

No. 93658-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRITT EASTERLY, ELZY EDWARDS and CLIFFORD EVELYN,

Respondents,

v.

CLARK COUNTY,

Petitioner.

ANSWER TO PETITION FOR REVIEW

Thomas S. Boothe, WSBA #21759
7635 SW Westmoor Way
Portland, OR 97225-2138
(503) 292-5800

Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Ave. SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Respondents Britt Easterly, Elzy Edwards,
and Clifford Evelyn

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A. INTRODUCTION

With its petition for review from a decision remanding for trial on race discrimination claims, Clark County invites this Court to step through the looking-glass. It alleges that the Court of Appeals has “abrogated” a statute that is unrelated to the facts of the case and not mentioned in the opinion. It avers that the Court of Appeals’ decision “conflicts” with other decisions involving totally unrelated issues. Most astonishingly, the County alleges that having to defend a third trial on race discrimination (the second plaintiff has trial pending, the third has prevailed at trial) threatens the public interest enshrined in the Washington Law Against Discrimination. RCW ch. 49.60 (“WLAD”).

B. STATEMENT OF THE CASE

The Court of Appeals recounted many of the critical material facts in this multi-plaintiff racial discrimination case against Clark County. Three African-Americans have alleged race discrimination in employment against the County. Op. at *1 n.2. Britt Easterly proved the allegations at trial; this Court can take judicial notice of the judgment. Appendix A. Cliff Evelyn’s discrimination claims were reinstated by the Court of Appeals; his trial will proceed because the County has not petitioned this Court regarding Evelyn’s claims. Op. at *1; Petition at 1-2. Thus, the only facts relevant to the County’s petition are those involving Elzy Edwards.

Edwards' WLAD claim arises from disparate treatment he received because he is African-American. CP 1-20. Edwards applied for Custody Officer position with the County and claims he was denied due to race. *Id.* He maintains that Breanne Nelson and Timothy Hockett, who investigated and participated in the selection process, heavily influenced the judgment of the ultimate decision maker. *Id.*

An application for Custody Officer is a four-step process. The first stage is written testing and oral interviews, the second stage is a background investigation, the third stage is a "Rule of Three" panel interview, and the fourth stage is review by the sheriff. CP 1164-65. Edwards passed the written and oral exams with high marks and made it to stage two. CP 1169. He was then investigated by Detective Timothy Hockett. *Id.* Although the County insisted in briefing below that Hockett approved a disproportionate number of "minorities" as candidates, it does not say "minorities" from which race or races. CP 90.

Despite the fact that Edwards' second stage interview had been scheduled, Hockett rescheduled it to the Martin Luther King Jr. holiday celebrating the civil rights gains of African Americans. CP 1243, 1675. Edwards did not object for fear of seeming uncooperative. CP 1676. No other interviews were scheduled that day. CP 92. The County claimed below that Hockett had no idea what race Edwards was until the interview.

CP 92. However, Hockett had a form indicating Edwards' race and a photo identification of Edwards in his investigative file, which he had reviewed to prepare for the interview. CP 1244-46.

Hockett's interview was more like an interrogation of a criminal suspect than a job interview. CP 1169-71. Hockett held against Edwards incidents of "police contact" where Edwards was actually the complainant, not the accused, and also financial challenges common to many people. CP 1171. Hockett characterized Edwards' inadvertent retention of cable boxes, which professional movers accidentally packed when Edwards moved from Florida, as "felony theft." CP 1171, 1174. Hockett ignored Edwards' explanations as to why returning cable boxes to a company in another state can be challenging, particularly when that cable company had recently changed ownership. CP 1281, 1674. Hockett faulted Edwards for having a high American Express balance despite the fact that his significant other had incurred the charges and could pay the bill easily. CP 1279. Hockett also questioned Edwards' supposed failure to disclose old arrests in Hawaii related to unpaid traffic tickets, even though Edwards had recalled and disclosed another, more serious arrest and had supplemented his statement to include the Hawaii information. CP 1172, 1674.

Another applicant for the same position, who was Caucasian, was also interviewed by Hockett. CP 1180. A County investigator later

compared Hockett's treatment of that applicant to Edwards' treatment, and found that they were treated very differently. CP 1180-85. Despite sharing many of similar "faults" to Edwards, Hockett approved the Caucasian applicant and denied Edwards. *Id.* A County investigator reviewing Hockett's actions found the differences in treatment of Edwards and the Caucasian applicant "startling." CP 1182.

Edwards complained about Hockett's treatment of him in the interview. CP 1169. The County employee to whom Edwards complained reviewed the recording and suggested assigning another investigator. The County refused. CP 1169, 1175.

Another Caucasian applicant also complained about Hockett's interview and *was* assigned a new investigator. CP 1181. The County later removed Hockett from all his investigative assignments, but still did not remedy Edwards' complaint. CP 38.

Although Hockett declined Edwards, he appealed that decision and was reinstated to the process. CP 1170, 1410. He was advanced to the third stage, the Rule of Three interview. CP 1170. During the "Rule of Three" interview process, however, Edwards was again treated differently. CP 1177-79. County Human Resource Specialist Breanne Nelson broke rules and took actions to influence the panel against Edwards, including:

- Telling the panelists that Edwards had been removed from consideration by Hockett, despite the fact that Edwards had won his appeal;
- Discussing the details of Hockett’s background investigation with the panel when she was not tasked with doing so;
- Telling the panelists that Edwards had bumped a “good” or “viable” candidate;
- Acting upset that Edwards was being interviewed;
- Telling the panelists she “didn’t know if the Sheriff was going to want to hire [Edwards]”; and
- Admonishing the panel after it approved Edwards as a candidate that the Sheriff would be disappointed that they did not back up Hockett’s [previously overruled] decision.

Id. In fact, Nelson’s interference with the “Rule of Three” panel’s work was so interfering and unusual the moderator asked Nelson more than once to be quiet and let the panel do their job. CP 1198.

Most critically, the County investigator said *it was difficult to decide if Nelson was motivated by race discrimination*. CP 1186. The investigator did *not* conclude that no race discrimination occurred. *Id.*

Despite Nelson’s best efforts to persuade the panel to reject Edwards, he was chosen as a suitable hire after the “Rule of Three” interview. CP 1170-71. However, Nelson’s interference caused a split in the panel; one of the three panelists wanted to reject Edwards because of the “background” issues Nelson raised. *Id.*

Nelson, dissatisfied with the panel's majority decision, took the matter to Undersheriff Dunegan. CP 1180. Dunegan rejected Edwards based on Nelson's representations. CP 1180. A non-African American applicant was selected instead of Edwards. CP 1182.

After Edwards' rejection by the County, Washington State Corrections and Oregon State Corrections both offered Edwards jobs; he took the job offer with Washington State Corrections. CP 1673. Almost a year later, the County decided "procedural errors" had affected Edwards' application process and offered to reinstate him to the process. CP 456. However, Edwards was already working for Washington State. CP 1673.

The County's statement of the case here, unsurprisingly, portrays the facts in the light most favorable to the County. Petition at 2-6. The County's central factual contention is the Edwards allegedly made misstatements in his application materials, and that this automatically, categorically, and unequivocally disqualified him from the position for which he applied. *Id.*

What the County could not explain to the Court of Appeals, and does not explain in its petition, was why the "unqualified" Edwards was advanced past the initial interview stage, to the "Rule of Three" panel interview, presented to the sheriff for acceptance or rejection, and then *invited to reapply almost a year later*. CP 456, 1170, 1410. The County

offers no explanation for wasting the presumably valuable time so many of its managerial officers in conducting a “Rule of Three” interview with a candidate who was not “minimally qualified.”

The Court of Appeals concluded that, given the full factual context of Edwards’ case, the County’s claim that he was rejected based on his lack of qualification, rather than his race, was a factual issue for the jury. Op. at *7-8.

C. ARGUMENT

- (1) The Court of Appeals’ Opinion Does Not Affect the Public’s Ability to Have Honest Law Enforcement Officers, However, It Does Protect the Public Interest in Eradicating Race Discrimination

The Court of Appeals concluded that a jury should decide whether the County rejected Edwards’ candidacy because of his race. Op. at *8.

The County argues that this Court should accept review because the Court of Appeals has somehow altered the public policy in favor of law enforcement officers being honest in the execution of their public duties. Petition at 8-9. The County suggests that the Court of Appeals’ opinion is an “abrogation” of this policy, citing RCW 43.101.021.

The County’s position strains credulity. RCW 43.101.021 establishes a public policy of honesty in the execution of public duties. It

says nothing about whether alleged misstatements on an application form are *de facto* disqualifiers from any law enforcement position.

The Court of Appeals' opinion does not hold that law enforcement officers need no longer be honest in fulfilling their public duties. It does not "abrogate" RCW 43.101.021; that statute is unrelated to this case. Edwards was never hired, so the County never gave him the chance to demonstrate his honesty in public duty.¹

The only holding of the Court of Appeals here is that there is genuine issue of material fact as to whether the County's claim that Edwards was "unqualified" was pretext for race discrimination. *That* is the public policy at stake here. The County's petition should be denied.

(2) This Case Does Not Involve Any Challenge to Polygraph Testing in Law Enforcement Hiring, Nor Does It "Alter" Any Job Requirements by Judicial Fiat

The County next suggests that the Court of Appeals' decision conflicts with this Court's decision in *O'Hartigan v. Dep't of Pers.*, 118 Wn.2d 111, 821 P.2d 44 (1991). Petition at 8-13. The County quotes extensively from *O'Hartigan*, particularly with respect to the sensitivity and gravity of law enforcement work. The County suggests that the Court of

¹ However, the State of Washington viewed Edwards as qualified and has given him the opportunity to demonstrate his integrity in the execution of his public duties. CP 1673.

Appeals' decision holds that "truthfulness and honesty is not a valid and/or minimum qualification to become a member of law enforcement." *Id.* at 13. The County also argues that the Court of Appeals has "unilaterally alter[ed]" the job requirements for corrections officers, citing *Dedman v. Washington Pers. Appeals Bd.*, 98 Wn. App. 471, 989 P.2d 1214 (1999). *Id.* at 13-14.

This Court will search the Court of Appeals' opinion in vain for any "holding" requiring a law enforcement agency to disregard questions of honesty in choosing officer candidates, or altering job requirements. No such holding exists. Law enforcement agencies may still use perceived honesty as a basis for rejecting an applicant. In fact, the Court of Appeals cited the County's claim of dishonesty as a "legitimate, nondiscriminatory reason for declining to hire Edwards." *Op.* at *7.

The Court of Appeals simply held that – based on the factual record before it – the County's claim that Edwards' alleged "dishonesty" was disqualifying appears to be pretextual. *Id.* It remanded for trial on that issue.

The problem for the County here is that it did *not* appear to treat "honesty" as a minimum qualification. It did *not* categorically reject Edwards for the claimed misstatements in his application. Instead, the County advanced him all the way through the hiring process even after the

claimed “disqualifying” behavior occurred. It also offered to reinstate him to the application process a year later, despite still protesting to this day that he was not even minimally qualified.

Had the County categorically rejected Edwards based on the alleged misstatements in his application form, the Court of Appeals might have seen this case differently. It is up to the jury to decide whether the County was really concerned with Edwards’ honesty, rather than with the color of his skin.

Nothing in the opinion alters the County’s ability to reject candidates for dishonesty, or alters the qualification standards for hiring. Agencies simply may not use alleged “dishonesty” as a pretext for race discrimination. The County’s petition should be denied.

(3) Requiring an Employer to Face a Jury on Race Discrimination Claims Because There Are Disputed Issues of Fact Does Not Injure the Public Policy Underpinning the WLAD

Finally, the County complains bitterly about the unfairness of facing trial on whether it discriminated against Edwards because of his race. Petition at 16-19. It argues the Court of Appeals’ decision injures the County, suggesting it is being punished for investigating discrimination. Petition at 14-19. The County argues that it investigated and there was “no evidence of racial bias or animus,” that offering to reinstate Edwards to the

hiring process due to “administrative errors” cannot be viewed as evidence that the County did not really believe he was unqualified. *Id.* at 17.

As a threshold matter, the County’s repeated attempts to recast the investigator’s report as some sort of exoneration of the County’s behavior are maddening. The report did *not* conclude that the County did not discriminate against Edwards. The County investigator said *it was difficult to decide if Nelson was motivated by race discrimination*. CP 1186. The investigator also said that, when comparing Edwards and a Caucasian applicant, the two were treated differently and the alleged “administrative errors” tended to favor the Caucasian, and disfavor Edwards. CP 1180-85.

The County’s statement that the investigator found no “evidence of racial bias or animus” is carefully crafted to distract from the investigator’s very serious findings. The County knows perfectly well that a lack of direct evidence of animus does not prove a lack of discriminatory intent. WILLIAM Y. CHIN, *The Age of Covert Racism in the Era of the Roberts Court During the Waning of Affirmative Action*, 16 Rutgers Race & L. Rev. 1, 15-16 (2015). Discrimination can be subtle, coded, and difficult to uncover. Of course, it is easier to recognize obvious, blatant racial bias than less obvious, subtle bias. *Id.*; *see also, Johnson v. Dep’t of Soc. & Health Servs.*, 80 Wn. App. 212, 227, 907 P.2d 1223 (1996) (purpose of disparate treatment claims

is to allow inference of discriminatory animus because direct evidence rarely available).

The reality of covert bias is precisely why the *McDonnell-Douglass* burden shifting test was adopted by our Supreme Court: to allow a plaintiff to present an indirect case of discrimination to a jury in the *absence* of direct proof of racial animus. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001), *as amended on denial of reconsideration* (July 17, 2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 226, 137 P.3d 844 (2006). As some academics studying the issue have noted: “One study revealed that judges evaluating workplace racial harassment claims tended to deem relevant only overtly racist behavior such as uttering racial slurs, but tend to disregard covert racist behavior such as exclusion from professional or work-related activities, social isolation, or other subtle stratagems.” CHIN, 16 Rutgers Race & L. Rev. at 15.

The County’s argument that the Court of Appeals’ opinion discourages investigation of discrimination is unavailing. The “catch-22” of which the County complains is purely of its own making. By claiming in court that Edwards lacked even minimal qualifications for the position, despite having advanced him all the way through an elaborate civil service process and later offering to reinstate him to it, the County made its bed and must lie in it. The jury may believe the County regarding its alleged

immutable standards of total honesty, or it may believe that the County invented this “absolute disqualification” standard after the fact to cover up race discrimination. Pointing out that the County’s hypocrisy and double-speak raises an inference of pretext sufficient to survive summary judgment does not threaten Washington’s policy against discrimination.

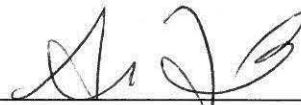
The very fact that Edwards and the County have two competing, plausible explanations of the County’s actions, backed by specific evidence, means a trial should be held. The County’s petition should be denied, so the trial may commence.

D. CONCLUSION

The County has not demonstrated any actual issues arising from the Court of Appeals’ opinion. Review should be denied.

DATED this 7th day of October, 2016.

Respectfully submitted,



Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Ave. SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Thomas S. Boothe, WSBA #21759
7635 SW Westmoor Way
Portland, OR 97225-2138
(503) 292-5800

Attorneys for Respondents Britt
Easterly, Elzy Edwards and
Clifford Evelyn

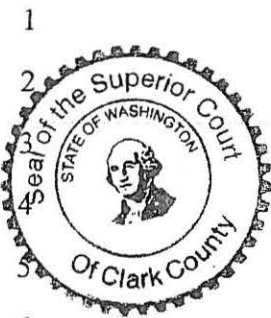
APPENDIX A

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B

FILED

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SCOTT G. WEBER, CLERK
CLARK COUNTY



1 STATE OF WASHINGTON }
2 COUNTY OF CLARK } ss.
3 I, Scott G. Weber, County Clerk and Clerk of the Superior Court of
4 Clark County, Washington, DO HEREBY CERTIFY that this
5 document, consisting of 3 page(s), is a true and correct
6 copy of the original now on file and of record in my office and, as
7 County Clerk, I am the legal custodian thereof.
8 Signed and sealed at Vancouver, Washington this date:
9 Sept 16, 2016
10 Scott G. Weber, County Clerk
11 By [Signature] Deputy

ROBERT A. LEWIS

7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8 IN AND FOR THE COUNTY OF CLARK

10 BRITT EASTERLY, ELZY EDWARDS
11 and CLIFFORD EVELYN,
12 Plaintiffs,
13 v.
14 CLARK COUNTY,
15 Defendant.

No. 9 2 05520 7

JUDGMENT AND ORDER

17 Pursuant to the Verdict of the duly empaneled jury in this matter after eight days of trial,
18 plaintiff submits the following Judgment:

19 JUDGMENT SUMMARY

20 The following is recited to be in compliance with RCW 4.64.030:

- 21 A. Judgment Creditor: Britt Easterly
- 22 B. Judgment Debtor No. 1 Clark County
- 23 C. Principal judgment amount: \$ 500,000.00
- 24 D. Costs and Statutory attorney fees
25 pursuant to RCW 49.60.030(2) \$ TBD
- 26 E. Adjustment for tax consequences
of economic damages: \$ N/A

1 F. The principal judgment amount set forth above in section C shall bear interest at
2 the statutory rate from entry of judgment on September 16, 2016, until paid in
3 full. When amounts are determined for costs and statutory attorney fees pursuant
4 to RCW 49.60.030(2), those amounts shall bear interest at the same rate from the
5 date of entry of judgment upon the award. Pursuant to RCW 4.56.110(3), the
6 equivalent coupon issue yield, as published by the Board of Governors of the
7 Federal Reserve System, of the average bill rate for the 26-week treasury bills is
8 determined at the first market auction conducted during the calendar month
9 preceding the date of entry of judgment was 0.40%, such that the Judgment
10 interest rate shall be 2.40%.

11 G. Attorney Fees and Costs: TBD

12 H.. Attorney for Judgment Creditor:
13 Thomas S. Boothe
14 7635 SW Westmoor Way
15 Portland, OR 97225-2138

16 I. Attorneys for Judgment Debtor:
17 Mitchell J. Cogen
18 David Riewald
19 Ben O'Glasser
20 Bullard Law
21 Suite 1900
22 200 SW Market Street
23 Portland, OR 97201

24 Emily Sheldrick
25 Clark County Prosecutor's Office: Civil Division
26 P.O. Box 5000
Vancouver, WA 98666-5000

ORDER

27 THIS MATTER having come on regularly upon the plaintiffs' motion for entry judgment
28 and the Court having considered the relevant pleadings and being otherwise fully advised in the
29 premises; now, therefore,

30 IT IS HEREBY ORDERED, ADJUDGED and DECREED that Judgment shall be and
31 hereby is rendered in favor of plaintiff against defendant in the amount of \$500,000, this Court

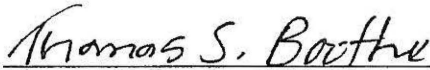
1 expressly reserving jurisdiction for consideration of plaintiff's timely submitted claims for
2 allowable costs, attorney fees, and disbursements..

3 DONE IN OPEN COURT this 16th day of September, 2016.

4
5 

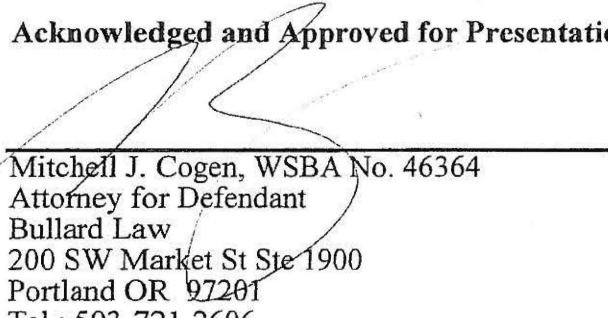
6 Robert A. Lewis
Superior Court Judge

7 **Prepared and Submitted by:**

8 

9 Thomas S. Boothe, WSBA No. 21759
Attorney for Plaintiff
10 7635 SW Westmoor Way
Portland, OR 07225-2138
11 Tel. (503) 292-5800
tsb@boothehouse.com
12

13 **Acknowledged and Approved for Presentation:**

14
15 
16 Mitchell J. Cogen, WSBA No. 46364
Attorney for Defendant
17 Bullard Law
200 SW Market St Ste 1900
18 Portland OR 97201
Tel.: 503-721-2606
19 mcogen@bullardlaw.com

DECLARATION OF SERVICE

On said day below, I electronically filed and e-served a true and accurate copy of the Answer to Petition for Review in Supreme Court Cause No. 93658-7 to the following counsel of record:

Thomas S. Boothe
7635 SW Westmoor Way
Portland, OR 97225-2138
tsb@boothehouse.com

Mitchell J. Cogen
Bullard Law
200 SW Market Street, Suite 1900
Portland, OR 97201
mcogen@bullardlaw.com

Emily Sheldrick
Prosecuting Attorney Office
Clark County
1300 Franklin Street
PO Box 5000
Vancouver, WA 98666-5000
emily.sheldrick@clark.wa.gov

Original e-filed with:
Washington Supreme Court
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 7, 2016, at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

October 07, 2016 - 11:41 AM

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- matt@tal-fitzlaw.com

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Easterly/Edwards/Evelyn's Answer to Petition for Review

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