69348-4

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Cause No. 69348-4-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CYNTHIA LUSEBRINK,
Appellant,

vs.

KENT SCHOOL DISTRICT, a municipal corporation and a subdivision of the State of Washington,
Respondent,

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal is primarily factual. Ms. Lusebrink disagrees with the jury's verdict that the District did not fail to accommodate her disability pursuant to RCW 49.60.180. The jury's verdict is supported by substantial evidence and should be honored by this Court.

II. COUNTER STATEMENT OF THE CASE

A. Factual Background.

Ms. Lusebrink was a Kent School District employee from 1997 until 2008. (VRP July 16, 2012 at 13-14) Mike McNett was a union advocacy specialist for the Washington Education Association. (VRP July 17, 2012 at 70.) Mr. McNett was paid by the union to represent Ms. Lusebrink in the accommodation process. (Id. at 119-120.) Lisa Brackin Johnson was employed by the Kent School District for twenty-five years. (VRP July 18, 2012 at 6.) She was the local president for the Kent Education Association (KEA). (Id. at 7.) She advocated for Ms. Lusebrink with regard to her request for accommodations. (Id. at 12.)

Keith Klug has been employed by Kent School District as the risk manager for more than fifteen years. (VRP July 19, 2012 at 4-5.) One of Mr. Klug's duties is to work with employees on accommodation issues. (Id. at 5.) The Kent School District is a very large District with approximately 1800 teachers. (July 23, 2012 VRP at 27.) He became

involved in Ms. Lusebrink's employment accommodation issues just prior to June 9, 2008. (July 19, 2012 VRP at 5.) Mr. Klug had training on disability accommodations. (Id.) He attended classes and seminars on Washington laws against discrimination. (July 19, 2012 VRP at 5-6.) The District also has in-service seminars. (Id. at 6.)

Kimberly Halley was employed by the Kent School District as the Executive Director of Inclusive Education. (July 19, 2012 VRP at 49-50.) She is responsible for all programming, staffing, support, and issues and problems related to special education services for the District. (Id. at 50.)

Kimberly Wigginton was Kent School District's human resources specialist and was involved with the employment of certificated employees from application to hiring. (July 19, 2012 VRP at 86-87.)

Charles Lind is the general counsel for the Kent School District. (July 19, 2012 VRP at 112-13.) Part of his job included working with union representatives on accommodations for staff. (Id. at 114.) He became knowledgeable about issues related to Ms. Lusebrink after her termination. (Id. at 117-18.)

B. Reasonable Accommodation.

In 2004, Ms. Lusebrink transferred into special education at Kentlake High School. (July 16, 2012 VRP at 16.) In 2005, she was diagnosed with a tumor on her liver, which required surgery. (Id. at 20.)

She requested and was given a leave of absence from October of 2005 through February of 2006. (*Id.*) When she returned, she sought an accommodation of starting back at only half-time, which the District allowed. (Id. at 20-21.) She also sought and obtained other accommodations, including having an aide and not having to lift anything heavier than ten pounds. (Id. at 23.) On April 1, 2006, she went back to work full-time in her special education position. (Id. at 20-21.) Ms. Lusebrink felt her return to work went well. (Id. at 24.)

Ms. Lusebrink did not request any accommodations at the start of the 2006-07 school year. (VRP July 16, 2013 at 25.) She did not have any lifting restrictions from her doctor at the start of the 2006-07 school year. (Id.) She and her doctor felt she was fine to return to work in her normal duties and go about her life normally. (Id.)

Ms. Lusebrink orally reported that in January of 2007, she reinjured herself during a field trip planned for her students. (July 16, 2012 VRP at 26-27.) In late April or May, Ms. Lusebrink learned that her incision site had herniated. (Id. at 28.) She had another surgery on July 31, 2007 to repair the hernia. (Id. at 29.) She had additional restrictions with the new surgery that prevented her from lifting anything heavy. (Id. at 30.) Given her new injury, she and her physicians felt that she needed a more extensive recovery period before returning to work. (Id. at 30.) She

requested and was given another leave of absence initially for the first half of the 2007-08 school year, and then ultimately for the entire school year. (Id. at 30-31.) Ms. Lusebrink testified that she believed at that time she could not teach in any manner that might put her in a position to receive a blow to her abdomen from students. (Id. at 132.) Ms. Lusebrink applied for the District's long-term disability benefits for the 2007-08 school year. (Id. at 31-32.) She understood that to qualify for long-term disability, she had to be disabled from her teaching position. (Id. at 134.)

In February of 2008, the District requested information from Ms. Lusebrink about her ability to return for the 2008-09 school year. (July 16, 2012 VRP at 37.) This is standard and allows the District to plan for staffing for the next school year. (July 19, 2012 VRP at 124-25.) Mr. McNett assisted her in responding to the District's request. (VRP July 17, 2012 at 76.) Ms. Lusebrink decided that she could not return to the special education classroom, and she began exploring her options with the District and her union for going to a regular education classroom. (July 16, 2012 VRP. at 40-42.) She also believed she could not return to an elementary school position due to the required lifting and moving furniture. (Id. at 43.) Mr. McNett sent an email to Mr. Miner, stating that Ms. Lusebrink intended to return to work for the 2008-09 school year, but stated she believed her medical providers would require her to be under light duty

restrictions. (July 17, 2012 VRP at 77-78.) Mr. McNett further communicated with Mr. Miner over a period of time. (Id. at 79-80.) He told Mr. Miner that Ms. Lusebrink believed it would be medically necessary for her to have a different placement. (Id. at 80.) Mr. Miner informed Mr. McNett that Ms. Lusebrink would need to follow the accommodation process. (Id. at 81.) Mr. McNett suggested that all the parties get together in the spring or summer to further discuss Ms. Lusebrink's placement for 2008-09. (Id. at 126.)

In May of 2008, Ms. Lusebrink was seeing a counselor. (July 16, 2012 VRP at 155.) On May 6, 2008, she told her counselor that because of her physical disabilities, she was having doubts whether she would ever be able to teach again. (Id. at 155.) She was certain that she would never be able to teach in special education again. (Id. at 156.) As of May 2008, Ms. Lusebrink and her doctors believed it was still too risky for her to return to a classroom teaching job. (Id. at 156-57, 159-61.)

On May 21, 2008, Ms. Lusebrink spoke with Mr. McNett about her medical condition and her doctors' concerns. (VRP July 17, 2012 at 128.) Ms. Lusebrink informed Mr. McNett that her doctor was reluctant to place her with students at least for the remainder of the school year. (Id. at 129-130.)

The District supported Ms. Lusebrink's application for continued Long Term Disability payments when Standard Insurance threatened to stop them. (July 16, 2012 VRP at 62; 168.) The District met with Ms. Lusebrink on June 9, 2008, to discuss helping her reinstate her long term disability benefits and her placement for the 2008-09 school year. (Id. at 61-62; 166-68.) The District agreed to write a letter to the insurance company, explaining the difference between a general education and a special education teacher, in order to get them to continue disability benefits. (July 16, 2012 VRP at 62-63; 168; July 23, 2012 VRP at 22.)

On June 9, 2008, Mr. McNett called a meeting with Ms. Lusebrink, Mr. McNett, Ms. Brackin Johnson, Mr. Klug, Ms. Halley, and Mr. Miner. (July 16, 2012 VRP at 163-64.) Although Ms. Lusebrink faults the District for not meeting earlier, it was Mr. McNett's suggestion that they wait until spring or summer, and when Mr. McNett called for the meeting, the meeting was in fact scheduled. (VRP July 17, 2012 at 126-27.) Mr. Mr. McNett essentially led the meeting, because he had requested it. (July 17, 2012 VRP at 104; 126.) His primary concern for the meeting was the long term disability discussion, because that was a more immediate issue. (Id. at 114.) He knew it was early to know what jobs would be open for the 2008-09 school year. (Id. at 114-115.) The District sees heavy job postings and hires most teachers in late June, July, and August. (July 18,

2012 VRP at 18-19.) All open positions at the District are sent to Ms. Johnson as the KEA president. (Id. at 26.)

At the June 9, 2008, meeting, the District explored the option of offering Ms. Lusebrink an IP, special education position. (July 19, 2012 VRP at 14; July 23, 2012 VRP at 23.) Coming into the meeting, Mr. McNett did not have an opinion about whether Ms. Lusebrink could safely teach in an IP classroom. (July 17, 2012 VRP at 139.) The IP class is a little different than the SC position that Ms. Lusebrink held previously, in that the students have less serious physical disability and they are only in the classroom periodically. (July 23, 2012 VRP at 23.) The District was prepared to accommodate Ms. Lusebrink's lifting restrictions and sitting requirements in the IP classroom. (July 23, 2012 VRP at 23.) However, at the meeting, Ms. Lusebrink made clear to the District that being a special education teacher was no longer an option for her, as it would be unsafe, and was not in line with what the doctors were allowing her to do. (July 16, 2012 VRP at 65; CP 59 bates stamp 994-95.) Accordingly, the District looked at Ms. Lusebrink's other certifications and qualifications and asked Ms. Lusebrink what she felt she could do. (July 23, 2012 VRP at 24.) At that point, Ms. Lusebrink got very emotional, crying and shaking. (Id.) She told Mr. Klug that she could not take the risk of going back into the classroom. (Id.) Ms. Lusebrink was concerned that if she

received some kind of blow to her abdomen, that could result in a life-threatening condition for her. (July 16, 2012 VRP at 117.) She understood that this type of blow could happen in a regular education classroom. (Id.) Ms. Lusebrink was concerned that any subsequent injury would be more difficult to repair and could potentially end up requiring her to get a liver transplant. (Id. at 124.) Ms. Lusebrink told Mr. Klug that she could die if she ripped open her stitches again, and she was concerned that having contact with a student could do that to her. (July 23, 2012 VRP at 36.) Due to Ms. Lusebrink's medical information provided at the June 9, 2008 meeting, which made clear she could not return to special education, she was never offered the IP position. (July 19, 2012 VRP at 31.)

Ms. Halley recalled at the June 9, 2008 meeting Ms. Lusebrink stated she was very concerned about being in a classroom and the potential for her to be reinjured. (July 19, 2012 VRP at 57.) This is particularly true for the IP position. (Id.) She specifically recalled Ms. Lusebrink expressing fear of going back into any classroom. (Id. at 58-59.)

The June 9, 2008 meeting was part of the interactive process for accommodation. (July 19, 2012 VRP at 9; July 23, 2012 VRP at 25-26.) Ms. Lusebrink is required to inform the District what her disability is and what restrictions she had. (July 19, 2012 VRP at 9.) Mr. Klug asked Ms.

Lusebrink about working in a kindergarten or elementary position, and she stated she was afraid the students would want to hug her and would hurt her, or she would have to pick them up. (July 23, 2012 VRP at 25.) He asked about middle school or high school, and she said she was afraid she would have to break up a fight or would get run over in the hallway. (Id.) Ms. Lusebrink told Mr. Klug she could not return to the classroom, she wanted an alternative position. (Id.) At the meeting, Ms. Lusebrink provided a letter from her therapist that stated she had the physical capacities to teach in a mainstream classroom, but Mr. Klug understood clearly from Ms. Lusebrink's statements that she did not want to go into any classroom. (July 23, 2012 VRP at 34.) She was hysterical, crying, she was afraid to go back into the classroom. (Id.)

Contrary to her position at trial, Ms. Lusebrink never asked for an accommodation to a regular classroom job during this meeting. (July 23, 2012 VRP at 29.) Mr. Klug asked Ms. Lusebrink what she was interested in and she stated she did not know. (Id.) She had been looking online and at the weekly postings. (Id.) She had not noticed anything that she felt was appropriate for her at that point. (Id.) Mr. Klug asked her what job classifications she was interested in, including food service, bus driving, and maintenance. (Id.) She refused all of those suggestions. (Id.) Mr. McNett brought up a TOSA position or curricular related positions and

they discussed that. Mr. Klug did not know whether any TOSA jobs were open, because he had not looked prior to the meeting. (Id.)

Mr. Klug was concerned about Ms. Lusebrink teaching a regular education class, given her expressed vulnerability and the risk of her being reinjured. (July 17, 2012 VRP at 107.) Because her latest medical information differed with what she said in the meeting, Mr. Klug suggested that she go back to her physician. (July 23, 2012 VRP at 34-35.) The District needed medical information to support accommodations, and Mr. Klug wanted clarification about what she could and could not do as far as the classroom position, and if she could not do the classroom position, to clarify what restrictions she had for other jobs. (Id. at 35.) Mr. Klug testified that he was very cautious, due to the extreme risk Ms. Lusebrink told him was present for her in the classroom. (Id. at 36.)

At the conclusion of the June 2008 meeting, there was no consensus about Ms. Lusebrink's placement for the 2008-09 school year. (July 17, 2012 VRP at 108.) Ms. Lusebrink was advised to check the District website and weekly postings for job openings she believed she would be qualified for, and to provide additional medical information. (July 16, 2012 VRP at 169; July 17, 2012 VRP at 108.) Mr. Klug told Ms. Lusebrink that if she found a job that she thought she could do, she should let him know. (July 17, 2012 VRP at 58.) The parties talked about other

positions, including a TOSA position, which involved teaching special education teachers, other curriculum and instruction positions that might be available at the District level. (July 16, 2012 VRP at 70-71; July 17, 2012 VRP at 107.) The District did not rule out Ms. Lusebrink working in a TOSA or curriculum type of position, but did not offer her one at that point either, contrary to Ms. Lusebrink's testimony at trial. (July 17, 2012 VRP at 107; July 23, 2012 VRP at 41.)

On June 11, 2008, Ms. Lusebrink wrote a letter to the disability insurance company, appealing the decision to terminate her benefits. (July 16, 2012 VRP at 179; CP 59 bates stamp 991-93.) She stated that the District felt it was not safe for her to return to the classroom. (Id. at 182.) As of June 11, 2008, Ms. Lusebrink took the position that Dr. Herner, physical therapist Lyons, and Kim Halley believed that she could not safely return to the classroom. (July 17, 2012 VRP at 13.)

On June 12, 2008, Ms. Lusebrink acknowledged in an email to her union representative, that the outcome of the June 9, 2008 meeting was agreement that no placement with students could be made, and that the District was looking for a non-student placement. (July 17, 2012 VRP at 17-18.) Her union representative informed her that as of June 12, 2008, a position had not emerged at the District that would be safe for her. (July 16, 2012 VRP at 187-88.)

Mr. Klug received a June 25, 2008 letter from Ms. Lusebrink's physician Dr. Herner, clarifying her recommendations regarding Ms. Lusebrink's ability to return to a teaching position. (July 23, 2012 VRP at 36-37; July 17, 2012 VRP at 135; CP 56 bates stamp 910.) Dr. Herner stated that Ms. Lusebrink was currently disabled from teaching. (July 17, 2012 VRP at 135.) Finally, she stated that she considered Ms. Lusebrink no longer able to pursue a career in teaching. (July 16, 2012 VRP at 176; July 17, 2012 VRP at 135-36.) Dr. Herner did not differentiate between a career in special education or in a general education classroom. (July 16, 2012 VRP at 177.) This letter was written for the school district. (July 17, 2012 VRP at 8-9.) There is no evidence of further medical information.

It would have been easy for the District to place Ms. Lusebrink in a regular education classroom. (July 23, 2012 VRP at 39.) She did not want to be near students or go back into a classroom. (Id.) The District could have placed Ms. Lusebrink into another teaching job. (Id. at 40.) However, once a teacher tries to go out of a teaching job classification, the employee has to apply for those jobs. (Id.)

Job openings at the District get posted online. (July 19, 2012 VRP at 22.) The District has an online application for employees (Id. at 26.) The District sent Ms. Lusebrink weekly emails providing information about all job postings. (Id. at 30-31.) TOSA jobs and curriculum jobs are

rare and highly sought after. (July 23, 2012 VRP at 41.) It is a position that most teachers want to get into, so openings are rare, and openings in positions that do not require classroom or student contact are even more rare. (July 23, 2012 VRP at 42.) Highly qualified people apply for those jobs. (Id.) Mr. Klug made clear to Ms. Lusebrink that he could not just place her in one of those jobs, she would have to apply. (Id.) He asked Ms. Lusebrink to contact him if she found a job she was interested in, so he could facilitate her getting into the interview process. (Id. at 42-43.) He also asked her to keep him updated on her medical condition, if anything changed. (Id. at 43.) He asked everyone in the meeting to keep an eye out for jobs. (Id.) Immediately after the meeting, Mr. Klug went to the IT department and verified Ms. Lusebrink was still on the District email list to make sure she was getting all the job postings sent to her. (Id.) He also met with the HR department and asked them to keep an eye out for a job that met Ms. Lusebrink's restrictions. (Id. at 43.) Ms. Lusebrink had access and notice of internal and external postings. (Id. at 44.) Ms. Lusebrink told Mr. Klug that she would apply for jobs she felt were appropriate for her and she would contact Mr. Klug so that he could facilitate it. (Id.) She never did that. (July 19, 2012 VRP at 29.)

After the June 9, 2008, meeting, Ms. Lusebrink noticed the TOSA positions posted online. (July 16, 2012 VRP at 79.) On July 31, 2008, she

submitted a Certificated Transfer Request Form for the position to acknowledge her agreement to take the position. (Id. at 79-81) Ms. Lusebrink did not inform Mr. Klug that she had applied for the TOSA position and he was unaware that she had. (July 19, 2012 VRP at 28.) Ms. Halley was aware of Ms. Luesbrink's need for accommodation and was aware that Ms. Lusebrink applied for the TOSA position. (July 19, 2012 VRP at 62.) The TOSA positions would have required Ms. Lusebrink to go into the SC special education classroom like the one she said she could not return to due to the danger. (Id. at 61-62.) Ms. Halley made sure that Ms. Lusebrink got an interview for the TOSA positions. (Id. at 62.) There were eight candidates for two TOSA positions. (Id.) Ms. Lusebrink interviewed for the TOSA position in late September or early October of 2008. (July 16, 2012 VRP at 81-82.) She was considered for the positions. (July 19, 2012 VRP at 62.) The Court refused to allow the District to put on any evidence that the candidate chosen was the most qualified or even a more qualified candidate than Ms. Lusebrink. (e.g. July 23, 2012 VRP at 3-8.)

On October 12, 2008, Ms. Lusebrink was informed she did not get chosen for that position. (July 16, 2012 VRP at 82.) She also applied for a payroll Administrative Assistant III position on November 18, 2008, and tested for that position. (Id. at 84.) She did not receive that position. (Id.

at 86.) From 2008 to 2009, Ms. Lusebrink testified she applied for four positions at the District. (Id. at 86.) She applied for a Kentwood teacher mentor/ coaching position. (Id. at 86-87.) She testified she applied for an assistant librarian position. (Id. at 87.) Mr. Klug was unaware that Ms. Lusebrink applied for any of these positions until after she was terminated. (July 19, 2012 VRP at 29.)

On December 8, 2008, Ms. Lusebrink received a notice of termination that stated she was being terminated for administrative reasons. (July 16, 2012 VRP at 87; July 17, 2012 VRP at 25.) The letter specifically stated that the termination was necessary because she was not an active employee and was not on an authorized leave of absence. (July 17, 2012 VRP at 26.) After Ms. Lusebrink's leave of absence for the 2007-08 year expired, she did not reapply for another leave of absence. (July 17, 2012 VRP at 27.) The letter specifically stated that she was eligible for reemployment with the District. (Id. at 28-29.) The District's policy requires an employee who is unable to work due to health related concerns or other reasons, to apply for a leave of absence. (July 19, 2012 VRP at 120.) If the employee wants the leave to be extended, they must reapply every year. (Id. at 124.) Although Ms. Lusebrink knew the policy, and had applied for two leaves of absence previously, she did not

apply for leave following the 2007-08 school year. (July 19, 2012 VRP at 123; July 16, 2012 VRP at 20, 30-31; July 17, 2012 VRP at 27.)

Ms. Lusebrink did check the website and the postings to look for jobs that she thought she could do, for a time. (July 17, 2012 VRP at 58.) After 2009, she no longer checked the website to look for jobs at Kent that she might be able to do. (Id. at 59-60.) From June of 2008 until July 4, 2012, she did not apply for a single teaching job anywhere. (July 17, 2012 VRP at 60; July 23, 2012 VRP at 82.) Ms. Lusebrink did not apply for a single classroom teaching position from May of 2007 through July 4, 2012. (July 16, 2012 VRP at 120; July 23, 2012 VRP at 82.) The reason she did not was because she was not physically able to do teaching jobs, due to the potential for injury. (July 16, 2012 VRP at 121.)

The District has a very simply online application process for jobs. (July 19, 2012 VRP at 87.) This involves an applicant filling out an online application and simply clicking a button to submit the application. (Id.) Once an application is completed, administrators can view and evaluate all applicants from their computers. (July 19, 2012 VRP at 87-88.)

Ms. Halley handles all of the general education teaching positions applications. (July 19, 2012 VRP at 88.) She testified that there were approximately 345 open teaching positions from June of 2008 until the first day of trial. (Id. at 88-90.) Ms. Lusebrink did not apply for any of

those positions. (Id. at 90.) On July 8, 2012, Ms. Lusebrink started an application for jobs at Kent School District. (Id.) However, she had not submitted her application as of July 19, 2012. (Id.)

The District is well aware of the accommodation process and requirements. (July 19, 2012 VRP at 130.) Part of the accommodation decision is dependent upon what the employee tells the District about jobs she can or cannot do. (Id.) Dr. Herner's June 25, 2008 letter that specifically indicated Ms. Lusebrink was disabled from any teaching job was a critical factor in the District's decision regarding accommodations for Ms. Lusebrink. (Id. at 146-47.)

C. A Mistrial Was Not Appropriate

This Court entered an o*rder in limine* prohibiting testimony regarding settlement discussions, negotiations, and offers of settlement. (CPs 80-81.) Ms. Lusebrink testified in direct examination that she applied for four positions with the District after June of 2008, including two TOSA positions, a payroll position, and an assistant library position. (July 16, 2012 VRP at 86-87.) She then testified that she did not get any of those jobs, despite her request for accommodation. (Id. at 87.) Upon hearing this information, Mr. Moberg ascertained with the District that the librarian job she testified about was the only librarian position that she sought. (July 19, 2012 VRP at 167.) Mr. Moberg did not believe

testimony related to the librarian position violated the Court's order on not discussing settlement negotiations, because it was offered prior to the litigation and after the parties completed the EEOC process. (Id. at 167-69.) In addition, Ms. Lusebrink opened the door to the District discussing the librarian position, because she specifically testified that she "applied for" it as part of the accommodation process, but did not receive it. (July 19, 2012 VRP at166-68; 174; July 16, 2012 VRP at 87.) The District had a right to rebut Ms. Lusebrink's testimony, because in fact, she was offered that position. (July 19, 2012 VRP at 164.)

Mr. Firkins never timely objected to the testimony about the librarian position. (July 19, 2012 VRP at 140-41.) Instead, he let the questioning of Mr. Lind go on rather than stopping it by objection before the jury heard all of the information, and in fact he allowed the direct examination of Mr. Lind to finish in its entirety, without objecting or asking for a sidebar. (Id. at 140-141; 149-50.) Then, Mr. Firkins improperly asked for a mistrial in front of the jury. (Id. At 149) On cross examination, Mr. Firkins launched into questions specifically intended to alert the jury that the librarian position was part of settlement discussions, in his opinion. (Id. at 149-50.) This improper questioning caused Mr. Moberg to object and ask for a sidebar. (Id. at 150.) The Defense was extremely careful not to elicit testimony about a myriad of issues subject

to rulings *in limine* throughout the trial. (July 19, 2012 VRP at167-76.) The Court appropriately stopped the trial on Mr. Moberg's objection and held a sidebar and specifically entertained Mr. Firkins' motion for mistrial. (Id. at 150-180.) The Court denied the mistrial, without prejudice, and created and issued a curative instruction. (Id. at 176-78.) Mr. Firkins indicated that the proposal was acceptable to him. (Id. at 178.) The Court gave an appropriate curative instruction, curing Ms. Lusebrink's testimony that she applied for the librarian position and did not receive it, and Mr. Lind's testimony that Ms. Lusebrink was offered the librarian position at the same pay and rejected the offer. (Id. at 188-89.)

The Court also entered an *order in limine* prohibiting testimony about "any claim or evidence of any claim that the District violated the Collective Bargaining Agreement with plaintiff's union." (CP 80.) In making this ruling, the Court specifically conceded that some information regarding the collective bargaining agreement and grievances might be necessary to provide context for the jury. (July 10, 2012 VRP at 125-133.) The Court stated, "And so, as Mr. Moberg's pointed out, yes, it was the Court's intention to grant the motion, that we would not have evidence of some sort of violation of the Collective Bargaining Agreement. That doesn't mean that the jury doesn't get to understand why Mr. McNett was there or that there was such an agreement." (Id. at 126.) Mr. Firkins

specifically argued that he should be able to introduce evidence related to the collective bargaining agreement and/or grievances, without making a claim of violation. (Id. at 131-32.) The Court's answer was simple:

> And I appreciate your candor in indicating some of the things that you believe that you can offer evidence about and I can't evaluate right now where the line would be drawn and still be consistent with the ruling. It's one thing to talk about the fact—and again, just thinking aloud, maybe there's the ability to offer some context about there was a grievance, and that's why Mr. McNett was there and so on.

(July 10, 2012 VRP at 132.)

Ms. Lusebrink challenges Mr. Lind's testimony. The first exception is to Mr. Lind statement, "There's actually—there's a collective bargaining agreement. We have eight different groups that have collective bargaining agreements, teachers, librarians, nurses, educational specialists are all a part of the Kent Educational Association, so there's some provisions of the collective bargaining agreement that deal—" (July 19, 2012 VRP at 119.) This testimony does not violate the Court's order not to discuss the *District's violations* of the collective bargaining agreement. There is no *order in limine* preventing discussing the existence of a collective bargaining agreement. The next testimony excepted to is simply testimony by Mr. Lind that he had discussions with Mr. McNett. (Id. at 128.) There is no *order in limine* precluding this.

The Court also ordered *in limine* to prohibit "any evidence regarding comparative qualifications of plaintiff and RG questioning the District's decision in filling the TOSA position." (CP 80.) The Court granted this *motion*, because he ruled there is no element requiring the Defendant to establish that it hired the most qualified candidate or conversely requiring the Plaintiff to prove that the District did not. (July 10, 2012 VRP at 117-120.) Ms. Lusebrink challenges Mr. Moberg's statement during closing arguments.

> And I think you can safely assume that this hiring committee that Ms. Halley was on, you saw her, she's a very careful deliberate lady, that committee took great care to listen to everybody's answers, to interview, and arrive at hiring the person that best suited the District for that job.

(July 24, 2012 VRP at 138.)

The Court sustained Mr. Firkins' objection to the testimony and admonished the jury again that closing argument is not evidence and instructed the jury to disregard. (July 24, 2012 VRP at 138-39.) However, this statement does not violate the Court's order prohibiting comparative qualifications between Ms. Lusebrink and RG.

D. The Jury Instruction.

There was much discussion and debate about Jury Instruction No. 11. (July 24, 2012 VRP at 6-27.) There is no pattern jury instruction that adequately covers the accommodation issues involved in this case. (Id at

28.) Mr. Firkins objected to the instruction, but only because he believed it should say that Ms. Lusebrink cannot be treated as any other employee and the District has some responsibility to actually get her to fill a position. (Id. at 49.) This is not the law in Washington. Mr. Moberg strenuously objected to the Court's use of the term "classroom teacher," because Ms. Lusebrink was not a regular classroom teacher, she was a special education teacher. (Id. at 23-24, 53-54.) In addition, Mr. Moberg wanted language in the instruction about Ms. Lusebrink's duty to apply for positions that she believed she was qualified for. (Id. at 35-36, 38, 53-55.) This was important, because Ms. Lusebrink did not apply for a single regular education classroom teacher position. (Id. at 35-36, 38.) Mr. Firkins argued his theory of the case to the jury extensively, under Court's Instruction No. 11, as the Court defined it. (Id. at 88-91.) He specifically said, "remember, it's the employer's obligation to find an accommodation, to do something, to have something other than the complete absence of any evidence in front of a jury where they can point to, we did this, we offered her this." (Id. at 89.)

> In most cases where you're going to see an employer making an effort to accommodate somebody, you're going to see evidence of it. You're going to see the interactive process. ... I want you to think about what the Kent School District did essentially in this case, which is to say, look for a job and tell us if you find anything. How are they doing anything different than every other human being on the

> planet? How are they treating Cindy Lusebrink differently than they would treat me or Mr. Moberg were we to apply? ... What you're going to see in the jury instruction when you read it carefully is that it uses the words must take affirmative measures, affirmative means not passive, not laying back and letting her do all the work. ... They must take affirmative steps. They must do something other than nothing and firing people when they are faced with an accommodation situation. And that's exactly what didn't happen here.

(July 24, 2012 VRP at 89-91.)

Mr. Firkins argued that the District could have placed Ms. Lusebrink into a TOSA position or into a general education classroom, but failed to. He argued that the District provided information about jobs, but did nothing further. He argued that the District did no more for Ms. Lusebrink than it would have done for anyone else. (Id. at 81-82; 89-91.)

The ordinary meaning of "affirmative" measures in light of the evidence in the case is "that involves or requires effort." Black's Law Dictionary, Abridged Seventh Addition. According to Free Miriam Online dictionary, affirmative as an adjective is defined to include, "positive." Although counsel argues that the instruction fails to alert the jury that the District had a "positive duty" to take actual and effective steps to accommodate Ms. Lusebrink, the very definition of "affirmative measures" requires that the District do something positive.

III. ARGUMENT

A. *Standard Of Review*

This court has often expressed its commitment to the sanctity of a jury verdict. Absent clear error in law this court cannot invade the province of the jury. A strong policy favors the finality of judgments on the merits. *Stanley v. Cole*, 157 Wn.App. 873, 887, 239 P.3d 611 (2010). The grant or denial of a motion for a new trial is reviewed on an abuse of discretion standard where the motion is not based on an allegation of legal error. *Edwards v. Le Duc*, 157 Wn.App. 455, 459, 238 P.3d 1187 (2010), *review denied*, 170 Wn.2d 1024, 249 P.3d 623 (2011).

The challenge of jury verdicts is reviewed under a sufficiency of the evidence standard. *Winbun v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576 (2001). So long as the facts articulated in the course of trial are based on substantial evidence and support the verdict, an appellate court cannot overturn the verdict. *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 817–18, 733 P.2d 969 (1987); *See also*, *Harrell v. Washington State ex rel. Dept. of Social Health Services*, 170 Wn.App. 386, 408-409, 285 P.3d 159, 171 (2012). "The record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question." *Canron, Inc. v. Fed. Ins. Co.*, 82 Wn.App. 480, 486, 918 P.2d 937 (1996). A party challenging the sufficiency of the evidence

admits the truth of the opposing party's evidence and all inferences that can be reasonably drawn there from. *Holland v. Columbia Irr. Dist.*, 75 Wn.2d 302, 304, 450 P.2d 488 (1969). Such a challenge requires that the "evidence be interpreted most strongly against the moving party and in the light most favorable to the party against whom the motion is made." *Washburn v. City of Federal Way,* 169 Wn.App. 588, 606, 283 P.3d 567, 577 (2012).

The court reviews a denial of a motion for a mistrial under an abuse of discretion standard. *State v. Hopson,* 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A trial court should grant a mistrial only when the party has been so prejudiced that nothing short of a new trial could ensure a fair trial. *Hopson,* 113 Wn.2d at 284, 778 P.2d 1014. The court must review the erroneous admission of evidence under ER 404(b) under the non-constitutional harmless error standard. *State v. Gresham,* 173 Wn.2d 405, 425, 269 P.3d 207 (2013). Under this standard, an error is harmless "'unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *Gresham,* 173 Wn.2d at 425, 269 P.3d 207. There is no error of law that prejudiced Ms. Lusebrink, and the verdict is supported by substantial evidence.

B. Reasonable Accommodation.

The District reasonably accommodated Ms. Lusebrink. "An employer has an obligation to reasonably accommodate a handicapped employee." *Dean v. Municipality of Metropolitan Seattle-Metro*, 104 Wn.2d 627, 632, 708 P.2d 393, 396 (1985). "Failure to accommodate constitutes discrimination under RCW 49.60.180." *Id.* The statute "is part of a comprehensive law by which the legislature declared it is an individual's civil right to be free from various types of discrimination and the legislature has directed liberal construction of the provisions of RCW 49.60 in order to accomplish its purpose." *Id.*

There is no question Ms. Lusebrink was disabled from her job as a special education teacher. Ms. Lusebrink, her doctors, and her union representative all agreed with this fact. Therefore, her only accommodation claim against the District is reassignment. "The Washington Human Rights Commission has promulgated WAC 162-22-[065] which offers guidance to employers in fulfilling their obligations to handicapped employees." *Dean*, 104 Wn.2d at 632-33, 708 P.2d at 396. Washington Administrative Code 162-22-065(2)(c) in relevant part states, "Possible examples of reasonable accommodation may include, but are not limited to, informing the employee of vacant positions and considering the employee for those positions for which the employee is qualified."

Accordingly, it is the duty of the employer to reasonably accommodate by informing an employee of job openings for which she might be qualified. *Dean*, 104 Wn.2d at 637-38, 708 P.2d at 399. It is correspondingly the duty of the employee to "cooperate with the employer in the hunt for other suitable work, by making the employer aware of [her] qualifications, by applying for all jobs which might fit [her] abilities and by accepting reasonably compensatory work [she] could perform." *Dean*, 104 Wn.2d at 638, 708 P.2d at 399; *Molloy v. City of Bellevue*, 71 Wn.App. 382, 391, 859 P.2d 613, 618 (1993). An employer has no duty to create a job for a handicapped employee ***or to hire her in preference to a more qualified employee***." *Dean*, 104 Wn.2d at 634, 708 P.2d at 397 (emphasis added); *Clarke v. Shoreline School District No. 412, King County*, 106 Wn.2d 102, 121, 720 P.2d 793, 804 (1986). "There is no discrimination in denying a job to a handicapped person who is unqualified to perform it. *Clarke*, 106 Wn.2d at 121, 720 P.2d 793; *Dean*, 104 Wn.2d at 638, 708 P.2d at 399. "If a handicapped employee is qualified for a job within an employer's business, and an opening exists, the employer must take affirmative steps to help the handicapped employee fill the position. *Clark*, 106 Wn.2d at 121, 720 P.2d at 804; *Dean*, 104 Wn.2d at 639, 708 P.2d at 400.

To "make a prima facie case of handicap discrimination, an employee plaintiff must prove that he or she is handicapped, that he or she

had the qualification required to fill vacant positions and that the employer failed to take affirmative measures to make known such job opportunities to the employee and to determine whether the employee was in fact qualified for those positions." *Dean*, 104 Wn.2d at 639, 708 P.2d at 399; *Clarke*, 106 Wn.2d at 120, 720 P.2d at 804. Clearly, *Clarke* and *Dean* require a school district to take *affirmative steps* to consider a disabled teacher for any open teaching/nonteaching positions. However, it is equally clear ***a district is not required to choose a disabled teacher over a more qualified candidate for the same job.***

The parties met on June 9, 2008 to have an interactive conversation about Ms. Lusebrink's disability and restrictions and to discuss what accommodations could be provided. At the time of this meeting, Ms. Lusebrink provided medical information that suggested she could not return to special education, but she could potentially do a regular classroom assignment. The District was prepared to offer Ms. Lusebrink a different assignment in special education that they believed would be less dangerous than the one she had been in. However, due to the additional medical documentation, Ms. Lusebrink was never offered the special education IP position. During the meeting, Ms. Lusebrink made very clear to the District employees that she was afraid to return to the classroom at all. She became emotional and stated she was fearful that she would

reinjure herself, potentially resulting in death. Because the medical information conflicted with Ms. Lusebrink's statements, the District asked her to get updated medical information to support her not returning to the classroom. The District received the June 25, 2008 letter from Dr. Herner, which specifically stated Ms. Lusebrink was disabled from teaching. The letter does not state that the condition was transitory or that she would at some point return to teaching. There is nothing equivocal about the opinion that she could no longer pursue a career in teaching.

Accordingly, the District informed Ms. Lusebrink that they would send her notice of open non-teaching positions, and she was encouraged to apply. The District made certain that she was on the email list for internal employees to receive notice of all open positions, and that she had access to an apply for positions online, which was a very simply process. Mr. Klug asked Ms. Lusebrink to inform him if she was interested in a position so that he could help facilitate her application process. She never did. The District assigned human resources personnel to assist Ms. Lusebrink in restoring her disability benefits, which gave her time to apply for open positions. Mr. Klug also asked HR to look out for positions that Ms. Lusebrink would be qualified for. The District considered Ms. Luesbrink for the three non-teaching positions she applied for. She was invited to participate in the interview process for the two TOSA positions, but the

District selected more qualified candidates. Those TOSA positions required her to be in the special education classroom. Mr. Klug testified that those jobs are very rare and highly sought after and the candidates are highly qualified. She was considered for and tested for a payroll position. The District hired a more qualified candidate.

There is no requirement under WLAD that Ms. Luesbrink actually be placed in a position for which she applied. *Sharpe v. AT&T,* 66 F.3d 1045, 1051 (9th Cir. 1995) (court upheld dismissal of employee's lawsuit on summary judgment concluding no WLAD discrimination even though disabled employee requested reassignment and applied to three different jobs, but was not selected). *Dean* and *Clarke* make clear a school district does not have to give a disabled teacher preference over a more qualified candidate when considering reassignment. The Washington State Supreme Court continues to hold that there is no such duty under the WLAD. *See Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 146 n. 2, 94 P.3d 930 (2004) (***"The employer does not have a duty to... give the employee preference over a more qualified employee"***) (emphasis added).

The WLAD "does not require an employer to offer the employee the precise accommodation he or she requests." *Doe v. Boeing, Co.* 121 Wn.2d 8, 20, 846 P.2d 531 (1993). In other words, the employer is not

required to defend the reasonableness of an accommodation the employee wanted, but did not receive. *Sharpe,* 66 F.3d at 1050.

It is undisputed there were regular teaching jobs available that Ms. Lusebrink could have been reassigned to. Mr. Klug could have placed Ms. Lusebrink into one of those jobs, rather than have her apply and compete with other candidates. However, Ms. Lusebrink did not want one of those jobs. During the trial, Ms. Lusebrink contended that she should have been given an English class. However, Ms. Lusebrink did not apply for any teaching job. All of the post June 9, 2008 evidence supports the finding by the jury that Ms. Lusebrink did not want a regular classroom position. In addition, Mr. Klug specifically asked her whether she wanted something in food service, maintenance, or transportation, and she was not interested in those jobs. As a matter of law, the District was not required to provide the precise accommodation requested by Ms. Lusebrink, and by failing to apply for any regular teaching position, and by providing the District with personal and medical information that indicated clearly that she could not go back into the classroom, Ms. Lusebrink denied the district any opportunity to provide this as accommodation. Ms. Lusebrink had a corresponding duty to apply for those positions she felt she was qualified for. If she believed she qualified for a regular classroom position, she was required to apply for one.

It is undisputed that the District did provide Ms. Lusebrink notice of all job postings. It is undisputed that Ms. Lusebrink did apply for three open positions for which she was qualified. It is undisputed that Ms. Lusebrink was considered for those positions. Ms. Lusebrink had a duty to review open positions and to apply if she believed she was qualified. She did so initially, but stopped looking at potential jobs after a short period of time. The District met its obligation of reasonable accommodation under the law. Ms. Lusebrink does not really contend that the District did not comply with the requirements set forth in *Dean* and *Clarke*. Ms. Lusebrink's argument is that the law should be changed to actually require an employer to place a disabled employee into a vacant position for which he or she is qualified, without the requirement of applying and competing with other applicants and with no regard to who is the most qualified candidate. This is not the state of the law currently and this is not a reasonable requirement for employers.

C. Jury Instruction 11 Did Not Prejudice Ms. Lusebrink.

Ms. Lusebrink's entire argument with regard to the insufficiency of the Jury Instruction No. 11 is that the District failed to put Ms. Lusebrink into a different position. As set forth above, there is no legal requirement that an employer actually reassign an employee. Ms. Lusebrink admitted this in closing argument. "You heard Mr. Klug. I asked him, I said, is it a

reasonable accommodation to place her into an open position for which she's qualified? And he said, yes, but it's not required. And I agree with him. It's not required that they place her in the two open TOSA positions for which she was qualified and for which she received an interview. They weren't required to do it, but certainly it was something they could have done." (July 24, 2012 VRP at 89.) Yet, here, Ms. Lusebrink argues that the District failed to accommodate, because they failed to reassign Ms. Lusebrink into an open position for which she was qualified or to permit Ms. Lusebrink to fill an open position. (Appeal Brief at 19-20.) This argument is not supported in the law and was rejected by the jury.

"On appeal, errors of law in jury instructions are reviewed *de novo,* and an instruction's erroneous statement of the applicable law is reversible error where it prejudices a party. *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682, 695 (1995). Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied. *Adcox v. Children's Orthopedic Hospital and Medical Center,* 123 Wn.2d 15, 36, 864 P.2d 921, 934 (1993); *Douglas v. Freeman*, 117 Wn.2d 242, 256-57, 814 P.2d 1160, 1168 (1991).

Jury Instruction No. 11 did not prevent Mr. Firkins from zealously advocating Ms. Lusebrink's theory of her case. Mr. Firkins made all the

same arguments about the District's duty to accommodate for the jury, as he has done for this Court. There is nothing misleading about Jury Instruction No. 11. The case law clearly supports the language stated in the instruction. "When an employee bases a claim on the employer's failure to reassign to a different position, the employee must prove that he or she was qualified to fill a vacant position, and that the employer failed to take affirmative measures to make such job opportunity known to the employee and to determine whether the employee was in fact qualified for such position. *Dean,* 104 Wn2d at 637–39, 708 P.2d 393; *Snyder v. Medical Service Corp. of Eastern Wash.,*98 Wn.App.315, 325, 988 P.2d 1023 (1999); *Hill v. BCTI Income Fund I,* 97 Wn.App. 657, 668, 986 P.2d 137 (1999); *Pulcino v. Federal Express Corporation,* 141 Wn.2d 629, 643-449 P.3d at 787, 795 (2000). This language comes straight out of the case law. There is no case that states an employer must place an individual into an empty position for which the employee is qualified as an accommodation. The WAC does not support Ms. Lusebrink's argument.

Ms. Lusebrink cites *Curtis* for the proposition that the District failed to reasonably accommodate her because it did not actually fill an open position with Ms. Lusebrink. *Curtis* states, "the employer must take affirmative steps to help the handicapped employee fill the position." *Curtis v. Security Bank of Washington*, 69 Wn.App. 12, 19, 847 P.2d 507

(1993). Ms. Lusebrink argues that affirmative steps means that she ultimately has to be given or offered another position. However, blatantly missing in the *Curtis* case is any determination by the court that the employer must fill the position with the handicapped person. That simply is not the state of the law. The District did not treat Ms. Lusebrink like any other applicant. The District sent her notice of all job openings. The fact that the District invested in technology which allowed it to provide notice easily through email and access to online job postings, does not minimize the fact that the District affirmatively sent her notice of all job openings. This is a very large District. The District is not required to forego technology and provide hand written and hand mailed or in person notice to Ms. Lusebrink in order to meet its burden. The District did assist her in applying for jobs, by providing access to its very easy online application system. Ms. Lusebrink never indicated that she needed any other assistance in applying for jobs. In fact, Ms. Lusebrink did apply for three other positions, obviously without significant difficulty. The District did affirmatively consider Ms. Lusebrink for the three positions she applied for and she was interviewed for the two TOSA positions and tested for the payroll position. She was not selected for the positions. Mr. Klug testified that those jobs are highly sought after and that highly qualified individuals seek those jobs. Ms. Halley testified that she

followed the District's process in selecting candidates for interview and for hire for the TOSA positions.

Ms. Lusebrink specifically finds fault with the Court's instruction on questions from the jurors that "affirmative" as used in the instruction, has its ordinary meaning. "Trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary understanding or self-explanatory." *State v. Brown*, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997) The Washington Supreme Court "has recognized that 'trial courts should exercise sound discretion to determine the appropriateness of acceding to requests that words of common understanding be specifically defined.'" *Brown*, 132 Wn.2d at 612, 940 P.2d 546. "And when a jury has begun deliberating, the trial court also has discretion to determine whether to give further instructions upon request." *Id.* In this case, the term "affirmative" does not need any further defining and should be given its ordinary meaning. The Court appropriately provided the jury examples set forth in the WAC in the jury instruction. The term "affirmative" needed no further definition, and certainly, the definition Ms. Lusebrink wanted inserted in the instruction is not supported in the law. There is no evidence that any error the Court did make affected the verdict.

D. A New Trial is Not Appropriate.

The purpose of a *motion in limine* is to avoid the requirement that counsel object when contested evidence is introduced at trial. *State v. Powell,* 126 Wn.2d 244, 256, 893 P.2d 615 (1995). The losing party is given a standing objection. *Id.* However, where the prevailing party obtains an order *in limine* excluding certain evidence, that party has a duty to bring the violation to the attention of the court and to allow the court to decide what remedy, if any, is necessary. *State v. Sullivan,* 69 Wn.App. 167, 171-72, 847 P.2d 953 (1993); *A.C. ex rel Cooper v. Bellingham Sch. Dist.,* 125 Wn.App. 511, 525, 105 P.3d 400 (2004). In other words, the prevailing party, by failing to object, waives review of the trial court's action or inaction on the violation of the order in limine. *Id.* at 173. As the *Sullivan* court explained,

> [W]here the evidence has been admitted notwithstanding the trial court's prior exclusionary ruling, the complaining party [is] required to object in order to give the trial court the opportunity of curing any potential prejudice. Otherwise, we would have a situation fraught with a potential for serious abuse. A party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.

Sullivan, 69 Wn.App. at 172, 847 P.2d 953.

A party cannot appeal a ruling admitting evidence, unless the party makes a *timely* and specific objection to the admission of the evidence."

State v. Avendano-Lopez, 79 Wn.App. 706, 710, 904 P.2d 324 (1995), *review denied,* 129 Wn.2d 1007, 917 P.2d 129 (1996), *citing* ER 103 (emphasis added).

> [A] new trial may be granted based on the prejudicial misconduct of counsel if the conduct complained of constitutes misconduct, not mere aggressive advocacy, and the misconduct is prejudicial in the context of the entire record. The misconduct must have been properly objected to by the movant and the must not have been cured by court instructions. 'A mistrial should be granted only when nothing the trial court could have said or done would have remedied the harm caused by the misconduct.'"

Kuhn v. Schnall, 155 Wn.App. 560, 576-577, 228 P.3d 828 (2010) (internal citations omitted).

Testimony violating a ruling *in limine* may be grounds for a mistrial if it prejudices the jury. *State v. Escalona,* 49 Wn.App. 251, 254–55, 742 P.2d 190 (1987). A mistrial is not warranted when an attorney does not intentionally solicit or expand upon a witness's testimony that violates an *order in limine. State v. Clemons,* 56 Wn.App. 57, 62, 782 P.2d 219 (1989), *review denied,* 114 Wn.2d 1005 (1990). A trial court properly declares a mistrial only when the party has been so prejudiced that nothing short of a new trial will ensure that the party gets a fair trial. *State v. Rodriguez,* 146 Wn.2d 260, 270, 45 P.3d 541 (2002). The trial court is best suited to assess the prejudice of a statement. *State v. Lewis,* 130 Wn.2d 700, 707, 927 P.2d 235 (1996). The trial court has broad

discretion in determining whether an instruction can cure an error. *State v. Ecklund,* 30 Wn.App. 313, 316, 633 P.2d 933 (1981).

> The trial judge can impartially observe and appraise the impact of inadmissible testimony upon the jury. His discretionary judgment that a corrective instruction and admonition effectively cures an error should be respected by the appellate court unless the record demonstrates that beyond a reasonable doubt the refusal to grant a new trial denied the defendant a fair trial.

Ecklund, 30 Wn.App. at 316, 633 P.2d 933.

We presume juries follow the trial court's instructions. *State v. Hanna,* 123 Wn.2d 704, 711, 871 P .2d 135, *cert. denied,* 513 U.S. 919 (1994). "Great weight is placed on the sound discretion of the trial court, which is not reversed absent a showing of an abuse of discretion." *Clemens*, 56 Wn.App. at 62, 787 P.2d at 222.

1. Evidence of settlement discussions.

Although the Court precluded evidence of settlement negotiations *in limine*, Ms. Lusebrink testified on direct examination that she applied for a librarian position and that the District did not offer it to her. Ms. Lusebrink used this testimony to support her claim that the District did not reasonably accommodate her. Mr. Firkins knew or should have known that the library position was the same one he discussed with Mr. Lind as part of the negotiations between the District and Ms. Lusebrink. Mr. Moberg had no way of knowing about the history of the librarian position,

as he was not involved in the case at that point. Clearly, Ms. Lusebrink "opened the door" to testimony regarding the librarian position when she testified about it and specifically that the District refused to hire her for that position. In fact, the District offered her that position. "Fairness dictates that the rules of evidence will allow the opponent to question a witness about a subject matter that the proponent first introduced through the witness." *State v. Gallagher*, 112 Wn.App. 601, 610, 51 P.3d 100 (2002). Ms. Lusebrink violated the *orders in limine* by testifying, albeit misleadingly, that she had applied for the position. Accordingly, the District had the right to go through the door that Ms. Lusebrink opened.

In addition, Mr. Firkins failed to timely object to the testimony related to the librarian position. When questioning Mr. Lind, general counsel for the Kent School District, Mr. Moberg asked him about his involvement in Ms. Lusebrink's accommodation process, and he essentially testified that he became involved in working with Mr. McNett after the termination of Ms. Lusebrink. Mr. Moberg then asked the question, "At any time in that process, was Ms. Lusebrink ever offered a job that—with the Kent School District that you believe she was capable of doing and qualified for?" The librarian position was a position offered to Ms. Lusebrink during Mr. Lind's involvement. Mr. Firkins could have objected to the question, knowing that Mr. Lind would answer with

information relevant to the librarian position, since he was involved in that process. He failed to object. Instead, he allowed Mr. Moberg to complete his entire direct examination of Mr. Lind, without objection. Mr. Firkins then started his cross-examination of Mr. Lind with, "Mr. Lind, you were informed that you were not to discuss settlement discussions by and between the parties; is that right?" Mr. Lind answered, "Actually, no, that's not how it was characterized to me the Court's rulings, Mr. Firkins." Mr. Firkins then continued, "You understood the library position was an exchange between you and I, that was a settlement offer by and between you and I where we were talking about settlement possibilities, is that right?" Clearly, Mr. Firkins could have objected to Mr. Moberg's question and the jury would never have heard about the librarian position from Mr. Lind. Mr. Moberg was not involved in those settlement negotiations that occurred prior to this litigation, but Mr. Firkins was and should have known immediately to object. Instead, he allowed all of the information that he now claims was "inherently prejudicial" to come in without objection, and he now wants this appellate court to reverse the verdict. The trial court issued a curative instruction that was appropriate to cure the error. This Court cannot overturn the trial court's ruling that a curative instruction was appropriate without abuse of discretion and there is no evidence of abuse of discretion.

2. Lind testimony.

There was no *order in limine* precluding Mr. Lind's testimony in general that there was a collective bargaining agreement. The *order in limine* prohibited discussion or statements that the District violated the collective bargaining agreement. (CP 80.) Accordingly, this testimony did not violate any order. Likewise, there was no *order in limine* prohibiting Mr. Lind from discussing his conversations with Mr. McNett. Accordingly, this disputed testimony was not a violation of any order.

3. Mr. Moberg's comment in closing argument.

In closing argument, an attorney has wide latitude to draw reasonable inferences from the evidence. *State v. Lewis,* 156 Wn.App. 230, 240, 233 P.3d 891 (2010). When improper argument is charged, the objecting party bears the burden of establishing the impropriety of the attorney's argument, as well as its prejudicial effect. *State v. Gentry,* 125 Wn.2d 570, 640, 888 P.2d 1105 (1995). Reversal is required only if there is a substantial likelihood that the misconduct affected the verdict. *State v. Lord,* 117 Wn.2d 829, 887, 822 P.2d 177 (1991).

Mr. Moberg did not violate the Court's *order in limine* on the District's *motion in limine*, prohibiting testimony about comparative qualifications of Ms. Lusebrink and RG questioning the decision of the District's decision in filling the TOSA position. He simply stated, "I think

you can safely assume that this hiring committee that Ms. Halley was on... took great care to listen to everybody's answers, to interview, and arrive at hiring the person that best suited the District for that job." There was no discussion about qualifications. There was no comparative language questioning the propriety of the hire. He simply stated that the committee took great care to arrive at hiring the person that best suited the District. This does not violate the *order in limine*. However, even if this language did violate of the order, the Court properly cured the violation by sustaining objection and instructing the jury that the closing argument was not evidence and to disregard Mr. Moberg's statement. There is no evidence that this statement affected the verdict.

E. The Jury's Verdict Was Appropriate.

Ms. Lusebrink argues that the jury's verdict is inconsistent and contrary to the evidence presented at trial. The court has no authority to speculate regarding the basis of a jury's verdict, let alone presume the basis for their verdict. *Thompson v. Grays Harbor Community Hosp.,* 36 Wn.App. 300, 309-310, 675 P.2d 239, 244-45 (1983). Ms. Lusebrink argues that the Court should have granted her Motion for new trial under CR 59(a)(8). "A motion for a new trial under CR 59(a)(8) may be granted when there is an 'error in law' that 'materially affected the substantial rights' of the aggrieved party and it is 'objected to at the time by the party

making the application.'" *M.R.B. v. Puyallup School District*, 169 Wn.App. 837, 848, 282 P.3d 1124 (2012). "The error of law complained of must be prejudicial." *Id.*

Ms. Lusebrink contends that the District did not put on sufficient evidence of affirmative measures. This appears to be the same argument as set forth above regarding the sufficiency of the jury instruction. As set forth above, that argument is simply without merit. The jury heard all of the evidence and found in the District's favor. There is no requirement that the District actually place Ms. Lusebrink in an open position in order to satisfy its accommodation requirements, nor does such an argument make sense given the court rulings that the District is not required to hire her over a more qualified candidate. Accordingly, the trial court properly denied the motion for new trial.

F. Ms. Lusebrink is not entitled to Attorneys' Fees.

Ms. Lusebrink is not entitled to attorneys' fees and costs under RCW 49.60.030, because she cannot establish that the District actually violated the statute. RCW 49.60.030(2).

IV. CONCLUSION

This court should affirm the jury verdict in this case.

RESPECTFULLY SUBMITTED July 12, 2013.

JERRY MOBERG & ASSOCIATES

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Attorney for Respondent/Defendants

CERTIFICATE OF SERVICE

I certify that on this date, a copy of the document to which is affixed was caused to be served and delivered upon the following:

Filed with the Court of Appeals, Division II, via Federal Express to:

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DATED this 12th day of July, 2013.

DAWN SEVERIN, Paralegal