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71526-7

No. 71526-7-I
COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DENNIS WILLHITE,
Plaintiff/Appellant,

v.

FARMERS NEW WORLD LIFE INSURANCE COMPANY, a Washington Corporation,
Defendant/Respondent,

and

ZURICH AMERICAN INSURANCE CO., a corporation,
Defendant.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Appellant Dennis Willhite was an employee of Respondent Farmers New World Life Insurance Company (FNWL) in November 2010, when the company carried out a company-wide reduction in force (RIF), terminating approximately 10 percent of its workforce. FNWL went to great lengths to ensure that the RIF process was legal and fair. After identifying which positions would be eliminated, FNWL used numerical scores, based on individual employees' past performance ratings and current skills, to determine which employees in those positions would have their employment terminated. Willhite was among those selected because he had the lowest score of the 15 managers in FNWL's marketing department.

Willhite sued, challenging his termination on several grounds. FNWL obtained summary judgment on Willhite's claims that his termination was due to age discrimination and violated public policy. After a two-week trial, a unanimous 12-person jury rejected Willhite's claims for disability discrimination under the Washington Law Against Discrimination (WLAD), violation of the Washington Family Leave Act (FLA), and breach of an implied contract. The court entered judgment on the verdict and the prior summary judgment rulings. This appeal followed, but Willhite does not challenge the summary judgment ruling on his age discrimination and public policy claims, or the verdict on his implied contract claim.

The disability discrimination claim was based on a disparate treatment theory. Willhite failed to show, however, that his disability was a substantial factor in FNWL's decision to terminate his employment. Indeed, he failed to show that FNWL knew or had notice that he had a disability. Willhite had taken FLA leave a few months before the RIF, but an independent, third-party service provider administered the leave and did not disclose to FNWL the reason for it. Willhite's treating physician released him to return to work without any restrictions, and when he started work again, he did not tell anyone at FNWL that he had been out on leave due to depression and anxiety. Nor did he ever tell anyone at FNWL that he had been diagnosed with, and received treatment for, depression.

The jury's verdict was supported by the evidence and was the result of deliberations based on proper instructions. There was no abuse of discretion in connection with the trial court's evidentiary rulings. In sum, there is no reversible error in this case.

II. STATEMENT OF ISSUES[1]

1. Whether the trial court properly instructed the jury on Willhite's disability discrimination claim.

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[1] Willhite failed to comply with RAP 10.3(a)(4)'s requirement that he identify the issues pertaining to his assignments of error. Appellant's Opening Brief at 3-4.

2. Whether the trial court properly excluded proposed Exhibit 84 and Dr. Laura Don's reports, and properly limited the scope of testimony from Willhite's treating physician, Dr. Luba Kihichak.

3. Whether the trial court abused its discretion in not admitting proposed Exhibit 15 when there was no order excluding the exhibit, but Willhite never offered it into evidence.

4. Whether the trial court should uphold the jury verdicts on Willhite's disability discrimination and FLA claims.

5. Whether the trial court properly granted summary judgment to FNWL on its unjust enrichment counterclaim.

6. Whether the trial court abused its discretion in limiting Willhite's damages testimony when Willhite was not disclosed as an expert and the excluded testimony would have been based on speculation, hearsay, and technical or other specialized knowledge, and was not reliable.

III. STATEMENT OF THE CASE

A. Factual Background

1. Willhite Joined FNWL

FNWL is a life insurance company headquartered on Mercer Island. CP 95 (¶3). It is a subsidiary of Farmers Group, Inc., which is based in Los Angeles, California. CP 11 (¶3); RP (12/10) 78:15-17.

Willhite began working for FNWL, in the company's marketing department in Los Angeles, in 1986. CP 191 (28:3-9). He previously had been employed by two affiliated companies, in non-marketing positions.

CP 190-91 (22:20-23:9, 24:18-26:18). In 1988, he transferred to FNWL's Mercer Island office, taking a position in the actuarial department and later moving to operations. CP 191-92 (28:10-12, 29:9-30:8, 30:24-32:5). He rejoined the marketing department in 2000, when FNWL moved its marketing function north. CP 193 (36:19-22); CP 30 (¶4).

In June 2000, Mike Keller took over the top position in FNWL's marketing department. CP 30 (¶3). He remained in that position until he stepped out of active management in early 2010, in preparation for his retirement at the end of the year. CP 29 (¶1); CP 36 (¶22). When Keller joined FNWL, Willhite was working for Joe Kessler, who oversaw the sales side of the marketing department. CP 194 (38:1-2); RP (12/11) 224:16-20, 226:6-11; CP 30 (¶4); RP (12/17) 186:3-187:4.

Kessler left the department in 2004 and Willhite started reporting directly to Keller. RP (12/11) 227:2-7. According to Willhite, Keller was "professional, super smart, [a] great person," "a great guy to work for," and "a very good boss." RP (12/11) 227:8-15. Keller was less impressed with Willhite's work performance, viewing him as having "some good years in the Marketing department and some mediocre years." CP 30-31 (¶¶6-7). When FNWL launched its new "Simple Term" life insurance product in 2005 and 2006, Keller saw Willhite do a very good job introducing the product to Farmers' agents, but noted that other aspects of Willhite's work were troubling. *Id.* Specifically, Keller observed that Willhite had difficulty working with a team and failed to take

responsibility for post-launch tasks. CP 31 (¶7); RP (12/17) 189:5-19, 198:10-21.

2. Willhite Was Unhappy About Not Being Promoted

In early 2007, Keller divided the marketing department into three functions: sales, marketing, and products and analytics. CP 31 (¶8). FNWL hired Rion Groves to head the marketing function under Keller, and Willhite started reporting to Groves. *Id.*; Ex. 160; RP (12/11) 228:1-229:4; RP (12/17) 200:12-25, 201:7-203:1. Willhite did not like working for Groves. RP (12/16) 178:20-179:9; Ex. 48. He thought Groves was not qualified to be the Executive Director-Life Marketing; he believed that company procedures had not been followed when Groves was selected; and he felt that he should have been promoted into that position. CP 196 (47:12-21); Ex. 48 (p.1); Ex. 167 (p.2); RP (12/11) 229:13-16; CP 203-04 (80:22-81:3); RP (12/16) 177:15-178:12. He told Keller he was disappointed that he had not been selected for that position. CP 32 (¶9).

Willhite also was unhappy when Keller promoted Willhite's peer, Michelle Douvia, to Director-Products & Analytics. CP 33 (¶11); CP 202 (74:16-75:13); Ex. 167 (p.2); RP (12/11) 235:15-21, 236:6-8. The position of director was a significant step up in the Farmers hierarchy—it was viewed as the first step to senior management. RP (12/16) 180:12-17. Although Keller at the same time promoted Willhite and another employee to the position of Senior Marketing Consultant (to get them to the same title and salary as other Farmers employees in Los Angeles performing equivalent functions), Willhite was upset that Douvia was appointed to a

Director position he believed she was not qualified for. Ex. 167 (p.2); CP 202 (74:16-75:13); CP 223 (178:1-17); CP 33 (¶11). He viewed Douvia as "a foreign national" who had worked at FNWL for a short time and had received a promotion he felt he deserved. Ex. 167 (p.2); RP Addendum (filed 8/6/14) [CP 203-04] 80:22-81:13; RP (12/12) 56:14-57:10.

3. Willhite Failed to Engage on Pilot Project

Willhite discussed his desire for promotion with Keller. CP 32-33 (¶10). Keller believed that Willhite's strength was in the sales side of marketing, and recommended that he join the Independent Agent Simple Term ("IAST") pilot project already in progress. *Id.*; CP 33-34 (¶¶13-14); CP 204-05 (83:25-84:13, 84:21-85:15). The goal of the project was to get independent agents appointed with FNWL and motivated to sell Simple Term policies. CP 33 (¶13). The project was high profile and offered Willhite an opportunity to demonstrate his skills to upper management and develop relationships with the people in Los Angeles who were decision-makers for promotions. CP 34 (¶14); CP 32 (¶10). The project also meant Willhite would no longer work for Groves, which Willhite had said he wanted. RP (12/16) 199:11-200:19; Ex. 41.

Willhite accepted Keller's recommendation and joined the IAST team in January 2008, reporting first to Keller and then to Douvia. CP 46; CP 206 (92:4-8). This was the only project Willhite worked on from early 2008 through mid-2009, as Keller wanted Willhite to devote his full attention to it. CP 34-35 (¶¶15,18); CP 206 (91:21-92:3). Although Willhite did a good job on the first phase (preparing the marketing

materials for the pilot's launch), he failed to execute on the next phase (the sales management piece of the project). CP 34-35 (¶¶16-17); RP (12/16) 184:20-185:16. He told Douvia that he had not gotten engaged with the project. Ex. 41 (p.1); RP (12/16) 186:2-10. By mid-2009, it was clear that the pilot project was a failure.[2] CP 34-35 (¶16). FNWL ended it in June. CP 35 (¶18); RP (12/16) 159:6-22.

4. Keller, Douvia, and Fitzpatrick Struggled to Find Willhite's Next Role

After Willhite's disappointing performance on the IAST project, the marketing department struggled with where next to assign him. CP 35-36 (¶¶19-21). Keller met with Douvia and Brian Fitzpatrick, who had been hired in 2008 as Executive Director over the marketing department's sales function, to discuss what could be made available to Willhite. CP 35-36 (¶¶20-21); CP 49-51 (¶¶2,7,8); RP (12/16) 194:19-195:8; RP (12/17) 83:16-84:19. They came up with two options: reporting to Fitzpatrick, Willhite could work as a Life Financial Sales Specialist, or he could take on a special project to work with certain achievement club agents to help them increase their sales of life insurance. CP 51 (¶8); CP 35-36 (¶21). The objective was to get Willhite the field experience and exposure it was believed Willhite needed to be prepared for future promotion. CP 50-52

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[2] FNWL had set conservative goals for what it wanted to achieve in the six months post-launch: have 300 agents appointed and 100-150 policies sold. CP 34 (¶16). Instead, as of June 2009, only 28 agents had been appointed and only *two* policies had been issued. CP 34-35 (¶16).

(¶¶7,11); CP 35 (¶20); RP (12/17) 19:19-24, 20:18-21:10, 23:7-15, 83:16-84:19, 85:7-86:17.

Willhite turned down both opportunities, suggesting that he instead be appointed a zone manager. CP 51 (¶9); CP 36 (¶21). He believed he was already prepared for a zone manager or state executive director position, and that the offered roles were beneath him. Ex. 48; CP 51 (¶9); CP 36 (¶21); CP 281-82. On June 19, 2009, he emailed Douvia expressing dissatisfaction with his "position/level within the company" and lobbying for promotion to a position he proposed the company create for him, *i.e.*, "Director of Marketing & Sales, Independent Agents." Ex. 38; RP (12/16) 195:9-197:23. Willhite previously had told Douvia, on several occasions, that he wanted to be promoted to director. RP (12/16) 196:11-18. Douvia did not have authority to create the proposed position and, in any event, she did not believe that a promotion was warranted given Willhite's performance over the previous year. RP (12/16) 197:1-12.

When the IAST project wound down, Willhite emailed Douvia in late August 2009, asking what projects he could work on. Ex. 40. Douvia responded that "we are somewhat at a loss as to what projects to assign to you," given Willhite's desire not to work under Groves and his rejection of the two opportunities offered by Fitzpatrick. Ex. 41 (p.1). She offered, however, to meet with Willhite and Fitzpatrick for further discussions. *Id.* Fitzpatrick re-extended both offers, and Willhite ultimately accepted the special project that had been developed for him to work with achievement club agents. CP 51-52 (¶¶10-11); RP (12/17) 85:7-86:4.

5. The Achievement Club Project

The Achievement Club project kicked off in the fall of 2009. RP (12/17) 86:18-87:14; CP 52 (¶12); Ex. 44; Ex. 175. The plan was for Willhite to work with a select group of agents in the Northwest who already had shown a commitment to selling life insurance and help them elevate their sales to the next achievement levels. CP 51-52 (¶11). He was to select an appropriate pool of agents, work with the State Executive Directors, establish metrics to track results, and work with the agents directly to increase their sales numbers. *Id.*; Ex. 175; RP (12/17) 88:10-89:4.

Willhite agreed to take on the Achievement Club project, but was not enthusiastic about it. RP (12/12) 65:2-67:19. He was annoyed that he had been offered the project because he felt he already had field experience. RP (12/16) 49:24-50:15. He told a member of FNWL's Human Resources ("HR") department, Brian Hogan, that the Achievement Club project was not difficult, *i.e.,* that it "was not rocket science," but he "didn't like it." RP (12/16) 49:3-9, 108:23-109:2.

Although the Achievement Club project was Willhite's only assignment, by mid-November, it appeared to Fitzgerald that Willhite had not made much progress. CP 52 (¶12). This surprised and displeased Fitzpatrick. *Id.*; RP (12/17) 38:4-14. When Willhite did not respond to his November 20, 2009 request for a status update, Fitzpatrick emailed Willhite on December 9 requesting a meeting. CP 52 (¶13); CP 60-61. Willhite agreed, but told Fitzpatrick he wanted Hogan to sit in on the

discussion. CP 63. When Fitzpatrick inquired as to why Hogan would attend the meeting as Fitzpatrick merely wanted an update on what Willhite had been working on, Willhite responded that getting engaged with the assignment had been stressful and he thought having Hogan at the meeting might help. CP 52 (¶¶14-15); CP 67-68. Willhite had already met with Hogan to discuss a host of matters, including (a) his perception that he had been "knocked down a rung on the [corporate] ladder" when Jim Vannice joined FNWL's marketing department as an Executive Director in 2005; (b) his belief that FNWL was not following company procedures when promoting and appointing persons to senior level positions;[3] (c) his view that he had been passed over for promotions and that people who had received promotions were less qualified than he; (d) his opinion that he was already prepared for a zone manager or state executive role and that one of those positions was his "next in line job"; and (e) his perception that the Achievement Club project was "busy work" and was beneath him. RP (12/16) 86:24-93:3; Ex. 48 (p.1); Ex. 49; Ex. 167 (pp.2,4-8); CP 202 (73:17-74:11); CP 223 (177:2-9, 178:1-17); CP 225 (188:7-19); CP 234 (230:1-4); CP 235 (241:8-17). During those meetings, Willhite had appeared to Hogan as "very confident and very matter of fact." RP (12/16) 47:17-23; *see* RP (12/16) 94:17-22, 97:13-15.

[3] Willhite failed to take into account that it was not company policy to post job vacancies above the director level. RP (12/16) 90:3-8.

Willhite, Fitzpatrick, and Hogan met on December 16, 2009. CP 53 (¶16). Before Fitzpatrick arrived and started the meeting, Willhite told Hogan that he was stressed, he did not feel well, and he was planning to see a doctor in the next week or so. RP (12/16) 44:21-45:19; Ex. 52. Hogan offered him Employee Assistance Program materials, which Willhite declined, and when Willhite mentioned taking time off, Hogan told him about FNWL's leave administrator, Liberty Mutual. RP (12/16) 45:15-46:10, 47:5-47:16, 99:25-101:8, 122:9-12, 123:5-12. They then started talking about plans for the holidays and skiing, and Fitzpatrick joined the meeting. RP (12/16) 101:9-16. The parties had a brief discussion of how the project might be approached and long-term goals, and when Willhite said he planned to evaluate his next steps during his time off over the next couple of weeks, Fitzpatrick responded that they could meet again after the first of the year and make a fresh start on the project. RP (12/16) 48:10-49:2, 101:9-103:2; CP 53 (¶¶16-17); Ex. 52; RP (12/17) 38:15-40:22. Willhite expressed gratitude for Fitzpatrick's understanding. CP 53 (¶17); CP 72.

It seemed to Fitzpatrick that Willhite came back reenergized at the beginning of 2010. RP (12/17) 42:14-18; CP 53 (¶18). By May, however, Fitzpatrick was again frustrated with Willhite's lack of progress. CP 53 (¶¶18-20); RP (12/17) 105:11-18. He met with Willhite on May 13 for a status update and followed that up with a request for additional information and documentation of the meetings and activities Willhite said he had been doing, and he scheduled a meeting on May 18 to discuss the

information. RP (12/17) 115:3-116:23; Ex. 57 (FNWL000471-72); RP (12/17) 136:8-19, 137:6-16.

Anticipating that at the upcoming meeting Willhite would report little progress, Fitzpatrick emailed HR on May 14, asking for guidance on disciplinary proceedings for Willhite. CP 77. Fitzpatrick was advised to give Willhite a formal warning. CP 53 (¶21); CP 80-81. If the May 18 meeting went as expected, Fitzpatrick planned to initiate formal disciplinary proceedings. RP (12/17) 47:15-48:12; Ex. 57.

Willhite met once, briefly, with Matt Crook, the new head of FNWL's HR department, in May 2010. CP 95 (¶2); RP (12/9) 30:24-31:13; RP (12/10) 59:21-60:15. He did not say anything to Crook about being depressed, feeling anxious, or having any kind of health problem. RP (12/10) 59:21-60:15, 38:3-39:1.

6. Willhite's Leave of Absence

The May 18 meeting Fitzpatrick had scheduled did not take place. CP 54 (¶22). Willhite emailed Fitzpatrick early that morning to report he would not be in the office that day because he had "picked up some kind of stomach bug." *Id.*; CP 88. The next day, Willhite emailed that he was "still sick." CP 88. He later emailed that his condition "was more serious than first thought" and that he would be requesting medical leave. CP 87.

Willhite took a leave of absence from May 18 through August 11, 2010. CP 96 (¶6). The leave was approved by Liberty Mutual, an independent, third-party service provider that administered FNWL's leave policies under the federal Family and Medical Leave Act (FMLA) and the

FLA, as well as the company's short term and long term disability benefits plans. *Id.*; CP 773 (¶8). It was Liberty Mutual, not FNWL, that determined Willhite's eligibility for FMLA/FLA leave and short-term disability benefits. CP 96 (¶6); CP 773 (¶8); Ex. 18 (LM000003-06).

It also was Liberty Mutual, not FNWL, that obtained Willhite's medical records to make the eligibility determinations. RP (12/16) 46:6-47:1, 68:7-19; CP 773 (¶8); CP 908-09; Ex. 18 (LM000003, LM000020-29, LM000100, LM000111, LM000113, LM000117). On May 19, 2010, Willhite's treating physician, Dr. Luba Kihichak, diagnosed Willhite with depression and an anxiety disorder. RP (12/12) 9:14-10:8; CP 903-04. She prescribed medication and counseling. CP 904. Six days later, she saw Willhite again and recommended work release for six weeks. CP 902, 908-09. At a July appointment, Willhite told Dr. Kihichak he had obtained leave from work until August 12, but had not gone for counseling. CP 896, 899. He eventually saw a mental health counselor, Dr. Richard Wemhoff, a few times. Ex. 18 (LM000080). On August 9, 2010, Dr. Kihichak wrote a letter to Liberty Mutual reporting that Willhite had improved to such an extent that in her professional opinion, Willhite would be able to return to work on August 12. RP (12/12) 31:3-8; CP 905; Ex. 18 (LM000082). She determined that Willhite could return to work without any restrictions. RP (12/12) 30:24-31:2; CP 906.

Liberty Mutual provided Willhite's medical records to its consulting physician, Dr. Don, for her to review and determine whether Willhite's condition met the requirements for short-term disability

benefits. Ex. 18 (LM000022[Claim note 33]); *see also* Ex. 18 (LM000020 [Claim notes 40, 41]). Dr. Don initially concluded that Willhite's medical records did not support a finding of significant psychiatric impairment. CP 1009-10. After receiving additional records from Dr. Kihichak and Dr. Wemhoff, Dr. Don determined that the information supported a finding of "significant psychiatric impairment from 5/18/10-8/7/10," but that "[b]y 8/8/10, [Willhite's] condition was sufficiently stabilized as to no longer preclude his capacity to perform his usual range of life activities." CP 1011.[4] Dr. Don also noted that "[b]y 8/8/10, there was no indication of psychiatric symptoms that precluded his capacity to perform his usual range of life activities, including work-related activities." CP 1012.

Liberty Mutual did not share Willhite's medical records or Dr. Don's reports with FNWL. CP 773 (¶8); CP 96 (¶6); CP 54 (¶23); CP 1713; RP (12/10) 73:1-14; RP (12/16) 107:4-11; RP (12/17) 128:21-129:2. The only information FNWL received from Liberty Mutual was that (a) Willhite had requested FMLA leave and short-term disability benefits, Ex. 18 (LM000003-06); (b) Willhite's request for FMLA leave was approved due to Willhite's "serious health condition," Ex. 18 (LM000008-09), RP

[4] Dr. Don did not, as Willhite claims, "place[] two conditions on Willhite's release to return to work: 1) that Willhite remain on his medication; and 2) that Willhite not be placed in a hostile work environment." Br. at 2; *see also* Br. at 9, 21. Dr. Don's report shows that the references to "medication" and "environment" were quoted excerpts from Dr. Wemhoff's 7/27/10 functional mental status evaluation, not independent assessments. CP 1012; Ex. 18 (LM000081). In any event, Dr. Don was not Willhite's treating physician—Dr. Kihichak was, and she was the one who determined that Willhite could return to work "without restriction." CP 906.

(12/10) 28:17-29:16; and (c) Willhite's short-term disability claim was closed due to Willhite's return to work, and his FMLA-approved leave ran from May 18, 2010 through August 8, 2010, Ex. 18 (LM000011). FNWL was aware that the reference to "serious health condition" in Liberty Mutual's letter was stock language indicating entitlement to FMLA/FLA leave. RP (12/10) 28:17-29:23; Ex. 18 (LM000008-09); *see* 29 U.S.C. § 2601(b)(2); RCW 49.78.220(1)(d).

7. Willhite's Return to Work

Willhite returned to work on August 12, 2010. Ex. 59; CP 96 (¶6). He did not tell anyone at FNWL the reason for his leave. CP 244 (294:23-295:1); RP (12/10) 29:24-30:20, 38:8-39:1; RP (12/16) 107:12-108:10; RP (12/17) 119:19-22, 129:3-131:12; *see* Appellant's Opening Brief (Br.) at 9. He did not ask for any disability accommodation, and he came back without any work restrictions. RP (12/10) 38:3-7, 29:20-23; RP (12/16) 108:6-13; RP (12/17) 119:23-120:6.

Willhite returned to work in the same position, receiving the same pay, and working on the same project as he had been working on before his leave. CP 245 (302:23-303:6). No one said anything negative to him about the fact that he had taken leave. CP 244 (296:16-21). In fact, because Fitzpatrick wanted to give him a chance to start up again on the Achievement Club project, Willhite was not given the formal warning that had been in the works before he took his leave. RP (12/17) 50:11-51:10; CP 54 (¶24). At the same time, Fitzpatrick wanted to make it clear that progress needed to be made, so a few days after Willhite returned to work,

Fitzpatrick met with him and gave him a written summary of expectations. CP 54 (¶25); CP 90; RP (12/17) 120:12-121:2. By mid-September, however, Fitzpatrick was frustrated because he felt that Willhite still had not taken ownership of the project and had not made any real progress. CP 54 (¶27); RP (12/17) 122:20-125:12; Exs. 67, 73. At about that time, Fitzpatrick learned of FNWL's plans to carry out a large-scale, company-wide RIF. CP 54 (¶27).

8. FNWL Announced a Company-Wide RIF in November 2010 and Willhite Was One of the Employees Chosen

In late spring 2010, FNWL's senior management began to consider a large-scale RIF due to the company's drop in sales and investment losses. RP (12/18) 67:24-71:8. By late summer, management concluded that positions had to be eliminated because the company's expenses were greater than what its revenue could sustain. *Id.*; RP (12/18) 73:13-19; CP 96 (¶7); RP (12/10) 13:20-14:2.

a. The RIF Selection Process

To determine which employees would be let go, the company went through a careful selection process. CP 96-97 (¶¶8-9). Each department head first determined how many positions his or her department could eliminate. CP 97 (¶8); RP (12/10) 14:11-15:12. After functions or positions were identified for elimination, to determine which employees in those functions or positions would be terminated, FNWL used a matrix assessment commonly used by other Farmers entities when undertaking a RIF or reorganization. CP 97 (¶¶8-9). Employees with similar skill sets in

the positions slated to be eliminated were grouped together in a matrix and then compared. *See* CP 97 (¶9). Each matrix had two components: past performance (using the employee's last three annual performance ratings) and a current skills assessment. *Id.* The scores on the two components were weighted and each employee received a combined matrix score. *Id.*; *see also* RP (12/10) 19:13-20:11. As a double-check, the company had members of the Farmers HR department review the employee groupings for each matrix and the matrix scores. RP (12/9) 65:6-18; RP (12/10) 18:14-19:4; RP (12/18) 48:7-49:4.

b. Willhite Ranked Lowest on His Matrix

FNWL's Chief Marketing Officer, David Pierce,[5] determined that the marketing department could eliminate six positions, including one at the manager level. CP 96-97 (¶¶7-8); RP (12/18) 47:6-10; RP (12/17) 126:11-17. Accordingly, six different matrices were completed for that department. CP 97 (¶10); Ex. 116; RP (12/9) 52:6-53:20; RP (12/10) 17:20-18:13. Willhite was one of the 15 employees included in the marketing managers matrix. CP 97 (¶10); RP (12/18) 47:11-48:6; Ex. 116 (FNWL000011-12); RP (12/9) 62:7-14.

Sixty percent of each marketing manager's matrix score was based on his or her performance ratings for the years 2007, 2008, and 2009. CP 97-98 (¶¶11-12); Ex. 116 (FNWL000012). For the years 2007 and 2008,

[5] Keller had announced his intent to retire at the end of 2010, and had stepped down into a project-based position. CP 36 (¶22). Pierce headed the marketing department, with Groves and Fitzpatrick reporting to him. RP (12/10) 15:15-16:10.

Willhite received scores of "3" (meets expectations); for the year 2009, he received a rating of "2" (partially meets expectations). CP 98 (¶12). His supervisor, Douvia, had given him the "3" rating for 2008 and the "2" rating for 2009, but the final say rested with Keller. RP (12/16) 188:12-189:9; CP 36 (¶25). The "2" rating for 2009 was consistent with Willhite's acknowledgment that he did not fully meet expectations for that year. RP (12/18) 49:7-52:2; Ex. 17 (p.190/FNWL000053). Based solely on the performance ratings portion of the matrix, Willhite was tied with one other employee for last place among the marketing managers. CP 98 (¶12); Ex. 116 (FNWL000012); *see* RP (12/9) 53:21-54:12.

The other 40 percent of each marketing manager's matrix score was based on an assessment of his or her current skills in the areas of initiative and drive; time management/managing multiple priorities; judgment and decision making; project work; teamwork/leadership; and communication. CP 98 (¶13); Ex. 116 (FNWL000010). To fill out this portion of the matrix, supervisors were provided a grid with the descriptions associated with the 1-10 rankings for each skill set. Ex. 116 (FNWL000010); CP 98 (¶13); RP (12/17) 126:18-127:4. The supervisors were instructed not to consider historical performance; rather, each supervisor was to assess an employee's skill levels as they existed at that time. RP (12/17) 142:8-22.

In October 2010, Fitzpatrick and Groves completed the skills assessments for their respective direct reports among the marketing managers. CP 773-74 (¶9); CP 55 (¶29); RP (12/10) 19:5-14; RP (12/17)

126:3-10. Fitzpatrick gave Willhite low scores in all areas. CP 55 (¶29); Ex. 116 (FNWL000011). The fact that Willhite had taken a leave of absence did not affect Fitzpatrick's assessment of his skills. CP 55 (¶29).[6] Rather, Fitzpatrick based his assessment on how Willhite had performed over the course of the almost nine months Willhite had been at work and reporting to him. *Id.*

Willhite's combined matrix score was the lowest on the manager matrix.[7] CP 98 (¶15); Ex. 116 (FNWL000012). Based on the score, Willhite was selected for termination. CP 98 (¶15); RP (12/9) 64:7-11.

c. RIF Notification

On November 10, 2010, FNWL notified 84 of its 832 employees—approximately 10 percent of its workforce—that their employment would be terminated, effective January 10, 2011. CP 98 (¶16). The terminations took place in multiple offices and affected employees in every department. *Id.* Willhite was one of several employees in the marketing department whose employment was terminated. *Id.*

During his termination meeting, Willhite was informed that he could elect to receive a severance package that included a severance

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[6] Willhite was not the only employee on the marketing department's managers matrix who had taken FMLA/FLA leave shortly before the RIF matrix was completed. CP 774 (¶11). One of the other eight employees Fitzpatrick supervised and assessed had taken FMLA/FLA medical leave at the end of 2009. *Id.*

[7] Willhite claims he "received the lowest assessment score of anyone in the company," Br. at 10, but the evidence shows only that he received the lowest score among employees in the marketing department. Ex. 116; *see also* RP (12/9) 63:24-64:9.

payment of $54,742, three months of outplacement services, and six months of paid COBRA benefits. CP 99 (¶¶20-21); CP 162. The benefits were offered in accordance with FNWL's Severance Plan, and Willhite's notification letter told him that "as a condition to receiving a benefit under the Severance Plan, you will be required to sign a General Release and Agreement releasing Farmers of all claims." CP 162. The Severance Plan had been announced to FNWL's employees in a January 2009 memo, which stated that the information contained therein was "a summary of the severance plan" and that "[i]n all cases, the terms of the actual policy apply." CP 287. The Severance Plan expressly stated that a fully executed release was a condition to receiving severance benefits. CP 146.

9. Willhite's Post-Termination Complaints

In January 2011, Willhite submitted a demand for a severance package "that recognize[d] his contributions and loyalty to the company" and that did not "give[] away rights available under law." CP 293. In the demand letter, he complained that he had been passed over for promotion and terminated because of his age; he said nothing about any alleged disability discrimination. CP 291-93. He also filed a charge of employment discrimination with the Equal Employment Opportunity Commission ("EEOC"). CP 947-50. He claimed he was discriminated against because of his age, CP 948, and denied that he had any disability, CP 947; *see also* CP 949 (response to questions 9-12). The EEOC charge was transferred to the Washington State Human Rights Commission ("WSHRC") for processing. CP 1019. Farmers investigated and

responded to the WSHRC that there had been no violation of any of Willhite's rights under any provisions of Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the WLAD, or any other law. CP 952; *see also* CP 953-68.

10. Willhite Was Mistakenly Paid Severance Benefits

Willhite received a General Release and Agreement ("Release") with his termination paperwork. CP 99 (¶22); CP 164-67; CP 215 (141:11-24). He knew that FNWL expected him to sign the Release in order to receive severance benefits. CP 214 (139:16-22). Although Willhite never signed the Release, FNWL mistakenly both paid him the cash severance benefit and paid his COBRA premiums. CP 100 (¶¶ 23-25); CP 220 (162:20-22, 163:18-25); CP 289. When FNWL learned of its error in making the cash payment, it wrote to Willhite requesting repayment. CP 169-70. Willhite received the letter but did not return the money. CP 220-21 (164:24-165:19).

B. Procedural Background

Willhite brought suit against FNWL for breach of implied contract, violation of the FLA, age discrimination, disability discrimination, breach of the implied covenant of good faith and fair dealing, and wrongful discharge against public policy. CP __. [Complaint, designated in Defendant/Respondent's Third Supplemental Designation of Clerk's Papers, filed October 24, 2014.] FNWL removed the action to federal court. CP 4 (Dkt. #1). The court denied Willhite's remand motion, holding that Willhite's breach-of-implied-covenant claim was completely

preempted by the Employment Retirement Income Security Act of 1974 ("ERISA"). CP 6 (Dkt. #15). When Willhite filed an amended complaint dropping his ERISA-preempted claim, the action was remanded to King County Superior Court. CP 7 (Dkt. #27); CP 176-87; CP 1740; CP 1-2.

In its answer to Willhite's amended complaint, FNWL denied all of Willhite's claims and asserted counterclaims based on Willhite's refusal to return his severance benefits. CP 10-23. Willhite denied the counterclaims. CP 24-28. After discovery, FNWL moved for summary judgment on all of Willhite's claims and its counterclaim for unjust enrichment. CP 387-413. Willhite moved for summary judgment on his implied contract claim. *See* CP 791. The trial court (a) granted FNWL's motion with respect to Willhite's claims for age discrimination and wrongful discharge; (b) granted FNWL's motion on its counterclaim; (c) denied FNWL's motion with respect to Willhite's disability discrimination and FLA claims; and (d) denied FNWL's and Willhite's motions regarding Willhite's contract claim. CP 791-92; CP 1196-98.

After a two-week trial in December 2013, a 12-person jury unanimously rejected Willhite's contract, disability discrimination, and FLA claims. CP 1752-60, 1796. The trial court entered a judgment on January 13, 2014, CP 1795-98, and an amended judgment on February 3, 2014, CP 1785-88. Willhite filed a notice of appeal on February 4, 2014. CP 1789-1808.

IV. ARGUMENT

A. The Trial Court Properly Instructed the Jury on Willhite's Disability Discrimination Claim

"'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.'" *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012) (quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)). Once that standard is met, the trial court has considerable discretion as to how the instructions to the jury will be worded. *State v. Rehak*, 67 Wn. App. 157, 165, 834 P.2d 651 (1992).

Disability discrimination claims can arise under at least two separate theories—failure to accommodate and disparate treatment. *McClarty v. Totem Electric*, 157 Wn.2d 214, 222, 137 P.3d 844 (2005). An employer who fails to accommodate an employee's disability faces an accommodation claim, while an employer who discharges an employee for a discriminatory reason faces a disparate treatment claim. *See id.*; *Sommer v. Dep't of Soc. & Health Servs.*, 104 Wn. App. 160, 172-73, 15 P.3d 664 (2001). Willhite repeatedly told the trial court that this "is not an accommodation case," RP (12/10) 30:23-24; RP (12/13) 78:6; RP (12/5) 129:17-23, and proposed jury instructions based on disparate treatment, CP 1166-69, not on failure to accommodate.

The trial court gave the jury five instructions relating to the liability portion of Willhite's disparate treatment claim. CP 1735-39. The first one, Instruction No. 14, set forth the elements of the claim. App. 17.

It was based on Washington Pattern Instruction (WPI) 330.32 and 330.01.01. Instruction Nos. 15, 16, and 17, App. 18-20, were based on WPI 330.31, 330.31.01, and 330.37, respectively, while Instruction No. 18, App. 21, was a modified version of Plaintiff's proposed instruction 14, CP 1167.

Before it instructed the jury, the trial court gave the parties its numbered set of proposed instructions and special verdict form, and then went through the instructions and the special verdict form questions, one by one, inviting the parties to state their objections or exceptions on the record. RP (12/18) 96:3-103:7. With respect to every single proposed instruction (except Instruction No. 14, discussed below), and with respect to every single question on the proposed special verdict form, Willhite's response was "no objection." *Id.* Moreover, Willhite did not state any objection or exception to the trial court's refusal to give any of his proposed instructions. *Id.*

1. Willhite Waived Any Objection to Instruction No. 18

Although he affirmatively represented to the trial court that he had "no objection" to Instruction No. 18, Willhite now argues that it was error for the court to have included in Instruction No. 18 the last sentence stating that "[w]here an employer did not know or had no notice of an employee's disability, the employee's disability cannot have been a substantial factor in the employment decision." RP (12/18) 98:18-19; CP 1739; Br. at 21-25. Willhite did not comply with CR 51(f)'s requirement

that he "state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made." His affirmative statement of "no objection" did not meet the necessary criterion for proper preservation and therefore Willhite waived any argument that Instruction No. 18 contained an error of law. *See Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha,* 126 Wn.2d 50, 98, 882 P.2d 703 (1994); *Schmidt v. Cornerstone Invs., Inc.,* 115 Wn.2d 148, 162-63, 795 P.2d 1143 (1990); *Couch v. Mine Safety Appliances Co.,* 107 Wn.2d 232, 245-46, 728 P.2d 585 (1986).[8]

2. The Jury Instructions Correctly Reflected the Law on Disparate Treatment Claims

A party asserting a disparate treatment claim at trial must show that "a *discriminatory intent* was a substantial factor in [the defendant's] actions." *Riehl v. Foodmaker, Inc.,* 152 Wn.2d 138, 149, 94 P.3d 930

[8] FNWL acknowledges that there were extended discussions about the jury instructions proposed by both sides. RP (12/13) 2:2-141:10; RP (12/16) 2:4-31:25); RP (12/17) 4:1-18:11; RP (12/18) 2:2-28:12. In the end, however, the trial court decided what instructions would be given, and then it offered both sides the opportunity to assert objections to those instructions. RP (12/18) 96:3-103:7. With but one exception, Willhite affirmatively stated that he had "no objection" to any of the final instructions. *Id.* These affirmative representations distinguish the circumstances of this case from those in *Washburn v. City of Federal Way,* 178 Wn.2d 732, 748, 310 P.3d 1275 (2013), where the City "formally objected to the trial court's refusal to give the City's instructions related to its public duty doctrine argument and objected to the trial court instructing the jury that the City owed a duty of ordinary care," and in *Crossen v. Skagit County,* 178 Wn.2d 355, 358, 669 P.2d 1244 (1983), where petitioner "took exception to the trial court's refusal to give a series of instructions on the duty of the County to place appropriate markers and warning signs along roadways."

(2004) (emphasis added); *accord Oda v. State,* 111 Wn. App. 79, 94, 44 P.3d 8 (2002) (in a disparate treatment case, "plaintiff has the burden of proving that a *discriminatory motive* more likely than not motivated the employer's practices" (emphasis added)); *Parsons v. St. Joseph's Hosp. & Health Care Ctr.,* 70 Wn. App. 804, 907, 856 P.2d 702 (1993) (in action for discriminatory termination of employment, "the central issue ... is whether [the employer] acted with a discriminatory motive or intent"). The last sentence of Instruction No. 18 merely reflected the common sense proposition that in order for an employer to intend to discriminate against an employee on the basis of a disability, the employer must know about or have notice of the disability.[9] When an employer has no knowledge or notice of an employee's disability, the disability simply cannot have been the motivation for, or a substantial factor in, the employer's action.

a. Instruction No. 18 Did Not Create an Additional Element of Proof

The elements of proof for Willhite's disparate treatment claim were set forth in Instruction No. 14. App. 17. Contrary to Willhite's current argument, Br. at 15, 22-25, there was nothing in the last sentence

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[9] *Cf. Hume v. Am. Disposal Co.,* 124 Wn.2d 656, 670-72, 880 P.2d 988 (1994) (holding employee did not prove his employer discriminated against him because of his disability when employee's evidence was insufficient to establish that employer knew or had reason to know of employee's alleged disability); *Callahan v. Walla Walla Housing Auth.,* 126 Wn. App. 812, 821-22, 110 P.3d 782 (2005) (reversing summary judgment in employer's favor on disparate treatment claim, finding there was evidence that could support a jury's finding that the supervisor knew about the employee's suspected diagnosis of multiple sclerosis when she fired the employee).

of Instruction No. 18, App. 21, that added another element of proof.[10] In fact, Willhite admits that "notice is inherent in the substantial factor question." Br. at 22.

In any event, the last sentence of Instruction No. 18 should be examined in light of the remainder of that instruction, as well as all the other instructions. *See Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 120, 323 P.3d 1036 (2014) (jury instructions are reviewed "as a whole"). At the start of Instruction No. 18, the jury was told that "[c]onduct resulting from the disability is part of the disability and not a separate basis for termination." CP 1739. The next portion of the instruction permitted Willhite to argue that if the jury found he had demonstrated a causal link between disability-produced conduct and his termination, then the jury could find that he was terminated on the impermissible basis of his disability. Nothing in the last sentence of the instruction prevented Willhite from making that argument. Rather, the sentence merely indicated that if FNWL did not have knowledge or notice that Willhite's "conduct ... resulted from his disability," FNWL could not have intended to discriminate against Willhite on the basis of disability.

[10] Because Instruction No. 18 did not add an element of proof to Willhite's disparate treatment claim, Willhite's citations to *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 33, 244 P.3d 438 (2010), and *Svendgard v. State*, 122 Wn. App. 670, 676-77, 95 P.3d 364 (2004), Br. at 23-24, are inapposite.

b. The Trial Court Correctly Rejected the Argument That FNWL Had Notice of Willhite's Disability as a Matter of Law.

Willhite argues that Instruction No. 18 was "erroneous" because FNWL had notice of his disability "as a matter of law." Br. at 15, 28. This argument is based on Willhite's assertion that FNWL had "imputed knowledge" of the disability "under fundamental agency principles." Br. at 15. According to Willhite, FNWL had imputed knowledge of Liberty Mutual's determination that Willhite suffered "significant psychiatric impairment from 5/18/10-8/7/10," CP 1011, and all other "facts known to Liberty Mutual." Br. at 16. This argument has no merit because it rests on an unproven premise, *i.e.*, that Liberty Mutual was FNWL's agent.

An agency relationship "results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control." *Moss v. Vadman,* 77 Wn.2d 396, 402-03, 463 P.2d 159 (1969). There are thus two "essential elements" of an agency relationship: consent and control. *Id.* at 403; *Stansfield v. Douglas Cnty.*, 107 Wn. App. 1, 17, 27 P.3d 205 (2001). The burden of establishing an agency relationship rests with the party asserting its existence. *Moss,* 77 Wn.2d at 403; *Hewson Constr. v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984).

Willhite never offered any evidence that FNWL exercised, or had a right to exercise, control over Liberty Mutual's actions in administering and approving FNWL's FMLA and FLA leave policies or FNWL's short-

term and long-term disability benefits plans. Nor did Willhite offer any evidence that Liberty Mutual allowed FNWL to exercise control over the manner of its performance. The evidence cited in Willhite's brief establishes that FNWL contracted with Liberty Mutual to administer employee leaves of absence, Br. at 19-20, and was therefore a service provider, but there is absolutely no proof that FNWL exercised or retained any control over how Liberty Mutual performed its contractual duties. The omission is critical because "control of the agent by the principal" is a "prerequisite of an agency." *Moss*, 77 Wn.2d at 402; *see Stansfield,* 107 Wn. App. at 18 (agency can be established "only if the principal controls the manner of [the agent's] performance"); Restatement (Third) of Agency § 1.01 cmt. c (2006) ("A relationship is not one of agency within the common-law definition unless ... the principal has the right throughout the duration of the relationship to control the agent's acts.").

When, as here, "no factual pattern exists which gives rise to an agency, then no agency exists ...." *Moss,* 77 Wn.2d at 403 (affirming trial court's conclusion that there was no agency, based on plaintiffs' failure to meet their burden of proof); *see Hewson,* 101 Wn.2d at 823-24 (agreeing with trial court that no agency existed where there was no evidence that the alleged principals assumed control over the alleged agent). Without an agency relationship, Liberty Mutual's knowledge cannot be imputed to FNWL. *Cf. Matsumura v. Eilert,* 74 Wn.2d 362, 363, 444 P.2d 806 (1968) ("Before the sins of an agent can be visited upon his principal, the agency must first be established.").

Implicitly acknowledging his failure to establish an agency relationship between FNWL and Liberty Mutual, Willhite told the trial court "that just because [information was] in the Liberty Mutual file, ... I agree, I will not argue that [FNWL is] imputed to know that." RP (12/18) 28:6-12.

Willhite's failure to meet his burden of proof is not cured by his citation to *Goodman v. Boeing Co.*, 75 Wn. App. 60, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995). Br. at 17-18. In that case, Boeing argued that information "cannot be imputed from agent to principal unless the agent is required to relay such information to the principal." 75 Wn. App. at 85. Accordingly, it must have been established that an agency relationship existed between Boeing and the firm that processed Boeing's workers' compensation claims. Here, however, no agency was admitted or proved. *Goodman* therefore is inapposite.

Kimbro v. Atlantic Richfield Co., 889 F.3d 869 (9th Cir. 1989), also is of no assistance to Willhite. Br. at 18-19. *Kimbro* merely stands for the proposition that in a failure to accommodate case, the employer has imputed knowledge of the facts concerning an employee's disability when those facts are known by the employee's supervisor. 889 F.3d at 875-76. But Liberty Mutual was not Willhite's supervisor, nor was it FNWL's employee, and *Kimbro* is therefore irrelevant.

Kimbro also is distinguishable because in that case, the employee had missed work several times with severe migraines and had discussed

the severe nature of his condition with his supervisors. "Because the employer's knowledge of the employee's medical condition was clear, the court found that the employer had notice of the handicap, even though it did not know that severe migraines constituted a handicap under Washington law." *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 671, 880 P.2d 988 (1994) (distinguishing *Kimbro* on lack of knowledge grounds). In this case, the record contains no evidence that Willhite had ever discussed his medical condition with anyone at FNWL or mentioned it to any FNWL employee. Accordingly, there was no evidence that FNWL knew or had reason to know that Willhite suffered from "significant psychiatric impairment" before, during, or after his leave.

c. FNWL's Leave Policy Did Not Provide Notice of Willhite's Disability.

Francom v. Costco Wholesale Corp., 98 Wn. App. 845, 991 P.2d 1182 (2000), is cited by Willhite for the proposition that an employer with an established procedure for reporting claims (in that case, a sexual harassment claim) "cannot claim notice provided pursuant to that procedures [sic] is ineffective." Br. at 22. But FNWL has never claimed that its leave policy and reporting procedures were ineffective. To the contrary, the policy and procedures *were* effective: Willhite submitted his claims for FMLA/FLA leave and short-term disability benefits to Liberty Mutual, per FNWL's policy, and Liberty Mutual approved his leave request and authorized payment of disability benefits. Although effective,

this process did not give FNWL any knowledge or notice that Willhite had a disability.

3. Instruction No. 14 Correctly Stated the Elements of a Disparate Treatment Claim

When the trial court and the parties were going through the court's proposed instructions, the only instruction to which Willhite asserted an objection was Instruction No. 14. RP (12/18) 97:23-98:5. As previously stated, this was the instruction that contained the elements Willhite needed to prove in order to prevail on his disparate treatment claim, and it was based on WPI 330.32 and 330.01.01. CP 1735. Willhite objected to the instruction because "it doesn't include, as an element of the claim, ... that either, A, Mr. Willhite gave Farmers Life notice of disability, or B, no notice was required to be given because Farmers Life had knowledge of the disability." RP (12/18) 97:24-98:5. To the extent Willhite's objection was aimed at adding a constructive notice provision to the instruction (*i.e.*, that FNWL "knew or should have known" that Willhite was disabled in November 2010 when the company decided Willhite should be one of the employees terminated in the RIF), Br. at 26-27; RP (12/13) 98:18-102:1, the objection fails because Willhite has produced no authority supporting the proposition that in a disparate treatment case, the requisite discriminatory intent can be based on constructive notice.[11]

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[11] The citations to *Sommer,* 104 Wn. App. 160; *Bachelder v. American West Airlines, Inc.,* 259 F.3d 1112 (9th Cir. 2001); and *Liu v. Amway Corp.,* 347 F.3d 1125 (9th Cir. 2003), Br. at 26, do not help Willhite. None is a disparate treatment case, and in all of them, the employer had actual notice. *Sommer,* 104 Wn. App. at 174 (plaintiff "produced evidence that he repeatedly notified [his (continued . . .)

Further, there was no evidence that Willhite's "serious health condition" (the reason for his FLA leave and the ground for Willhite's constructive notice argument) was still an issue for Willhite after he returned to work in mid-August. In fact, his return to work with no restrictions, RP (12/10) 29:17-23; CP 906, suggested otherwise.[12] That being said, there was nothing in Instruction No. 14 or Instruction No. 18 that prevented Willhite from arguing that FNWL had knowledge or notice

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(. . . continued)
employer] of his depression"); *Bachelder,* 259 F.3d at 1131 (plaintiff "provided two doctor's notes to [her employer]"); *Liu,* 347 F.3d at 1134 (plaintiff "duly informed [her supervisor] of the reasons for her leave").

[12] Willhite cites two unpublished opinions of this Court for the proposition that knowledge of a "serious health condition" is "sufficient notice of a disability under the WLAD." Br. at 31-33. FNWL moves to strike the citations and argument on the ground that Willhite has violated GR 14.1(a). But even if the opinions were considered, they would not help Willhite because the facts in the *Owens* case are vastly different from the facts in this case and, in any event, Willhite misstated the holdings. The plaintiff in *Rigby ex rel.Owens v. Farmers Insurance Exchange,* 107 Wn. App. 1039 (table), 2001 WL 882183, at *1 (2001), had told several supervisors during the weeks before she was fired that "she was receiving counseling and that she was suffering from stress." On the morning that plaintiff called in to request emergency medical leave, she told a supervisor that it was because of her "mental instability." *Id.* That evidence was found to be sufficient to establish a prima facie claim for disparate treatment, while the employer's knowledge of plaintiff's "serious health condition" was relevant to plaintiff's claim for FMLA leave. Willhite, on the other hand, in the four and a half months before he started his FMLA/FLA leave, never said anything to anyone at FNWL about being depressed or anxious, and on the first morning of his leave, only told Fitzpatrick that he had a "stomach bug." When he returned from his leave, he came back without any work restrictions, without requesting any accommodation, and without ever telling anyone at FNWL that he was, or even that he had been, suffering from depression or anxiety. Given these facts, and the actual holdings in the *Owens* opinions, the Court should reject Willhite's argument.

of his disability. Instruction No. 3, CP 1655, allowed Willhite to argue that the jury could infer knowledge or notice.

4. Willhite Failed to Preserve Any Other Claim of Instructional Error; in Any Event, the Trial Court Did Not Abuse Its Discretion in Refusing to Give Willhite's Proposed Instructions 14, 15, and 16

Willhite has assigned error to the trial court's "fail[ure] to give proposed jury instructions 14, 15 and 16...." Br. at 4. Willhite did not preserve this claimed error because he failed to object to the omission of those instructions from the court's set of instructions. RP (12/18) 96:4-103:7; *see* discussion at 24-25, *supra.* Moreover, inasmuch as CR 51(f) applies by analogy to objections to special verdict forms, *see Raum v. City of Bellevue,* 171 Wn. App. 124, 144-45, 286 P.3d 695 (2012), Willhite's failure to object to any of the special verdict questions, and the fact that he has not assigned error to any portion of the special verdict form, is additional evidence that Willhite has waived his claims of instructional error.

Even if there were no waiver, the court's refusal to give Willhite's proposed instructions still would be no basis for overturning the jury's verdict. "A trial court's decision not to issue a jury instruction is reviewed for abuse of discretion." *Rekhter,* 180 Wn.2d at 20. To assess whether a decision not to issue a particular instruction was an abuse of discretion, this Court looks to the instructions that were given, reads them as a whole, and determines whether they (a) allowed both sides to argue their theory of the case, (b) properly informed the jury of the applicable law, and (c)

were not misleading. *See id.*; *Bodin,* 130 Wn.2d at 732. When these conditions are met, there is no error or abuse of discretion in refusing to give cumulative, collateral, or repetitious instructions, or detailed augmenting instructions. *Bodin,* 130 Wn.2d at 732. Nor is there any error or abuse of discretion in rejecting a proposed instruction that misstates the law or is misleading. *See Rehak,* 67 Wn. App. at 165.

Plaintiff's proposed instruction 14 read as follows:

> The law makes no distinction between conduct caused by a disability and the disability itself. As such, you may conclude that Willhite's disability was a "substantial factor" in Farmers' termination decision, if you find that the decision was based in part upon performance deficits, personality changes or other symptoms that were a result of Willhite's depression.

App. 44 (CP 1167). The second sentence of this proposed instruction was confusing and improperly implied it was a proven fact that "performance deficits, personality changes or other [unspecified] symptoms ... were a result of Willhite's depression." No such fact was proved.[13] Further, although the misleading sentence was omitted from the final set of instructions, the trial court incorporated the first sentence into Instruction No. 18. CP 1739. Instruction No. 18 allowed Willhite to argue his theory that conduct resulting from his disability was a substantial factor in FNWL's decision to terminate him. There was no abuse of discretion in choosing to give Instruction No. 18 instead of proposed instruction 14.

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[13] *See* discussion at 42-43, *infra.*

Nor was there any abuse of discretion in declining to give proposed instruction 15. That proposed instruction, App. 45 (CP 1168), can be described as a "detailed augmenting instruction" or as pure argument, as the trial court recognized. RP (12/13) 105:12-106:2. In either case, the trial court did not abuse its discretion when it refused to give it.

Finally, there also was no abuse of discretion in declining to give proposed instruction 16. App. 46 (CP 1169). That proposed instruction was drawn from the "third prong" of the *McDonnell Douglas* test applicable to summary judgment motions. *See Scrivener v. Clark Coll.*, __ Wn.2d __, 334 P.3d 541, 545-47 (2014). But the third prong reflects a burden of production, not a burden of persuasion; it is applied by the judge, not the trier of fact, to determine if summary judgment is appropriate. *See id.* at 546; *Carle v. McChord Credit Union,* 65 Wn. App. 93, 98-102, 827 P.2d 1070 (1992). In this case, the parties were past the summary judgment stage. The issue at trial was whether Willhite could carry his ultimate burden of presenting evidence sufficient to persuade the jury that FNWL's alleged discriminatory animus was more than likely a substantial factor in FNWL's decision to terminate Willhite's employment in the RIF. That was the question presented by Instruction No. 14. Proposed instruction 16, like proposed instruction 15, can be viewed as a "detailed augmenting" instruction or as argument that is more properly presented by counsel at closing. RP (12/13) 105:24-106:10. The trial court did not abuse its discretion in declining to give it.

5. The Disability Discrimination Instructions Produced No Reversible Error

An erroneous jury instruction is reversible error only if it prejudices a party. *Anfinson,* 174 Wn.2d at 860; *Stiley v. Block,* 130 Wn.2d 486, 498-99, 925 P.2d 194 (1996). "Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be demonstrated if the instruction is merely misleading." *Anfinson,* 174 Wn.2d at 860. "An error is prejudicial if it affects the outcome of the trial." *Stiley,* 130 Wn.2d at 499. Because the trial court gave no erroneous instruction to the jury, there is no reversible error.

B. The Trial Court Properly Excluded Proposed Exhibit 84 and Dr. Don's Reports and Properly Limited the Scope of Testimony from Willhite's Treating Physician

The granting of a motion to exclude certain evidence "is addressed to the discretion of the trial court and should be reversed only in the event of abuse of discretion." *Hizey v. Carpenter,* 119 Wn.2d 251, 268, 830 P.2d 646 (1992); *accord Hume,* 124 Wn.2d at 666; *Burchfiel v. Boeing Corp.,* 149 Wn. App. 468, 485, 205 P.3d 145 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. *Anfinson,* 174 Wn.2d at 860.

The trial court did not abuse its discretion in excluding proposed Exhibit 84, a 26-page brochure from the National Institute of Mental Health entitled "depression." CP 981-1007. Because the brochure is not an "adjudicative fact," it is not admissible under ER 201. Further, because it contains inadmissible hearsay and was intended to be used as a surrogate

for expert testimony, the trial court properly excluded it. RP (12/5) 61:17-62:21; *see Davis v. Am. Drug Stores, Inc.*, No. 01 C 3704, 2003 WL 21149063, at *1 (N.D. Ill. May 19, 2003) (in a disability discrimination case, striking, as improper expert testimony, paragraphs from a National Institutes of Health report on asthma symptoms).

The trial court also did not abuse its discretion in ordering that Dr. Don's reports be removed from Exhibit 18 (Liberty Mutual's file regarding Willhite's request for short-term disability benefits).[14] Because Dr. Don was a consulting physician for Liberty Mutual and not an agent for FNWL (and not one of Willhite's treating physicians), her analysis of the medical reports of Dr. Kihichak and Dr. Wemhoff was hearsay and therefore inadmissible under ER 802. FNWL brought a motion in limine to exclude the reports on hearsay, relevance, and prejudice grounds. CP 866-67, 1410-11. With no proof that Liberty Mutual was FNWL's agent, or that FNWL ever saw Dr. Don's reports, the trial court properly rejected Willhite's argument that the reports were admissible under ER 801(d)(2). RP (12/5) 70:17-72:19.

Because Willhite had not disclosed Dr. Kihichak as an expert witness, FNWL brought a motion in limine to limit the scope of her testimony to (a) her perception of Willhite's appearance, words, or actions, (b) her diagnosis and treatment of Willhite, and (c) information

[14] Willhite did not assign error to that evidentiary ruling as required by RAP 10.3(a)(4), but argues that the ruling was "reversible error." Br. at 16.

contained in her office records. CP 849-55; CP 1403-05. Citing King County Superior Court Local Rule 26(k) and ER 701, FNWL moved to bar Dr. Kihichak from offering expert opinion generally, or speculation, about (a) typical or common effects of depression, (b) when Willhite's depression or anxiety supposedly began, and (c) her agreement or disagreement with written statements made by Dr. Wemhoff or Dr. Don. *Id.* The trial court granted the motion in part and denied it in part. RP (12/5) 20:3-11, 17:21-18:13. The ruling was not an abuse of discretion because it was based on well-reasoned authority. *See Eberhart v. Novartis Pharmas. Corp.*, 867 F. Supp. 2d 1241, 1252-53 (N.D. Ga. 2011) (explaining "[t]he extent to which non-expert witness treating physicians may offer opinion testiminy ... is strictly and narrowly limited to" testimony that "is an account of their observations during the course of treatment" or testimony that is "offered for the purpose of explaining the physician's decision-making process or the treatment provided"); *Frederick v. Hanna,* Civil Action No. 05-514, 2007 WL 853480, at *6 (W.D. Pa. Mar. 16, 2007) (ruling on motion in limine that treating physicians not disclosed as experts could "testify regarding their treatment, examination, and diagnosis," but could not "proffer any expert opinions"); *Kitts v. Gen. Tel. N., Inc.*, No. 2:04-CV-173, 2005 WL 2277438, at *6 (S.D. Ohio Sept. 19, 2005) (striking portions of plaintiff's treating physician's affidavit that "cross[ed] the line into expert testimony" because the statements were based "not on [the physician's] treatment of Plaintiff, but rather on his broader education and experience

with other patients"); *Parker v. Cent. Kansas Med. Ctr.*, 178 F. Supp. 2d 1205, 1210 (D. Kan. 2001) (allowing plaintiff's treating physician, who had not been disclosed as an expert witness, to provide "testimony regarding her observations based solely on her personal knowledge," but not allowing "testimony beyond the scope of her treatment of plaintiff"), *aff'd*, 57 F. App'x 401 (10th Cir. 2003). It also was consistent with the decision in *Smith v. Orthopedics International, Ltd., P.S.*, 170 Wn.2d 659, 668, 244 P.3d 939 (2010) (the only reported Washington decision post-dating the amendment to ER 701), where the court held that "[a]lthough a treating physician fact witness may testify as to both facts and medical opinions ..., such testimony is limited to 'the medical judgments and opinions *which were derived from the treatment.*'" (Citation omitted.)

C. Willhite Never Offered Proposed Exhibit 15

Willhite assigns error to the trial court's "[e]xclud[ing] the letter of Angie Bechtel containing Farmers' post termination explanation for its termination decision." Br. at 4, 37-38; *see* CP 952-68. The court, however, did not exclude proposed Exhibit 15. Instead, Willhite failed to offer the exhibit into evidence.[15] *See* CP 1772, 1432; RP (12/18) 156:2-19.

[15] Identifying the letter on an ER 904 filing and listing it as a potential exhibit on the parties' joint statement of evidence, Br. at 37 n.8, is not the same as offering it into evidence at trial. At the conclusion of trial, the court granted the parties' motion to withdraw all the exhibits that had not been admitted. RP (12/18) 103:15-104:9.

FNWL's motion in limine was directed to "Testimony and Argument Relating to Angie Bechtel's Investigation of Plaintiff's EEOC/WSHRC Charge of Age Discrimination," but *not* to Bechtel's letter. CP 860-62, 1407-08. In fact, during oral argument on the motion, FNWL expressly stated that it was not contending that the letter was inadmissible. RP (12/5) 43:14-22; *see also* RP (12/5) 48:20-22. The trial court did not exclude the letter, *see* RP (12/5) 52:17-56:7, but Willhite never offered it during trial. The Court should reject Willhite's attempt to blame the trial court for his own omission.

The Court also should reject Willhite's argument that he was entitled to an instruction that the jury could infer discrimination from the Bechtel letter. Br. at 36-37. Because it was never offered or admitted, the letter could not provide grounds for the jury to infer anything from it.

D. The Court Should Uphold the Jury Verdict on Willhite's Disability Discrimination Claim

Jury verdicts are reviewed for substantial evidence, taking all material evidence and reasonable inferences in favor of the verdict. *Klem v. Wash. Mut. Bank,* 176 Wn.2d 771, 782, 295 P.3d 1179 (2013); *Boeing Co. v. Sierracin Corp.,* 108 Wn.2d 38, 67, 738 P.2d 665 (1987). This Court will reverse a jury verdict only if there is no competent evidence or reasonable inference upon which the verdict might be sustained. *See Harris v. Drake,* 152 Wn.2d 480, 493, 99 P.3d 872 (2004); *Indus. Indem. Co. of the Nw., Inc. v. Kallevig,* 114 Wn.2d 907, 916, 792 P.2d 520 (1990). The Court should reject Willhite's argument that he is entitled to

reversal of the jury's verdict and entry of judgment as a matter of law on his discrimination claim.

In arguing for entry of judgment in his favor, Br. at 40-43, Willhite misrepresents the record and ignores material evidence and competing inferences. For example, he argues it was "undisputed" that Willhite was suffering from and disabled by depression the entire time that he worked on the Achievement Club project. Br. at 41. But Willhite was not diagnosed with depression until May 19, 2010 (*i.e.*, the day after he started his medical leave) and when asked in deposition, "During what period of time were you disabled?," his response was: "From the time of the leave." CP 933 (310:23-311:1). FNWL certainly disputed the starting date of Willhite's depression and alleged disability. *See, e.g.*, CP 862-63.

Similarly, Willhite argues it was "undisputed" that he was "still receiving treatment at the time" the skills assessment was completed for the RIF. Br. at 41. He may still have been taking medication in late October 2010, but Willhite ignores the evidence that his medication and counseling had caused his condition to improve to such an extent that by mid-August 2010, his treating physician had determined he could return to work without any restriction. CP 905-06. He also ignores his own representation to the EEOC that he was not disabled. CP 947-50.

Willhite also suggests that depression was the reason for the withdrawal and disengagement Douvia observed in 2007 and 2008. Br. at 42-43. But Willhite ignores the more likely possibility that it was his disappointment and anger over changes in the "culture" and leadership of

FNWL's marketing department, CP 196-97 (47:12-49:3); RP (12/16) 135:25-136:5, 137:2-8, and his perception that he was being passed over for promotions he felt he deserved, CP 203-04 (80:22-81:13); CP 260-62, 267, that caused him to react negatively. The latter inference is both reasonable and consistent with Willhite's own notes indicating his longstanding frustration with appointments and promotions given to other people. *See* Ex. 167; *see also* CP 291-92.

In the end, however, the critical point is that taking all the evidence and reasonable inferences in FNWL's favor, it cannot be said that the jury had no grounds for its verdict. The evidence was abundant and undisputed that no one at FNWL knew or had notice that Willhite was disabled when the company carried out its RIF. Under these circumstances, disability cannot have been a substantial factor in the decision to terminate Willhite's employment.

E. The Court Should Uphold the Jury Verdict on Willhite's FLA Claim

Willhite does not assign error to the instructions relating to his FLA claim. Nor did he object to the proposed instructions or the special verdict form questions relating to the FLA claim. CP 1733-34, 1754-55; RP (12/18) 97:17-21, 101:2-6.[16] Nevertheless, he argues that the jury's verdict should be "vacated" and judgment on the claim should be entered in his favor "as a matter of law." Br. at 39-43. His arguments should be rejected because he did not preserve any claim of error and because the

[16]*Compare* Instruction No. 12 *with* proposed instruction 20. CP 1733, 1173.

record shows that he was granted FLA leave, and when he returned from that leave, he was reinstated to his former position. CP 245 (302:23-303:6). These facts show there was no violation of RCW 49.78.300(1). Because substantial evidence supported the verdict, there are no grounds to vacate the verdict or enter judgment in Willhite's favor.

F. The Trial Court Correctly Granted Summary Judgment to FNWL on Its Unjust Enrichment Counterclaim

Willhite's challenge to the trial court's summary judgment ruling on FNWL's unjust enrichment counterclaim is based on the argument that Farmers' severance plan contained an unconditional promise that all employees whose positions were eliminated would receive severance benefits. Br. at 43-45. The evidence is undisputed that no such unconditional promise was made. The Severance Plan adopted by Farmers in January 2009 expressly provided that "[a]s a condition to receiving a benefit under the Plan, you must sign, return (and not revoke) a general release in a form satisfactory to Farmers." CP 146; *see* CP 99 (¶20). The memo announcing the plan contained a description of the new benefits (severance pay, COBRA payments, outplacement services), but also specifically acknowledged that "the terms of the actual plan apply." CP 287.

Consistent with the terms of the Severance Plan, Willhite's termination notice stated that "as a condition to receiving a benefit under the Severance Plan you will be required to sign a General Release and Agreement releasing Farmers of all claims." CP 162. Willhite did not

sign the General Release and Agreement that was part of his termination documentation, and then he refused to return the severance benefits mistakenly provided to him. CP 99-100 (¶¶22-25); CP 164-67. Under these circumstances, all the elements of unjust enrichment were met: FNWL conferred a benefit upon Willhite, Willhite knew of the benefit, and retention of the benefit was unjust without execution of the release. *See Young v. Young,* 164 Wn.2d 477, 484-85, 191 P.3d 1258 (2008).[17] The trial court committed no error in granting summary judgment in FNWL's favor.

G. The Trial Court Did Not Abuse Its Discretion in Limiting Willhite's Damages Testimony

The final assignment of error in Willhite's opening brief concerns the trial court's decision to limit the scope of Willhite's damages testimony. Br. at 4, 45-47. Specifically, the trial court ruled that Willhite could not testify regarding his claims for alleged future profit sharing payments, future short-term incentive plan payments, or future pension payments. RP (12/11) 87:23-106:9. The decision was based on an extensive voir dire of Willhite's proposed testimony, RP (12/11) 4:11-

[17] The Court should reject Willhite's argument that the Severance Plan is an adhesion contract. Br. at 45. There is nothing wrong with conditioning benefts that are not required by law upon execution of a release. *See Lockheed Corp. v. Spink,* 517 U.S. 882, 894, 116 S. Ct. 1783, 135 L. Ed. 2d 153 (1996) (finding no problem with an employer's conditioning payment of early retirement benefits upon an employee's waiver of employment-related claims).

81:20, and ER 701, which provides that if a witness is not testifying as an expert,[18]

> the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

ER 701 was amended in 2004. *See* 5B Karl B. Tegland, *Washington Practice - Evidence Law and Practice* § 701.1, at 4 (5th ed. 2007). The purpose of the amendment was to conform ER 701 to Fed. R. Evid. 701, which had been amended to add what is now the last clause in the rule. *See id.* at 4 & n.8. Under the new version of the rule, what is essentially expert testimony "may not be admitted under the guise of lay opinions. Such a substitution subverts the disclosure and discovery requirements ... and the reliability requirements for expert testimony...." *United States v. Peoples,* 250 F.3d 630, 641 (8th Cir. 2001);[19] *see also* Fed. R. Evid. 701 advisory committee's note (2000 amendment) (noting the new clause was designed to "eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple

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[18] Willhite was never disclosed as an expert witness in this case. CP __(¶3) [Declaration of Molly Daily in Support of Defendant's Motion in Limine to Exclude Testimony About Additional Categories of Damages, filed December 10, 2013, designated in Defendant/Respondent's Fourth Supplemental Designation of Clerk's Papers, filed October 31, 2014].

[19] The three Washington cases cited by Willhite in support of his argument, Br. at 45-46, were all decided before the amendment to ER 701, and are inapplicable in any event.

expedient of proffering an expert in lay witness clothing"); *United States v. Garcia,* 413 F.3d 201, 215 (2d Cir. 2005) ("The purpose of [subsection c] is to prevent a party from conflating expert and lay opinion testimony thereby conferring an aura of expertise on a witness without establishing the reliability standard for expert testimony set forth in Rule 702.").

There was no abuse of discretion in refusing to allow Willhite to testify about future payments he allegedly would have received under the Farmers profit sharing plan (had his employment not been terminated), when it was shown that Willhite did not know how the payments were calculated and did not know if Farmers was profitable or what level of profitability it had achieved since his termination or would achieve in the future, and admitted that the profit sharing plan had been discontinued. RP (12/11) 87:23-89:20, 51:13-52:2. Nor was there any abuse of discretion in refusing to allow Willlhite to testify about future short-term incentive plan payments, RP (12/11) 90:21-91:9, when he admitted he had no knowledge about how the company measured its performance for purposes of determining potential plan payments, RP (12/11) 53:20-54:25, 58:25-59:10, or how the company might choose to factor in regional results or the distribution of performance ratings, RP (12/11) 60:18-62:12. *See AVM Techs., Inc. v. Intel Corp.,* 927 F. Supp. 2d 139, 146-48 (D. Del. 2013) (barring damages testimony from lay witness who planned to testify based on speculation as to "what would have happened"). Finally, there also was no abuse of discretion in refusing to allow Willhite to testify regarding his claimed pension damages when he admittedly made several

mistakes in his damages calculations. RP (12/11) 91:10-106:9; *see Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 83 (3d Cir. 2009). Those mistakes highlighted the lack of reliability of Willhite's calculations.

V. CONCLUSION

For all the reasons stated, the trial court's amended judgment should be affirmed.

DATED this 5th day of November, 2014.

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Of Attorneys for Respondent Farmers New World Life Insurance Company

APPENDIX

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

Dennis Willhite, Plaintiff, vs. Farmers Insurance et ano, Defendant.	)	No: 12-2-23827-8 SEA

COURT'S INSTRUCTIONS TO THE JURY

Dated this 18th day of December, 2013

Honorable Ken Schubert

ORIGINAL

JURY INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It is also your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or believe of a witness or

your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence of the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest

convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

JURY INSTRUCTION NO. 2

The following is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed; and you are to consider only those matters that are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

Dennis Willhite is a former employee of Farmers Life. Farmers Life terminated Mr. Willhite's employment as part of a reduction-in-force. Mr. Willhite claims that his termination (1) breached a promise by Farmers Life that he would not be terminated for poor performance without notice and an opportunity to improve and (2) was unlawful discrimination on the basis of disability. He also alleges that Farmers Life violated the Washington Family Leave Act.

Farmers Life denies Mr. Willhite's claims.

JURY INSTRUCTION NO. 3

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

JURY INSTRUCTION NO. 4

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

JURY INSTRUCTION NO. 5

The law treats all parties equally whether they are corporations, partnerships, or individuals. This means that corporations, partnerships, and individuals are to be treated in the same fair and unprejudiced manner.

JURY INSTRUCTION NO. 6

In Washington, employment for an indefinite duration generally is at-will. "At-will employment" means both the employer and the employee may terminate the employment relationship at any time, for any reason, or for no reason, so long as the reason is not prohibited by law.

JURY INSTRUCTION NO. 7

If an employer creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations, and the employee is induced by those promises to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship and modify the "at will" nature of the employment.

Dennis Willhite has alleged that Farmers Life made a promise to him that he would not be terminated for poor performance without prior notice and an opportunity to improve. In order to prevail on this claim, Dennis Willhite must prove:

(1) That statements in a policy manual or handbook amounted to a specific promise by Farmers Life that he would not be terminated for poor performance without prior notice and an opportunity to improve; and

(2) That he justifiably relied upon such promise; and

(3) That Farmers Life breached the promise of specific treatment.

If you find that Dennis Willhite has proved each of the above propositions by a preponderance of the evidence, then your verdict should be for Dennis Willhite on this claim. On the other hand, if you find that any of the above propositions has not been proved, then your verdict should be for Farmers Life.

JURY INSTRUCTION NO. 8

Only those statements in employment handbooks, manuals, or similar documents that constitute promises of specific treatment in specific situations are binding. A promise is an expression that justifies the person to whom it is made in reasonably believing that a commitment has been made that something specific will happen or not happen in the future.

General statements of company policy do not constitute promises of specific treatment in a specific situation.

An illusory promise is a purported promise that actually promises nothing because it leaves to the speaker the choice of performance or nonperformance. An alleged promise may be illusory if it is so indefinite it cannot be enforced, or if its performance is optional or discretionary on the part of the promisor. An illusory promise is unenforceable.

Terms such as "shall," "will," and "must" in policy manuals may give rise to a promise of specific treatment. On the other hand, terms such as "should," "may," "might," and "normally" are illusory and do not give rise to a promise of specific treatment.

JURY INSTRUCTION NO. 9

An employer can disclaim what might otherwise appear to be enforceable promises in handbooks or manuals. The disclaimer must state in a conspicuous manner that nothing contained in the handbook, manual, or similar document is intended to be part of the employment relationship and that such statements are instead simply general statements of company policy. A disclaimer must be effectively communicated to the employee in order to be effective. An employer's inconsistent representations can negate the effects of a disclaimer.

JURY INSTRUCTION NO. 10

To establish justifiable reliance, an employee must have actual knowledge of the promise that was allegedly breached. General reliance on an "atmosphere" of job security is not sufficient. The employee must rely on an employer's specific promise.

In order for Dennis Willhite to prove that he justifiably relied on a promise that he would not be terminated for poor performance without prior notice and an opportunity to improve, he must prove that:

1. He was induced by the promise to remain on the job, and

2. He was induced by the promise to not actively seek other employment.

JURY INSTRUCTION NO. 11

A breach of promise is defined as a failure to perform a duty or obligation contained in the promise.

JURY INSTRUCTION NO. 12

In general, the Washington Family Leave Act ("FLA") requires employers to provide eligible employees with up to 12 weeks per year of unpaid leave for certain reasons, including to attend to a serious health condition. At the end of the leave, the employee is entitled to either return to the position of employment he had previously held, or, alternatively, be placed in an equivalent position. The FLA makes it unlawful for any employer to interfere with, restrain, or deny the exercise of or attempt to exercise, any right it provides.

Upon his return from FLA leave, Dennis Willhite was entitled to be restored to the position of employment he held when his leave commenced or to an equivalent position. Mr. Willhite has alleged that Farmers Life interfered with, restrained, or denied him the exercise of that right. In order to prevail on this claim, Mr. Willhite must prove:

(1) He took leave under the FLA; and

(2) Upon his return from FLA leave, Farmers Life failed to reinstate him to his former position or an equivalent position.

If you find that Dennis Willhite has proved each of the above propositions by a preponderance of the evidence, then your verdict should be for Dennis Willhite on this claim. On the other hand, if you find that either of the above propositions has not been proved, then your verdict should be for Farmers Life.

JURY INSTRUCTION NO. 13

An employee has no greater rights to continued employment or other benefits and conditions of employment than any of his fellow employees by virtue of the fact that he exercised rights to FLA leave.

JURY INSTRUCTION NO. 14

Discrimination in employment on the basis of disability is prohibited.

To establish his claim of discrimination on the basis of disability, Dennis Willhite has the burden of proving each of the following propositions:

(1) That he had a disability;

(2) That he was able to perform the essential functions of his job; and

(3) That his disability was a substantial factor in Farmers Life's decision to lay him off.

"Substantial factor" means a significant motivating factor in bringing about the employer's decision. Dennis Willhite does not have to prove that his disability was the only factor or the main factor in the decision. Nor does he have to prove that he would not have been terminated but for his disability.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for Dennis Willhite. On the other hand, if any of these propositions has not been proved, your verdict should be for Farmers Life on this claim.

JURY INSTRUCTION NO. 15

A disability is a sensory, mental, or physical impairment that:

1. Is medically recognized or diagnosable; or

2. Exists as a record or history.

JURY INSTRUCTION NO. 16

An impairment includes but is not limited to: a physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculo-skeletal, special sense organs, respiratory, including speech organs, cardio-vascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or any mental, developmental, traumatic, or psychological disorder including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

JURY INSTRUCTION NO. 17

An essential function is a job duty that is fundamental, basic, necessary and indispensable to filling a particular position, as opposed to a marginal duty divorced from the essence or substance of the job.

In determining whether a function is essential to a position, you may consider, among others, the following factors:

(1) whether the reasons the position exists include performing that function;

(2) the employer's judgment as to which functions are essential;

(3) the judgment of those who have experience working in and around the position in question;

(4) any written job descriptions such as those used to advertise the position; and

(5) the amount of time spent on the job performing the particular function.

JURY INSTRUCTION NO. 18

Dennis Willhite alleges that Farmers Life based its decision to terminate him on conduct resulting from his disability. Conduct resulting from the disability is part of the disability and not a separate basis for termination. To establish that Farmers Life terminated him based on conduct resulting from his disability, Dennis Willhite must prove:

(1) That the conduct on which Farmers Life relied resulted from his disability, and

(2) That there was a causal link between the disability-produced conduct and the termination.

Where an employer did not know or had no notice of an employee's disability, the employee's disability cannot have been a substantial factor in the employment decision.

JURY INSTRUCTION NO. 19

You heard evidence in this lawsuit that Dennis Willhite asserted a claim of age discrimination and a claim that Farmers Life was motivated to choose him for the layoff in order to lower its pension benefits obligation to him. Both of those claims have been dismissed. You are not to consider those dismissed claims in deciding any of the remaining claims in this case.

JURY INSTRUCTION NO. 20

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

The burden of proving damages rests with the party who is claiming them and it is for you to determine, based upon the evidence, whether any particular element of damages has been proved by a preponderance of the evidence. You must be governed by your own judgment, by the evidence in the case, and by these instructions, rather than by speculation, guess, or conjecture.

You may not award damages as a punishment, and damages cannot be imposed or increased to penalize Farmers Life. You may not award damages for to compensate Dennis Willhite for court costs or attorney fees.

JURY INSTRUCTION NO. 21

If your verdict is for Dennis Willhite on his claim for breach of promise of specific treatment in specific situations and if you find that Dennis Willhite has proved that he incurred actual damages related to lost past and future salary and the amount of those actual damages, then you shall award actual damages to him.

Actual damages are those losses of past and future salary that were reasonably foreseeable, at the time the promise was made, as a probable result of a breach. A loss may be foreseeable as a probable result of breach because it follows from breach of the promise either

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

In calculating Dennis Willhite's actual damages for lost past and future salary, you should determine the sum of money that will put him in as good a position as he would have been in if both Dennis Willhite and Farmers Life had performed their promises.

JURY INSTRUCTION NO. 22

A party who sustains damage as a result of another party's breach of a promise has a duty to minimize his loss. An injured party is not entitled to recover for any part of the loss that he could have avoided with reasonable efforts. The party who caused the damages has the burden to prove that the injured party failed to use reasonable efforts to minimize his loss, and the amount of damages that could have been minimized or avoided.

JURY INSTRUCTION NO. 23

If your verdict is for Dennis Willhite on his claim for disability discrimination you must determine the amount of money that will reasonably and fairly compensate him for such damages as you find were proximately caused by the acts of Farmers Life.

If you find for Dennis Willhite on his claim for disability discrimination, you should consider the following elements:

(1) The reasonable value of lost past salary, from January 11, 2011 to the date of trial;

(2) The reasonable value of lost future salary; and

(3) The emotional harm to Dennis Willhite caused by Farmers Life's wrongful conduct, including emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish, experienced by Dennis Willhite and with reasonable probability to be experienced by him in the future.

Any award of damages must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

JURY INSTRUCTION NO. 24

If you find that Farmers Life violated the Washington Family Leave Act, then you must determine the amount of damages Dennis Willhite suffered.

If you find that Dennis Willhite has suffered loss of past salary relating to his employment by reason of Farmers Life's violation of the Family Leave Act, you must determine and award the amount of such lost past salary.

JURY INSTRUCTION NO. 25

In calculating damages for lost future salary you should determine the present cash value of Dennis Willhite's salary from today until the time that Dennis Willhite may reasonably be expected to retire or fully recover from the continuing effects of the discrimination, decreased by any projected future earnings.

JURY INSTRUCTION NO. 26

Any award for future economic damages must be for the present cash value of those damages. Noneconomic damages are not reduced to present cash value.

"Present cash value" means the sum of money needed now which, if invested at a reasonable rate of return, would equal the amount of loss at the time in the future when the earnings would have been received.

The rate of interest to be applied in determining present cash value should be that rate which in your judgment is reasonable under all circumstances. In this regard, you should take into consideration the prevailing rates of interest in the area that can reasonably be expected from safe investments that a person of ordinary prudence, but without particular financial experience or skill, can make in this locality.

JURY INSTRUCTION NO. 27

In order to prevail on his claim for disability discrimination, Dennis Willhite must prove that Farmers Life intended to discriminate against him. He need not prove, however, that Farmers Life intended to cause him emotional distress in order to recover emotional distress damages. Rather, he need only prove that he suffered such harm as a result of Farmers Life's discriminatory conduct.

JURY INSTRUCTION NO. 28

The plaintiff, Dennis Willhite, has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

To establish a failure to mitigate damages proximately caused by disability discrimination, Farmers Life has the burden of proving:

(1) There were openings in comparable positions available for Dennis Willhite elsewhere after Farmers Life laid him off;

(2) Dennis Willhite failed to use reasonable care and diligence in seeking those openings; and

(3) the amount by which damages would have been reduced if Dennis Willhite had used reasonable care and diligence in seeking those openings.

Dennis Willhite need not show that he was successful at finding comparable employment in order to establish that he mitigated his damages. He mitigated his damages if he exercised reasonable diligence in finding comparable employment.

You should take into account the characteristics of Dennis Willhite and the job market in evaluating the reasonableness of his efforts to mitigate damages.

If you find that Farmers Life has proved all of the above, you should reduce your award of damages for wage loss accordingly.

JURY INSTRUCTION NO. 29

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon

the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

FILED
KING COUNTY WASHINGTON

DEC 19 2013

SUPERIOR COURT CLERK
BY Susan Bone
DEPUTY

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

Willhite

Plaintiff/Petitioner,

vs.

Farmers Ins. Group et Ano

Defendant/Respondent.

NO. 12-2-23827-8

[X] SEA
[ ] KNT

Verdict form **is attached.**

BREACH OF PROMISE OF SPECIFIC TREATMENT IN SPECIFIC SITUATIONS – LIABILITY

QUESTION NO. 1:

Has Dennis Willhite proved by a preponderance of the evidence that statements in a policy manual or handbook amounted to a promise by Farmers Life that he would not be terminated for poor performance without prior notice and an opportunity to improve?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: NO

Instruction: If you answered "no" to Question No. 1, skip to Question No. 4. If you answered "yes" to Question No. 1, then proceed to Question No. 2.

QUESTION NO. 2:

Has Dennis Willhite proved by a preponderance of the evidence that he justifiably relied upon the promise?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: _____

Instruction: If you answered "no" to Question No. 2, skip to Question No. 4. If you answered "yes" to Question No. 2, then proceed to Question No. 3.

QUESTION NO. 3:

Has Dennis Willhite proved by a preponderance of the evidence that Farmers Life breached the promise?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: _____

Instruction: Proceed to Question No. 4.

INTERFERENCE UNDER THE WASHINGTON FAMILY LEAVE ACT (FLA) – LIABILITY

QUESTION NO. 4:

Has Dennis Willhite proved by a preponderance of the evidence that he took leave under the Washington Family Leave Act?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: YES

Instruction: If you answered "no" to Question No. 4, skip to Question No. 6. If you answered "yes" to Question No. 4, then proceed to Question No. 5.

QUESTION NO. 5:

Has Dennis Willhite proved by a preponderance of the evidence that upon his return from FLA leave, Farmers Life failed to reinstate him to his former position or an equivalent position?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: NO

Instruction: Proceed to Question No. 6.

DISABILITY DISCRIMINATION – LIABILITY

QUESTION NO. 6:

Has Dennis Willhite proved by a preponderance of the evidence that he had a disability?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: YES

Instruction: If you answered "no" to Question No. 6, skip to Question No. 10. If you answered "yes" to Question No. 6, then proceed to Question No. 7.

QUESTION NO. 7:

Has Dennis Willhite proved by a preponderance of the evidence that Farmers Life had notice of his disability?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: NO

Instruction: If you answered "no" to Question No. 7, skip to Question No. 10. If you answered "yes" to Question No. 7, then proceed to Question No. 8.

QUESTION NO. 8:

Has Dennis Willhite proved by a preponderance of the evidence that he was able to perform the essential functions of the job in question?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: _____

Instruction: If you answered "no" to Question No. 8, skip to Question No. 10. If you answered "yes" to Question No. 8, then proceed to Question No. 9.

QUESTION NO. 9:

Has Dennis Willhite proved by a preponderance of the evidence that his disability was a substantial factor in Farmers Life's decision to lay him off?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: _____

Instruction: Proceed to Question No. 10.

DISABILITY DISCRIMINATION – DAMAGES

QUESTION NO. 10:

Instruction: If you answered "no" or did not reach a verdict as to any of Question Nos. 6-9, SKIP THIS QUESTION and proceed to Question No. 11. If you answered "yes" to all of Question Nos. 6-9, then answer this Question.

You must determine the reasonable value of Dennis Willhite's damages, if any, that were proximately caused by disability discrimination. Please state the amount of damages Dennis Willhite is entitled to for each of the following categories. If you find that Dennis Willhite is not entitled to damages for a category or categories, write "0" in that category or those categories.

a. Lost past salary $_____

b. Lost future salary $_____

c. Damages for emotional harm $_____ Total: $_____

Instruction: Proceed to Question 11.

FAMILY LEAVE ACT VIOLATION – DAMAGES

QUESTION NO. 11:

Instruction: If you answered "no" or did not reach a verdict as to any of Question Nos. 4-5, SKIP THIS QUESTION and proceed to Question No. 12. If you answered "yes" to all of Question Nos. 4-5, then answer this Question.

What is the reasonable value of the actual lost past salary damages, if any, that Dennis Willhite suffered by reason of Farmers Life's violation of the Washington Family Leave Act? If you find that Dennis Willhite did not suffer resulting damages, write "0."

ANSWER: $_____*

* *Instruction: If you awarded lost past earnings in response to Question No. 10 above, do not duplicate those amounts in your response to Question No. 11.*

Instruction: Proceed to Question 12.

BREACH OF PROMISE – DAMAGES

QUESTION NO. 12:

Instruction: If you answered "no" or did not reach a verdict as to any of Question Nos. 1-3, date and sign this verdict form and notify the bailiff. If you answered "yes" to all of Question Nos. 1-3, then answer this Question.

What is the reasonable value of the actual damages suffered by Dennis Willhite, if any, for losses of salary that were reasonably foreseeable at the time the promise that he would not be terminated for poor performance without prior notice and an opportunity to improve was made, as a probable result of breach of that promise?

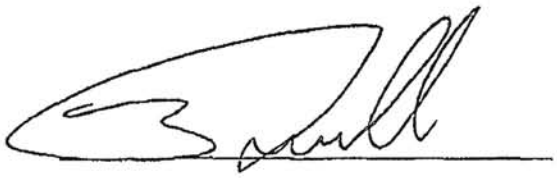
ANSWER: $_____*

* *Instructions: If you awarded lost past salary in response to Question No. 10 or Question No. 11 above, do not include such losses in your damages award here. If you awarded future lost salary under Question No. 10 above, do not include such losses in your damages award here.*

Instructions: Date and sign this verdict form and notify the bailiff.

SIGNATURE OF PRESIDING JUROR

I verify the accuracy of these responses.



Presiding Juror

19 December 2013

Date

PLAINTIFF'S PROPOSED INSTRUCTION NO. 13

Discrimination in employment on the basis of disability is prohibited.

To establish his claim of discrimination on the basis of disability, Willhite has the burden of proving each of the following propositions:

(1) That Willhite had a disability, specifically depression (this is undisputed);
(2) That Willhite was able to perform the essential functions of his job with reasonable accommodation (this is also undisputed); and
(3) That Willhite's disability was a substantial factor in Farmers decision to lay him off.

Willhite does not have to prove that his disability was the only factor or the main factor in the decision.

Nor does Willhite have to prove that he would not have been termination but for his disability.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for Willhite on the disability discrimination claim. On the other hand, if any of these propositions has not been proved, your verdict should be for Farmers on the disability discrimination claim. [15]

[15] WPI 330.32 ***Modified***; *Anica v. Wal-Mart Stores, Inc.*, 120 Wn.App. 481, 491 (2004).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 14

The law makes no distinction between conduct caused by a disability and the disability itself. As such, you may conclude that Willhite's disability was a "substantial factor" in Famers' termination decision, if you find that the decision was based in part upon performance deficits, personality changes or other symptoms that were a result of Willhite's depression.[16]

[16] *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1093-95 (2007) (holding: "[I]f the law fails to protect the manifestations of [the plaintiff's] disability, there is no real protection in the law because it would protected the disabled in name only." Court further held that "a jury **must** be instructed that it may find that the employee was terminated on the impermissible basis of her disability" if evidence is presented of a causal link between the disability-produced conduct and the termination." Court held is was reversible error to not provide the following proposed instruction: "Conduct resulting from a disability is part of the disability and not a separate basis for termination."
Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 152 (2004) (holding that personality changes could be a symptom of depression and therefore impressible grounds for termination).
Callahan v. Walla Walla Housing Authority, 126 Wn.App. 812, 821 (2005) (holding that there can be disability discrimination even without a diagnosed condition.
Humphrey v. Memorial Hospitals Assn., 239 F.3d 1128, 1139-40 (2001) (holding that under the ADA, conduct resulting from the disability is considered to be part of the disability).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 15

You may also consider the following when determining whether Willhite's disability was a substantial factor in Farmers' termination decision:

1) The proximity of time between the disability leave and the termination, as well as the years of employment prior to termination;[17]

2) A prior history of satisfactory work performance.[18]

3) Whether the performance evaluations upon which the termination decision was based contain subjective opinions, such as those assessing an employee's "dedication," or "enthusiasm."[19]

4) Whether there was a drop in performance evaluation scores after the onset of the disability.[20]

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[17] *Anica v. Wal-Mart Stores, Inc.*, 120 Wn.App. 481, 491 (2004); *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1137 (2003); *Matthews v. Alhambra School Dist.*, 39 NDLR P 224 (unpublished but cited by Farmers in MSJ proceedings); *Murray v. JEN-WELD Inc.*, 922 F.Supp.2d 497, 514 (USDC MD Pennsylvania 2013)(cited by Farmers in MSJ proceedings); *Presta v. West Customer Management Group LLC*, 2011 WL 6370355 (2011)

[18] *Anica v. Wal-Mart Stores, Inc.*, 120 Wn.App. 481, 491 (2004); *Phillips v. City of Seattle*, 111 Wn.2d 903, 909 (1989) (holding that whether a condition was the reason for a dismissal "depends upon the documentation of the employer, testimony regarding the dismissal and other relevant facts.")

[19] *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1136-37 (2003).

[20] *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1137 (2003).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 16

When determining whether disability was a substantial factor in the termination decision, you may also consider whether Farmers' offered explanations for the termination decision are: 1) inconsistent; 2) unworthy of belief; 3) unsupported by facts; or 4) affirmatively false.[21]

If you disbelieve any of Farmers' offered explanation for Willhite's termination, you are entitled to infer discrimination from this evidence alone, and conclude that Willhite's disability was a substantial factor in Farmers' termination decision. [22]

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[21] *Sellsted v. Washington Mutual Savings Bank*, 69 Wn.App. 852, 861 (1993); *Chen v. State*, 86 Wn.App. 183, 190 (1997); *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 134 (2000)

[22] *Reeves v. Sanderson Plumbing Inc.*, 530 U.S. 133, 147-48 (2000); *Hill v. BCTI Income Fund, 144 Wn.2d 172, 185 (2001); St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993); Cluff v. CMX Corp., Inc., 84 Wn.App. 634, 639 (1997) (holding: "Pretext can be showed indirectly by establishing the employer's explanation for the termination is false.")

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington that on the date indicated below the foregoing Respondent's Brief is being served via email (per existing agreement) to the counsel set forth below.

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DATED: November 5, 2014 at Seattle, WA.

Deborah Harwood, Legal Secretary
STOEL RIVES