FILED
SUPREME COURT
STATE OF WASHINGTON
10/5/2018 1:03 PM
BY SUSAN L. CARLSON
CLERK

No. 96270-7

SUPREME COURT
OF THE STATE OF WASHINGTON

ALONCITA MONROE, Appellant

vs.

CITY OF SEATTLE, Respondent.

ANSWER OF RESPONDENT TO APPELLANT'S PETITION FOR REVIEW

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I. INTRODUCTION

On February 8, 2013, Plaintiff Aloncita Monroe reported to work at the Seattle Department of Transportation ("SDOT"), behaved bizarrely, refused to take a fitness-for-duty examination ("FFDE"), and walked off the job. During the subsequent investigation and disciplinary process, neither Ms. Monroe, her union, nor her attorney ever mentioned Ms. Monroe's disability (anxiety and depression), despite the fact that after Ms. Monroe failed a previous FFDE and drug test at another City department just two years prior, she quickly requested disability accommodation.

Nevertheless, at trial, Ms. Monroe changed her approach and tried to convince the jury that SDOT failed to accommodate, harassed, and terminated her due to her disability. Yet Ms. Monroe herself testified that she never requested an accommodation at SDOT, that she did not think there was anything SDOT should have done to accommodate her that it did not do, and that her disability did not affect the events of February 8. The jury found for SDOT on all claims.

Ms. Monroe now seeks review because one juror speculated that other jurors convinced a third juror to change her vote while he was in the restroom. This speculation does not amount to a strong, affirmative showing of misconduct, and it inheres in the verdict. Ms. Monroe also challenges some of the trial court's rulings on jury instructions, but the instructions

given were accurate and permitted her to argue her theories of the case. This case does not involve any significant question of law under the Constitution, nor does it involve any issue of substantial public interest. Ms. Monroe's use of offensive hyperbole does not change the fact that her claims lack merit, and this Court should therefore deny review.

II. COUNTERSTATEMENT OF ISSUES FOR REVIEW

1. Does the juror's declaration provide any basis to reverse when it did not amount to a strong affirmative showing of misconduct, the facts alleged inhered in the verdict, and no prejudice was shown?

2. Did the trial court abuse its discretion in rejecting Ms. Monroe's implicit bias instruction when the jurors were instructed not to reach their decision on sympathy, bias, or personal preference, and Ms. Monroe discussed implicit bias?

3. Did the trial court abuse its discretion in rejecting Ms. Monroe's pretext instruction when the instruction was not required and Ms. Monroe discussed pretext?

4. Did the trial court abuse its discretion in rejecting Ms. Monroe's continuing duty instruction when the joint instruction that was given allowed Ms. Monroe to argue her theory of the case?

5. Did the instruction on disability discrimination accurately state the law and, even if it did not, can Ms. Monroe show prejudice?

6. Were there any errors to cumulate?

III. COUNTERSTATEMENT OF THE CASE

A. Ms. Monroe's 2011 FFDE and the Accommodation Process

Ms. Monroe was an Administrative Specialist 1 ("AS1") for Seattle Public Utilities ("SPU"), performing clerical tasks. RP 1304-05, Ex. 232 at 2. In 2011, her supervisors saw her behaving bizarrely, and directed her to take a FFDE.[1] *See* Ex. 215. The FFDE confirmed that Ms. Monroe was not fit for duty, and she tested positive for three drugs not prescribed to her, including methadone, which she admitted she took that day. *Id.*, RP 1309.

After Ms. Monroe failed the FFDE, she requested disability accommodation. RP 1310, Ex. 217. Her physician, Dr. Chris Bjarke, diagnosed her with depression and anxiety and opined that she was unable to perform front desk duties. *See* Ex. 28. The City looked for positions in other departments to accommodate her. *See* Ex. 233 at 2, RP 1055. An AS1 job at SDOT became available, and Dr. Bjarke opined that Ms. Monroe could perform the essential functions of that job, with no restrictions indicated. *See* Ex. 256, RP 1081. An independent physician, Dr. Russell Vandenbelt, also opined that if Ms. Monroe was reassigned to an AS1 job in a department

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[1] The FFDE is a medical exam that the City may order if an employee's behavior or appearance leads the City to believe a physical or psychological condition may be impairing the employee's ability to safely perform her job. *See* Ex. 5. The FFDE is conducted by an independent physician, and, by its nature, is urgent. *Id.; see* RP 669-70. Refusal to cooperate with the FFDE process is considered insubordination. Ex. 6.

outside of SPU, she could work without additional accommodation. Ex. 45. Ms. Monroe was therefore placed in the SDOT job. *See* Ex. 279.

B. Ms. Monroe's Work at SDOT

Ms. Monroe began work at SDOT on November 7, 2012, and was supervised by Paul Jackson. Ex. 279. At SDOT, she never raised concerns or made requests regarding her disability (RP 1435-39) and, when asked if there was anything that SDOT should have done for her that it did not do because of her disability, Ms. Monroe said, "No." RP 1479-81, CP 1574.

On February 8, 2013, Ms. Monroe's officemates observed her behaving disturbingly: repeatedly pushing a pushpin in and out of a calendar, making bizarre hand gestures and jerky physical movements, and generally acting agitated, disoriented, and confused. RP 1523, RP 1702, RP 1635; *see also* Ex. 346 at 1-2. Mr. Jackson also observed her strange behavior, and notified SDOT's safety office. RP 525-26. SDOT safety officer Scott Jensen arrived, observed the same behavior, and the decision was made to send Ms. Monroe for a FFDE. *See* RP 527, RP 1140, RP 1200-02, Ex. 328.

Mr. Jensen asked Ms. Monroe if she was familiar with the FFDE process, and when she said she was not, he explained the process and read the consent form to her. RP 1204-06. Ms. Monroe was given the opportunity to contact her union representative in the next-door office. RP 530, RP 1205-06. She was unable to reach Lisa Jacobs, her representative, and, despite Mr.

Jensen's explanation that declining to undergo the FFDE could result in discipline, Ms. Monroe signed her refusal on the form. RP 1208-09, Ex. 71.

Ms. Monroe then went into the women's locker room, and while there received a call from Ms. Jacobs. RP 1214-16, RP 352. About seven to ten minutes after Ms. Monroe went into the locker room, Mr. Jackson knocked on the door to see if she was ok. RP 395-97, RP 533-34. Ms. Monroe handed the phone to Mr. Jackson, and Ms. Jacobs explained to him that Ms. Monroe was ready to take the FFDE. RP 534. Because Ms. Monroe had already signed her refusal, Mr. Jackson said he could not let her revoke unless his superiors directed him. RP 534, RP 1218. Ms. Jacobs told Mr. Jackson that his superiors would call him, and, when Mr. Jackson returned to his office, he received a call from human resources saying that Ms. Monroe could take the FFDE. RP 534-35. But when Mr. Jackson and Mr. Jensen attempted to reinitiate the FFDE process with Ms. Monroe, she was not in the locker room, and her car was gone. RP 535-36, RP 1217, RP 1220-21.

SDOT investigated the incident and ultimately terminated Ms. Monroe's employment. *See* Ex. 346, Ex. 355. At no point during the investigation or Loudermill[2] hearing did Ms. Monroe, Ms. Jacobs, or Ms. Monroe's attorney, Mr. Sheridan, mention Ms. Monroe's disability. RP 757,

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[2] *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 547-48, 105 S. Ct. 1487, 84 L. Ed. 2d. 494 (1985) (public employee has due process right to pre-termination hearing).

RP 1232, RP 1652-54, RP 1651, RP 1663-64, RP 1234, RP 387, RP 960-61. Moreover, when asked if her disability affected the events of February 8, Ms. Monroe responded, "I would say no." RP 1498.

C. Pre-Trial, Trial, and Post-Trial Rulings

Ms. Monroe filed this lawsuit under the Washington Law Against Discrimination ("WLAD"), and her claims for disability discrimination, failure to accommodate, disability-based harassment, and retaliation went to the jury.[3] *See* CP 938-41, CP 943. After a two-week trial, the jury (which was not sequestered during deliberations) returned a defense verdict on all counts (CP 920-22), and Ms. Monroe moved for a new trial. CP 953-71. She included a declaration from Willie Neal, the only juror who voted for her on all claims. CP 972, RP 6-8 (12/20)[4] (11-1 on all but one claim). Mr. Neal speculated that deliberation occurred for a few minutes while he was in the bathroom. CP 973-74. The trial court denied the motion (CP 1347-48), Ms. Monroe appealed, and the Court of Appeals affirmed on all issues raised.[5]

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[3] The trial court granted the City's summary judgment motion on Ms. Monroe's sex-based harassment claim. RP 87-88.

[4] The last volume of the Report of Proceedings contains proceedings from December 20, 2016, and January 27, 2017, and is not consecutively numbered with the rest of the RP cites. The City has therefore put dates (either 12/20 or 1/27) after cites to this volume.

[5] Ms. Monroe has abandoned before this Court one evidentiary issue she raised in the Court of Appeals. *See* Court of Appeals Opinion ("Op.") at 13-15.

IV. ARGUMENT

A. Mr. Neal's Declaration Provides No Basis to Accept Review.

Ms. Monroe contends that the trial court and the Court of Appeals committed a constitutional violation by "discounting" and "diminishing" the declaration of an African-American juror. This Court should reject Ms. Monroe's inflammatory rhetoric. In addition to offering no analysis of her constitutional claims, Ms. Monroe cannot overcome the fact that, regardless of the race of the jurors, judges, parties, or witnesses, Mr. Neal's declaration is simply far too speculative to support a claim of juror misconduct.

Though Ms. Monroe bears the burden of showing that juror misconduct occurred, *State v. Barnes*, 85 Wn. App. 638, 668, 932 P.2d 669 (1997), she cannot meet that burden. "A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994). The decision as to whether juror misconduct occurred is within the trial court's discretion. *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 203, 75 P.3d 944 (2003).

Mr. Neal's declaration falls woefully short of a strong, affirmative showing of misconduct. He claims he heard talking as he came out of the bathroom, but he does not know what was discussed. He claims two jurors

had "guilty expressions;" not only is this wildly subjective, but there is no evidence that any "guilt" was due to deliberating while he was in the bathroom. He also states that because one of the jurors switched her vote, he "felt" that the group had convinced her to change her mind while he was in the bathroom, but because he does not say when the last vote was taken prior to his restroom break, the juror could have changed her mind on her own earlier in deliberations.[6] The Court of Appeals held that Mr. Neal's inferences about what may have occurred while he was in the restroom did not amount to a strong, affirmative showing of misconduct (Op. at 7); far from being "novel" or "irrational" (Petition for Review ("PFR") at 16), this holding is amply supported by the evidence and the law. The trial court, too, did not abuse its discretion in declining to find that Mr. Neal's unsubstantiated claims established misconduct. The declaration's speculative nature, combined with the presumption that jurors follow the court's instructions (*Hizey v. Carpenter*, 119 Wn.2d 251, 271, 830 P.2d 646 (1992)), means Ms. Monroe cannot meet her high burden.[7]

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[6] In addition, because the final vote on the failure to accommodate claim was ten to two (*see* CP 973-74, RP 6-7 (12/20)), a second juror voting in favor of Ms. Monroe on that claim remained in the room while Mr. Neal was in the restroom. Mr. Neal's speculation that "the group" convinced the third juror to change her mind while he was in the restroom is further weakened by the presence of that second juror, and is certainly insufficient for a "strong, affirmative showing of misconduct."

[7] Ms. Monroe claims that Judge Erlick had a duty to investigate or accept Mr. Neal's testimony as true. PFR at 16. She offers no support for this proposition, nor for the proposition that a trial court is obligated to investigate jurors' speculations.

Further, Ms. Monroe's continued attempts to invoke RCW 4.44.300 are puzzling and disingenuous. Although she asserts that the statute prohibits separation of jurors during deliberations (PFR at 14), RCW 4.44.300 allows a jury to separate during deliberations unless good cause is shown for sequestration. The jury here was not sequestered. Jurors went home after closing arguments, returned the next day for deliberations, and were told they could leave the jury room during deliberations, if they told the bailiff. *See* RP 1963. No party requested sequestration, nor does Ms. Monroe argue good cause for it. Nor does she contend that any juror had improper contact with outside individuals. *See State v. Crowell*, 92 Wn.2d 143, 147, 594 P.2d 905 (1979) (RCW 4.44.300 "is designed to insulate the jury from out-of-court communications that may prejudice their verdict."). Because the jury was not sequestered, and was therefore allowed to "separate," RCW 4.44.300 was not violated.

Ms. Monroe also claims that the Court of Appeals' opinion conflicts with this Court's holding that prejudice is presumed if jury separation occurs. PFR at 10 (citing *State v. Smalls*, 99 Wn.2d 755, 665 P.2d 384 (1983)). However, *Smalls* addresses an earlier version of RCW 4.44.300 that did not permit separation during deliberation.[8] Because the statute now

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[8] In 2003, RCW 4.44.300 was amended to allow for separation during deliberation (*see* Laws of 2003, ch. 406, § 17). Prior to that time, the statute provided:

allows a jury to separate unless good cause for sequestration is shown, *Smalls'* presumption of prejudice is not applicable to the facts of this case, where sequestration was neither requested nor ordered.[9] To hold as Ms. Monroe suggests would mean that a presumption of prejudice would result every time a juror used the restroom during the deliberation phase.[10]

Though only minimally addressed by Ms. Monroe, the trial court's conclusion that the alleged misconduct inhered in the verdict and thus could not be considered was also correct. "Central to our jury system is the secrecy of jury deliberations. Courts are appropriately forbidden from receiving information to impeach a verdict based on revealing the details of the jury's

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> After hearing the charge, the jury may either decide in the jury box or retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the best of his ability, keep the jury thus separate from other persons, without drink, except water, and without food, except [as] ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on.

RCW 4.44.300 (2002) (amended 2003); *see also* CP 1291.

[9] In *Smalls*, over the defendant's objection, the trial court sent the jury home at 8:45 p.m. after the first day of deliberation, to return the following morning. 99 Wn.2d at 766, 767. The Court applied a presumption of prejudice, noting that jurors might be influenced by contact with family, friends, or the media. *Id*. at 766.

[10] Regardless, it is doubtful that Mr. Neal's use of the restroom would qualify as "separation," as he used the bathroom inside the jury room. *See* RP 34-35 (1/27), RP 50 (1/27), CP 973 ("As I went to open the bathroom door to rejoin the group, I could hear the jurors talking. When I opened the door, everyone stopped talking….").

deliberations." *Long v. Brusco Tug & Barge, Inc.,* 185 Wn.2d 127, 131, 368 P.3d 478 (2016). "[A] juror's postverdict statements regarding the way in which the jury reached its verdict cannot be used to support a motion for a new trial." *Breckenridge*, 150 Wn.2d at 205.[11]

Ms. Monroe's entire argument hinges on the inference that, because a juror changed her vote after Mr. Neal returned from the restroom, deliberations (as opposed to, say, discussions about holiday plans or the Seahawks) must have occurred while he was in the restroom. But, as the trial court noted, this inference necessarily probes the reasons for, and timing of, this other juror's decision-making process. No one knows when or why the juror changed her mind, and Mr. Neal's speculation on this issue strikes at the heart of the prohibition of inquiry into "[t]he mental processes by which individual jurors reached their respective conclusions . . . ." *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967). The trial court correctly concluded that the alleged misconduct inhered in the verdict. *See State v. Hatley*, 41 Wn. App. 789, 793, 706 P.2d 1083 (1985) (evidence concerning jurors' mental processes, including when they made up their minds, inheres in the verdict).

Yet even if misconduct occurred, there is no prejudice. Whether

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[11] Whether facts inhere in the verdict is a question of law reviewed de novo. *Long*, 185 Wn.2d at 131.

misconduct is prejudicial is a matter of trial court discretion. *Richards v. Overlake Hosp. Med. Ctr*., 59 Wn. App. 266, 271, 796 P.2d 737 (1990). The trial court found that "it would be purely speculation that any misconduct, if it existed, prejudiced the plaintiff." RP 55-56 (1/27). This was not an abuse of discretion, as there is no evidence that any deliberation without Mr. Neal caused the third juror to change her vote. To hold otherwise would be to allow any verdict to be imperiled by the speculation of an unhappy juror, making the jury verdict "the first round in an interminably prolonged trial process." *Hatley*, 41 Wn. App. at 794. There are no significant constitutional issues, and this Court should deny review.

B. The Trial Court Did Not Abuse Its Discretion or Misstate the Law in Its Instructions to the Jury.

Ms. Monroe claims that the failure to give her proposed instructions on implicit bias, pretext, and continuing duty violated her constitutional rights and was an abuse of discretion. A party is not entitled to an instruction simply because it may accurately state the law; instead, the well-established test is whether the instructions, read as a whole, sufficiently inform the jury of applicable law, are not misleading, and allow each party to argue its theory of the case. *Crossen v. Skagit County,* 100 Wn.2d 355, 360, 669 P.2d 1244 (1983). Here, the trial court's exercise of its discretion in denying Ms.

Monroe's proposed instructions[12] did not implicate any significant constitutional or substantial public interest issues, as the instructions given were sufficient and no prejudice was shown. Moreover, the disability discrimination instruction accurately stated the law and was not prejudicial; therefore, no substantial public interest issue is implicated.

1. Implicit Bias Instruction

Ms. Monroe claims that the trial court's refusal to give her requested implicit bias instruction was either a constitutional violation or an abuse of discretion, but she offers no analysis of this claim. Moreover, she has failed to address the applicable standard: whether the instructions given allowed her to argue her theory of the case, were not misleading, and as a whole informed the jury of applicable law. *Crossen*, 100 Wn.2d at 360.

An analysis of this standard shows that there was no abuse of discretion or constitutional violation. The trial court gave Instruction No. 1, based on Washington Pattern Instruction ("WPI") 1.02,[13] which read, in part:

> You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To ensure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

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[12] A trial court's decision not to give a proposed instruction is reviewed for abuse of discretion. *Terrell v. Hamilton*, 190 Wn. App. 489, 505, 358 P.3d 453 (2015).

[13] As Ms. Monroe notes, WPI 1.02 has since been modified to include a sentence telling jurors that, in assessing credibility, they must avoid bias, "conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability."

CP 926. An oral version of this instruction was given before opening statements (*see* RP 274-75), and an additional oral instruction along similar lines was given after closing statements:

> Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Here I offer you the following guidelines: Respect each other's opinions and different viewpoints that each of you bring to this process. Don't be afraid to speak up and express your views. Be patient and generous in allowing everyone an opportunity to be heard. Differences of opinion are healthy. They bring the evidence into focus and bring out points that you yourself may not have considered. Listen carefully to each other, even after you have spoken. Keep your mind open while you listen to others.

RP 1962 (based on WPI 6.18). Citing to Instruction No. 1, the Court of Appeals found no abuse of discretion. Op. at 10. And, as it further noted, Ms. Monroe addressed implicit bias in closing argument. *Id.*, RP 1865-66. She therefore cannot show prejudice. The trial court was within its discretion to decline Ms. Monroe's implicit bias instruction, and the instructions given were sufficient to allow her to argue her theory of the case.

Ms. Monroe also argues that this Court should implement a bright line rule <u>requiring</u> an implicit bias instruction in every case requested. She offers no compelling rationale for so curtailing the discretion of the trial court in instructing the jury, and certainly does not demonstrate that the Constitution requires adopting such a bright line rule. This Court should deny review on this issue.

2. Pretext Instruction

Ms. Monroe claims that it was "at least" an abuse of discretion to decline to give her pretext instruction in a discrimination case. Again, she offers no analysis of this claim. Moreover, as she notes, Division I of the Court of Appeals addressed the same issue in *Farah v. Hertz Transp., Inc*., 196 Wn. App. 171, 177, 383 P.3d 552 (2016), *rev. denied*, 187 Wn.2d 1023, 390 P.3d 332 (2017): whether the trial court's refusal to give a virtually identical pretext instruction was an abuse of discretion. The Court of Appeals held that although the instruction "might be appropriate, the arguments in its favor are not compelling enough to hold that it is an abuse of discretion to refuse to give the instruction." *Id*. at 181. Counsel for the *Farah* plaintiffs (also counsel for Ms. Monroe) petitioned for review, and on March 7, 2017, this Court denied review. 187 Wn.2d 1023. Ms. Monroe does not explain how her case differs from *Farah* such that the standard for accepting review on this issue is now met.[14]

Ms. Monroe also utterly fails to address prejudice. An error in refusing to give a jury instruction is harmless if it did not affect the outcome of the case (*Terrell*, 190 Wn. App. at 499, 502), and Ms. Monroe must show prejudice. *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 91, 18 P.3d 558 (2001).

[14] On October 3, 2018, this Court denied review of *Johnson, et al. v. Seattle Public Utilities, et al*., No. 96043-7, a case with the same implicit bias and pretext issues.

She cannot meet this burden because, as the Court of Appeals noted (Op. at 11), she explicitly argued her pretext theory in closing:

> Also, we are going to talk to you about pretext, which means that in a world where people are doing what's right, there is no reason not to tell the truth. If they are not telling the truth, you can conclude that they are not telling the truth because they don't want you to know the truth. And so I'm going to show you a bunch of places where those witnesses, when we call them on our case, they did not tell the truth. . . . And that is evidence of discrimination. Because if they weren't discriminating, they would tell the truth.

RP 1883; *see also* RP 1959 ("They lied because of discrimination. You just have to connect the dots."). In fact, in closing Ms. Monroe accused nearly <u>all</u> of the City's witnesses of lying (RP 1866-68, RP 1884, RP 1886-87, RP 1893-94, RP 1897-1900, RP 1961); therefore no prejudice can be shown.[15] *See Farah,* 196 Wn. App. at 181 (pattern instructions are sufficient to allow a plaintiff who wishes to argue relevant pretext to do so); *McDonald v. Dept. of Labor & Indus*., 104 Wn. App. 617, 625-26, 17 P.3d 1195 (2001) (affirming because plaintiff did not show how he was precluded from arguing his theory of the case). Because Ms. Monroe has presented no reason for this Court to reconsider its decision to deny review in *Farah*, nor shown that constitutional or public interest issues are implicated by the trial court's

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[15] Ms. Monroe cites *Townsend v. Lumbermans Mut. Cas. Co*., 294 F.3d 1232, 1241 n. 5 (10th Cir. 2002) for the proposition that argument by counsel about pretext is insufficient, and that an instruction is necessary. But *Farah* explicitly considered *Townsend* and ultimately rejected its reasoning, finding that the general instructions were sufficient. 196 Wn. App. at 180-81. Ms. Monroe's reliance on *Townsend* is therefore misplaced.

decision, this Court should deny review.

3. Continuing Duty Instruction

Ms. Monroe claims that the trial court abused its discretion in failing to give her proposed instruction (CP 910) on the employer's "continuing duty" to accommodate an employee with disabilities. However, the trial court's Instruction No. 10, verbatim from WPI 330.34 (and jointly proposed, *see* CP 867), correctly described the duty of reasonable accommodation:

> Once an employer is on notice of an impairment, the employer has a duty to inquire about the nature and extent of the impairment. The employee has a duty to cooperate with her employer to explain the nature and extent of the employee's impairment and resulting limitations as well as her qualifications. . . .

CP 935. This instruction allowed Ms. Monroe to argue her theory of the case, and, as the Court of Appeals noted, was a correct statement of the law. Op. at 12.

Moreover, despite the absence of her proposed instruction, Ms. Monroe did, in fact, argue in closing that the City had a continuing duty to accommodate, citing the City's own Disability Resource Guide. RP 1891-92; *see also* RP 1911, RP 1960. She therefore cannot demonstrate prejudice. *McDonald*, 104 Wn. App. at 625-26 (plaintiff did not show how he was precluded from arguing his theory of the case). Because Ms. Monroe has not shown that any constitutional or public interest issues are implicated by the

trial court's exercise of its discretion, review should be denied.

4. Disability Discrimination Instruction

Despite the fact that Instruction No. 13 was taken verbatim from WPI 330.32, Ms. Monroe claims it is not accurate because it erroneously requires her to prove that "she is able to perform the essential functions of the job in question with reasonable accommodation." *See* CP 938.

The instruction, however, is accurate. The Note on Use for WPI 330.32 says to "[u]se this instruction, rather than WPI 330.01 Employment Discrimination – Disparate Treatment – Burden of Proof, in a case of discriminatory treatment when the basis of the claim is disability." The pattern instructions set forth a different instruction for disability disparate treatment claims because, unlike employees in other protected categories, an employer <u>may</u> discharge a disabled employee if that employee's disability prevents her from performing the essential functions of the job. Indeed, the WLAD explicitly states that "the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved . . ." RCW 49.60.180(1).

Case law also recognizes that an employee claiming disability discrimination must prove that she can perform her job's essential functions. *See Clarke v. Shoreline Sch. Dist. No. 412, King County*, 106 Wn.2d 102, 119, 720 P.2d 793 (1986) ("an employer may discharge a handicapped

employee who is unable to perform an essential function of the job"); *Bass v. City of Tacoma*, 90 Wn. App. 681, 688, 953 P.2d 129 (1998), *as amended*, 976 P.2d 1248 (1999) (plaintiff "must prove (1) that the City made an adverse employment decision; (2) that she was disabled; (3) that her disability was a substantial factor in the City's adverse employment decision; and (4) that she was, or with reasonable accommodation would have been, able and qualified to perform the essential functions of the job."). WPI 330.32 reflects this commonsense concept. The trial court properly gave the instruction, and the Court of Appeals correctly found that it did not misstate the law. *See* Op. at 9.

Even if the instruction were erroneous, however, Ms. Monroe cannot show prejudice. *See Boeing Co. v. Key*, 101 Wn. App. 629, 633, 5 P.3d 16 (2000) ("An erroneous instruction does not require reversal unless prejudice is shown."). "Error is not prejudicial unless it affects or presumptively affects the outcome of the trial." *Goodman v. Boeing Co.*, 75 Wn. App. 60, 68, 877 P.2d 703 (1994). No party argued that Ms. Monroe was unable to perform the essential functions of her job. In fact, in closing argument the City maintained that Ms. Monroe could do the SDOT job, without any restriction, pointing to the conclusions of Dr. Bjarke and Dr. Vandenbelt that she could do the AS1 job, so long as it was not at SPU. *See* RP 1935-43. The City further argued that "the only question" for the jury to answer, with respect to the disability disparate treatment claim, was whether Ms. Monroe

"was fired only because of what she did on February 8th" (RP 1946); the City did not argue that inability to perform the essential functions of the job was the reason. Any error, then, was not prejudicial. *See, e.g., State v. Moton*, 51 Wn. App. 455, 458-60, 754 P.2d 687 (1988) (despite "to convict" instruction erroneously not specifying the person allegedly assaulted, error was harmless because evidence and argument of the parties were clear in specifying the victim). There are no substantial public interest issues raised, and this Court should deny review.

C. There Were No Errors to Cumulate.

Given that the trial court did not abuse its discretion in any of the ways claimed by Ms. Monroe, there is no cumulation of errors.

V. CONCLUSION

For all of the foregoing reasons, review should be denied.

DATED this 5th day of October, 2018.

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CERTIFICATE OF E-FILING AND E-SERVICE

I certify that on this date I electronically filed the foregoing document with the Clerk of the Court via the Washington State Appellate Courts' Portal, which will send notice of filing to all counsel of record.

DATED this 5th day of October, 2018.

s/ Kim Fabel
KIM FABEL
Legal Assistant

SEATTLE CITY ATTORNEY'S OFFICE

October 05, 2018 - 1:03 PM

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Appellate Court Case Title:	Aloncita Monroe v. City of Seattle
Superior Court Case Number:	15-2-11126-4

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