

Hon. Lauren King

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSHUA A. DIEMERT, an individual,)	
)	Civil Action No. 2:22-cv-01640-LK
Plaintiff,)	
)	
v.)	PLAINTIFF’S OPPOSITION TO
)	DEFENDANT’S MOTION TO
THE CITY OF SEATTLE, a Municipal)	DISMISS PURSUANT TO RULE 12(b)
Corporation,)	
)	
Defendant.)	Noted on motion calendar April 7, 2023
)	
)	ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

The City moves under Fed. R. Civ. P. 12(b)(6) to dismiss a complaint of its own invention—not the one before this Court. The City’s motion¹ disregards Mr. Diemert’s detailed allegations, misconstrues the claims of his First Amended Complaint (FAC, Dkt. 11), and fails in its attempt to justify the racial harassment and discrimination it inflicted upon him. The FAC extensively details each of Mr. Diemert’s claims, leaving no doubt that if he proves those well-pled allegations, the City is liable for violating his rights. Put simply, the City has failed to demonstrate “beyond doubt” that Mr. Diemert can prove “no set of facts entitling him to relief.” *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011).

The City offers three bases on which to dismiss the complaint, but none are convincing. *First*, Mr. Diemert has stated plausible equal protection, Title VII, and Washington Law Against Discrimination (WLAD) claims. He has pled severe racial harassment and retaliation (FAC ¶¶ 3–6, 28, 32–36, 45, 48–54, 57–58, 63–69, 70–77, 85, 88, 90–98, 120–125, 129–143, 152–165, 174–184) that compromised his work environment and his health (FAC ¶¶ 3–6, 55, 70–74, 86, 92, 103). *Second*, whether the Race and Social Justice Initiative (RSJI) is narrowly tailored to achieve a compelling purpose is plainly premature on a motion to dismiss, but, in any event, the City cannot meet its immense burden under strict scrutiny. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). *Third*, Mr. Diemert filed a tort claim form and gave 60 days’ notice before bringing his claims. *See* Exh. 6 of FAC (Dkt. 11-6) (showing that the City received Mr. Diemert’s form on November 14, 2022). Mr. Diemert received a letter from the City on January 19, 2023, indicating that it had received notice of his claim. *See* Exh. 1.²

¹ Mr. Diemert responds to Defendant’s Corrected Motion to Dismiss (MTD) attached to Defendant’s Praecipe at Dkt. 19. Although Defendant has improperly attached exhibits to its motion, each exhibit further corroborates Mr. Diemert’s claims.

² Mr. Diemert requests that this Court take judicial notice of the City having received his tort claim form pursuant to Fed. R. Evid. 201. In any event, in light of this letter, it is obviously incorrect for the City to assert that there is no possible evidence supporting Mr. Diemert’s contention that he filed a tort claim notice.

1 If Mr. Diemert can prove the allegations set forth in the First Amended Complaint—as
2 this Court must assume on a motion to dismiss—he will prevail on his claims. Accordingly, this
3 Court should deny the City’s motion.

4 II. STATEMENT OF FACTS

5 A. The Race and Social Justice Initiative Is Official City Policy that Requires 6 Employees to Use Race Throughout Their Employment

7 The City concedes that the RSJI is its longstanding practice and standard operating
8 procedure. *See* MTD, Dkt. 19-1 at 5 (“The Race and Social Justice Initiative is the City’s
9 commitment...”); (“This work is critical to the City, including Plaintiff’s former department,
10 the HSD.”); at 6 (“The RSJI training are for all employees...”); at 7 (“Another component of
11 the RSJI is the Race Equity Toolkit...”). Further, it is indisputable that RSJI directs employees
12 to lead with race, “center People of Color,” “de-center whiteness,” and that all white employees
13 should work at undoing their “whiteness” and “prioritize the leadership of Black, Indigenous,
14 and People of Color...” FAC ¶ 41.

15 Since 2005, all City departments have developed and implemented annual RSJI work
16 plans. City employees are encouraged to attend training to examine “program and budget change
17 decisions from a race and social equity perspective.” FAC ¶ 43. Employees use the Racial Equity
18 Toolkit to accomplish this objective. FAC ¶ 43. The City’s Office for Civil Rights proclaims that
19 institutionalizing the Racial Equity Toolkit is its “most pressing priority,” and the City instructs
20 its employees that “colorblindness” is a form of white supremacy. FAC ¶ 44. The Racial Equity
21 Toolkit guides application of RSJI policy and instructs employees to see each other through a
22 racial lens. When combined with the discriminatory training and mandates of the RSJI, the
23 application of the Racial Equity Toolkit fomented an environment that led to the discriminatory
24 practices that severely impacted Mr. Diemert.

25 RSJI applies to all employees, but it applies differently to employees depending on their
26 racial identity. RSJI forces employees to make assumptions about fellow employees because of
27 their race. *See* FAC ¶ 42 (“RSJI divides people into two main categories, white and ‘Black,
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1 Indigenous and People of Color’ (BIPOC), or ‘oppressor’ and ‘oppressed.’ City training
2 promotes ‘BIPOC Affinity Spaces’ and encourages the exclusion of ‘white folks....”).
3 Accordingly, Mr. Diemert was treated significantly worse than his BIPOC-identifying
4 colleagues consistent with City policy. He was regularly told that he could never experience
5 racism because he possessed “privilege,” and that he was “consciously or unconsciously” to
6 blame for systemic racism solely because of his race. *See* FAC ¶¶ 4, 49, 70, 83, 90–91. The
7 City’s RSJI resulted in an environment where directors were encouraged and did use race in
8 employment decisions (FAC ¶ 104), the City denied access to services to white applicants (FAC
9 ¶ 49), racially segregated training and staff meetings (FAC ¶¶ 77, 79, 92), allowed Mr. Diemert
10 to be physically accosted while being subjected to racially derogatory comments without the
11 offending employee facing any recourse (FAC ¶¶ 57–58, 120–128), and one in which the City
12 made no serious attempts to investigate Mr. Diemert’s complaints of discrimination (FAC ¶¶ 34,
13 53, 130–132).

14 **B. Mr. Diemert Experienced Repeated Racial Harassment and the City Was**
15 **Indifferent to His Complaints**

16 Mr. Diemert experienced severe racial harassment and discrimination as a City
17 employee. From being denied opportunities for advancement based on his racial and ethnic
18 identity (FAC ¶¶ 32–37), to being threatened by a supervisor and forced to report to this same
19 supervisor (FAC ¶¶ 57–58, 120–128), and to being verbally assaulted in a racially discriminatory
20 manner (FAC ¶¶ 33, 48–49, 51, 58, 66, 96), the racial harassment and discrimination was
21 seemingly limitless. The City was aware of the ongoing discrimination Mr. Diemert was
22 experiencing and the impact it was having on his health (FAC ¶¶ 52, 55, 86, 103).

23 **C. Mr. Diemert Faced Retaliatory Actions After Reporting**

24 Throughout his employment, Mr. Diemert repeatedly informed his supervisors, union
25 representatives, and managers of the discrimination he personally experienced and the practices
26 he observed that he reasonably concluded violated Title VII. *See* FAC ¶¶ 47–55, 60. In
27 retaliation, the City refused to excuse Mr. Diemert from RSJI-type training (FAC ¶ 103), denied
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1 him backpay for out-of-class work (FAC ¶ 119), covertly surveilled him by creating a “secret”
2 or “confidential” file (FAC ¶ 102), and required him to continue working under a supervisor that
3 he had reported for misconduct, racial harassment, and discrimination (FAC ¶¶ 120–121).

4 The retaliation expanded after Mr. Diemert filed his initial EEOC charge and continued
5 to raise concerns about the discriminatory behavior he was experiencing. This included being
6 forced to continue reporting to Mr. Said (FAC ¶¶ 120–121), his direct supervisor, canceling
7 nearly all of his monthly meetings and ceasing to support him in his work (FAC ¶¶ 136, 179),
8 undue scrutiny from Supervisor Kilpatrick-Goodwill (FAC ¶¶ 133–134), the City conducting an
9 incomplete and biased internal investigation into Mr. Diemert’s claims of discrimination (FAC
10 ¶¶ 129–132), as well as HR refusing to process Mr. Diemert’s FMLA paperwork (FAC ¶ 137).
11 The Department of Labor found that the City had violated Mr. Diemert’s FMLA rights and that
12 “Tina Ng-Rudell in Human Services had caused roadblocks in the employee’s ability to be
13 approved for FMLA leave” and that the City “did not provide an explanation for why the
14 violations occurred.” FAC ¶ 137. Mr. Diemert informed the City of the impact this retaliation
15 was having on his work and health when he told Mr. Mayo, “ever since I reported Shamsu to
16 Ethics and filed a charge with the EEOC I have felt like I am being pressured to quit...the
17 workplace is not conducive to my health, I feel like I am constantly...on defense from being
18 attacked or discriminated against because the environment is toxic and hostile.” FAC ¶ 143.

19 **D. All of Mr. Diemert’s Allegations Are Relevant and Timely Filed**

20 On December 23, 2020, Mr. Diemert filed a charge of retaliation and discrimination with
21 the EEOC. FAC ¶ 15.³ On January 16, 2021, Mr. Diemert filed an amended charge of retaliation
22 and discrimination. FAC ¶ 16. On June 30, 2022, Mr. Diemert filed an additional charge with
23 the EEOC, detailing additional, continuing acts of discrimination he experienced between
24 December 23, 2020, and September 7, 2021. FAC ¶ 17. Mr. Diemert timely filed his EEOC
25 charges relative to his allegations. Acts that occurred in 2020 and 2021 include:

26 ³ Mr. Diemert will testify that he had attempted to file his EEOC charge earlier in 2020, but due
27 to the pandemic and communicated instructions from an EEOC representative, Mr. Diemert was
28 not permitted to submit his charge until December 23, 2020.

- 1 1. Regular occurrence of disparaging anti-white comments made by supervisors, managers,
2 trainers, and coworkers in communications, meetings, and trainings, and distinctions
3 made by supervisors among employees based solely on their racial identity. *See* FAC
4 ¶¶ 38–45, 62, 69–71, 74–75, 77, 80–87, 90–95, 97–101, 110.
- 5 2. Throughout 2020 and 2021, Department leadership and coworkers openly discussed
6 using race as a determining factor in lay-off decisions and how they could use the Race
7 Equity Toolkit and the RSJI to accomplish this, even if it meant violating the seniority
8 system. *See* FAC ¶¶ 110, 140.
- 9 3. The City’s Office for Civil Rights openly promoted segregated training for City
10 employees, specifically targeting training for white employees that promoted racial
11 stereotypes of all white employees as being complicit in the “system of white supremacy”
12 and “internaliz[ing] and reinforc[ing] racism.” *See* FAC ¶ 77.
- 13 4. Supervisor Kilpatrick-Goodwill, Mr. Diemert’s supervisor and supervisor of HSD’s
14 utility-assistance programs, told Mr. Diemert that it is impossible to be racist towards
15 “white people,” that all “white people” are racist, and that “black people” cannot be racist,
16 thereby echoing the same racially hostile messaging disseminated in RSJI training and
17 related workshops. *See* FAC ¶ 91.
- 18 5. On February 19, 2020, Mr. Said chest bumped Mr. Diemert, got in his face, accused him
19 of having “white privilege,” and suggested that Mr. Diemert only reported him for his
20 fraudulent conduct because he was a racist. Mr. Said went on to espouse more racial
21 stereotypes, echoing the racial stereotyping the City teaches in their mandatory RSJI
22 classes. The City did not offer any solution apart from suggesting Mr. Diemert move
23 away from his preferred workstation. Mr. Diemert was forced to continue reporting to
24 him. *See* FAC ¶¶ 56–58, 120–121.
- 25 6. In 2020, Mr. Diemert was told by coworkers that his comments about “white privilege”
26 were invalid solely because he was white, and they proceeded to make general
27 disparaging comments about “white people.” *See* FAC ¶ 98.

- 1 7. In January 2021, Supervisor Kilpatrick-Goodwill retaliated against Mr. Diemert because
2 he had filed his EEOC charge on December 23, 2020, and because he had voiced his
3 objections to the City's RSJI on numerous occasions, subjecting him to scrutiny to which
4 no similarly situated coworker was subjected. *See* FAC ¶ 134.
- 5 8. In June 2021, Race and Social Justice Lead/Chief Equity Officer Edward Odom shared
6 an article about critical race theory and laws attempting to ban the teaching of it, drawing
7 specific attention to the 1921 Tulsa Race Massacre. Mr. Diemert commented on the post
8 that Mr. Odom shared. Mr. Odom responded by telling him that because he was white,
9 he should feel guilty for what happened 100 years earlier in Tulsa. Mr. Odom then sent
10 Mr. Diemert an aggressive and condescending email further attacking him for his
11 comments. *See* FAC ¶ 99. Mr. Odom shared his criticism of Mr. Diemert with many other
12 senior staff members in the IT Department and elsewhere who disparaged Mr. Diemert
13 in both public and private. *See* FAC ¶ 100.
- 14 9. On June 21, 2021, Mr. Diemert complained in an email to Senior Officer Groce about
15 the racially stereotyping and denigrating comments he was constantly facing, requesting
16 that he just be allowed to do his job without being subjected to racial harassment. He
17 asked to create an affinity group opposed to racial stereotypes, but his request was denied
18 and he was instead required to support the City's commitment to RSJI. *See* FAC ¶¶ 88–
19 89.
- 20 10. In February or March 2020, Mr. Diemert raised his concerns with his Supervisor,
21 Kilpatrick-Goodwill, about the radicalized training and RSJI material. Thereafter,
22 Supervisor Kilpatrick-Goodwill retaliated against Mr. Diemert by ceasing to support him
23 and cancelling meetings, although she continued to meet and support similarly situated
24 coworkers. *See* FAC ¶ 136.
- 25 11. Mr. Diemert also experienced actions with an FMLA request in 2021, because of his race
26 and in retaliation to his complaints. In July 2021, the Department of Labor found that the
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1 City violated Mr. Diemert’s FMLA rights by denying him a reduced work schedule and
2 leave for biannual medical treatment. *See* FAC ¶ 137.

3 12. Throughout 2021, Mr. Diemert continued to notify his supervisors and others that his
4 health was suffering because of the racial harassment that he experienced. *See* FAC
5 ¶ 139.

6 13. In 2021, the City’s Department of Human Resources conducted a haphazard and biased
7 investigation into Mr. Diemert’s claims of discrimination. Mr. Kuykendall wrote the first
8 draft of his report finding no fault even before he completed his investigation and without
9 thoroughly investigating Mr. Diemert’s claims. *See* FAC ¶¶ 130–131.

10 With respect to the incidents that predate the filing deadlines for Mr. Diemert’s federal
11 and state law claims, they are evidence of the continuing pattern of the discriminatory and
12 harassing conduct that defined the racially hostile work environment Mr. Diemert experienced.

13 **E. Mr. Diemert Properly Filed His Tort Claim Form Prior to Bringing His State**
14 **Law Claims**

15 Mr. Diemert fully complied with RCW 4.96.020 and more than sixty calendar days have
16 elapsed since Daniel Brown, a City Services Manager, signed off on having received
17 Mr. Diemert’s tort claim form. *See* Exh. 6 to FAC, Dkt. 11-6. Mr. Diemert submitted the “State
18 of Washington Standard Tort Claim Form” which is provided as an option on the City’s website.⁴
19 Mr. Diemert mailed his form to the City Clerk’s Office at the address listed on the City’s website.
20 The City confirmed that it received Mr. Diemert’s form. *See* **Exh. 1**.

21 **III. STATEMENT OF ISSUES**

22 There is a single issue for this Court to resolve—whether the facts Mr. Diemert alleges
23 in the FAC sufficiently state a “plausible” ground for relief or if the City has shown “beyond
24 doubt” that Mr. Diemert “can prove no set of facts in support of the claim” that would entitle
25 him to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Iqbal*, 556 U.S. at 678;

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28 ⁴ <https://www.seattle.gov/city-finance/file-a-damage-claim>.

1 *Aguayo*, 653 F.3d at 917. Because Mr. Diemert has alleged plausible grounds for relief, the City’s
2 motion should be denied.

3 IV. ARGUMENT

4 A. Standard of Review

5 On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), courts must take all facts in the
6 complaint as true, make all reasonable inferences in favor of the plaintiffs, and determine
7 whether the complaint states a plausible claim for relief. *Ashcroft*, 556 U.S. at 678. A claim is
8 facially plausible when a plaintiff pleads “factual content that allows the court to draw the
9 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

10 At the pleading stage, “general allegations embrace those specific facts that are necessary
11 to support the claim.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). There is no
12 “probability requirement” at the pleading stage. *Twombly*, 550 U.S. at 556. Instead, plaintiffs
13 must allege facts sufficient to “raise a reasonable expectation that discovery will reveal
14 evidence” that plaintiffs are entitled to relief. *Id.* A well-pleaded complaint may proceed “even
15 if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is
16 very remote and unlikely.” *Id.* (cleaned up).

17 B. Mr. Diemert Has Alleged a Plausible Hostile Work Environment Claim

18 The City mischaracterizes Mr. Diemert’s hostile work environment claim, suggesting
19 that he *only* alleges unwelcome RSJI programming. MTD, Dkt. 19-1 at 4, 8, 12. That is wrong.
20 The “fundamental premise” of Mr. Diemert’s complaint is **not** that “he was harmed...by being
21 educated about the realities of systemic discrimination,” but rather the City subjected him to a
22 hostile work environment because of his race. Mr. Diemert further shows that the City welcomes
23 this hostile work environment as it teaches its employees to unquestionably associate “white”
24 with “privilege” and invidious “supremacy,” leading employees to judge and denigrate Mr.
25 Diemert based on his race. *See* FAC ¶¶ 40, 44–45, 47, 70, 74, 77, 106, 131.

26 To prevail on a hostile workplace claim premised on race, an employee must show:
27 (1) that he was subjected to verbal or physical conduct of a racial nature; (2) that the conduct
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1 was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the
2 conditions of the plaintiff’s employment and create an abusive work environment. *Vasquez v.*
3 *Cnty. of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003), *as amended* (Jan. 2, 2004). To determine
4 whether the conduct complained of was sufficiently severe or pervasive to violate Title VII, “all
5 the circumstances, including the frequency of the discriminatory conduct; its severity; whether
6 it is physically threatening or humiliating, or a mere offensive utterance; and whether it
7 unreasonably interferes with an employee’s work performance,” are considered. *Vasquez*, 349
8 F.3d at 642. In addition, “[t]he working environment must both subjectively and objectively be
9 perceived as abusive.” *Id.* That is, that both Mr. Diemert personally and a reasonable person in
10 the same situation would have found the conduct unwelcome and abusive.

11 Mr. Diemert has plausibly alleged that he was subjected to verbal and physical conduct
12 of a racial nature, that the conduct was unwelcome, and that with respect to the totality of the
13 circumstances, the City subjected him to an abusive and hostile work environment. The City
14 claims that Mr. Diemert was not “singled out or treated differently” because the RSJI applied to
15 all employees. MTD, Dkt. 19-1 at 16. But this assertion ignores two key precepts—the City
16 designed RSJI so that employees are required to be treated *unequally* and the extensive
17 allegations in the FAC show how the City created an unrelenting hostile work environment for
18 Mr. Diemert personally. *See, e.g.*, FAC ¶ 33 (“Supervisor Inay berated Mr. Diemert for using his
19 ‘white privilege’ to keep the position and told him he was responsible for denying a ‘person of
20 color’ an opportunity for promotion....”); FAC ¶ 34 (“Mr. Diemert did not receive any support
21 as Mr. Sharkey supported Supervisor Inay’s racial views.”); FAC ¶ 48 (“Upon introducing
22 himself to YFE Manager Javier Pulido, Mr. Pulido condescendingly asked Mr. Diemert, ‘what
23 could a straight white male possibly offer our department?’”); FAC ¶ 58 (“Mr. Said chest
24 bumped Mr. Diemert, got in his face, told him he had ‘white privilege’....”) FAC ¶ 131 (“The
25 incomplete investigation and the inaccurate and one-sided nature of the report again showed Mr.
26 Diemert that there was no chance that the Department or the City would abandon its relentless
27 RSJI push. To Defendant, Mr. Diemert was merely a member of a disfavored racial group.”).

1 Moreover, the FAC also emphasizes how the City uses RSJI to divide employees by race,
2 encourage segregated meetings and affinity groups, and delineate specific tasks for members of
3 each “race” to accomplish. *See* FAC ¶¶ 41–42, 44, 65 (“[T]he facilitators at the event stated that
4 ‘white people are like the devil,’ that ‘racism is in white people’s DNA,’ and that ‘white people
5 are cannibals.’”).

6 Many courts have found that such programs and such comments can and do support
7 claims of a hostile work environment, even with facts that do not rise to the level of what
8 Mr. Diemert has alleged. For example, in *Mais v. Albemarle Cnty. Sch. Bd.*, No. 3:22-CV-51,
9 2023 WL 2143471, at *8–10 (W.D. Va. Feb. 21, 2023), an assistant principal brought complaints
10 to administrators about antiracism training that demonized staff members for being white. *Id.* at
11 *1. In response to these complaints, the training leader did not alter the training content. *Id.* The
12 assistant principal also complained to the principal about the aide causing her emotional distress
13 and disrupting her work after the aide called her offensive names, but the principal took no action
14 to address these concerns. The assistant principal would go on to resign following further
15 mistreatment, such as being told that she was acting like “a typical defensive white person” by
16 discussing her feelings. *Id.* at *3. The court found that these allegations, which mirror some of
17 Mr. Diemert’s allegations, properly pled a Title VII claim and survived a motion to dismiss. *Id.*
18 at *8–10. *See also Devine v. Pittsburgh Bd. of Pub. Educ.*, No. 2:13-CV-220, 2015 WL 3646453
19 (W.D. Pa. June 10, 2015) (denying a motion to dismiss where plaintiff alleged that her supervisor
20 terminated her due to her race by applying a different performance standard to teachers she
21 associated with “white privilege”). Similarly, in *Hartman v. Pena*, 914 F. Supp. 225, 229 (N.D.
22 Ill. 1995), a male employee with the Federal Aviation Administration attended a required
23 “Cultural Diversity Workshop” in which female attendees were directed to deride male
24 participants, and other female participants physically harassed the males. *Id.* at 227–28. The
25 plaintiff felt pressured to participate in the workshop. The court found this conduct to be both
26 subjectively and objectively hostile. *Id.* at 230.

1 The City does not deny that Mr. Diemert pled that the racial conduct and comments he
2 details were unwelcome, but it claims that *as a matter of law*, the allegations do not reach the
3 level of “objective harassment” and that no “reasonable person” in Mr. Diemert’s situation could
4 find RSJI to be “abusive or hostile.” *See* MTD, Dkt. 19-1 at 18. That is nonsense. The claims
5 and facts Mr. Diemert has pled would shock the conscience of all but the most ardent believers
6 of race essentialism. Moreover, *Mais*, *Devine*, and *Hartman* directly refute the City’s argument.
7 Those cases present situations far less extreme than the City’s actions here, yet each court
8 rejected attempts to dismiss the complaint. The determination of “reasonableness” belongs with
9 the fact finder, and the City provides no support for its contrary contention, much less any
10 authority supporting a motion to dismiss.

11 The City would further have the Court overlook properly pled allegations by wrongly
12 construing them as outside the statute of limitations. MTD, Dkt. 19-1 at 17 n.7. Mr. Diemert
13 outlines a series of discriminatory events in his FAC that constitute a continuing violation of
14 Title VII. *See Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002) (events occurring
15 prior to the statute of limitations are not time-barred if they are part of the same unlawful
16 employment practice and at least one event took place inside the limitations period). Mr. Diemert
17 has alleged that recurring negative stereotypes were taught in training workshops, while
18 derogatory comments and discriminatory decisions about him were made by colleagues and
19 managers, over many years, and more than one of them occurred within the statute of limitations.
20 *See* FAC ¶¶ 90–102, 104–110, 129–132.

21 Mr. Diemert, therefore, has alleged many events, comments, and other unwelcome racial
22 conduct occurring over years that support his claim that his employment with the City was
23 marked by severe and pervasive racial harassment. He was coerced to resign from a lead role,
24 humiliated, subjected to discriminatory training, experienced pronounced discrimination from
25 his supervisors and colleagues, and was left completely unsupported whenever he complained
26 about the discrimination he was experiencing. *See* FAC ¶¶ 38–45, 56–58, 62, 69–71, 74–75, 77,
27 80–87, 90–95, 97–101, 110, 120–121, 140. *See, e.g., Vasquez*, 349 F.3d at 642; *Mais*, 2023 WL
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1 2143471, at *8–10; *Devine*, 2015 WL 3646453; *Hartman*, 914 F. Supp. at 229; *see also*
2 *Hernandez v. City of Vancouver*, 277 F. App’x 666, 670–71 (9th Cir. 2008) (“human resources
3 personnel investigating complaints dismissed his charges of racism as ‘sarcastic’; and, superiors
4 and co-workers had made racist comments regarding Hispanics generally.... Hernandez’s
5 allegations of hostility, if credited, describe conduct that ‘pollute[d] [Hernandez’s] workplace,
6 making it more difficult for [him] to do [his] job, to take pride in [his] work, and to desire to stay
7 on in [his] position.’”).

8 **C. Mr. Diemert Has Alleged a Plausible Disparate Treatment Claim**

9 For Mr. Diemert to plead a plausible disparate treatment claim, he must show that (1) he
10 is a member of a protected class; (2) he was qualified for his job position and performed his job
11 satisfactorily; (3) he experienced an adverse employment action; and (4) “similarly situated
12 individuals outside his protected class were treated more favorably” or there are other
13 circumstances surrounding the adverse employment action that give rise to an inference of
14 discrimination. *Knight v. Brown*, 797 F. Supp. 2d 1107, 1125 (W.D. Wash. 2011), *aff’d*, 485 F.
15 App’x 183 (9th Cir. 2012). The first two elements are not at issue, but the City argues that
16 Mr. Diemert did not experience an adverse employment action and that Mr. Diemert has not
17 alleged discriminatory intent. *See* MTD, Dkt. 19-1 at 19–20. The City is wrong.

18 Mr. Diemert experienced a series of adverse employment actions. “An adverse
19 employment action is one that ‘materially affect[s] the compensation, terms, conditions, or
20 privileges of...employment.’” *Knight*, 797 F. Supp. 2d at 1125 (citing *Davis v. Team Elec. Co.*,
21 520 F.3d 1080, 1089 (9th Cir. 2008)). Mr. Diemert has pled many, including, but not limited to,
22 less favorable treatment in work/project assignments, hours, and promotions; failure to address
23 his genuine concerns; creating a confidential file about him; subjecting him to increased scrutiny;
24 interfering with his FMLA rights; coercing him into stepping down out of a lead position because
25 of his race; denying him back pay for out-of-class work but requiring him to complete this type
26 of work anyway; and forcing him to continue reporting to the supervisor that had physically
27 accosted him. *See* FAC ¶¶ 32–37, 47, 101, 111–125, 128, 137–143, 171–172. The continued
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1 subjection to unwelcome conduct based on Mr. Diemert’s race took a serious toll on his health
2 and compelled him to resign, resulting in a constructive discharge. Each of these actions
3 individually and all of them collectively constitute adverse actions under Title VII. *See Knight*,
4 797 F. Supp. 2d at 1125 (citing *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000)).

5 Likewise, RSJI is *not* “race neutral”—to the contrary, it is *race mandatory*. *See* MTD,
6 Dkt. 19-1 at 20. It plainly evinces the City’s discriminatory intent towards Mr. Diemert because
7 RSJI explicitly makes racial distinctions and assigns negative attributes to people because of
8 their race. It encouraged managers and employees to make denigrating and stereotyping
9 comments to others, including Mr. Diemert, based solely on a person’s race, and encouraged
10 employment decisions to be made on a racial basis.⁵ The City openly acknowledged its
11 discriminatory intent to benefit BIPOC employees over other employees on numerous
12 occasions—it is exactly this RSJI-inspired intent that led the City to giving similarly situated
13 BIPOC employees more favorable treatment in work/project assignments, hours, and
14 promotions; subjecting Mr. Diemert to increased scrutiny, conducting a haphazard investigation
15 into his discrimination claims, interfering with his FMLA rights, denying him backpay, reducing
16 his workload, cancelling his regularly scheduled meetings with his supervisor, delaying the
17 provisions of remote work support, and forcing Mr. Diemert to continue reporting to Mr. Said.
18 *See* FAC ¶¶ 110, 119–121, 130–132, 136–137, 171. Indeed, the FAC, goes into detail about the
19 City’s RSJI precisely to demonstrate the discriminatory and far-reaching parameters of its
20 official policy. *See* FAC ¶¶ 38–45, 62, 69–71, 74–75, 77, 80–87, 90–95, 97–101, 110.

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24 ⁵ This philosophy is alluded to in the City’s own response, when it notes “as for the attack on
25 ‘white culture’ that Plaintiff alleges, the RSJI does not attack white employees’ values.” MTD,
26 Dkt. 19 at 6. “White culture” and “white values” are not statements Mr. Diemert would ever use.
27 Mr. Diemert did explain *how* the City even injects race into objective and neutral concepts like
28 “sense of urgency” and “objectivity.” *See* Exh. 7 of the FAC, Dkt. 11-7. By characterizing these
things as “white,” the City proves Mr. Diemert’s point. For the City—even before this Court—
everything is always about race, even things that obviously aren’t.

D. Plaintiff Has Sufficiently Pled That He Was Constructively Discharged

Mr. Diemert has sufficiently alleged that he was constructively discharged because the facts he asserts indicate recurring discriminatory treatment that would lead a reasonable person to resign. “A constructive discharge occurs when, looking at the totality of the circumstances, a reasonable person in the employee’s position would have felt that he was forced to quit because of intolerable and discriminatory working conditions.” *Sanchez v. City of Santa Ana*, 915 F.2d 424, 439 (9th Cir. 1990) (quoting *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987)). *Accord, Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000); *Nielson v. AgriNorthwest*, 95 Wn. App. 571, 578 (1999); *Washington v. Boeing Co.*, 105 Wn. App. 1, 15–16 (2000); *Sneed v. Barna*, 80 Wn. App. 843, 849 (1996). An employer acts “deliberately” if its deliberate act creates the intolerable condition, without regard to the employer’s intent as to the resulting consequence. *Sneed*, 80 Wn. App. at 849. “Whether working conditions are so intolerable and discriminatory as to justify a reasonable employee’s design to resign is normally a factual question for the jury.” *Sanchez*, 915 F.2d at 431; *Short v. Battle Ground Sch. Dist.*, 169 Wn. App. 188, 206 (2012), *disapproved on other grounds, Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481 (2014).

The City dismisses the severity of the discriminatory environment that Mr. Diemert faced, referring to it as merely “dissatisfaction with the City’s racial equity work....” MTD, Dkt. 19-1 at 19. Mr. Diemert experienced far more than a mere dissatisfaction with the RSJI. He was demeaned, insulted, denied opportunities, racially harassed, subjected to intimidation, and suffered physically and emotionally—precisely the type of conditions that would lead a reasonable person to resign. *See* FAC ¶¶ 38–45, 110, 119–121, 130–132, 136–137, 171.

E. Plaintiff Has Pled a Plausible Retaliation Claim

To make a prima facie case of retaliation, a plaintiff must establish that he undertook a protected activity under Title VII, his employer subjected him to an adverse employment action, and there is a causal link between those two events. *Vasquez*, 349 F.3d at 646. Mr. Diemert has pled each of these elements in his amended complaint.

1 Mr. Diemert undoubtedly alleges with sufficiency that he undertook protected activity
2 that led to the City’s retaliation against him. An employee undertakes a protected activity when
3 the employee reports “an employment practice that either violates Title VII or that the employee
4 reasonably believes violates that law.” *Westendorf v. W. Coast Contractors of Nev., Inc.*, 712
5 F.3d 417, 422 (9th Cir. 2013); *see also Cheatham v. City of Phoenix*, 699 F. App’x 647, 648–49
6 (9th Cir. 2017). Protected activity includes “engaging in other activity intended to oppose an
7 employer’s discriminatory practices.” *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d
8 1185, 1197 (9th Cir. 2003).

9 Even a plaintiff’s mistaken belief that his employer violated Title VII may be reasonable,
10 as the court assesses the reasonableness of the plaintiff’s belief “according to an objective
11 standard—one that makes due allowance...for the limited knowledge possessed by most Title
12 VII plaintiffs about the factual and legal bases of their claims,” and not by whether the
13 employer’s conduct was actually unlawful. *See Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994).

14 Here, it is undisputed that Mr. Diemert filed complaints of harassment and discrimination
15 with the EEOC. FAC ¶¶ 15–16, 133. Moreover, Mr. Diemert further alleges that he made
16 numerous complaints about racial discrimination to his supervisors, union representatives, and
17 managers within the 300 days leading to the filing of his EEOC charge and prior to that time as
18 well— which the City also does not dispute. *See* FAC ¶¶ 47–60, 120. His complaints included,
19 among others, those made to his supervisor for divisive and discriminatory comments from co-
20 workers, those made to a planning and development specialist about a racially offensive white
21 caucus meeting, and those made to a director regarding the City’s failure to address incidents
22 when he reported them. *Id.* These complaints, including informal ones, clearly constitute
23 protected activity. *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506
24 (9th Cir. 2000) (stating that “informal complaints constitute a protected activity” and “actions
25 taken against [the plaintiff] after these initial complaints are appropriately the subject of [a]
26 retaliation claim”).

1 Given the multiple allegations of explicit racial training (negatively stereotyping only
2 white people), racially discriminatory comments (e.g., “white people are like the devil,” and
3 “white people are cannibals”), and physical intimidation by his supervisor, as set forth by Mr.
4 Diemert in the complaint, it is frankly incredible that the City attempts to argue that Mr. Diemert
5 did not have a reasonable good faith belief that the conduct he repeatedly complained of was
6 unlawful—especially given that the City’s toxic work environment came under scrutiny by the
7 United States Department of Justice in August of 2020. *See* FAC ¶ 80. The City fails to provide
8 any authority that Mr. Diemert’s complaints were not plausibly based on a reasonable belief that
9 the City’s actions were unlawful.

10 Mr. Diemert also sufficiently alleges that the City’s adverse actions against him were
11 retaliatory. To be adverse, an employment action must be such that “it well might have dissuaded
12 a reasonable worker from making or supporting a charge of discrimination,” even if the action
13 did not affect “the terms and conditions of employment.” *Burlington N. & Santa Fe Ry. Co. v.*
14 *White*, 548 U.S. 53, 60 (2006). “[T]he significance of any given act of retaliation will often
15 depend on the particular circumstances.” *Id.* at 69. An action need not rise to the level of an
16 ultimate employment action, such as discharge, change in job title, or reduction in pay, to be an
17 adverse action supporting a claim for retaliation. *See Ray v. Henderson*, 217 F.3d 1234, 1242–
18 43 (9th Cir. 2000). The numerous adverse actions to which Mr. Diemert was subjected are
19 detailed above, including but not limited to belittling him, forcing him to report to a hostile
20 supervisor, interfering with his FMLA rights, withdrawing support, and subjecting him to sudden
21 intense scrutiny.

22 The causal link between Mr. Diemert’s protected activity and the City’s actions can be
23 inferred from circumstantial evidence such as the City’s knowledge of the protected activities
24 and the proximity in time between the protected activity and the adverse action. *Dawson v. Entek*
25 *Int’l*, 630 F.3d 928, 936 (9th Cir. 2011); *see also Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d
26 1054, 1065 (9th Cir. 2002) (stating that to support “an inference of retaliatory motive, the
27 [adverse action] must have occurred fairly soon after the employee’s protected expression”).

1 Given that a significant portion of the City’s adverse treatment of Mr. Diemert occurred
2 in the six months after he filed his EEOC complaint, the Court may infer that this treatment was
3 retaliation against Mr. Diemert filing the complaint. *See, e.g., Johnson v. Alameda-Contra Costa*
4 *Transit Dep’t*, No. 04-4879, 2006 WL 2587293, at *7 (N.D. Cal. Sept. 8, 2006) (temporal
5 proximity of three to four months supports inference of retaliation); *see also Pringle v. Wheeler*,
6 478 F. Supp. 3d 899, 918 (N.D. Cal. 2020) (plaintiff plausibly alleged that leave denials
7 occurring eight months after he filed an EEOC complaint were retaliatory); *Adetuyi v. City &*
8 *Cnty. of San Francisco*, 63 F. Supp. 3d 1073, 1090 (N.D. Cal. 2014) (finding that the five-year
9 delay between a black city employee’s lawsuit against his employer and his former supervisor
10 alleging harassment and retaliation, and the city’s later decision declining to promote employee,
11 was not so lacking in temporal proximity that it failed to give rise to an inference of causation).

12 **F. Mr. Diemert Has Plausibly Alleged a Violation of the Equal Protection Clause**

13 Mr. Diemert has adequately alleged that the City discriminated against him because of
14 his race, and thereby denied him his constitutional right to equal protection of the laws.
15 Mr. Diemert clearly identifies the moving force behind the constitutional violations he
16 experienced—the very Race and Social Justice Initiative the City openly lauds and acknowledges
17 in its motion. *See generally* MTD, Dkt. 19-1.

18 The Fourteenth Amendment provides that “[n]o state shall...deny to any person within
19 its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The purpose of
20 the Equal Protection Clause of the Fourteenth Amendment is to “secure every person within the
21 state’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by
22 express terms of a statute or by its improper execution through duly constituted agents.” *Sunday*
23 *Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918). Pursuant to 42 U.S.C. § 1983, a
24 plaintiff alleging a violation of equal protection must plead that the defendants, acting under
25 color of state law, deprived him of rights secured by the Constitution or federal statutes. *Ortez v.*
26 *Washington Cnty., Or.*, 88 F.3d 804, 810 (9th Cir. 1996). The plaintiff must show that the
27 defendant “acted in a discriminatory manner,” that the discrimination was “intentional,” and that
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1 it occurred because of his membership in a protected class. *Fed. Deposit Ins. Corp. v. Henderson*,
2 940 F.2d 465, 471 (9th Cir. 1991); *Thornton v. City of St. Helens*, 425 F.3d 1158, 1166 (9th Cir.
3 2005). Intentional race discrimination violates “equal protection unless narrowly tailored to serve
4 a compelling state interest.” *Alaska v. EEOC*, 564 F.3d 1062, 1068 (9th Cir. 2009).

5 “A municipality may be held liable under § 1983 if the plaintiff proves that a government
6 employee committed the alleged violation pursuant to a formal government policy or a
7 ‘longstanding practice or custom which constitutes the “standard operating procedure” of the
8 local government entity.’” *Watts v. Cnty. of Sacramento*, 256 F.3d 886, 891 (9th Cir. 2001)
9 (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)). *See also Ortez*, 88 F.3d at
10 811 (citing *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 624 (9th Cir. 1988), and
11 noting that a “claim of municipal liability under section 1983 is sufficient to withstand a motion
12 to dismiss even if the claim is based on nothing more than a bare allegation that the actions of
13 individual municipal employees conformed to official policy, custom, or practice”).

14 Mr. Diemert’s FAC details each of these elements. It outlines how the City and various
15 employees of the City intentionally discriminated against him and harassed him because of his
16 race, how he was treated differently from similarly situated employees, and how this behavior
17 conformed to and was, in fact, encouraged by the City’s Race and Social Justice Initiative. *See*
18 FAC ¶¶ 33, 35, 48, 56–58, 69, 88–89, 99, 130–131. As a public employee, Mr. Diemert was
19 entitled under the Equal Protection Clause to be free from purposeful workplace harassment and
20 discrimination on the basis of his race. *See Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605
21 F.3d 703, 707 (9th Cir. 2010) (citing *Alaska v. EEOC*, 564 F.3d 1062, 1069 (9th Cir. 2009) (en
22 banc); *Bator v. Hawaii*, 39 F.3d 1021, 1029 (9th Cir. 1994)). Unfortunately for Mr. Diemert, his
23 experience was quite the opposite—from being told that he should resign from a lead position
24 because he had “white privilege” (FAC ¶ 33) to being physically accosted by a supervisor who
25 was also making derogatory racial comments to him and being told that Mr. Diemert and
26 members of “his race” were responsible for various atrocities committed long ago by other
27 people (FAC ¶¶ 57–58), the City was not only aware of this discrimination but was actively
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1 involved in encouraging and promoting this behavior through its RSJI. FAC ¶ 91; *see also* MTD,
2 Dkt. 19-1 at 4 (“[T]he City...is proud to have created a powerful program that works today to
3 incorporate principles of racial equity into *all aspects* of its programming.”) (emphasis added).

4 The City contends that “there is no cognizable race-based classification or action at issue
5 in this case,” but then repeatedly details its race-based classifications. *See* MTD, Dkt. 19-1 at 5
6 (“RSJI trainings educate all employees on racial equity principles....”); pg. 6 (“RSJI...sheds
7 light on how certain values—a sense of urgency, for example—are rooted in a history of white
8 supremacy....”); pg. 7 (“Another component of RSJI is the Race Equity Toolkit....”); pg. 15
9 (“RSJI is motivated in part by disparities by race....”). The City completely ignores the majority
10 of Mr. Diemert’s allegations, including the racial harassment he personally experienced and how
11 similarly situated employees were treated more favorably. Furthermore, the interactions
12 Mr. Diemert had with his colleagues and supervisors implicate municipal liability because those
13 individuals were acting pursuant to the City’s RSJI. *See* MTD, Dkt. 19-1 at 23 (admitting that
14 the RSJI and use of critical race theory is “encouraged”). The ultimate crux of the City’s
15 argument is that it disagrees with the allegations at issue (or at least offers a different
16 interpretation of the alleged events and the City’s conduct), but this is entirely irrelevant for
17 purposes of evaluating whether Mr. Diemert has plausibly pled an equal protection claim.

18 Moreover, whether the RSJI is narrowly tailored to achieve a compelling purpose is
19 premature on a motion to dismiss. This is something to be determined after discovery and fact-
20 finding, not on a motion to dismiss where the plaintiff’s allegations must be taken as true.
21 *Ashcroft*, 556 U.S. at 678 (pleading standard is a plausibility standard, not a probability
22 standard). *See also Hassan v. City of New York*, 804 F.3d 277, 306 (3d Cir. 2015), *as amended*
23 (Feb. 2, 2016) (noting that the burden of producing evidence to overcome heightened scrutiny’s
24 presumption of unconstitutionality belonged to the city, and where there was a race-based
25 affirmative action plan subject to strict scrutiny, the city had to meet its burden “after its Motion
26 to Dismiss”). *See also Duronslet v. Cnty. of Los Angeles*, 266 F. Supp. 3d 1213, 1223 (C.D. Cal.
27 2017) (“[T]he Court finds it premature to determine either the level of scrutiny to apply or
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1 whether the County’s policy can withstand such scrutiny. Both are fact-dependent inquiries that
2 are unsuitable for resolution at the pleading stage.”).

3 Because Mr. Diemert has adequately alleged that the City discriminated against him
4 because of his race, denied him equal protection of the laws, and identified the moving force
5 behind the constitutional violations he experienced, he has plausibly alleged an equal protection
6 claim.

7 **G. Mr. Diemert Submitted a Tort Claim Form**

8 Mr. Diemert fully complied with RCW 4.96, *et seq.*, and this Court should not dismiss
9 his WLAD claims. Mr. Diemert mailed the tort claim form provided on the City’s website⁶ via
10 certified mail. The exhibit attached to the amended complaint is the verification signature from
11 the City that it received Mr. Diemert’s tort claim form. Mr. Diemert also received a letter from
12 the City on January 18, 2023, indicating that it had received notice of Mr. Diemert’s claim. *See*
13 **Exh. 1**. Should this Court require Mr. Diemert to re-serve his form on the City, it should grant
14 Mr. Diemert leave to amend his complaint. *See Snoqualmie Indian Tribe v. City of Snoqualmie*,
15 186 F. Supp. 3d 1155, 1165–66 (W.D. Wash. 2016) (citing *Eminence Capital, LLC v. Aspeon,*
16 *Inc.*, 316 F.3d 1048, 1051–52 (9th Cir. 2003)). The policy favoring amendment is to be applied
17 with “extreme liberality.” *Id.* at 1165.

18 **CONCLUSION**

19 For the foregoing reasons, the City’s Motion to Dismiss should be denied. In the
20 alternative, should the Court grant the City’s Motion, it should dismiss the complaint with leave
21 to amend.

22 **LOCAL CIVIL RULE 10 CERTIFICATION**

23 The undersigned hereby certify that this memorandum contains 7,381 words, in
24 compliance with the Local Civil Rules.

25
26 ⁶ <https://www.seattle.gov/city-finance/file-a-damage-claim>;
27 [https://www.seattle.gov/documents/Departments/CityFinance/FilingADamageClaim/Washington](https://www.seattle.gov/documents/Departments/CityFinance/FilingADamageClaim/Washington-state-standard-tort-claim-form.pdf)
28 [-state-standard-tort-claim-form.pdf](https://www.seattle.gov/documents/Departments/CityFinance/FilingADamageClaim/Washington-state-standard-tort-claim-form.pdf).

1 DATED: April 3, 2023.

2 Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record. I also emailed a courtesy copy to all counsel of record.

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