

# HAGGARD & GANSON LLP

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August 8, 2022

Mr. Mike Bolasina  
Summit Law Group  
315 Fifth Avenue South, Ste 1000  
Seattle, WA 98104

**Re: City of Lynnwood discrimination investigation**

Dear Mr. Bolasina:

At your request, I investigated two discrimination complaints, both of which were submitted on May 9, 2022, against City of Lynnwood Councilmember Jim Smith. The complaints alleged that Smith engaged in discriminatory conduct on the basis of race and/or sex. In the course of the investigation, I interviewed the following people on the dates indicated:

- Christine Frizzell, Mayor, on May 13, 2022
- Redacted Text [4L], on May 23, 2022
- Redacted Text [4L], on May 23, 2022
- Redacted Text [4L]  
on May 26, 2022
- Redacted Text [4L] on May 27, 2022
- Redacted Text [4L] on June 10, 2022
- Redacted Text [4L] on June 10, 2022
- Councilmember Jim Smith on July 21, 2022<sup>1</sup>
- Redacted Text [4L] on August 1, 2022

Because some of the alleged conduct occurred during City Council meetings, I watched pertinent portions of the video footage from meetings that occurred on December

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<sup>1</sup> I also reviewed Councilmember Smith's written response to the complaints, which he sent me on August 1, 2022.

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6, 2021; February 22, 2022; February 28, 2022; April 18, 2022; April 25, 2022; May 16, 2022; May 23, 2022; and July 20, 2022.

This report constitutes a summary of the evidence, the witness interviews, and the conclusions I draw therefrom. It is not intended as a full recitation of the facts gathered. I base my conclusions on a preponderance of the evidence standard, under which I accept an allegation as fact when it is more probably true than not true.

## **FACTS**

### *Summary of written complaints*

On May 9, 2022, [Redacted Text [4L]] and [Redacted Text [4L]] submitted written complaints alleging that Councilmember Jim Smith discriminated against them on the basis of race (both are Black). [Redacted Text [4L]] also alleged that Smith discriminated against her on the basis of sex. In summary, the written complaints allege that Smith:

- Asked Jensen for information he was not entitled to, and continued to press for the information after she declined to provide it.
- Attempted to direct [Redacted Text [4L]] work.
- Obstructed the confirmation of Arra Rael, a LGBTQ+ woman of color, to the City's Diversity, Equity, and Inclusion Commission (DEIC), while simultaneously pushing for the confirmation of Michael Miller, a less qualified straight white male. [Redacted Text [4L]] complaint characterizes this as "institutionalized racism."
- Made unhelpful comments and disrupted DEIC meetings that [Redacted Text [4L]] and/or [Redacted Text [4L]] attended or oversaw.
- Made dismissive comments about race and equity work to [Redacted Text [4L]], including insinuations that the work is agenda driven.
- Attempted to change the municipal code to "eliminate applicants of color" from commissions.

### *Councilmember Smith's general denial of the complaints*

Councilmember Smith denies all allegations. He told me that because he lived in Hawaii, Japan, and the Philippines as a child, he understands what it is like to be a

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minority. He said he came of age during the civil rights era of the 1960s and learned that “you don’t see color.”

Smith admitted that he still regularly attends DEIC meetings, even though he is not the council liaison. He admitted that he does not regularly attend any other board or commission meetings, except for the board for which he is the council liaison. He claimed he has a genuine interest in the DEIC, although sometimes he does not agree with the positions the DEIC takes. For example, he gets offended if the DEIC commissioners use the term “white privilege,” as he believes that is “racist.”

Smith said he believes his preferred DEIC candidate, Michael Miller, is qualified to serve as a DEIC commissioner. He claimed Miller is Native American and would contribute to the diversity of the commission because he would be the only Native American and the only male.

Smith admitted asking [Redacted Text [4L]] for information, but claimed he was entitled to that information. He denied attempting to direct [Redacted Text [4L]]. He said his requests of [Redacted Text [4L]] were “polite and businesslike” and that his interactions with [Redacted Text [4L]] have always been “amicable.”<sup>2</sup>

### *The Diversity, Equity, and Inclusion Commission*

The DEIC, which was created via City Council ordinance in 2018, is an advisory commission whose duties include the following:

- Achieving Lynnwood’s Community Vision in regard to being a welcoming city and a cohesive community that respects all;
- Recommending effective strategies for public engagement, removing barriers, and increasing access to city services for our city’s diverse population;
- Recommending areas for addressing root causes of inequities and lack of access and recommending opportunities for community partnerships;
- Facilitating the building of relationships with underserved and underrepresented communities and serving as Trusted Messengers to the community at large.

Per the Lynnwood Municipal Code (LMC), the Mayor nominates candidates for commission appointments and the City Council confirms. With regard to DEIC

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<sup>2</sup> Emails between Smith and [Redacted Text [4L]] indicate they had a long conversation while volunteering at the local food bank—which Smith said he enjoyed.

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appointments, I understand that the Mayor's nomination occurs after [Redacted Text [4L]] and a committee of two commissioners have reviewed applications and moved a qualified candidate forward, the candidate has come to a DEIC meeting to introduce themselves, and the Mayor has interviewed the candidate. The DEIC is comprised of seven commissioners. Currently, all seven are women, and six of them are of color.

As the [Redacted Text [4L]] supports the DEIC along with other boards and commissions. As the [Redacted Text [4L]] serves as the staff liaison to the DEIC.

In early 2021, Councilmember Smith briefly served as council liaison to the DEIC. Smith told me he asked to be appointed as liaison; he said he had attended DEIC meetings even before being elected to his current council seat in November of 2019.

In March of 2021, [Redacted Text [4L]] sent an email to Council President George Hurst requesting that Smith be replaced as liaison. [Redacted Text [4L]] email described Smith as "not an ally to the work of Diversity, Equity and Inclusion." Her email alleged that Smith repeatedly rolled his eyes during meetings and that:

In several meetings he has had agitated and disordered reactions to Commissioners, [Redacted Text [4L]], and Chair on issues being discussed around race and social justice. He is silent in times where he could support and vocal creating barriers and what he considers acceptable behavior for people of color. He consistently points to a lack of individual racism on his part and on the part of many good people living in Lynnwood and City employees; in doing so he does not see a systematic issue about race and outcomes and therefore no need to take any action, certainly oblivious to systematic and individualized racism.

In response to [Redacted Text [4L]] email, Hurst removed Smith as DEIC liaison and started attending meetings in Smith's place. Smith said that when Hurst asked him to step down, he did not elaborate on the reasons, nor did he tell him about [Redacted Text [4L]] email. Smith said the first time he saw [Redacted Text [4L]] email was when this investigation commenced in May of 2022.

[Redacted Text [4L]] described Smith as willfully blind to systemic and institutionalized racism. She said, "He did not seem to want to further his knowledge." She summarized Smith's attitude as, "I'm not racist, so racism must not exist." She said he often referred to racism as something that occurred in the past but is no longer relevant. She said he

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repeatedly mentioned that he understood what it is like to be a minority because he had lived in Hawaii as a child.

Multiple witnesses mentioned Smith's tendency to claim that his childhood residency in Hawaii or Asia gave him an understanding of what it is like to be a minority.<sup>3</sup> This tendency is widely seen as tone deaf. One witness said it "makes people of color angry."

**Redacted Text [4L]**,<sup>4</sup> who served on the DEIC for approximately seven months in 2021, told me she disagreed with Smith being removed as the DEIC liaison and believed it was motivated by **Redacted Text [4L]** dislike of Smith.<sup>5</sup> She said that at Smith's first DEIC meeting, **Redacted Text [4L]** questioned why Smith was the liaison and alleged that because Smith is a straight white male, he does not have anything to contribute. **Redacted Text [4L]** characterized that as "reverse racism."

However, the DEIC commissioners and staff did not object to Council President Hurst, also a white male, serving as the new liaison. Witnesses said Hurst listened to the commission's discussions and did not interject with unproductive behaviors or opinions. Witnesses said this was a noticeable contrast to how Smith had behaved.

Even after he was replaced as the liaison, Smith continued to attend DEIC meetings on a regular basis. As noted, he admitted he does not routinely attend meetings for other commissions, except for the LEOFF Board, for which he serves as council liaison. Witnesses said Smith's presence at DEIC meetings continues to not add value. **Redacted Text [4L]** said Smith always shows an inclination to "put the brakes on rather than help the wheels spin."

Witnesses said that on more than one occasion, Smith accused the DEIC of violating the Open Public Meetings Act. **Redacted Text [4L]**, who served as staff liaison to the DEIC before **Redacted Text [4L]** was hired in September of 2021, said the DEIC always gave proper notice of meetings and conducted them in public; however, sometimes agendas or minutes would go out a little late. **Redacted Text [4L]** said it seemed as though Smith was being "hyper-technical," was "scrutinizing" the DEIC in a way he did not scrutinize other commissions, and "was watching the agenda posting and minutes posting

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<sup>3</sup> Smith made this comment multiple times in public meetings. He also mentioned it during his investigative interview.

<sup>4</sup> **Redacted Text [4L]** is the daughter of **Redacted Text [4L]**, a current councilmember.

<sup>5</sup> **Redacted Text [4L]** ran against Smith for City Council in 2019. However, I did not get the impression that **Redacted Text [4L]** opinion of Smith was the result of sour grapes, as **Redacted Text [4L]** was able to clearly explain why she believed Smith's perspective on race and social justice issues was undereducated.

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like a hawk.” [Redacted Text [4L]] said that when Smith raised challenges about the DEIC complying with the OPMA, it always sounded “accusatory.”

Witnesses said they do not believe Smith has a genuine interest in DEI work; rather, his motivation for attending DEIC meetings is to keep watch and intimidate. [Redacted Text [4L]] said his impression is that Smith “is letting us know he is watching.” Witnesses said that when DEIC meetings occurred remotely due to the COVID-19 pandemic, Smith would regularly interject in the chat, such that staff felt compelled to remove the chat function.

Smith told me that it is his prerogative as a member of the public to attend public meetings, including those of the DEIC. He denied accusing the DEIC of violating the OPMA, although he said he did question whether one special meeting had been properly noticed 24 hours in advance. Smith told me he thought the DEIC practice of forming small committees to review commissioner applications was problematic under the OPMA.<sup>6</sup>

Smith said he interjected in the chat only to help the commissioners with parliamentary procedure, and on one occasion he delivered comments during the public comment period.

Beginning in 2021, Councilmember Smith made efforts to promote the appointment of his friend, Michael Miller, to the DEIC. On June 27, 2021, Smith emailed former Mayor Nicola Smith, stating, “We have a policy of Lynnwood residents prioritized for commissions as you know. Mike Miller lives in Lynnwood and applied for the DEIC many months ago. Additionally, he would be the first Native American on the Commission. *Please put him ahead of the other candidates.*” (Emphasis added.)

Former Mayor Nicola Smith responded to Smith’s email, “There were many applicants for DEI. Commissioners scrubbed all the applications and Mr. Miller did not make the cut along with others. Nor has he attended any DEI meetings. Therefore, he is not going to move forward at this time.” Nicola Smith forwarded Councilmember Smith’s email and her response to [Redacted Text [4L]] and to [Redacted Text [4L]].

No one I interviewed spoke ill of Michael Miller as a person or community member; [Redacted Text [4L]], in particular, praised him as a “good man.” However, many witnesses questioned his qualifications to serve on the DEIC. [Redacted Text [4L]] told me that Miller “never rose to the top in terms of application or interests.” He said that, unlike other candidates who

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<sup>6</sup> I am not aware of the sub-committees having a quorum of DEIC members attend.

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work in the DEI field and/or serve as spokespeople for communities of color, Miller never demonstrated a real understanding of DEI issues or a true interest in the work.

According to **Redacted Text [4L]**, in evaluating candidates the commissioners look at whether potential members understand oppression, the need to “elevate and amplify voices,” and the “systemic nature of inequity.” They ask, “Can this person be an advocate for community members?” **Redacted Text [4L]** said Miller did not fit these criteria.

As noted, Councilmember Smith has claimed that Miller has Native American heritage; however, staff are skeptical about how meaningful this is. I asked Smith whether he is aware of Miller having lived experience as a Native American—for example, has he resided on a reservation or participated in Tribal traditions? I also asked Smith if he is aware of Miller having professional experience or education in equity or social justice work. Smith said he thinks the answer to both questions is yes; however, he was unable to provide specifics.

#### *City Council opposition to Race and Social Justice Coordinator position*

In 2020, the DEIC advocated for the creation of the Race and Social Justice Coordinator position (**Redacted Text [4L]** position). Multiple councilmembers, including but not limited to Smith, questioned whether the position should be created. Ultimately, former Mayor Nicola Smith utilized executive authority to hire for the position, which had been included in an earlier budget.

Councilmember Smith told me that he and other councilmembers questioned the position due to declines in city revenues; he said his opposition to the position was monetary and not philosophical.

However, many witnesses were skeptical of Smith’s motivations. One witness characterized Smith’s opposition as along the lines of, “Prove to me that racism exists. I want stats.” This witness said she was astounded that the City Council questioned the necessity for the position, because the discussions were occurring in the wake of George Floyd’s murder by Minneapolis police officers.

#### *Relevant provisions of the Lynnwood Municipal Code*

Two chapters of the LMC are of particular relevance to this investigation: LMC 2.24 and LMC 2.60. The former applies to all advisory bodies, including but not limited to the DEIC. LMC 2.24.030B states, “Advisory body members shall be registered voters. Voter registration requirements for up to one member of each board or commission may be

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waived by the mayor and confirmed by council if the individual is ineligible to be a registered voter.”

In December of 2021, the City Council voted to amend LMC 2.24.030 to its current form. Prior to the amendment, the LMC allowed for the Mayor and Council to waive the voter registration requirement for up to *two* members. The amendment passed by a 6-1 vote, with Christine Frizzell (now the Mayor) voting no.<sup>7</sup>

Some witnesses believed the amendment, in reducing the number of non-registered voters who could serve on commissions, was an unnecessary discriminatory barrier. According to [Redacted Text [4L]] “Voter registration has nothing to do with being a good commissioner.” [Redacted Text [4L]] said that in restricting membership to one non-voter, the Council “silenced” a substantial portion of the City’s residents who were born outside the United States. [Redacted Text [4L]] noted that it can take many years to achieve citizenship; she opined that immigrants should not be precluded from serving on boards and commissions, particularly the DEIC, just because they have not attained citizenship.

LMC 2.24.030 further states, “Twice a year, the administration shall provide to the council a report on all applications to serve on city advisory bodies received in the time period since the date of the most recent report. The report shall contain at a minimum the name of all applicants, the date of receipt of their application by the city, the advisory body to which they applied, and the date and disposition of each application.”

LMC 2.60.040 applies only to the DEIC. It provides, “No more than two member(s) of the commission may be nonresident community stakeholder(s) of the city of Lynnwood.” It further states, “There is a preference for city of Lynnwood residents over nonresident candidates.” LMC 2.24.010 defines “community stakeholder” as “a person who lives within Lynnwood’s municipal urban growth area [MUGA] as defined by the city’s comprehensive plan.” The LMC does not define “preferred.”

Putting it all together, the Council may confirm one DEIC commissioner who is not a registered voter. The Council may confirm up to two commissioners who live in the MUGA, although Lynnwood residents are “preferred” over MUGA residents.

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<sup>7</sup> The amendment was part of a broader ordinance that included, among other changes, a requirement to record meetings. In December, then-Councilmember Frizzell moved to postpone consideration of the ordinance, indicating that staff had not fully developed technical capabilities to record meetings.



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At the time of Arra Rael's appointment in May of 2022, the DEIC had five commissioners and thus two vacancies. All five members reside in the city limits, while Rael resides in the MUGA.

*Smith's interactions with [Redacted Text (4L)] during Rael's confirmation process*

In February of 2022, after two vacancies opened on the DEIC, Councilmember Smith went looking for a list of recent applications for boards and commissions. His primary purpose was to see if Michael Miller was still on a list. Emails I received via a public records request show that Smith initially asked Lisa Harrison, the Executive Assistant for the City Council, to provide the list; however, Harrison could not locate the most updated version. On February 18, Harrison emailed [Redacted Text (4L)], copying Smith, as follows:

Councilmember Smith asked for the latest list of applicants for boards and commissions. I can only find the one from June (attached) but I thought you sent something later. Could you please forward him and me the latest?

In response, [Redacted Text (4L)] sent the report she provided to the Council on December 6, 2021.

Smith replied, [Redacted Text (4L)], is there a reason names were removed from the list from June through November? I know of at least one who wanted to stay on the list."<sup>8</sup> Jensen replied:

CVP Smith, the report to Council is a list of applications received between June and November of 2021. It is not a list of pending applications. Applications are kept on file for nine months. As positions on boards or commissions become vacant, I send pending applications to the staff liaisons for review. If an applicant has a question about an application they've submitted, they may send me an email for an update.

Ultimately, Miller submitted a new application to be a DEIC commissioner in early 2022. In the spring of 2022, Mayor Christine Frizzell nominated Arra Rael for one of the two open seats. Miller did not receive a nomination.

On April 12, 2022, Smith again emailed [Redacted Text (4L)], asking her to provide unredacted applications for the recent applicants to the DEIC. Smith was looking for the applicants'

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<sup>8</sup> Smith was referring to Miller. [Redacted Text (4L)] told me Miller was not on the December list because he had applied prior to June of 2021. The list covers the past six months; accordingly, Miller had rolled off.

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street addresses, which staff had redacted prior to putting the applications in the record. Smith was specifically looking for Rael's address. He suspected Rael did not live in the city limits; in his view, therefore, the LMC afforded "preference" to Miller over her.

Rael's nomination was set to come before the City Council at the April 18 meeting. At the same meeting, the Council was asked to confirm a nominee for the Planning Commission and a nominee for the Ethics Commission, both of whom are white males. Smith did not request unredacted applications for Planning or Ethics Commissions. He told me he did not need unredacted versions of these applications because he had verified, through a review of Snohomish County voting records, that both nominees were Lynnwood voters. He said he did not see Rael on the voter rolls for the City of Lynnwood; accordingly, he went in search of her address.

[Redacted Text (4L)] did not give Smith unredacted applications for the DEIC applicants. Instead, she sent Smith a link to LMC 2.24.030, which establishes the confirmation process for advisory bodies. [Redacted Text (4L)] email informed Smith that, per the LMC, staff would continue to provide the Council with a semi-annual report on the applications received within the previous six months.

Smith replied as follows:

Out of courtesy and security we redact people's address so that it is not on the website. However, non-redacted versions can be, and should be, provided to the Councilmembers if so requested. I am requesting a non redacted version of each applicant.

Additionally, I am seeing many people that have applied for the DEIC being disregarded. This certainly does not bode well for our desire to encourage people to apply for various commissions. The last list of applicants was provided in November. I would think that this is something that is kept up to date. Because at least one applicant being brought forward was not on the last list, and many long time residents have been overlooked, *I am also requesting an updated version of this list.* (Emphasis added.)

[Redacted Text (4L)] did not respond. On April 14, Smith wrote to [Redacted Text (4L)], "I never received the updated list of Commission applicants nor the two unredacted applicants of the DEIC. Please send right away." [Redacted Text (4L)] did not respond. Smith was not provided with unredacted applications; nor did [Redacted Text (4L)] provide an updated applicant list outside of the semi-annual cycle.

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[Redacted Text (4L)] told me she is not obligated to provide an applicant list other than on the semi-annual rotation. She said Smith's request that she provide an updated list crossed the line from a request for information to directing her work. She emphasized that Smith is not allowed to do that, because she supports the Mayor, not the councilmembers. [Redacted Text (4L)] feels that Smith deliberately tries to intimidate her, and his demand that she provide unredacted applications and an updated list was another example of this.

Furthermore, [Redacted Text (4L)] believes Smith's requests were targeted at Rael because she is a LGBTQ+ woman of color. [Redacted Text (4L)] pointed out that Smith did not request unredacted applications for the white male nominees to the Planning and Ethics Commissions.

[Redacted Text (4L)] said that Smith's treatment of her, his persistent lack of support for diversity and equity issues, and his targeting of Rael make her believe he is motivated by racism as well as sexism. She told me, "I don't like the spotlight. But I can't stand by and watch institutionalized racism happen right before my eyes without speaking out."

[Redacted Text (4L)] said [Redacted Text (4L)] is "fed up" and does not want to deal with Smith. [Redacted Text (4L)] said, "[Redacted Text (4L)] feels his words are hurting her more as a Black woman. When you talk disparagingly about race and social justice causes, a Black woman in the room is going to feel like she's 'less than.'"

[Redacted Text (4L)] believes she has suffered double discrimination by virtue of being a woman of color. She said Smith asked [Redacted Text (4L)] to provide information concerning the DEIC applicants but did not continue to ask after [Redacted Text (4L)] declined, via email, to provide the information. [Redacted Text (4L)] complaint states as follows:

CM Smith requested information from a male staff member. The staff member sent a reply by email. CM Smith did not respond to the male staff member's email. I received the same request from CM Smith. I replied to his email with basically the same message he received from my male coworker. However, CM Smith continued to send me emails with a demand for the information. He also instructed the Council's executive assistant to send me emails.

I made a public records request for all emails between [Redacted Text (4L)] and/or [Redacted Text (4L)] and Councilmember Smith from January 1, 2022, to the present. In response, I received only one email between Smith and [Redacted Text (4L)] concerning a request for information. On March 9, 2022, Smith sent a one-sentence message to [Redacted Text (4L)] asking for the names of the three applicants for the open DEIC position. [Redacted Text (4L)] did not respond.

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[Redacted Text (4L)] did compose a *draft* response, which he shared with [Redacted Text (4L)] but apparently never sent to Smith. [Redacted Text (4L)] may have assumed [Redacted Text (4L)] sent the email, but according to the records I received in response to my records request, he did not. [Redacted Text (4L)] draft response, dated March 16, indicates that [Redacted Text (4L)] did not plan to provide the applicants' names, out of a belief that Smith was overstepping his role as a councilmember and trying to interfere in the nomination process. [Redacted Text (4L)] draft email states:

I appreciate your patience; I know it's been nearly a week since you wrote to ask about DEIC candidates. Your request is a departure from the usual way that the City and the Council communicate about candidates who have applied to a board or commission. Past practice has adhered to the guidelines in the general LMC, which provide that Council is given a report (twice a year) of candidates who have applied to a board or commission since the last report. Council is not provided with information on nominated commissioners until the candidate is introduced to the Council during a work session. Is there some reason that you want to change this procedure? I spoke with commission liaisons and could not find any other request for information about nominated commissioners prior to the introductions and council work sessions and feel that DEI Commission should follow the same procedure as its counterparts. With that said, I am happy to sit down with you, the mayor, and Council President Hurst to discuss this further.

#### *Arra Rael's confirmation process*

Arra Rael, whom the Mayor nominated for the DEIC in the spring of 2022, is employed as the Diversity, Equity, Inclusion, and Belonging Manager at the Center for Human Services in Lynnwood. Rael is Asian American and LGBTQ+. The DEIC commissioners and City staff believe she is exceptionally well qualified to serve as a DEIC commissioner, because she has real-life experience as a member of several protected classes as well as professional experience in the DEI field.

As noted, Michael Miller did not receive a nomination. Miller's application, unlike Rael's, did not indicate he had education or professional experience in the DEI field. Miller's application, unlike Rael's, did not explain how his lived experience gives him an understanding of what it is like to be a minority. [Redacted Text (4L)] said the DEIC reviewed Miller's application and saw "an older, white, straight man . . . upper middle class." [Redacted Text (4L)] stated that with the history of Lynnwood as majority white in terms of number and in terms of power, Rael's voice was "more important" than Miller's.

Miller did have one advantage over Rael: he resides in the Lynnwood city limits while Rael does not. In addition, at the time of her nomination, Rael was not a registered

voter in the MUGA. Rael did not misrepresent either fact in her application materials. The application form did not ask if she is a resident of Lynnwood. It asked for her address, which she provided. Rael's address states it is in Lynnwood, which led Rael to believe she is a Lynnwood resident. Rael learned through the appointment process that her apartment complex lies just outside the city boundary.

On her application, Rael answered "no" to the question, "Are you a registered voter in the City of Lynnwood?" She indicated "yes" when asked, "Are you a registered voter somewhere else?" At the time, Rael was registered to vote at her former address in Marysville. She changed her voter registration to her current address prior to the City Council vote on her confirmation.

On April 18, 2022, the City Council interviewed Rael along with the two applicants for the other commissions: Matt Cail for the Planning Commission and Rick Michels for the Ethics Commission.

Cail's interview took 14 minutes. The councilmembers asked Cail questions that sounded par for the course and noncontroversial, such as "What do you think is the most pressing issue for the Planning Commission?" "How would you deal with conflict?" and "How will you use your skillset to benefit the Commission?" The councilmembers were upbeat and spoke to Cail in a friendly tone.

Michels' interview took 16 minutes. Councilmembers Smith and Shannon Sessions corrected Michels on his misconception that the Ethics Commission provides input to the City Council. Sessions said, "You'd be there to judge us if there was a complaint." Otherwise, as with Cail's interview, the councilmembers were upbeat and friendly. They spoke favorably about Michels being a father of six.

Rael's interview took 40 minutes. This was partially due to Rael's tendency to give lengthy answers to questions, but partially due to councilmembers' more rigorous questioning. Councilmembers Patrick Decker, Sessions, and Smith all asked challenging questions of Rael, and Sessions and Decker had an audibly less friendly tone than they had used with Cail or Michels.

Councilmember Smith publicly stated that he lived in Hawaii, Japan, and the Philippines as a "military brat." He said, "I've got a little bit of background being a minority over there." He added that he had been attending the DEIC meetings consistently for three years.

Smith stated to Rael, “You say you live in Lynnwood, but you’re not a registered Lynnwood voter.” Rael responded that she was still registered at her former address in Marysville. Smith and Rael then discussed if Rael lives in the city limits, and Rael said she had recently found out that her apartment complex is in an unincorporated area. (Smith seemed to know this already.)

Smith then stated that he had been trying to get information on the DEIC applicants, but “there doesn’t seem to be enough transparency.” He then alluded to the possibility that the City Council might not confirm Rael’s nomination. He told Rael that the Council would “look into this as far as our requirements,” and indicated that Rael could still be involved with the City in other ways.

Smith then asked Rael, “Do you think we have a lot of sexism in Lynnwood?” He asked, “If we had commissions that were all male commissions, don’t you think we should be trying to get a balance?”<sup>9</sup>

At the City Council meeting on April 25, the Council voted unanimously to confirm Cail to the Planning Commission and Michels to the Ethics Commission. The Council tabled Rael’s confirmation. The Council was split, with Councilmembers Hurst, Josh Binda, and Sutton speaking in favor of Rael and Councilmembers Smith, Julieta Altamirano-Crosby, Decker, and Sessions debating Rael’s eligibility on the basis of her residency and voter registration.

Council President Hurst moved to confirm Rael, stating that Rael is a registered voter and a MUGA resident and therefore is eligible for confirmation. Hurst stated that staff had verified that the five current members of the DEIC are all Lynnwood residents; accordingly, the Council was free to appoint up to two MUGA residents. Mayor Frizzell added, “I’ve asked staff to triple-check, and all five [current DEIC] members reside within the boundaries of the City of Lynnwood.”

Some of the councilmembers, notably Sessions, said they interpreted the LMC to require that candidates not only be registered voters, but that they be correctly registered in their current place of residence. Sessions stated that at a minimum, the LMC was unclear on this point.

Councilmember Smith spoke at length about Rael’s nomination. Ostensibly, he supported Rael as being qualified. However, he publicly challenged staff’s claim that all five current DEIC commissioners are Lynnwood residents; he stated his belief, based on

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<sup>9</sup> This seemed to be an indirect way of pointing out that all five of the DEIC commissioners were female, such that appointing a male (Miller) would be a step toward “balance.”

what a DEIC commissioner allegedly told him, that one of the current members lives in the MUGA and not in the city.<sup>10</sup>

Smith strongly criticized staff for not providing him the information he requested. While he stated, “I’m trying not to get too upset tonight,” his voice sounded angry. He stated that he requested information “over and over” but did not get it, and that:

We need to make this decision and we need to have this information, but to say “no, we’re going to redact it, and you guys are not allowed to have this information, just trust us” . . . Well, having been in government for over 26 years, I think a lot of us realized, we just don’t trust government, we don’t trust the politicians, we don’t trust the bureaucrats. We want to have total and complete transparency.

Smith reiterated that Miller had applied but “they took him off the list.”<sup>11</sup> With audible scorn in his voice, Smith stated, “We didn’t know that we had a limitation of *nine months*. Did you know that? *Nine months* and your name gets taken off.”<sup>12</sup> Smith complained that councilmembers are asked to recruit applicants for advisory bodies, but “then we do it and we get slapped in the face.” He concluded, “I’m concerned that we’re starting to get more agenda driven rather than what is best for all of the people that we represent.”

Councilmember Sessions then stated that the municipal code was not clear about residency and voter registration requirements or at a minimum, the discussion was becoming confused. Accordingly, Sessions suggested the vote be postponed so as to obtain clarification from the City Attorney. Councilmember Decker moved to postpone the matter to May 23, and Sessions seconded. Rael’s confirmation was postponed on a 5-2 vote, with Hurst and Binda voting no.

Following the April 25 meeting, the DEIC issued a written statement criticizing the City Council. The statement characterized the Council’s actions as “intentionally choosing to create barriers to equitable representation” and engaging in a “pattern of exclusion and discrimination.”

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<sup>10</sup> Smith told me he was referring to Selam Habte. He said Habte told him she does not live in the Lynnwood city limits. I was told that Habte’s address is, in fact, in Lynnwood, although it is very close to the boundary.

<sup>11</sup> Smith also mentioned that someone named “Dio,” whom he alleged is “American Mexican,” had applied for the DEIC but did not receive a nomination.

<sup>12</sup> Italics to indicate audible emphasis in Smith’s remarks.

*City Council meetings subsequent to April 25*

At the May 16 City Council meeting, the Council discussed the general requirements for membership on boards and commissions. They discussed the LMC's stated "preference" for Lynnwood residents over nonresidents, with Councilmember Decker emphasizing this point. Decker and [Redacted Text (4L)] debated what it means to give a "preference" to residents. [Redacted Text (4L)] told the Council that the intent of the LMC is to give preference to a Lynnwood resident only if their qualifications are equal to the qualifications of a MUGA resident. Smith and Decker voiced disagreement with this interpretation.

Smith again publicly scolded the staff for taking Miller "off the list" and not providing unredacted applications or an updated applicant list when Smith requested it. He alleged such action was in violation of the LMC.

On May 23, 2022, the City Council voted 5-2 to confirm Arra Rael. Decker and Smith voted no. Smith again alleged a "lack of transparency," stating, "Council isn't trusted to look at addresses of applications." He alleged that ignoring Lynnwood residents is disrespectful toward them.

On July 20, 2022, the Council discussed proposed amendments to the LMC. Sessions proposed language that would require applicants to be correctly registered to vote at their current residence. Decker proposed language that would give Lynnwood residents priority over nonresidents, regardless of their relative qualifications. Smith indicated support for this, but others disagreed.

Smith again criticized staff for not providing requested information. He claimed that the councilmembers are treated as "second class citizens." He again complained that councilmembers were asked to recruit applicants, only to have applicants "taken off the list" after nine months.

## **CONCLUSIONS**

[Redacted Text (4L)] *claims*

Based on a preponderance of the evidence, I find that [Redacted Text (4L)] claims of race and sex discrimination are substantiated. This conclusion is based on the totality of the circumstances. Smith, a white man, treated [Redacted Text (4L)], a Black woman, as if she must answer to him, then publicly criticized her when she did not comply. At the same time, he opposed the DEIC confirmation of a woman of color in favor of his preferred candidate, a



white male, and he failed to support or add value to the City's work on diversity, equity, and inclusion issues.

Smith claims he merely asked [Redacted Text (4L)] to provide information, which is his right as a councilmember. However, Smith in fact attempted to direct [Redacted Text (4L)] work by asking her to provide an updated applicant list outside the semi-annual cycle set forth in the LMC. This crossed the line from being a mere request for information.

As a matter of state law<sup>13</sup> and city policy, a councilmember has no authority to direct the work of the Mayor's [Redacted Text (4L)]. In January of 2022, Mayor Frizzell adopted new communications standards, which establish parameters for councilmember interactions with staff. These guidelines state:

For items on a council meeting agenda, councilmembers should directly email the contact person listed on the agenda.

For questions an individual Councilmember may have of the Executive branch outside of a meeting, please directly contact the applicable Department Director, or if unknown, you may send an email to the Mayor's Executive Assistant who will route your request to the appropriate Department Director.

....

*Please note that Councilmembers do not have the authority to direct staff to proceed with any action. (Emphasis added.)*

Despite this, Smith behaved as if he was entitled to have [Redacted Text (4L)] do this work. Two of his emails to [Redacted Text (4L)] went beyond polite requests; in fact, they were directive and/or accusatory in tone. Smith did not seem to recognize that he was asking [Redacted Text (4L)] to perform tasks especially for him.

When [Redacted Text (4L)] did not comply with Smith's direction, he publicly criticized her in five separate council meetings. While Smith did not mention [Redacted Text (4L)] name, it was clear who he was talking about (and [Redacted Text (4L)] was present for at least two of the meetings). From my work as a city attorney, I am aware that it can be unsettling, even frightening, for a staff member to be publicly berated by an elected official.

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<sup>13</sup> See RCW 35A.12.100 ("The mayor shall be the chief executive and administrative officer of the city, in charge of all departments and employees . . .").

Moreover, Smith’s repeated criticism that [Redacted Text (4L)] took Mike Miller “off the list” lacked an obvious point. [Redacted Text (4L)] keeps applications on file for nine months; however, nothing prohibits an applicant from reapplying as vacancies arise.

[Redacted Text (4L)] experienced Smith’s directiveness and public criticism at the same time she witnessed him displaying underinformed perspectives on racism. From Smith’s vantage point, it may seem that racism is a thing of the past because he, as an individual, does not believe he holds overtly racist views. Yet, systemic racism still affects the lives of many BIPOC people in a significant way. A quote that seems particularly relevant here is:

Denial that racism still exists; denial that, even if it does exist, it’s to blame for the situation at hand; denial that the problem is as bad as people of color say it is—these denials are the easy outs that the dominant white narrative offers to people.<sup>14</sup>

[Redacted Text (4L)], as a Black woman, is understandably sensitive to claims that racism is no longer a problem, or that a straight white male understands what it is like to be a disadvantaged minority, or that a white male applicant should be confirmed over a more qualified woman of color. From [Redacted Text (4L)] vantage point, if Smith had a true understanding of racism or sexism, he would not have considered himself privileged to treat her with disrespect.

It is important to note that Smith was not the only councilmember to question or challenge the DEIC’s actions. He was not the only councilmember who opposed the creation of [Redacted Text (4L)] position. He was not alone in voting to delay Arra Rael’s confirmation or in voting against her confirmation. Smith was not the only councilmember who has supported municipal code amendments that some see as discriminatory barriers. However, Smith *is* the only councilmember to combine those actions with the disrespectful treatment of a female employee of color.

[Redacted Text (4L)] *claims*

Based on a preponderance of evidence, I find that [Redacted Text (4L)] complaint is not substantiated. As noted, Councilmember Smith has demonstrated underinformed views on race and social justice issues, along with a lack of willingness to educate himself or develop true empathy for these causes. At the same time, he insists on being outspoken on the issues. This understandably makes people of color and other minorities frustrated and

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<sup>14</sup> *The Sum of Us: What Racism Costs Everyone and How We Can Prosper Together*, by Heather McGhee, copyright 2021.

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uncomfortable. I am sympathetic to [Redacted Text (4L)] being compelled to experience that on a consistent basis.

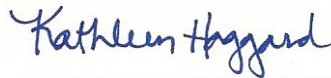
Nevertheless, as an elected official, Smith is entitled to express his views on politics and City business, even if others may find those views objectionable. Without a showing that Smith has treated a particular employee with disrespect, an expression of views is not enough, in my opinion, to sustain a claim of hostile work environment.

I was not presented with sufficient evidence that Smith treated [Redacted Text (4L)] in the same dismissive, disrespectful manner that he treated [Redacted Text (4L)]; that Smith attempted to direct [Redacted Text (4L)] work; or that Smith repeatedly and publicly criticized [Redacted Text (4L)] actions.<sup>15</sup> Accordingly, standing alone, Smith's outspoken opinion about race and social justice issues does not establish a hostile work environment for [Redacted Text (4L)].

If you have any questions or need additional information, please let me know.

Sincerely,

HAGGARD & GANSON LLP



Kathleen Haggard

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<sup>15</sup> That [Redacted Text (4L)] did not receive the same disrespectful treatment bolsters my conclusions that Smith discriminated against [Redacted Text (4L)] because she is Black *and* female.