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No. 72666-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

IGNACIO B. MARIN,

Appellant,

v.

KING COUNTY, WASHINGTON.

Respondent,

APPELLANT IGNACIO MARIN'S OPENING BRIEF

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I. INTRODUCTION

King County ("County") failed to remedy known discrimination and a hostile work environment in its Wastewater Treatment Divisions ("WTD") Ignacio Marin ("Marin") reports racist conduct, disproportionate assignment to the least desirable grueling manual labor, and harassment of himself and his coworkers in a Hostile Work Environment ("HWE"). Supervisor Sagnis with overt retaliatory intent imposes immediate unwarranted discipline on Marin without investigating the facts. Marin, receives an adverse transfer to the Renton Treatment Plant ("RTP"), where it would take him "years to learn the plant". Marin is considered "of little value" and his supervisor notes say "eligible to retire in 3 years." Without required training the County denies Marin's HWE complaint and withholds "smoking gun" information, but Marin does not concede. The County blames Marin, papers his file with criticism and threat of discipline, up to termination, until finally Marin, on medical leave without requested accommodations, spirals downward into depression, unwanted early retirement and financial insecurity.

II. ASSIGNMENTS OF ERROR

1. The Court erred in granting Summary Judgment dismissing claims of "different treatment" discrimination based on race, national origin, disability, and retaliation.

2. The Court erred in granting the County's CR 50 motion as to "retaliation" as a basis for Marin's HWE claim.
3. The Court erred in granting a motion in limine to exclude pre- statute of limitation evidence of racial disparity, Washington Law Against Discrimination ("WLAD") protected activity and HWE.
4. The Court erred in striking the testimony of Lloyd Holman.
5. The Court erred in excluding evidence of conversations between Marin and Supervisor Sagnis regarding a protected activity and retaliatory disciplinary action.
6. The Court erred in requiring Marin to lay a foundation outside the presence of the jury as to each witnesses' prior knowledge of Marin having made a complaint of discrimination.
7. The Court erred in failing to fully question and excuse panel juror 71.
8. The Court erred in denying Marin's motion to supplement the record with juror 71's email.
9. The Court erred in reducing voir dire time without prior notice and with issues of bias, inter-alia, remaining to be addressed.
10. The Court erred in penalizing Marin's trial time, for a cause challenge.
11. The Court erred in failing to grant an additional preemptory challenge when a juror came into the box after peremptory challenges.
12. The Court erred in its February 19, 2013 Order Imposing Sanctions.

13. The Court erred in failing to use a Burnett analysis prior to allowing the County to place undisclosed prejudicial documents into evidence.

14. The Court erred in denying Marin's Motion for Sanctions..

15. The Court erred in sanctioning Marin's counsel.

16. The Court erred in overruling Marin's objections to character evidence and opinions of credibility in testimony of Mark McClung, MD.

17. The Court erred by awarding excessive "costs" against Marin.

18. The Court erred in denying Marin's requests for protection against inherent and actual bias, and in denying "Batson" motions.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A WLAD retaliation claim should not be dismissed on summary judgment where there is admissible evidence of WLAD protected activity, direct evidence of retaliatory animus, and "materially adverse action(s)". Assignments of Error 1, 14.

2. "Retaliation" should not be dismissed as one basis of a HWE claim under CR 50 where there is admissible evidence of known WLAD protected activity, direct evidence of supervisory retaliatory animus, and "materially adverse action(s)" by managers, supervisors and coworkers. Assignments of Error 2, 3, 4, 5, 6, 14.

3. Under the WLAD, pre-statute evidence relevant to show an ongoing HWE, notice of protected activity, a pattern and practice of racial

disparity, and/or "pretext" of the employer's explanations Assignments of Error 1,2,3,5, 6.4.

4. A recording of conversations between a public agency supervisor and a public employee relating to the employee's complaint of harassment/discrimination and, to the supervisor's formal disciplinary action against that employee are not "private" conversations subject to the restrictions of RCW 9.73.030 Assignments of Error 5,12,15.

5. Sanctions should not be imposed on counsel pursuant to CR 26(g), where counsel produced discovery "seasonably" without CR 37 Motion or Order, and where any arguable delay was not intentional or prejudicial. Assignments of Error 12,14,15.

6. The Court did not ensure selection of an impartial/constitutional jury where it failed to question or excuse juror 71 for cause; denied a Batson Motion and anti-bias instructions, reduced voir dire time without notice, denied Marin a peremptory challenge to a new juror; deducted from Marin's limited trial time for voir dire and a cause challenge to juror 71. Assignments of Error 7,8,9,10,11,18.

7. The Court should have decided Marin's discovery abuse motions to exclude evidence based on the Burnett standard and acted on his spoliation motions to mitigate prejudice. Assignments of Error 5, 12, 13,14,15, 18.

8. The Court should have excluded opinions of expert psychiatrist McClung about Marin's "character traits" under ER 403, ER 404, and ER

702; and his opinion about credibility of Marin's "perceptions" of workplace harassment. Assignments of Error 16, 18,

9. The Judgment for Costs against Marin should be reduced where it awards costs not authorized by statute. Assignment of Error 17, 18.

III. STATEMENT OF THE CASE.

This is a hotly contested hard fought RCW 49.60 WLAD employment discrimination case. Substantial claims of discrimination and retaliation were dismissed on summary judgment. CP 1752-1757. The trial started September 4, 2014 on issues of HWE based on race, national origin, age, disability and retaliation as well as a "failure to make reasonable accommodation" disability claim. The retaliation basis for the HWE was dismissed on a CR 50 ruling the day before closing. Trial ended on September 24, 2014 and resulted in a defense verdict. RP 9/25/2014 p.96-99. Marin, a Peruvian born naturalized US Citizen, and a qualified licensed Boiler Operator and Certified Wastewater Treatment Operator, worked in the Wastewater Treatment Division ("WTD") (previously Metro) for more than 28 years. During his employment, he had experienced, and complained about, racial hostility, different treatment from Caucasian coworkers, a hostile work environment, and retaliation for his complaints and protected activity. CP 1435-1449. In 2009-2011 WTD also failed to provide reasonable accommodations his doctor's requested

so that he could perform his job. Exh.173; Exh.209. In 2010-2011 the WTD applied retaliatory sanctioning and threats of discipline, despite its inadequate training about Renton ("RTP") and Hazardous High Voltage equipment by WTD. Exh.206.

The waste water treatment plants at West Point ("WPTP") and Renton ("RTP") operate 24 hours a day and have close knit shift crews of 5-6 WTP Operators that are on 12-hour shifts. The crews known as "A", "B", "C" and "D" Crews. Marin worked at WPTP from 1982 to 2009, in a continuing and repeated cycle of different treatment, reporting, lack of remedial action and retaliation. In his second complaint to management, in December 1990, Marin testified to the history of his experience of discrimination and retaliation.,CP 1558[1] See generally CP 1558-1631 Marin's Response to County's motion for summary judgment.

Testimony about Marin's treatment on "D Crew" at WPTP from 1997 to 2005 describes the same kinds of continuing different treatment as his complaints on the same "D Crew" under supervisor James Sagnis and Mark Horton from 2007–2009. Norm Cook, an African American coworker on "D Crew" corroborates Marin's testimony of continuing disproportionate assignment to the dirtiest and hardest work; denial of sign off's for advancement, and unfair discipline. CP 1438 (Marin Decl SJ) CP

1424:23-1426:17 and CP 1429:2 -1432:7 and CP 1434:13-18 (Cook); CP 1430:1-6. "Mr. Marin and I were in the heavy area until one of the favored guys went on vacation and then we could work their desirable area until they got back." CP 1430:17-20.

Supervisor Sagnis and Horton took over Marin's "D Crew" in 2007 through 2009, worsening the disparity in "filthy" manual labor, public demeaning, and limited opportunities for training or skilled operator work, increasing Marin's anxiety and cardiac symptoms. RP 9/17/2014 p.38,40. Horton's bullying Marin to "dig grit" and displacing Marin on engine work, by calling in a Caucasian from another crew "so Marin would have "no excuses " but dig pre-aer grit Exh.s 60, 61, made Marin ill in April 2009. When Marin complained about Horton's disparate harassment, Sagnis on April 20, 2009 accused Marin of misconduct. Sagnis, WTD HR, and WTP Manager Elardo rushed with numerous emails, edits and rewrites to prepare and impose unwarranted, disparate discipline accusing Marin of "insubordination", with written discipline on May 10, 2009. Exh 82 & 83; Exh.162; RP 9/09/2014 p.9; Exh.86.

On May 11, 2009 the Operators Union filed Marin's grievance alleging no "just cause", harassment, and hostile work environment. Exh. 84. A County EAP Counselor documented Marin's report of illness and

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[1] There is not enough room in an appeal brief to layout the extensive record of evidence

hostile work environment and made a referral of Marin to King County Disability Services. Exh.67. Disability Services' documented Marin's disability and symptoms, his report of Horton and Sagnis' harassment, and, made a referral of Marin to King County Human Resources ("KCHR") for intake of a discrimination complaint, Exh. 69, and Marin's completed FMLA documentation. But there it ended. No complaint was taken and nothing happened to remedy Marin's workplace or to derail the unwarranted discipline. Marin fearing retaliation hired a lawyer, filed a WLAD complaint with KCHR and was temporarily moved to RTP "C Crew". "C Crew" supervisor James Alenduff was told Marin needed to be in a "safe non-hostile environment" for about 3 weeks during an investigation of his WLAD grievance. CP 3379-3410, Exh.89; RP 9/18/2014 p.20-21. Marin's temporary stay at RTP was extended on July 21, 2009 Exh.104. Marin would never return to WPTP.

Meanwhile at WPTP, Sagnis makes overt retaliatory statements against Marin. Exhs.122, 135. Sagnis tells "D Crew", during the formal discrimination investigation of Sagnis and Horton that Marin would not be coming back. RP 9/08/2014 p.145, 147-148. HR's Ramsey writes to HR Director Milestone and WTP Mgr. Elardo, documenting Sagnis' reaction to Marin's proposed return to "D Crew": "would not be pleasant" that

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of discriminatory conduct at issue in this case. Marin will cite to the clerks papers.

Marin had "shit all over the crew" and Marin had "made his bed, now he would have to lie in it". Exh.135. The County leaves Sagnis and Horton in charge of "D Crew", choosing to block the return of Marin to WPTP where he successfully operated for years. Exh.135. The County pretextually and strategically "offered" Marin a return to "D Crew", Sagnis still there, without telling Marin of the "finding" of Sagnis' retaliatory statements nor the County's decision that Marin could never return to "D Crew". RP 9/23/2014 p.166-167; Exhs.135, 160

RTP plant manager Fischer opposed Marin's permanent transfer to RTP because "the problem was caused at West Point and should be solved at West Point", and because Marin would be of "very little value" at RTP on crews. Exh.149. Fischer and Marin's new crew knew it would take years for Marin to learn the huge RTP. RP 9/10/2014 p.100-101;RP 9/22/2014 p.158.

Marin struggled to learn RTP while Alenduff's "C Crew" trainer Lee Higginbotham declined to train Marin and organized the crew to not allow Marin to "touch" any equipment". RP 9/17/2014 p.43-44; RP 9/10/2014 p.201; RP 9/18/2014 p.37. RTP's training depended on word of mouth, hands on training under an experienced operator to learn the plant. RP 9/16/2014 p.12-13. Deprived of meaningful work, Marin took his earned vacation leave rather than sit and "look lazy" with nothing to do.

WTD management did not notice Marin was gone for a month. RP 9/17/2014 P. 45-46. Terrified of further retaliation, Marin reported "anonymously" through counsel to County Prosecutor Lynn Kalina that he had observed Alenduff watch computer porn on shift and sexually harass a female janitor. Exh.125. Shunned, Marin was found crying in a hallway. RP 9/23/2014 p.171-173. WTD moved Marin to "B Crew" at RTP while terminating Alenduff but also investigating alleged errors by Marin on "C Crew". At direction of HR Mgr. Ramsey, and then HR attorney Hillary, "B Crew" Supervisor Read documented Marin who "shadowed" her crew as an "extra" employee. Exh.167; Exh.175; 9/16/2014 P. 76:18-23; RP 9/23/2014 p.176. Marin declined an offer to concede his WLAD complaint or HWE grievance on Mgr. Elardo's terms: a determination that there had been no discrimination, harassment or HWE at WPTP, coupled with an offer to remove the unfounded written discipline Sagnis imposed on Marin May 10, 2009. Exh.162.[2]

RTP did not provide Marin required hazardous energy training for lockout/tag out (LOTO) of RTP high voltage equipment, and knew that RTP had developed no "equipment specific procedures" he could refer to.

[2] WPTP had further reason to remove Sagnis and Horton and allow Marin's return in late 2009-2010. Sagnis and Horton were found culpable for a massive (Exxon Valdez sized) raw sewage spill into Puget Sound from WPTP. Horton was fired. Sagnis, disciplined again, remained over D Crew, blocking Marin's return. CP2947-2948; 2657-2658 The trial court excluded this evidence from the jury.

RP 9/16/2014 p.14-15; 9/16/2014 p.24-25. When WTD HR and the Prosecuting Attorney's office were scheduling Marin's WLAD complaint for mediation in late fall 2010, HR attorney Hillary started emailing and drafting documents for Read to write up Marin for alleged performance failings including seeking too much assistance from coworkers, and not knowing a name Read used to refer to one of RTP's old buildings; and not doing a complete, or correct "lock out" of the Raw Sewage Pump #2 (RSP #2). Exh.192; Exh.200; Exh.204; Exh.205, and ultimately threatening discipline up to termination for further "mistakes." Exh.206. The County ignored Marin's valid responses and Marin's doctors reported Marin's increase in anxiety, blood pressure and atrial fibrillation symptoms and taking Marin out of work on FMLA. Though Dr. Vance explained why Marin needed different supervisory methods, Exh.209, and Dr. Finch wrote that Marin could not return without changes in the work environment, the County did not implement requested or other accommodations. Exh.598. Marin remained off work rendered ill with anxiety and panic after a write up that threatened up to termination for not knowing RTP hazardous high voltage lock out tag out equipment and procedures for "every piece of equipment" in the RTP. Exh.205, Exh.206; Exh.598; Exh.209; Exh.262. The write up, different from the usual informal "TLC" memos which do not threaten discipline, RP 9/9/2014 p.

9-10, had been written by attorney Hillary, and cleared by the Prosecutors office especially for Marin, in a way that he could not grieve. RP 9/09/2014 p.10.

Marin, his doctors and attorney, asked for supportive supervision, training and corrective practices; for safety training, a walk through with a trained safety official, and for the written procedures for lock out of high voltage equipment like the RSP #2. Without such accommodations, Marin was never medically released to return to work and had to retire early May 1, 2011, at a drastically reduced benefit, when he was running out of earned leave. Exh.228; Exh.230; Exh.209; RP 9/17/2014 p.70; Exh. 598; RP 9/10/2014 p.145-146.

Marin filed suit on July 26, 2011. CP 1. Prior to trial, the court excluded swaths of Marin's "pre-statute" and other evidence in rulings on Motions in Limine. CP 2950-2951. Based on a finding that Marin's recording of 2 discipline and complaint related meetings with Sagnis violated RCW 9.73.030, Marin's testimony and evidence was further restricted. CP 1093. On a CR 50 motion the court dismissed Marin's claim that "retaliation" was a basis of the HWE. RP 9/24/2019 p.98.

The Court shortened voir dire, denied time to follow up on bias issues apparent from the juror questionnaire RP 9/4/2014 p.102-103; CP 7527-7535 (Sup of CP see appendix) denied Marin's request for an extra

peremptory on new jurors in the box RP 9/03/2014 p.171; denied "inherent bias" instructions RP 9/03/2014 p.1-8; CP 2990-2992; and denied Marin's Batson challenges. RP 9/04/2014 p.5-13. The County brought successful challenges to Mexican American and African American jurors, and in closing pointed at dark skinned U.S. citizen Marin referring to him more than once, over objection, as "the Defendant". RP 9/25/2014 p.48:14-24; p.49:2-8, p.17; p.52:12.

In contrast, the Court denied Marin's cause challenge to juror 71 with clear bias in favor of his "good friend," his wife's "best friend", Prosecutor Kalina, involved in this case, whom the juror had seen twice during the week of this trial. RP 9/04/2014 p.104-105. Prior to the jurors being sworn, the Court declined to hear from juror 71 about his concern of fairness. RP 9/03/2014 p.168:3-16. The parties were informed after opening statements that juror 71 had sent an email to the Court. The Court denied Marin's motion to put the juror's written email in the record claiming " the entirety of the email is contained in the oral record." CP 3604-3605.

The Court ruled that any time questioning juror 71 would reduce the time that Marin had been allotted to present his evidence. RP 9/04/2014 p.104:6-12. Marin renewed his challenge to have juror 71 released as the alternate. The Court declined and used a lottery system. RP

9/24/2014 p.130-131. Juror 71 became the presiding juror who brought in a defense verdict. CP 3139-3141. The Court after the start of trial reduced the amount of time for each side from 1500 minutes to 1300 minutes. RP 9/11/2014 p.101-103.

The Court denied Marin's motion to exclude County expert medical testimony about "character traits" and credibility of Marin's "perceptions" resulting in the jury hearing repeated objections as the term "paranoid traits" was repeated ten times. RP 9/ 23/2014 p.210-216; RP 9/24/2014 p.38:24; p.43:1; p.44:5; p.61:14; p.61:23; p.66:8; p.67:12 and p.67:15.

In the Judgment the Court assessed Marin with excessive litigation costs not allowed by statute. CP 3587-3588.

Marin, inter alia, appeals from; Judgment of October 31, 2014 including the award of costs CP 3587-3589; 3508-3533; 3558-3561; the Jury Verdict of September 25, 2014 CP 3139-3140; the Order of February 19, 2013 regarding Sanctions CP 1089-1096; the Order of November 20, 2013 granting in part King County's Motion for Summary Judgment CP 1752-1757; the Order 30, 2012 regarding King County's Motion for Evidentiary Hearing and Sanctions CP 587-591; the Order of February 25, 2013 denying Marin's Motion for Sanctions for Spoliation CP 1098-1101 ; the Order of September 24, 2014 Granting of King County's CR 50

Motion for Directed Verdict on Marin's Retaliation Claim RP 9/24/2014 P 98:18-22 , and rulings on Motions in Limine, Admission of Evidence, and Jury Selection; County violations of Discovery and Trial Court Orders, and failure and refusal of the Court to take action to remedy overt and/or inherent bias before and during trial.

V. ARGUMENT

1. Summary Dismissal of Marin's Retaliation Claim was error.

A. Review of Dismissal on Summary Judgment is "Denovo."

Review of a grant of summary judgment is de novo. Camicia v. Howard S. Wright Constr. Co., 179 Wn.2d 684, 693, 317 P.3d 987 (2014).

B. Evidence of "materially adverse " actions following WLAD protected activity precludes summary judgment.

Whether alleged retaliatory acts are "materially adverse" as seen from a person in Marin's position, is a question of fact for the jury.

> Federal law provides that context matters in analyzing the significance of any given act of retaliation because " '[a]n act that would be immaterial in some situations is material in others.' " *Burlington N. & Santa Fe Ry. Co.,* 548 U.S. at 69 (quoting *Wash v. Illinois Dep't of Revenue,* 420 F.3d 658, 661 (7th Cir.2005)). Accordingly, whether a particular action would be viewed as adverse by a reasonable employee is a question of fact appropriate for a jury. *See Burlington,* 548 U.S. at 71–73; *McArdle v. Dell Products, L.P.,* 293 F. Appx. 331, 337 (5th Cir.2008

Boyd v. State, Dep't of Soc. & Health Servs., No. 4 5174-3-II, 2015 WL 1945252, at *5 (Wash. Ct. App. Feb. 3, 2015)

Burlington N. & Santa Fe Rwy. v. White, 548 U.S. 53, 68-69, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006) holds that "materially adverse", "in this context means **it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.**" Id. [Citations omitted.] (emphasis added)

The evidence of protected activity and adverse actions Marin presented in opposition to summary judgment created "material issues of fact" as to "retaliation" under RCW 49.60.2010. CP 1555 - 1631(Opp to SJ Materials) CP 1435-1554 (Marin Decl) CP 1424-1434 (Cook Decl) CP 1385-1423 (Evans Decl) RCW 49.60.210. Boyd, supra, at *5. And see Burlington, 548 U.S., at 68-69. The trial court imposed additional hurdles to Marin's "retaliation" claim on summary judgment. CP 1752-1757 (Order) p. 5, Section, E.1.

Adverse employment action involves a change in employment that is more than an inconvenience or alteration of one's job responsibilities. Alonso v. Qwest Commc'ns Co., LLC, 178 Wn.App. 734, 746, 315 P.3d 610 (2013); including a demotion or **adverse transfer, or a hostile work environment**. Kirby v. City of Tacoma, 124 Wn.App. 454, 465, 98 P.3d 827 (2004 (quoting Robel v. Roundup Corp., 148 Wn.2d 35, 74 n. 24, 59 P.3d 611 (2002)).

The trial court on summary judgment did find that Marin's evidence supported a hostile work environment based on race, national

origin, age, disability **and retaliation**. CP 1752-1757 Elements of a HWE claim include conduct "severe or pervasive enough to alter the terms and conditions of employment" Antonius v. King County, 153 Wn.2d 256, 261, 103 P.3d 729 (2004). Marin's retaliation claim should not have been dismissed on summary judgment.

Marin's evidence of protected activity includes a pattern of WLAD activity from 1989 to 2011 with opposition to racial comments, complaints to WTD (formerly METRO), a Human Rights Commission complaint; opposition to repeated demotion to grueling manual labor.[3] CP 1435-1554. Marin testified about a supervisor's sexual harassment of a WPTP minority female coworker in 2005. CP1475-1485 He grieved retaliatory discipline and HWE in May 2009 and again reported a supervisor for such conduct in Renton in October 2009. Exh. 125, *Infra.*

Marin opposed exclusion from training that Caucasians were allowed to attend CP 1479 #7. Protected activity and "materially adverse" treatment continued after the July 2008 "statute of limitations date" on "D Crew" under Sagnis and Horton. Marin continued to oppose disparate

[3]From 1997 through 2009, Marin held a bid on "D Crew" except when he was "bumped" off D Crew despite having greater seniority than those who "bumped" him and he spoke to Supervision in 2005 CP 1484 #12,13; and in 2008 CP 1485 #15 about that disparity. He asked the plant manager how others could keep their positions for years without being transferred and said he was going to talk to his "attorney". He more than once objected to disparate transfer to less desirable "Facilities" or Day Operations" trying get back to his bid job. CP 1487-1490

assignments to the dirtiest grueling manual work, and exclusion from desirable high skill work on "D Crew" and disparate discipline from 1997 through April 2011 (with some relief in 2005-06), as well as other adverse treatment and complaints. CP 1485 – 1490; 1498-99 (Cook decl.) CP 1424-1434.

C. With direct evidence of retaliatory animus, a trial is required.

The County admits management knew Sagnis expressed such extreme retaliatory animus toward Marin ("it wouldn't be pleasant", "he had shit all over the crew" and "he had made his bed and he would have to lie in it") that Marin could not be returned to the Plant he had known for over 20 years, WPTP. Exh.135;CP 1490 – 1491; Sagnis also told his "D Crew" while the discrimination investigation of him was underway that Marin would not be returning to "D Crew". RP 9/08/2014 P.145,147-148. Marin's direct evidence of retaliatory animus by Sagnis requires that the "retaliation" claim go to the jury. Hegwine v. Longview Fibre Co., Inc., 162 Wn.2d 340, 359,172 P.3d 688 (2007).

D. Marin's transfer to Renton where he was "of little value" without "years of training" and treatment there, were "materially adverse".

At Renton from 2009-2011 Marin was scrutinized, shunned, denied meaningful work, denied training, his file papered including threat of further discipline or termination, in a workplace where supervisors Alenduff, Davidson, and Read, and the chain of command Managers

Fischer, Elardo and WTD HR, and Disability Services all knew of Marin's "protected activity" and ongoing HWE complaint. CP 1555-1631(Opp to SJ Materials); CP 1435-1554 (Marin decl); CP 1424-1434 (Cook Decl); CP 1385-1423 (Evans Decl).

It was "materially adverse" when Marin was threatened with discipline up to termination if he could not "lock out" any piece of equipment in the RTP without receiving required training on Hazardous Energy Procedures at RTP, denied reasonable requested "walk through" with a safety trainer; "training" and equipment specific written procedures for such lockouts. (Decl Evans) CP 1387 – 1423. Marin was reasonably terrified for his career and safety. Id.

E. Marin provided evidence that County "reasons" for "materially adverse" actions leading to his early retirement were pretext .

Marin, without hazardous energy training or written procedures for RTP high voltage equipment, followed directions of a Sr. Operator at RTP but received an not grieveable TLC write up threatening discipline up to termination for any mistakes in "locking out" equipment at RTP. CP 1503-09; Exh. 206. The letter to Marin was adverse compared to other use of "TLC" notes to employees; and was different from treatment of other employees with history of "unsafe" acts or lockout tagout violations. Exh 206; RP 9/09/2014 p. 9-10:1-10.

Billy Burton, long time RTP crew member, had a safety "near Miss" incident for locking out the wrong breaker and failure to follow the procedures, without getting a "TLC" or threats of discipline. CP 1503-04.

Marin received none of the supportive actions prescribed for Burton, even though Marin, asked for exactly that kind of supportive supervision, training and correction as "reasonable accommodations". Exh.209 (Vance) Exh.598 (Finch and Vance); Exh.217 (Vance 1/31/2011); Exh. 226; Exh. 228 (emails requesting accommodation re: training electrical safety) (Decl. Evans) CP 1387 – 1423.

2. Claims of Race, Age, and Disability Different treatment should not have been dismissed.

A. Marin's protected "status" including Peruvian national origin, brown skin color,South American accent, age (60+) and anxiety and cardiac disabilities are undisputed.

B. Marin established "adverse employment actions" within the 3 year statute of limitations.

Marin established, *inter alia*, a hostile work environment with disparate assignments to the least desirable manual labor CP 1435-1554 (Marin decl); unwarranted discipline Exh. 162; mocking of his skills and accent publicly RP 9/4/2014 p.122-128 (Archuleta); RP 9/10/2014 p.205 (Brody); adverse transfer to a location where he was "not useful" and "not allowed to touch equipment" RP 9/10/2014 p.201; threats of discipline; Exh.206; inadequate training, CP 1387–1423; and finding in his workplace, a story book about a dark skinned immigrant who had been

shot with a gun, together with a cut out of an AK 47 rifle. In 2010 Marin reported finding the frightening racial materials at his desk, but Supr. Read just noted in her diary that it was a "positive story". Exh.180; and see SJ Brief Opposition Generally CP 1555–1643.

Marin was disciplined for going home sick by collective efforts of HR, Mgr. Elardo and Sagnis even though EAP and Disability Services validated his disability and referred him to HR to complain. Exh.s 67, 69, 84.

C. Pretext

Marin established material issues of fact as to pretext, that is, County explanations for adverse actions against Marin were pretextual. SJ Brief Opposition Generally 1555–1643; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).Marin's evidence of pretext, *inter alia*, included the history of "D Crew's" disparate assignment of the two minority employees to the most grueling and dirty work assignments CP 1424-34; Marin's description of being assigned to the work areas of Caucasian crew members to do disparate massive manual labor and cleaning projects alone in their areas, within the statute of limitations; CP 1435-1554; Marin's being denied training or access to high skilled desirable assignments CP 1424-1434; Sagnis lack of progression plan for Marin as he was "eligible to retire in 3 years" Exh. 85; and Elardo's failure to overturn Marin's unwarranted discipline.

3. The Court Erroneously Granted a CR 50 Motion Dismissing "Retaliation" as a Basis for Marin's HWE Claim

A. Standard For Review:

Under CR 50, "judgment as a matter of law is only appropriate when no substantial evidence or reasonable inference would sustain a verdict for the nonmoving party." Corey v. Pierce County, 154 Wn. App. 752, 760, 225 P.3d 367 (2010).

> Because judgment as a matter of law intrudes upon the rightful province of the jury, it is highly disfavored and judgment may be entered only when no jury could decide in that party's favor."

David E Breskin, 10 Washington Practice § 50.1 (2013).

> "...[O]nce a trial court concludes that an employment discrimination claim cannot be resolved as a matter of law short of a trial, no directed verdict should issue before both parties' witnesses have been duly examined and cross-examined and **both parties have set forth their evidence**. Considerations of judicial economy would therefore generally dictate that, once a jury is seated in a case involving the McDonnell Douglas framework, a trial court refrain from ruling on CR 50 motions until after a jury verdict is returned."

Hill v. BCTI Income Fund-I,144 Wash. 2d 172,187 fn. 9, 23 P.3d 440 (2001) overruled on other grounds by McClarty v. Totem Elec., 157 Wash.2d 214, 137 P.3d 844 (2006)(emphasis added).

B. The CR 50 motion should not have been granted dismissing retaliation as a basis for the hostile work environment

A few minutes before 12 noon on September 24 the County's motion for DV was decided based on Marin's evidence only. RP

9/17/2014 P. 193-200. Closing argument was scheduled for 9 a.m. the following day. In granting the CR 50 dismissal of retaliation the Court stated as follows:

> In terms of the retaliation or implying that there hasn't been shown a foundation for retaliation, that there is no showing of harassment, after a person has learned of a complaint of discrimination, and I will grant the motion as to retaliation.

RP 9/24/2014 P. 98:Lines 18-22.

The Court however found sufficient evidence to submit the case of hostile work environment to the jury as on all other "protected status". RP 9/24/2014 P. 98. The only question was whether the evidence was sufficient to show that retaliation was also a factor or basis in the creation or continuation of the hostile work environment. The following evidence, among much more, admitted at trial, was sufficient direct and circumstantial evidence of widespread notice of protected WLAD activity and materially adverse actions to take retaliation to the jury:

1. Apr. 20, 2009 Marin complained to Sagnis about harassment by Horton that had caused Marin to go home ill. Sagnis immediately accused Marin of insubordination proposing written discipline for not carrying out Horton's assignment to dig "grit" and for taking sick leave. Exh. 68, 70, 71, 72. Apr. 20, 2009 HR told Sagnis "[t]he discipline you would like to impose will be more supportable if you do a thorough investigation..." . Sagnis didn't investigate before the May 10 disciplinary action. So on June 2, 2009, Sagnis reported that he "just found out" Marin had a witness and a "good excuse," Exh. 86. It was unwarranted discipline. Exh. 135.

2. While on medical leave from Apr. 20 to May 10, 2009. Exh.s 67, 69

Marin reported harassment and disability issues to County EAP Counselor Tony Hansen and County Disability Services Carol Gordon, including Horton's and Sagnis' harassment of April 16, 17,18, and 20, 2009, which put him on medical leave. Exh.s 67, 78, 69. Gordon and Hansen informed KC HR of Marin's harassment complaint. *Marin requested transfer to B Crew as an accommodation, which Gordon denied.* Exh 60.p.2d. May 4, 2009 KC HR Kathy Lee wrote to WTD HR Ramsey about Sagnis' disciplinary proposal. Exh. 80. that Gordon referred Marin to HR for his complaint of "unspecified issues of harassment and intimidation". Exh. 72.

3. May 10, 2009, Marin returned to work and was disciplined. Exh. 82, 83

4. May 11, 2009 Union Rep. Hansen filed Marin's grievance. It reads: "disparity of treatment with other similarly situated employees" "Supervisor/acting supervisor misconduct and creation of a hostile work environment". Exh. 84.

5. June 19, 2009, WTD HR Ramsey and Milestone did Marin's complaint intake.[4] They noted his fear for his safety if he complained against Sagnis and Horton. Marin reported new retaliation on D Crew since his complaint and grievance. Exh. 87 p. 29-31. WTD temporarily moved Marin to Renton (RTP). Exh. 88; 89.

6. July 2, 2009, HR set up C Crew interviews on Marin's complaint "on site" with emails to Lynn Kalina, Mgr. Elardo, Attorney Karen Sutherland. Exh. 97. Sagnis, within a few weeks of Marin's absence, retaliated, telling D Crew Marin would not be coming back. RP 9/08/2014 P. 145, 147-148.

7. Word of Marin's "protected activity" spread. Mike Fischer, RTP plant manager. RP 9/10/2014 P. 97, knew of Marin's allegations of a HWE on "D Crew" at WPTP. RP 9/16/2014 P. 71-73. Keith Brody worked on "C Crew" with Alenduff and Marin. RP 9/10/2014 P. 191 Brody heard Marin was a "guest"; was told not to ask questions, and that Marin was there due to investigation at WPTP. Alenduff's "Trainer" Higginbotham told Brody "the crew" decided Marin was not to do

[4] Ramsey and Milestone intake notes describe decades of discrimination and complaints,"redacted" per a Motion in Limine on pre-statute events. [CP 3379-3410 Offer of Proof (unredacted Exh. 87].

hands on work; not to touch any equipment. RP 9/10/2014 P. 201. Marin, with no meaningful work went home despondent, Exh. 117.

8. Oct. 14, 2009, Marin told HR he was on leave because of treatment by C Crew. Alenduff told Marin the crew didn't want to work with him. Exh 118. Marin, to protect a coworker, anonymously reported sexual harassment and computer porn "C Crew". Supervisor Alenduff was investigated and learned from his Union Rep. RTP Electrical Supervisor Davidson that Marin turned him in. RP 9/23/2014 p. 68: 15-24.

9. On Nov.18, 2009, WPTP Mgr. Elardo reprimanded Sagnis for retaliatory statements about Marin. Exh 122; Exh 135. WTD chose not to transfer Sagnis, rather excluded Marin. Elardo wrote that Marin could not return to "D Crew" "as a preventative measure against legal claims of discrimination and retaliation" Id. HR terrified Marin through Mar. 2010, that he would return to Sagnis's West Point D Crew. Exh 159; and that he was "welcome to go back to West Point 'D Crew'". RP 9/23/2014 P. 166-167. Exh. 160.

10. From Feb. 2010 – Mar. 2010, RTP Mgr. Fisher told Elardo and HR that he wanted to give Marin two week notice to return to WPTP, that "*the problem* was caused at WPTP and should be solved there." Exh 149 p.2. Fisher opposed Marin's RTP transfer as he was "of little value" at Renton, Exh. 149. Fischer knew it would take years to become proficient at RTP, RP 9/10/2014 P.100-101, and that Alenduff's crew was not good for Marin. RP 9/16/2014 P. 69,70. Marin was not told. RP 9/16/2014 P.71. WTD said Marin had to stay and Fischer must support supervisor Read in "documenting" and "addressing "performance issues that might arise while Marin was assigned to her "B Crew". RP 9/16/2014 P. 76 Fischer knew about the complaints about "C Crew", the "Alenduff, Sagnis and Horton" matters. Exh. 149.

11. On Mar. 15, 2010, Mgr. Elardo offered to settle Marin's HWE grievance with two provisions: 1) remove Sagnis' May 10, 2009 discipline from his file, but 2) accept the finding there was no harassment/HWE. Elardo knew of Sagnis' retaliation and that Marin was "legitimately engaged in other work activities" when accused insubordination. Exh. 162. Marin declined to meet about the "resolution". Exh. 169.

12. May 9, 2010, Marin found at his work desk a cut out of an AK-47 machine gun and a small book about an immigrant who was shot with a gun. Marin, alarmed, reported it. Exh.180. Supr. Read's diary calls the shooting story a "Cracker Jack toy" and a "positive story". RP 9/17/2014 P. 49-51. Read was told by HR to keep a diary on Marin but not others. Exh. 180. RP 9/10/2014 P.52-53; Exh 175. C Crew's Higginbotham was in that work station immediately prior to Marin on May 9, 2010. RP 9/17/2014 p. 165:1-15.

13. During Nov 2010 to Jan. 5, 2011 HR Attorney Hillary helped Read draft write-ups of Marin. Exh. 190, 192,194, 195, 198, 200, 201, 204, 205. Marin suffered increased anxiety disability and medical leave. His doctors sought accommodations. Exh. 598. Marin anticipated a Jan. 20, 2010 mediation with the County, which might resolve his claims and stress. Finch RP 9/10/2014 P. 133: Lines17-24.

14. Dec. 30, 2009 Hillary sent Read a "TLC" Memo, disparate from other TLC memos, 9/9/2014 p.10, accusing Marin of a lock-out error, threatening up to termination if he could not independently "lock out" every piece of equipment at RTP, Exh. 206, an impossible and unlawful requirement. RP 9/16/2014 P.14-16. Jan. 5, 2010, Marin's first day back, Hillary asked for the initialed "TLC" and Read's schedule, because "we are doing final preparation and will need to talk with you in more detail." Exh. 205.

15. After Jan. 5, 2011, Marin was medically restricted. Exh. 598.03 Without change of supervisory methods or environment his doctors recommended leaving the job. Marin's requested safety walkthrough and written procedures were "reasonable". RP 9/16/2014 P.33-35. Waiting for accommodations that never came, he ran out of sick leave and had to take early retirement May 1, 2011. Exh. 232.

Not only should the CR 50 motion not have been granted as to "retaliation", further evidence of pre-statute "notice" of protected activity and retaliatory HWE should have been admitted giving the jury a full and fair picture of WTD's entrenched and retaliatory environment.

4. The Court Erred in Excluding Large Swaths of Marin's Evidence of Protected Activity, Hostile Work Environment and Retaliation.

A. Standard of review of exclusion of evidence.

Ordinarily, evidentiary rulings are reviewed for abuse of discretion. However, "[t]he de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." Folsom v. Burger King, 135 Wash.2d 658, 663, 958 P.2d 301 (1998); Momah v. Bharti, 144 Wash. App. 731, 749, 182 P.3d 455, 465 (2008), as amended (July 3, 2008).

B. "Pre-statute" evidence of an ongoing hostile work environment is admissible.

The trial court erroneously excluded evidence of direct and circumstantial evidence of the continuing hostile environment of national origin/racial, disability discrimination and Marin's RCW 49.60 protected activity prior to the statute of limitations. CP 2950-2951 (Order Pre SOL); CP 2638-2644 (Response in Opp to Pre SOL). See eg. CP 1424-1434.

C. Pre-statute evidence of notice, knowledge, intent, animus and motive, and comparisons to show "pretext" are admissable.

The Court excluded witness testimony and documents about Marin's complaints of racial and disability discrimination, and the knowledge of West Point Treatment Plant management and coworkers of his protected activity, including many prior WLAD complaints to management and to

the Human Rights Commission; a Complaint brought by a coworker on his behalf in 2002-2005; and his witness testimony about a supervisor sexually harassing a Hispanic female coworker in or about 2005. The Court required redaction of exhibits showing Marin's prior complaints about discrimination including content of the notes taken by King County managers and HR related to Marin's 2009 harassment and HWE complaints. CP 2947-2949 (Order Re Bad Acts);CP 2648-2661 (Response in Opp to MIL RE Bad Acts). See eg. Admitted Exh. 87 compared to Offer of Proof unredacted Exh. 87; CP 3379-3410.

D. The Court Erred In Striking the Testimony Of Lloyd Holman

Lloyd Holman testified regarding statements in Marin's workplace at RTP that Alenduff was terminated in part because of a complaint Marin made regarding an offensive picture. RP 9/17/2014 P. 32-33. The Court struck the testimony immediately before hearing oral argument on the County's motion for a directed verdict. The Court erroneously excluded it as hearsay. RP 9/24/2014 P. 69-77. Holman's testimony was not offered for the truth of the content, thus was not hearsay. ER 801(c), but rather for the fact of the statement in Marin's workplace, as one piece of evidence of widespread knowledge in the WTD and in Marin's workplace of Marin's WLAD protected activity. RP 9/24/2014 P. 76. In Wilson v. Olivettei North America , Inc., 85 Wash. App. 804, 934 P.2d 1231(1997) the trial

court excluded the plaintiff's testimony about statements she heard in the workplace, in part, because the defendant would not be able to rebut the testimony. Id. at 812. The Court of Appeals reversed noting in footnote 1 that the testimony was not hearsay. Id. at 814.

> Statements that are "in issue," or that have independent legal significance, are not hearsay. Although the rule has been stated in various ways, the general notion is that evidence of a statement that must be proved to establish a claim or defense is not hearsay because its relevance does not depend upon its truth. The statement is relevant simply because it was made.

5B Wash. Prac., Evidence Law and Practice § 801.10 (5th ed.)

E. The trial court erred in granting the County's motion in limine regarding conversations between Sagnis and Marin.

The Court restricted Marin from describing to the jury his April 20, 2009 complaint to Sagnis (which was immediately followed by written discipline of Marin) limiting Marin to the word "harassment" without further description of the nature of the different treatment. There was significant evidence outside the recordings of these meetings that should have been admissible and considered by the jury. CP 2959-2960 (Order Re Evidence of Conversations RE; Sagnis and Marin) CP 2620-2646 (Response in Opp) CP 2959-2961; CP 2620-2636 (Resp in Opposition to MIL).

F. The trial court erred in requiring Marin to "lay a foundation outside the presence of the jury" for each actor's prior knowledge of his protected activity before eliciting evidence of "retaliation".

The Court erroneously, as a Motion in Limine, required Marin to make a showing outside the presence of the jury prior to introducing evidence or argument of retaliation by any coworker of direct evidence that the retaliatory actor was aware that Marin had made a complaint of discrimination protected by the WLAD. CP. 2963-2964.

> "Because employers rarely will reveal they are motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose." *Vasquez[v. State, Dep't of Soc. & Health Serv.,* 94 Wash.App. 976, 985, 974 P.2d 348 (1999)], citing *Kahn[v. Salerno,* 90 Wash.App. 110,130, 951 P.2d 321 (1998)].

Estevez v. Faculty Club of Univ. of Washington, 129 Wash. App. 774, 799, 120 P.3d 579, 590 (2005)

This requirement invaded the province of the jury for making factual determinations and was an improper hurdle to the presentation and consideration of ample circumstantial evidence presented by Marin. See CP. 2486-2497 (Opposition to MIL) and CP 2499-2552 (Rose decl in Opposition to MIL).

5. The Court Failed to Excuse Juror 71 for Cause; Reduced Voir Dire Time; Failed to Add Peremptory Challenges When the Jurors Changed; Unfairly Cut Marin's Trial Time to Question Juror 71.

A. Denial of a cause challenge is reviewed for abuse of discretion.
A trial court's decision as to whether to dismiss a juror is reviewed on the basis of abuse of discretion. State v. Depaz, 165 Wn.2d 842, 852,

204 P.3d 217 (2009). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Powell, 126 Wash.2d 244, 258, 893 P.2d 615 (1995).

B. Denial of Marin's Challenge for Cause.

RCW 4.44.190 allows a party to challenge jurors for cause based on actual bias. A challenge must be sustained where a juror clearly shows prejudices against the one party on voir dire. State v. Moser, 37 Wn.2d 911, 226 P.2d 867 (1951). The trial Court has discretion in determining whether to sustain a challenge for cause under RCW 4.44.230 and RCW 4.44.240. If the adverse party alleges insufficiency of the opposing party's challenge for cause, the trial court "shall determine the sufficiency thereof, assuming the facts alleged therein to be true." RCW 4.44.230. These statutes do not authorize the trial court or defense counsel to rehabilitate a juror who has expressed an actual bias on voir dire. To the contrary, in determining the sufficiency of any challenge, the trial court "shall assum[e] the facts alleged therein to be true." Id. A juror's first statement in open court that they cannot be fair should be presumed as true.

On his questionnaire juror 71 indicated that he was a good friend with a King County prosecutor. RP 9/04/2014 P. 103. He said nothing about which section in which this attorney worked. RP 9/04/2014 P.103. Exh.s 347; 349. Nothing in the questionnaire indicates any bias towards either party in the case. Prior to the swearing in of the jury the following colloquy occurred between the trial court and juror 71:

> [Trial court]: That concludes our peremptory challenges. There was a point where, the very last juror that was called, you were raising your card. I don't want to ask you any questions about what the lawyers were asking you. I just wanted to make sure it wasn't a question about your ability to serve and a hardship issue.
> [Juror 71]: It was a fairness issue. There was a question earlier, but I forget the question..
> [Trial court]: Then we won't get into it. I just was checking on that.
> [Juror 71]: Okay.

RP 9/03/2014 P.168; Lines 6-16.

Despite juror 71 raising the issue of his fairness, the trial court chose to ignore it. At the time the fairness issue was raised the jury had not been sworn and there were other potential jurors seated in the courtroom who could have taken the place of juror 71. RP 9/03/2014 P. 168-169

C. The Court reduced the allotted voir dire time without allowing a fair opportunity to adjust to the change.

Prior to peremptory challenges and prior to this specific issue of juror 71 arising, Marin's counsel had sought additional time to question jurors but the Court denied the request. RP 9/04/2014 P. 102. This was error. State v. Brady, 116 Wash. App. 143, 148-49, 64 P.3d 1258, 1262 (2003)(altering time allowance for voir dire prejudiced the defendant)

Prior to trial the Court had set the parameters for *voir dire* and informed counsel. The Court was asked for "two 30 minute sessions per side for *voir dire* with an option for another if there are still issues". The Court

gave two thirty minute sessions and assured the parties that "if something comes up where you feel you need more time because of some issue, just let the court know. I'm assuming that the jury selection is going to take us a whole day basically." RP 8/28/2014 P.14-15. No third session was allowed though counsel indicated a need for follow up on issues from the Juror Questionnaires. RP 9/4/2014 P.102. After the jurors heard the party's opening statements but prior to the presentation of any evidence the trial court informed the parties of an email from juror 71 on the issue of his fairness:

> [The Court] Counsel, continuing with our jury issues, which don't seem to abate, I don't know if you remember, but this particular Juror [71] had his card raised for a long time and was not called upon, but he sent **us** an e-mail saying, "I did not get an opportunity to bring up this issue. When the issue was raised, I held up my card and was not called to answer."
> This is [Juror 71]. He says, "I raised my card for some time at the end of voir dire, but again was not called upon. When the judge asked me at the end, I said I had a fairness issue, which might have been perceived as a fairness of the process. Rather than that, what I meant was my own fairness or impartiality. I have a good friend, my wife's best friend, who is a King County prosecutor in the Employment Group. My concern is that I would feel some bias towards the King County prosecutor, so I wanted to bring this up." [5]

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[5] Respondent's counsel represented to the trial court when this issue came up that they did not work for the King County prosecutor's office. RP 9/04/2014, P. 103. However when they initially introduced themselves to the court in this case in 2012 they told the court at that time that they were "acting as special deputy prosecutors on behalf of King County". Further respondent counsel Patricia Eakes worked as an employee for the King County prosecutor's office for several years prior to entering private practice. Decl. Kytle Exh. 7. (Motion To Supplement The Record filed in this Court.) The point is this juror who mentioned the King County Prosecutors in his email making the above potentially relevant.

RP 9/04/2014 P.101-102

D. The Court cut Marin's trial time improperly sanctioning him for necessary questioning of Juror 71.

After Juror 71's "email" the Court indicated that if either side wanted to question him, the time spent in doing so would be charged against the 50/50 time limits the Court was allowing each side to try the case. RP 9/04/2014 P. 104; Lines 6-12. This had a chilling effect on Marin's ability to get a fair trial, because the sanction of reducing trial time was one sided. Juror 71 had already struggled three times to alert the Court to his inability to be fair, and had stated that he was biased in favor of King County. This was another change from what the trial court previously represented to counsel, that if more time was needed for *voir dire* it would be allowed. RP 8/28/2014 P. 14-15.

Nevertheless Marin's counsel asked juror 71 careful questions as he was already a seated and sworn juror. His responses indicated that the King County Prosecuting Attorney he considers his "good friend" and his wife's "best friend" is in fact Lynn Kalina whose name appears on many exhibits in the case (the King County prosecutor offered to the Court to redact her name from the exhibits substituting "PA" for Prosecuting Attorney). Ms. Kalina had been involved with the Marin case on behalf of King County for several years including mediation. RP 9/04/2014 P. 106-

108; RP 9/08/2014 p.6. Kalina signed a Consultation Selection form retaining Karen Sutherland who did repeated investigations related to Marin's 2009–2011 complaints and reports. Exh 92.

Juror 71 [seated Juror 13] when asked by Marin's counsel when he had last seen Ms. Kalina responded "Pretty often. Already twice this week". RP 9/04/2014, P. 105. "This week" was the week of the start of the Marin trial.

After that disclosure Marin's counsel addressed the Court outside the presence of the juror about Ms. Kalina's role and challenged juror 71 for cause. No questions were asked of juror 71 by the Court or King County. RP 9/04/2014, p.106-110. RCW 2.36.110 gives trial courts discretion in deciding whether to dismiss a juror. This discretion extends to the manner in which the court investigates alleged misconduct. Washington courts "are unwilling to impose on the trial court a mandatory format for establishing [the] record." State v. Jorden, 103 Wn.App. 221, 229, 11 P.3d 866 (2000). But the court cannot simply put road blocks up to making a record of juror bias. The trial court may limit the amount of time afforded for attorneys to conduct their examinations, but in doing so must ensure that the parties receive reasonable time to discover any prejudices among the members of the panel. State v. Brady, 116 Wash. App. 143, 147, 64 P.3d 1258, 1261 (Div. 2 2003).

The duty of a trial court as to jury selection has been stated as follows:

> ...our Supreme Court has explained that when a prospective juror has a relationship with a party to the case that is either close or subordinate, or one that suggests bias, the trial court must do more than "rehabilitate" the juror through the use of any talismanic question. The court is *statutorily bound to conduct voir dire adequate to the situation,* whether by questions of its own or through those asked by counsel. Kim v Walls, 275 Ga. 177,178, 563 S.E.2d 847 (2002). We require this because a trial judge "is the only person in a courtroom whose primary concern, indeed primary duty, is to ensure the selection of a fair and impartial jury." Id.

Harper v. Barge Air Conditioning, Inc., 313 Ga. App. 474, 475-76, 722 S.E.2d 84, 85-86 (2011)(reversing verdict for defendant where jurors had a past relationship with defense counsel and indicated a bias in defense's favor).

The Court made the following statement as to Juror 71 prior to resuming trial for the presentation of any evidence:

> **If we weren't in trouble with our alternates, I would grant Ms. Mann her motion because we could still have a full jury**; but since we are in trouble with our alternates, I'm in the unhappy position where granting Plaintiff's motion impacts Defense's right to have a full and complete jury. I think I need some direction, if there is any, on this issue, so let's keep him for today and **I'll reserve ruling on the motion with no prejudice to grant it at a later date**. All right. You had another issue?

RP 9/04/2014 P. 110

The Court did not give additional time. Rather it sanctioned Marin, deducting from his trial time for questioning and challenging Juror 71. The next day in court the Court denied the motion to exclude Juror 71 for

cause. RP 7/08/2014 p.4-7. At the end of the case there were still thirteen jurors. Marin's counsel renewed the cause challenge and moved the trial court to dismiss Juror 71.

Though the Court had earlier stated that it's denial of the cause challenge was "without prejudice" to raise it again because of the shortage of jurors RP 9/4/2014 p.108-110, the Court denied the challenge, stating that "I understand Ms. Mann's perspective, and there is a logic and common sense to it, but I don't think the Court can do that without inviting other issues, so we will do it by lottery as we usually do". RP 9/24/2014 p.130- 131.[6]

There is no requirement that the trial court use a lottery system. **[T]he "defendant has no right to be tried by a particular juror or by a particular jury."** State v. Gentry, 125 Wash.2d 570, 615, 888 P.2d 1105 (1995) (emphasis added).

E. The Court denied Marin a peremptory challenge when new jurors came into the box after challenges were completed.

Immediately after juror 71's colloquy with the trial court juror 64 who was in the juror box raised his hand and the trial court realized that juror 64 had been previously released and replaced him with another juror—juror 73. RP 9/03/2014 P. 168-169. Marin's counsel sought an additional

peremptory challenge after the substitution of Juror 64 but the court denied it. RP 9/03/2014 P. 171.

6. The Court Erred in Imposing Prejudicial Discovery Sanctions

A. King County received discovery from Marin and was not prejudiced by any arguable delay.

In the course of discovery, Marin produced two recorded conversations with his supervisor, James Sagnis, in 2009. Marin provided discovery responses to the County on April 13, 2012, on June 8, 2012 (Exhs. 1-2 to Flemming decl.) CP 3654-3722; 3723-3733, and further responses on July 5, 2012 (Including a CD with the recordings.). The County claimed "delay" in production and claimed Mann signed the June 8, 2012 discovery responses pursuant to CR 26(g) and that discovery responses did not properly reveal the Marin recordings. However, attorney Mark Rose signed those responses. CP 3732-3733 and a second supplemental response dated June 15, 2012. CP 3759.

In discovery responses dated April 13, 2012, particularly number 4, Marin described his conversations with Sagnis in detail. CP 3688-3689. The transcript of the recording of April 20, 2009 is at CP 284-287.The County also possessed an email to Marin from Sagnis, produced by the County after Sagnis' deposition, essentially impeaching Sagnis and

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[6] Juror 71 became the Presiding Juror delivering to King County a defense

corroborating Marin's description of events. *See* Rose decl. re: motion for sanctions, Exhs. 2, 17; CP 882-883, 950-952. Sagnis asserted in the email that Marin had not produced any evidence to verify his medical condition. This contradicted his statement to County investigator Karen Sutherland denying any conversation with Marin about his medical condition. CP 893-897.

Sagnis' deposition took place on June 29, 2012. Neither the County's attorneys nor Marin's attorneys had copies of Marin's recordings at that time. The County admits that Marin's counsel provided it 767 pages of supplemental information on July 5, 2012, including a CD with the Sagnis-Marin conversations. CP 3645. Flemming Decl. at 3. In response to objections from the County, Marin's counsel also described in a letter dated August 6, 2012 why those recordings had not been earlier produced. (Ex. 6 to Flemming decl. at 5-7) CP 3775-3777. The letter was signed by all four of Marin's attorneys.

The County filed a motion for an evidentiary hearing on the possible violation of RCW 9.73.030, a statute that bars the recording of some private conversations. Despite having the recordings since July 5, the County sought sanctions, although it did not specifically file a motion to compel. The Court entered an order on October 30, 2012 setting out the

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verdict the afternoon of the same day as closing arguments. CP 3140-3141

process for consideration of the motion, staying discovery and authorizing Marin to file his own discovery related motions against the county. The Court declined to conduct an evidentiary hearing but made a "finding" by its February 19, 2013 order that Marin violated RCW 9.73.030 and that Mann willfully failed to disclose the recordings in response to County discovery requests. CP 1089-1096. The Court excluded the recordings and sanctioned Mann. *See* Order CP 1089-1096.

B. The Sagnis Complaint/Discipline Conversations were not Private.

The Court concluded as a matter of law, without the public hearing , that Marin's recording of his April 20, 2009 and May 10, 2009 conversations with Sagnis violated RCW 9.73.030 because such conversations were "private." The Court on that basis further ruled the recordings were inadmissible under RCW 9.73.050 and specifically ruled that Marin was barred from testifying regarding those conversations at trial. CP. 1089-1096. However, the Court erred in its analysis of RCW 9.73.030. It is undisputed that the two conversations at issue involved a public employment supervisor and employee over Marin's discrimination/harassment complaint to Sagnis, and Sagnis' job-related commencement of discipline of Marin. The Court acknowledged that Sagnis may have intended to [and immediately did] disclose the information he learned in the conversations to others, but the court deemed

that point "irrelevant." Order at 3 CP 1091. That is not correct. The fact that the conversations were intended for a public purpose is evidence that they were not private in the first place.

The Court properly acknowledged in its order that RCW 9.73.030 does not define "private" for purposes of that statute, and acknowledged the dictionary definition of that term, referenced in State v. Clark, 129 Wn.2d 211, 224-25, 916 P.2d 384 (1996) and other cases, requires that such a conversation be confidential, in secret, or not in public. However, the Court failed to apply the proper test for whether the conversations were private. Washington courts determine if a matter is private on a case-by-case basis. Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 190, 829 P2d 1061 (1992) citing State v. Forrester, 21 Wn. App. 855,861,587 P2d 179 (1978), *review denied,* 92 Wn.2d 1006 (1979) ("court must consider the intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case. "). The Supreme Court has stated, citing State v. Christensen, 153 Wn.2d 186, 102 P.3d 789 (2004), that courts must look to "the subject matter of the calls, the location of the participants, the potential presence of third parties, and the role of the interloper." Moreover, a communication is private "(1) when parties manifest a subjective intent that it be private and (2) where that expectation is reasonable." State v. Modica, 164 Wn.2d 83,

186 P.3d 1062 (2008) (telephone conversation between jail inmate and grandmother; jail inmate had no privacy expectation).

Thus, in this case, the context of the conversation, the parties' subjective intent regarding it, and the parties' use of information derived from the conversation were all relevant factors for the trial court's analysis. The trial court placed principal emphasis on two decisions, Kitsap County v. Smith, 143 Wn. App. 893, 180 P.3d 834, *review denied, 164* Wn.2d 1036 (2008) and Smith v. Employment Security Dep't, 155 Wn. App. 24, 226 P.3d 263 (2010). That emphasis is misplaced. In Kitsap County, a County employee removed documents from his office and gave them to his attorney. The County learned that Smith had also recorded conversations with fellow employees and citizens without their knowledge. The conversations apparently took place in meetings or when the employee contacted individuals regarding neighbor disputes or trespassing. Id. at 908. The Court of Appeals reversed the trial court's denial of declaratory relief on RCW 9.73, finding a justiciable controversy. The Court only decided the issue could be heard, not whether the conversations were private. In Smith, the Court upheld the denial of unemployment compensation benefits to Smith for misconduct. The Court noted that Smith's recordings were expansive covering conversations in vehicles, local businesses, and inside people's homes. Smith, 155 Wn.

App. at 30. Smith was denied benefits by ESD because he was terminated for violating a County policy against such recordings. The Court further concluded that the conversations indiscriminately recorded by Smith were private under RCW 9.73.030. Id. at 39.

By contrast, the recordings here were public in their nature as they involved a public employment supervisor and employee over an employment disciplinary matter about which Sagnis indicated he would converse with others upon the conclusion of the meeting. He believed Marin engaged in misconduct on the job. In the second meeting, Sagnis actually handed Marin a reprimand that had been reviewed and edited by other County managers. Marin asked for union representation and filed a grievance. He subsequently spoke to the County Employee Assistance Program counselor, and consulted with his union representative who filed a grievance Exh. 84 Sagnis had no reasonable expectation of privacy.[7]

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[7] That there was no reasonable expectation of privacy on Sagnis's part is further reinforced by public records cases. For example, under the Public Records Act, for purposes of RCW 42.56.230(2) relating to the exemption for personal information of public employees, while *employee evaluations* are confidential *employee disciplinary proceedings* are not. *See, e.g., Bellevue John Does* 1-11 *v. Bellevue School District No. 405,* 164 Wn.2d 199,215, 189 P.3d 139 (2008) ("when a complaint regarding misconduct during the course of public employment is substantiated or results in some sort of discipline, an employee does not have a right to privacy in the complaint."). *See also, Cowles Publishing Co. v. State Patrol,* 109 Wn.2d 712, 727, 748 P.2d 597 (1988) (police officer has no right to privacy regarding substantiated misconduct complaint). Indeed, even if Sagnis was merely "investigating" Marin, that was not private. An investigative report regarding alleged hostile work environment in the Federal Way Municipal Court that touched on a judge's conduct was not private. *Morgan v. City of Federal Way, 166* Wn.2d 747, 756-57, 213 P.3d 596 (2009).

Neither Marin nor Sagnis intended the conversations to be private. In sum, the trial court committed error in finding that RCW 9.73.030 applied here.

7. The Trial Court failed to Properly Consider Marin's Discovery and Spoliation Motions; and Failed to Use a Burnet Analysis Before Admitting the County's Prejudicial Undisclosed Documents.

Marin's motions about County discovery abuse and spoliation were improperly denied by the trial court. CP 825-1087; CP 1098 (Order); CP 2939-2940 (Order).

At trial the County offered in evidence Exh 618, 619 " summary exhibits", based on massive Excel spreadsheets represented to be time card information "sent to payroll" coding Marin's work hours, neither of which were produced in discovery. RP 9/18/2014 P. 210-13. Data entered by unknown supervisors, without any "code sheet" to understand its meaning. Such data would be responsive to Marin's first discovery requests served with his complaint about training and assignments, but not produced. Ass't Plant Manager Woolfort not a witness competent for cross examination of the data or its meaning or the statistics summaries. Id.

Likewise with Exhs. 458, 629 and 630; RP 9/09/2104 P. 38,105-109, the County produced new "emails" and "logs" during testimony of Marin's witnesses. RP 9/09/2014 P.104-109 Trial court erred in failing to go through any analysis of prejudice as required by law though Marin's the discovery request was very specific.

> [Ms. Mann] Request No. 101, which we've handed up, is: "Please provide all documents detailing the priority directive to have all grit hosed and pumped out of the southwest pre-aer tank by the morning of April 17,2009, but then its actions to enforce a priority directive any communications regarding the priority directive.
>
> The logs showing the beginning of that project and the continuation of it on 4-15, which are 629 and 630, as well as this e-mail, would come directly within that request and response; and it was particularly prejudicial to get those in the middle of a witness without having been able to depose Ms. Elardo, Mr. Sagnis or the other Management witnesses about that or to review it with the Union representative prior to her testimony. So we would ask that it be excluded and we would also ask for sanctions; that that part of the testimony related to them be stricken; and that there be -- we're in the middle of a trial and we can't ask for, at this time, additional discovery or advantage in any reasonable way...

RP 9/09/2014 p.105-106

The Supreme Court has said:

> Although a trial court generally has broad discretion to fashion remedies for discovery violations, when imposing a severe sanction such as witness exclusion, **"the record must show three things—the trial court's consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it."** Mayer, 156 Wash.2d at 688, 132 P.3d 115 (relying on Burnet, 131 Wash.2d at 494, 933 P.2d 1036).

Blair v. Ta-Seattle E. No. 176, 171 Wash. 2d 342, 348, 254 P.3d 797, 800 (2011) and see Jones v. City of Seattle, 179 Wash. 2d 322, 344, 314 P.3d 380, 391 (2013), as corrected (Feb. 5, 2014)

8. The Court Committed Error in Sanctioning Marin's Counsel

The Court concluded that Mann should have produced the two Marin

recordings in response to the County's interrogatories that requested identification of "documents." The Court ruled that CR 37 was not violated because there was no violation of a court order, but the Court concluded that CR 26(g) was violated because Mann signed Marin's answers to interrogatories. CP 1089-1096 Order at 6.

However, Mann did not sign the June 8, 2012, June 15, 2012 or July 5, 2012 certificates on the County's discovery requests. Although the court determined that CR 37 was not implicated here, it nevertheless applied CR 37 case law, concluded Mann's violation was "willful," and imposed $5000 in sanctions, choosing not to dismiss Marin's case as the County had requested. CP 1089-1097 This error is particularly important for review where it is a common practice for employers in employment law cases to chill the advocacy of employee lawyers by making sanctions arguments and threats of bar complaints.[8] The Court abused its discretion in applying CR 37 case law and in concluding that Mann willfully[9] failed to turn over recordings.

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[8] This is not an idle concern, the National Employment Lawyers Association is so concerned about employers using the tactic of attacking employment lawyers with sanctions arguments and threats of ethical complaints to defeat legitimate employee claims that it has a project to protect its members. See eg. NELA Ethics https://www.nela.org/NELA/index.cfm?event=showPage&pg=committeesEthics

[9] Willful," as that term is used in CR 37 sanctions cases, means "[a] party's disregard of court order without reasonable excuse or justification." Smith v. BehrProcess Corp., 113 Wn. App. 306, 327, 54 P.3d 665 (2002). This test for "willful[ness]"does not require misconduct that rises to being "deliberate," but instead denotes "disregard" for a court

A. First, the Court applied the incorrect legal standard, where CR 26(g) and CR 37 are distinct rules; the latter applies only in the context of violation of a court order.

Our Supreme Court adopted its CR 37 sanctions analysis in Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997) and Rivers v. Wash.State Conf. of Mason Contractors, 145 Wn.2d 674, 41 P.3d 1175 (2002) for heavier types of discovery sanctions such as the exclusion of a witness, dismissal of a claim, dismissal of a complaint, or a default judgment.[10] CR 26(g) addresses a narrower concern that discovery requests are appropriately made and answers are properly given. The sanctions that may be imposed are also narrower; the sanction "may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee." The Supreme Court in Wash. Physicians Ins. Exchange v. Fisons, 122 Wn.2d 299, 339-43, 858 P.2d 1054 (1992) specifically distinguished between CR 37 and CR 26(g). CR 37 does not apply where a more specific rule like CR 26(g) does. Id at 340. CR 26(g) allows sanctions for discovery violations without any proof of intent. The factors for imposing CR 26(g) sanctions are set out in Fisons:

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order when there is no excuse or justification that is reasonable. In this case, of course, there was no "court order" at issue.

[10] In fact, the *Burnet-Rivers* sanctions analysis is *inapplicable* to a CR 26(g)violation. Mayer v. STO Corp., 156 Wn.2d 677, 689, 132 P.3d 115 (2006); Wash.Motorsports Limited P'ship v. Spokane Raceway Park, Inc., 168 Wn. App. 710, 716, 282P.3d 1107 (2012).

> First, the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer's lack of intent to violate the rules' and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions.

Fisons, 122 Wn.2d at 355-56.

While one of these factors is "intent" to violate CR 26(g), the presence of such intent is not required, and absence of it will not preclude the sanction, but intent has a bearing on the choice of sanction. In Washington Motorsports, the court ruled the attorney signing the discovery requests had intent to violate CR 26(g), based on at least three indicia: his co-counsel's refusal to sign the discovery responses; egregious acts of the attorney's client in evading discovery that were known to the attorney; and the fact the attorney had previously signed very similar responses that had been ruled inadequate (with sanctions imposed only on the client in that first instance). 168 Wn. App. at 716-17. On that basis, the Washington Motorsports court affirmed $8,624 in sanctions. to adopt the trial court's approach here would, in effect, turn every routine motion to compel into a Burnet-Rivers sanctions opportunity contrary to the direction of the Supreme Court in Fisons.

The proper course for the trial court under CR 26(g) was to determine if discovery was appropriate and to award those monetary sanctions that were appropriate under the Fisons court's approach of the least severe sanction adequate to serve the rule's purpose.

B. Second, Mann did not violate CR 26(g) as the trial court concluded.

The County argued below that its discovery requests sought "*all documents - including emails and recordings - relating to language or conduct that supported Marin's allegations of a hostile and discriminatory work environment*" and "*all documents related to charges, complaints, or grievances filed by Marin[,] and all documents related to wrongful acts or adverse employment actions taken by the County or its employees against him.*" CP 3802 King County's Motion for Evidentiary Hearing at 5. However, the **actual instructions** to the first discovery requests had a very "generic" definition of "document" that **did not use the word "recording,**': even if its phrasing was broad enough in retrospect to encompass recordings. CP 3657 Ex. 1 to Flemming Decl. Mann had attorney Rose and paralegal Danielle Rieger review the file of all Marin's documents that the firm had previously received and the documents Marin had brought to the office in working with Rose on responses to the first discovery requests, for purposes of providing responsive documents to the

County. The firm produced documents in April 2012, and later on June 8 and 15, 2012. The documents in the firm's possession DID NOT include the recordings. CP 44-54 Rose Decl. at 2. Rose, not Mann, signed the certificate for supplementation Marin's discovery responses pursuant to CR 26(g). Rose was not aware of the recordings when he signed the June 15, 2012 certificate. CP 44-54 Rose Decl. at 2. Nothing in the record shows or suggests that Mann knew of the recordings at that time except in the following highly attenuated way. CP 255-258 Marin Decl. at 3. In May 2009, *more than three years before,* she learned Marin had made recordings of a recent meeting or meetings with a supervisor and heard an attempt to play a short portion on the original handheld recording device; that recording was unintelligible and of no further consequence. CP 257 Marin Decl. at 5; CP 90. This occurred at her first hourly consultation meeting with Marin - at a time years before any litigation began and when she was first trying to assimilate a large amount of historic information. The recording had no further significance to Mann. Her representation was not as an attorney in litigation. Marin was still employed by the County and remained so for nearly two more years. The litigation did not begin until several months after his employment terminated in 2011. In the intervening time, Mann's representation of Marin, on an hourly fee basis,

was situational and sporadic, when a need arose. [11] When the present controversy over the recordings began in the summer of 2012, Mann voluntarily stated to the County's attorneys that she had learned at that initial meeting on May 20, 2009 that recordings existed, albeit unintelligible to her knowledge. She further noted at the time of considering Marin's responses to the County's first discovery requests, the existence of the recordings did not come to her mind. In the intervening years, the recordings had played no role in her assistance to Marin, and they passed out of her thinking and active memory. The firm seasonably supplemented on July 5, 2012 Marin's discovery responses to provide the recordings.

C. Third, the County was not prejudiced by the delay in production of the 'recordings.'

In its Order at 7, the Court decried Mann's reference to County discovery misconduct, but it misunderstood the relevance of that evidence. The purpose of the "attack on the County's alleged conduct" was to demonstrate the "lack of prejudice" to the County. Lack of prejudice is relevant to the determination of the appropriate sanction where the Fisons court specifically noted that a party's failure to mitigate harm was relevant

[11] Mann performs several "consultations" in the course of each month with employees who have immediate questions or difficulties in employment, which take one, two or a few sessions. The details of those hourly consultations quickly fade from active memory.

to the sanctions analysis.[12] Moreover, because the County sought the extreme sanction of dismissal of Marin's case, he had to establish that there was no prejudice to the County from the brief delay in the production of the recordings. Marin's briefing pointed out that the County knew *from its own documents* of Sagnis's conduct at the 2009 meetings with Marin, which were not produced by the County until after Sagnis's deposition. Further, these documents describing Sagnis' acts impeached Sagnis' prior statements and deposition testimony about the same Marin meeting; the County was not prejudiced from not knowing Marin had made the recordings at issue or having the recordings (which Mann and her colleagues also did not have and had not heard at the time of the Sagnis deposition).[13] In addition, where Marin seasonably updated his interrogatory answers and provided the recordings to the County, as required by CR 26(e), there was no prejudice to the County.

In Giddens v. Kansas City So. Railway Co., 29 S.W.3d 813, 820 (Mo. 2000), the Missouri Supreme Court found that such an updating by the provision of certain videotapes was satisfactory even though not provided prior to the plaintiffs deposition:

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26. These points also supported Marin's opposition to the County's motion for a stay -- because Marin needed follow-up once his attorneys learned of the additional key documents describing Sagnis's behavior -- and also Marin's own discovery motion seeking affirmative relief against the County. Plaintiff's Motion for Sanctions

[13] CP 3775; CP 90

> Revelation of the videotapes prior to the supplemental deposition could only be prejudicial if Giddens were to lie at his supplemental deposition, and the rules are not intended to provide a means by which a plaintiff may avoid the truth or avoid being caught in a lie. If Giddens is completely truthful in his answers to questions propounded at the deposition, then no prejudice occurs.

As noted, *supra,* the County was never prejudiced in its preparation for Sagnis's deposition by not having the recordings because it had both an extensive answer to its interrogatory number 4 from Marin, served on April 13, 2012, describing Marin's recollection of conversations with Sagnis, and the County had Sagnis's own [as yet undisclosed] emails. By the time of Sagnis's deposition on June 29, 2012, the County's lawyers had all of the essential information upon which to defend the deposition.

D. Finally, the Court considered the County's proffer of improper "character evidence" against Mann.

The trial court abused its discretion in relying on the County's citation of other unrelated matters, some ten years old or more, in which there were sanctions, to conclude present actions were "willful". CP 1095. Order at 7. Reliance on past matters involving sanctions against Mann was improper "character evidence." ER 404. The County's motion for evidentiary hearing at CP 3808-09(11-12) made specific reference to past sanctions against Mann. In effect, the County attempted to use such sanctions as character evidence not permitted under ER 404.(b). As ER 404(b) specifically provides, evidence of other wrongs is not admissible to

prove "the character of a person in order to show action in conformity [14] For example, in Dickerson v. Chadwell, Inc., 62 Wn. App. 426, 430 n.3, 814 P.2d 687 (1991), *review denied,* 118 Wn.2d 1011 (1992)[15], this Court held that plaintiff s prior acts of violence were inadmissible to prove the plaintiff s propensity for provocative conduct. *See also,* Jones v. So. Pac. R.R., 962 F.2d 447 (5th Cir. 1992)(citations for safety violations inadmissible to prove engineer was negligent on day in question). Here, the County combed Ms. Mann's 35 year career seeking to prove that Mann was the "type of person" who violated rules in order to make its case for sanction. 19 In sum, the trial court committed error in sanctioning Mann by applying the analysis of CR 37 instead of CR 26(g) as required by Fisons. Simply put, Mann did not intentionally violate CR 26(g). The word "intent" denotes a state of mind that goes beyond the "disregard" standard that applies to violation of a court order. The record does not support that Mann had any such state of mind.

The court compounded the error by failing to understand that the County was not prejudiced by not having the Marin recordings at the time

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[14] The matters referenced in the County's motion in at least two of the cases mentioned had *nothing to do with discovery* but were plainly an attack on Mann's character.

[15] The Supreme Court has held, for example, that evidence of prior misconduct is inadmissible in the criminal context to prove the defendant is a dangerous person or the "criminal type." State v. Everybodytalksabout, 145 Wn.2d 456,466,39 P.3d 294 (2002). The principle is equally true in the civil setting

of Sagnis' deposition and relying on inadmissible character evidence to sanction Mann. This Court should reverse the trial court's February 19, 2013 order, and find the recordings were public and not of private Sagnis-Marin conversations on April 20, 2009 and May 10, 2009, and vacate the sanctions against Marin's counsel.

9. The Court Erred in Admitting "Character Evidence" and "Opinions on Credibility" In Expert Testimony of Dr. McClung, MD.

A. Under ER 404, evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith.(with limited exceptions not applicable here.)

Marin's counsel objected before Dr. McClung's testimony that his "opinions" about Marin's "character traits" and "perceptions", should be excluded as evidence and opinions about credibility. Marin warned the Court about the prejudicial purpose of the County, to smear Marin with inadmissible terms like "paranoid " to cause the jury to disbelieve his "perceptions about his work environment". See, eg. RP 9/24/2014 P.38-39. Such opinions violate ER 403 as far more prejudicial than relevant, especially when intentionally laced numerous times with the word "**paranoid**" and "character trait", based on the experts "feeling" and general surmise. RP 9/24/2014 P. 38,42,43,44,61,66,67.

Marin' counsel objected in advance and frequently to the County offering this kind of "expert" opinion testimony of McClung, and

specifically moved the Court to restrict McClung from testifying to "paranoid traits" which routinely and irrelevantly appear in psychological testing or that Marin "might perceive" things differently than others. Such testimony was highly prejudicial, without adequate foundation or relevance to any material issue in the case to overcome the prejudice. The County established no basis on which McClung's opinions about Marin's "character traits", or credibility of his description of discriminatory events was admissible as lay or expert testimony. ER 403, 404, 405 and 702. RP 9/23/2014 P 210-220.

The DSM IV R and DSM V Manuals of Mental Disorders do not have a "diagnosis" for "personality traits", "character traits" or "paranoid traits". Despite Dr. McClung's reference to "paranoid traits" as a "diagnosis", there is no recognized diagnosis of "paranoid traits".[16]. Dr. McClung made no professionally recognized diagnosis which has as a symptom delusions or paranoia, but conveyed to the jury that Marin had "paranoid character traits" that "might" cause Marin to misperceive or misreport the events he experienced at work.

Over Marin's counsel's strenuous objections Dr. McClung and the County's attorney intentionally and repetitiously "tagged" Marin with the

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[16] American Psychiatric Association, *Diagnostic and Statistical Manual* 5th Ed., *Index* 917 – 947

word "Paranoid" numerous times, despite no diagnosis of a paranoia related mental illness , not "paranoia" or "paranoid personality disorder." RP 9/24/2014 P. 38,39,43,44,61,66,67. The Court allowed the County to make inadmissible attacks on Marin's character leaving the jury with an impression that he was diagnosed as "paranoid" and not believable.

B. Expert testimony regarding the credibility witnesses is not allowed. State v. Israel, 91 Wash. App. 846, 854, 963 P.2d 897, 901 (1998)

Credibility of a witness may not be proved through expert testimony or third party "assessment", or "character traits" or psychological tests or out of court conduct. Id. ER 607, 608, 609. Credibility is for the jury to determine based on testimony in court.

C. McClung's testimony about "paranoid traits" and "perception" was more prejudicial than relevant under ER 403.

Such testimony is especially prejudicial in a race discrimination case, as it misdirects the jury away from its job to determine "severity of the harassment" from the "victim's perspective" or a reasonable person in Marin's position, including "careful consideration of the social context in which particular behavior occurs and is experienced by its target". Harris v. Forklift Systems, Inc.,510 U.S 17, 23,114 S.Ct. 367 (1993) (sexual harassment); Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81, 118 S. Ct. 998 (1998)(sexual harassment); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1115 (9th Cir 2004) (racial hostile work

environment). Like the "reasonable woman standard" for a sexually hostile work environment, the jury is to assess Marin in context of entrenched industrial plant majority crews as a reasonable older minority male with a foreign accent and a frightening heart condition made symptomatic by anxiety.

Marin was further denied a "thorough sifting" cross-examination of Dr. McClung, limited by the Court to 15 minutes, RP 9/23/2014 P. 216, with prior motions *in limine* preventing cross examination of McClung's opinions about Marin's valid perception of a WLAD hostile environment. CP 2950-2951. McClung made no expert findings that were relevant to Marin's psychological damages and concurred that he had the disability for which Marin's doctors sought accommodation. The balance of his testimony attempted to damage Marin's credibility about discrimination and retaliation in the workplace, and to make him appear unworthy.

10. The Court Punished Marin with Costs Beyond Those Allowed by RCW 4.84.010; and RCW 49.60.030 Does Not Apply.

A. The standard of review for cost awards unauthorized by statute is a question of law subject to de novo review.

The standard of review for an award of costs is a two-step process. First, whether a statute, contract, or equitable theory authorizes the award is a matter of law subject to de novo review. Mehlenbacher v. DeMont, 103 Wash.App. 240, 244, 11 P.3d 871 (2000); Tradewell Group, Inc. v. Mavis, 71 Wash.App. 120, 126, 857 P.2d 1053 (1993). Second, if such

authority exists, the amount of the award is subject to the abuse of discretion standard. Tradewell Group, Inc. at 127.

B. Most of the Judgment for Costs is Unauthorized by Statute.

"Costs have historically been very narrowly defined, and RCW 4.84.010 limits cost recovery to a narrow range of expenses such as filing fees, witness fees, and service of process expenses." Hume v. Am. Disposal Co., 124 Wn.2d 656, 674 (1994), *cert. denied*, 513 U.S. 1112(1995). Absent a statute expressly permitting expanded cost recovery, parties are not entitled to costs beyond those enumerated in RCW 4.84.010." Id. The County's cost bill claimed $17,378.37 in costs including full depositions unused at trial, doctors' professional deposition fees, subpoenas for deposition, "Videography" and "Synching", and witness fee charges. CP 3508-10. After opposition, CP 3534-3545, the County withdrew only video related costs; and without Court findings the Amended Cost Bill of $14,378.37, CP 3558-60, became the Judgment CP 3587-89. Statute authorized few of the costs. CP 3534-3545, CP 3581-85.

11. The Court Erred in Denying Marin Protection Against Bias.

This case presents crucial issues of racial and immigrant bias in civil jury trials: State v. Saintcalle, 178 Wash. 2d 34, 71-72, 309 P.3d 326, 348-49 cert. denied, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013) Marin asked for advance oral Instructions 2 and 3 regarding bias. CP 2990-2992.

The trial court declined to give any preventive bias instructions RP 9/03/2014 p.1-8. Marin's Batson challenges regarding Hispanic and Black Jurors, were essential to Marin. State v. Saintcalle, supra, at 42-43. This plaintiff immigrant of color with a Hispanic accent, was refused any instructions about bias or inherent bias, denied "Batson" motions while burdening him with time-consuming struggles to remove majority jurors with pro-Defendant bias, refused voir dire time to follow up on bias raised on juror questionnaires; charged trial time to examine an obviously biased juror; and degraded by Defense Counsel in a civil case closing, labeled twice as "the defendant"; RP 9/25/2014 p.48, 49, 52. This overt and implicit "bias" cries out for a remedy. Saintcalle at 71-72.

VI. CONCLUSION

Ignacio Marin should receive a full and fair jury trial, with all claims and admissible evidence, before an unbiased jury, with protection against bias. Marin seeks attorney fees and costs on this appeal.

DATED this 30 day of June, 2015.

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CERTIFICATE OF SERVICE

The undersigned declares that on the below date I caused the foregoing pleading to be served via ABC Delivery to the following attorneys:

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DATED this 30th day of June 2015.

s/James Kytle
James Kytle

APPENDIX

The Honorable Jean A. Rietschel
Trial Date: September 2, 2014

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

IGNACIO B. MARIN, Plaintiff, v. KING COUNTY, WASHINGTON, Defendant.	No. 11-2-25462-3 SEA **PLAINTIFF'S MOTION RE: VOIR DIRE AND JURORS 56, 64, 71 AND RE: DENIAL OF TIME TO FOLLOW UP**

In setting out the ground rules of *voir dire*, the Plaintiff specifically asked for two rounds of 30 minutes with additional time if needed to follow up on specific issues. When the two rounds of 30 minutes were completed, the court indicated it would move on to challenges, and Counsel for Plaintiff specifically asked for time to follow up on specific items brought up on the questionnaire. Following the two rounds Counsel had specific items designated for follow up on lists and "post it" notes about the jurors from the questionnaires.

Counsel asked the Court for time to do specific follow up on issues not yet covered from the questionnaire. Jurors late in the venire who only came into possible consideration (after over 20 jurors were let go for hardship) who had said they would follow conscience rather than the

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Judge's instructions, or who knew King County employees, were Jurors 64, 65, 68, 71 and 77 (in addition to earlier jurors 4, and 20 and 28). Of particular significance were: juror 68, William Bou, who had his hand raised to talk, and counsel had promised to come back to him, as he both selected "conscience" and knew King County officials in his capacity as an employee of the City of Seattle; Juror 65, Marvin Crippen, who selected conscience over instructions and whose cousin and husband advise King County officials on politics; Juror 71, George Gilbert whose wife is a lawyer and who disclosed he had a friend who is a King County prosecutor and also was acquainted with Juror 15, Lawrence Cook; Juror 77, Brian Baxter, a former King County employee who said it was a "good place to work"; Juror 80, Gary Hurlbut, who said there should be limits on damages based on their value to society and that there should be a metric; and the last juror left in the panel, Juror 84, Donna Martin, who had a bad experience with a boss which she didn't explain and whose explanation regarding protecting employees from harassment was cut off the photocopy.

The 30 minute segments in *voir dire* were had been necessarily taken up for Plaintiff on issues raised in the pool and keeping track of who had been removed for hardships and still had pending hardships. Issues that had to be addressed in the two 30 minute segments by Plaintiff included general *voir dire* issues of role and power of the jury; and raising hand to identify if not be impartial; and critical issues including but not limited to:

1. Unresolved hardships mixed with bias, including but not limited to:

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a. Mr. Cox, Juror 10, an attorney whose former sister-in-law worked with Defense counsel, his wife worked at the same firm as Mr. Calfo, and who had hardship child care obligations;

b. Mr. Cook, Juror 15, an attorney who currently practices employment law and also knew defense counsel, who was unsure as to whether he could follow the judge's instructions to not read materials relevant to the case and still meet his obligations on cases involving employment law; and

c. Mr. Leahy, Juror 56, whom the Court intended to excuse, but the record will likely show that No. "58" was called out to be excused instead, despite the fact that juror 58 had already been taken out of the pool.

2. Employees who endorsed caps on damages; and/or inability to award emotional distress damages: Jurors # 4, 16, 17; 18; 26; 27; 38; 39; 40; 42; 46; 47; 48; 55; 59; 60; 61 (during oral *voir dire*) 66; 67; 70; 72; 73; 74; 80; 83 (Jill's numbers from damages caps & mental suffering 4; 7; 16; 17; 18; 26; 27; 38; 39; 40; 42; 48; 55; 67; 70; 72; 74)

3. Jurors who endorsed that they would start out "favoring the employer": Jurors # 4; 16; 26; 27; 32; 40; 62; 72

4. Jurors who said they would follow conscience rather than instructions: Jurors 4; 20; 28; 39 (who selected "Law" but wrote "Conscience depending on case"); 64; 65; 68; 71 (including hardship jurors: 7; 17; 25; 26; 37; 49; 55; 59; 60; 67; 75; 78)

5. Jurors with prior employment conflicts with supervisors or coworkers: Jurors #7; 8; 17; 24; 25; 26; 27; 30; 32; 33; 37; 40; 54; 56; 62; 64; 66; 68; 72; 73; 80; 84

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6. Human Resource professionals with a PACCAR juror # 39, Marissa Yap, who was involved in claims but would not be specific about kind of issues or her role, or whether she could award emotional distress damages (and who was not released for hardship despite having a priority meeting on Sept. 23);

7. Juror #47, Zachary Schmitz who knew WTD manager Christie True and later disclosed knowing WTD management including WTD current manager and witness Pam Elardo and disclosed applying for position with King County WTD; and concerned about where the money would come from for damages; the suit; and later disclosed he has a role in the same Insurance Pool with King County in his work for City of Woodinville; and extended time to question and obtain cause challenge; Eventual cause challenge granted.

8. Juror # 4, as to whom Plaintiff made an early cause challenge based on his refusal to participate and declaration he didn't want to hear about discrimination or to be questioned; the juror remained on the panel and then had to be removed following his outbursts in the jury room after being sworn.

During the 30 minute segments some Jurors who were or had been King County Employees or had connection to them were addressed but time did not allow many others to be addressed: the list of such jurors on Plaintiff's counsel's notes included – 15, 21, 24, 27, 39, 40, 46, 47, 52, 56, 65, 68, 71, 77. Those who responded or were addressed during the 30 minute segments included: Steve Gallemore (Juror 21) a retired King County Sheriff and Boeing Security with friends working for King County; Brian Baxter (Juror 77), a former King County Bus Mechanic and Diesel Mechanic who still had friends working for King County; Courtney Gearhart (Juror 49),

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whose father was a past probation officer for King County; Raymond Robello (Juror 17), who goes to church with several King County employees.

The rest needed to be addressed with specific follow up which was requested: Juror 71, who stated on questionnaire a friendship with a KC prosecutor; and Marvin Crippen, Juror 65, whose cousin and her husband served as political advisors for King County officials.

After the Defense peremptory challenge of Juror 33, Raymond Hamilton, Plaintiff made a Batson Challenge based on dismissal of black and Hispanic jurors by the Defense.

Counsel asked the Court for time to do specific follow up on issues not yet covered from the questionnaire. Jurors late in the venire, who only came into possible consideration after over 20 hardship jurors were let go, who had said they would follow conscience rather than the Judge's instructions or who knew King County employees were Jurors 64, 65, 68, 71 and 77 (in addition to earlier jurors 4, and 20 and 28). Of particular significance were: juror 68, William Bou, who had his hand raised to talk, and counsel had promised to come back to him, as he both selected "conscience" and knew King County officials in his capacity as an employee of the City of Seattle; Juror 65, Marvin Crippen, who selected conscience over instructions and whose cousin and husband advise King County officials on politics; Juror 71, George Gilbert, whose wife is a lawyer and who disclosed he had a friend who is a King County prosecutor and also was acquainted with Juror 15, Lawrence Cook; Juror 77, Brian Baxter, a former King County employee who said Defendant was a "good place to work"; Juror 80, Gary Hurlbut, who said there should be limits on damages based on their value to society and that there should be a metric; and the last juror left in the panel, Juror 84, Donna Martin, who had a bad experience with a boss

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which she didn't explain and whose explanation regarding protecting employees from harassment was cut off the photocopy.

There was confusion at the end of *voir dire* about the total count of how many jurors were actually left in the panel prior to challenges, and Counsel asked the Court to obtain more jurors so there would be enough to have jurors remaining to cover potential challenges, so the Court would not be in the position of having to keep a questioned juror in order to seat a jury of 12.

At the time jurors were brought into the box, filling in the spaces during challenges, there was still confusion about which jurors were coming into the box. When juror 56 was put in the box, counsel did not have a juror "post it" or information for juror 56 on the chart, as it had been removed during hardships (the court excused jurors "55, 58, 57, 59 ..." and we assumed juror 58 was juror 56, as there was no juror 58 at that point); when Juror 64 came into the box, counsel stated – "the next juror we have to come into the box is juror 65; we do not have juror 64 on our chart." Plaintiff's counsel thought she had made an error in removing Juror 64, but in fact, the Court had made an error in having both 56 and 64 still in the venire. Two jurors who had been "dismissed for hardship" were still on the panel and were brought into the box during challenges: jurors 56 and 64.

> RCW 4.44.190
> Challenge for actual bias.
> A challenge for actual bias may be taken for the cause mentioned in RCW 4.44.170(2). But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he or she may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

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Dalton v. State, 63 P.3d 847, 853 115 Wn.App. 703, 713 (2003): "One touchstone of a fair trial is an impartial trier of fact--'a jury capable and willing to decide the case solely on the evidence Before it.' " *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 554, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) (quoting *Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)). Our federal and state constitutions provide that the right of trial by jury shall "be preserved" and "remain inviolate." U.S. CONST. amend. VII; Wash. CONST. art. I, § 21.

> A litigant's constitutional rights are invaded when he is required to exhaust his peremptory challenges on a juror who should have been dismissed for cause. The failure to dismiss for cause is prejudicial in itself without regard to whether the final peremptory might have been used to dismiss another juror who sat on the panel. *McMahon v. Carlisle-Pennell Lbr. Co.,* 135 Wash. 27, 28-31, 236 P. 797 (1925); *State v. Muller,* 114 Wash. 660, 661, 195 P. 1047 (1921); *State v. Stentz,* 30 Wash. 134, 143, 70 P. 241 (1902); *State v. Rutten,* 13 Wash. 203, 206, 43 P. 30 (1895); *State v. Moody,* 7 Wash. 395, 396-97, 35 P. 132 (1893).
>
> If a juror should have been excused for cause but was not, the remedy is reversal. The discretion of the trial court to determine partiality of a juror is subject to review by this court under the constitutional guaranty to the accused of a trial by an impartial jury. State v. Rutten, supra.
>
> Actual bias is the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, ... RCW 4.44.170(2); see RCW 4.44.190.

Miles v. F.E.R.M. Enterprises, Inc.. 29 Wn.App. 61, 64 (Wash.App. Div. 3 1981).

Also check Brady v. Fibreboard Corp., 71 Wn.App. 280 (Wash.App. Div. 2 1993)

A juror's failure to speak during *voir dire* regarding a material fact can amount to juror misconduct. *Allyn v. Boe,* 87 Wash.App. 722, 729, 943 P.2d 364 (1997).

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In cases that involve a juror's alleged concealment of bias, the test is "whether the movant can demonstrate that information a juror failed to disclose in *voir dire* was material, and also that a truthful disclosure would have provided a basis for a *challenge for cause.*" *Cho,* 108 Wash.App. at 321, 30 P.3d 496 (emphasis added). "[O]nly those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *McDonough,* 464 U.S. at 556, 104 S.Ct. 845. *See also In re Pers. Restraint of Lord,* 123 Wash.2d 296, 313, 868 P.2d 835, *clarified,* 123 Wash.2d 737, 870 P.2d 964 (1994) ("Any misleading or false answers during *voir dire* require reversal only if accurate answers would have provided grounds for a challenge for cause."). If a juror knows that disclosure is the appropriate response to the court's 115 Wn.App. 714 and/or counsels' questions, then bias is conclusively presumed.

Respectfully submitted September 8, 2014.

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on the below date I caused the foregoing pleading to be served via hand delivery on the following:

PATTY EAKES
CALFO HARRIGAN LEYH & EAKES LLP
999 THIRD AVENUE, STE 4400
SEATTLE, WA 98104

DATED this 8th day of September 2014 in SEATTLE, WASHINGTON.

s/ Mark W. Rose
Mark Rose

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Ignacio Marin v. King County
Case No. 11-2-25462-3SEA

Time Entered Summary South Treatment Plant C-Crew
July 1, 2009 - October 27, 2009

Task Billed	Hours
Training	68.40
Data Entry	30.50
DCB Monitoring	40.50
Water Reuse	191.70
Odor Control -Liquids	26.00
Lab/Process Support	4.00
Subtotal	292.70
Benefit Time/Furlough/FMLA	250.60
	543.30

Defendant Exhibit 618

Ignacio Marin v. King County
Case No. 11-2-25462-3SEA

Time Entered Summary South Treatment Plant C-Crew
July 1, 2009 - October 27, 2009

Task Billed	Hours
Training	68.40
Data Entry	30.50
DCB Monitoring	40.50
Water Reuse	191.70
Odor Control - Liquids	26.00
Lab/Process Support	4.00
Total	361.10

Defendant's Exhibit 618-A

Ignacio Marin v. King County
Case No. 11-2-25462-3SEA

Time Entered Summary South Treatment Plant B-Crew
October 27, 2009 - January 5, 2011

Task Billed	Hours
Training	214.20
Data Entry	50.00
DCB Monitoring	136.30
Odor Control -Liquids	49.70
Odor Control -Solids	60.30
Pump Building Area	86.90
Primary Area	170.40
Secondary Area	221.90
DAFT Area	391.00
Digester Area	353.30
ETS Area	12.00
Lab/Process Support	200.20
Subtotal	1732.00
Benefit Time/Furlough/FMLA	417.50
	2149.50

Defendant Exhibit 619

Ignacio Marin v. King County
Case No. 11-2-25462-3SEA

Time Entered Summary South Treatment Plant B-Crew
October 27, 2009 - January 5, 2011

Task Billed	Hours
Training	214.20
Data Entry	50.00
DCB Monitoring	136.30
Odor Control -Liquids	49.70
Odor Control -Solids	60.30
Pump Building Area	86.90
Primary Area	170.40
Secondary Area	221.90
DAFT Area	391.00
Digester Area	353.30
ETS Area	12.00
Lab/Process Support	200.20
Total	1946.20

Defendant's Exhibit 619-A