69348-1

69348-1

NO. 69348-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

CYNTHIA LUSEBRINK,

Appellant,
v.

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

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT
CAUSE NO. 10-2-10370-8 KNT

REPLY BRIEF OF APPELLANT

Tyler K. Firkins
Van Siclen, Stocks & Firkins
721 45th St NE
Auburn, WA 98002
253-859-8899
tfirkins@vansiclen.com

TABLE OF CONTENTS

		Page
I.	Introduction	1
II.	Reply Statement of the Case	2
	A. The District failed to provide any accommodation to Ms. Lusebrink	2
	B. The District repeatedly violated orders in limine at trial mistrial when a party	3
III.	Argument	5
	A. Reassignment is a reasonable accommodation available to the District	7
	B. Ms. Lusebrink was prejudiced by Jury Instruction 11	14
	C. It was error to deny Plaintiff's motion for mistrial	19
	D. It was error to deny Plaintiff's motion for new trial	23
VI.	Conclusion	25

TABLE OF AUTHORITIES

Page No

Washington Cases

Clarke v. Shoreline School Dist. No. 412, 106 Wash.2d 102, 120-122, 720 P.2d 793, 804-805 (1986)..... 8

Curtis v. Sec. Bank, 69 Wn.App. 12, 17, 847 P.2d 507 (1993)..... 6, 8 9, 14, 15, 16, 17

Davis v. Microsoft Corp., 109 Wn.App. 884, 892, 37 P.3d 333, 337 (Div. 1, 2002)..... 6, 10 14, 16, 17

Dean v. Municipality of Metro. Seattle, 104 Wn.2d 627, 637-39, 208 P.2d 393 (1985)..... 9, 14 15, 17

Dickerson v. Chadwell, Inc., 62 Wn.App. 426, 429, 814 P.2d 687 (1991)..... 23

Doe v. Boeing Co., 121 Wn.2d 8, 13018, 846 P.2d 531 (1993).....7

Griffith v. Boise Cascade, Inc., 111 Wash. App. 436, 444, 45 P.3d 589, 593 (2002).....11

Keller v. City of Spokane, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002)..... 15

Pulcino v. Fed. Express Corp., 141 Wn.2d. 141 Wn.2d 629, 9 P.3d 787 (2000) 15

Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 146 n.2,
94 P.3d 930 (2004)..... 12, 13

State v. Avendano-Lopez, 79 Wn. App. 706, 712-13,
904 P.2d 324 (1995)..... 22

State v. Brown, 132 Wn.2d 529, 589-90,
940 P.2d 546 (1997)..... 16

State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)..... 25

State v. Gallagher, 112 Wn. App. 601, 610, 51 P.3d 100 (2002)... 21, 22

State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)..... 25

State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982)..... 15

State v. Miles, 73 Wn.2d 67, 71,
436 P.2d 198 (1968)..... 23

State v. Sullivan, 69 Wn. App. 167,
847 P.2d 953 (1993)..... 19, 20

State v. Weber, 99 Wn.2d 158, 164-65,
659 P.2d 1102 (1983).....22

Thompson v. King Feed & Nutrition Serv., Inc., 153 Wn.2d 447, 453,
105 P.3d 378 (2005)..... 15

Federal Cases

Sharpe v. American Tel. Tel. Co., 66 F.3d 1045
(9th Cir.1995)..... 11, 12

I. INTRODUCTION

Plaintiff Cynthia Lusebrink was disabled as a result of an on-the-job injury while working for the Kent School District. Rather than provide accommodation, the District instead passively allowed her to try and remedy the situation on her own before ultimately firing her. The District continues to argue that its lack of affirmative conduct was sufficient under the law, even though it did nothing but allow Ms. Lusebrink to participate in the same job application process as every other potential job seeker.

The District's erroneous assertion was compounded by its conduct at trial. The District elicited inaccurate testimony in violation of orders in limine that Ms. Lusebrink had been offered, and had rejected, jobs in the District. Ms. Lusebrink's counsel moved for mistrial and was denied. The trial court provided an inadequate curative instruction, putting the jury in a position to infer that the District provided accommodation when it in fact did nothing.

When the case finally went to the jury, the jury was provided with an erroneous instruction that stated the District's passive conduct was sufficient. Perhaps unsurprisingly, the jury appears to have adopted the passive conduct outlined in the instruction to be affirmative. This Court should reverse and remand this case for a new trial with a directed finding on the District's liability.

II. REPLY STATEMENT OF THE CASE

A. The District failed to provide any accommodation to Ms. Lusebrink.

There was virtually no evidence offered by the District at trial to actually demonstrate that it took any affirmative steps to accommodate Ms. Lusebrink's disability before she was fired.

Ms. Lusebrink met with school officials on June 9, 2008 to discuss her disability, fulfilling her duty to inform her employer. Id. at 65. At the time of the meeting there was a vacant TOSA position into which the District could have reassigned Ms. Lusebrink. VRP July 23, 2012 at 56. It did not, instead opening the position to all candidates and forcing Ms. Lusebrink to engage in the application process on her own. VRP July 16, 2013 at 79-81. Nobody at the District contacted Ms. Lusebrink to offer any assistance in applying for the position. *Id.* at 89-91. Keith Klug had no idea that Ms. Lusebrink had even applied. VRP July 19, 2013 at 29.

In total, Ms. Lusebrink applied for four open positions for which she was qualified within the Kent School District, and that met her limitations. VRP July 16, 2013 at 87. She found each of these positions on her own, without any assistance from the District. *Id.* at 90. She was never offered a position. *Id.* at 89. The District instead requested that she resign on October 8, 2008, and when she refused, fired her on December 5, 2008. *Id.* at 82, 87.

There is no evidence that the District took any affirmative steps to accommodate Ms. Lusebrink's disability after meeting with her on June 9, 2008. Mr. Klug testified that he assigned some unknown individual from the District's Human Resources to assist Ms. Lusebrink with a job, but he could not remember who and did not know what they supposedly did. VRP July 23, 2013 at 43, 53. No District witness has so testified, nor is there other evidence that the District took affirmative steps to alert Ms. Lusebrink to open positions for which she was qualified. Instead, the District told Ms. Lusebrink to look for jobs herself. VRP July 23, 2012 at 43.

B. The District repeatedly violated orders in limine at trial.

At trial, evidence or testimony regarding settlement negotiations or regarding previously undisclosed accommodations was prohibited by order of the trial court. VRP July 10, 2013 at 91, 94-95; VRP July 11, 2013 at 165-66. Mr. Lind, general counsel for the District, testified that the District offered a librarian position to Ms. Lusebrink as an accommodation, at the same salary level she had as a teacher, but that she refused. VRP July 19, 2013 at 140. These statements violated the two orders in limine above, because the offer of the position was part of settlement negotiations long after Ms. Lusebrink had been fired, and had never before been disclosed as a claimed accommodation. *Id.* at 156-58. Furthermore, this statement is knowingly and indisputably false.

During negotiations, Mr. Lind offered the position to Ms. Lusebrink through her counsel. *Id.* Ms. Lusebrink's counsel accepted with conditions, in effect making a counter offer. *Id.* Ms. Lusebrink's counsel read into the record the email he sent to Mr. Lind:

> Chuck, thank you for sending my client the various posts. My client is willing to accept the following as a full and final settlement of this claim. Your offer and acceptance should not be construed to be an actual accommodation, but, instead, constitute a settlement agreement between the parties. Cynthia will accept this position, library paraeducator job number such and such, external job posting location Crestwood Elementary School. She will continue to work in this position until such a time as a TOSA position becomes available, at which time she will be moved into that position.
>
> She will also require the following – one, restoration of her seniority; two, the District must pay all legal fees; three, her salary must be reimbursed for the last 16 months, and she shall be paid her full teacher's salary until a teacher on special assignment becomes open, of which she will be placed in the position. Thank you in advance for your consideration.

Id. at 157. Mr. Lind responded that he did not accept the settlement offer. *Id.* It is important to also note that the position as offered did not restore Ms. Lusebrink to her original salary, but instead paid only $14.24 per hour. *Id.* at 171. Mr. Lind's statement was purposely elicited by the District. *Id.* at 167. It falsely conveyed to the jury that the District had offered Ms. Lusebrink a job as an accommodation, but she refused.

Plaintiff moved for a mistrial, but was denied by the trial court. *Id.* at 156-58. The trial court attempted a curative instruction, but the instruction did not cure the prejudice. *Id.* at 188-89. The instruction still stated that there was an "offer" of a position by the District, and a "rejection" by Ms. Lusebrink. *Id.* This merely reinforced the problem of Mr. Lind's inaccurate testimony.

Additionally during closing, the District's counsel stated that the jury should "assume" that the District hired the "best person" for each position to which Ms. Lusebrink had applied. VRP July 24, 2013 at 138. The jury had, over the course of trial, been told by the District that Ms. Lusebrink had rejected an offered accommodation, which was untrue, and then reasonably lost out to the "best" person for each job. No jury could be reasonably expected to be unprejudiced by these statements. The compounding effect of these errors during trial should have resulted in a new trial. CP 1417-31. This court should reverse the trial court's errors and remand for a new trial, with instruction to the trial court to enter a finding in favor of Ms. Lusebrink on the District's liability.

III. ARGUMENT

Each of the errors discussed below stem from an erroneous interpretation or implementation of what type of acts are necessary to accommodate a disabled individual under the Washington Law Against Discrimination (WLAD). The District appears to misunderstand the thrust of

Plaintiff's argument: Ms. Lusebrink is not arguing that the District is obligated to hire her over other employee candidates for a specific position in an open employment process. Instead, *Curtis v. Sec. Bank,* 69 Wn.App. 12, 17, 847 P.2d 507 (1993) and *Davis v. Microsoft Corp.*, 109 Wn.App. 884, 892, 37 P.3d 333 (2002) stand for the proposition that an employer must take affirmative steps to accommodate a disabled employee, and that reasonable accommodation the District could have provided to Ms. Lusebrink included reassigning her into one of the positions that came open. Next, Jury Instruction 11 as given by the trial court failed to adequately describe affirmative conduct. The exact conduct described by the District has previously been held to be insufficient, and it was error for the trial court here to permit the District to argue that its passive conduct met its duty. Finally, because of the District's violation of the order limiting testimony about failed negotiations, including the assistant librarian position testified to by Mr. Lind, and the wholly inadequate curative instruction, a false inference arose that the District somehow affirmatively accommodated Ms. Lusebrink by offering her a position when it did no such thing. It was further error to deny Plaintiff's motion for a new trial in the face of these errors. This Court now has the opportunity to provide guidance in future suits by clarifying what constitutes an affirmative act satisfying an employer's duty to accommodate under the

WLAD. It is clear from the case law that some attempted resolution, beyond simply firing Ms. Lusebrink, should be required.

A. Reassignment is a reasonable accommodation available to the District.

The District did not engage in a single affirmative act to accommodate Ms. Lusebrink. An affirmative measure easily available to the District, but not used, was to reassign Ms. Lusebrink into one of the positions that came open. The District erroneously frames the argument here to whether or not it had a duty to hire Ms. Lusebrink to a specific position through the job application process. This ignores the District's intervening duties before this point. Once Ms. Lusebrink informed the District of her handicap, which she indisputably did, the District had an affirmative duty to reasonably accommodate that disability. *Doe v. Boeing Co.*, 121 Wn.2d 8, 13-18, 846 P.2d 531 (1993). Interestingly, the District itself points out that an "affirmative" duty means it had to actually do something "positive," but this is not especially helpful in describing its actual duty.[1] Sitting back and doing nothing while Ms. Lusebrink herself independently undertakes the same job application process as any other applicant does not fall within this definition. It is not an "affirmative" act to simply consider, but never offer, Ms.

---

[1] Confusingly, "positive" has at least eight common definitions, and in this context could be variously defined as "unconditioned," "contributing toward," or even "having a good effect," none of which are helpful in defining the District's duty for the jury here. *See* Mirriam-Webster online dictionary at http://www.mirriam-webster.com.

Lusebrink for jobs she found and applied to by herself. Further, as of the June 9, 2008 meeting, the District knew of an open position, not yet posted, to which it could have simply reassigned her. VRP July 23, 2012 at 56. It did not.

The District is correct that it was undisputed that Ms. Lusebrink was disabled from teaching special education, though this doesn't explain why the only position affirmatively suggested by the District for Ms. Lusebrink was a special education position. The District's duty to reassign extended beyond the limited scope it argues. Under the WAC 162-22-065, affirmative acts include "informing the employee of vacant positions and considering the employee for those positions for which the employee is qualified." (emphasis added.) As further clarified by *Clarke v. Shoreline School District No. 412,* 106 Wn.2d 102, 121, 720 P.3d 793 (1986), the employer must take "affirmative steps" to "help the handicapped employee fill the position." It is unreasonable to argue that the District, by holding a single informational meeting it was legally bound to hold and by permitting Ms. Lusebrink to continue to access the same job database she was permitted to access long before she was disabled, somehow took an affirmative step to actually help Ms. Lusebrink fill an open position.

The court in *Curtis v. Sec. Bank* held that reasonable accommodation by reassignment requires an employer to do at least three things: (1) perform

capabilities testing on open positions to determine if they are suitable for a particular disability, (2) encourage the employee to apply for the vacant positions she can perform, and (3) affirmatively assist her in applying for those positions. *Curtis v. Sec. Bank*, 69 Wash.App. at 17. This is because the employer that stands in the better position to know or efficiently determine whether vacant positions can accommodate an employee's disability, as the employer creates that position's responsibilities in the first place. *Id.* Further, "assign," as defined by Merriam-Webster, is "to appoint to a duty or post." It is not defined as permission to engage in a standard hiring process in exactly the same position as any other applicant. In fact, Mr. Klug testified that he wasn't even aware that Ms. Lusebrink had applied for any positions, and thus could not have helped her apply to any positions. VRP July 19, 2013 at 29.

Previously, King County attempted the same erroneous tactic now used here by the District. In *Dean v. Municipality of Metropolitan Seattle,* 104 Wn.2d 627, 639, 708 P.2d 393 (1985), King County Metro argued that it had reasonably accommodated Dean's disability even though it did not assist him in applying to open positions, but instead "left the initiative to him." The court disagreed. Similarly here, the District did absolutely nothing other than have a meeting. No jobs were proposed at the meeting. Subsequent to the meeting, the District took only one affirmative step—to fire the plaintiff. Passively waiting for the plaintiff to detect a job does not constitute an

affirmative measure or a lawful effort to accommodate the plaintiff's disability. This is particularly true where as here the District created the disability that it then refused to accommodate.

The District's witnesses at trial could have testified that they looked for and apprised Ms. Lusebrink of potential jobs. Not a single witness so testified. The only evidence offered by the District is Keith Klug's claim that he assigned an unidentified person in HR a task to do something. VRP July 23, 2012 at 43. But simply assigning an unidentified person an unidentified task is insufficient. The unidentified person must actually then do something. Even taking this statement in the light most favorable to the District, the supposedly-assigned HR person never made themselves known to Ms. Lusebrink, never communicated with her in any way, and certainly never provided any notice of open positions or application help to Ms. Lusebrink.

Up until the day Ms. Lusebrink was fired, the District failed entirely to take a single affirmative measure to find her a job. Employees have never been required to apply for jobs without first being informed by the employer that the job could accommodate the disability. *Davis*, 109 Wn.App. at 894. This is because it is the duty of an employer under WLAD to engage in the accommodation process, and would undermine the WLAD's purpose of eliminating unlawful discrimination by placing the disabled employee "in the same position as any other candidate." *Id.* Further, the District's theory that

simply "considering" a disabled employee for positions is not sufficient. Ms. Lusebrink could have applied for a hundred jobs, and the District could have chosen to "consider" her for each while always hiring someone else. This does not help eliminate unlawful discrimination in employment, and may actually facilitate it by providing the District with perpetual cover for its discrimination against Ms. Lusebrink or other disabled employees.

For example, in *Griffith v. Boise Cascade, Inc.* , 111 Wash.App. 436, 444, 45 P.3d 589, 593 (2002), the Court upheld a summary judgment order against the disabled employee because the employer identified the employee's limitations, found a position that matched her restrictions, and ultimately offered her a position that matched her limitations. *Id.* at 444. The employer thus avoided liability by searching for and finding a job that met the employee's limitations. Unlike *Griffith*, the District here did not search for an appropriate job, did not match the plaintiff's limitations with potential openings, and certainly did not offer the plaintiff a job. On the occasions when the plaintiff applied for jobs based on her own search efforts, she was rejected. While Ms. Lusebrink was prohibited at trial from arguing that she was the most qualified candidate, there is no evidence that the District took any affirmative action other than to fire Ms. Lusebrink.

The District relies on *Sharpe v. American Tel. & Tel. Co.*, 66 F.3d 1045 (9th Cir.1995) and *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 146 n.2,

94 P.3d 930 (2004) for the proposition that it did not need to reassign Ms. Lusebrink to an open position. This is incorrect. In *Sharpe,* the disabled employee was transferred as a result of cutbacks to a new position that was problematic for his disability. AT&T withheld Sharpe's transfer while it gathered sufficient information from Sharpe's doctor, and then helped him search for a new position by providing him with a secretary and regional personnel in addition to access to online postings. *Id.* at 1051. While Sharpe was considered but not hired for each of the three positions to which he applied, HR personnel contacted hiring managers to make sure Sharpe was fairly considered, and then offered him his old position back. *Id.* (emphasis added.) Thus, while *Sharpe* stands for the proposition that an employer does not have to select a disabled candidate over a better qualified candidate, the court also reaffirmed that an employer must take actual affirmative steps to inform an employee of job openings and then help her to apply for and move into openings. *Id.* Conversely here, the District did nothing of its own initiative other than to fire Ms. Lusebrink.

The District claims it solicited information from Ms. Lusebrink and her physician. It did not. As is apparent from Dr. Herner's letter of June 25, 2008, the District informed the doctor that Ms. Lusebrink could not teach in a general education classroom. No district witness acknowledges ever talking to Dr. Herner and asking her about what jobs Ms. Lusebrink could do—the

District, according to Dr. Herner, simply informed her what it would not allow Ms. Lusebrink to do. The District also claims it allowed Ms. Lusebrink access to its website. However, every citizen with access to the internet has the exact same access that the District claims it granted to her. In other words, the District passively allowed Ms. Lusebrink to search herself for a job—something she already had every right to do. Stated still a different way, the District did nothing.

In contrast, the employee in *Riehl v. Foodmaker* never confirmed with his employer that there was any nexus between his disability and the need for accommodation. *Riehl,* 152 Wn.2d at 146. Thus, the court held that it was not reasonable for the employer to provide accommodation unless medically necessary to do so. *Id.* at 147. It is undisputed in the present case, however, that Ms. Lusebrink has a disability medically requiring accommodation. The *Reihl* court reaffirms that employers are not required to place a disabled employee in a specific position, but nowhere does it remove the requirement that employers must affirmatively accommodate a disabled employee once that disability's requirements are made known to them.

As demonstrated above, the District failed to accommodate Ms. Lusebrink's disability. It is irrelevant whether she was, in fact, the most qualified candidate because the positions for which she applied were positions that she located on her own initiative. In an accommodation process, the first

step requires that the employer determine whether a job can accommodate a particular employee's disability. *Davis,* 109 Wn.App. at 884. Only then does an employee need to apply. *Id.* The District did not examine any positions to determine if they could fit Ms. Lusebrink's required accommodations. The District did not inform Ms. Lusebrink of any particular positions that could accommodate her disability. The District did not reassign Ms. Lusebrink to open positions as it could have. The District failed to take any affirmative measures to accommodate Ms. Lusebrink. The District instead asks this Court to shift the burden of complying with the WLAD from itself to Ms. Lusebrink. Under *Davis*, such minimization of the employer's role is error. *Id.*

The District's passive behavior up until the time Ms. Lusebrink was fired is precisely the conduct that has been previously held to be insufficient to constitute affirmative measures to assist the employee under both *Dean* and *Curtis*. It was error for the trial court to permit the District to argue that its lack of action was an accommodation. This court should reverse and remand for a new trial with a directed finding that the District is liable for failing to accommodate Ms. Lusebrink.

B. Ms. Lusebrink was prejudiced by Jury Instruction 11.

The trial court prejudiced Ms. Lusebrink by providing the jury with examples of passive conduct in its Instruction 11 that it defined as affirmative. A jury instruction is sufficient only when it allows a party to argue her theory

of the case while not misleading the jury and properly informs the jury of the law. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). It is not an either/or scenario. A clear misstatement of law is presumed to be prejudicial. *Keller v. City of Spokane*, 146 Wn.2d 237, 249–50, 44 P.3d 845 (2002). In the instant case, the instruction provided as examples of accommodation "making known job opportunities" and "determining whether [Ms. Lusebrink] was in fact qualified for those positions." This fails to describe the District's duty to accommodate under WLAD. While both informing the employee of positions and considering the employee for positions are indeed acts described by the *Dean, Curtis,* and *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 9 P.3d 787 (2000), no case law relieves the District of the responsibility to actually engage in the process. Conversely, many cases are decided in favor of plaintiffs when employers failed to interact in the process. *See Id.* Firing an employee is not an interactive act. Because of the inherent ambiguity in the examples of accommodation provided by the court, the jury could only reasonably decide whether accommodation occurred based on the passive definitions they were given in the instruction.

It is well established that jurors are presumed to follow the court's instructions. *See State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). Here, the jury is presumed to have followed the instruction erroneously defining the

District's passive conduct as sufficiently affirmative. Regardless of whether Ms. Lusebrink's counsel was able to argue against the erroneous instruction at closing, the jury is presumed to have considered the District's passive acts as affirmative accommodations.

The District is correct that it is not incumbent on a trial court to define common words that are self-explanatory. *State v. Brown*, 132 Wn.2d 529, 589-90, 940 P.2d 546 (1997). In *Brown,* the disputed terms were "in the course of," "in furtherance of," "in flight from," and "immediate flight" *Id.* The jury asked for a legal definition of "in furtherance of" and "immediate flight." *Id.* The trial court declined to define the terms. *Id.* In upholding the trial court's ruling, the *Brown* court specifically noted that

> The phrases here are not defined by statute. No appellate court has defined them and no pattern jury instructions address them. We conclude the phrases are expressions of common understanding to be given meaning from their common usage.

Id. The phrases were therefore determined to be expressions of common understanding.

What constitutes an affirmative act of accommodation under the WLAD, however, has been the subject of numerous lawsuits citied in this briefing. It is far-fetched to assume that an average juror will have sufficient grasp of the relevant case law to know that under *Davis*, 109 Wn.App. at 894, simply allowing access to online postings is insufficient to "inform" an

employee of relevant jobs, and that under *Curtis*, 69 Wn.App. at 17, the employer must evaluate whether the disabled employee can perform the job and then affirmatively assist the employee in applying for that job. The trial court's response to the jury's request for a definition of "affirmative" that the word be given its ordinary meaning thus failed to communicate what it actually means under WLAD. "Affirmative" could mean so many different things in this context that it has no "ordinary" meaning, and such an explanation by the trial court would only confuse jurors.

The District again attempts to narrow the scope of Ms. Lusebrink's case theory to only whether it should have assigned her to an open position. To the contrary, plaintiff has consistently argued throughout this case that the District has failed to provide any reasonable accommodation to Ms. Lusebrink, instead relying on her to navigate the process alone. Reassignment to an open position is an accommodate mechanism that was easily available to the District in this case. However simple the District's online jobs postings were to navigate, however, the District cannot relieve itself of its duty to find specific jobs appropriate for Ms. Lusebrink, and communicate those opportunities to her. *Davis*, 109 Wn.App. at 894. The District's obligation under *Dean* and *Curtis* is not dependent on Ms. Lusebrink instructing the District to inform her of appropriate jobs.

Also contrary to the record in this case, the District now asserts in its Response that it "sent [Ms. Lusebrink] notice of all job openings." Brief of Respondent at 35. The District does not cite to the record for this proposition. In fact, there is nothing in the record to support this contention. No witness testified that they sent Ms. Lusebrink any job postings appropriate for her disability. The opposite is true: Mr. Klug testified that he assigned some secret worker to perform this task. VRP July 23, 2012 at 43. This worker never testified. Ms. Lusebrink never received a telephone call, letter, email, or any other communication from the District that it had identified any particular open jobs as suitable for her disability. VRP July 16, 2013 at 89-91; VRP July 23, 2012 at 53. Apparently, the District is interpreting its act of posting jobs to its online site as affirmatively examining and notifying Ms. Lusebrink of appropriate jobs. Ms. Lusebrink's access to this system existed before she notified the district of her disability, just as it existed for every other potential applicant. As a result, this fails to demonstrate that Ms. Lusebrink was treated differently than any other applicant. Again, the fact that Ms. Lusebrink was considered for positions to which she applied is irrelevant, because those were positions to which she applied entirely independent of any act or assistance by the District. Mr. Klug didn't even know she had applied. VRP July 19, 2013 at 29.

It was error for the trial court to give Jury Instruction 11. The instruction misstated the law and understandably confused the jury. This Court should reverse.

C. It was error to deny Plaintiff's motion for mistrial.

Instruction 11 should never have gone to the jury for the additional reason that the trial court should have granted Ms. Lusebrink's motion for mistrial when it became apparent the District had purposely elicited testimony in violation of at least two orders in limine. As an initial matter, Ms. Lusebrink did not waive her objection to the District's violation of the orders in limine prohibiting such testimony. The rule expounded by *State v. Sullivan*, 69 Wn.App. 167, 847 P.2d 953 (1993) is that a party loses an appealable issue regarding a violated order in limine when the party does not object to the order, because "[a] party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal." *Sullivan*, 69 Wn.App. at 172. This is because it is necessary that the trial court have an opportunity to determine whether the offered evidence is covered by the pretrial motions, and whether it could be cured through an instruction. *Id.*

In this case, both parties submitted standard motions in limine to exclude evidence of anything related to settlement discussions or negotiations, which the court granted. CP 1247; 1252. An additional order prohibited the

District from presenting evidence or testimony that it had accommodated Ms. Lusebrink in some previously-undisclosed manner. CP 1274. After the District violated the orders by eliciting testimony regarding a librarian position offered to Ms. Lusebrink during negotiations, Ms. Lusebrink's counsel moved for mistrial. There was extensive discussion on the record regarding the trial court's decision, and the court did in fact attempt a curative instruction. VRP July 19, 2012 at 155-189. The danger of preventing the trial court from avoiding prejudice as discussed by the *Sullivan* court was not an issue here. *Sullivan*, 69 Wn.App. at 172.

Additionally, no rule or case law supports the proposition that even if Ms. Lusebrink violated the court's order by discussing application to a librarian position she did not receive, that entitles the District to itself violate the order by eliciting testimony of settlement negotiations. The District did not object to Ms. Lusebrink's testimony regarding what jobs she applied to. VRP July 16, 2012 at 87. She was never called for an interview for the job. *Id.* Instead, the District later offered it as part of settlement negotiations. VRP July 19, 2012 at 157-58. Also, even if the District was somehow able to violate the order in response, it was in no way permitted to violate yet another order in limine that prohibited testimony of previously undisclosed claimed accommodations.

Mr. Lusebrink never "opened the door" to examination on settlement issues as contended by the District. In *State v. Gallagher*, 112 Wn.App. 601, 610, 51 P.3d 100 (2002), relied upon by the District, defense counsel deliberately questioned a detective regarding evidence of syringes, which he knew the detective could not testify to because it was excluded through a motion in limine, in an effort to paint a false picture that no drug activity was going on at his client's residence. The State, prior to questioning, requested of the court permission on redirect to question the detective regarding the excluded evidence of syringes found at the residence, which was granted. *Id.* This is a markedly different situation than the present case.

Ms. Lusebrink accurately testified that she did not receive any jobs she applied for, and the District then used this as an opportunity, without alerting the court, to violate the order by eliciting testimony it knew or should have known was misleading. Unfortunately, Ms. Lusebrink's counsel believed Mr. Lind was discussing a different position and did not realize the thrust of Mr. Lind's testimony in time to object until it was already on the record, and so made his objection known immediately on cross examination. VRP July 19, 2012 at 171. The jury was left in a position to believe that the District had reasonably offered Ms. Lusebrink a job as an accommodation, when in fact that offer was part of ongoing settlement discussions with her attorney long after she had been fired. Any prejudice the District believes it incurred by

testimony that it didn't hire Ms. Lusebrink for four jobs to which she applied rather than three is far outweighed by the prejudice Ms. Lusebrink incurred by Ms. Lind's false testimony that the District offered her a job with a full-time teacher's salary as an accommodation, when in fact it did no such thing.

The court in *State v. Avendano-Lopez*, 79 Wn.App. 706, 712-13, 904 P.2d 324 (1995), found that the defendant's testimony about being released from jail was insufficient to open the door to questions about the defendant's prior criminal acts. Here, Ms. Lusebrink's testimony that she had applied for and not received a job is insufficient to open the door to evidence regarding previously undisclosed and misleading testimony that the District had accommodated her. The rule of fairness described by the *Gallagher* court does not extend to previously undisclosed evidence of a material element of the case, especially when such evidence is indisputably false. VRP July 19, 2012 at 171-72.

As noted by the court in *State v. Weber,* 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983), the proper inquiry is whether the jury was prejudiced by the statements. Here, the jury was prejudiced by hearing inaccurate testimony from the District's general counsel, Mr. Lind. Mr. Lind falsely suggested to the jury that Ms. Lusebrink was actually offered a job, when she was not.

The watered-down limiting instruction provided by the court did nothing to resolve the problem, particularly when the instruction itself

inaccurately described Ms. Lusebrink as rejecting a position with the District. VRP July 19, 2013 at 188-89. Such an instruction is incapable of removing the "prejudicial impression" created in the minds of jurors. *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968). It instead compounded the prejudice of the testimony, as the court itself had now stated to the jury that the District had offered a position when it did not, and that Ms. Lusebrink had rejected the offered position when she did not. There is no difference between this and an improper argument in a suit for damages that the defendant offered $50,000 as settlement and the plaintiff rejected it. Even if the prejudice here could have been fixed through a curative instruction, the opposite occurred. It was error to deny Plaintiff's motion for mistrial.

D. It was error to deny Plaintiff's motion for a new trial.

As noted above, two major categories of error occurred during this trial. First, the trial court erred by permitting a serious misstatement of the law to become part of Jury Instruction 11. Second, the District presented repeated statements and testimony at trial that substantially prejudiced Ms. Lusebrink. Plaintiff objected, and in the case of Mr. Lind's testimony moved for mistrial, but the motion was denied and the damage was done. When an error of law materially and prejudicially affects the substantial rights of a party a trial, a new trial is appropriate. *Dickerson v. Chadwell, Inc.*, 62 Wn.App. 426, 429, 814 P.2d 687 (1991).

In his closing argument, counsel for the District made several references to the argument that the jury should "assume" that the District hired the most qualified person for the jobs rather than Ms. Lusebrink, and therefore its actions were within the law. Ms. Lusebrink's counsel objected on each occasion. The court sustained, but it was still implied to the jury that the District's hiring process was entirely reasonable without allowing Ms. Lusebrink to present her evidence to the contrary. Plaintiff was prohibited by the District's motion in limine from presenting her evidence that the individual hired was in fact not the most qualified candidate, and that this was pretext for discrimination. Combined with the fact that the jury had already been inaccurately told she rejected a position, the court's instruction to disregard Mr. Moberg's statements was useless. Parsing out the District's argument to exclude reference to qualifications of candidates does not cure the statement that the jury should "assume" that the District hired the "best suited" person. Stated simply, the District said that the jury should not question that it hired the most qualified candidate, and therefore behaving lawfully.

This argument goes straight to the errors contained in the court's instruction to the jury and the court's denial of mistrial. Throughout trial, the District presented evidence of exactly two things that it did: it permitted Ms. Lusebrink to continue to access online job postings, and it "considered" but

didn't hire her for jobs. It never presented evidence that it did anything else prior to firing her. Cumulative error can require a new trial. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). It can warrant reversal even when each error considered individually would not. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Although plaintiff maintains that each of the errors discussed above is individually significant enough to warrant reversal, the combination of errors that occurred in this case makes reversal even more necessary. It was error for the trial court to deny Ms. Lusebrink's motion for a new trial.

IV. CONCLUSION

The District failed to present any evidence that it engaged in any affirmative act of accommodation. Ms. Lusebrink was improperly left to her own devices to try and find an appropriate reassignment. At trial, the District purposely elicited improper, undisclosed, and highly prejudicial testimony from its general counsel, and compounded this problem with its counsel's statements during closing. The jury was then erroneously instructed on the law. This court should reverse the trial court, and remand with instructions to find for Ms. Lusebrink on liability.

DATED this the 12th day of August, 2013.

Tyler K. Firkins, WSBA No. 20964
Attorney for Plaintiffs

CERTIFICATE OF TRANSMITTAL

I hereby certify that the foregoing Appellant's Reply Brief was electronically sent (per prior agreement) to the following counsel:

ATTORNEY FOR RESPONDENT:

Jerry J. Moberg
Legal Department
451 Diamond Dr.
Ephrata, WA 98823
By E-Mail and Federal Express

DATED this 12th day of August, 2013, at Auburn, Washington.

Diana Butler

Diana Butler