THE HONORABLE KARENA KIRKENDOLL
HEARING: OCTOBER 22, 2021; 9:00 A.M.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

GILLIAN MARSHALL,

Plaintiff,

v.

THE STATE OF WASHINGTON, UNIVERSITY OF WASHINGTON, a State Agency, DIANE YOUNG, individually, JILL PURDY, individually, and MARK PAGANO, individually,

Defendants.

No. 19-2-11120-3

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND RELIEF REQUESTED

The University of Washington hired Plaintiff, Dr. Gillian Marshall, as an assistant professor, gave her raises, and reappointed her for continued employment. When student evaluations showed serious problems with her teaching, the University appropriately considered that information in her annual reviews and in evaluating her tenure application. Dr. Marshall's poor teaching record led to two "non-meritorious" performance reviews and a failure to earn a lifetime tenured position. Dr. Marshall now claims that race discrimination is to blame. Race discrimination had nothing to do with it.

Under anti-discrimination laws, "legally sufficient evidence is required to transform an ordinary conflict . . . into an actionable claim of discrimination" because the "[l]aw does not blindly ascribe to race all personal conflicts between individuals of different races. To do so would turn the workplace into a litigious cauldron of racial suspicion." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 282 (4th Cir. 2000).[1] Here, Dr. Marshall catalogues a host of alleged workplace grievances that do not change the fact that Dr. Marshall's teaching record is inadequate to justify a lifetime appointment at the University. She has no evidence race negatively affected any employment decision about her, and her grievances also do not give rise to actionable claims under Washington's Law Against Discrimination (WLAD). The Court should enter summary judgment for Defendants.

II. STATEMENT OF FACTS

A. UWT ENTHUSIASTICALLY RECRUITED AND HIRED DR. MARSHALL.

The University of Washington Tacoma ("UWT") is one of three University of Washington campuses, and offers undergraduate, graduate, and professional degrees. In 2014, the Social Work and Criminal Justice ("SWCJ") program[2] at UWT began a search to hire a new assistant professor. Decl. of Diane Young in Supp. of Defs.' Mot. for Summ. J. ("Young Decl.")

[1] Washington courts often look to federal case law on Title VII when interpreting the WLAD. *Blackburn v. State*, 186 Wn.2d 250, 257–58, 375 P.3d 1076, 1080 (2016).

[2] This academic unit changed from a program to the School of Social Work and Criminal Justice during Dr. Marshall's employment. To avoid confusion, it will be referred to as a program through this motion.

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¶ 2. Defendant Dr. Diane Young was the program director. *Id.* ¶ 1. At that time, the program had only one black tenured faculty member, Dr. Marian Harris. *Id.* ¶ 3. Actively seeking to entice a diverse pool of strong applicants, the position was advertised widely, and with that goal in mind. *Id.* ¶¶ 3, 5 & Ex. A. The advertisement highlighted the program's interest in social justice, and specifically asked applicants to describe how their teaching, research, and service has supported students from racial, ethnic, and gender backgrounds traditionally underrepresented in their academic field. *Id.* Ex. B.

Dr. Marshall was a highly qualified applicant for this position. *Id.* ¶ 6. She has a Master of Social Work degree and PhD in social welfare from the University of Washington, and her interests were consistent with the SWCJ's needs. *Id.*; Second Suppl. Compl. ("Compl.") ¶¶ 2.2-2.3. Dr. Young and others participating in the search also understood Dr. Marshall was expecting to be awarded a K01 grant from the National Institutes of Health. Young Decl. ¶ 7. According to Dr. Marshall, the K01 grant is "career development award" intended to allow a young academic to focus on research. Decl. of Mary Crego Peterson in Supp. of Mot. for Summ. J. ("Peterson Decl.") Ex. A at 12:8-24. Indeed, Dr. Marshall testified that a K01 grant protects 75 percent of the faculty member's time for research, leaving only 25 percent for teaching and other service. *Id.* at 332:17-333:13. Dr. Marshall would have been the first faculty member in the SWCJ program to have a K01 grant. Young Decl. ¶ 7.

After personally meeting and interviewing several qualified candidates, including Dr. Marshall, Dr. Young asked permission to hire two candidates instead of one, noting that four of the top five candidates were people of color who could bring diverse perspectives to the program. *Id.* ¶ 8 & Ex. C. Thanks to Dr. Young's successful lobbying, she was able to make two offers to women of color, including Dr. Marshall, who describes herself as a black woman. Young Decl. ¶ 10; Compl. ¶ 2.1.

Dr. Marshall did not accept the University's offer of employment right away, and instead negotiated for a higher salary. Peterson Decl. Ex. A at 11:9-12:7. Dr. Young—who was eager to

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hire Dr. Marshall—agreed to increase the starting salary, and Dr. Marshall began working as an assistant professor at UWT in 2015. *Id.*; Compl. ¶ 2.1; Young Decl. ¶ 11.

B. DR. MARSHALL RECEIVED UNUSUALLY LOW TEACHING EVALUATIONS.

1. After her first year, Dr. Marshall received a strong course evaluation, was deemed "meritorious," and received a raise.

As expected, Dr. Marshall was awarded the K01 grant. Peterson Decl. Ex. A at 14:11-23. Because that grant required her to dedicate 75 percent of her time to research, she had limited time to teach. *See id.* While the typical teaching load in the SWCJ program was six courses per academic year, Dr. Marshall taught only one course per year. Young Decl. ¶ 13. The lone course she taught in her first year, the 2015-16 academic year, received positive reviews. *See* Peterson Decl. Ex. B at 13:15-14:8, 19:10-20:15; Ex. C.

Those strong teaching reviews contributed to a positive overall annual review for Dr. Marshall at the end of her first year. Each year, faculty members complete a report describing their activities in that academic year. *Id.* Ex. A at 324:7-22. Senior faculty review the reports of more junior faculty, and make recommendations regarding whether their performance should be deemed meritorious for that year. *Id.* A meritorious performance review may lead to a raise in years when the University is able to allocate funding for University-wide raises to all faculty deemed meritorious. Young Decl. ¶ 15. At the end of Dr. Marshall's first year, she was deemed meritorious and received a raise. Peterson Decl. Ex. A at 263:13-17.

2. Teaching problems emerged during Dr. Marshall's second year.

In Dr. Marshall's second year, the 2016-17 academic year, she taught a graduate level course that earned very negative student evaluations. On a scale from 1 (low) to 5 (high), Dr. Marshall's combined median course rating was a 2.8. Young Decl. Ex. D. Fifty-three percent of the evaluations rated her "evaluative and grading techniques" either "poor" or "very poor." *Id.* at 2. In narrative comments, one student noted that "Often the teacher presented as condescending or unaware that the students work in the social work field." *Id.* at 3. Another

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student noted, "The organization of the professor detracted from my overall learning." *Id.* at 4. Dr. Marshall was not deemed meritorious that year. Peterson Decl. Ex. A at 263:18-20.

3. Dr. Marshall's reappointment was postponed one year because of her mixed teaching record.

Beginning in the second year, the University conducts a detailed review of a non-tenured assistant professor's progress through a process known as "reappointment." Young Decl. ¶ 17. The reappointment review begins with a faculty committee that reviews the candidate's performance. *Id.* The process then proceeds to a recommendation by senior voting faculty members in the program, then to a recommendation by the program director, then to the campus chancellor who makes a final decision in conjunction with the executive vice chancellor for academic affairs. *Id.* Dr. Harris, who was the chair of Dr. Marshall's reappointment committee (Compl. ¶ 2.72), described the purpose as "to assess an assistant professor in three areas: research, teaching, and service, and to see if that individual is doing what he or she should be doing in order to get tenure and promoted at some point." Peterson Decl. Ex. B at 13:19-14:8.

Dr. Marshall's reappointment committee provided a written report that noted her strong research performance, but also expressed concerns about her teaching at the graduate level. *Id.* Ex. B at 13:15-14:8; Ex. C. Specifically, the committee noted:

> Her teaching evaluation for the graduate level course in Human Behavior and the Social Environment was extremely low (2.8 overall rating from the student teaching evaluation). This low rating is not as strong as the typical rating for faculty who teach Social Work graduate students. Students commented about the lack of clarity regarding assignments and grading as well as the instructor being unprepared for class. They felt that course material was not posted or made available in a timely manner. The committee noted that there seemed to be some organizational and communication issues in the graduate class as well as lack of attention to detail.

Id. Ex. C.

Nevertheless, the committee recommended reappointment. *Id.* Ex. B at 23:16-24:7. In a divided vote, the voting faculty in her department did not recommend reappointment. Decl. of Jill Purdy in Supp. of Defs.' Mot. for Summ. J. ("Purdy Decl.") Ex. A at UW13013. Ultimately, UWT decided to postpone the reappointment decision for one year to give Dr. Marshall

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additional time to demonstrate effective teaching. *Id.* at UW13014-15; Compl. ¶¶ 2.76-2.78. The decision to postpone reappointment did not change Dr. Marshall's title, compensation, job duties, or timeline for applying for tenure. Purdy Decl. ¶ 3.

4. Dr. Marshall's student evaluations in 2017-18 were shockingly low.

During her third year, Dr. Marshall's student teaching evaluations got worse. She once again taught only one course, again at the graduate level, and students gave her a combined median rating of 1.3 on a scale of 1-5. Young Decl. Ex. F. Seventy-three percent of the evaluations noted the "clarity of student responsibilities" was "very poor." *Id.* Seventy-two percent of the evaluations noted her use of class time was "poor" or "very poor." *Id.* Narrative comments noted problems including lack of preparation, poor time management and disorganization. *Id.* One evaluation stated: "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'm just glad it's over." *Id.* at 4.

In her deposition, even Dr. Marshall admitted that she did not consider a 1.3 rating to be meritorious. Peterson Decl. Ex. A at 330:23-331:4. In fact, she was not deemed meritorious that year. *Id.* at 263:21-23.

Because Dr. Marshall had two consecutive years of non-meritorious reviews, the Faculty Code required appointment of an ad hoc committee to assess the appropriateness of those reviews. Faculty Code Section 24-55(H) (Purdy Decl. Ex. B); Compl. ¶ 2.113. That committee was chaired by Dr. Erin Casey, who also chaired the search committee that recommended hiring Dr. Marshall. Young Decl. ¶ 23 & Ex. I. The committee reviewed materials relating to Dr. Marshall's merit evaluations and met with her before issuing a report. *Id.* Ex. I. It found the non-meritorious ratings were appropriate, and once again noted concerns regarding her teaching evaluations. *Id.*; Compl. ¶ 2.119.

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5. Dr. Marshall was reappointed despite serious concerns about her teaching record.

Because her reappointment was postponed the previous year, Dr. Marshall went through the reappointment process again in 2017-18. Her reappointment review recognized both the strengths and weaknesses of her performance, including positive research contributions and negative student evaluations of her teaching. Dr. Young praised Dr. Marshall for her research performance, but noted consistent, serious concerns raised by students in two separate classes. Based on these concerns, Dr. Young did not recommend reappointment. Young Decl. Ex. G. Defendant Jill Purdy, Executive Vice Chancellor for Academic Affairs, recommended reappointment. Purdy Decl. ¶ 4 & Ex. A at UW13023-25. Defendant Mark Pagano, Chancellor, also favored reappointment. Decl. of Mark Pagano in Supp. of Defs.' Mot. for Summ. J. ("Pagano Decl.") ¶ 3. Despite serious concerns about her teaching record, Dr. Marshall was reappointed for a second three-year term as a non-tenured, but tenure-track, assistant professor. Young Decl. Ex. H.

Even in making the reappointment, Dr. Purdy highlighted concerns that had been raised about Dr. Marshall's record, including her teaching. Purdy Decl. Ex. A at UW13023-25. Dr. Purdy pointed out that Dr. Marshall's review committee concluded Dr. Marshall's teaching was not on track for tenure and promotion, and that she would have very limited opportunities to demonstrate strong teaching capability prior to promotion and tenure review. *Id.* Dr. Purdy encouraged Dr. Marshall "to attend to the concerns outlined" in the letter as she advanced "toward promotion and tenure review," and Dr. Purdy tried to help by offering Dr. Marshall a paid teaching mentor from the Tacoma campus. *Id.* & ¶ 5. After discussing candidates, Dr. Marshall selected Dr. Carolyn West, another woman of color, to be her teaching mentor. *Id.* ¶ 5; Peterson Decl. Ex. A at 142:10-23.

Despite these efforts, in 2018-19, Plaintiff taught at the graduate level again, and again received very low student evaluation scores. *Id.* Ex. J. This time a 1.9 out of 5. *Id.* Although

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recommendations were once again mixed, Plaintiff was deemed meritorious in 2018-2019, as well as in 2019-20. Peterson Decl. Ex. A at 264:14-24.

C. THE UNIVERSITY INVESTIGATED DR. MARSHALL'S CONCERNS ABOUT DISCRIMINATION AND FOUND THEM TO BE UNSUBSTANTIATED.

Even though she was ultimately reappointed, Dr. Marshall raised concerns about discrimination following her second reappointment review. Compl. ¶ 2.107. The University prohibits discrimination and retaliation, and has established a separate office—the University Compliant Investigation and Resolution Office (UCIRO)—to conduct neutral investigations of alleged violations. Pagano Decl. Exs. A-B. By policy, when discrimination concerns are raised by employees, UCIRO will investigate allegations going back one year; when concerns are raised by University administrators, UCIRO will go back further. *Id.* Ex. B at UW5592; Peterson Decl. Ex. A at 296:5-23.

Because Dr. Marshall wanted UCIRO to review her allegations of discrimination stretching back more than one year, she asked Defendant Mark Pagano, UWT's Chancellor, to support an institutional investigation of her claims. Peterson Decl. Ex. A at 296:5-23; Compl. ¶¶ 2.125-2.129. Dr. Pagano agreed, and asked UCIRO to investigate Dr. Marshall's claims. Pagano Decl. ¶ 7. The investigation was conducted by Beth Louie, a UCIRO investigator and also a woman of color. Peterson Decl. Ex. A at 54:4-8. Ms. Louie interviewed 20 witnesses and reviewed relevant documents, and did not find evidence of discrimination against Dr. Marshall. *Id.* at 158:16-159:25 & Ex. D at 4-5. Ms. Louie reported her findings to Dr. Marshall during an in-person meeting. Dr. Marshall brought a court reporter to transcribe that meeting. *See id.* Ex. D. Ms. Louie told Dr. Marshall that, based on Ms. Louie's investigation, "the concerns about teaching evaluations and the teaching scores sort of drove" the decisions Dr. Marshall was concerned about. *Id.* at 5. Dr. Marshall also received a letter closing the investigation and stating that Ms. Louie could not substantiate any claims that the University's anti-discrimination policies had been violated. *Id.* Ex. A at 161:20-163:7; Ex. E.

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D. DR. MARSHALL DID NOT EARN TENURE

1. Tenure applicants must meet very high standards, and applications receive rigorous review.

In June 2020, Dr. Marshall applied for tenure and promotion to the rank of associate professor. Compl. ¶ 2.132. Tenure is a recognition of high quality teaching and scholarship, and is akin to a lifetime appointment. Once a candidate earns tenure, he or she may be removed under only very limited circumstances, such as conviction of a felony or scholarly misconduct. Faculty Code 25-51 (Purdy Decl. Ex. C).

Tenure is an honor to be earned, not a right accorded all faculty members. Under the University's Faculty Code:

> Tenure should be granted to faculty members of such scholarly and professional character and qualifications that the University, so far as its resources permit, can justifiably undertake to employ them for the rest of their academic careers. Such a policy requires that the granting of tenure be considered carefully. It should be a specific act, even more significant than promotion in academic rank, which is exercised only after careful consideration of the candidate's scholarly and professional character and qualifications.

Faculty Code 25-41(A). As a candidate for tenure and promotion to associate professor, Dr. Marshall was required to demonstrate "a record of substantial success in teaching and/or research. For . . . tenure-eligible . . . appointments, *both of these shall be required*, except that in unusual cases an outstanding record in one of these activities may be considered sufficient." Faculty Code 24-34(A)(2)[3] (emphasis added) (Purdy Decl. Ex. B).

The process to obtain tenure is extremely rigorous, in keeping with the significant long-term commitment the University is considering. The candidate prepares an extensive dossier of professional accomplishments, including a detailed curriculum vitae, teaching evaluations, and a self-assessment. Faculty Code 24-54(B). These dossiers are often hundreds of pages long, and are a candidate's opportunity to make the case that a lifetime appointment has been earned. Purdy Decl. ¶ 8.

[3] This language was amended slightly while Dr. Marshall's tenure application was being reviewed. It previously required "a record of substantial success in both teaching and research, except that in unusual cases an outstanding record in one of these activities may be considered sufficient." For purposes of this action, it there is no substantive difference.

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The promotion and tenure candidacy is then reviewed at multiple levels of the University, including by (1) a promotion and tenure committee comprising members of the candidate's department or school; (2) all tenured faculty superior in rank in the candidate's department or school; (3) the director or dean of the department or school; (4) a campus council comprising six elected faculty members; (5) the vice chancellor for academic affairs and the chancellor; and (6) the Provost. Faculty Code 24-54; 25-41(B); Purdy Decl. ¶ 9. Because of joint accreditation, Dr. Marshall's review also included recommendation by the dean of the School of Social Work in Seattle. Purdy Decl. ¶ 9. Although each of these levels of review results in a recommendation, the Provost makes the ultimate decision under the Faculty Code. Faculty Code 25-41(B).

2. Dr. Marshall's tenure candidacy failed to receive support at any level of review.

Dr. Marshall's tenure application was reviewed carefully at each required level. Her four-person promotion and tenure committee unanimously recommended *against* tenure, as did all tenured faculty in her department, with the exception of two who abstained, including Defendant Dr. Young. Purdy Decl. Ex. A at UW12846; Young Decl. ¶ 26. The interim director of her department also recommended against tenure (Dr. Young had, by this time, stepped down), as did the Seattle-based dean of the School of Social Work, a woman of color. Purdy Decl. Ex. A at UW12869-76, UW12891-92. Only non-SWCJ faculty members on the campus council considered Dr. Marshall's tenure application, and that group of six faculty members also did not support tenure, with two in favor, two against, one abstaining, and one absent for the vote. *Id.* at UW12846, UW12868. The vice chancellor, Defendant Jill Purdy, recommended against tenure, as did the chancellor, Defendant Mark Pagano. *Id.* at UW12846-50.

By the time Dr. Marshall's application reached the Provost's desk, only two people who had reviewed Dr. Marshall's tenure application had concluded she had earned tenure, while seventeen—including everyone casting a vote within her school and in the field of social

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work—concluded she had not earned tenure. The Provost also concluded she had not earned tenure. *Id.* at UW12841.

3. At each level of review, Dr. Marshall's poor teaching record was a deciding factor.

At each level of tenure review, Dr. Marshall's poor teaching record was a deciding factor. Her promotion and tenure committee found her research record met the standard for tenure and promotion, but noted that the student evaluations for her graduate level courses were "universally low," and concluded that her overall teaching record did not meet the standard for tenure and promotion. Purdy Decl. Ex. A at UW12896-97. The committee noted that, even if racial and gender bias were factors in her poor teaching evaluations, those "factors collectively are unlikely to fully account for the unusually low nature of these scores." *Id.*

The senior faculty in her department also concluded her teaching did not meet the standard for tenure. They observed that the overall "magnitude of Dr. Marshall's low [teaching] scores are unheard of across the UW Tacoma campus." *Id.* Ex. A at UW12878. They acknowledged that, because of her K01 research grant, Dr. Marshall had taught only one course per year instead of the usual six, but explained that they "did not take issue with her reduced teaching load, but rather with the poor quality of her teaching." *Id.* The interim director of Dr. Marshall's department also concluded that bias alone cannot have accounted for her low teaching scores, and that she did not meet the "requirements for effective teaching." *Id.* at UW12873. And the Seattle-based dean of the School of Social Work concluded that Dr. Marshall's "teaching record is weak." *Id.* at UW12891.

The six-member campus-wide faculty council had more mixed reviews of her teaching, but still did not recommend tenure. Some focused on the lack of improvement in her student evaluations, while others concluded she had shown some improvement. *Id.* at UW12865-66. Some also thought her research record was inadequate given the fact that she had dedicated 75 percent of her time to research. *Id.* After considering these and other factors, the council—

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comprising, for Dr. Marshall's review, only non-SWCJ faculty members—did not recommend tenure. *Id.* at UW12868.

Dr. Purdy, Executive Vice Chancellor for Academic Affairs at UWT, also did not recommend tenure, citing Dr. Marshall's failure to demonstrate an ability to teach effectively. *Id.* at UW12849. Indeed, she noted that, of the five courses Dr. Marshall had taught before applying for tenure, three—more than half—had low scores. *Id.* at UW12846. Chancellor Pagano agreed with Dr. Purdy's assessment, and likewise did not recommend tenure. *Id.* at UW12850.

Provost Richards also concluded Dr. Marshall had not earned promotion and tenure because of her teaching. After considering her record, including her expressed concerns about discrimination, his decision was "a performance based assessment focused on deficiencies in the teaching record." *Id.* at UW12841.

E. DR. MARSHALL'S ALLEGATIONS

In addition to allegations relating to her annual performance reviews, reappointment process, and failure to earn tenure, Dr. Marshall's Complaint also catalogues a variety of other perceived workplace slights. These include the opposition she claims she faced when she decided to administer her K01 grant through the Seattle campus rather than the Tacoma campus, *e.g.*, Compl. ¶¶ 2.38-2.43; a request that she teach a class she did not want to teach (and was not required to teach after she complained), *id.* ¶¶2.79-2.82; apparently poorly received recommendations not to dedicate an entire additional quarter only to research given her teaching record, *id.* 2.54-2.63; alleged challenges she faced in obtaining a copy of her personnel file from administration, *id.* ¶ 2.131.3; and an allegation that another professor was "speaking negatively" about her to students, *id.* ¶ 2.131.4.

Dr. Marshall claims these and other incidents described in her Complaint constitute (1) intentional discrimination in violation of the Washington Law Against Discrimination (WLAD); (2) retaliation in violation of WLAD; (3) harassment in retaliation for opposing

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discrimination in violation of WLAD; (4) aiding and abetting (by Drs. Young, Purdy, and Pagano) discrimination, harassment, and retaliation in violation of WLAD; and (5) whistleblower retaliation in violation of RCW 42.40 et seq. and WLAD. Compl. ¶¶ 3.1-3.7

III. STATEMENT OF ISSUES

Should the Court enter summary judgment for Defendants because no evidence exists showing Defendants discriminated or retaliated against Dr. Marshall because of her race?

IV. EVIDENCE RELIED UPON

Defendants rely on the Declarations of Mary Crego Peterson, Diane Young, Jill Purdy, and Mark Pagano in support of this motion, along with the other papers and pleadings cited in this motion.

V. AUTHORITY

Dr. Marshall claims Defendants discriminated and retaliated against her based on her race, in violation of the WLAD. Compl. ¶¶ 3.1-3.3. To prove a WLAD violation, she must show that race was a "substantial factor" in motivating her employer's actions. *E.g.*, *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 445, 334 P.3d 541 (2014). Dr. Marshall can prove no such thing.

Dr. Marshall alleges no direct evidence of race discrimination. "Direct evidence" is evidence, such as derogatory remarks, that requires no inference of racial animus. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998); *see also Alonso v. Qwest Commc'ns Co., LLC*, 178 Wn. App. 734, 744, 315 P.3d 610 (2013) (an "an employer's discriminatory remarks" generally constitute "direct evidence of discrimination"). If a plaintiff lacks direct evidence of race discrimination, Washington courts evaluate indirect evidence using the burden shifting standard established by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Id.* [Scrivener?] at 445-46.

Under the *McDonnell Douglas* framework, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *Scrivener*, 181 Wn.2d at 446. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse

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employment action. *Id.* If the defendant meets that burden, the plaintiff must produce sufficient evidence that the defendant's alleged nondiscriminatory reason was a "pretext" for discrimination or that race was otherwise a substantial factor in the employer's decision. *Id.* at 446-448. Evidence of pretext "must be *specific and substantial* in order to create a triable issue." *Mondero v. Salt River Project*, 400 F.3d 1207, 1213 (9th Cir. 2005) (emphasis added).

Here, as described below, Dr. Marshall cannot establish a prima facie case of race discrimination or retaliation. Even if she could, she cannot show that Defendants' actions were animated by anything other than Dr. Marshall's poor teaching record.

Dr. Marshall also alleges a whistleblower claim. Compl. ¶ 3.7. In January, Defendants moved for partial summary judgment on three issues, including Dr. Marshall's whistleblower claim. The hearing on that motion was stricken when the parties proposed changes to the trial schedule. Peterson Decl. ¶ 7 & Ex. F. That motion is fully briefed, and Defendants have re-noted that motion for October 22, 2021, to be heard with this motion, to avoid repetitive briefing. That whistleblower claim, like all the others, should be dismissed.

A. THE COURT SHOULD DISMISS DR. MARSHALL'S UNFOUNDED DISCRIMINATION CLAIMS.

Although it is not clear from the face of the Complaint itself, Dr. Marshall has indicated she is bringing two types of discrimination claims: (1) a claim for disparate treatment, and (2) a claim for hostile work environment. Both should be dismissed.

1. The Court should dismiss Dr. Marshall's disparate treatment claims.

Disparate treatment "occurs when an employer treats some people less favorably than others because of race." *Alonso*, 178 Wn. App. at 743. To establish a prima facie case of disparate treatment discrimination, "a plaintiff must show that his employer simply treats some people less favorably than others because of their protected status." *Id.* A plaintiff generally must show that (1) she is a member of one or more protected classes; (2) she suffered a tangible adverse employment action; (3) the action occurred under circumstances that raise a reasonable inference of unlawful discrimination; and (4) she was doing satisfactory work. *See Marin v.*

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King Cty., 194 Wn. App. 795, 808–09, 378 P.3d 203 (2016). An adverse employment action must be a tangible action such as a demotion or a reduction in pay, and does not include inconveniences or even, for example, an employer yelling at or threatening to fire an employee. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004).

For purposes of this motion, Defendants assume Dr. Marshall meets the first two prongs of the prima facie test: (1) that she is a member of a protected class, and (2) that she suffered a tangible adverse employment action when the University declined to grant her tenure and, accordingly, set a termination date of June 15, 2022. Purdy Decl. Ex. A at UW12841. But Dr. Marshall cannot show she was doing "satisfactory work" (fourth prong) or, therefore, that any tangible adverse employment actions occurred under circumstances giving rise to a reasonable inference of discrimination (third prong). As described above, of the five classes Dr. Marshall had taught by the time of her tenure application, three had low teaching scores. Those low teaching scores were the animating factor behind every conceivable "tangible adverse employment action" affecting Dr. Marshall, including her failure to earn tenure and her non-meritorious performance reviews (which, while not reducing her pay, did result in her failing to earn raises each non-meritorious year).

Even if the Court were to assume a prima facie case of disparate treatment, Dr. Marshall could not show that University decisionmakers relied on her poor teaching record only as "pretext" to conceal race discrimination. Nearly every person at every layer of her tenure review reached the same conclusion: that Dr. Marshall's teaching record was insufficient to earn tenure. Dr. Marshall has no evidence—certainly not specific and substantial evidence—that race was a substantial factor for any of those faculty members, let alone all eighteen of them. *Mondero*, 400 F.3d at 1213.

None of the other grievances Dr. Marshall raises constitute "tangible adverse employment actions" remotely akin to a hiring, firing, failure to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

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Marin, 194 Wn. App. at 808. Dr. Marshall catalogues a long list of perceived slights ranging from administrative obstacles to a lack of general supportiveness. But those are not the sorts of tangible employment actions that give rise to WLAD claims. *See id.* When the University took actual, tangible action that changed the terms of her employment, it was because of Dr. Marshall's teaching record. There is no evidence that race was a substantial factor.

2. Dr. Marshall Cannot Prove a Hostile Work Environment.

Dr. Marshall also alleges she is making a "hostile work environment" claim, which is different from a disparate treatment claim. To prove a "hostile work environment," Dr. Marshall must show "harassment" that (1) was unwelcome, (2) was because of race, (3) affected the terms and conditions of employment, and (4) is imputable to the employer. *Antonius v. King Cty.*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004). The third element "requires that the harassment be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment," and must "be determined with regard to the totality of the circumstances." *Id.* (citations and quotations omitted).

"Harassment" is conduct an employee finds offensive. *Goode v. Tukwila Sch. Dist. No. 406*, 194 Wn. App. 1048, *3 (2016) (unpublished). Discriminatory or derogatory comments, mockery, or insults towards the employee generally constitute harassment. *Id.* (citing cases). But "[a]sserting subjective offense to facially innocuous comments, especially without acknowledging how the comment was discriminatory, is not sufficient to prevent summary judgment dismissal." *Id.*

Discrete employment actions do *not* constitute harassment. For example, in *Goode v. Tukwila School District*, the court held that racist comments constitute harassment, but that individual employment actions do not:

> Goode also relies on numerous incidents throughout his employment to establish harassment, such as the change of the physical education department head and his exclusion from decision making processes. But case authority demonstrates that these incidents do not constitute harassment for hostile work environment purposes. These incidents may support a disparate treatment claim.

194 Wn. App. 1048, *4.

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Here, Dr. Marshall identifies no conduct that constitutes "harassment" under Washington law. Instead, she catalogues a wide variety of workplace slights and frustrations, all of which are the sorts of incidents that could only serve as bases for disparate treatment claims, and then only if they had resulted in tangible adverse employment actions (which, with only a few arguable exceptions described above, they did not). Dr. Marshall does not describe a workplace in which she is objectively subject to ridicule, hostility, or discriminatory comments. She claims only to have encountered workplace obstacles that she subjectively considers to have been motivated by racial animus. None of this is sufficient to defeat summary judgment.

Indeed, the WLAD is not "intended as a general civility code," and "not everything that makes an employee unhappy is an actionable adverse action." *Alonso*, 178 Wn. App. at 747 (citations and quotations omitted). Courts may not "transmute . . . ordinary workplace disagreements between individuals of different races into actionable race discrimination." *Hawkins*, 203 F.3d at 276. Instead, "legally sufficient evidence is required to transform an ordinary conflict . . . into an actionable claim of discrimination" because the "[l]aw does not blindly ascribe to race all personal conflicts between individuals of different races. To do so would turn the workplace into a litigious cauldron of racial suspicion." *Id.* at 282. Here, there is no legally sufficient evidence to suggest Dr. Marshall has alleged anything other than "ordinary workplace disagreements."

Dr. Marshall also cannot show harassment sufficiently *pervasive* that it altered the conditions of employment and created an abusive working environment. *Antonius*, 153 Wn.2d at 261. Very few of the workplace episodes described by Dr. Marshall are linked. They involve different incidents over several years, and different individuals at the University. Courts must consider whether the alleged acts involved "the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers." *Crownover v. State ex rel. Dep't of Transp.*, 165 Wn. App. 131, 144, 265 P.3d 971 (2011). Acts that are "so discrete in time or circumstances that they do not reinforce each other do not constitute a single hostile

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work environment." *Id.* (discussing application of statute of limitations) (citations and quotations omitted). Here, Dr. Marshall describes too many different episodes, involving too many different actors, to prove any single hostile work environment. She certainly cannot prove an environment that went so far as to "alter the conditions of her employment." The Court should enter summary judgment for Defendants on her hostile work environment claim.

3. Defendants Are Entitled to an Inference of Nondiscrimination Because They Went Out of Their Way to Hire Dr. Marshall.

Dr. Marshall alleges she has suffered racial discrimination, uninterrupted, since even before she started at UWT in September 2015. Peterson Decl. Ex. A at 111:24-112:4, 400:9-23. She alleges this even though Dr. Young lobbied for an extra position in order to ensure she could hire her, and even though Dr. Young increased the offered salary in order to persuade Dr. Marshall to accept. These facts raise an obvious question courts require plaintiffs like Dr. Marshall to answer: "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?" *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 189-90, 23 P.3d 440 (2001), *abrogated on other grounds by Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cnty.*, 189 Wn.2d 516, 404 P.3d 464 (2017).

Where the same actor is responsible for both hiring the plaintiff *and* for alleged adverse employment actions that occurred later, "there is a strong inference that [the plaintiff] was *not* discharged because of any attribute the decision makers were aware of at the time of hiring." *Hill*, 144 Wn.2d at 189. This "same-actor inference" is "a 'strong inference' that a court must take into account on a summary judgment motion." *Schechner v. KPIX-TV*, 686 F.3d 1018, 1026 (9th Cir. 2012) (citations omitted). The "same actor inference" does not require that the decision makers be strictly the "same" and does not require an especially short period of time between hiring and any adverse actions. *Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 438, 454, 115 P.3d 1065 (2005).

Here, Dr. Young and the SWCJ program intentionally sought out diverse candidates for the program. After identifying at least four strong applicants of color, Dr. Young lobbied the

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administration to allow her to hire two, rather than just one, including Dr. Marshall. Dr. Young then increased the salary she offered to Dr. Marshall (at Dr. Marshall's request) to ensure Dr. Marshall took the job. Dr. Marshall now claims she was immediately the subject of race discrimination, including by Dr. Young, and has suffered discrimination ever since. Under these circumstances, Defendants are entitled to the "strong inference" that they did *not* go out of their way to hire Dr. Marshall, only to immediately (in Dr. Marshall's view) begin discriminating against her because of her race. The Court should apply the "same actor inference" to Defendants, and particularly to any actions involving Dr. Young and the SWCJ program.

B. THE COURT SHOULD DISMISS DR. MARSHALL'S RETALIATION CLAIMS

The *McDonnell Douglas* burden shifting analysis also applies to Dr. Marshall's claims for retaliation and for "retaliation for opposing discrimination."[4] *E.g.*, *Mackey v. Home Depot USA, Inc.*, 12 Wn. App. 2d 557, 571 (2020) (retaliation for opposing discrimination); *Currier v. Northland Servs. Inc.*, 182 Wn. App. 733, 742-43, 332 P.3d 1006 (2014) (retaliation). In order to state a prima facie case of retaliation under the WLAD, Dr. Marshall must show that (1) she engaged in statutorily-protected activity; (2) her employer took adverse employment action against her; and (3) there was a causal link between her protected activity and the employer's adverse action. *See Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002). Dr. Marshall cannot meet these standards. Even assuming she engaged in statutorily-protected activity, she admits she has suffered no adverse employment action as a result.

In her deposition, Dr. Marshall was repeatedly asked how she was treated after key events during her time at UWT. For example, after she filed her tort claim, she claims she suddenly received *better* treatment from UWT administration. Peterson Decl. Ex. A at 102:11-103:4; 409:6-410:1. She could recall no difference in how she was treated before and after she filed this lawsuit. *Id.* at 414:19-21. After she initiated the UCIRO investigation, she testified that

[4] Dr. Marshall's Complaint does not make clear what difference, if any, exists between these two claims. Dr. Marshall's claim for whistleblower retaliation under the WLAD appears to be indistinguishable from, and premised on, her claim for "whistleblower retaliation" under RCW 42.40. *See* Compl. ¶ 3.7.

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she was treated better than she had been before. *Id.* at 407:15-408:2. And even if she felt as if members of her department started keeping their distance after she initiated the UCIRO investigation, her interactions with her fellow faculty members were not meaningfully different than they were before the UCIRO investigation, and nothing her faculty colleagues did would constitute an adverse employment action (*e.g.*, hiring, firing) necessary to sustain a retaliation claim. *Id.* at 402:23-406:3. In short, Dr. Marshall cannot prove retaliation without proving *adverse action* that was *caused* by her allegedly protected activity. *See Milligan*, 110 Wn. App. at 638. Here, she admits she was largely treated *better* following the activities she claims were protected, or that any negative changes in treatment were minor. She cannot have suffered unlawful retaliation under those circumstances.

Even if Dr. Marshall could make a prima facie case for retaliation, her claims would still be subject to the *McDonnell Douglas* burden shifting analysis described above, and she would have to show—with specific and substantial evidence—that any adverse employment actions were pretext for race discrimination. *Milligan*, 110 Wn. App. at 638; *Mondero*, 400 F.3d at 1213. For the reasons already discussed, she cannot do that. The tangible adverse employment actions at issue resulted from her poor teaching record, not the color of her skin. The Court should enter summary judgment for Defendants on all of Dr. Marshall's retaliation claims.

C. NO AIDING AND ABETTING LIABILITY CAN EXIST WITHOUT UNDERLYING DISCRIMINATION.

Because Dr. Marshall cannot prove her discrimination and retaliation claims under the WLAD, she cannot prove that Drs. Young, Purdy, or Pagano aided and abetted discrimination or retaliation. Without an underlying act of unlawful discrimination or retaliation, an aiding and abetting claim must be dismissed. *E.g.*, *Hargrave v. Univ. of Wash.*, 113 F. Supp. 3d 1085, 1106 (W.D. Wash. 2015). The individual Defendants emphatically deny taking any action to harm Dr. Marshall on the basis of her race in any event, and Dr. Marshall has no evidence of racial motivation for any recommendations or actions by the individual defendants. Young Decl. ¶ 27;

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Purdy Decl. ¶ 10; Pagano Decl. ¶ 8. The Court should enter summary judgment for the individual defendants.

D. COURTS AND JURIES ARE NOT "SUPER-TENURE REVIEW COMMITTEES."

Fundamentally, this case now appears to be about tenure, and, for all the reasons outlined in Defendants' re-noted motion for partial summary judgment, Defendants urge the Court not to stray beyond its proper role in rooting out unlawful race discrimination. Courts are not empowered to act as "Super-Tenure Review Committees." *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980) (citations and quotations omitted). Indeed, "academic tenure decisions involve subjective judgments on scholarship that neither courts nor juries are well qualified to make," and "a disagreement among academic professionals . . . is something that [anti-discrimination laws do] not proscribe." *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1067-68 (9th Cir. 2002), *overruled on other grounds by Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457 (9th Cir. 2014). Here, Dr. Marshall is asking the Court to invite twelve citizens to act as her tenure review committee based on nothing more than her subjective view that she has suffered discrimination. The Court should enter summary judgment for Defendants.

VI. CONCLUSION

Dr. Marshall failed to earn tenure, and earned two non-meritorious performance reviews, because of her poor teaching record. No evidence exists showing that those employment actions, or any other, were motivated by racial animus. Indeed, Defendants hired Dr. Marshall hoping and expecting she would be successful at UWT. The Court should not accept Dr. Marshall's invitation simply to assume, as Dr. Marshall apparently does, that every perceived workplace slight she claims she experienced is racially motivated or actionable. The Court should enter summary judgment for the Defendants and dismiss all of Dr. Marshall's claims.

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Dated this 24th day of September, 2021.

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CERTIFICATE OF SERVICE

On the date indicated below, I hereby certify that I caused to be served upon all counsel of record, via Linx eservice and email, a true and correct copy of the foregoing document.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of September, 2021, at Seattle, Washington.

s/Brenda K. Partridge
Brenda K. Partridge

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