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.

RESPONSE TO PETITION FOR REVIEW

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

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Petitioners challenge the Court of Appeals' reasoned decision to allow, but not require, an instruction to the jury on a permissible inference of discrimination in disparate treatment cases under the Washington Law Against Discrimination ("WLAD"). While Petitioners seek a change in the law to make such a "pretext instruction" mandatory, they provide no compelling reason for (i) the creation of such an inflexible rule in Washington, or (ii) a finding that the trial court abused its discretion here in declining to provide their requested instruction.

I. STATEMENT OF THE CASE

The Hertz Corporation[1] operates a vehicle rental operation at Sea-Tac International Airport ("Sea-Tac"). 11/13 RP 92:24-93:2.[2] Hertz employed the Petitioners as Shuttlers, who are responsible for moving vehicles within the Sea-Tac garage. 12/4 RP 191:7-21. As of September 30, 2011, more than 50 percent of its Shuttlers were practicing Muslims.[3] 12/3 RP 85:21-86:9. At the time of trial, the Shuttler staff was also about 50 percent practicing Muslims. *Id*. Hertz allowed Muslim employees to take paid rest breaks to engage in prayer and related activities.[4] 11/13 RP

[1] The Hertz Corporation is the corporate affiliate of Defendant Hertz Transporting, Inc. 12/4 RP 144:18-21. "Hertz" refers to both entities collectively.
[2] Cites to the Report of Proceedings are [month/day] RP [page:line(s)].
[3] Most of Hertz's Muslim workforce was from Somalia. 12/3 RP 84:24-85:3.
[4] Shuttlers received a paid ten-minute rest break (with a five-minute grace period) for every four hours worked. 11/13 RP 98:6-17.

96:7-97:13. Hertz allowed great flexibility as to the frequency and timing of these breaks and maintained two prayer rooms. *Id.*; 12/3 RP 139:2-23.[5]

Hertz managers communicated with Petitioners in English.[6] Several Petitioners were Lead Shuttlers, which required them to speak with Dispatchers over the radio in English.[7] Other Petitioners also admitted that they could communicate in English.[8]

A. Concerns with Shuttlers' Abuse of Paid Rest Breaks

Hertz expected Shuttlers to clock for their paid rest breaks so it could objectively monitor the frequency, timing and duration of breaks. 11/13 RP 99:10-15. While the requirement was in place for years, Hertz knew that some Muslim Shuttlers were taking unclocked breaks for prayer while also taking full clocked rest breaks, which impacted operations. *Id.* at 100:24-105:6; 12/4 RP 208:4-21; 12/8 RP 109:12-111:24. Hertz undertook periodic efforts to monitor and curb abuse of paid rest breaks.[9] While the policy to clock for all breaks remained, prayer was a sensitive

[5] Hertz installed a foot washing station and designated a sink so its Muslim employees could wash prior to prayer. 11/13 RP 96:7-97:13; 12/3 RP 82:6-11.
[6] 11/17 RP 127:17-128:1; 12/4 RP 19:1-15, 83:22-24, 196:16-198:22; 12/8 RP 105:22-106:6; 12/9 RP 63:20-65:8. Even a manager who spoke both English and Somali usually communicated with the Petitioners in English. 12/3 RP 101:17-105:19.
[7] 11/19 RP 88:13-15; 11/20 RP 7:15-8:2; 11/24 RP 102:10-12, 103:13-16; 12/1 RP 105:13-16; 12/4 RP 192:11-16. Hertz generally provided written communications in English. 12/8 RP 18:25-19:6.
[8] *See, e.g.*, 11/12 RP 15:14-16;11/13 RP 132:9-18; 11/18 RP 42:14-16, 52:7-10, 63:2-15; 11/19 RP 76:17-20; 11/20 RP 7:15-8:2, 44:15-18; 11/25 RP 13:5-6, 56:17-22; 12/1 RP 32:15-16, 104:15-18, 105:3-7.
[9] For example, Hertz issued a memo in April 2009 to all Shuttlers reminding them that unclocked breaks were a violation of company policy that could lead to discipline, up to termination. 11/13 RP 101:23-102:25, 167:20-170:10; Exs. 1735, 1892.

issue, and obtaining compliance became more difficult with a growing operation. 11/13 RP 101:6-22; 12/3 RP 112:16-113:8.

Hertz resolved to address the problem of excessive paid break time in late 2010 CBA negotiations with the Shuttlers' union. 12/3 RP 87:1-88:12; 11/13 RP 171:3-23. The union's CBA negotiating team included Petitioner and Shop Steward Ileys Omar. 11/17 RP 8:23-9:6; 12/9 RP 191:1-18. The parties agreed that ten-minute breaks would be clocked, but Shuttlers would have the option to break their rest periods into "mini-breaks." 11/17 RP 9:24-13:21. Hertz agreed to the mini-break option because Ms. Omar said it would allow Shuttlers to accommodate prayer. *Id*. at 14:4-19; 11/12 RP 118:10-119:23.[10] Shuttlers would not be required to clock out for mini-breaks, so long as they were not abused. 11/17 RP 15:6-16. The option to use mini-breaks for prayer did not expand the amount of rest break time provided by the CBA. *Id.* at 15:17-16:1.

After CBA ratification, Hertz issued warnings to Petitioners who took unclocked prayer breaks without following the mini-break procedure. 12/4 RP 227:13-231:14, Ex. 1746. Hertz later discussed and posted a

[10] 11/12 RP 118:10-119:23 (impeachment of Ms. Omar based on her prior testimony that "the whole reasoning why we put the mini language in there" is so "anyone who is praying who used the mini language, the mini prayer, the mini time to pray, which is that they will not be clocking out. And all the other people, even though [sic] that chose to take the ten minutes, they will clock out for the ten minutes and do whatever they want to do. And if you choose not to take the ten minutes, you take the mini-breaks, which means you don't clock out, but you can use it to pray or whatever you want to do.")

memo stating, "all religious observation must take place off company time." 12/4 RP 237:15-241:1, Ex. 1884. But rest break abuse continued, impacting employee productivity and morale. 11/17 RP 24:17-26:16.

Hertz thus decided to require Shuttlers to clock out for **all** time spent on personal activities beginning September 30.[11] 12/9 RP 81:5-82:14. Hertz posted and distributed a memo to the Shuttlers in advance stating that "all rest and meal periods must be punched, including any religious observation you do when you're here." Ex. 1; 12/4 RP 244:7-245:19. During multiple shift meetings on September 28 and 29, managers reviewed the policy and emphasized that Shuttlers would need to clock out for all rest breaks, including prayer. 12/8 RP 60:2-8; 12/9 RP 88:9-89:4.

B. Petitioners Choose not to Comply

From September 30 to October 4, managers and Dispatchers reminded Shuttlers as they were clocking in for the day and in shift meetings to clock out for all breaks, including those spent eating, sleeping, smoking, drinking coffee or praying.[12] At prayer times, as Shuttlers approached prayer areas, managers again encouraged them to clock and informed them that refusing amounted to insubordination.[13] Despite these

[11] Hertz excluded restroom and water fountain use. 11/17 RP 26:22-27:1.
[12] 12/4 RP 87:23-89:11, 95:8-96:2; 12/9 RP 96:7-14;-97:22.
[13] 11/12 RP 217:8-17; 12/4 RP 88:11-92:1, 96:17-97:6; 12/9 RP 97:14-100:25.

efforts, 34 Shuttlers refused to clock out for prayer.[14] Faced with open defiance, Hertz suspended Shuttlers it observed refusing to clock out.[15]

The jury received extensive evidence that Petitioners understood the clocking rule, but simply refused to comply.[16] For example, on September 30 after Hertz suspended Petitioner Muna Mohamed, Petitioner Asha Farah left a voicemail for her union business agent stating, in relevant part: "this morning, yesterday they came whatever they say you guys have to, if you are religious__, you have to punch out anytime you praying. … We don't care. We praying. They have to send us home."[17]

After the suspensions, Hertz investigated whether managers had effectively communicated the clocking rule to the Shuttlers and whether those suspended had been insubordinate.[18] 11/17 RP 33:19-34:2. Hertz

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[14] 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.

[15] 12/4 RP 88:11-93:14, 96:17-98:16; 12/9 RP 97:14-101:24. Petitioners claimed Hertz did not enforce the rule for coffee or smoking breaks, but managers, Dispatchers and Petitioners alike testified that they did not see Shuttlers taking smoking or coffee breaks without clocking out on the days the suspensions occurred. *See, e.g.*, 11/12 RP 116:14-23; 11/18 RP 107:12-110:5; 11/20 RP 42:12-17; 11/24 RP 35:2-10, 66:13-67:17, 108:12-109:5; 11/25 RP 8:23-9:1, 61:19-62:1, 100:24-101:2; 12/2 RP 13:13-14:5, 89:11-16; 12/3 RP 18:11-21; 12/4 RP 53:4-24; 12/8 RP 151:13-23; 12/9 RP 130:23-131:1.

[16] *See, e.g.*, 11/13 RP 151:1-152:7; 11/25 RP 33:3-34:2; 11/25/RP 142:24-143:24; 12/4 RP 88:11-89:6, 94:16-95:19, 12/9 RP 109:25-110:9, 11/12 RP 97:5-105:20; 11/24 RP 26:2-23.

[17] Exs. 1773 (voicemail), 1893 (transcript).

[18] Company policy defined insubordination as a refusal to follow a directive of management. 12/4 RP 160:15-161:7. Insubordination could result in discipline up to and including immediate termination. *Id*. at 165:6-25; Ex. 1076. The investigation included manager and employee statements and employee surveys regarding the rest break policy. 11/17 RP 33:19-35:9. The statements included a report that Petitioner Saalim Abubakar said, "I can see big money coming. Ten[,] Twenty or maybe $30,000 apiece." Ex. 1882.

concluded that the suspended Shuttlers were informed of the rule and had refused to follow it.[19] *Id.* Hertz therefore upheld the suspensions. *Id*.

Hertz's top manager in Washington, Zaidun Abdallah,[20] drafted a letter asking the suspended Shuttlers to accept the clocking rule and return to work. 12/8 RP 181:14-25, 185:5-186:2; 12/9 RP 170:9-19; Ex. 58. He sent the letter to each suspended Shuttler, stating: (1) Hertz was <u>not</u> denying them an opportunity to pray; (2) Hertz did not intend to dock their pay for prayer breaks; (3) Hertz expected them to follow managers' instructions; (4) if they disagreed with an instruction, they were free to file a grievance;[21] and (5) they needed to return the enclosed acknowledgment of the clocking rule by the stated deadline. 12/8 RP 185:5-186:2.[22] In response, each Petitioner sent Hertz a letter (drafted by Ms. Omar) asserting that Hertz violated the CBA and federal labor law by requiring them to clock out for mini-breaks and offering to return to work **if** Hertz

[19] The investigation identified two Somali Muslim Shuttlers who complied with the rule on September 30, including Hassan Hassan. 11/17 RP 59:2-11; 12/9 RP 126:24-127:3. Mr. Hassan's time card showed he had taken prayer breaks in addition to, rather than as part of, his allotted break time. 12/3 RP 92:12-93:5. Hertz simply reminded him that prayer was to be part of break time and he received no discipline. *Id*. at 93:6-94:5.
[20] Mr. Abdallah is himself a practicing Muslim. 12/8 RP 179:12-13.
[21] Hertz also promised Petitioners' union that it would expedite any challenge to the clocking rule or the suspensions under the CBA. 12/9 RP 170:9-19; Ex. 58.
[22] Exs. 58, 65, 72, 79, 87, 93, 100, 106, 114, 121, 129, 141, 151, 160, 169, 177, 185, 192, 201, 209, 216, 225, and 232.

dropped the rule.[23] The mini-break argument was inapposite, as Shuttlers were taking prayer breaks **in addition to** full ten-minute rest breaks.[24]

Only nine of the 34 suspended Shuttlers chose to sign and return the acknowledgment. 12/8 RP 186:17-187:6. Faced with Petitioners' refusal to even provisionally follow this rule (*i.e.*, while grieving it), Hertz discharged them. 11/17 RP 61:1-62:19. On October 21, to offset the loss of the Petitioners, Hertz hired nine Shuttlers, including three previously laid off employees known by Hertz to be Somali Muslims who prayed at work. *Id.* at 68:6-69:24. These three, together with the two Muslim Shuttlers who chose to comply from the outset, the eight Shuttlers who returned to work after receiving Mr. Abdallah's letter, and five Muslim Shuttlers who were on leave during the suspensions, all complied with the clocking rule. *Id.*; 12/3/RP 95:22-96:6; 12/9 RP 127:20-128:2.

C. Hertz Applies the Clocking Rule to All Types of Breaks

Other than prayer breaks, Hertz was not aware of other common and recurrent instances of Shuttlers disengaging from work without

[23] Exs. 59, 66, 73, 80, 88, 94, 107, 115, 122, 130, 142, 152, 161, 170, 178, 193, 202, 210, 217, 226, 233 and 243; 11/12 RP 44:8-45:22. Many Petitioners admitted they refused to follow the rule because they thought it violated the CBA, a position irreconcilable with their claimed lack of notice of the rule. *E.g.*, 11/12 RP 110:21-24; 11/18 RP 107:8-11; 11/19 RP 110:20-111:16; 11/24 RP 39:18-40:23, 71:24-72:16; 11/25 RP 61:14-16, 141:1-9; 12/1 RP 64:15-17, 93:9-11;12/3 RP 73:2-13.

[24] 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.

clocking out.[25] Nevertheless, Hertz instituted the clocking rule across the board and enforced it for all personal activities. 11/17 RP 63:19-67:24; 12/3 RP 95:22-97:18. Hertz made a concerted effort to confirm that Shuttlers engaged in personal activities were clocked out, with managers documenting hundreds of random time card checks.[26]

While Petitioners argued that Hertz only began enforcing the clocking rule against Shuttlers who smoked after "national news media coverage" (Petition at 6), the exhibit they relied on for this claim shows that Hertz was already monitoring Shuttlers for compliance across the board. Ex. 20. Hertz managers also testified that prior to September 30 they were instructed to require clocking for all breaks, not just prayer. 12/4 RP 241:13-243:18; 12/9 RP 81:5-82:14. While Petitioners claim (at 7) non-Somali employees were treated more favorably, they presented no evidence of other employees **refusing** to comply with the clocking rule.

II. ARGUMENT

Petitioners argued before the Court of Appeals that the trial court erred in rejecting their "pretext instruction," which states as follows:

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[25] 12/9 RP 129:6-9; 11/17 RP 62:20-63:8; 12/4 RP 209:7-18, 246:12-19. Despite claims of smoke break abuse among Shuttlers, Petitioners could only identify a few who they claimed took smoke breaks without clocking out in 2011, many of whom were Somali Muslims. *See, e.g.*, 11/25 RP 39:10-40:11, 101:3-102:9; 12/1 RP 48:22-49:12, 65:4-66:8; 12/2 RP 14:6-16:1, 52:13-53:23; 12/3 RP 18:22-19:18.

[26] 11/17 RP 63:19-67:24; 12/3 RP 95:22-97:18; 12/4 RP 99:5-23, 192:17-193:3, 202:14-203:11, 204:5-207:11, 247:8-20; Ex. 1766; 12/8 RP 114:16-115:1, 149:10-150:24; 12/9 RP 162:16-163:2.

> You may find that a plaintiff's religion or national origin was a substantial factor in the defendant's [sic] decision to suspend or terminate a plaintiff if it has been proved that the defendants' stated reasons for either of the decisions are not the real reasons, but are a pretext to hide religious or national origin discrimination.

CP 1109. The Court of Appeals' opinion ("Opinion") did not create an issue of substantial public interest or contradict controlling authority pursuant to RAP 13.4(b) merely by declining to require a pretext instruction in **all** WLAD cases, thereby supplanting the discretion of trial court judges to determine whether it is appropriate in each case.

A. Petitioners' Requested Pretext Instruction Does Not Present an Issue of Substantial Public Interest

1. The Foundation for the Pattern Jury Instructions for the WLAD

The concept of pretext arises from the shifting burdens of proof that Washington courts adopted for evaluating motions for judgment as a matter of law in WLAD cases. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179-182, 23 P.3d 440 (2001).[27] Once the employee presents a prima facie case, a presumption of discrimination exists and the employer must produce evidence of its legitimate, nondiscriminatory reasons for the termination; if the employer meets this burden, the employee must show that the employer's reasons are pretextual and unworthy of belief. *Id.*

[27] Under this test, an employee must first make out a prima facie case by showing he or she: (1) was within the protected group; (2) was discharged; (3) was doing satisfactory work when discharged; and (4) was replaced by someone not in the protected class. *Griffith v. Schnitzler Steel Indus., Inc.*, 128 Wn. App. 438, 446-47, 115 P.3d 1065 (2005).

In 1992, the Court of Appeals in *Burnside v. Simpson Paper Co.* addressed whether a trial court should have instructed its jury on the shifting burdens of proof. 66 Wn. App. 510, 522-24, 832 P.2d 537 (1992) *aff'd*, 123 Wn.2d 93, 864 P.2d 937 (1994). *Burnside* concluded that the trial court had properly limited its instructions to the ultimate question of discrimination. *Id*. The court held that "[i]ssues of the plaintiff's prima facie case, the employer's burden to rebut with a legitimate nondiscriminatory reason, and the employee's showing of pretext are irrelevant once all the evidence is in," observing that it "creates needless confusion to instruct the jury on these burdens." *Id*.

In 1993, this Court addressed the pretext concept in *Kastanis v. Educational Employees Credit Union*.[28] The trial court had instructed the jury on the elements of the employee's marital status discrimination claim, but placed the burden on the employer to prove the defense of "business necessity." 122 Wn.2d at 489. The employer challenged that burden allocation, as well as the court's refusal to instruct that the employee must prove the employer's business necessity was pretextual. *Id*. at 488-495. The Court noted the difficulties when jury instructions include the burden-shifting test, because it was "never intended as a charge to the jury." *Id*. at 490. The Court determined that, given the employee's burden to prove

[28] 122 Wn.2d 483, 859 P.2d 26 (1993), *amended*, 122 Wn.2d 483, 865 P.2d 507 (1994).

discrimination, the instructions misstated the law by placing the burden to prove business necessity on the employer, but also concluded that "a separate instruction on pretext was unnecessary," and thus the trial court did not err in declining to give such an instruction. *Id*. at 494-95. While an employee must show pretext to avoid summary judgment, the employee's "burden at trial is to prove the employer intentionally discriminated." *Id*.

This Court issued another landmark decision for WLAD jury instructions two years later in *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995). Rejecting a standard that would require an employee to prove that discrimination was "a 'determining factor,'" the *Mackay* Court instead held that an employee need only prove that discrimination "was a 'substantial factor'" in the employer's challenged action, explaining that a discrimination action under the WLAD is "a multiple causation case." 127 Wn.2d at 285-89.

Consistent with these cases and other precedents, Washington's pattern instructions set forth the flexible "substantial factor" standard for discrimination claims and do not include **any** accompanying instructions addressing burden shifting or the concept of pretext. 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 330.1 at pp. 343-48 (6th ed. 2012) (WPI). To the contrary, the comments to the model instruction addressing the burden of proof state that the "jury should not

be instructed on burden shifting" and "an instruction or language on pretext is inappropriate." *Id.* at 346 (citing *Kastanis* and *Burnside*). At the same time, the model instruction makes clear that to prevail an employee need only prove that the employer took the challenged action and that discrimination "was a substantial factor" in the employer's decision. *Id.* at 346. The instruction also broadly defines "substantial factor" to mean "a significant motivating factor in bringing about the employer's decision," and clarifies that "substantial factor" does "not mean the only factor or the main factor in the challenged action or decision." *Id*. at 348.

2. There Was No Error of Law in the Jury Instructions

In this case, the trial court provided instructions on discrimination that mirror the pattern instructions and accurately reflect the WLAD. 12/10 RP 54:11-55:2, 56:10-14. Petitioners nevertheless contend that the instructions failed to inform the jury of the applicable law. Petition at 9-15. Petitioners claim that the refusal to mandate a pretext instruction undermines the WLAD and allows for rampant jury confusion. This argument is not supported by logic, experience or applicable law. For the more than 20 years since *Burnside*, *Kastanis* and *Mackay*, trial courts have been guided by **both** *Mackay's* broad interpretation of the WLAD **and** the directives of *Burnside* and *Kastanis* that burden-shifting and pretext

instructions are not necessary and carry the risk of jury confusion.[29] These concepts are baked into the pattern jury instruction via the flexible "substantial factor" test for liability. The mere fact that no Washington appellate court has previously mandated a pretext instruction belies Petitioners' claim that one is required under the WLAD in every case.

Petitioners argue that an instruction on pretext is necessary to give effect to the Court's decision in *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172. In *Hill*, the Court addressed the standard an employee must meet to survive a motion for judgment as a matter of law. 144 Wn.2d at 176. The Court concluded that a prima facie case, "plus evidence sufficient to disbelieve the employer's explanation, will *ordinarily* suffice to require" a trial, but there will still be instances where no rational factfinder could find discrimination. *Id*. at 185-190. While *Hill* speaks to whether a case should be determined by a jury or as a matter of law, it does not mandate a one-sided jury instruction wherever an employee alleges pretext.

Accordingly, given the malleable instructions provided to the jury here to guide its determination of whether discrimination was a "substantial factor" in Hertz's actions, Petitioners have no basis for

[29] While the Court of Appeals concluded in its Opinion (at 7) that *Burnside* and *Kastanis* are not "dispositive" of the present issue because they do not directly address whether a pretext instruction on permissible inferences is required, these precedents certainly reflect the absence of such a requirement and the existing discretion of trial courts to determine whether to provide such an instruction based on the evidence in each individual case.

claiming that the instructions given were an incorrect statement of Washington law without the addition of their proposed pretext instruction. Therefore, the Court of Appeals did not err by (i) declining to create a rule that would require trial courts to provide a pretext instruction, while still (ii) preserving a trial court's discretion to do so when appropriate.

3. The Jury Instructions Provided Were Sufficient

Jury instructions are sufficient if "they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). "No more is required." *Douglas v. Freeman*, 117 Wn.2d 242, 256-57, 814 P.2d 1160 (1991). Under this standard, the Court of Appeals reasonably determined that the instructions provided here were sufficient and the trial court did not abuse its discretion in refusing to give a pretext instruction.

The trial court provided the pattern instructions on Petitioners' claim that discrimination was a substantial factor in their suspensions and terminations, defining "substantial factor" broadly to be a "significant motivating factor" but not "the only factor or the main factor." 12/10 RP 54:11-55:2, 56:10-14. The trial court informed the jurors that (i) it was their "duty to decide the facts," (ii) they were "the sole judges" of witness credibility and "the value or weight to be given to the testimony of each

witness," and, (iii) they could consider, *inter alia*, "any personal interest the witness might have in the outcome," "any bias or prejudice" shown, and "the reasonableness of the witness's statements in the context of all of the other evidence." 12/10 RP 48:14-49:11. The trial court informed the jury 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.

These instructions left Petitioners free to argue to the jury that Hertz's concerns regarding Petitioners' abuse of paid rest break time and open refusal to clock for all paid rest breaks were "not the real reasons" for their suspensions and terminations and that the jury should infer that discrimination was a "substantial factor" in Hertz's actions. Petitioners in fact structured their case, from opening,[30] through witness examination,[31] to closing, on unfounded allegations that Respondents were simply lying. In Petitioners' closing, their counsel: (i) repetitively argued that Hertz's reasons for its actions were a sham to execute a discriminatory plan to discharge the Petitioners; (ii) used the term "the plan" 16 times, "the setup" five times, and "targeting" five times, in reference to this alleged

[30] *See, e.g.*, 11/6 RP 107:3-4 ("So the plan. Hertz focused on clocking out for prayer."); *Id*. at 112:12-13 ("But the plan was only applied to the Somali Muslim workforce.")
[31] *See, e.g.*, 11/12 RP 161:17-19 ("The plan that was set up on the 27th, it focused only on the Somali Muslims and prayer, correct?").

plot; (iii) expressly discussed both "circumstantial" and "direct" evidence; and (iv) and even 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."[32] That the jury did not find in Petitioners' favor does not mean it was confused or not properly instructed.[33]

Thus, even accepting that one route by which a jury can find discrimination is to infer its existence from disbelief of an employer's stated reasons for its actions, the trial court's refusal to give Petitioners' specific pretext instruction in this case was not an abuse of discretion. *See City of Seattle v. Pearson*, 192 Wn. App. 802, 820–23, 369 P.3d 194 (2016) (proposed instruction was an accurate statement of law, but no error in its rejection where instructions "sufficiently informed jury of the applicable law" and allowed party to argue her theory of the case); *State v. Hathaway*, 161 Wn. App. 634, 647, 251 P.3d 253 (2011) (it is not error "to refuse a specific instruction when a more general instruction adequately explains the law and allows each party to argue its case theory").[34]

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[32] 12/10 RP 64:10-106:9, 168:1-181:8 (closing), 70:8-71:17; 77:5-77:25, 100:10-101:12, 175:13-21 (direct/circumstantial evidence), 70:8-72:25; 179:23-180:2 (substantial factor).

[33] Petitioners' authorities for the proposition that the trial court's instructions were insufficient do not support their position. In *Dabroe v. Rhodes Co.*, the trial court failed to give **any** instruction directly applying the duty of care standard to the alleged negligence. 64 Wn.2d 431, 432-35, 392 P.2d 317 (1964). Moreover, Petitioners' reliance on *Harris v. Fiore*, 70 Wn.2d 357, 360, 423 P.2d 63 (1967) is misleading, because in that negligence case the trial court was found to have acted properly by providing instructions on contributory negligence and deception that related to the **defendant's** case theory.

[34] Moreover, if a pretext instruction on a permissible inference of discrimination were to

4. Federal Authority Does Not Support Petitioners

Petitioners' attempt to rely on federal case law is unnecessary and misplaced, as it disregards relevant Washington law, including the fact that the WLAD "substantial factor" test is not the same as the standards applied in the federal court Title VII cases they cite.[35] Moreover, while Petitioners claim that five federal circuits require a pretext instruction, such requirements are not absolute. For example, before giving such an instruction, the Fourth and Tenth Circuits require the employee to make a showing that the evidence in the case warrants the instruction, such as admissions of false statements by managers regarding the employee's termination, material inconsistencies in testimony, or juror questions regarding their interpretation of the employer's non-discriminatory

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be required, so should instructions on permissible inferences of **non**-discrimination. *See Hill*, 144 Wn.2d at 187 (if evidence suggestive of pretext allows a case to proceed to trial, it is the jury's task to choose between "*reasonable but competing* inferences of *both* discrimination and *non*-discrimination"); *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 463–64 (6th Cir. 1995) (no error in instructing jury it could infer non-discrimination from hiring and firing by same actor); *Walker v. AT&T Technologies*, 995 F.2d 846 (8th Cir. 1993) (error in denying request for instruction explaining that employer has the right to make subjective personnel decisions for any reason that is not discriminatory). In this case, the trial court rejected both Petitioners' pretext instruction **and** Hertz's proposed instruction relating to its business judgment (*i.e.*, no liability if employer's good-faith reason is faulty, so long as it is non-discriminatory). 12/10 RP 22:25-23:8.

[35] *Compare Mackay*, 127 Wn.2d at 310, *and* 12/10 RP 18-20, 56:10-14 (jury instructions) *with Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1236-37 (10th Cir. 2002) (approving instruction using "a motivating factor" standard); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 278 (3d. Cir. 1998) ("a determinative factor"; "except for" discrimination); *Kozlowski v. Hampton Sch. Bd.*, 77 Fed. Appx. 133, 145 (4th Cir. 2003) (discrimination must be a "causative" or "determinative" factor). *See also Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2520, 186 L. Ed. 2d 503 (2013) (a "motivating factor" standard applies to status-based claims under Title VII).

reason.[36] Here, while Petitioners argue that Mr. Hoehne contradicted prior testimony by stating that he asked a group of Petitioners if they had punched out as they approached (rather than left) the prayer area, **Petitioner** Hassan Farah admitted this event at trial.[37] Moreover, the jury here did not ask the trial court any questions during its deliberations.

Finally, even if Title VII decisions are considered relevant, the First, Seventh, Eighth, Ninth and Eleventh circuits have reached the logical conclusion that there is no need to remove trial court discretion with respect to whether to give a pretext instruction.[38] These decisions reflect the reasoning quoted by the Ninth Circuit in *Browning v. U.S.*:

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[36] *See Townsend*, 294 F.3d at 1235, 1241 (pretext instruction only required where "rational finder of fact could reasonably find the defendant's explanation false and could infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose"; admission of false statement); *Kozlowski*, 77 Fed. Appx. at 142-44 (**if** "the evidence presented at trial creates some likelihood that the jury might disbelieve the legitimate, non-discriminatory reasons given by the employer to justify its actions, then the jury should be instructed on this permissible inference"; material inconsistencies and juror question during deliberations).

[37] 11/20 RP 49:11-51:12. Moreover, Mr. Hoehne was only one of many managers who tried to get Petitioners to clock out for their prayer breaks and there was testimony from other managers, Dispatchers and co-workers regarding Hertz's extensive efforts in this regard. *E.g.*, 11/12 RP 170:23-171:6; 12/4 RP 88:11-89:11, 44:9-47:5; 12/8 RP 119:18-120:10, 143:19-25; 12/9 RP 97:14-100:25; *Supra* at pp. 3-5.

[38] *See Fife v. Digital Equip. Corp.*, 232 F.3d 3, 7 (1st Cir. 2000) ("we doubt that such an explanation is compulsory, even if properly requested"); *Williams v. Eau Claire Pub. Sch.*, 397 F.3d 441, 446 (6th Cir. 2005) ("it is not necessary that these instructions be cast in the language of pretext or the framework of shifting burdens … in order for them to be adequate, accurate and complete"); *Lewis v. City of Chicago Police Dep't*, 590 F.3d 427, 439–40 (7th Cir. 2009)(no error in refusal to give pretext instruction; exclusion "did not render final instructions inaccurate, nor did it cause confusion for the jury"); *Moore v. Robertson Fire Prot. Dist.*, 249 F.3d 786, 789-90 (8th Cir. 2001) (no abuse of discretion in rejecting pretext instruction); *Browning v. U.S.*, 567 F.3d 1038, 1039-41 (9th Cir. 2009) (same); *Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1233-35 (11th Cir. 2004) (same).

> I'm mindful of Ninth Circuit authority that cautions trial judges against giving any kind of inference instruction, and I'm mindful of the risk that an inference instruction can be seen as potentially a comment on the evidence; and so I'm not inclined to give any permissive inference instruction and instead to permit counsel full latitude to argue inferences, based on a circumstantial evidence instruction.

567 F.3d at 1042. Thus, an employee cannot claim the lack of a pretext instruction misled the jury, where, as here, the trial court informed the jury it could draw inferences from the evidence and the weighing of witness credibility and the employee was free to, and did, argue that the jury should find for the employee if it believes the employer's reasons were pretextual. *See Conroy*, 375 F.3d at 1233-1236 (applying same reasoning).

B. The Opinion Does Not Conflict with Supreme Court Precedent

Petitioners also argue, presumably under RAP 13.4(b)(1), that the Opinion conflicts with negligent tort cases involving the res ipsa loquitor doctrine. *Id*. at 16-20. However, this case does not involve any common law tort claim and does not turn on a negligence theory of liability. To the contrary, Petitioners' statutory claims require them to prove intentional discrimination. *See Hegwine v. Longview Fibre Co.*, 162 Wn. 2d 340, 355–56, 172 P.3d 688, 697 (2007) ("the burden of persuasion always remains with the employee to show intentional discrimination."). Intended to address situations where a faultless plaintiff is injured but cannot prove a negligent act by the defendant, res ipsa loquitor allows a permissive

inference of negligence "in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential." *Curtis v. Lein*, 169 Wn.2d 884, 890, 239 P.3d 1078 (2010).[39] Here, while Petitioners claimed they were faultless and injured by a discriminatory plot, the jury rejected this claim in the face of overwhelming evidence that Petitioners' own actions were the cause of their injuries. Moreover, the jury is only instructed on res ipsa loquitor in a negligence case if the trial court first determines, as a matter of law, that the doctrine may apply to that case. *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). This gate-keeping function is similar to the Court of Appeals' approach here, recognizing that the trial court is in the best position to decide whether a requested instruction should be given on the record before it.

III. CONCLUSION

For the foregoing reasons, the Petition for Review should be denied.

Respectfully submitted this 16th day of December 2016

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[39] Specifically, to obtain the permissive inference, the plaintiff must establish "(1) the occurrence producing the injury was of a kind that ordinarily does not occur in the absence of negligence; (2) the injury was caused by an agency or instrumentality within the exclusive control of defendant; and (3) the injury-causing occurrence was not due to any contribution by the injured party." *Curtis*, 169 Wn.2d at 891.

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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 December 16th, 2016, I caused to be served the foregoing *Response to Petition for Review* via E-Mail and U.S. Mail, First Class postage prepaid on the following:

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DATED this_16th day of December, 2016.

By s/ Anita Spencer
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