaintiff's position, there is substantial evidence demonstrating both (1) that Mr. Rowekamp has performed similar standard inquiries whenever anyone threatened litigation, and (2) that Defendant discharged anyone who falsified employment application information. Thus, there is in fact mosaic-type evidence that similarly-situated individuals (who had not engaged in activity protected by Title VII) were treated in the exact manner Plaintiff was, bolstering rather than undermining Defendant's stated reason for his discharge.

For all the reasons outlined above, summary judgment should be **GRANTED** in favor of Defendant with regard to Plaintiff's retaliation claims.

IV. CONCLUSION

For the foregoing reasons, it is **RECOMMENDED** that Defendant's motion for summary judgment be **GRANTED**, and that Plaintiff's motion for partial summary judgment be **DENIED**.

IT IS SO RECOMMENDED this 15th day of January, 2019.

All Citations

Not Reported in Fed. Supp., 2019 WL 13289498

Footnotes

1 The legality of Plaintiff's discharge from Rural Metro was litigated in *Bailey v. EMS Ventures, Inc.*, No. 1:11-cv-1090-AT (N.D. Ga.), wherein Plaintiff alleged race discrimination and retaliation; summary judgment in favor of Rural Metro Ambulance was recommended in December 2014, and that recommendation was adopted and judgment entered in July 2015 [*id.* at Docs. 107, 114]. Nevertheless, Plaintiff testified that his race discrimination and retaliation claims against Rural Metro were resolved by way of a confidential settlement. (Pl. Dep. at 17-18).

Plaintiff testified that he filed an EEOC charge and lawsuit against Care Ambulance, alleging discrimination on the basis of his race and religion, as well as retaliation, and that his claims were again resolved by way of a confidential settlement. (Pl. Dep. at 18-19; DSMF ¶ 14).

2 Defendant uses a third-party vendor, Inverify, to run it background checks and validate previous experience. (PSMF ¶ 6.)

3 The form also provided a list of “CONDITIONS OF APPLICATION,” which included, among other things, that the applicant “CERTIFY that all information provided in this employment application is true and complete,” and “that any false information or omission may disqualify [the applicant] from further consideration for employment and may result in my immediate dismissal if discovered at a later date.” (Pl. Dep. at Ex. 1 at 6-7.) The electronic forms maintained for Plaintiff's application includes “I agree,” in the consent box for those conditions, (Pl. Dep. at Ex. 1 at 7), though Plaintiff testified that he “didn't recall seeing that [language] at the time of initially applying,” and also “didn't understand any consequences,” of not providing accurate information (*id.* at 34-37).

4 Plaintiff testified that he did not recall exactly what position he had applied for (Pl. Dep. at 37-38); but explained that he had been seeking an emergency-side paramedic position, and believed that he expressed that desire at his interview and articulated as much in subsequent emails (*id.* at 58-59). According to the electronic forms, the position for which Plaintiff applied is simply labeled “DeKalb County-Part Time Paramedic,” (Pl. Dep. at 58, Ex. 1 at 1-2), and the job description for the position is labeled “EMT-Paramedic,” (id. at 58, Ex. 2 at 1). According to Ms. Moore, at that time, the assumption with most applicants and hires, including Plaintiff, was that they would work on the emergency side. (30(b)(6) Dep. at 48, 119)

5 It is undisputed that Plaintiff in fact completed some pre-employment tests in late October 2014, including a Physical Agility Test (“PAT”). (PSMF ¶ 19; R-PSMF ¶ 19; *see also* 30(b)(6) Dep. at Exs. 2-3 [Doc. 55-1 at 8-34].)

6 According to Ellette Jackson, a field training officer for Defendant who taught Plaintiff's orientation in January 2015, the contract with DeKalb County dictated a number of requirements, protocols, and policies. (Dep. of Ellette Jackson (“Jackson Dep.”) [Doc. 57] at 8, 18.) Ms. Jackson testified that Defendant needed to “abide by that contract,” which was a “multimillion dollar contract.” (Jackson Dep. at 37.)

7 Non-emergency paramedics, on the other hand, not have to comply with DeKalb County's more restrictive grooming policy. (DSMF ¶ 36.)

8 Plaintiff testified that all of his other employers were able to accommodate his religious beliefs regarding facial hair on the emergency side so long as he passed safety tests for using the relevant equipment. (PSMF ¶ 13.)

Ms. Moore explained that after Plaintiff's request (though not before it), Defendant has granted at least one religious accommodation to a Washington, D.C. paramedic seeking to maintain more facial hair than permitted by the grooming policy; however, according to Ms. Moore, that employee passed a series of special testing to confirm his facial hair did not interfere with the safety mask, and his facial hair would not have violated the grooming policies of the applicable client. (30(b)(6) Dep. at 49-52.) Although Ms. Moore and Ms. Jackson did not know whether Plaintiff had been tested, (30(b)(6) Dep. at 40-42; Jackson Dep. at 73-74), Plaintiff testified that he did in fact undergo a safety mask seal test with his goatee, which he passed (Pl. Dep. at 41).

9 According to Ms. Jackson, around this time, Plaintiff stated during an orientation session that he “find[s] little loopholes” in companies' policies and procedures, and “then what [he] do[es] is [he] sue[s] them. They are making all this money,” and he “need[ed] to get [his] piece of the money too, you know”; Ms. Jackson thereafter reported to her direct supervisor, Mr. Lavallee, that she believed Plaintiff was looking for an excuse to sue the company. (Jackson Dep. at 32-35, 67; PSAMF ¶ 73.)

10 Although Defendant offered stipends for picking up open shifts that, which could conceivably have impacted pay, the program was not available until 2016, and was therefore never available during the relevant time period. (Moore Dec. [Doc. 71-1] ¶¶ 11-13.)

11 Plaintiff recalled being advised that scheduling orientation shifts—which were required on both the emergency and non-emergency side for all paramedics—would be more difficult on the non-emergency side since there were fewer slots for ride-alongs. (Pl. Dep. at 52-54; *see also* Dec. of Bataski Bailey (“Pl. Dec.”) [Doc. 65-9] ¶ 5, Ex. A.) Ms. Moore explained that although there were fewer trucks, and thus fewer shifts overall, on the non-emergency side, Defendant's hiring and scheduling practice was such that they would not hire part-time paramedics when there were limitations on the availability of shifts in any area. (30(b)(6) Dep. at 9, 117-18.)

12 As noted above, by this time, the parties in that case had briefed summary judgment, and the Magistrate Judge had recommended Plaintiff's claims be dismissed. *See Bailey v. EMS Ventures, Inc.*, No. 1:11-cv-1090-AT at Doc. 107.

13 While Defendant has, on a case-by-case basis, hired employees who have admitted to being fired, it has not allowed anyone who falsified such information remain employed. (DSMF ¶ 58; R-DSMF ¶ 58; 30(b)(6) Dep. at 68-70; Rowekamp Dep. at 82.)

14 Outside of pre-employment screenings, Defendant's policy states that it only drug tests employees upon reasonable suspicion such as “physical, behavioral, or performance indicators of possible drug or alcohol use.” (Pl. Dep. at Ex. 6 at Bates No. MAA000319.)

15 For example, Ms. Moore recommended a non-Rastafarian employee for termination because he had falsified his termination status with his previous employer. Defendant discovered that he had been terminated from a company which had since been acquired by Defendant, when his application stated otherwise. Even though the individual asserted that the termination was a difference of opinion, Defendant rescinded his job offer during his new-hire orientation. Another non-Rastafarian employee was terminated for falsifying his discharge status with a prior employer, after Ms. Moore called the prior employer during the course of investigating a co-worker's report that the individual had displayed volatile behavior while working for that prior employer. (30(b)(6) Dep. at 16-20.)

16 Ms. Moore did not herself make the decision that Plaintiff's employment be terminated. (PSMF ¶ 63.)

17 As noted, at the time of Plaintiff's discharge there was a pending recommendation that Plaintiff's claims against Rural Metro be dismissed upon Rural Metro's motion for summary judgment. *See Bailey v. EMS Ventures, Inc.*, No. 1:11-cv-1090-AT, Doc. 107.

18 Defendant briefly contends that Plaintiff cannot make out a prima facie case of retaliation because there is no causal nexus between his complaints and his discharge, but thereafter appears to acknowledge that the temporal proximity may serve to establish that nexus. [Doc. 59-1 at 16-17.]

19 Defendant also argues that Plaintiff's drug testing was not an adverse employment action for retaliation purposes, and even if it were, Defendant had legitimate non-retaliatory reasons for requiring Plaintiff to submit to it.

20 By comparison, in his claims for retaliation under Section 1981 and Title VII, Plaintiff specifically identifies his drug testing and his discharge as the adverse employment actions taken in retaliation for engaging in protected activity. [Doc. 1 at ¶¶ 41-45, 52-61.]

21 Beyond the fact that by being offered a religious accommodation, an employee receives preferential treatment that would not be available to other employees.

22 Plaintiff had another year of experience with Rural Metro. See *Bailey v. EMS Ventures, Inc.*, No. 1:11-cv-1090-AT, Doc. 107 at 3.

23 Plaintiff started at Grady Ambulance approximately four months after being discharged by Defendant. (Pl. Dep. at 75.)

24 Even if Plaintiff did not already have the relevant experience, and even if he were presently seeking, without success, a supervisory position, the possible limitation on advancement potential does not, on its own, make an accommodation unreasonable. *See* *Camara*, 292 F. Supp. 3d at 1328 ("A transfer offer is a reasonable accommodation even if the employee might temporarily lose seniority privileges.") (citing *Cosme v. Henderson*, 287 F.3d 152, 160 (2d Cir. 2002)).

25 Moreover, it makes sense that during orientation, when all new paramedics—the majority of which were emergency paramedics—needed to have training on both sides, the side with fewer absolute shifts would be more limited. To the contrary, for ordinary work shifts, when emergency paramedics were not vying with non-emergency paramedics for the same shifts, more shifts would be available for the non-emergency work.

26 Plaintiff does not explain precisely what how his "ability to interact with the community" would have been limited working as a non-emergency paramedic, though the Court notes the he disparagingly referred to such work as "granny totes," because he believed it usually involved transporting elderly patients. (Pl. Dep. at 26-28, 51).

27 Plaintiff also cites *Arias v. Raimondo*, where the Ninth Circuit held merely that a plaintiff could state a plausible claim for retaliation under the FLSA by alleging that an employer routinely investigated the immigration status, and helped immigration enforcement officials apprehend, anyone who asserted workplace rights. 860 F.3d 1185, 1187 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 673, 199 L. Ed. 2d 535 (2018). *Arias*, obviously, did not address issues of proof.

28 Plaintiff argues that any investigation of an employee following complaints of discrimination place such employees "between a rock and a hard place," because either the discrimination will go unchecked or the employee "stands to lose his job once the employer begins scrutinizing his every move." [Doc. 69 at 7-8.] This misapprehends both the present situation and the general conclusion Plaintiff wishes to draw. As to the present case, Plaintiff has not offered evidence to support that Defendant scrutinized his every move; instead, the undisputed facts show that a simple Google search of Plaintiff's name immediately revealed the information forming the basis of his discharge. Moreover, as discussed below, unreasonable investigations may constitute actionable adverse employment actions for retaliation purposes; thus, reasonable employees—without readily accessible derogatory information they wish to remain secret—are not stuck between Plaintiff's proverbial rock and a hard place.

29 Along similar lines, where an unrelated complaint—likely to result in a serious investigation and discharge—is made about an employee in response to that employee's protected activity, such a complaint may constitute an adverse action for retaliation purposes, since it would dissuade an employee from opposing unlawful conduct. *See* *Entrekin v. City of Panama City Fla.*, 376 F. App'x 987, 996 (11th Cir. 2010) (finding speech policy and behavioral complaints against police officer were adverse actions when they were purportedly made in retaliation for complaining about sexual harassment).

30 Plaintiff's citation on reply to *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 360 (2013), for the proposition that any time "an employer conducts an investigation into the employee's background ... in response to

protected activity, a plaintiff can show that the subsequent legitimate reason for termination," is simply misguided. [Doc. 69 at 7.] The case addresses the "but-for" standard that is necessary to causation in Title VII retaliation cases, but never discusses investigating an employee's complaints regarding discrimination, much less suggests that any investigation is per se unlawful (or that no adverse action may be taken if an investigation yields incriminating evidence regarding the complaining employee). *See Nassar*, 570 U.S. at 360. While it is necessary that protected activity be a but-for cause of a subsequent adverse action for the latter to be legally cognizable, that alone is not sufficient, since the action must also be both materially adverse and motivated by retaliatory animus.

31 That it uncovered information pertaining to Plaintiff's prior discharges and unsuccessful lawsuits does not retroactively make the initial search unreasonable.

32 Defendant affirmatively concedes the first two elements of the prima facie case, and the Court assumes for present purposes that Plaintiff has satisfied the third element with regard to the drug testing and his discharge, since, as noted above, Defendant offers only a perfunctory argument on the issue and instead focuses on the pretext analysis. *See Cheffer v. Reno*, 55 F.3d 1517, 1519 n.1 (11th Cir. 1995) (finding issue abandoned even though party's brief listed the issue in the statement of issues because party provided no argument on the merits of the claim in their brief). Indeed, the "mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action" may establish causation if it is "very close." *Clark Cty. Sch. Dist. v. Breedon*, 532 U.S. 268, 273 (2001). A period of less than a month—as was the case here—between an employer's knowledge of protected activity and the resulting adverse action is sufficient to establish causation. *See Clemons v. Delta Air Lines Inc.*, 625 F. App'x 941, 945 (11th Cir. 2015) (collecting cases); *see also Curtis v. Broward Cty.*, 292 F. App'x 882, 885 (11th Cir. 2008) (seven weeks is sufficiently close to establish causal connection).

33 Beyond a lack of support in case law, Plaintiff's position would yield the absurd result that an employer, faced with an EEOC charge or discrimination lawsuit, may not even investigate the claim to defend itself without immediately becoming liable for retaliation.

34 The Court notes that the circumstances of his discharge were readily available through the parties' summary judgment filings and the Magistrate Judge's report and recommendation in *Bailey v. EMS Ventures, Inc.*

35 Plaintiff never explains what additional information Defendant might have obtained from either his attorney or Rural Metro that would have changed what Defendant considered to be a false disclosure in his application materials. From Defendant's view, Plaintiff did not disclose his discharge from Rural Metro when he should have, and the fact that Plaintiff later described his discharge as wrongful did not change Defendant's conclusion that the application information had been falsified. The Court does not know what Plaintiff's attorneys, much less Rural Metro, could have said that would have changed Defendant's belief that Plaintiff was untruthful in his application.

End of Document

493 Fed.Appx. 690 (Table)
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a “Table of Decisions Without Reported Opinions” appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals,
Sixth Circuit.

Sheryl L. SZEINBACH, Plaintiff–Appellant,
v.
OHIO STATE UNIVERSITY, Defendant–Appellee.

No. 11–3002.
|
Aug. 10, 2012.

Synopsis
Background: Tenured state university professor brought Title VII action against university for retaliation and retaliation by association. The United States District Court for the Southern District of Ohio, Mark R. Abel, United States Magistrate Judge, 758 F.Supp.2d 448, granted summary judgment in favor of university. Professor appealed.

Holdings: The Court of Appeals, Helene N. White, Circuit Judge, held that:

[1] professor's alleged receipt of lesser pay increases than similarly-situated faculty received amounted to “adverse employment action,” and

[2] university's investigation of allegations of research misconduct against professor was “adverse employment action.”

Affirmed in part, reversed in part, and remanded.

West Headnotes (2)

[1] **Education** Exercise of rights; retaliation

Public Employment Exercise of Rights; Retaliation

Tenured state university professor's alleged receipt of lesser pay increases than similarly-situated faculty received, allegedly resulting in an approximately one percent salary differential, amounted to “adverse employment action,” as required to establish prima facie Title VII retaliation claim against university. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10 Cases that cite this headnote

[2] **Education** Exercise of rights; retaliation

Public Employment Exercise of Rights; Retaliation

State university's investigation of allegations of research misconduct against tenured professor was “adverse employment action,” as required to establish professor's prima facie Title VII retaliation claim against university. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

16 Cases that cite this headnote

***691** On Appeal from the United States District Court for the Southern District of Ohio.

BEFORE: WHITE, STRANCH, and FARRIS[*], Circuit Judges.

Opinion

HELENE N. WHITE, Circuit Judge.

****1** Sheryl Szeinbach appeals from the order granting summary judgment, dismissing her Title VII retaliation and retaliation-by-association claims against her employer, Defendant Ohio State University (OSU).[1] The magistrate judge[2] granted summary judgment on the sole ground that Szeinbach failed to establish a prima facie case, specifically an adverse employment action. We affirm in part and reverse and remand in part.

I

OSU hired Dr. Szeinbach in 1999 as a full professor with tenure in the College of Pharmacy (COP), and later hired Dr. Enrique Seoane–Vasquez (Seoane) as an Assistant Professor in the COP in 2002. Seoane, who is from Spain and of Spanish origin, filed a discrimination suit against OSU in August 2007, after having filed several internal complaints and a discrimination charge with the EEOC. Szeinbach filed the instant suit in August 2008, also after filing several internal complaints of retaliation and several charges with the EEOC. Szeinbach's second amended complaint alleged that OSU retaliated against her for supporting Seoane's discrimination charges against OSU, and for associating with Seoane, in violation of Title VII.

Szeinbach alleged that various COP faculty participated in the retaliation, including COP Professor Dr. Rajesh Balkrishnan and Dr. Milap Nahata, Chair of the COP's Division of Pharmacy Practice (PPD), both of whom are of Indian origin. Szeinbach alleged that she and Seoane opposed OSU's hiring of Balkrishnan in 2004; that Nahata and Balkrishnan favored faculty and students of Indian origin and treated faculty of Spanish origin less favorably, and that COP Dean Robert Brueggemeier, Nahata and Balkrishnan retaliated against Szeinbach for supporting Seoane.

The same magistrate judge (MJ) presided over Seoane and Szeinbach's cases. During protracted and acrimonious discovery it became apparent that some emails ***692** of OSU faculty whom Seoane and Szeinbach alleged retaliated against them had been deleted. Both Seoane and Szeinbach moved for spoliation sanctions, but Seoane dismissed his suit in October 2009, before the MJ ruled. Szeinbach's amended motion for spoliation sanctions sought entry of judgment in her favor on liability, or alternatively, an adverse-inference jury instruction. The MJ denied Szeinbach's motion, but left open “the possibility that the jury should be informed of OSU's failure to timely implement a plan to preserve documents relevant to this dispute” and noted that OSU advanced no reasonable explanation for its failure to issue an effective preservation directive no later than August 2007, when Seoane filed suit. Subsequently, however, the MJ granted OSU's motion for summary judgment, concluding that Szeinbach failed to establish a prima facie case of retaliation because she failed to demonstrate that she had been subjected to any adverse employment action.

II

This court reviews de novo the magistrate judge's grant of summary judgment. *Hawkins v. Anheuser–Busch, Inc.,* 517 F.3d 321, 332 (6th Cir.2008). The district court must construe the evidence and draw all reasonable inferences therefrom in the nonmoving party's favor. The issue is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251–52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

****2** We conclude that summary judgment was proper as to the attempted actions by Balkrishnan and OSU that were not implemented, and OSU's alleged attempted termination of Szeinbach's employment, but that granting summary judgment on the basis that there were no adverse employment actions was improper with respect to Szeinbach's differential-salary-increases claim and research-misconduct-investigation claim.

III

The burden of establishing a *prima facie* Title VII retaliation case is not onerous. *DiCarlo v. Potter,* 358 F.3d 408, 420 (6th Cir.2004), *Miller v. City of Canton,* 319 Fed.Appx. 411, 420 (6th Cir.2009) (observing that Title VII's anti-retaliation provision is broader than Title VII's discrimination provision, and that “[a] plaintiff easily makes out a *prima facie* case of retaliation.”) A plaintiff must demonstrate that: 1) she engaged in protected activity; 2) the defendant knew of this exercise of protected rights; 3) the defendant thereafter took adverse employment action against her; and 4) there was a causal connection between the protected activity and the adverse employment action. *Spengler v. Worthington Cylinders,* 615 F.3d 481, 491–92 (6th Cir.2010). If the plaintiff establishes a *prima facie* case, then the burden of production shifts to the defendant to “articulate some legitimate, nondiscriminatory reason for its action.” *Id.* at 492 (brackets omitted) (quoting *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). If the defendant succeeds in doing so, then the burden shifts back to the plaintiff to demonstrate that the defendant's “proffered reason was not the true reason for the employment decision.” *Id.* (internal quotation marks omitted).

The sole issue here, whether Szeinbach presented sufficient evidence to raise a genuine issue of material fact regarding whether she suffered an adverse employment action, is governed by *Burlington Northern & Santa Fe Railway Company v. White,* 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006):

> ***693** The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm.... [A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.
>
> We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth a general civility code for the American workplace. An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. The antiretaliation provision seeks to prevent employer interference with unfettered access to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely to deter victims of discrimination from complaining to the EEOC, the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.
>
> ****3** We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings....
>
> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an act that would be immaterial in some situations is material in others.

Burlington Northern, 548 U.S. at 67–69, 126 S.Ct. 2405 (internal citations and quotations omitted); *see also, Thompson v. N. Am. Stainless, LP,* ––U.S. ––––, 131 S.Ct. 863, 868, 178 L.Ed.2d 694 (2011) (reiterating that *Burlington Northern* prohibits any employer action that might have dissuaded a reasonable worker from making or supporting a charge of discrimination, and observing that "[w]e think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiance would be fired.")

1—Differential Salary Increases

[1] Szeinbach alleged that OSU retaliated against her by awarding her lesser pay increases than it would have absent her protected activities. The MJ concluded that the lesser pay increases were not adverse employment actions because Szeinbach and similarly-situated faculty received pay increases that differed by de ***694** minimis amounts—approximately 1% of her salary.[3]

The MJ determined that because Szeinbach's salary was not decreased, and because similarly-situated faculty received raises that were greater than Szeinbach's by de minimis amounts, she had not established that her lesser merit-pay salary increases amounted to an adverse employment action.

In *White v. Baxter Healthcare Corp.,* 533 F.3d 381 (6th Cir.2008), a Title VII *discrimination* case, this court held that the plaintiff employee's allegedly downgraded performance evaluation constituted an adverse employment action where the employee testified that he would have received a higher pay increase had he received a higher performance evaluation. This court observed that the plaintiff produced enough evidence to create a genuine issue of material fact regarding whether the downgraded performance evaluation had an adverse impact on his receipt of wages or salary. Had the plaintiff received a higher performance evaluation, his salary increase would have been 3%—whereas with the downgraded performance evaluation he received at most a 2% salary increase. *White,* 533 F.3d at 402–03.

****4** Given that the 1% salary-increase differential in *White* was held to "constitute[ ] a significant change in employment status ... or a decision causing a significant change in benefits," the district court should not have granted summary judgment to OSU on Szeinbach's salary-differential claim as to 2007 and 2008[4] on the grounds that OSU did not take an adverse employment action. On remand, the district court can consider the other arguments that OSU advanced on summary judgment on the salary-differential claim, such as the argument that there is no causal connection between Szeinbach's smaller raises and any protected activity in which she engaged.

2—Research–Misconduct Investigation of Szeinbach's Publications

[2] OSU's research-misconduct investigation of Szeinbach resulted from Balkrishnan submitting an internal "whistleblower" complaint in 2007 alleging suspected wrongful conduct by Szeinbach regarding two of her academic publications. The MJ properly observed that Balkrishnan's whistleblower complaint ***695** "activated an investigative procedure set forth in OSU's Research Committee Interim Policy and Procedures Concerning Misconduct in Research or Scholarly Activities." But this was no run-of-the-mill internal investigation. Before submitting his internal whistleblower complaint, Balkrishnan emailed the editor of one of the journals that had published an article of Szeinbach's, and stated that her 2007 article had reported "exactly identical results just analysing the data slightly differently" from a 2005 article Szeinbach had co-authored that was published in a different journal, and that the 2007 article had failed to reference the 2005 article. On the same day, Balkrishnan emailed Chair Nahata the same allegations, characterizing this email as seeking Nahata's advice given Nahata's experience as an editor of an unrelated journal.

Balkrishnan also forwarded to Nahata, Dean Brueggemeier, and many other OSU faculty the email he had sent to the editor. In addition, Balkrishnan forwarded these emails to a group of professors at other universities, adding an allegation that Szeinbach had presented this research in 2005 and planned to present it again at the upcoming ISPOR meeting.

Szeinbach testified on deposition that a colleague at the University of Arkansas, Dr. Bradley Martin, told her at a professional meeting of the International Society for Pharmacoeconomics and Outcomes Research in 2006 that he was looking for somebody in Szeinbach's area (psychometrics) and invited her to visit his campus. Szeinbach testified that Martin ceased having employment discussions with her after he, Martin, received Balkrishnan's May 1, 2007 email.

When coworker retaliation is at issue, "an employer will be liable if the coworker's retaliatory conduct is sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination, supervisors or members of management have actual or constructive knowledge of the coworker's retaliatory behavior, and supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation." *Hawkins v. Anheuser–Busch, Inc.,* 517 F.3d 321, 347 (6th Cir.2008)

****5** Szeinbach presented sufficient evidence to establish an adverse employment action based on the conduct of Balkrishnan. Balkrishnan emailed faculty all over the country stating that Szeinbach committed research misconduct (and planned to further that research misconduct at the 2007 ISPOR conference) before OSU and the journal that published Szeinbach's article even investigated her alleged research misconduct. Szeinbach presented sufficient evidence to raise a genuine issue of material fact whether the investigation, which spanned almost two years, had a significant negative impact on her professional advancement, that is, constituted an adverse employment action.

Having been copied on Balkrishnan's emails, Nahata and Brueggemeier were aware of Balkrishnan's actions. Although OSU maintained that Brueggemeier disciplined Balkrishnan for this conduct, Balkrishnan denied receiving any such discipline, and OSU produced no documentary evidence of discipline; Brueggemeier's performance reviews and merit pay letters are devoid of any reference to discipline. Viewing the facts in a light most favorable to Szeinbach, a reasonable jury could conclude that Dean Brueggemeier and Chair Nahata "condoned, tolerated, or encouraged [Balkrishnan's] acts of retaliation." *Hawkins,* 517 F.3d at 347. The district court therefore should not have granted OSU summary judgment on Szeinbach's research-misconduct-investigation claim on the grounds that there was no adverse ***696** employment action. On remand, the district court can consider the other arguments that OSU advanced on this claim, such as (1) that there is no causal connection between the research-misconduct investigation and any protected activity in which Szeinbach engaged, and (2) that the relevant decision-makers during the research-misconduct investigation had no knowledge of Szeinbach's protected activity.

3—Remaining Claims

Szeinbach presented insufficient evidence to support that OSU's reduction of her required class from four to two hours and suspension of student enrollment in the PPAD graduate program—structural changes in programs at the COP that were implemented based on recommendations of a task force—qualify as adverse employment actions under *Burlington Northern.* The same is true of her six claims of co-worker retaliation by Associate Professor Balkrishnan, five of which were mere attempts on his part to interfere with or circumscribe Szeinbach's teaching and advising of students and her participation in promotion and tenure decisions, and the sixth, his internal complaint against her, which resulted in no action against her. Finally, Szeinbach presented no evidence of injury or harm resulting from OSU's alleged attempted termination of her employment, thus that claim fails as well.

IV

Regarding spoliation sanctions, Szeinbach will be free to request an adverse-inference jury instruction on remand, as the MJ's Order left open "the possibility that the jury should be informed of OSU's failure to timely implement a plan to preserve documents relevant to this dispute," and noted that OSU advanced no reasonable explanation for its failure to issue an effective preservation directive no later than August 2007, when Seoane filed suit. R. 80 at 10 n. 33.

V

****6** For these reasons we affirm the dismissal of Szeinbach's claims, with the exception of her differential-salary-increases and research-misconduct investigation claims, which we reverse because she presented sufficient evidence to raise a genuine issue of fact regarding whether she suffered adverse employment actions. On remand, the district court may consider the other grounds that OSU advanced in support of summary judgment on these claims including the remaining challenges to the prima facie case and those to the last two steps of the *McDonnell Douglas* analysis.

All Citations

493 Fed.Appx. 690 (Table), 2012 WL 3264398, 115 Fair Empl.Prac.Cas. (BNA) 1326, 289 Ed. Law Rep. 114

Footnotes

* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

1 Szeinbach does not challenge the magistrate judge's determination that her arguments in response to OSU's summary-judgment motion were limited to her retaliation claims. R. 182 at 15 n. 6. Szeinbach thus appears to have abandoned her sex-discrimination claim.

2 The parties consented to disposition of this case by a magistrate judge. PID# 227.

3 In this regard, the MJ erroneously determined that he was bound to follow *Mitchell v. Vanderbilt Univ.,* 389 F.3d 177 (6th Cir.2004), a pre-*Burlington Northern* case that applied the now-disclaimed standard for adverse employment actions. This court has published no authority holding that *Mitchell* applies to Title VII *retaliation* claims post-*Burlington Northern.*

The MJ also erroneously relied on *Freeman v. Potter,* 200 Fed.Appx. 439 (6th Cir.2006), to support that *Mitchell* is still good law. *Freeman* is unpublished and did not involve Title VII retaliation, but rather age discrimination (ADEA) and Title VII gender discrimination. A Tenth Circuit case OSU relied on in addition to *Freeman* to support that *Mitchell* is still good law, *Somoza v. University of Denver,* 513 F.3d 1206, 1215–16 (10th Cir.2008), is neither binding nor persuasive—it cited *Mitchell* to support that "subjective injuries, like a bruised ego, ... do not rise to the level of dissuading a reasonable worker from making or supporting a charge of discrimination," and remarked in a footnote, without explanation, that "this pre-*Burlington Northern* precedent appears to retain its vitality." *Id.* at 1216 n. 3. The remaining cases OSU relied on are not binding because they are unpublished or are not Sixth Circuit decisions. R. 182 at 20 n. 10. OSU cites no published Sixth Circuit decisions to support that *Mitchell* properly applies to Title VII retaliation cases post-*Burlington Northern.*

4 Szeinbach conceded that she could recover only for retaliation that occurred after December 15, 2006.

26 Wash.App.2d 1031

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

Gillian MARSHALL, Appellant,
v.
The STATE of Washington, University of Washington, a State Agency, Diane Young, Individually, Jill Purdy, individually, and Mark Pagano, individually, Respondent.

No. 56547-1-II
|
Filed May 2, 2023

Appeal from Pierce County Superior Court, Docket No: 19-2-11120-3, Honorable Karena Kirkendoll, Judge

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UNPUBLISHED OPINION

Maxa, J.

***1** Gillian Marshall, a Black professor, appeals the trial court's grant of summary judgment in favor of the University of Washington Tacoma, director of the School of Social Work and Criminal Justice (SSWCJ) Diane Young, Executive Vice Chancellor Jill Purdy, and Chancellor Mark Pagano (collectively, UWT).[1] The case involves Marshall's allegation that she experienced racial discrimination during her five-year employment as an assistant professor at UWT, which culminated when she was denied promotion to associate professor, denied tenure, and terminated.

We hold that the trial court erred in granting summary judgment in favor of UWT regarding Marshall's racial discrimination and hostile work environment claims. However, we hold that the trial court did not err in granting summary judgment in favor of UWT regarding Marshall's retaliation claims. Accordingly, we affirm in part, reverse in part, and remand for further proceedings regarding the racial discrimination and hostile work environment claims.

FACTS

UWT Merit Review, Reappointment, and Tenure Procedures

UWT's merit review process, reappointment, and promotion procedures are outlined in the University of Washington's faculty code.

Under section 24-55 of the faculty code, faculty members are reviewed every year by their colleagues to determine their merit and to recommend whether to award a merit salary increase. The review involves consideration of the faculty member's cumulative record, including research, teaching, service, and their impact on the university. If a member receives two consecutive annual ratings of nonmeritorious, a committee of senior faculty convenes to more fully review that member's record and merit.

Under section 24-41 of the faculty code, assistant professor positions are for three years with an opportunity for reappointment to another three-year term. Reappointment occurs at the end of the assistant professor's second year and can be postponed for a year if the committee recommends, and then reappointment is considered after the third year. If the assistant professor is reappointed, a tenure decision must be made by the end of the second three-year term.

Section 24-34 of the faculty code states,

> Appointment to the rank of associate professor requires a record of substantial success in teaching and/or research. For tenured ... appointments, both of these shall be required, except that in unusual cases an outstanding record in one of these activities may be considered sufficient.

Clerk's Papers (CP) at 3105.

In addition, Executive Order 45[2] notes that "an essential qualification for the granting of tenure or for promotion is the ability to teach effectively." CP at 3164. The order also states that consideration also should be given to "the way in which the candidate will fit into the present and foreseeable future of the academic unit." CP at 3166.

***2** Section 24-32 of the faculty code states,

> In accord with the University's expressed commitment to excellence and equity, any contributions in scholarship and research, teaching, and service that address diversity and equal opportunity shall be included and considered among the professional and scholarly qualifications for appointment and promotion outlined below.

CP at 3102.

Hiring of Marshall

In 2014, the SSWCJ began the search to hire a new assistant professor. The SSWCJ had only one Black tenured faculty member, Marian Harris, and was looking to recruit more faculty of color. At that time, Young was the director of the SSWCJ.

Marshall applied for the assistant professor position. Young thought that Marshall was highly qualified. Young met with several qualified candidates, and four of the five top candidates were people of color. Young then lobbied successfully to hire two candidates instead of one, in part because of the chance to bring "very needed diverse perspectives" into the SSWCJ.

Young offered Marshall an assistant professor position. Marshall negotiated for a higher salary. Because Young wanted to entice Marshall to accept the offer, she agreed to increase the starting salary. Marshall accepted the offer, and was appointed as an assistant professor effective September 2015 for a period of three years.

When Marshall applied, she was expecting a K01 grant from the National Institute of Health (NIH), which included over $1 million in funding over five years. Marshall was the first person in the SSWCJ program to receive a K01 award. The K01 award was a career development award and required Marshall to devote 75 percent of her time to research and 25 percent to teaching and service. Because of the requirement, Marshall was only required to teach one course per year. The normal course load was six classes.

Marshall had experienced issues with one of her other grants, so she decided to have her K01 award administered through the University of Washington's Seattle campus (UW Seattle). Young and UWT's grant administrators were surprised when they found out that the K01 award was being administered in Seattle. Young expressed that Marshall should not have done so without discussing it with her first. But Marshall explained that during her interview, Young and two other faculty members told her that new grants could be administered in Seattle. Young told Marshall that she was not happy with her about not being forthcoming and called her deceptive. Young attempted to have the K01 award transferred to UWT but was unsuccessful.

2015-2016 Academic Year

Marshall taught her first class in the 2016 Winter quarter. It was an undergraduate course, Introduction to Social Work. There were 19 students in the class, and 12 students submitted evaluations. In her evaluations, Marshall received a combined median score of 4.7 and an adjusted combined median score of 4.5 out of 5. Student comments reflected the positive evaluation scores Marshall received.

Marshall's performance for the 2015-2016 year was deemed meritorious, and she received a merit salary increase. Marshall's receipt of the K01 award was noted, as well as the fact that she was the first one in the history of the campus to receive the K01, she already had two manuscripts accepted for publication with two more under review, and her teaching evaluations were positive.

2016-2017 Academic Year

***3** In the 2017 Winter quarter, Marshall taught a graduate class, Human Behavior and Social Work II. There were 23 students in the class, and 17 students submitted evaluations. In the evaluations, Marshall received a combined median score of 2.8 and an adjusted combined median score of 3.3 out of 5. Student comments were mixed, but many students remarked that assignment expectations were very unclear and changed frequently. Students also noted that Marshall was unprepared for many classes and disorganized, and materials were uploaded late. Evaluations did note that Marshall was very kind, had great ideas to help them learn, was approachable, and knowledgeable.

During the quarter, Marshall invited an associate professor of education, Julia Aguirre, to observe one of her classes. Aguirre submitted a peer evaluation based on what she observed. Aguirre commented on "equity-based inclusive practices documented in the literature and present in ... Dr. Marshall's teaching." CP at 2993.

Aguirre noted that as the students responded to Marshall's questions, Marshall effectively facilitated the activity and recorded each response ensuring everyone's voice was heard. Aguirre noted that Marshall's style of teaching was in sharp contrast to the traditional lecture style and promoted engaging participant driven discussions, reinforcing participants' prior knowledge. Aguirre wrote that Marshall created an environment that fostered critical and collaborative discussion.

Aguirre noted that Marshall's strength was in being able to facilitate complex discussions while meaningfully engaging students in critical thinking and collaboration. The discussions reflected what the syllabus aimed to achieve. Aguirre concluded that Marshall's ability to facilitate such complex discussions and connect them to lived experiences of the students was "an exemplary model for faculty to learn from." CP at 2995.

2017 Reappointment Review

In April 2017, Marshall was up for reappointment for another three-year term as an assistant professor. The reappointment committee consisted of Harris, the other Black faculty member; Charles Emlet, Marshall's assigned mentor; and Karina Walters, a faculty member at UW Seattle.

The committee's report noted that Marshall had "a well-focused research trajectory that is congruent with the expectations of the [SSWCJ] and consistent with the University of Washington tenure and promotion policy." CP at 3040. The committee stated that it was "impressed with Dr. Marshall's solid and well-planned approach for future publications based on her funding awards." CP at 3040.

Regarding teaching, the committee noted that Marshall's evaluations for her undergraduate class were very positive but the evaluations for the graduate class were lower. However, the committee noted the favorable peer evaluation from Aguirre. The committee made eight specific recommendations on how Marshall could improve in this area, including working with a mentor.

The committee recommended renewal of Marshall's appointment. The committee's report stated, "The review committee feels that there is every reason to believe that Dr. Marshall will continue to be a productive scholar, continue her excellent teaching at the undergraduate level as reflected in her teaching evaluation and improve her teaching at the graduate level." CP at 3042.

However, the SSWCJ voting faculty was split in its voting regarding Marshall's reappointment: one voted to reappoint, two voted to postpone, and three voted not to reappoint. Because of the different recommendations of the reappointment committee and the voting faculty, SSWCJ acting director Tom Diehm (Young was on sabbatical) recommended postponing the reappointment decision until Spring 2018 so Marshall would have time to address the issues noted by the committee and the voting faculty.

***4** Vice Chancellor Lavitt also recommended a one-year postponement because the faculty did not support Marshall's reappointment. She noted Marshall's lower evaluations from her graduate class, but observed that all faculty often struggle when teaching at a new institution for the first time. Lavitt also emphasized that research was an area of strength for Marshall. In conclusion, Lavitt hoped that "with additional time and evidence, [Marshall] will be reappointed as affirmation of her progress toward tenure." CP at 3039.

That same year, the SSWCJ voting faculty deemed Marshall's performance for the 2016-2017 year as nonmeritorious. Marshall did not receive a merit salary increase.

2017-2018 Academic Year

The following year, Marshall taught the same graduate course in the 2018 Winter quarter. There were 17 students in the class, and 11 students submitted evaluations. In the evaluations, Marshall received a combined median score and adjusted combined median score of 1.3 out of 5.

A majority of the student evaluations focused on Marshall's lack of preparation, unclear expectations, poor time management, and disorganization of the class. Students reported that Marshall's responses to questions were either vague or condescending. The evaluations consistently noted that Marshall knew the subject matter very well and was knowledgeable, but she did not deliver the information in an effective manner. The students expressed a desire to have Marshall teach by sharing her thoughts, experiences, and wisdom that connected the materials to the real world.

Some students remarked that there was not enough lecturing and that they learned most of the material from answering questions in the book. One evaluation commented that Marshall cared about the students' learning and growth, but the disorganization of the course and shifting expectations made it difficult on nearly all the students who had other responsibilities outside of this class. One student wrote, "My experience with Dr. Marshall and this course felt like a complete waste of time, money, and effort. I honestly don't know what suggestions can be made for improving this class. I am just glad it's over." CP at 3023. Another student wrote, "Get a new teacher for this course." CP at 3024.

During the quarter, Marshall had Beth Kalikoff, an associate professor in writing studies at UWT, sit in on a class and evaluate it. Kalikoff sent a lengthy memo to Young regarding her observations. Kalikoff was impressed by Marshall's alternative approach to the traditional lecture style and found her course materials were crafted with care, clarity, and transparency. The day Kalikoff observed, she noted the "crisp organization" and students' engagement with the readings and activities. CP at 3001. The class was very interactive; most of the students spoke up in class discussions, responded to each other in a collegial way, and demonstrated professional maturity. The students had a reaction to a movie Marshall showed, which Marshall picked up on, stopped and had a meaningful dialogue about the moment. Kalikoff noted that this decision demonstrated "insight and moxie," both characteristics she saw in Marshall's teaching. CP at 3001.

Kalikoff also responded to the student evaluations Marshall received. In response to comments about disorganization, Kalikoff said that Marshall's class was "one of the best-organized classes I've ever seen, and I've seen a lot of well-organized classes." CP at 3001. Kalikoff attributed the gap between her observations and the students' comments to their expectations of wanting a more traditional lecture. Kalikoff also attributed the gap to biases the students may hold because Marshall is a woman of color. She stated that "[w]omen of color can receive evaluations shaped by bias" and referred Young to research on the issue by assessment scholars at the University of Washington and endorsed by the Office of the Provost. CP at 3002-03. Kalikoff made two recommendations regarding student evaluations: "(1) value students' evaluations proportionately, and (2) weigh student evaluations in context, in light of peer review and self-assessment." CP at 3003.

***5** Kalikoff ended her evaluation by noting that Marshall's "gifts as a teaching scholar are evident in her course and assignment development, her high standards, her determination to help students meet those standards," and that she is "well-organized, collegial, and well-prepared." CP at 3003. Kalikoff stated, "I learned a lot about the subject and about teaching." CP at 3003.

2018 Reappointment Review

In April 2018, after the previous postponement, a reappointment review committee consisting of Lavitt (now an SSWCJ faculty member), Emlet, and Taryn Lindhorst, a professor at the UW Seattle School of Social Work, addressed whether to reappoint Marshall. The committee stated that Marshall's success as a researcher was unequivocal and that her research was outstanding in both quality and quantity. The committee pointed out her tremendous success in securing funding and highlighted that Marshall had 15 publications, eight of which were published while she was at UWT. The committee stated, "There is no question that Dr. Marshall is building a reputation as a leading scholar in this area." CP at 3050. The committee noted that "if [research] were the sole requirement for reappointment, then the decision would be an easy one." CP at 3050.

Regarding Marshall's teaching, the committee noted that because of Marshall's K01 award, Marshall had taught only three courses during her time at UWT. The committee acknowledged that there were only a few data points to demonstrate effective teaching. The committee stated that Marshall followed through on the recommendations given to her the previous year to improve her teaching. Marshall sought out experts to help in teaching, made extensive revisions to the syllabus, attended teaching workshops, and developed new strategies. Unfortunately, graduate students rated the 2018 class even lower than the 2017 class. The committee noted that this rating was an "extraordinarily low score" for SSWCJ faculty and a "surprising trend downward." CP at 3050-51.

But the committee acknowledged that student evaluations were only one measurement used to evaluate effective teaching, and that it was an imperfect measure. The committee believed, and Kalikoff's evaluation of Marshall's teaching confirmed, that student evaluations were subject to gender and racial biases. The committee believed that bias provided some explanation for the poor evaluations, as did Marshall's active learning style rather than a more traditional lecture style. The committee also noted that the two collegial assessments of Marshall's teaching both were positive.

The committee recommended that Marshall work in an ongoing manner with a tenured faculty member who has faced similar biases from student evaluations. They suggested that several women of color who have won teaching awards would be outstanding teaching mentors for Marshall. The committee emphasized that particularly in light of a recent survey of faculty of color that showed multiple experiences of bias and discrimination, "it is incumbent on the institution to further invest in helping Dr. Marshall develop her expertise in the classroom." CP at 3051. They suggested that the director of the SSWCJ identify institutional resources for teaching support. The committee recommended Marshall's reappointment by a two to one vote.

Young subsequently sent a letter to Purdy, then the Executive Vice Chancellor of Academic Affairs, regarding Marshall's reappointment. Young reported that the SSWCJ voting faculty recommended by a five-to-two vote that Marshall not be appointed. The majority sentiment of the faculty was that "even with great research, extremely poor teaching and minimal service do not serve our students, program, and campus." CP at 3044. The faculty also disagreed that Marshall had worked hard to improve teaching, emphasizing that Marshall did not utilize support that was available to her.

***6** Young concurred with the voting faculty and recommended that Marshall not be reappointed. Young believed that Marshall did not meet the expectations in teaching, which her successful research did not outweigh. Young acknowledged that she and the rest of the SSWCJ voting faculty believed that gender and racial bias in course evaluations were real, but saw no themes across the evaluations to indicate such a severe bias. She stated that Marshall's 2018 course evaluation score was the lowest by far during her six years as director of the SSWCJ.

Young also noted that the students' comments about Marshall's attitude, disorganization, and unclear communication were things that she and the faculty and staff also experienced in their interactions with Marshall. Young recommended that Purdy not reappoint Marshall.

After Young made this recommendation, Marshall met with Vice Chancellor Purdy and Chancellor Pagano. Marshall was presented with three options: (1) request that Purdy and Pagano disregard the faculty and Young's recommendations and reappoint her, (2) accept the decision not to reappoint and leave UWT after another year, or (3) resign from UWT. Marshall refused to resign, stating in an email, "I would prefer to be treated with the same respect and dignity as a Caucasian faculty member." CP at 4293. Marshall concluded,

> You know or should know that the University of Washington's Tacoma campus suffers from ongoing institutional racism, inequity and unfair treatment of faculty of color which is well documented, and until that problem is addressed and solved, qualified persons of color, such as myself, will continue to be denied tenure track positions. You are in a position to bring an end to this problem. The decision is really yours not mine.

CP at 4293.

Vice Chancellor Purdy then reviewed Marshall's materials as well as the recommendation summaries. She concluded that Marshall would be reappointed with a mandatory promotion and tenure review to be considered in 2020-2021. Purdy noted the negative student evaluations and the positive peer evaluations of her teaching, and acknowledged that bias against women of color was a possible explanation for her low scores. And Purdy agreed that Marshall had demonstrated substantial progress toward meeting expectations for promotion and tenure regarding scholarship.

2018 Merit Review Committee

In the Fall of 2018, Young informed Marshall that her 2017-2018 performance was deemed nonmeritorious and she would not receive a merit salary increase. And because this was Marshall's second consecutive annual rating of no merit, the faculty code required a review process to more fully review Marshall's record and merit. The merit review committee consisted of SSWCJ professors Erin Casey, Michelle Garner, Lavitt, Eric Madis, and Randy Myers.

Marshall described to the committee that ever since she arrived at UWT she had experienced significant impediments to her success, which she attributed to her race. She reported, " 'I have experienced biased, unfair treatment and hostility which I believe accounts for an undeserved rating of non-meritorious.' " CP at 3065. Marshall noted that it was unclear why she received a nonmeritorious rating the previous two years, as she had received no feedback or explanation.

The committee unanimously found that for the two years Marshall received a nonmeritorious rating that all the policies were properly followed. The committee upheld both of the nonmeritorious decisions. The committee also provided Marshall with recommendations to improve her ratings in teaching and service in the future.

***7** In addition, the committee recommended that the SSWCJ review its merit policies because of the serious role racial bias plays in teacher evaluations and in the merit review process. The committee further noted Marshall's unique situation because of her K01 award and that there were no overt policies or procedures to specify expectations in research, teaching, and service. They believed that the policies should be updated to create transparency around these expectations because Marshall's situation differed from the standard course load per year.

UCIRO Investigation

Marshall told Vice Chancellor Purdy that she wanted an investigation done on discrimination she claimed she had faced. In August 2018, Chancellor Pagano initiated an investigation into Marshall's claims of discrimination with the University Complaint Investigation and Resolution Office (UCIRO). Beth Louie was assigned to investigate the behavior of Young and Diehm. Louie interviewed 20 different people over the course of her investigation. She also reviewed all of the University of Washington's policies concerning reappointment, merit reviews, course releases, and grant administration.

Whistleblower Report

Marshall noted that although the faculty code only stated nonmeritorious and meritorious categories for awarding merit, an “extra-meritorious” category was used in practice. Marshall never received this rating and claimed that this extra rating was given to White faculty for monetary increases.

In December 2018, Marshall filed a whistleblower report with the state auditor's office. She reported that Young and other faculty violated the faculty code when it came to merit ratings. However, the auditor declined to open an investigation into the matter because it was better suited for a different agency.

January 2019 Tort Claim

In January 2019, Marshall filed a tort claim with the State of Washington. She stated that she intended to file a lawsuit against UWT because the campus suffered from institutional racism. She asserted the following claims: (1) intentional racial discrimination and racial harassment, (2) retaliation, (3) harassment in retaliation for opposing discrimination, (4) Young's aiding and abetting the discrimination, harassment, and retaliation, and (5) whistleblower retaliation. Marshall provided a very detailed discussion of what had occurred during her time at UWT.

When Marshall filed her tort claim, she was one of only two Black professors out of 22 faculty members in the SSWCJ. There was one Asian professor, and the rest were White.

2018-2019 Academic Year

In the 2019 Winter quarter, Marshall again taught the same graduate course. There were 18 students in the class, and 12 students submitted evaluations. In the evaluations, Marshall received a combined median score of 1.9 and an adjusted combined median score of 2.5.

Once again, student evaluations focused on Marshall's lack of organization, unclear expectations, and variable and late grading. One student said they had never taken a worse class because of the lack of organization. Another student described the class as “very chaotic.” CP at 3028. Another comment stated, “This professor ... is either not interested or incompetent. Immediate removal from this program is extremely necessary.” CP at 3029.

Kalikoff again was invited to evaluate Marshall's teaching. Kalikoff sat in on the first day of class. She admired the way Marshall used class time to introduce herself, the course, the profession, and the students to each other. Students were engaged during introductions and took opportunities given to them by Marshall to speak and learn. Throughout the various activities, Marshall was clear and transparent. Kalikoff also liked the way Marshall handled student expectations of the course and thought that she was off to a terrific start.

***8** In June, Young informed Marshall that the committee had a divided recommendation but the majority rated her as meritorious for the 2018-19 academic year. Young herself made a recommendation of nonmeritorious. Marshall was deemed meritorious and received a merit increase to her salary.

Marshall Lawsuit Against UWT

On September 30, 2019, Marshall filed a lawsuit against UWT, Young, and Diehm. Consistent with her January 2019 tort claim, Marshall asserted the following claims: (1) intentional racial discrimination and racial harassment, (2) retaliation, (3) harassment in retaliation for opposing discrimination, (4) Young's and Diehm's aiding and abetting the discrimination, harassment, and retaliation, and (5) whistleblower retaliation. She requested damages and “instatement to a tenured faculty position.” CP at 39.

The litigation proceeded as Marshall continued to work at UWT.

UCIRO Investigation Results

In October 2019, Louie revealed the results of her UCIRO investigation. She looked at whether there was evidence of discrimination, harassment, or retaliation in Marshall's reappointments, merit reviews, and grant administration. The investigation did not reveal that any of the teaching evaluations and decisions based on them were motivated by race or discrimination. Louie determined that the 2017 decision to postpone reappointment was due to the split between the committee and faculty vote and the concerns around teaching and service. Louie also found no discrimination during the 2017, 2018, and 2019 merit reviews. Louie concluded that none of the University's non-discrimination, non-harassment, or non-retaliation policies were violated.

However, the investigation revealed that in the 2017 and 2018 reviews, the committee was confused around the 75 percent of time spent on research required by the K01 award and what that meant in practice. Louie pointed out that a conversation regarding the K01 requirements should have happened in the beginning when Marshall started.

2019-2020 Academic Year

In the 2019 Fall quarter Marshall once again taught the undergraduate course Introduction to Social Work. There were 37 students in the class, and 33 students submitted evaluations. In the evaluations, Marshall received a combined median score of 4.0 and an adjusted combined median score of 4.1. This course did not have qualitative comments, only quantitative ratings. The course was well-rated by the students, with many of the categories being rated 4 or 5.

Deirdre Raynor, professor of American ethnic literature at UWT, sat in on and evaluated the class. Raynor sent an email to SSWCJ Acting Dean Marcie Lazzari to report her observations. The first thing Raynor noted was how well organized the class was and the range of methods Marshall used to engage the students. All the students in the class were engaged during the lecture. During a break in the class, a number of students talked to Marshall and she gave them her undivided attention, giving them resources to enhance their learning and treated them with respect. Students felt like they were getting a great introduction into social work and that they planned to take more classes in the area because of Marshall.

In June 2020, Acting Dean Lazzari informed Marshall that she received three votes for meritorious, three for non-meritorious, and one abstention, and noted that Marshall was making progress in all domains. Despite the split, Marshall was deemed meritorious.

2020 Tenure and Promotion Review

***9** In June 2020, Marshall applied for tenure and promotion. Marshall provided for consideration extensive discussion and documents regarding her research, teaching, achievements, service, and four external peer reviews of her research and scholarship. Two of the external reviewers were chosen by the SSWCJ committee and two were chosen by Marshall.

The reviewers all provided very positive comments about Marshall's research and scholarship. One reviewer stated, “Without any doubt, Dr. Marshall is an impressive scholar who has made significant contributions to the social work profession.” CP at 2979. Another reviewer stated that Marshall's “quantity and quality of work place her in the top 10-15% of Assistant Professors in gerontology across the social and behavioral sciences.” CP at 2987.

SSWCJ Tenure Review Committee

The first step in the tenure review process was consideration by the SSWCJ tenure review committee, which consisted of four SSWCJ professors. All four members voted to deny Marshall promotion and tenure.

Jeff Cohen, the review committee chair, explained the committee's recommendation in a detailed, eight-page report dated October 9, 2020. The report opened with the following statement:

> While at UW Tacoma, Dr. Marshall has established herself as a strong researcher with a *growing national reputation* in the areas of social work, gerontology, public health and economics. She has built a research agenda that cuts across and integrates multiple disciplines and addresses important dynamics related to health disparities as influenced by race, ethnicity, socioeconomic status, and age.

CP at 2918 (emphasis added). However, the committee noted that Marshall was less successful in the classroom. The committee concluded that Marshall did not meet expectations in the area of teaching, and that the totality of her record did not warrant promotion with tenure.

The committee acknowledged the positive evaluations from Marshall's undergraduate classes and the four positive collegial evaluations of Marshall's teaching. But the committee noted serious concerns related to Marshall's teaching, pointing out her low teaching scores for the three times she taught the graduate classes. These were "exceptionally low scores" in the SSWCJ and in UWT as a whole. CP at 2920. The committee stated, "While racial and gender bias are undoubtedly also among the factors at play, the committee believes that these factors collectively are unlikely to fully account for the unusually low nature of these scores." CP at 2920. They also pointed to the numerous negative qualitative evaluations regarding Marshall's teaching.

The committee noted that they faced several "tensions" in assessing Marshall's teaching: (1) poor student evaluations versus positive collegial ones, (2) weighing success in undergraduate versus significant challenges in graduate courses, (3) the small number of classes taught, and (4) the lack of clarity around Marshall's expected teaching load. They also considered the role of gender and racial bias. However, it was the committee's unanimous assessment that "Marshall's record of teaching does not meet the department's criteria for tenure and promotion, nor does it meet the Faculty Code's threshold of 'substantial success' in teaching as a pre-requisite for tenure and promotion." CP at 2921.

Regarding research, the committee unanimously agreed that the quantity and quality of Marshall's research met expectations for tenure and promotion. The report noted that Marshall had published a total of 14 peer reviewed journal articles (six in which she was the first or sole author), with four additional manuscripts under review. She also had given 13 refereed conference presentations. And the committee stated that the K01 grant was a "prestigious career award." CP at 2922. However, the report concluded, "The committee is in agreement in its determination that Dr. Marshall's record of research does not meet the Faculty Code's threshold of 'outstanding' needed to outweigh what are very clear deficiencies in the area of teaching, which is a vital aspect of faculty responsibilities at UW Tacoma." CP at 2925.

SSWCJ Voting Faculty Recommendation

***10** The next step in the process was the recommendation of the SSWCJ voting faculty. The faculty voted to deny tenure and promotion to Marshall. There were seven negative votes, no positive votes, and two abstentions. SSWCJ Acting Dean Lazzari provided a summary of the faculty's recommendation in a report dated November 3, 2020.

The faculty cited Marshall's problematic teaching scores and the nature of qualitative comments in graduate level courses. Her low scores were "unheard of across the UW Tacoma campus." CP at 2902. And while Marshall received positive comments in undergraduate courses, the course was taught for non-majors. Colleagues in the SSWCJ did not have a problem with Marshall's reduced course load, but with her poor quality of teaching.

The faculty noted that while Marshall received positive peer evaluations, none of the evaluations were conducted by anyone within the SSWCJ or from the social work profession. UWT attempted to pair Marshall with an African-American teaching mentor, who had won the UWT distinguished teaching award, but this arrangement did not work out for Marshall.

The faculty noted Marshall's strong record in research and publication, but noted that her peers in the SSWCJ had comparable or greater productivity records without being able to spend 75 percent of their time on research. The faculty concluded that there was no doubt that Marshall would continue to be a productive scholar. But the faculty doubted that Marshall would be able to effectively teach graduate courses. In addition, the report stated,

> Faculty expressed concern regarding Dr. Marshall's patterns of behavior toward colleagues. While faculty acknowledge the racialized and gendered context of the SSWCJ and the campus in general, Dr. Marshall's lack of engagement was noted upon her arrival on campus. Additionally, there is a pattern of disrespect toward others as evidenced by lack of participation and contributions to the work of the School. Faculty believe that members of the School community have tried hard to establish positive relationships with Dr. Marshall, but her negative responses have resulted in ongoing strained interactions.

CP at 2903.

The report concluded, "In making their recommendation, faculty are clear that Dr. Marshall does not meet the minimal criteria for promotion and tenure related to teaching. While her research productivity is quite strong, is it excellent enough to outweigh the difficulties related to teaching? The faculty think not." CP at 2903.

Acting Dean Lazzari Recommendation
Next was the personal recommendation from Acting Dean Lazzari, which she presented in a detailed report dated November 20, 2020. Lazzari recommended that Marshall be denied tenure and promotion.

Lazzari's report favorably discussed Marshall's research and scholarship. She stated that one of the external reviewers commented on Marshall's success in obtaining funding for her research, "which they linked to the acknowledgment of the significance of her research." CP at 2895. Another external reviewer stated that Marshall's work was " 'significant in scope, complexity, and practical experience.' " CP at 2895. Lazzari concluded, "It is apparent to me that Dr. Marshall's research efforts have a strong social justice focus and, therefore, support the values of the campus and of our School." CP at 2895-96.

***11** Regarding teaching, Lazzari recounted Marshall's low evaluation scores, and negative student comments. While Lazzari acknowledged that student evaluations can be negatively affected by bias, in her opinion the low scores could not be totally attributed to bias. She also noted the positive peer evaluations, but thought it was unusual that none of the evaluators were from the SSWCJ. Lazzari stated that Marshall's "challenges at the graduate level raise serious questions about her teaching competence and effectiveness." CP at 2897. Lazzari concluded that Marshall did not meet UWT's requirements for effective teaching. She stated,

> I definitely think there is a place in the academy for Dr. Marshall, a setting where conducting research is the primary goal. This is not the case at the University of Washington Tacoma, SSWCJ. Our primary focus is upon excellent teachers and instruction while placing a high value on research productivity as well.

CP at 2899.

Lazzari also commented that there was a lack of trust between Marshall and others at UWT. She noted that "Marshall's interactions with faculty and staff colleagues in the SSWCJ are noticeably strained and in some cases, irrevocably damaged." CP at 2899.

UWT Tenure Committee
The tenure review process also involves a recommendation from a campus-wide appointment, promotion, and tenure (APT) committee, which consists of elected UWT faculty members. On December 1, 2020, the APT committee in a mixed vote recommended that Marshall be denied promotion and tenure. There were two affirmative votes, two negative votes, and one abstention.

The committee's report discussed Marshall's scholarship and teaching, essentially repeating information contained in previous reports. The report stated,

> The evaluation of this committee is mixed. Some believed that her research record was sound based on external reviews; others' perceived her research record as inadequate given the amount of release time Dr. Marshall was awarded. The reviews for her teaching were mixed as well with some committee members noting the lack of improvement in graduate course student evaluations given the teaching focus of the school and campus. Others on the other hand believe that while the teaching evidence regarding Dr. Marshall is insufficient to inspire an unequivocal vote of confidence, she appears to have reacted to previous recommendations regarding her teaching, shown some improvement, and shown some previous success in her classes.

CP at 2889-90.

In conclusion, the report stated, "It is difficult to evaluate the prospects of the candidate for future performance, particularly in the area of teaching and service given the limited number of data points available and the difficulty of previous interactions between her and her colleagues." CP at 2890.

UW Seattle Dean of School of Social Work Recommendation
On December 9, 2020, Edwina Uehara, the Dean of the School of Social Work at UW Seattle, wrote a short letter to UW Provost Mark Richards regarding Marshall's tenure and promotion. Uehara noted the strength of Marshall's research but agreed that her teaching record was weak. Uehara concluded, "Given SSWCJ's criterion for promotion with respect to teaching, I concur that Dr. Marshall should not be promoted to the rank of Associate Professor with tenure." CP at 2915.

Initial Recommendation and Marshall Response
In January 2021, Vice Chancellor Purdy sent a memo to Marshall regarding her and Chancellor Pagano's initial recommendation to deny promotion and tenure and summarizing the reasons for the recommendation. The concluding paragraph stated,

> Dr. Marshall has expressed concern that she is being evaluated unfairly based on her race. We have reviewed the record carefully in light of Dr. Marshall's concerns, and see no indication of racial bias or discrimination. Her qualifications have been evaluated by many different people with different backgrounds, and similar concerns regarding her teaching have emerged. Our recommendation is not based on race.

***12** CP at 2876.

Marshall submitted a lengthy response to Purdy's and Pagano's recommendation to deny promotion and tenure. In the introduction, she stated,

> It is my opinion that this and all previous reviews were conducted with bias and outside the requirements of the Faculty Code. This decision consistently misrepresents my promotion and tenure (P&T) file as it includes many inaccuracies and misquotes the faculty code ultimately resulting in a discriminatory outcome.

CP at 2877.

Regarding teaching, Marshall emphasized that the faculty code does not distinguish between teaching at the undergraduate and graduate levels. Without that distinction, she pointed out that her evaluation scores reflected an upward trajectory after her 1.3 rating in 2018, culminating in a 4.1 rating when teaching an undergraduate class in the Fall of 2019. And she noted that she received a 4.3 rating when teaching an undergraduate class in the Fall of 2020, after her tenure application was submitted.

Marshall addressed the concern that her peer evaluations were done by professors outside the SSWCJ. She noted that neither the faculty code nor SSWCJ procedures required that teaching evaluations be conducted by a professor in her discipline. In addition, her peer evaluators were trained to teach students how to teach. And she stated,

> As you know, going outside the SSWCJ faculty is necessary here because of systemic race discrimination within the SSWCJ faculty. These subjective comments reinforce the unfairness of the faculty's subjective approach.... Thus, in the hostile and pernicious work environment in my unit, it is unclear to me why you insist that only the White American faculty in my unit, who know that I reported Diane Young to UCIRO for discrimination, are the individuals whose voices matter to you.

CP at 2879.

Marshall emphasized that she had a "growing national reputation for my published and peer reviewed work in my area of research" and could bring that expertise to the classroom regarding current issues within social work. CP at 2879.

Finally, Marshall highlighted the significant efforts she had made to improve her courses and her teaching. Her improvement in teaching was reflected by the upward trajectory in teaching evaluation scores.

Marshall also provided a detailed discussion of her research and scholarship record. She quoted section 24-32 of the faculty code, which states that contributions in scholarship and research that address diversity and equal opportunity must be considered among the qualifications for promotion. Marshall stated,

> I am the only faculty member in the School of Social Work and Criminal Justice and one of few in the country addressing a unique and innovative area of social work focused on older African Americans, financial stress and health. This work is consistent with the stated mission and values of UW Tacoma's commitment to diversity, equity and inclusion. My research continues to be on the foreground of social justice in written and in verbal form.

CP at 2880.

***13** Marshall outlined all her accomplishments in the area of scholarship, including the K01 award, other awards and honors, and producing 20 peer-reviewed publications. She pointed out that her reappointment committee described her research as outstanding and the tenure review committee praised her work. She concluded,

> Being awarded a Career Development Award (K01), a supplemental grant and the NIH loan repayment, demonstrates a proven track record of securing major National Institutes of Health (NIH) grant funding. To date I have secured over $1 million dollars in grant funding through the NIH. Therefore, with the many firsts I have achieved on the UW Tacoma campus, my publication record, and with statements such as these, it is unclear to me why I would not be viewed as outstanding based on section 24-34A1-2 of the faculty code.

CP at 2881.

Marshall also highlighted her service contributions, which were extensive despite the limitations required by her K01 award. CP 2881-82.

In summary, Marshall stated,

> The initial recommendation provided by the [Vice Chancellor] and the Chancellor fit within many discriminatory frameworks in which the minority applicant is always found wanting no matter the level of achievement. The justification for denying me tenure is insufficient to overcome the fact that the decision is based on racial bias and not on the actual requirements outlined under Section 34-32(A)-(F).
>
> ....
>
> Instead of being appreciated and rewarded for the scholarship that I have brought to SWCJ, I have experienced explicit and implicit racial bias and retaliation for opposing these harmful acts. The arguments I have offered above are only some of the ways in which the SWCJ faculty showed bias.
>
> ....
>
> The University of Washington leadership has failed to treat me fairly at work because of racial animus and bias embedded in White American faculty and administrators at UW-Tacoma. I have experienced racial discrimination and your letter is another example of a reprisal for opposing discrimination.

CP at 2882-83.

Vice Chancellor Purdy/Chancellor Pagano Recommendation

On February 1, 2021, Vice Chancellor Purdy sent a memo to UW Provost Mark Richards in which she did not recommend Marshall's promotion and tenure. Chancellor Pagano concurred with this recommendation.

Purdy summarized the votes of the tenure review committee, voting faculty, and APT committee regarding Marshall's promotion and tenure. She also noted that both the UWT SSWCJ Dean and the UW Seattle Dean of the School of Social Work were not in favor of promotion and tenure.

Regarding teaching, Purdy noted that Marshall received overall positive scores in the two undergraduate level classes she taught but had very low ratings in her three graduate level classes. Purdy stated, "While factors such as race and gender can negatively impact quantitative student evaluations, we have not found nor does the file cite any resource that suggests bias alone could account for such low scores." CP at 2870. Purdy also referenced the negative student comments. She acknowledged Marshall's positive peer evaluations, but emphasized that none of those evaluations were done by social work colleagues who could address aspects of teaching related to the subject matter. Purdy concluded that Marshall had not shown substantial success in teaching as required in the faculty code for promotion and tenure.

***14** Regarding research, Purdy noted the favorable reports from external reviewers and the other committees regarding Marshall's scholarship. However, she stated,

> After careful consideration, we do not find this to be an 'unusual case' in which an outstanding record in either teaching or research may be considered sufficient for promotion, as per [the faculty code]. The campus mission and the goals of the school require tenured faculty to contribute in both teaching and research.

CP at 2872.

In conclusion, Purdy cited Executive Order 45, which states that the ability to teach effectively is an essential qualification for granting tenure or promotion. She stated, "Assessments of Dr. Marshall's scholarly record are positive, but scholarly achievement alone is insufficient to meet the needs of the school." CP at 2873.

Provost Richards Decision

In a letter to Chancellor Pagano dated May 10, Provost Richards concurred with Pagano's recommendation that Marshall be denied promotion and tenure after a careful review of the promotion record and Marshall's performance and qualifications. He emphasized that the faculty code required a record of substantial success in both teaching and research except in unusual cases. Provost Richards concluded, "Based on my review, there is not sufficient evidence to accept the candidate's suggestion that her record of research and scholarship is unusual and should be enough for promotion and tenure." CP at 2865.

Richards expressly addressed Marshall's allegations of discrimination:

> My review and decision took into consideration concerns raised by the candidate throughout the review process regarding racial bias, systemic race discrimination, and

> retaliation. I was not presented with evidence to support the contentions that the review process and recommendation was unfair, discriminatory, or factually unsubstantiated. The recommendation to deny was a performance based assessment focused on deficiencies in the teaching record.

CP at 2865.

Provost Richards instructed Chancellor Pagano to inform Marshall of the decision to deny her promotion and tenure, and to inform her that her appointment at UWT would cease in June 2022.

UWT Summary Judgment Motion

In September 2021, UWT filed a summary judgment motion seeking dismissal of all of Marshall's claims. UWT argued that there was no evidence that race had anything to do with Marshall's nonmeritorious performance reviews or her failure to receive tenure. Instead, UWT focused on the fact that Marshall's teaching record was inadequate to warrant tenure. UWT relied on the poor student evaluations and the rigorous tenure review process that determined that Marshall should not be given tenure. UWT also argued that no evidence supported Marshall's retaliation and hostile work environment claims.

UWT submitted declarations from Young, Vice Chancellor Purdy, and Chancellor Pagano discussing Marshall's reappointment and tenure process. They all stated that Marshall's race was not a factor in any decisions they made. Young stated, "I did not treat Dr. Marshall less favorably than any other employee based on her race." CP at 3171.

Marshall Summary Judgment Response

***15** Marshall opposed the summary judgment motion, and filed voluminous materials and declarations to support her position. She submitted a declaration attaching her 2019 tort claim, interrogatory answers and supplemental answers, a narrative discussing events during her time at UWT that caused her emotional harm, and other documents. She also submitted witness declarations from Lavitt (two declarations), Kalikoff, and Aguirre. Marshall submitted expert declarations from Chris Knaus, and Leah Hollis. She submitted the declaration of Kimi Ginn, who helped author a report evaluating the condition of UWT faculty of color during the 2016-17 academic year. And Marshall submitted the declaration of Sarah Hampson, a professor who was up for tenure the year before Marshall.

Marshall's tort claim, interrogatory answers and emotional harm narrative all identify multiple instances that Marshall believed reflected discrimination, harassment, and retaliation. Some of the instances relate to the factual background recited above, such as conflict regarding administration of her K01 award.

Marshall's dozens of other allegations of harassment in these materials included the following:

- Young verbally assaulted Marshall about decisions she made.

- In March 2016, Young asked Marshall if she felt that she was a good fit for UWT and said that she wondered about fit, which made Marshall wonder if her job was at stake.

- Marshall expressed no desire to teach classes like Cultural Diversity because she had no expertise in that area, but Young assigned the class to her anyway because she was Black. When Harris (the only other Black professor) first arrived she also was assigned to teach the course.

- Marshall's student loan repayments, qualified for a two-year certification regarding student loan repayments. But Young decided to call the loan repayment program help desk and only certified Marshall for one year. Marshall felt that Young was behaving in a punitive and retaliatory manor and told Chancellor Pagano about Young's decision. Chancellor Pagano overturned Young's decision and approved the certification for two years.

- Young would talk about Marshall as if she were not in the room; faculty stopped speaking to her at faculty meetings; Young would move seats if Marshall sat next to her; Marshall was never invited to lunch or coffee with colleagues and felt isolated; Marshall was ignored when she spoke up and her contributions were not taken seriously.

- After Marshall's reappointment review in 2017, Marshall never felt safe at work and felt that Young and the other faculty were colluding to fire her.

- Marshall asserted that none of the faculty observed her teach but labeled her a bad teacher and tried to convince her she was a poor teacher.

- Purdy repeatedly told Marshall that she was not a good teacher, she could not teach, and that the faculty did not want her there.

- Purdy told Marshall that if she decided to stay at UWT that she would never get tenure because the faculty did not like her.

- During one meeting with Purdy and Young, Young described Marshall as "struggling" with her teaching, and Marshall corrected her because she herself never said she was struggling.

- Marshall experienced no stress, fear, embarrassment, humiliation, anxiety or anguish when Young was on sabbatical.

- Both Pagano and Purdy attempted to convince Marshall she was not a good fit for UWT, and they questioned Marshall about whether she had heard anything back about a position with the Veterans Administration and the School of Social Work at UW Seattle.

- Marshall was given a teaching mentor, Carolyn West, but instead of helping with Marshall's teaching, West gave her advice on how to make herself marketable, how to develop a personal website, and to send a curriculum vitae to ensure Marshall was ready for the job market.

- SSWCJ professor Rich Furman accused Marshall of being angry and aggressive (a very stereotypical way of describing Black men and women), and he never was nice to her.

***16** Lavitt was the Vice Chancellor of UWT in 2016-17 and then was a colleague of Marshall's in the SSWCJ from 2017 until she left UWT in June 2019. She stated that in 2016 Young was complaining about Marshall and painted a picture of Marshall being difficult. In July 2017, Young wanted Lavitt to be aware that Marshall was not supporting the SSWCJ program. Lavitt described SSWCJ faculty meetings as "chilly" and stated that there was little support for Marshall. Even Emlet, her assigned mentor, did not appear to like her. In June 2016, a departing faculty member discussed with Lavitt how badly Marshall was being treated.

Lavitt described a SSWCJ faculty retreat in the Fall of 2018 where Vice Chancellor Purdy asked Marshall to leave the meeting so they could discuss reappointment policies and practices. Lavitt stated, "It was Dr. Purdy's advice that the faculty create policies with criteria to assess 'collegiality.' She talked about the necessity of ensuring a 'good fit' for the department." CP at 3520. Lavitt continued, "Based on my 20 years of academic administrative experience, 'fit' is often code for policies that perpetuate bias and reduce the likelihood of having diverse faculty." CP at 3520.

Lavitt was so upset by Purdy's remarks about collegiality and fit that she emailed a colleague in another program. The email stated, "I am concerned about a recent message from [Purdy] regarding [promotion and tenure]. She talked to Social Work about faculty 'fit' and the need to develop criteria for collegiality..... I am concerned about the impact of these messages on the success of faculty of color in particular." CP at 3528. Lavitt also stated that in one discussion about hiring more persons of color, Chancellor Pagano stated, " '[W]hy can't we find a good one?' " CP at 3524. Lavitt understood this statement as referring to a good person of color.

Kalikoff is the Director of the Center for Teaching and Learning at UW Seattle, and also an associate professor emeritus at UWT. The Center's focus is on evidence-based teaching, which uses strategies to increase student engagement and achievement in contrast to nonstop lectures. Kalikoff addressed her evaluations of Marshall's classes in February 2018 and January 2019, discussed above. After her 2018 observation of Marshall's class, Kalikoff believed that Marshall had an obvious commitment to evidence-based teaching and that her class was one of the best-organized classes she had ever seen.

Kalikoff noted that Young in 2018, the tenure review committee, and Purdy in 2021 all discounted peer reviews coming from outside the SSWCJ. But Kalikoff explained that these comments ignored the fact that the criticisms of Marshall's teaching related to her delivery, not deficiencies in the subject matter.

Regarding the student evaluations, Kalikoff stated, "Student feedback has value to the evaluation of teaching, but only when interpreted in the context of peer review and faculty self-assessment." CP at 3424. She said that although student voices are important, student evaluations cannot be used to assess an instructor's performance. Kalikoff also noted that research suggests that implicit bias may be an issue when students perceive that a faculty member is young and a person of color. She said, "Don't hold the instructor responsible for implicit bias." CP at 3427. According to Kalikoff, research of student evaluations has shown that Black faculty and particularly women of color "often receive lower student ratings and harsher student comments than other instructors." CP at 3428.

***17** Aguirre is a full professor of education at UWT. Her declaration attached the letter she wrote about her observation of Marshall's class in March 2017, discussed above.

Knaus also is a professor in education at UWT, specializing in identifying structural racism in educational systems. He pointed out that UWT had around 360 full time faculty, but only two of them were Black. Knaus explained that reliance on student evaluations is a racialized barrier to the advancement of people of color through the tenure process and that research shows student evaluations are racially biased against Black women. Peer review for tenure also exhibits implicit bias and enforces White faculty scholarly approaches.

Knaus stated that barriers to faculty advancement often are justified by “coded language.” CP at 3329. He stated, “Coded language includes statements about collegiality and fit; these are usually applied within a context of questioning whether a potential hire or candidate for tenure/promotion is a good ‘fit’ within a department, college, or university.” CP at 3329.

Knaus discussed racial discrimination at UWT, stating that “I personally have witnessed too many incidents of racial discrimination at the UW Tacoma campus to recall of them.” CP at 3331. He attached a January 2016 Diversity Fellows Statement that he was involved in drafting, that documented racism that impacted faculty of color. The report's executive summary stated,

> People of color employed by the University of Washington Tacoma face (1) barriers well-documented in higher education literature and in reports previously convened by the University of Washington; (2) the passive aggressiveness of local culture in UWT and in the Pacific Northwest; (3) seemingly permanent inertia manifested by colleagues and leadership who ignore thoughtful research reports (like this one) of campus diversity issues and/or who take little action to address their personal and professional concerns; and (4) a context of faculty and university policies that do not fundamentally address the causes, nor practice of, racial exclusion and oppression.

CP at 3336.

Hollis's declaration attached a lengthy expert witness report. Hollis has a doctorate in administration, training and policy, and for 20 years has researched “institutional abuse, racism, sexism, and other structural obstacles in higher education.” CP at 3396. She discussed workplace bullying in higher education, and stated that people of color are most likely to be bullied and that Black women are more likely to face multiple bullies.

Hollis provided a discussion of some of the events during Marshall's time at UWT that Hollis perceived as improper or unfair. She concluded, “Despite Dr. Marshall being an ascending academic star, the record shows that Dr. Young has engaged in a campaign of workplace bullying since Dr. Marshall's point of hire.” CP at 3398. Hollis suggested that the only reason that Marshall was hired was so UWT could access her grant money, a type of tokenism.

Hollis stated her opinion that the student evaluation process is flawed. She cited research stating that students consistently rate Black faculty the lowest among all other faculty. Hollis stated that several universities across the country are “looking for alternatives to this flawed student evaluation process rather than rest the career of a professor on a group of late teenagers.” CP at 3409.

***18** Ginn attached a draft report that she helped draft on behalf of the UWT Office of Equity and Inclusion. The purpose of the report was to document the experiences of UWT faculty of color “regarding how well they fit and how well received they feel at [UWT]”. CP at 3367. The report was based on structured interviews with 24 UWT faculty of color.

As a whole, the report found that the faculty interviewed experienced a hostile racial climate. The report identified four themes where faculty ran into issues related to their race. One of highest reported issues was between the faculty of color and their director or dean. It was reported that directors used racist and sexist language in their evaluations and did not support their professional trajectories. Directors often sided with students rather than the faculty of color when issues arose in the classroom. And as a result of these interactions, faculty of color often spent time negotiating problems or documenting racist interactions rather than developing their professional careers.

Another problem area identified by the report was within the tenure process. Faculty of color were expected to publish more than their White peers and their work was often perceived as questionable.

Sarah Hampson stated in her declaration that she was up for tenure in another department the year before Marshall applied for tenure. Hampson learned that Vice Chancellor Purdy was enforcing a 2018 faculty code change stating that the tenure review committee had to be comprised of faculty within her unit. When Hampson expressed a concern to Purdy, Purdy assured her that her committee was okay because it already had been constituted and she knew the change was in error. Marshall later told Hampson that she was not permitted to have faculty from other units on her tenure review committee.

Trial Court Ruling and Appeal

The trial court granted summary judgment in favor of UWT and dismissed all of Marshall's claims. Marshall filed a motion for reconsideration, which the court denied.

After summary judgment was granted, Marshall's attorney submitted a declaration attaching a letter from Young relating to the 2019 reappointment of a White professor that previously had been sealed. The reappointment review committee, the voting faculty, and Young all recommended that the White professor be reappointed even though she struggled with teaching, significant improvement was needed in her scholarly productivity, and she needed to increase her service contributions. However, this declaration was not included in the pleadings the trial court considered on summary judgment.

Marshall appeals the trial court's grant of summary judgment in favor of UWT.

ANALYSIS

A. Summary Judgment Standard

We review summary judgment orders de novo. *Mihaila v. Troth*, 21 Wn. App. 2d 227, 231, 505 P.3d 163 (2022). We view all evidence in the light most favorable to the nonmoving party, including reasonable inferences from the evidence. *Id.* Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.* A genuine issue of material fact exists if reasonable minds can come to different conclusions on a factual issue. *Id.*

The moving party has the initial burden of showing the absence of a genuine issue of material fact. *Sartin v. Est. of McPike*, 15 Wn. App. 2d 163, 172, 475 P.3d 522 (2020). A moving defendant can meet this burden by demonstrating that the plaintiff cannot support their claim with any competent evidence. *Id.* If the defendant makes such a showing, the burden shifts to the plaintiff to present evidence that creates a genuine issue of material fact. *Id.* "Summary judgment is appropriate if a plaintiff fails to show sufficient evidence that creates a question of fact about an essential element on which he or she will have the burden of proof at trial." *Id.*

B. Racial Discrimination Claim

***19** Marshall argues that the trial court erred in granting summary judgment in favor of UWT on her discrimination claim because she produced sufficient evidence to create a genuine issue of fact regarding that claim. We agree.

1. Legal Principles

The Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, prohibits employers from discharging or discriminating against any employee based on one of several protected characteristics, including race and gender. RCW 49.60.180(2), (3).

A person can show direct evidence of discrimination by demonstrating that "(1) the defendant employer acted with a discriminatory motive and (2) the discriminatory motivation was a significant or substantial factor in an employment decision." *Alonso v. Qwest Commc'ns Co.*, 178 Wn. App. 734, 744, 315 P.3d 610 (2013).

Because direct evidence of racial discriminatory intent is rare, a person " 'may rely on circumstantial, indirect, and inferential evidence to establish discriminatory action.' " *Mackey v. Home Depot USA, Inc.*, 12 Wn. App. 2d 557, 571, 459 P.3d 371 (2020) (quoting *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County*, 189 Wn.2d 516, 526, 404 P.3d 464 (2017)). To analyze circumstantial evidence in this context, we apply the burden-shifting framework adopted in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668 (1973). *Mackey*, 12 Wn. App. 2d at 571.

First, the plaintiff must establish a prima facie case of discrimination. *Id.* This requires a showing that the plaintiff was (1) a member of a protected class, (2) terminated or suffered an adverse employment action, and (3) performing satisfactory work. *Id.* A rebuttable presumption of discrimination exists if the employee establishes a prima facie case. *Id.*

Second, the burden then shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. *Id.* "The employer is not required to persuade the court that it actually was motivated by the nondiscriminatory reason, only that the employer's evidence if taken as true would permit the conclusion that there was a nondiscriminatory reason." *Id.* at 571-72.

Third, if the employer satisfies this burden, the plaintiff must present evidence that the alleged nondiscriminatory reason was a pretext. *Id.* at 572. The plaintiff may satisfy this prong by presenting evidence that the employer's reason is a pretext or that discrimination was a substantial factor motivating the employment action even if the stated reason is legitimate. *Id.* "The employee is not required to show that discrimination was the only motivating factor for the discharge because an employer's decision may be based on both legitimate and illegitimate reasons." *Id.*

The Supreme Court has emphasized that under this framework, courts should be hesitant to grant summary judgment in employment discrimination cases: "Summary judgment for an employer is seldom appropriate in employment discrimination cases because of the difficulty of proving discriminatory motivation." *Mikkelsen*, 189 Wn.2d at 527; *see also* *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 445, 344 P.3d 541 (2014). When there are reasonable competing inferences of both discrimination and nondiscrimination, the employer's true motivation is a question of fact. *Mikkelsen*, 189 Wn.2d at 528. "To overcome summary judgment, the plaintiff needs to show only that a reasonable jury could find that discrimination was a substantial factor in the employer's adverse employment action." *Id.* And the plaintiff's burden is only one of production, not of persuasion. *Scrivener*, 181 Wn.2d at 445.

2. Inference of Nondiscrimination

***20** Initially, UWT argues that it is entitled to an inference of nondiscrimination because the same decision-makers who hired Marshall also took the employment actions at issue. We disagree.

UWT relies primarily on *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001). The court in *Hill* stated, "When someone is both hired and fired by the same decision makers within a relatively short period of time, there is a strong inference that he or she was not discharged because of any attribute the decision makers were aware of at the time of hiring." 144 Wn.2d at 189. In this situation, the employee must answer the question: "if the employer is opposed to employing persons with a certain attribute, why would the employer have hired such a person in the first place?" *Id.*

However, the people that hired Marshall were not the only ones involved in the adverse employment actions. UWT points to Young, who lobbied for authorization to hire Marshall. But she was not the only person involved in the reappointment and merit review processes and she was not involved in the tenure review process. UWT also points to Professor Casey, who chaired Marshall's hiring search committee, and Professor Emlet, who was on the committee. But those professors were not the sole decision makers regarding the employment actions at issue. We conclude that UWT is not entitled to an inference of nondiscrimination.

3. Direct Evidence Analysis

Marshall argues that she produced direct evidence of a discriminatory motive based on her race. We disagree.

Marshall relies solely on statements she attributes to Purdy, Pagano, and Young as direct evidence of discrimination. "We generally consider an employer's discriminatory remarks to be direct evidence of discrimination." *Alonso*, 178 Wn. App. at 744.

In *Alonso*, the plaintiff was a disabled combat veteran who claimed discrimination based on his protected status as a veteran, a Mexican-American, and a disabled person. *Id.* at 744-45. He presented evidence that his supervisor (1) stated that he hated " 'people that served in the first Gulf War for five days and claim a disability,' " (2) stated that he hated disabled combat veterans and hated the fact that the plaintiff was receiving disability benefits, (3) referred to Mexicans as " 'Spics' " and allowed other people to use the term, and (4) openly mocked the plaintiff's speech impediment and accent. *Id.* The court held that this direct evidence was sufficient to prove that the supervisor acted with discriminatory motive. *Id.*

First, Marshall relies on Purdy's comments in the October 2018 faculty meeting about creating policies with criteria to assess collegiality and the need for ensuring a good fit with the department. Similarly, Marshall notes that Young talked to her about her fit in the department in her 2016 review. Marshall emphasizes that Lavitt testified that "collegiality" and "fit" are code words for policies that perpetuate bias, as did Knaus.

Marshall claims that this coded language is direct evidence of discriminatory motive. But by its plain meaning, coded language has a hidden meaning. The use of words like "collegiality" and "fit" are not explicitly discriminatory terms. Even if we can infer that these statements reflected an intent to exclude persons of color from advancement, the evidence is indirect rather than direct.

***21** Second, Marshall refers to Chancellor Pagano's statement that "why can't we find a good one," which Lavitt understood as referring to a person of color. CP at 3524. Marshall claims that this statement shows that Chancellor Pagano was poorly equipped to confront race discrimination. To the extent we can infer that this statement reflected tokenism, once again the evidence is indirect rather than direct.

Third, Marshall refers to Emlet's statement after her first reappointment that she was aloof and unengaged, which she characterizes as a common bias perception. But again, these are not explicitly discriminatory terms. This evidence also is indirect rather than direct.

Unlike in *Alonso* where the employer used overtly racist and discriminatory language to disparage Alonso, there is no evidence that anyone associated with UWT made overtly discriminatory or racist remarks about Marshall or persons of color in general. And Marshall points to no other direct evidence of discrimination against her.[3] Therefore, we conclude that Marshall did not present direct evidence of discriminatory intent.

4. Circumstantial Evidence Analysis

Alternatively, Marshall argues that she produced enough circumstantial evidence of discrimination to defeat summary judgment regarding her racial discrimination claims. We agree.

a. Prima Facie Case

There is no question that Marshall is a member of a protected class and suffered adverse employment actions: having her reappointment deferred and receiving a nonmeritorious finding in 2016-2017, receiving a nonmeritorious finding in 2017-2018, and being denied promotion and tenure in 2021. However, to establish a prima facie case Marshall also must show that she was performing satisfactory work. *Mackey*, 12 Wn. App. 2d at 571. UWT challenges this element.

UWT emphasizes the poor student evaluation scores and negative student comments regarding the three graduate classes Marshall taught. According to UWT, the poor teaching evaluations justified all the employment actions, including her denial of promotion and tenure. UWT claims that in this context, her work was not satisfactory.

Regarding 2017 reappointment, Marshall at that time had taught one undergraduate class with positive evaluations and one graduate class with lower evaluation scores – a median score of 2.8 and an adjusted combined median score of 3.3 out of 5. But she had excellent research and scholarship. And the reappointment review committee recommended reappointment, stating, "The review committee feels that there is every reason to believe that Dr. Marshall will continue to be a productive scholar, continue her excellent teaching at the undergraduate level as reflected in her teaching evaluation and improve her teaching at the graduate level." CP at 3042. A reasonable person could determine, as did the committee, that Marshall should have received reappointment in 2017. Therefore, we conclude that there is at least a question of fact as to whether Marshall's work was "satisfactory" enough to establish a prima facie case regarding this decision.

Regarding the nonmeritorious findings in 2016-17 and 2017-18, Marshall received lower evaluation scores in her 2017 class and very low scores in her 2018 class. But the peer evaluators of those classes were very complementary. In 2017, education professor Aguirre stated that Marshall's performance in class was "an exemplary model for faculty to learn from." CP at 2995. In 2018, education professor Kalikoff stated that Marshall's class was "one of the best-organized classes I've ever seen, and I've seen a lot of well-organized classes." CP at 3001. In addition, Marshall's research and scholarship continued to be very strong. Finally, the reappointment review committee recommended reappointment in 2017 and Marshall actually was reappointed in 2018.

***22** Under these facts, a reasonable person could determine that Marshall's work was "satisfactory" enough that she should not have received nonmeritorious findings in 2016-17 and 2017-18. Therefore, we conclude that there is at least a question of fact as to whether Marshall established a prima facie case of discrimination regarding the nonmeritorious findings.

Regarding the denial of promotion and tenure, Marshall received positive scores in the two undergraduate classes she taught. All of the peer evaluations of Marshall's teaching were highly complementary. And it is undisputed that Marshall's scholarship and research were excellent. The only negative evaluations were in her three graduate classes. And after the very low evaluation scores in 2017, the scores improved for the 2018 graduate class and greatly improved for the 2019 undergraduate class. A reasonable person could determine, as did a few of the members of the APT committee, that Marshall should have received tenure. Therefore, we conclude that there is at least a question of fact as to whether Marshall's work was "satisfactory" enough to establish a prima facie case regarding this decision.

b. Legitimate Nondiscriminatory Reason

Regarding reappointment, the reason given for the voting faculty's mixed vote on Marshall's reappointment in 2017 was the significant concerns with her teaching performance. Teaching performance was a legitimate, nondiscriminatory reason for the deferral. In addition, the primary reason given by both the acting director and the Vice Chancellor for deferring was the fact that the review committee and the faculty's recommendations differed and the faculty did not support reappointment. This also was a legitimate, nondiscriminatory reason.

Regarding the nonmeritorious findings, the reasons given in both 2017 and 2018 were the poor evaluations in the graduate classes Marshall taught. The 2017 scores were somewhat low, and the 2018 scores were even lower – 1.3 out of 5. Teaching performance was a legitimate, nondiscriminatory reason for the nonmeritorious findings.

Regarding denial of promotion and tenure, UWT again had a nondiscriminatory reason for not granting Marshall promotion and tenure: poor student evaluation scores and negative student comments regarding the three graduate classes she taught. This was the stated reason given in all the recommendations and reports regarding Marshall's advancement. And there is no question that poor teaching performance is a legitimate reason for denying promotion and tenure. The faculty code expressly states that those seeking to be appointed to the rank of associate professor with tenure must demonstrate a record of substantial success in both teaching and research.

As noted above, UWT's burden is only to show that its evidence, if taken as true, showed a legitimate nondiscriminatory reason for the employment action. *Mackey*, 12 Wn. App. 2d at 571-72. We conclude that UWT met the second prong of the analysis.

c. Evidence of Pretext/Substantial Factor

In order to avoid summary judgment, Marshall had to present sufficient evidence to create a question of fact as to whether UWT's stated reason for deferring Marshall's reappointment and for not granting her promotion and tenure was a pretext or that discrimination was a substantial factor motivating the actions.

i. Legal Principles

The ways in which an employee can show pretext include that the employer's reason (1) had no factual basis, (2) was not really a motivating factor for the employment action, (3) lacked a temporal connection with the decision, and (4) was not a motivating factor for employment actions for similarly situated employees. *Mackey*, 12 Wn. App. 2d at 581. Significantly, whether the employer's decision was correct or incorrect is not necessarily dispositive. *Id.* at 582. The question is whether the employer's stated reason for the employment action was the *actual* reason. *Id.*

***23** Even if the plaintiff cannot show that the employer's reason was pretextual, the plaintiff still can satisfy the third prong by showing that discrimination was a substantial motivating factor for the employment decision. *Id.* at 583.

As noted above, our analysis must be guided by the Supreme Court's admonition that summary judgment is rarely appropriate in employment discrimination cases. *Mikkelsen*, 189 Wn.2d at 527. This is because a plaintiff often does not have direct evidence of discriminatory motive. Therefore, we must reverse a summary judgment order if we determine that there are reasonable competing inferences of both discrimination and nondiscrimination. *Id.* at 528.

ii. Analysis

Marshall's argument essentially is that UWT made the wrong decisions regarding her reappointment, nonmeritorious findings, and promotion and tenure. She seems to suggest that if a reasonable person could conclude that these decisions were wrong, this fact alone creates a question of fact regarding race discrimination. However, the fact that UWT may have made the wrong decision is not necessarily dispositive. *Mackey*, 12 Wn. App. 2d at 582. Even if the decision was "wrong," Marshall must present evidence that the employer's alleged nondiscriminatory basis for the decision was not the *actual* reason. *See id.* There must be something more than an incorrect employment action for there to be a reasonable inference of race discrimination.

Here, viewing the evidence in the light most favorable to Marshall, there is "something more." We conclude that based on the totality of the evidence viewed in the light most favorable to Marshall, Marshall has presented sufficient evidence for a jury to reasonably infer that UWT's stated reason for its employment actions – poor graduate student evaluations – was a pretext or that the actions were motivated by racial discrimination. A combination of a number of factors compels this conclusion.

First, we cannot ignore the evidence that two separate studies conducted while Marshall was at UWT documented pervasive racism against people of color employed at UWT. Standing alone, this general evidence of racism may not be sufficient to overcome summary judgment because Marshall must show that racism affected her personally. However, this evidence of institutional racism provides a part of the foundation for reviewing the employment actions involving Marshall.

Second, there is at least some evidence the people involved in the employment actions involving Marshall used language that suggests racial animus. In 2016 Young questioned Marshall about whether she was a good fit for UWT. And Chancellor Purdy discussed fit and collegiality as criteria for tenure in a faculty meeting. Lavitt submitted a declaration stating that based on her 20 years of experience, words like "fit" and "collegiality" often are code for enforcing biased policies and reduce the likelihood of hiring diverse faculty.

There also are a few examples in the record of comments that carry racial connotations. SSWCJ professor Emlet – Marshall's assigned mentor – called her aloof and questioned whether she wanted to be at UWT. This comment could be interpreted as reflecting an attitude based on a stereotype of Black women. SSWCJ professor Furman described Marshall as angry and aggressive. Describing a Black woman with words like these evokes the harmful stereotype of the angry Black woman. *See* *Henderson v. Thompson*, 200 Wn.2d 417, 436, 518 P.3d 1011 (2022). And Chancellor Pagano stated, "[W]hy can't we find a good one," which Lavitt interpreted as referring to faculty of color. CP at 3524. This statement could be interpreted as tokenism, a type of racial discrimination.

***24** Again, this evidence standing alone may not be sufficient to overcome summary judgment. But these comments also provide part of the foundation for reviewing the employment actions involving Marshall.

Third, UWT's adverse employment decisions regarding Marshall were based almost solely on low student evaluations in three graduate classes. UWT's emphasis on these evaluations seems somewhat unusual in light of other information that UWT acknowledged but essentially ignored. Four peer evaluations of those same graduate classes were very positive, praising Marshall's teaching ability. Marshall received favorable evaluations in the two undergraduate classes she taught. And following the very poor scores for the 2018 graduate class, Marshall showed improvement in her teaching. The evaluation scores improved the next year for her graduate class and greatly improved the year after that for her undergraduate class.

Further, UWT recognized that there could be reasons other than Marshall's teaching ability for the negative evaluations. Multiple people and committees acknowledged that student evaluations of women of color often reflect implicit racial and gender bias, which may have affected Marshall's evaluations. And Kalikoff explained in her letter to Young that Marshall may have received poor evaluations because she was using an evidence-based teaching method that did not rely on the traditional lecture format and was uncomfortable for the students. Kalikoff stated, "At the risk of stating the obvious, when students expect traditional lecture and get active learning, they may conclude that the teacher is teaching the wrong way." CP at 3420.

Finally, it is significant that while the SSWCJ faculty consistently criticized Marshall's teaching ability based on the student evaluations, not a single faculty member observed one of Marshall's classes to confirm or refute the evaluations. This fact is especially significant because the SSWCJ faculty noted that none of Marshall's peer reviewers taught in the field of social work and weighed their evaluations less because of that fact. Nor did Purdy or Pagano observe Marshall's teaching.

A reasonable person may have difficulty understanding UWT's unwavering reliance on low evaluation scores for three classes in light of all the other evidence that either contradicted or explained those low scores and in the absence of any personal knowledge regarding Marshall's teaching ability. A reasonable inference is that something other than poor teaching was the real reason for the adverse employment actions.

Fourth, Marshall's very strong research and scholarship is a factor that must be considered. Marshall's K01 award was very prestigious and brought $1 million into the university. This award required Marshall to focus on research rather than teaching. And almost every person and committee that evaluated Marshall noted that she clearly met expectations regarding research and scholarship. In addition, Marshall appeared to be a rising star in her field because of her scholarship. Marshall's tenure review committee stated that Marshall had a "*growing national reputation* in the areas of social work, gerontology, public health and economics." CP at 2918 (emphasis added).

***25** Reasonable persons could disagree as to whether Marshall should have been granted tenure based on her research and scholarship alone, as allowed by the UW faculty code. But what seems unusual is that UWT made almost no effort to figure out a way to retain this "rising star" on the faculty. No SSWCJ faculty observed Marshall's classes with a goal of helping her improve as a teacher. UWT did not attempt to figure out an accommodation, such as having Marshall teach only undergraduate classes until her teaching improved. And in the five years Marshall taught at UWT, there was almost no effort to clarify Marshall's expectations or create policies around her workload in connection with her K01 award requirements so the various committees could appropriately evaluate her.

In summary, the evidence raises too many questions surrounding the employment actions regarding Marshall for us to hold as a matter of law that Marshall has not presented sufficient evidence that UWT's stated reasons were a pretext or that racial discrimination was a substantial factor in its actions. Why did UWT rely so heavily on the poor evaluation scores and negative comments from a small number of graduate students? Why was more weight not given to Marshall's positive peer evaluations? Why were the positive reviews in Marshall's undergraduate classes not seriously considered along with her graduate classes? Why did Marshall's very strong research and scholarship record not factor more prominently in the employment decisions? Why did the SSWCJ faculty make almost no effort to retain someone who was developing national prominence in her field? A jury must be allowed to determine if the answers to these questions relate to race discrimination.

To be sure, UWT has viable arguments that basing the employment actions regarding Marshall was not a pretext and that racial discrimination was not a substantial factor in those actions. For example, UWT emphasizes that the promotion and tenure process involved multiple layers of review, including by people outside the SSWCJ, and 18 out of 20 faculty members and administrators concluded that her teaching record was insufficient to warrant tenure. UWT points out that although Marshall focuses on her peer evaluations, undergraduate classes and scholarship record, the tenure reviewers considered all this information in making their recommendations. However, these are arguments that must be considered by a jury, not arguments that require dismissal of Marshall's claims as a matter of law.

The Supreme Court has clearly stated that summary judgment is rarely appropriate in employment discrimination cases. *Mikkelsen*, 189 Wn.2d at 527. Accordingly, we hold that the trial court erred in granting summary judgment in favor of UWT on Marshall's race discrimination claim.

C. Hostile Work Environment Claim

Marshall argues that trial court erred in granting summary judgment in favor of UWT on her hostile work environment claim. We agree.

1. Legal Principles

One type of discrimination that violates the WLAD is the creation of a hostile work environment. *See LaRose v. King County*, 8 Wn. App. 2d 90, 104, 437 P.3d 701 (2019). To establish a prima facie claim of a hostile work environment, the plaintiff must show that " '(1) the harassment was unwelcome, (2) the harassment was because of [their protected class], (3) the harassment affected the terms and conditions of employment, and (4) the harassment is imputable to the employer.' " *Id.* at 105 (quoting *Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004)).

Regarding the third element, the totality of the circumstances must show that the harassment was " 'sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment.' " *Antonius*, 153 Wn.2d at 261 (quoting *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985)). There must be a "pervasive pattern of unlawful treatment over a period of time." *Antonius*, 153 Wn.2d at 268. In analyzing this element, we consider "the frequency and severity of the discriminatory conduct, whether the conduct is physically threatening or humiliating or a mere offensive utterance, and whether the conduct unreasonably interferes with an employee's work performance." *LaRose*, 8 Wn. App. 2d at 111-12. Whether harassment affects the plaintiff's conditions of employment generally is a question of fact. *Id.* at 112.

2. Statute of Limitations

***26** Initially, the parties dispute whether the statute of limitations prevents Marshall from relying on incidents that occurred more than three years before she filed her complaint against UWT on September 30, 2019.

A claim of discrimination under the WLAD is subject to the general three-year statute of limitations stated in RCW 4.16.080(2) for personal injury actions. *Antonius*, 153 Wn.2d at 261-62. However, courts can consider acts that extend beyond the statute of limitations if they are " 'part of the same actionable hostile work environment practice.' " *Id.* at 271 (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 120, 122 S. Ct. 2061, 153 L.Ed. 2d 106 (2002)). To constitute part of the same practice, the acts must have "some relationship to each other." *Antonius*, 153 Wn.2d at 271. But if there is no relationship between the actions or there is an intervening act by the employer, then the previous acts cannot be considered a part of one hostile work environment claim. *Id.*

Here, Marshall submitted a list of events that she believed contributed to the hostile work environment that date back to January 2015. And from the time Marshall started at UWT until September 30, 2016, there was no significant gap or intervening act to separate these acts from the others. The acts alleged before and after September 2016 all contained interactions with Young, Purdy, Pagano, or others at UWT. The events before September 30, 2016 bear some relationship to one another and therefore are part of one hostile work environment claim.

Therefore, we conclude that Marshall can rely on incidents that occurred before September 30, 2016 to support her hostile work environment claim.

3. Hostile Work Environment Analysis

Marshall provided multiple instances of conduct that she believed was harassing beginning during the hiring process and continuing until she was denied tenure. These instances are contained in her tort claim, interrogatory answers, and emotional harm narrative. Some of the instances are listed in the statement of facts above. In addition, Hollis provided an expert opinion that Young's conduct toward Marshall constituted bullying.

For summary judgment purposes, we must accept Marshall's statements of what occurred and Hollis's opinion as true. *Mihaila*, 21 Wn. App. 2d at 231. We conclude that there are genuine issues of fact as to whether Marshall experienced unwelcome harassment that affected the terms and conditions of employment and that were imputable to UWT. The issue here is whether there is a question of fact as to whether this harassment was because of Marshall's race.

Marshall argues that UWT faculty and administrators used coded language that reflected racist attitudes, which shows that the harassment she experienced was because of her race. As discussed above, Marshall presented evidence that people involved in her employment actions used coded language that could reflect racial animus. Young questioned Marshall about whether she was a good fit for UWT. Chancellor Purdy discussed fit and collegiality as criteria for tenure in a faculty meeting. Professor Emlet – Marshall's assigned mentor – called her aloof and questioned whether she wanted to be at UWT. Professor Furman called Marshall angry and aggressive. Chancellor Pagano stated, "[W]hy can't we find a good one?" CP at 3524. These comments carry racial connotations or are common stereotypes regarding Black women.

***27** These comments may not be sufficient standing alone to create a question of fact regarding whether alleged pervasive harassment that lasted over a six-year period was based on Marshall's race. But Marshall can rely on the reasonable inference that the harassment was because she was Black. Unlike for the pretext issue, UWT has not presented a legitimate nondiscriminatory reason for the harassment of Marshall. In fact, UWT offers no explanation other than Marshall's race, nondiscriminatory or otherwise, to explain the harassment. Viewed in the light most favorable to Marshall, these facts create a reasonable inference that the harassment was based on her race.

Viewing the facts in a light most favorable to Marshall, we hold that Marshall presented a genuine issue of material fact as to whether she was subjected to a hostile work environment because of her race. Accordingly, we hold that the trial court erred in granting summary judgment in favor of UWT on Marshall's hostile work environment claim.

D. Retaliation Claims

Marshall argues that the trial court erred in granting summary judgment in favor of UWT on her whistleblower and WLAD retaliation claims because she presented sufficient evidence to create genuine issues of material fact regarding those claims. We disagree.

1. Whistleblower Retaliation

Marshall argues that there is a question of fact as to whether UWT discriminated against her because she made a whistleblower report. We disagree.

a. Legal Principles

The whistleblower retaliation statute, RCW 42.40.050(1)(a) provides, "Any person who is a whistleblower, as defined in RCW 42.40.020, and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW." Under RCW 42.40.050(1)(b), "reprisal or retaliatory action" means but is not limited to denial of promotion, dismissal and a superior behaving in a hostile manner toward the whistleblower.

Under RCW 42.40.020(10)(a), a whistleblower is defined as an employee who reports or is perceived to have reported "alleged improper governmental action" to the state auditor's office or other public official. The term "alleged improper governmental action" includes a number of categories of conduct, including actions that constitute a waste of public resources, violate state or federal law, causes substantial and specific danger to the public health or safety, or constitutes gross mismanagement. RCW 42.40.020(6)(a). However, improper governmental action does not include

> personnel actions, for which other remedies exist, including but not limited to employee grievances, complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions in pay, dismissals, suspensions, demotions, violations of the state civil service law, alleged labor agreement violations, reprimands, claims of discriminatory treatment, or any action which may be taken under chapter 41.06 RCW, or other disciplinary action except as provided in RCW 42.40.030.

RCW 42.40.020(6)(b).

Once the employee has established a presumption of whistleblower retaliation, RCW 42.40.050(2) states that the burden shifts back to the employer to rebut the presumption.

b. Analysis

Marshall filed her whistleblower report in December 2018 with the state auditor's office. She alleged that Young and UWT were improperly using an extra meritorious category not identified in the faculty code in merit reviews to award White faculty extra money. She claimed that use of this category violated the faculty code.

However, conduct that violates the faculty code does not fall within any of the definitions of "improper governmental action" under RCW 42.40.020(6)(a). Instead, Marshall's report involved performance evaluations and discriminatory treatment, both of which RCW 42.40.020(6)(b) expressly excludes from the definition of "improper governmental action." Therefore, Marshall did not meet the definition of "whistleblower" under RCW 42.40.020(10)(a) and is not able to assert a retaliation claim under RCW 42.40.050(1)(a).

***28** We hold that the trial court did not err in granting summary judgment in favor of UWT on Marshall's whistleblower retaliation claim.

2. WLAD Retaliation

Marshall argues that there is a question of fact as to whether UWT discriminated against her because she opposed discrimination at UWT. We disagree.

a. Legal Principles

RCW 49.60.210(1) states,

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

Marshall presented no direct evidence of retaliation. But the evidentiary burden-shifting framework also applies to retaliation claims. *Mackey*, 12 Wn. App. 2d at 571. To establish a prima facie case of retaliation under RCW 49.60.210(1), a plaintiff must show that (1) they engaged in statutorily protected activity, (2) their employer took an adverse employment action against the employee, and (3) there was a causal connection between the employee's activity and the adverse action. *Id.* at 574.

If the plaintiff establishes a prima facie case, then the defendant may rebut the claim by presenting evidence of a legitimate nondiscriminatory reason for the adverse action. *Id.* at 571-72. This shifts the burden back to the plaintiff to prove that the employer's reason is pretextual. *Id.* at 572.

When a person reasonably believes they are opposing discriminatory practices, RCW 49.60.210(1) protects that person whether or not the practice is actually discriminatory. *Ellis v. City of Seattle,* 142 Wn.2d 450, 460–61, 13 P.3d 1065 (2000).

b. Analysis

Here, Marshall claims retaliation based on her complaint to UCIRO in August 2018 about discrimination. Making a discrimination complaint is a protected activity and Marshall later suffered an adverse employment action. The question is whether she can establish a causal connection between the activity and the adverse action.

Marshall argues that any conduct toward her and any employment action that occurred after she made the complaint to UCIRO in August 2018 can be attributed to retaliation. However, Marshall presents no evidence that the UCIRO complaint was related in any way to this conduct and actions. Nothing in the record shows that anyone associated with UWT was upset by the UCIRO complaint or ever mentioned the complaint. Marshall has presented no evidence or even an inference that UWT actors were substantially motivated by retaliation. Instead, Marshall argues that her adverse employment decisions were motivated by racial bias that preceded her UCIRO claim.

We hold that the trial court did not err in granting summary judgment in favor of UWT regarding Marshall's WLAD retaliation claim.

E. Tenure as a Remedy

Marshall argues that the trial court has the power to grant tenure as an equitable remedy for her racial discrimination claims. We decline to address this issue.

Marshall requests granting tenure as a remedy because she asserts that tenure was incorrectly denied because of racial discrimination. But there is no indication that the trial court ruled on this issue. And the issue will not be ripe unless a jury finds in Marshall's favor on her racial discrimination claim. Therefore, deciding this issue at this stage would be providing an advisory opinion.

CONCLUSION

***29** We affirm in part, reverse in part, and remand for further proceedings regarding the racial discrimination and hostile work environment claims.

We concur:

LEE, J.

GLASGOW, C.J.

All Citations

Not Reported in Pac. Rptr., 26 Wash.App.2d 1031, 2023 WL 3191451

Footnotes

1 Marshall, the other individual parties, and other professors involved in this case have earned a Ph.D. We mean no disrespect in referring to them only by their last names rather than using the title “Dr.” each time.

2 Executive orders are issued by the President of the University of Washington.

3 We do not foreclose the possibility that "coded" statements can be so numerous and pervasive that they could constitute direct evidence of discriminatory intent. But that is not the evidence here.

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Only the Westlaw citation is currently available.
United States District Court, E.D. Washington.

Tahvio GRATTON, an individual, Plaintiff,
v.
UNITED PARCEL SERVICE, INC., a Delaware Corporation, Defendant.

NO. 1:22-CV-3149-TOR
|
Signed April 22, 2024

Attorneys and Law Firms

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ORDER ON MOTIONS FOR SUMMARY JUDGMENT

THOMAS O. RICE, United States District Judge

***1** BEFORE THE COURT is Plaintiff's Motion for Partial Summary Judgment (ECF No. 52) and Defendant's Motion for Summary Judgment (ECF No. 53). The Court has reviewed the record and files herein, is fully informed, and finds that oral argument is unnecessary to resolve these motions. For the reasons discussed below, Plaintiff's Motion for Partial Summary Judgment is **GRANTED IN PART** and Defendant's Motion for Summary Judgment is **GRANTED IN PART**.

BACKGROUND

This case arises out of Plaintiff Tahvio Gratton's charges of racial discrimination against his former employer, Defendant United Parcel Service.

I. Plaintiff's Work History

In September 2016, Plaintiff began working for Defendant as a package car cover driver at Defendant's Seattle, Washington distribution center. ECF No. 54 at 2, ¶ 1. As a cover driver, Plaintiff's primary responsibility was to cover the shifts of drivers with regular routes who were out for the day. *Id.* at 3, ¶ 9. Two years into his tenure at UPS, Plaintiff relocated to Yakima, Washington, and began working at Defendant's facility there. ECF Nos. 54 at 3, ¶ 4; 52 at 3. At both locations, the parties' employment relationship was governed by the terms of a National Master Collective Bargaining Agreement (Master CBA) and the Western Supplemental Agreement (Supplement) (collectively, the CBA) negotiated by the International Brotherhood of Teamsters Union (Union). ECF Nos. 53 at 3; 54 at 2, ¶ 2; 55-1 at 302. As is pertinent here, the CBA outlines grievance procedures for employees raising workplace issues as well as for processing discharges, suspensions, and terminations. ECF No. 55-1 at 519-27.

Tensions began to arise between Plaintiff and Defendant shortly after Plaintiff's transfer to the Yakima center. On April 20, 2018, Plaintiff filed a grievance with the Union asserting that he had been "laid off"[1] on multiple occasions without advance notice and in violation of his contractual guarantee to work a certain number of hours. ECF No. 68-1 at 9. Plaintiff argues that he was frequently laid off in favor of white drivers with less seniority than him. ECF Nos. 66 at 2; 68-1 at 13. Defendant, on the other hand, maintains that Plaintiff was laid off because shifts for cover drivers were assigned based on seniority, and Plaintiff was more junior due to his recent transfer. ECF No. 53 at 3-4. Defendant also states that it only offered lower-ranked white drivers work over Plaintiff on a layoff day when Plaintiff failed to respond to Defendant's calls and text messages asking him to come in. ECF Nos. 75 at 5-6; 67 at 2; 55-1 at 176. Plaintiff disputes that he was unresponsive to Defendant. *Id.* Regardless, as a result of the grievance, Defendant was required to begin posting a regular schedule that notified drivers of upcoming lay-off days, and Plaintiff received back wages for the hours he missed. ECF Nos. 55-1 at 174; 75 at 4.

***2** On April 25, 2018, about one week after the filing of the initial grievance, On-Road Supervisor Sam O'Rourke accompanied Plaintiff on a ride-along observation. ECF No. 54 at 4, ¶ 14; 67 at 3. Throughout the trip, Mr. O'Rourke repeatedly referred to Plaintiff as "boy," saying things like, "[m]ove faster boy" and "[l]et's get going boy, let's move." ECF No. 52-2 at 12-13; 32, ¶¶ 12-14. When Plaintiff greeted a customer he normally talked with as he unloaded his truck, Mr. O'Rourke said, "I didn't tell you to talk, boy." ECF No. 52-2 at 32, ¶ 12; 33, ¶ 19. When Plaintiff asked O'Rourke to stop referring to him as boy, Mr. O'Rourke allegedly refused.

ECF No. 52-2 at 43. Both Plaintiff and a customer who witnessed a portion of this exchange were offended by the racial undertones of O'Rourke's speech.

Plaintiff reported O'Rourke's conduct to Yakima Center Manager Erik Loomis the following morning. ECF Nos. 68-1 at 15, 69-1 at 3, ¶ 7. Mr. Loomis appeared unconcerned and simply replied, "That's just the way Sam talks." ECF No. 69-1 at 3, ¶ 7. Nevertheless, Mr. Loomis later conceded that Mr. O'Rourke's language could "definitely ... be perceived" as racist or derogatory, although he did not believe that Mr. O'Rourke intended for it to be taken as such. ECF Nos. 52-2 at 40; 55-1 at 125. Mr. Loomis claims that he had an informal discussion with Mr. O'Rourke and counseled him not to use the word "boy" in reference to Plaintiff again. ECF No. 55-1 at 125-28.

Plaintiff avers that Yakima supervisors retaliated against him after his report to Mr. Loomis. ECF No. 66 at 3. Specifically, Plaintiff claims that Mr. Loomis and Plaintiff's direct supervisor, Matthew Fromherz—a friend of Mr. O'Rourke's—began verbally abusing him and denying him work. *Id.*; ECF No. 68-1 at 145. In one incident, Plaintiff recounts that he approached Mr. Fromherz regarding a series of recent layoffs and asked why he wasn't being put on schedule despite there being work to do. ECF No. 68-1 at 17. In apparent reference to Mr. O'Rourke's earlier "boy" comments, Mr. Fromherz reportedly replied, "Because you didn't come and ask me like a man." *Id.* Mr. Fromherz denies that this happened. ECF No. 5-2 at 120. Another time, Plaintiff states that he came to work on a day off to collect a package, as he regularly did, and that Mr. Fromherz yelled at him to "[g]et the fuck off the property" after learning he was not there for work purposes. ECF Nos. 66 at 3; 68-1 at 15. Mr. Fromherz disputes this occurred as Plaintiff describes, claiming that Plaintiff was interfering with a delivery. ECF No. 55-1 at 179-80. Plaintiff reported these incidents to Mr. Loomis, who allegedly failed to take corrective action. *Id.* Therefore, in June 2018, Plaintiff grieved these concerns to the Union. ECF No. 54 at 4-5, ¶¶ 16-17; 55-1 at 68, 216.

Plaintiff alleges that after he filed grievances in June 2018, his supervisors began searching for reasons to fire him. He provides a record retained by his supervisors of formal discussions they had with him, which documents issues such as taking a 27- or 29-minute lunch instead of the full 30-minute time allotted and failing to respond to a request to come in on days where he had been previously informed he was laid off. ECF No. 68-1 at 166-67. One supervisor, Michelle Reyes, declared that she was present on multiple occasions where Mr. Fromherz and Mr. Loomis discussed their desire to "get rid" of Plaintiff. ECF No. 68-1 at 4, ¶ 6; *but see id.* at 116-17 (Mr. Loomis averring that it was possible he mentioned it would "be better" if Plaintiff were gone, but that he did not directly express that he wanted to fire Plaintiff). Another employee, Lisa Irvine, witnessed the same thing. ECF No. 52-2 at 128. Plaintiff also claims that he was berated for having visible tattoos in violation of the dress code where other white drivers were not. ECF No. 68-1 at 14, 70. Mr. Loomis disputes this and says that white employees were corrected on an equal basis for dress code infractions. ECF No. 73 at 7.

***3** In October 2018, Plaintiff assumed the position of "bid driver," meaning he had a regular daily route that he drove each day and no longer had to cover for others. ECF No. 52-2 at 23. However, Plaintiff asserts that he was only able to bid for the "mall route," which was the bulkiest and least desirable route, because Mr. Loomis refused to teach him any other route. *Id.* at 24. Plaintiff also claims that, on the one occasion where Mr. Loomis offered Plaintiff the opportunity to learn an alternative open route, Mr. Loomis informed Plaintiff that he would have to learn the route from Mr. O'Rourke. *Id.* at 23-24. Plaintiff refused to do another ride-along with Mr. O'Rourke. *Id.* Plaintiff believes that Mr. Loomis convinced Brandon Ward, a driver with more seniority than Plaintiff, to bid on the mall route so Plaintiff would not get it, but that Mr. Ward eventually took his name off the list and Plaintiff was awarded the route by default. ECF Nos. 52-2 at 60; 68-1 at 43-44. On October 19, 2018, Plaintiff filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC), alleging that he had been discriminated against and harassed on the basis of race, and that he had been retaliated against for complaining about such conduct. ECF No. 52-2 at 62.

After acquiring the mall route, Plaintiff alleges that his supervisors conspired to make his job more challenging. Ms. Reyes purportedly overheard Mr. Loomis and Mr. Fromherz planning to "pile the work on [Plaintiff]" and to add stops to his route that were out of the way. ECF No. 52-2 at 67, ¶¶ 9-10. Plaintiff also presses that he was burdened with the worst truck, known among the drivers as the "death truck," which slowed his delivery time. ECF Nos. 69-1 at 4-5, ¶ 16; 66 at 5.

Oppositely, Mr. Fromherz testified at his deposition that extra stops were added to the route, not the individual driver, and that there was no racial motive behind adding stops to Plaintiff's route. ECF No. 55-1 at 188, 190. More frequently, Mr. Fromherz stated, other drivers were forced to help Plaintiff because he took longer to complete his route. *Id.* at 187.

Plaintiff states that these issues continued throughout his employment at the Yakima center. In one grievance dated June 11, 2020, Plaintiff alleged that Mr. Loomis racially discriminated against him because he told Plaintiff that he could only count the number of pre-packed bags (as opposed to individual packages), towards his production quota. ECF No. 55-1 at 85-86. Plaintiff reported that a white driver was allowed to count the number of packages instead of the number of bags towards his production quota. ECF No. 55-1 at 85-86. Defendant, however, states that it is UPS policy to count the number of pre-packed bags, not individual packages; that the white employee's package count was in fact changed to comply with said policy; and that the white employee did not receive any bonus. ECF No. 54 at 7-8, ¶¶ 32, 34-35.

Approximately six months later, in January 2021, Plaintiff grieved "[c]ontinuous harassment and retaliation" from Mr. Loomis, stating, "Erik Loomis has gone out of his way to make my job harder than it has to be ... [by] overloading my route, giving me a worse truck, and instructing supervisors to comply with his malicious efforts to retaliate against me." ECF No. 55-1 at 97-98. He further added that he was working overtime and that Mr. Loomis was retaliating against him for assuming the position of Union shop steward and helping other black employees file grievances. *Id.*; *see infra* Background II. (discussing grievances by other black drivers). In a related grievance filed eight months later, in September 2021, Plaintiff wrote that management favored certain drivers and that his route was being manipulated to make him appear like a slow driver. *Id.* at 101. Plaintiff also testified that Mr. Loomis frequently withheld his checks and that he had to file grievances for withheld wages. ECF No. 68-1 at 25, 54.

In response to Plaintiff's complaint regarding Mr. Loomis, Karl Leyert, a labor manager for Defendant, began investigating Plaintiff's grievance. ECF Nos. 55-1 at 199; 68-6 at 8-9. Mr. Leyert determined that Mr. Loomis's actions were not the product of racial bias, but instead the result of neutral application of UPS policy. ECF No. 55-1 at 199. For example, regarding Plaintiff's complaint about being assigned the "death truck," Mr. Leyert explained that UPS "switch[es] trucks based off the route and the need of the vehicle," rather than the individual, and that therefore the fact that Plaintiff switched routes meant he had a different truck. *Id.* at 199-200. However, Mr. Leyert admitted that he did not interview Plaintiff or the two references Plaintiff listed on his grievance. *See* 55-1 at 98; 200. In general, Mr. Leyert felt that "there was no merit to a lot of [Plaintiff's] claims." ECF No. 68-6 at 23.

II. Related Racial Allegations

4** Other black employees of Defendant reported similar allegations of racial harassment and retaliation by Yakima center supervisors. One employee, Derek Tamez, testified that another on-road supervisor, Bill Peterson, referred to Plaintiff as "that ner Tahvio." ECF No. 52-2 at 151. Mr. Peterson also allegedly stated than a different black employee was "stupid and dumb and worthless." ECF No. 52-2 at 152. Mr. Tamez reported the comments to Mr. Loomis, who apparently shrugged it off, saying, "I don't have any control over a lot of things that happen here." *Id.* at 152.

Another black employee, Xavier Briggs, was told at the beginning of his employment that Mr. Loomis wanted him to successfully run his route five times in order to complete his probationary period, whereas new white drivers were not required to complete any test routes. ECF No. 52-2 at 52-3, ¶ 23. Mr. Briggs also declared that white drivers received preferential treatment when it came to routes and workload, and that he and Plaintiff frequently had to help with the misloads of more junior white drivers. *Id.* at 53, ¶¶ 25-31.

Black employees also claimed that they were punished by management for associating with Plaintiff. Mr. Briggs declared that Mr. Loomis approached him and asked "if [he] knew of things that [Plaintiff] was doing wrong." ECF No. 52-2 at 56, ¶ 49. When Mr. Briggs refused to answer, Mr. Loomis allegedly retaliated by loading up Mr. Briggs' route with extra stops. *Id.* at ¶ 51.

Travis Anderson, a different black employee, also testified that he was retaliated against by Mr. Loomis on account of his race. ECF No. 52-2 at 90, ¶ 4. Mr. Anderson testified that after he prevailed on a wage grievance, Mr. Loomis approached him and told them that he needed to cut his hair or that his employment would be terminated. *Id.* at 90-91, ¶¶ 7-11. Mr. Anderson, who is Pan African, had always worn his hair long and had never been asked to cut it before. *Id.* at 90, ¶¶ 7-8. Mr. Anderson alleges that a white employee with a similar hairstyle was not asked to cut his hair. *Id.* at 91, ¶ 13. Due to his concerns, Mr. Anderson asked Plaintiff to help him file a religious exemption, which was successful. *Id.*

After prevailing on his exemption, Mr. Anderson declared that Mr. Loomis further retaliated against him by forcing him to cover up his tattoos. *Id.* at 91, ¶ 16. Mr. Anderson felt that he was being singled out on the basis of race because "there were white drivers with all kinds of tattoos showing all the time." *Id.* at 92, ¶ 17. Mr. Anderson likewise testified that he overheard Mr. Loomis telling other drivers to stay away from Plaintiff and that Plaintiff was causing problems. *Id.* at ¶ 19.

III. Plaintiff's Termination

Plaintiff was dismissed from employment on October 27, 2021 following allegations of sexual harassment alleged to have occurred on October 19, 2021. ECF No. 54 at 11, ¶ 49; 67 at 17, ¶ 50. Plaintiff and Defendant present conflicting accounts of the events leading up to Plaintiff's dismissal.

According to Plaintiff, he tripped walking down the belt in the loading dock area of the Yakima warehouse. ECF No. 68-6 at 124. As he fell, Plaintiff reached out to steady himself on the back of a nearby pre-load supervisor, Linda Hernandez Cruz. *Id.* Plaintiff states that he did not realize it was Ms. Hernandez Cruz until he straightened back up, at which point Ms. Hernandez Cruz said, "You touched me inappropriately." *Id.* Plaintiff clarified that he had only caught himself on her back. *Id.* Ms. Hernandez Cruz warned, "Don't ever do that again."

Ms. Hernandez Cruz remembers the events of October 19 quite differently. She recollects that she was training another employee in the loading area, and bent over at one point to sort through the packages. ECF No. 55-1 at 227. At that point, someone came from behind her and grabbed her lower hip. *Id.* She stood up, and seeing Plaintiff, asked, "Why are you touching me inappropriate[ly]?" *Id.* Plaintiff mumbled something back which Ms. Hernandez Cruz could not hear, and then said he wasn't touching her inappropriately. *Id.*

***5** Other employees who were present for the incident also offer varying accounts of what happened. Jose Ramirez Castillo was assisting with loading a truck and saw Ms. Hernandez Cruz bend over to pick up a package. ECF No. 55-1 at 235-36. At that point, Mr. Ramirez Castillo saw Plaintiff approach from behind her with his arm extended towards her bottom and watched as Plaintiff grabbed her bottom for a brief moment before Ms. Hernandez Cruz stood up. *Id.* at 235-36. Mr. Ramirez Castillo added that the pathway was clear and that "there was no way [Plaintiff] could have stumbled." *Id.* at 246.

In his deposition, Mr. Ramirez Castillo recalled Ms. Hernandez Cruz asking, "What are you doing? That is unacceptable." ECF No. 55-1 at 236. Plaintiff allegedly replied, "Oh, I'm sorry. I'm just kidding," and added something to the effect of "Man, no one can take a joke." *Id.* at 236-37. In an earlier written statement, Mr. Ramirez Castillo testified that Plaintiff had grabbed Ms. Hernandez Cruz's bottom hip and said he "[couldn't] wait to go one-on-one" with Ms. Hernandez Cruz as he grabbed her. *Id.* at 244. During his deposition, however, Mr. Ramirez Castillo testified that he could not recall whether Plaintiff said he wanted to go one-on-one with her or not. *Id.* He further clarified that, in writing that Plaintiff had grabbed her "bottom hip," he meant Plaintiff grabbed Ms. Hernandez Cruz's buttocks, not her lower hip. *Id.*

Mr. Tamez also claimed to have witnessed the incident. ECF No. 55-1 at 287. Mr. Tamez stated that he watched Plaintiff stumble and hold his arms in front of him, bracing himself on the back of Ms. Hernandez Cruz. *Id.* Mr. Tamez saw Mr. Gratton hold his arms up as Ms. Hernandez Cruz turned around, but was too far away to hear their conversation. *Id.* He wrote, "What I witnessed was most certainly an accident." *Id.*

Ms. Hernandez Cruz reported the contact to Mr. Fromherz the day it occurred. ECF No. 55-1 at 239. That same day, Mr. Fromherz collected Mr. Ramirez Castillo from the loading center to verify the incident and take a statement. *Id.* at 240. Mr. Fromherz provided Ms. Hernandez Cruz and Mr. Ramirez Castillo with Defendant's EthicsPoint phone number, which both individuals called. ECF Nos. 55-1 at 230; 68-1 at 154; 68-6 at 89.

EthicsPoint referred the matter to security supervisor Ryan Wiedenmeyer for investigation. ECF No. 55-1 at 269. Mr. Wiedenmeyer spoke with all involved parties, including Plaintiff and Mr. Fromherz. *Id.* at 273. At the time of his interview, Plaintiff did not identify Mr. Tamez as a potential witness. *Id.* at 280-81; ECF No. 68-6 at 107-108. Two other unnamed witnesses were also identified after the fact by Mr. Fromherz. ECF No. 68-6 at 118-19. Mr. Wiedenmeyer did not have the opportunity to interview these three persons before submitting his report. *Id.*

Based on the information provided by both parties during the investigation, Mr. Wiedenmeyer concluded that "it seemed more that it was a touch versus someone falling into someone" and that there had been some deliberate "unwanted physical contact." ECF Nos. 55-1 at 274; 68-6 at 110. However, he determined that the statements which Mr. Ramirez Castillo alleged Plaintiff had made regarding wanting to "go one-on-one" with Ms. Hernandez Cruz were unsubstantiated. ECF No. 68-6 at 110. Prior to this incident, Mr. Wiedenmeyer had not investigated a claim at the Yakima center. ECF No. 55-1 at 272. Mr. Wiedenmeyer was also unaware of Plaintiff's prior allegations of racial bias. *Id.* at 279. The parties' statements and Mr. Wiedenmeyer's findings were sent to Mr. Leyert on October 27. ECF No. 68-6 at 119-20.

***6** Mr. Leyert and his supervisor determined that Plaintiff had engaged in unprovoked assault in violation of Article 28, Section 2(a)(5) of the Supplement to the CBA. ECF No. 55-1 at 206, 211-12. Article 28 allows for an employee to be discharged without a warning letter for unprovoked assault. *Id.* at 526. Per UPS policy, the letter was signed by Mr. Loomis as the center manager, who forwarded it to Plaintiff on October 27. *Id.* at 210; ECF No. 52-2 at 164. However, Defendant claims that only Mr. Leyert and his supervisor had the authority to terminate Plaintiff's employment. ECF No. 53 at 10.

Plaintiff filed a grievance that same day, asserting that he was "wrongful[ly] terminat[ed]." ECF No. 55-1 at 103. Plaintiff also filed a second grievance that day, stating that he was "falsely accused [of] inappropriate behavior in the workplace." *Id.* at 105. Pursuant to Defendant's policy, both a center-level hearing and a panel-level hearing were held, at which Plaintiff defended his innocence, but did not mention whether he believed his termination was on account of racial bias. ECF Nos. 54 at 12, ¶ 55; 55-1 at 35. Plaintiff now asserts that the reason for his firing was pretextual and motivated by racial animus. He argues that this is evidenced by the fact that Mr. Leyert submitted a draft termination letter in the Workday program before Mr. Wiedenmeyer's investigation was complete. ECF No. 55-1 at 209. Mr. Leyert, however, testified that he regularly drafted letters in the Workday system before an investigation was complete or the letters were sent out. *Id.* at 208. Plaintiff also alleges that Defendant failed to respond allegations of sexual harassment against white male employees similarly. ECF Nos. 67 at 20; 68-1 at 150-51.

On October 18, 2022, around one year after his termination, Plaintiff filed a lawsuit against Defendant in this Court. ECF No. 1. By amended complaint, Plaintiff alleged he was subject to discrimination, a hostile work environment, and retaliation in violation of 42 U.S.C. § 1981, the Washington Law Against Discrimination (WLAD), and Washington's wrongful discharge in violation of public policy tort. *See* ECF No. 18 at 2, ¶2.

DISCUSSION

I. Summary Judgment Standard

A court may grant summary judgment in favor of a moving party who demonstrates "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In ruling on a motion for summary judgment, the court must only consider admissible evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). The party moving for summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to identify specific facts showing there is a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

For purposes of summary judgment, a fact is "material" if it might affect the outcome of the suit under the governing law. *Id.* at 248. Further, a dispute is "genuine" only where the evidence is such that a reasonable jury could find in favor of the non-moving party. *Id.* The court views the facts, and all rational inferences therefrom, in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). Summary judgment will thus be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

***7** On cross-motions for summary judgment "both parties asserting that there are no uncontested issues of material fact[ ] does not vitiate the court's responsibility to determine whether disputed issues of material fact are present." *Fair Housing Council of Riverside Cnty, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (quoting *United States v. Fred A. Arnold, Inc.*, 573 F.2d 605, 606 (9th Cir. 1978)). Moreover, the court must consider each motion on its own merits. *Id.* at 1134 ("[W]hen simultaneous cross-motions for summary judgment on the same claim are before the court, the court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them.”). However, where motions for summary judgment center around the same dispositive issue, a court need not organize its discussion of the cross-motions into separate sections. *Tulalip Tribes of Washington v. Washington*, 783 F.3d 1151, 1156 (9th Cir. 2015); *see also, e.g., Acosta v. City Nat'l Corp.*, 922 F.3d 880, 890 (9th Cir. 2019) (determining that where two motions for summary judgment center around the same central legal issue and one party has the same burden of proof under substantive law in both motions, granting one party's motion compels denial of the other party's motion).

II. Gateway Issues

The parties move for summary judgment on the statute of limitations, preemption, and waiver and estoppel issues. Because a decision on each of these matters has the potential to be dispositive of Plaintiff's other claims, the Court addresses them first.[2]

A. Statute of Limitations

Plaintiff seeks to dismiss Defendant's affirmative defenses of statute of limitations, timeliness, and laches.[3] ECF No. 52 at 13. Defendant opposes the motion and brings a cross-motion for summary judgment on the statute of limitations issue. ECF Nos. 63 at 9; 53 at 11.

Defendant agrees that Plaintiff's claims based on his 2021 termination are timely, but contends that any claim for any event occurring prior to October 18, 2018, is barred by the statute of limitations. ECF No. 63 at 9. Therefore, Defendant argues, Plaintiff cannot base his claims on the following actions: (1) Mr. O'Rourke allegedly referring Plaintiff as “boy” in April 2018; (2) Mr. Fromherz allegedly swearing at Plaintiff in May 2018; (3) Plaintiff being laid off as a cover driver, which ended when he won the mall route bid on October 10, 2018; and (4) any other alleged comments or actions taken by Mr. Fromherz or Mr. Loomis prior to October 2018. ECF No. 53 at 11. Plaintiff responds that his claims accrued during the statutory period and that “[p]atterns of racial hostility, discrimination and retaliation began in 2018 and continued for years, culminating in [his] termination.” ECF No. 70 at 6. Defendant presses that Plaintiff misapplies the continuing violations doctrine, and that Plaintiff cannot rely on discrete acts predating October 18, 2018 to prove his claims. ECF No. 73 at 4-5.

The statute of limitations for WLAD and related state law tort claims is three years. *Arthur v. Whitman Cnty.*, 24 F. Supp. 3d 1024, 1028 (E.D. Wash. 2014) (citing *Antonius v. King Cnty.*, 153 Wash.2d 256, 261-62 (2004)); *see also* RCW 4.16.080. The statute of limitations for bringing a claim under Section 1981, respectively, is four years. *Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1003 (9th Cir. 2011). Discrete acts of discrimination and retaliation occurring outside the statute of limitations period may be time barred, even if they relate to acts alleged in timely filed charges. *Broyles v. Thurston Cnty.*, 147 Wash. App. 409, 432 (2008); *see also Shah v. Cnty. of Los Angeles*, 399 F. App'x 305, 306 (9th Cir. 2010).

***8** However, acts that are otherwise time-barred may be admissible as evidence of a hostile work environment even if they are not independently admissible to support a claim for discrimination or retaliation. *See Diemert v. City of Seattle*, ––– F. Supp. 3d ––––, 2023 WL 5530009, at *7 (W.D. Wash. Aug. 28, 2023); *see also Broyles*, 147 Wash. App. at 434 (“In sum, a plaintiff with a hostile work environment claim may not use that claim to seek damages for a discrete discriminatory act that is time barred but, if otherwise admissible, may use that discrete act as background information if it tends to support a hostile work environment claim.”). A hostile work environment claim “will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period.” *Nat'l R.R. Corp. v. Morgan*, 536 U.S. 101, 122 (2002); *see also Story v. Napolitano*, 771 F.Supp.2d 1234, 1246 (9th Cir. 2011) (explaining that the continuing violations doctrine applies to Section 1981 hostile work environment claims “involving related acts that collectively constitute a single unlawful employment practice”).

Plaintiff filed suit in this case on October 18, 2022. Therefore, as Defendant notes, discrete acts supporting his discrimination and retaliation claims under WLAD and the tort of wrongful discharge in violation of public policy may only reach as far back as October 18, 2019, due to the three-year statute of limitations period. Similarly, evidence of any discrete acts supporting Plaintiff's discrimination and retaliation claims under Section 1981 may only reach as far back as October 18, 2018, due to the four-year statute of limitations period. As such, Plaintiff may not rely on evidence predating October 18, 2018.

However, evidence predating October 18, 2018, may be used to support Plaintiff's claim of a hostile work environment. Defendant contends that the acts prior to October 2018 "involved different actors, are drastically different in nature, and occurred over two years before any timely alleged harassing act." ECF No. 73 at 5. The Court disagrees. The acts prior to October 2018 involved the same primary persons—Mr. O'Rourke, Mr. Fromherz, and Mr. Loomis—as those involved after the fact in allegedly assigning Plaintiff to less desirable routes, overloading Plaintiff with work and making his job more difficult, denying Plaintiff his wages and bonuses, and attempting to uncover unfavorable information about Plaintiff from other employees. Accordingly, the Court will allow Plaintiff to introduce evidence of acts predating October 18, 2018 to support his claim of a hostile work environment.

B. Preemption

Plaintiff seeks to dismiss the affirmative defense of preemption. ECF No. 52 at 16-17. Defendant moves for summary judgment on the same issue. ECF No. 53 at 22-26.

Plaintiff asserts that this Court already rejected Defendant's preemption arguments in ruling on Plaintiff's motion to compel. ECF No. 52 at 16-17. In that Order, the Court wrote:

> Defendant presses that Plaintiff's discovery request is preempted to the extent that it implicates his [WLAD] claim. Specifically, Defendant argues that because the state law claim is dependent upon the meaning of terms contained [within the CBA], it is preempted under § 301 of the Labor Management Relations Act of 1947 (LMRA).
>
> The Court rejects this contention. Plaintiff's complaint alleges unlawful employment practices and unlawful termination for engaging in protected activity under WLAD. "[T]he Ninth Circuit has specifically held that rights established by the WLAD are non-negotiable and separate from a CBA." *Sellar v. Woodland Park Zoological Soc'y*, 2:23-cv-00627-TL, 2023 5425490, at *4 (W.D. Wash. Aug. 23, 2023); *see also McFarland v. BNSF Ry. Co.*, 4:16-cv-5024-EFS, 2016 WL 10515857, at *3 (E.D. Wash. May 5, 2016) (unreported) (wrongful discharge claim from engagement in protected activity is a substantive protection under Washington tort law, separate from any rights provided by the CBA). Accordingly, the Court will not entertain Defendant's argument that Plaintiff's WLAD claim and related motion to compel is preempted or otherwise null.

***9** ECF No. 27 at 8-9.

Defendant responds that this analysis was not dispositive of its preemption arguments because (1) the holding was in the context of a motion to compel and therefore could not have addressed the merits of the defense on a full evidentiary record, and (2) the discovery ruling only referenced preemption under the LMRA, whereas here Defendant also argues that the *Garmon* doctrine divests the Court of jurisdiction. ECF Nos. 63 at 7-8; 53 at 22-26.

Defendant's claim that the earlier LMRA analysis does not control is tenuous because the issue before the Court on the motion to compel was a legal one that could be resolved without further evidence. However, the outcome would not change even if the Court were to find that its earlier analysis was not dispositive. Defendant asserts that Plaintiff's claims are preempted because "[t]he essence of his claim ... is that UPS misapplied the CBA term 'unprovoked assault' by either interpreting this term unfairly or in a discriminatory way, or otherwise breached very specific CBA provisions related to pay, seniority, and routes." ECF No. 53 at 23-24. Defendant adds, "[I]t cannot be that UPS complied with the CBA in all regards, as governed by the National Labor Relations Act amended by the LMRA, but acted improperly under a different law." *Id.* at 24.

It stretches the allegations of the amended complaint too far to characterize Plaintiff's claims as mere hairsplitting over the meaning of a CBA-specific term. Plaintiff does not argue that he was fired because Defendant misinterpreted the meaning of "unprovoked assault" under Article 28; instead, he asserts that Defendant manufactured a claim of sexual assault as a pretext for firing him due to racial biases. At core, Plaintiff's claims are that Defendant unlawfully discriminated against him on the basis of race under WLAD, state tort law, and Section 1981. The Court declines to recast those claims into CBA-specific arguments simply because Plaintiff took advantage of Defendant's grievance process. Therefore, Plaintiff's allegations are not preempted by Section 301 of LMRA.

Defendant's contentions about the *Garmon* doctrine are likewise misplaced. Defendant says that *Garmon* bars Plaintiff's retaliation claim to the extent that those claim is based "on filing grievances, the unfair application of the CBA, or any other labor-related aspect of his employment." ECF No. 53 at 25. Defendant notes that one of Plaintiff's grievances explicitly stated that Plaintiff believed he was being retaliated against for his role as shop steward of the Union. ECF No. 63 at 8. It is true that one sentence mentioned his role as shop steward, but Plaintiff is not relying on that specific passage to establish his retaliation claim. Plaintiff's retaliation claim is instead grounded in the allegation that Defendant racially discriminated against him, which was also a focal point of multiple grievances. Accordingly, Defendant's preemption defenses are dismissed.

C. Waiver & Estoppel

Plaintiff next moves to dismiss the affirmative defenses of waiver and estoppel. ECF No. 52 at 14. Defendant did not address the issue of waiver; therefore, the Court dismisses that defense. *Bowen*, 125 F.3d at 806.

***10** On the issue of estoppel, Defendant argues that Plaintiff is estopped from bringing claims based on the subject matter of a grievance which has formally settled, and that it has resolved many of Plaintiff's pay-related claims internally. ECF No. 63 at 10. Even if Plaintiff's wage-related grievances were resolved, Plaintiff's complaints about compensation are peripheral to his allegations of racial discrimination. In other words, Defendant did not settle Plaintiff's claims of racial bias in the workplace through the grievance process. Accordingly, Plaintiff is not estopped from bringing his claims.

III. Discrimination Claims

Defendant moves for summary judgment on Plaintiff's WLAD and Section 1981 discrimination claims. ECF No. 53 at 11-17. Defendant argues that Plaintiff's discrimination claims fail because (1) Plaintiff did not establish a *prima facie* case of discrimination; (2) Defendant identified legitimate, nondiscriminatory reasons for each alleged act of discrimination it took; and (3) the evidence does not show pretext. *Id.* The Court agrees and finds that Plaintiff has not established a prima facie case of discrimination.

Section 1981 claims and state law employment discrimination claims are analyzed under the *McDonnell Douglas* burden-shifting framework. *Weil v. Citizens Telecom Servs. Co., LLC*, 922 F.3d 993, 1002 (9th Cir. 2019) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Under the *McDonnell Douglas* framework, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1106 (9th Cir. 2008). If the plaintiff establishes a prima facie case, then the defendant must articulate a non-discriminatory reason for its actions. *Lindsey v. SLT L.A., LLC*, 447 F.3d 1138, 1144 (9th Cir. 2006). If the defendant satisfies its burden, then the burden shifts back to plaintiff to demonstrate that the reason identified by defendant was mere pretext for discrimination. *Id.*

To stake a successful prima facie case of racial discrimination under Section 1981, plaintiffs must show "(1) that they are members of a protected class; (2) that they were qualified for their positions and performing their jobs satisfactorily; (3) that they experienced adverse employment actions; and (4) that 'similarly situated individuals outside their protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination.' " *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1156 (9th Cir. 2010) (quoting *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004)). Similarly, WLAD requires plaintiffs to show that they "(1) belong to a protected class, (2) [were] treated less favorably in the terms or conditions of their employment (3) than a similarly situated, nonprotected employee, and (4) the nonprotected 'comparator' employee does substantially the same work." *Smith v. City of Seattle*, No. 84351-6-I, 2023 WL 8372399, at *5 (Wash. Ct. App. Dec. 4, 2023) (citations omitted). The showing is minimal and does not need to rise to the level of a preponderance of the evidence. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994).

To establish that similarly situated individuals outside the protected class were treated more favorably under the fourth *Hawn* factor, a plaintiff needs to identify a white comparator to whom he was "similarly situated in all material respects." *Weil*, 922 F.3d at 1004 (quoting *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006)). Employees are materially similar when they have "similar jobs and display similar conduct." *Id.* (quoting *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003)).

***11** Defendant alleges that Plaintiff has not made a successful prima facie showing of discrimination under either Section 1981 or WLAD because Plaintiff failed to identify any similarly situated white employee other than Mike Summerville, whom he alleged was allowed to count individual packages towards his production bonus. ECF No. 53 at 12. Relatedly, Defendant claims that Plaintiff has failed to identify a single specific white driver who had their workload reduced while Plaintiff's load was increased or was not disciplined for dress code infractions. *Id.* at 13.

Plaintiff responds that he is not obligated to show that similarly situated white employees were treated more favorably because the test allows him to produce evidence of either similarly situated employees *or* “other circumstances surrounding the adverse employment action [which] give rise to an inference of discrimination.” *Hawn*, 615 F.3d at 1156; ECF No. 66 at 21. He notes that both Mr. Loomis and Mr. Fromherz attempted to deny him work and fire him, and that Mr. Loomis did not take corrective action when Mr. Peterson allegedly referred to him using a racial epithet. ECF No. 66 at 21.

Plaintiff is technically correct that he is not required to submit comparator evidence under *Hawn.* But while the test does allow Plaintiff to choose between bringing comparator evidence or evidence of other circumstances surrounding the adverse employment action, the Ninth Circuit has explained that a district court may properly focus on the question of comparator evidence when a plaintiff's action “sounds in disparate treatment and seeks to raise an inference of discrimination based solely on circumstantial evidence” and the comparison “is central to plaintiff's case.” *Hawn*, 615 F.3d at 1156-57.

It is apparent from the face of the amended complaint and supportive pleadings that Plaintiff's case is based on his alleged disparate treatment. ECF No. 66 at 20 (alleging he suffered disparate treatment). Plaintiff claims that he was denied work opportunities, assignments, and bonuses given to white employees, forced to assist white drivers with their loads, and singled out and written up for minor infractions while white employees were not. *See* ECF No. 18 at 2, ¶ 2; 66 at 21-22. Other black employees offered similar testimony. *See supra* Background II.

Plaintiff has not offered comparator evidence which would satisfy his burden to establish a prima facie case of discrimination. Despite claiming that he received less favorable treatment than other white employees, Plaintiff did not identify any specific similarly situated white employees who received more work than him, were assigned better routes than him, or required his assistance delivering their misloads. Plaintiff mentions by name Mr. Summerville, whom he alleges was given a bonus with respect to his production quota, but Defendant introduced evidence that Mr. Summerville was also apprehended for his miscalculation and not compensated on a package-by-package basis. ECF No. 73 at 7; *see also* *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (“[M]ere allegation and speculation do not create a factual dispute for purposes of summary judgment.”).

Likewise, Plaintiff has not shown to the Court's satisfaction that he was singled out for dress code or other minor infractions on a more frequent basis than his white peers: Plaintiff offers his disciplinary log into evidence, but fails to provide comparable documentation or evidence beyond mere speculation regarding his supervisors’ treatment of white employees who committed similar infractions. Ms. Reyes declared that Doug Shively and Dennis Forbes were two white drivers who frequently took too long on their routes and were not criticized like Plaintiff. ECF No. 68-1 at 5-6, ¶ 11. However, the Court lacks information as to the similarity of Plaintiff and these drivers: the record is not clear as to these drivers’ routes or seniority, and there is no disciplinary record available which confirms whether or not that they were in fact not scolded by Mr. Loomis or Mr. Fromherz. *See id.* (Ms. Reyes conjecturing that supervisors did not criticize Mr. Shively and Mr. Forbes “as far as *I* know”) (emphasis added).

***12** Plaintiff also provides the testimony of Mr. Anderson, a black employee who alleges he was asked to cut his hair while Grant Ellsworth—a white employee who also had long hair—was not. Even if true, this does not show that Defendant discriminated against Plaintiff specifically for his tattoos, nor is there sufficient information in the record to establish that Plaintiff and Mr. Ellsworth were similarly situated. Therefore, Plaintiff has not proved a prima facie case of discrimination, and summary judgment is granted to Defendant on this issue.

IV. Hostile Work Environment Claims

Defendant moves for summary judgment on Plaintiff's hostile work environment claims. ECF No. 53 at 17-18. To prevail on a hostile work environment claim, Plaintiff must show that (1) he was subjected to verbal or physical conduct of a racial nature; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive work environment. *Vasquez*, 349 F.3d at 642. To resolve a hostile work environment claim, the court will consider all circumstances, “including the frequency of the allegedly discriminatory conduct, its severity, and whether it unreasonably interferes with an employee's work performance.” *Surrell*, 518 F.3d at 1109 (citing *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000)). Generally, “simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’ ” *Faragher v. Boca Raton*, 524

U.S. 775, 786 (1998). However, an employer may create a hostile work environment "by failing to take immediate and corrective action in response to a coworker's or third party's sexual harassment or racial discrimination the employer knew or should have known about." *Fried v. Wynn Las Vegas, LLC*, 18 F.4th 643, 647 (9th Cir. 2021).

Defendant argues that Plaintiff has not raised a triable issue on his hostile work environment claim because the allegations of racism he refers to are neither severe nor pervasive enough. ECF Nos. 53 at 18-21; 73 at 9-10. Plaintiff responds that he only need show whether the conduct was severe "or" pervasive, not both, and that such questions are better reserved to the trier-of-fact. ECF No. 66 at 22.

The Court recounts the verbal acts of discrimination which are alleged to have contributed to a hostile work environment. In spring 2018, Mr. O'Rourke referred to Plaintiff as "boy" while on a ride-along with him.[4] Mr. O'Rourke did not stop when Plaintiff asked him to, but did not repeat the remark after his conversation with Mr. Loomis. Later that spring, Mr. Fromherz, a friend of Mr. O'Rourke's, allegedly told Plaintiff he had not "acted like a man" and yelled at him to leave when he came into the facility on a day off. When Plaintiff reported this to Mr. Loomis, he failed to take any corrective action. Similarly, at some undated point in time, another employee reported a different supervisor refer to Plaintiff using a racial epithet and other expletives. Mr. Loomis again failed to take any corrective action.

"The required severity for harassing conduct varies inversely with the pervasiveness or frequency of the conduct." *Fried*, 18 F.4th at 649 (internal quotations and citations omitted). Thus, denigrating comments do not create a hostile work environment when made on only one or several occasions several weeks or months apart. *Id.* Some examples are illuminating. In *Swinton*, the Ninth Circuit affirmed a jury finding that the plaintiff's employer had created a hostile work environment. *Swinton v. Potomac Corp.*, 270 F.3d 794, 799 (9th Cir. 2001). A supervisor within the department "regularly" told racial "jokes" and used racial slurs in front of the plaintiff and plaintiff's peers. *Id.* Plaintiff's co-workers also told racially offensive jokes and referred to plaintiff using racist language. *Id.* at 799-800. The Ninth Circuit had little trouble affirming the jury's conclusion that the defendant employer had created a hostile work environment by engaging in a pattern of making racist comments. *Id.* at 807. By contrast, in *Vasquez*, the court found the plaintiff had not stated an actionable hostile work environment claim where he only recited a few instances of his supervisors making racial remarks about Hispanics, several months apart, and apparently one supervisor made a negative remark about him in front of youth at the juvenile detention center plaintiff worked at. 349 F.3d at 643. *See also, e.g., Manatt v. Bank of America, NA*, 339 F.3d 792, 795 (9th Cir. 2003) (finding no claim for hostile work environment where plaintiff, who was Asian, observed her coworkers pull their eyes back and refer to her as "China woman" on two separate occasions).

***13** For summary judgment purposes, the Court assumes Defendant's supervisors in fact made the abovementioned remarks in reference to Plaintiff. Nonetheless, the Court does not find that Defendant's statements created an actionable claim for a hostile work environment. While it goes without saying that such comments have no place in a professional setting or any other civilized environment, they were dispersed in time and only occurred on a handful of occasions. *Compare Lyzer v. Caruso Produce, Inc.*, 3:17-cv-1335-SB, 2019 WL 5960655, at *2 (D. Or. Nov. 13, 2019) (declining to grant summary judgment to defendant-employer on hostile work environment claim where plaintiff's white co-workers and supervisors repeatedly called him "boy," referred to him using the n-word, and "joked" that they were going to physically beat him). Moreover, Plaintiff did not have personal knowledge of Mr. Peterson's comments to Mr. Tamez. Accordingly, the comments are insufficiently severe or pervasive for Plaintiff to prevail on his hostile work environment claims.

V. Retaliation Claims

Defendant moves for summary judgment on Plaintiff's WLAD and Section 1981 retaliation claims. A claim for retaliation uses the same *McDonnell Douglas* burden-shifting approach as a claim for discrimination. *Surrell*, 518 F.3d at 1105. To establish a prima facie case of retaliation, a plaintiff must prove (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and (3) there was a causal connection between the two. *Id.* at 1108. "Protected activity includes the filing of a charge or a complaint, or providing testimony regarding an employer's alleged unlawful practices, as well as engaging in other activity intended to 'oppose' an employer's discriminatory practices." *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003) (quoting 42 U.S.C. § 2000e-3(a)), *amended on denial of reh'g*, No. 00-35999, 2003 WL 21027351 (9th Cir. May 8, 2003). Further, "the plaintiff must make some showing sufficient for a reasonable trier of fact to infer that the defendant was aware that the plaintiff had engaged in protected activity." *Id.* (citing *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982)). A causal connection may be "inferred from circumstantial evidence such as the employer's knowledge of the protected activities and the proximity in time between the protected activity and the adverse action." *Dawson v. Entek Intern.*, 630 F.3d 928, 936 (9th Cir. 2011). An employment action is adverse if it "materially affect[s] [the] compensation, terms, conditions, or privileges of employment," and is "based on retaliatory motive and is reasonably likely to deter the charging party or others from engaging a protected activity." *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 970 (9th Cir. 2002) (internal quotations and citations omitted).

The Court finds Plaintiff engaged in the following protected activity within the relevant limitations period:

1. Filing an EEOC charge on October 19, 2018;
2. Filing a Union grievance on June 11, 2020 regarding Mr. Loomis's treatment of Mr. Summerville versus Plaintiff with respect to production quotas;
3. Filing a Union grievance on January 20, 2021 regarding alleged harassment and retaliation by Mr. Loomis; and
4. Filing a Union grievance on September 8, 2021 regarding alleged favoritism by Yakima center management.

See ECF Nos. 55-2 at 62; 55-1 at 85, 97, 101.[5]

Defendant argues that, of these, only the October 19, 2018 EEOC charge and second June 11, 2020 grievance regarding Plaintiff's production quota constitutes protected activity. ECF No. 53 at 20. Specifically, Defendant claims that the other grievances cannot constitute protected activity because they "had nothing to do with race." ECF No. 53 at 20. The Court disagrees. Plaintiff's January 2021 grievance alleged that he was subject to "continuous harassment and retaliation from Center Manager Erik Loomis," who had "gone out of his way to make my job harder than it has to be in any event [by] overloading my route, giving me a worse truck, and instructing supervisors to comply with his malicious efforts to retaliate against me." ECF No. 55-1 at 97. In the fact section, Plaintiff wrote:

> ***14** Favoritism – I'm the only bid route driver to whom Erik takes my assigned truck away from and time ... Also my route is constantly overloaded to make routes lighter for the people he likes. Retaliation – Being shop steward Erik Loomis retaliates against me because of other drivers grievances.

ECF No. 55-1 at 98 (capitalization and spelling altered for readability).

Defendant offers that these statements cannot constitute protected activity because the alleged retaliation was due to Plaintiff's status as a shop steward, not a black man, and because Plaintiff did not explicitly mention Mr. Loomis favored white drivers. ECF Nos. 53 at 20; 54 at 8-9, ¶ 38. This mischaracterizes the background animating these grievances. Plaintiff and others testified he was retaliated against for assisting other black drivers with their grievances, many of which were race-based. *See, e.g.*, ECF No. 52-2 at 52, ¶ 20 ("[Plaintiff] also helped other employees to understand their rights and bring issues forward when needed. In particular, [Plaintiff] was helping to advocate for other black drivers when we weren't being treated fairly."). Moreover, there is room for reasonable debate as to whether Mr. Loomis's alleged "favoritism" of other drivers meant he favored other white drivers, particularly in light of the fact that Plaintiff was alleging "continuous harassment" by Mr. Loomis and that Plaintiff's earlier June 11, 2020 complaint alleged that Loomis discriminated against him and had an "overly negative and prejudiced" attitude toward black employees. ECF No. 55-1 at 85. Therefore, viewing the facts in the light most favorable to Plaintiff, the January 20 grievance constitutes protected activity.

Similarly, Defendant represents that the September 2021 document should be excluded. ECF No. 54 at 8-9, ¶ 38. In that grievance, Plaintiff complained of:

> Constant favoritism in our center for drivers that management "likes." My route has also been constantly manipulated to make me look like a slow driver. When I requested my route to be made more efficiently, I then was intimidated with a ride along in which that was the only day my route was made efficient to accommodate the managers shift to be off by 5:30 p.m.

ECF No. 55-1 at 101 (capitalization and spelling altered for readability).

Again, given the broader context of allegations within which this grievance fits, the complaint easily qualifies as protected activity. Therefore, the Court proceeds to consider whether there was some adverse action by Defendant.

Defendant admits that Plaintiff's termination qualifies as a materially adverse action, but argues that Plaintiff cannot raise a genuine issue of material fact to support the inference of causation. ECF No. 53 at 21. First, Defendant argues that there is too wide of a gap between Plaintiff's protected activity and the alleged adverse action. *Id.* However, that argument is foreclosed by the fact that Plaintiff's last grievance was filed in September 2021, approximately one month before his termination.

Next, Defendant argues that Plaintiff cannot raise a triable issue as to whether Mr. Leyert or Mr. Wiedenmeyer had any knowledge of his protected activity so as to establish pretext. ECF No. 53 at 21; *see also Raad*, 323 F.3d at 1197 ("In order to prevail, [plaintiff] must present evidence from which a reasonable trier of fact could conclude that the [officials] who refused to hire her were aware that she engaged in protected activity."). This is refuted by Mr. Leyert's own deposition. Mr. Leyert specifically testified that he reviewed Plaintiff's grievance about favoritism in route/truck assignments. ECF No. 55-1 at 199. Moreover, a genuine issue of material fact exists as to Mr. Loomis's involvement in the investigation of the sexual assault claim and Plaintiff's termination. Although Mr. Loomis claimed he was not a part of the firing process, the termination letter was signed by and sent by Mr. Loomis to Plaintiff, and Defendant has not presented any written policy confirming that center managers merely sign off on termination letters as a matter of company practice. Further, Mr. Fromherz, whom Plaintiff reported conflict with, assisted Ms. Hernandez Cruz and Mr. Ramirez Castillo with contacting the EthicsPoint hotline, and the extent of his involvement in Mr. Wiedenmeyer's investigation is unclear.

***15** Having concluded that Plaintiff raised a prima facie case of retaliation and that Defendant proffered a legitimate, non-retaliatory reason for Plaintiff's termination—that is, for unprovoked assault under the CBA—the Court also has no difficulty in concluding that Plaintiff has presented sufficient evidence of pretext to avoid the entry of summary judgment for Defendant on this claim. As recounted, multiple different accounts exist of what transpired on October 19, 2021, and certain aspects of Mr. Wiedenmeyer's investigation—such as Mr. Leyert drafting a termination letter before the investigation was completed—could lead reasonable minds to differ as to whether Defendant's justification for Plaintiff's separation was pretextual.

In sum, enough questions about the credibility of these parties, their knowledge of Plaintiff's protected activities, and the possibility of pretext exist to weigh against granting summary judgment for Defendant on this claim. *See McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004) ("In evaluating motions for summary judgment in the context of employment discrimination, we have emphasized the importance of zealously guarding an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the evidence and an opportunity to evaluate the credibility of the witnesses."). Thus, the Court declines to grant summary judgment to Defendant on Plaintiff's claims for retaliation.

VI. Wrongful Termination in Violation of Public Policy

Defendant argues that Plaintiff's wrongful termination claim is based on the same set of facts as his discrimination and retaliation claims and therefore must be disposed of. ECF No. 53 at 22. Having found that Plaintiff's retaliation claim survives Defendant's motion for summary judgment, the Court declines to dismiss the wrongful termination claim.

VII. Other Affirmative Defenses

Plaintiff seeks to dismiss the following defenses pled in Defendant's Answer: (1) scope of managerial authority, (2) after-acquired evidence, and (3) mitigation of damages. The Court dismisses the after-acquired evidence and mitigation of damages defenses.

A. Scope of Managerial Authority

Plaintiff seeks to dismiss the following defense: "[T]hat any unlawful or wrongful act, if any, taken by any of the officers, directors, supervisors, or employees of Defendant were outside the scope of his/her authority and such acts, if any, were not authorized, ratified or condoned by Defendant, nor did Defendant know nor should it have known of such conduct." ECF No. 7 at 13, ¶ 12.

Defendant points out that this is not truly an affirmative defense as it does not have the burden of proof on this issue, which Plaintiff does not rebut. *See* ECF No. 63 at 16 (citing *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002)). Therefore, the Court instead construes the defense as a denial. *See Snap! Mobile, Inc. v. Croghan*, 2019 WL 884177, at *6 (N.D. Cal. Feb. 22, 2019) ("The few authorities to address the subject have held that denials that are improperly pled as defenses should not be stricken.") (citation omitted); *see also Ogden v. Pub. Utility Dist. No. 2 of Grant Cnty.*, 2:12-cv-584-RMP, 2016 WL 589870, at *2 (E.D. Wash. Feb. 11, 2016) (improper categorization as an affirmative defense will not support striking the denial from the Answer). Further, the parties' substantive arguments reveal that a genuine issue of material fact remains as to this issue.

An "employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim." *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013). A tangible employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998)). As discussed *supra*, there is room for reasonable debate as to what extent Mr. Fromherz and Mr. Loomis were involved in Plaintiff's termination and as to whether Plaintiff's working conditions—such as his truck assignment and package route—marked significant changes in his employment status. Accordingly, the Court declines to grant summary judgment to Plaintiff on this issue.

B. After-Acquired Evidence

***16** Plaintiff seeks to dismiss Defendant's after-acquired evidence defense. ECF No. 52 at 17-18. Defendant opposes the motion, arguing that after-acquired evidence justifies its termination of Plaintiff. ECF Nos. 63 at 4-5; 14-16. The Court agrees with Plaintiff and dismisses this affirmative defense.

To prevail on an after-acquired evidence, a defendant must show that the plaintiff would have been terminated on an independent basis from the act alleged to have been motivated by discrimination. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995). When an employer obtains after-acquired evidence of employee wrongdoing through the course of discovery, it must establish that "the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of discharge." *Id.* at 362-63; *see also O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 761 (9th Cir. 1996) ("An employer can avoid backpay and other remedies by coming forward with after acquired evidence of an employee's misconduct, but only if it can prove by a preponderance of the evidence that it would have fired the employee for that misconduct.").

In the course of this lawsuit, Defendant maintains that it also uncovered two independent bases for firing Plaintiff, including (1) that Plaintiff ran a personal barbeque business during work hours in violation of the CBA, and (2) that Plaintiff lied about his employment history on his job application, also in violation of the CBA. Neither of these rationalizations allow Defendant to stake an after-acquired evidence defense because Defendant had knowledge of both facts prior to Plaintiff's discharge for unprovoked assault.

The Court begins with the issue of Plaintiff managing his personal business from work. The following colloquy, taken from Mr. Fromherz's deposition, makes it apparent that Defendant was quite aware of Plaintiff's self-employment:

> Q. [by attorney]: Did you ever have reason to believe that [Plaintiff] was doing non-work activities during the workday?
>
> A. [by Mr. Fromherz]: Like selling barbeque sauce?
>
> Q. Possibly.
>
> A. Yes. Well aware that Tahvio went around on his routes and tried to sell barbeque sauce to everybody on it.
>
> Q. How do you know that?
>
> A. There – his cards would be on their desk. He would give them samples. He would bring back stuff and ship it while he was still punched in. There were all kind of different instances like that ... he, you know, started making barbeque sauce *and made everybody well aware of it.*
>
> Q. I just want to make sure I understand. So he would come back to UPS and from UPS mail barbeque sauce?
>
> A. Mm-hmm.
>
> Q. While on the clock?
>
> ...
>
> A. Yes.

ECF No. 55-1 at 192-93 (emphasis added).

In response, Defendant complains that Mr. Fromherz "did not have the authority to discipline or terminate Plaintiff for selling barbeque products." ECF No. 64 at 10, ¶ 38; *see also* ECF No. 63 at 5. But the relevant question is one of knowledge, not authority. Second, Defendant presses that Mr. Fromherz's knowledge should not be imputed to Defendant. But Mr. Fromherz explicitly testified that "everybody" was aware of Plaintiff's business and that it was done out in the open. This, coupled with Plaintiff's testimony that others frequently sold their baked goods at the Yakima center as well, suggests that if there was a CBA policy against selling handmade items while on the job, it was not enforced. *See* ECF No. 72 at 11. As such, Defendant has not introduced a genuine issue of fact as to whether it lacked constructive knowledge of Plaintiff's barbeque business.

***17** Second, Defendant cannot reasonably claim that it was unaware of Plaintiff's employment history. As Plaintiff does not dispute, he was terminated from Wheeler Enterprises, the job he held prior to working for UPS, yet indicated that he had never been fired from a previous job on his employment application. ECF No. 54 at 13, ¶¶ 63-64. Plaintiff also allegedly used a fake name for his supervisor/reference on the application. *Id.*; ECF No. 75 at 32, ¶ 64.

Defendant asserts that it was not aware of these falsities until Plaintiff's deposition. However, Defendant received an ethics report in October 2016 from an anonymous caller who wanted to make Defendant aware that Plaintiff provided a fake reference on his employment application and that he had been fired from his former job. ECF No. 52-2 at 176. The caller also gave the name of then-supervisor of Wheeler Enterprises, Trina Wheeler, and a private investigator whom Ms. Wheeler retained because she believed Plaintiff was stealing money from the company. *Id.* Nearly a month after the report was filed, Defendant contacted the caller back to share that the report had been forwarded to management and that "[w]e consider this matter closed." ECF No. 52-2 at 176.

Defendant responds that it was not required to verify this report or "act on anonymous rumors" in order to preserve this defense. ECF No. 63 at 5-6. Again, the question is not one of action, but of knowledge. Therefore, the Court dismisses this defense.

C. Mitigation of Damages

Plaintiff seeks to dismiss Defendant's mitigation of damages defense. "As a broad proposition, injured parties are expected to mitigate the damage they suffer." *Sangster v. United Air Lines, Inc.*, 633 F.2d 864, 867 (9th Cir. 1980). To prevail on a defense for failure to mitigate damages, a defendant must establish "that, based on undisputed facts in the record, during the time in question there were substantially equivalent jobs available, which the plaintiff could have obtained, *and* that the plaintiff failed to use reasonable diligence in seeking one." *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1497 (9th Cir. 1995) (quoting *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994)) (cleaned up) (emphasis in original). The defendant bears the burden of proving a failure to mitigate damages. *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978).

Plaintiff alleges that Defendant has not produced any evidence proving that substantially equivalent jobs were available. ECF No. 52 at 11. For its part, Defendant contends that Plaintiff did not seek any comparable jobs but instead chose to become self-employed, and that numerous issues of fact remain as to whether Plaintiff's mitigation through self-employment was reasonable. ECF No. 63 at 11. Defendant also says that it has not received Plaintiff's monthly or annual profit or loss forms yet, and that it needs those documents to prove its mitigation defense. *Id.* at 12, n.3.

It appears that Defendant believes it does not need to produce evidence of other substantially equivalent available jobs so long as it can prove that Plaintiff's current self-employment is not substantially equivalent to his work at UPS. This approach has not been sanctioned by the Ninth Circuit. To prevail on a mitigation of damages defense, Defendant must provide evidence that substantially equivalent jobs were available to Plaintiff during the time in question which Plaintiff did not endeavor to obtain. To date, Defendant has submitted no declaration, report, or other material from which a finder of fact could draw the conclusion that other substantially equivalent jobs were available to Plaintiff outside of self-employment. Although genuine issues of fact can exist as to whether a plaintiff mitigated his damages through self-employment, *see Kloss v. Honewell, Inc.*, 77 Wash. App. 294, 301 (1995), a defendant must nevertheless provide evidence that other substantially equivalent employment existed. *Compare, e.g., McHugh v. Papillon Airways, Inc.*, No. 2:05-cv-00976-RLH-PAL, 2008 WL 182259, at *7 (D. Nev. Jan. 16, 2008) (genuine issue of material fact on mitigation of damages defense where plaintiff was self-employed *and* Defendant submitted data regarding employment rates of equivalent jobs in the area). Defendant did not do so, and accordingly Defendant cannot prevail on its mitigation of damages defense.

VIII. Punitive Damages

***18** Defendant argues that Plaintiff cannot recover punitive damages for intentional discrimination or retaliation. A party may recover punitive damages under Section 1981 "if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). "[A]n employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) (citation and internal quotation marks omitted). However, the limit on liability does not apply "when the corporate officers who engage in illegal conduct are sufficiently senior to be considered proxies for the company." *Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212 F.3d 493, 517 (9th Cir. 2000).

Material issues of fact pervade as to what agents had a role in Plaintiff's termination and the seniority of those persons. As such, the Court declines to enter summary judgment for Defendant on this issue.

CONCLUSION

Plaintiff's claims for discrimination and a hostile work environment are dismissed. Defendant's affirmative defenses of administrative exhaustion, statute of limitations, laches, preemption, waiver and estoppel, after-acquired evidence, and mitigation of damages are dismissed.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Partial Summary Judgment (ECF No. 52) is **GRANTED IN PART.**

2. Defendant's Motion for Summary Judgment (ECF No. 53) is **GRANTED IN PART.**

All Citations

Not Reported in Fed. Supp., 2024 WL 1724771

Footnotes

1 Cover drivers are assigned shifts based on seniority, and may be "laid off" on days they are otherwise scheduled to work based on the schedules of other drivers with regularly assigned routes and the volume of packages. ECF No. 54 at 3, ¶¶ 7-8.

2 As an initial matter, Plaintiff also claims that Defendant's response to his interrogatory asking Defendant to identify the factual bases for its affirmative defenses are lacking. ECF No. 52 at 8-9. Defendant supplemented its response to this interrogatory on June 30, 2023, with a factual statement of events it believed supported its defenses. ECF No. 63 at 3. The Court does not find anything further is required. Separately, Defendant concedes that its thirteenth affirmative defense (failure to exhaust administrative remedies) should be dismissed. ECF No. 63 at 13. The Court accepts Defendant's concession and dismisses the exhaustion defense.

3 Defendant did not respond to Plaintiff's argument that its affirmative defense of laches was barred. *Compare* ECF No. 52 at 13-14 (discussing the defense of laches) *with* ECF No. 63. Accordingly, the Court dismisses the defense of laches. *See Bowen v. Oistead*, 125 F.3d 800, 806 (9th Cir. 1997).

4 As mentioned, for his hostile work environment claims, Plaintiff may rely on evidence outside the limitations period.

5 Notably, the EEOC document—which was filed within the limitations period—references events *outside* the limitations period. Therefore, while the EEOC document itself may come in as evidence of Plaintiff engaging in protected activity, Plaintiff may not rely upon evidence of the discrete acts mentioned within that document to prove his retaliation and discrimination claims.

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787 Fed.Appx. 416 (Mem)
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See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Troy COACHMAN, Plaintiff-Appellee,
v.
SEATTLE AUTO MANAGEMENT, INC., dba Mercedes Benz of Seattle; Al Monjazeb, Defendants-Appellants.

No. 18-35881
|
Argued and Submitted November 7, 2019 Seattle, Washington
|
FILED December 11, 2019

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Appeal from the United States District Court for the Western District of Washington, Ricardo S. Martinez, District Judge, Presiding, D.C. No. 2:17-cv-00187-RSM

Before: GOULD and NGUYEN, Circuit Judges, and PRESNELL,[*] District Judge.

MEMORANDUM[**]

Seattle Auto Management, Inc. and Al Monjazeb appeal the district court's denial of their Rule 59 Motion for remittitur or ***417** new trial. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

The appellants first argue that the appellee's closing argument violated the court's *in limine* ruling with respect to the appellant's financial condition. Because the appellants failed to object at trial to the alleged misconduct, reversal is improper unless there was "plain or fundamental" error. *Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 517 (9th Cir. 2004). "Plain error review requires: (1) an error; (2) that the error be plain or obvious; (3) that the error have been prejudicial or affect substantial rights; and (4) that review be necessary to prevent a miscarriage of justice." *Id.* While making the closing argument at issue, counsel used Coachman's value to the appellants as an analog for his personal loss. While that comparison may have been inapt, there is no indication that it was prejudicial or affected substantial rights. The district court did not commit plain or fundamental error in denying the motion for a new trial.

The appellants also argue that the ratio between the noneconomic and economic compensatory damages renders $4,697,248 in noneconomic damages excessive. However, Washington law does not limit compensatory damages based on the ratio between economic and noneconomic damages. Indeed, we will not disturb the jury's verdict "unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice." *Bunch v. King Cty. Dep't of Youth Servs.*, 155 Wash.2d 165, 116 P.3d 381, 389 (2005) (quoting *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wash.2d 831, 699 P.2d 1230, 1233 (1985)). The appellants chose not to address damages during their closing argument, and there is support in the record for the size of the damages award; we find no persuasive reason to disturb the jury's verdict.

AFFIRMED.

All Citations

787 Fed.Appx. 416 (Mem)

Footnotes

* The Honorable Gregory A. Presnell, United States District Judge for the Middle District of Florida, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

GUPTA WESSLER LLP

October 24, 2025 - 4:47 PM

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