No. 93883-1

SUPREME COURT OF THE STATE OF WASHINGTON

HASSAN FARAH, ILEYS OMAR, MARIAN MUMIN, DAHIR JAMA, FOUZIA M. MOHAMUD, MARIAN ALI, ABDIAZIZ ABDULLE, SAALIM ABUKAR, MOHAMED ISMAIL, SUDI HASHI, HALI ABDULLE, MURAYAD ABDULLAHI, ZAINAB AWEIS, FARDOWSA ADEN, MARYAN MUSE, ASLI MOHAMED, SAHRA GELLE (A/K/A) Hani Huseen), ASHA FARAH, ALI ADAM ABDI, MUNA MOHAMED, FARAH GEEDI, AHMED HASSAN HUSSEIN, IBRAHIM SALAH, AHMED A. HIRSI, and MOHAMUD A. HASSAN,

Plaintiffs/Petitioners,

v.

HERTZ TRANSPORTING, INC., MATT HOEHNE, and TODD HARRIS;

Defendants/Respondents.

ANSWER TO AMICUS CURIAE MEMORANDUM OF WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

Washington Court of Appeals Case No. 73268-4-I

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I. IDENTIFY OF PARTIES ANSWERING TO AMICUS CURIAE

Respondents Hertz Transporting, Inc., Matt Hoehne, and Todd Harris (collectively, "Hertz") file this Answer to the Memorandum of Amicus Curie ("Memorandum") filed by the Washington Employment Lawyers Association ("WELA") on January 12, 2017.

II. RELEVANT PROCEDURAL FACTS

On November 16, 2016, Plaintiffs filed their Petition for Review ("Petition") of the Published Opinion of the Court of Appeals ("Opinion"). Plaintiffs seek review of the determination that the trial court did not err in refusing to give a "pretext instruction" requested by Plaintiffs that would have informed the jury that it "may find" discrimination to be a substantial factor in Hertz's actions if "it has been proved" that the "stated reasons" for those actions are not "the real reasons," but rather "are a pretext" to hide discrimination. CP 1109. On December 20, 2016, Hertz filed its Response ("Response"). On January 12, 2017, WELA filed both a Motion to Appear as Amicus Curiae ("Motion") and the Memorandum it sought to file. On January 20, Hertz filed its objection to the Motion. On January 23, the Court granted WELA's Motion to file the Memorandum.

III. ARGUMENT

WELA's Memorandum is duplicative of Plaintiffs' Petition, offers only speculative assertions regarding what jurors do or do not understand,

and ignores the record in this case. The trial court's discretionary decision to decline Plaintiffs' pretext instruction, and the Court of Appeals' appropriate refusal to create a new rule that would eliminate a trial court's discretion in undefined circumstances, do not present "an issue of substantial public interest that should be determined by the Supreme Court." *See* RAP 13.4(b)(4).

A. WELA's Legal Arguments Duplicate Those in the Petition

WELA's Memorandum takes the same position, repeats the same legal arguments, and attempts to rely on the same cases set forth by the Plaintiffs in their Petition. *Compare* Petition (at 9-15) *with* Memorandum (at 2-8). Hertz previously addressed the fatal flaws in WELA's and Plaintiffs' duplicative argument in its Response. *Compare* Memorandum (at 2-8) *with* Response (at 9-20).

The only new argument WELA makes is the specious claim that a trial court's failure to expressly instruct the jury that it may rely on evidence of pretext to infer discrimination violates a plaintiff's constitutional right to a jury trial. Memorandum at 8-10. WELA, however, offers neither reference to the record nor competent legal authority in support of this argument. The trial court properly instructed the jury here that "the law does not distinguish between direct and circumstantial evidence," and that "circumstantial evidence" refers to

"evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case." 12/10 RP 52:21-53:8.[1] Appellate courts need only address whether the jury instructions as given precluded a plaintiff from arguing his or her theory of the case, were misleading, or when taken as a whole failed to inform the jury of the applicable statutory law. *Raum v. City of Bellevue*, 171 Wn. App. 124, 142, 286 P.3d 695 (2012). As discussed in the Response (at 14-19), the instructions in this case were legally accurate and allowed Plaintiffs to argue their theory that Hertz engaged in a wide ranging conspiracy to discriminate against them.

B. WELA Does Not and Cannot Support its Legal Argument with the Record in this Case

In arguing that this Court should accept review and "hold that in a discrimination case under RCW 49.60 a trial court must give a requested pretext instruction … when one is supported by the evidence," WELA concedes the trial court's authority to decide jury instructions based on the evidence before it.[2] Memorandum at 1. Yet WELA offers no discussion of the actual evidence in this case or any citation to the record, and admits to have only read the Opinion, the Petition, and the Response. *See* Motion

[1] Cites to the Report of Proceedings are [month/day] RP [page:line(s)].

[2] *See, e.g., Clark County v. McManus*, 185 Wn.2d 466, 470, 372 P.3d 764 (2016) (trial court has the discretion whether to give a particular jury instruction).

at 2 (Part III). WELA attempts to bypass this shortcoming with the conclusory and false assertion that "it is undisputed" that "the evidence presented at trial supported a pretext instruction." Memorandum at 3.

To the contrary, the undisputed facts in this case demonstrate why the trial court correctly rejected Plaintiffs' proffered instruction. Those facts include, but are not limited to, the following:

- More than half of all of Hertz's Shuttler employees were practicing Muslims (12/3 RP 85:21-86:9), and Hertz allowed its Muslim employees to take paid rest breaks to engage in prayer and prayer-related activities (11/13 RP 96:7-97:13);
- Each work day, Plaintiffs and other Muslim Shuttlers were taking both multiple paid prayer breaks without clocking out and regular paid ten-minute rest breaks for which they clocked out;[3]
- Hertz imposed a policy requiring Shuttlers to clock out for all rest breaks, including prayer breaks (12/9 RP 81:5-82:14);
- Plaintiffs (and others) who did not follow that policy when taking prayer breaks after the policy was implemented were suspended;[4]
- Hertz sent Plaintiffs (and others) a letter informing them, *inter alia*, that they remained free to pray at work and could return to work if they agreed to acknowledge and follow the clocking rule;[5]
- Plaintiffs (unlike other suspended Shuttlers) did not sign and return the acknowledgement (12/8 RP 186:17-187:6) and were discharged by Hertz (11/17 RP 61:1-62:19);

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[3] 12/9 RP 73:23-74:6; 12/4 237:10-14. Petitioners admitted this key point. 11/12 RP 31:6-13; 11/13 RP 136:25-137:13; 11/17 RP 173:3-10; 11/18 RP 65:7-22, 125:5-8; 11/19 RP 79:7-13; 11/20 RP 10:14-23, 24:21-25:1; 11/24 RP 26:2-23, 49:12-21, 84:7-20, 114:24-115:9; 11/25 RP 14:19-15:10, 47:15-25, 69:9-16, 112:24-113:6; 12/1 RP 34:15-18, 74:25-75:7, 107:2-6; 12/2 RP 26:6-10, 59:13-21, 98:10-17, 120:25-121:6; 12/3 RP 31:25-32:13, 57:19-58:15.

[4] 11/12 RP 170:23-171:6; 12/4 RP 42:25-44:8, 88:11-89:11, 91:16-92:1, 96:17-23; 12/9 RP 97:14-99:12.

[5] 12/8 RP 181:14-25, 185:5-186:2; 12/9 RP 170:9-19; Ex. 58.

- Two Muslim Shuttlers who complied with the rule from the outset were not suspended;
- Eight Muslim Shuttlers who returned to work after acknowledging the clocking rule, as well as five Muslim Shuttlers who were on leave during the suspensions, all complied with the clocking rule on their return without controversy.[6]

While Plaintiffs argued that Hertz implemented the clocking rule because of discriminatory animus, the undisputed facts showed that all Plaintiffs (who made up a large percentage of Hertz's Shuttler workforce) were taking paid rest break time far in excess of the allowed amounts.[7] Given the undeniable economic costs and impacts to Hertz from Plaintiffs' excessive use of paid work time for personal activities and Plaintiffs' undisputed refusal to acknowledge the rule requiring them to clock for all rest breaks, Plaintiffs' case theory of a vast discriminatory conspiracy against them did not (and could not) depend on any argument that Hertz's stated legitimate reasons for its actions in fact played no role whatsoever in its motivations for those actions. Accordingly, this case simply did not turn on a pretext argument (*i.e.*, an argument that Hertz's stated reasons for its actions were entirely false) sufficient to warrant the requested instruction.

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[6] 11/17 RP 61:1-62:19, 68:6-69:24; 12/3/RP 95:22-96:6; 12/9 RP 127:20-128:2.

[7] It is important to note that Plaintiffs did not claim in this lawsuit that they were unable to perform their prayers and prayer-related activities within the allotted paid break time, nor did they otherwise make any claim that Hertz failed to accommodate their religious practices.

C. WELA Falsely Claims that Plaintiffs' Proposed Pretext Instruction is "Legally Correct"

WELA further mispresents the record in this case by asserting that it is "undisputed" that Plaintiffs proposed "a legally correct pretext instruction" based on Washington law. Memorandum at 3. To the contrary, Hertz's position is that, even if the proposed instruction is generally "an accurate statement of the law" (Opinion at 5), that instruction was not necessary, applicable, or appropriate in this case, and instead would have created a risk of jury confusion and prejudice.

Given that Hertz had legitimate interests in monitoring and curtailing the excessive amounts of paid work time being taken by Plaintiffs and others for personal activities, providing Plaintiffs' requested pretext instruction would have carried the risk that the jury would be confused into believing that Plaintiffs needed to disprove the legitimacy of Hertz's stated reasons for its actions. In fact, the jury could both accept that Hertz's stated reasons were legitimate and nevertheless conclude that discriminatory animus was also a "substantial factor" for Hertz's actions if warranted by the evidence (which it was not).[8] This Court has recognized

[8] *Cf. Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1343–45 (9th Cir. 1987) (finding no reversible error in refusal to give defendant's proposed instruction regarding a plaintiff's burden to prove defendant's reasons were pretextual and noting that an instruction on pretext "might mislead the jury to believe that the plaintiff must prove that the employer's stated nondiscriminatory reason was false and that age was the sole factor

that an employee may show "pretext" with evidence "either (1) that the defendant's reason is pretextual or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer." *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 446–47, 334 P.3d 541 (2014) (emphasis added). Accordingly, Plaintiffs' proposed instruction could have been misleading, because it is not consistent with the description of pretext in *Scrivener* and could have been interpreted by the jury to indicate that Plaintiffs were required to disprove Hertz's stated reasons for the jury to be able to infer discrimination.[9]

D. Plaintiffs' Failure to Convince the Jury Cannot be Attributed to the Lack of their Requested Pretext Instruction

Evidently recognizing the fact that Hertz's concerns about excessive paid rest break time by Plaintiffs were undeniably legitimate, in their closing argument, Plaintiffs: (1) conceded that "[t]his case isn't about … whether Hertz could make a group of people clock out for prayer" and "instituting a clock-out plan" was "fine"; and (2) instead argued that "[i]t's how [Hertz] went about it that was discriminatory." 12/10 RP 67:10-20;

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in the decision") (emphasis added) (internal citations omitted).

[9] Given the absence of evidence (or even argument) that Hertz's actions were not motivated, at least in part, by its stated business reasons, use of Plaintiff's pretext instruction would also create a significant risk of being interpreted by the jury as a judicial comment on the evidence offered by Hertz and the ultimate issue in this case. *See Browning v. U.S.*, 567 F.3d 1038, 1039-42 (9th Cir. 2009) (noting "the risk that an inference instruction can be seen as potentially a comment on the evidence") (internal citations omitted).

71:2-17. Drawing upon the instruction given to the jury that, in order to find discrimination to be a "substantial factor," the jury need not find it to be "the only factor or the main factor" (12/10 RP 54:11-55:2, 56:10-14), Plaintiffs argued that "there could be a hundred substantial factors" for Hertz's actions, and national origin or religion need only be "in the mix," and "plaintiffs win." 12/10 RP 72:4-25. Thus, Plaintiffs' strategy and closing argument in this case did not hinge on proving or even arguing that Hertz lacked any legitimate motivations for its actions, but rather focused on attempting to convince the jury that discrimination was also among those motivations.[10]

In short, WELA's abstract argument that jurors are unable to understand that they may infer discrimination from circumstantial evidence without an express pretext instruction is divorced from the evidence and circumstances in this case and ignores the fact that "[j]urors

[10] *See, e.g.*, 12/10 RP 70:8-72:25. Notably, Plaintiffs also did not limit themselves to arguing that the jury should infer discrimination from indirect, circumstantial evidence. They also argued that there was "direct evidence" of discrimination because the notice Hertz posted regarding the new clocking rule expressly stated that the rule applied to prayer breaks. 12/10 RP 76:8-77:25. Of course, Hertz offered its own testimony that it instituted the clocking rule to address the open and obvious issue of a large number of Shuttlers (including Plaintiffs) taking unclocked breaks for prayer in addition to regular clocked rest breaks and that it was not aware of any other comparable recurrent and widespread issue of excessive paid rest break time. *See, e.g.*, 12/9 RP 77:9-81:4. Additionally, Plaintiffs also offered hotly contested evidence of a Hertz manager allegedly telling one of the Plaintiffs he "looked like a terrorist" and otherwise treating the Plaintiffs poorly. *Compare* 12/10 RP 84:21-85:2 *with* 12/9 RP 20:11-18.

do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might," but rather can bring a "commonsense understanding of the instructions in the light of all that has taken place at the trial . . . ." *Boyde v. California*, 494 U.S. 370, 380–81, 110 S. Ct. 1190 (1990). Here, given the facts in this case and Plaintiffs' repetitive closing argument regarding Hertz's alleged "set up" and "plan" to target them for suspension and termination,[11] there is no basis to conclude that a pretext instruction was necessary for Plaintiffs to argue their theory of the case or that the jury did not understand that its job was simply to determine whether discriminatory animus was a "substantial factor" in Hertz's actions based on the totality of the evidence, including its assessment of the credibility of witnesses and any direct and circumstantial evidence, which the trial court explained to the jury to be "evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case." 12/10 RP 48:14-49:11, 52:21-53:8. Plaintiffs did not need a pretext instruction and did not face a high hurdle in merely being asked to convince the jury that, notwithstanding any legitimate business reasons for Hertz's actions, discrimination was nevertheless a "substantial factor" in those actions, even if not "the only factor or the main factor" (12/10 RP 54:11-55:2,

[11] *See, e.g.*, 12/10 RP 76:8-77:18, 85:11-13, 86:24-87:7, 88:10, 93:23-24, 176:15-17.

56:10-14). They simply failed to do so.

IV. CONCLUSION

For the foregoing reasons, this Court should reject WELA's unsupported contention that the record in this case and the trial court's exercise of discretion to deny the Plaintiffs' proposed pretext instruction constitutes "an issue of substantial public interest that should be determined by the Supreme Court." *See* RAP 13.4(b)(4).

Respectfully submitted this 13th day of February, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies as follows:

I am and at all times herein after mentioned a citizen of the United States, a resident of the State of Washington, over the age of 18 years, and competent to be a witness in the above action, and not a party thereto; that on February 13, 2017, I caused to be served the foregoing *Answer to Amicus Curiae Memorandum of Washington Employment Lawyers Association* via E-Mail and U.S. Mail, First Class postage prepaid on the following:

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