No. 76478-1-I

No. 96270-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ALONCITA MONROE,

Plaintiff/Petitioner,

v.

CITY OF SEATTLE,

Defendant/Respondent.

CORRECTED PETITION FOR REVIEW

THE SHERIDAN LAW FIRM, P.S.

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A. IDENTITY OF PETITIONER / INTRODUCTION

This is a related case to Johnson et. al. v. City of Seattle, Supreme Court No. 96043-7.

At the recommendation of a City retained doctor, a disabled white woman with a documented history of anxiety and depression, was transferred from one City of Seattle department to another as an accommodation, because the City's doctor opined that in her then current assignment, "her increase in anxiety and depression symptoms would limit her ability to adequately concentrate, withstand day-to-day usual work stresses and interact appropriately with supervisors and coworkers." So the disabled white woman was transferred to the City's Department of Transportation, and was assigned to work under the supervision of a six foot two, 305-pound black male supervisor with a history of aggressive behavior at work.

One day her black supervisor cornered the disabled white woman in a women's restroom at work. He stood outside the restroom door pounding with his fist and yelling for her to get out. He wanted her to take a fitness for duty exam off site, and she said she would go, but she wanted her sister, also an employee, to accompany her, because the disabled white woman was afraid to be alone with this large, black man. Her anxiety

peeked in the women's restroom; she had soiled herself in fear; she called her shop steward from inside the restroom. Through the telephone, the white shop steward heard the yelling and banging, and after the disabled white woman handed the black manager the phone through a partially opened restroom door, she proposed having a third party join them. The black manager yelled at the shop steward saying, "It's too late" [for the disabled white woman to get the fitness for duty exam now]. The disabled white woman left the workplace after her security badge was taken.

The disabled white woman was then terminated for leaving her work place and for refusing the fitness for duty exam despite testimony to the contrary.

The facts stated above describe the case of the petitioner with one vital exception—**Petitioner Aloncita Monroe is not white; she is black**.

Many white readers of these paragraphs may have been horrified and outraged by the black manager's treatment of the disabled white woman in the workplace. Yet for reasons they may not be able to explain, they may find that the effect of knowing now that the female employee is actually black, has somewhat diminished the outrage and horror felt in hearing the facts.[1] This is the nature of implicit bias: bias held by all of us

[1] According to prominent scholar and expert witness Dr. Anthony Greenwald, "seventy percent of Americans hold implicit prejudiced views based on race, color, national origin

including by the jury, the judge, and all persons present at trial.

In recent history, in some states, lesser conduct by a black man, if directed against a white woman, could have led to a lynching.[2] In those same states, this author knows of no instance in which the same alleged conduct by a black or white man against a black woman, ever led to a lynching. It may be that white society discounts the significance of violence against black women.[3]

A means of fighting against such bias in the courtroom is through the use of an implicit bias jury instruction. The petitioner proposed two, but the Respondent City of Seattle vehemently objected to their use, and the Honorable John Erlick agreed with the respondent. He also excluded a pretext instruction proposed by the petitioner, a continuing duty to accommodate instruction proposed by the petitioner, and included an essential functions element in the disability discrimination instruction even though the trial court admitted its inclusion made little sense and was confusing.

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and ethnicity." Samaha v. Washington State Dep't of Transp., No. CV-10-175-RMP, 2012 WL 11091843, at *1 (E.D. Wash. Jan. 3, 2012).

[2] See Equal Justice Initiative, "Lynching In America: Confronting The Legacy Of Racial Terror," Third Edition, available at: https://lynchinginamerica.eji.org/report/.

[3] "The legal and social double standard that allowed white men to commit sexual violence against black women with impunity, while the most baseless fear of sexual contact between a black man and white woman resulted in deadly violence, continued after emancipation. Nearly one in four black people lynched from 1877 to 1945 were accused of improper contact with a disabled white woman." Equal Justice Initiative, available at https://eji.org/history-racial-injustice-sexual-exploitation-black-women.

During deliberations, Mr. Willie J. Neal, Jr., the only black juror out of the twelve deliberating jurors, left the deliberations to visit the restroom. Judge Erlick had cautioned the jury not to deliberate unless everyone was in the room. At the time of his departure, he and two white jurors had voted in favor of plaintiff's failure to accommodate claim. While in the restroom, he could hear talking. When he came out, without further discussion, a new vote was taken, and without explanation or discussion, one of the two white jurors changed her vote now voting against liability. Immediately, the Asian American foreperson pressed the button to summon the clerk and to present their decision. The jury was polled and confirmed a 10-2 verdict for the City on the failure to accommodate claim and 11-1 verdicts on the other claims. Two days later, Mr. Neal completed a sworn statement outlining these troubling facts. He concluded that improper deliberations occurred while he was in the restroom. CP 972-74 (Appendix at 1-3).

The Neal Declaration became the focus of plaintiff's motion for a new trial, but the uncontradicted sworn statement by Mr. Neal, the only black juror, was not enough to overturn the verdict. The City submitted no contradictory evidence from any other juror or any other source. Judge Erlick denied the motion and asked, "**How do we know that it wasn't the African American juror's implicit bias towards your client**?" *See* RP

(1/27 Albino) 17 (emphasis added). The following exchange followed:

> MR. SHERIDAN: Well, that is the difficulty, Your Honor, is that we -- we have to be mindful that our own implicit biases don't infect the proceedings here today. And the whole purpose -- the whole purpose of the implicit bias jury instruction and the whole purpose of the ABA's . . . 2016 guidance[4] on how we should conduct jury trials is that this exists in everything we do, and it exists in whites against blacks. That's what the studies say. And the terrible part about not giving that instruction, given the fact that the ABA says to give it, is that it's not like, you know, the global warming argument where you an find 1 percent of the scientific community say, 'There's no evidence.' We have a situation where every single scholarly article -- including Judge Doyle's article, which I just happened to see yesterday -- they all say that it is helpful to address implicit bias head-on. And -- and --
> THE COURT: And you did.
> MR. SHERIDAN: -- yes.
> THE COURT: You addressed it in voir dire. You addressed in the opening -- your opening statement. You addressed it in your closing argument. You raised it throughout this entire trial.
>
> . . . .
>
> MR. SHERIDAN: … [S]ometime in our lives, Judge, it is going to be a no-brainer that implicit bias is examined, and maybe those -- maybe that test is going to be given during jury -- during -- you know, during jury orientation to sensitize people. But also, to get back to what you said, which is the idea of Sheridan got to argue it; what's the harm? Well, we have extensive citation in our briefs where courts have said there's a big difference between having an instruction and having a defense -- a plaintiff's or defense lawyer argue something. The instruction is -- carries the weight. The lawyers arguments -- remember the first thing out of [defense counsel] Mr. Johnson's mouth when he -- when he stood up was -- in closing was, 'Well, good thing

[4] See American Bar Association, Principles for Juries and Jury Trials, Principle 6(c) (2016), filed at CP 1127 (Appendix at 26).

> this is argument. You don't have to believe what Sheridan said.' And that's the difference between you saying it and me saying it. And, basically, the cases that – you'll see them in our reply brief and other places -- but it's -- basically says that, you know -- the *Townsend* case, it says, 'It's unreasonable to expect jurors, aided only by arguments of counsel, will intuitively grasp a point of law until recently eluded by both judge . . . -- '

RP (1/27 Albino) 17; *see also* RP (12/19 Moll) 1916.

This exchange with this highly respected white trial judge demonstrates that implicit bias infects us all, and that failure to give an implicit bias jury instruction in this case is a constitutional violation and an abuse of discretion, because an implicit bias jury instruction promotes consciousness and introspection, which are methods of fighting those biases.[5] The uncontested sworn statement of the only black juror should have been enough to support a new trial. His sworn factual testimony was strong circumstantial evidence of juror misconduct in violation of the Washington State Constitution and the failure to grant a new trial was an abuse of discretion.

[5] "Research on the role of attention in weakening the effects of implicit cognition . . . supports consciousness raising as a strategy for avoiding unintended discrimination. That is, when a decision maker is aware of the source and nature of a bias in judgment, that bias may effectively be anticipated and avoided. Consciousness raising may also have some value in attenuating implicit bias when the source of implicit bias is not properly identified, as suggested by findings that attentional effort reduces effects of weak cues." Greenwald, A. G., & Banaji, M. R. (1995). "Implicit social cognition: Attitudes, Self-Esteem, and Stereotypes." Psychological Review, page 16. Available at: http://faculty.washington.edu/agg/pdf/Greenwald_Banaji_PsychRev_1995.OCR.pdf.

Today more than ever, we need a frequent recurrence to fundamental principles because—today more than ever—it is essential to the security of individual rights and the perpetuity of free government. Const. art. I, § 32. The overarching issue is, what Supreme Court actions are needed to ensure that a black person gets a fair trial in Washington State? If this Court does nothing, injustice will prevail and discontent will ferment in all affected communities.

This petition for review should be accepted by the Supreme Court because the petition raises significant questions of law under the Constitution of the State of Washington; and involves issues of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b) (3) and (4). Additionally, once the juror misconduct is confirmed, the petition demonstrates that the Court of Appeals decision is in conflict with Supreme Court precedent. RAP 13.4(b) (1). Upon review, the jury verdict should be set aside and a new trial granted with new rules requiring an implicit bias instruction when requested and for evaluating juror misconduct.

B. COURT OF APPEALS DECISION

The opinion of the Court of Appeals was entered on August 6, 2018 (the "Opinion" or "Op."). The Opinion, which is attached at the Appendix, pages 4 through 18, affirmed the trial court's decisions in all

respects.

The Court of Appeals affirmed the trial court's denial of a new trial, because Mr. Neal did not actually hear the deliberations, holding that Mr. Neal's sworn statement does not amount to the "strong, affirmative showing of misconduct necessary to overcome the policy in favor of stable verdicts." Op., Appendix at 9. The Court also affirmed the ruling even though it acknowledged that the jury was separated during the time Mr. Neal was in the restroom, and recognized the applicability of RCW 4.44.300 (requiring that the jury must be kept together in a room provided for them), as well as the applicability of the Supreme Court holding in State v. Smalls, 99 Wn.2d 755, 766, 665 P.2d 384 (1983) (if the jury is separated, a presumption arises that the defendant has been prejudiced), but concluded that these issues could be disregarded, because the "juror left merely to use the restroom." Op., Appendix at 10, fn. 8.

The Court of Appeals also affirmed the trial court's failure to give an implicit bias jury instruction, which would have provoked juror introspection, and another, which would have explained that false testimony can be used to prove discrimination. *See* Op., Appendix at 13; and Proposed Instructions 4 and 17, Appendix at 21-22. As to the implicit bias instruction, the Court noted that "Monroe cites no Washington authority that has ever found error in not giving an implicit bias

instruction. And, Monroe was able to and did address her implicit bias theory in her closing argument." Op., Appendix at 13.

As to the pretext instruction, relying on *Farah*, the Court held, "To the extent that Monroe's theory of the case was that the City had presented a pretextual reason for terminating her, she had the opportunity to present that theory during her case in chief. And, in her closing arguments, she articulated her theory of pretext to the jury." Op., Appendix at 14.

The Court of Appeals affirmed the trial court's failure to give a continuing duty to accommodate instruction, and in doing so, ignored the Ninth Circuit holding in *Humphrey* that followed the EEOC Enforcement Guidance notes stating that the duty to accommodate is ongoing. The Court held that "Monroe was able to argue her theory of the case without the [proposed instruction]. Op., Appendix at 15-16.

The Court of Appeals affirmed the trial court's decision to include an essential functions element in the disability discrimination instruction even though the trial court admitted its inclusion made little sense and was confusing, because the disability discrimination claim under these facts should only have required that the plaintiff prove that her disability was a substantial factor in the termination. Op., Appendix at 11-12.

The Court of Appeals did not consider the cumulative effect of these errors.

C. ISSUES PRESENTED FOR REVIEW

1. Knowing that implicit bias permeates modern American society, is it a constitutional violation or an abuse of discretion for the trial court and the Court of Appeals to discount and diminish the uncontradicted sworn statement of a black juror when that statement provided strong circumstantial evidence of juror misconduct under RCW 4.44.300?

2. Knowing that implicit bias permeates modern American society, in a case involving a black plaintiff, does the Court of Appeals decision denying the reality of juror misconduct based on a new "restroom" exemption conflict with the Supreme Court's holding in State v. Smalls, and should the Court have found that the trial court should have investigated the misconduct claim or accepted the declaration as true, and that the City failed to overcome the presumption that black Petitioner Aloncita Monroe was prejudiced?

3. Knowing that implicit bias permeates modern American society, in a case involving a black plaintiff, is it a constitutional violation and an issue of substantial public interest to exclude a proposed jury instruction on implicit bias?

4. Knowing that implicit bias permeates modern American society, in a case involving a black plaintiff, is it a constitutional violation or an issue of substantial public interest to exclude a jury instruction on pretext?

5. Is it an issue of substantial public interest and an abuse of discretion to exclude a continuing duty to accommodate instruction as adopted by the Ninth Circuit holding in *Humphrey*?

6. Is it an issue of substantial public interest and an abuse of discretion to include an essential functions element in the disability discrimination instruction even though its inclusion makes little sense and is confusing?

7. Is it an issue of substantial public interest that the Court of Appeals did not consider the cumulative effect of these errors?

D. STATEMENT OF THE CASE

1. The Facts As Stated By The Court of Appeals

The petitioner accepts the facts stated by the Court of Appeals and adds the following additional facts.

2. Paul Jackson Was a Bully And Ms. Monroe was Disabled

Evidence presented at trial showed that Jackson led "through fear, threats and intimidation" and described their work environment as "toxic and hostile." *See* Ex. 73. There was documentation that he engaged in "[s]everal instances of loud, intimidating, rude and disrespectful behavior." *Id.*, at 2. Jackson, who is African-American, was physically large—over six feet two inches tall, and in 2013, weighed approximately 305 pounds. RP 394; CP 299.

Ms. Monroe's condition affects her work in that it limits her "ability to focus, concentrate, and communicate." RP 603; Ex. 270 (MONR006605). To focus, she sometimes hums or "may say something to [her]self," RP 1332-33, 600; and when speaking, looks up at the ceiling occasionally. RP 1338. *See also*, Ex. 45, at ¶ 2 (Dr. Vandenbelt).

The Citywide ADA Coordinator, Mr. McClenney, testified that his goal in working with Monroe was to "put her in a position that met the restrictions and the limitations … identified by her doctor," RP 1034, "to place her in an environment that was less stressful than the one she was coming from," RP 1038, and "to find a job that would allow her to still be successful despite the fact that she had problems with focus, concentration, and communication." RP 1106.

3. DOT Management and Staff Questioned Monroe's Ability to Do the Assigned Job

Concerns with Monroe's ability to perform the AS1 job at SDOT appeared almost immediately. Two days after she started at SDOT, her co-worker, Sharon DeWitt, complained to Monroe about having "to repeat the answers to her questions several times," and how "it took all day [for Monroe] to do an accident report and enter calls into the dispatch log sheet." RP 1546-48. DeWitt testified that Monroe "was unfocused and … took copious amounts of notes, but then never seemed to be able to refer back to the notes." RP 1533. DeWitt testified that she also observed

Monroe "sort of staring at the screen and nothing was happening," and when she was asked if that occurred t**hroughout the 90 days that Monroe worked at SDOT,** DeWitt replied, "it happened a lot." RP 1533-34. Mr. Jackson admits that Monroe raised concerns with him about Ms. DeWitt "not being a good colleague" or polite to Monroe. RP 504.

4. The Incident

When Jackson told Monroe on February 8 that she was allegedly acting odd, Monroe asked, " 'When did all this happen? Did it happen within a week, a day, an hour?' And he said …, 'No, it's been just over the three-hour period,'" that morning. RP 1337. No one had told Monroe they thought she was acting strange. *Id.* She told Jackson it was "not true," and asked him "what really is all this about?" RP 1338-39.

Monroe testified Jackson "snapped the form from [her]," and that the entire incident led her to get hot flashes, that she "started to, um, wet my panties," causing her to head to the restroom to take care of the issue, as "urine [was] coming down [her] leg." RP 1359-60.

The union representative, Lisa Jacobs, testified that over the phone she could hear "this loud noise in the background," what turned out to be Mr. Jackson "banging on the door" of the locker room. RP 353-54. Jacobs had Monroe pass the phone to Jackson through the doorway, in order to explain that Monroe was "willing to take the fit for duty if her sister can

come along." RP 353, 355. Jackson responded, " 'No, too late,' in a very firm, dismissive, booming voice." RP 355-56. Jacobs tried to explain that she had already spoken with HR and everything was okay, but Jackson persisted in refusing to let Monroe continue with the exam, stating that "he gave her a chance, 'No, [it's] too late.'" *Id.* At trial, Jackson denied saying it was "too late," but had admitted it in his deposition. *See* RP 401-02.

E. ARGUMENT

1. Knowing That Implicit Bias Permeates Modern American Society, It Is A Constitutional Violation For The Trial Court And The Court Of Appeals To Discount And Diminish The Uncontradicted Sworn Statement Of A Black Juror When That Statement Provided Strong Circumstantial Evidence Of Juror Misconduct Under RCW 4.44.300

"The right of trial by jury shall remain inviolate." Const. art. I, § 21. During deliberations, the jury "must be kept together in a room provided for them." RCW 4.44.300; *see* Appendix at 27. "RCW 4.44.300 continues to prohibit separation of the jurors during deliberations." Smalls, 99 Wn.2d at 766.

Mr. Neil's sworn testimony describes how the jury was not kept together during deliberations. He swore,

- The failure to accommodate was first. Three of us voted 'yes,' meaning we voted in favor of Ms. Monroe on that claim, which caused the group to go on to the next claim, and then come back and revisit the first claim.
- Each time three of us voted 'yes.' I voted in favor of a 'yes' vote to each of the claims.
- We were told by Judge Erick not to deliberate when anyone was out of

the room.

- Toward the end of the morning, I went to the bathroom. I was in there for a few minutes. As I went to open the bathroom door to rejoin the group, I could hear the jurors talking, but I could not hear what was being said.
- When I opened the door, everyone stopped talking, and two of the jurors looked at me with guilty expressions.
- Then, someone said, 'let's do another vote.' Without any argument or explanation, one of the jurors who had voted 'yes' with me on the first claim, switched her vote to 'no.'
- Within seconds, the foreperson hit the buzzer [summoning the clerk] and we were done without further discussion.

CP 973-974, Appendix 2-3. These uncontested facts are admissible as circumstantial evidence supporting juror misconduct.

> '[C]ircumstantial 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. The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

WPI 1.03. These are facts; not mental processes. "When that to which the juror testifies to can be rebutted by other testimony without probing a juror's mental processes, it may not inhere in the verdict." Long v. Brusco Tug & Barge, Inc., 185 Wn.2d 127, 140, 368 P.3d 478 (2016) (Gonzalez, J., dissenting) (quotation marks omitted), quoting in part, Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962) (citing State v. Parker, 25 Wash. 405, 65 P. 776 (1901)). Mr. Neil's uncontested testimony showed jury misconduct, but instead of acting on that testimony, Judge Erlick dismissed the testimony questioning whether Mr. Neil suffered

from implicit bias, but never sought a hearing to assess his credibility. RP (1/27 Albino) 17.

Judge Erlick had a duty to investigate or to accept the testimony as true. Where there is potential juror misconduct, "the trial judge is faced with a 'delicate and complex task,' in that he or she must adequately investigate the allegations." State v. Earl, 142 Wn. App. 768, 775, 177 P.3d 132 (2008). Judge Erlick failed to do so.

The Court of Appeals did no better. The Court made the novel and irrational argument that Mr. Neil's testimony fails because Mr. Neil "did not hear a discussion. … He infers that it did from the expressions on other jurors' faces when he returned." Op., Appendix at 10. Of course, had Mr. Neil heard the discussion, he could have deliberated, but he did not. He was faced with no discussion upon his return, just an immediate vote without the opportunity for further deliberation. These facts are strong circumstantial evidence of misconduct. The immediate vote and the change of vote—all without deliberation—makes no sense. This is a constitutional violation.

There is a "presumption of prejudice when the jury . . . separate[s] during deliberations." Smalls, 99 Wn.2d at 767. The City did not rebut that presumption, and the Court relegated this legal issue to a footnote. *See* Opinion, Appendix at 10, footnote 8.

2. Failure to Give an Implicit Bias Jury Instruction in a WLAD Case is a Violation of the Right to Trial by Jury, Equal Protection and is an Abuse of Discretion

Too late for the petitioner, *three* Washington Pattern Jury Instructions have now been amended to add paragraphs on implicit bias. *See* WPI 1.01, 1.02, and 1.08. This case was all about credibility. Implicit bias was operating at all levels in the courtroom, and a bright line rule is needed now requiring the instruction in every case it is requested.

3. Failure to Give a Pretext Jury Instruction in a WLAD Case is an Abuse of Discretion

It is at least an abuse of discretion to fail to give a pretext jury instruction that would address the difficult burden of the plaintiffs in a discrimination case. This is not a case in which the plaintiff could argue this point based on the other instructions.

> [T]he permissibility of an inference of discrimination from pretext alone is a matter of law .... While counsel may be relied on to ... suggest reasoning, the judge's duty to give an instruction on an applicable matter of law is clear. That is particularly true where, as here, the law goes to the heart of the matter.... It is unreasonable… to expect that jurors, aided only by the arguments of counsel, will intuitively grasp a point of law that until recently eluded federal judges who had the benefits of such arguments.

Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 n.5 (10th Cir. 2002) (discussing Fifth Circuit Court of Appeals making the same erroneous assumption in *Reeves*). *But see*, Farah v. Hertz Transporting, Inc., 196 Wn. App. 171, 177, 383 P.3d 552 (2016) (pretext instruction is

an accurate statement of the law, but not required), *review denied*, 187 Wn.2d 1023, 390 P.3d 332 (2017). The *Farah* holding should be overturned, and a bright line rule is needed for inclusion of this instruction in WLAD cases.

4. The "Continuing Duty" Instruction Was Necessary

The reasoning in *Townsend* applies here as well. Proposed Instruction No. 30 would have informed the jury of the relevant aspects of disability accommodation law, including, that "[t]he duty to accommodate is a continuing duty that is not exhausted by one effort." CP 910 (Appendix at 23). Such language is an accurate statement of the law enunciated in *Humphrey*, which the jury was not informed about but needed to know in order to properly evaluate Plaintiff's claim. *See, e.g.,* RP 981. Instructions No. 10 and 14, which the court gave to address the failure to accommodate claim, failed to inform the jury of the "continuing" nature of the City's duty and that it was obligated under the law "to engage in the interactive process … where the employer is aware that the initial accommodation is failing." *See* CP 935, 939-40; *cf*. CP 910, Appendix at 23. Thus, it was an abuse of discretion to refuse to give Proposed Instruction No. 30, as the instructions given failed to adequately allow Plaintiff to argue her case.

5. Inclusion Of The Essential Functions Element Was An Abuse Of Discretion

Plaintiff took exception to adding the "essential functions" element to the disparate treatment claim instruction. RP 1788-90; RP 1854. The trial court acknowledged the issue was "horribly confusing," *id*., at 1795, and gave serious consideration to the instruction Plaintiff proposed without the "essential functions" element, but ultimately decided to follow the pattern instruction's comments. *See* RP 1796 ("Okay. I'm going to give 330.01. … I realize that -- one moment. No, I won't. I'm sorry. I just -- when it's so explicit, it says, 'Don't give 330.01.'") The instruction is not an accurate statement of the law and the Court should clarify its use.

6. The Cumulative Effect of Errors Here Constitutes a Constitutional Violation or an Abuse Of Discretion

The cumulative prejudice is evident, and the Court should accept review and examine rulings below using a totality of circumstances approach as one would in other cases involving constitutional issues. *See*, Kentucky v. Whorton, 441 U.S. 786, 789, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979) (failure to give presumption of innocence instruction evaluated in light of the totality of the circumstances-including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors-to determine whether the defendant received a constitutionally fair trial); *see also, e.g.,* Specialty

Asphalt & Constr., LLC v. Lincoln Cty., _ Wn.2d _, 421 P.3d 925, 932 (2018) (evidence of discrimination must be "taken together").

F. CONCLUSION

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

Respectfully submitted this 5th day of September, 2018.

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DECLARATION OF SERVICE

Mark Rose states and declares as follows:

On September 5, 2018 I caused to be delivered a copy of the Petition for Review to be delivered via the Court's electronic delivery service to:

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No. 76478-1-I

No. _____

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CITY OF SEATTLE,

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APPENDIX TO PETITION FOR REVIEW

THE SHERIDAN LAW FIRM, P.S.

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Honorable John P. Erlick

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

ALONCITA MONROE, an individual,

Plaintiff,

vs.

THE CITY OF SEATTLE, a municipal corporation,

Defendant.

Case No.: 15-2-11126-4-SEA

DECLARATION OF WILLIE JAMES NEAL JR. IN SUPPORT OF PLAINTIFF'S MOTION FOR NEW TRIAL

I, WILLIE JAMES NEAL, JR., declare under penalty of perjury under the laws of the State of Washington as follows:

1. I am over the age of eighteen and have personal knowledge of the facts contained in this Declaration. I am competent to testify as to the facts provided below.

2. I was a juror in this case. We began deliberations December 20 at 9:30 a.m., and by around 11:30 a.m., the foreperson hit the buzzer and we were called in to give the verdict at 1:30 p.m. I voted "yes" for each of the plaintiff's claims. When the jury was polled, I indicated my vote on the record.

3. The plaintiff in this case, Ms. Monroe, was black. I was the only black juror of twelve. Four were Asian American and seven were Caucasian. No one spoke with an accent.

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4. I observed the following about the witnesses: Mr. Jackson and Ms. Dawes-Milton appeared black. Ms. Rutherford, Ms. Beltz, Ms. DeWitt, Mr. Hitsman, and Mr. Jensen appeared white, and Mr. Chinn appeared to be Asian-American.

5. During deliberations, I argued that if this was your mom, your sister, or daughter, would you like her to work for Jackson? No one talked about how Jackson mistreated Ms. Monroe or how she urinated on herself. The big juror was looking at his watch over and over. I suggested we slow down and go over each element of the claim. No one agreed. We sort of ran through each claim.

6. I felt the deliberations were unfair and went too fast, and that Ms. Monroe did not get a fair trial owing to her race.

7. I also felt that the deliberations were not adequate. The foreperson was in charge of pulling up the exhibits so we could discuss them as we went through the jury verdict form, but the jury did not review any exhibits.

8. I also felt that there was misconduct in the jury deliberation process. We deliberated by going through the jury verdict form. The failure to accommodate claim was first. Three of us voted "yes," meaning we voted in favor of Ms. Monroe on that claim, which caused the group to go on to the next claim, and then come back and revisit the first claim. Each time three of us voted "yes." I voted in favor of a "yes" vote to each of the claims. We were told by Judge Erlick not to deliberate when anyone was out of the room. Toward the end of the morning, I went to the bathroom. I was in there for a few minutes. As I went to open the bathroom door to rejoin the group, I could hear the jurors talking, but I could not hear what was being said. When I opened the door, everyone stopped talking, and two of the jurors looked at me with guilty expressions. Then, someone said, "let's do another vote." Without any argument or explanation, one of the jurors who had voted "yes" with me on the first claim, switched her vote to "no." Within seconds, the foreperson hit the buzzer and we were

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done without further discussion. I felt like this was a rigged outcome, and that the group convinced her to change her mind out of my presence.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED this 22nd day of December, 2016.

Willie James Neal, Jr.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ALONCITA MONROE, an individual, Appellant, v. THE CITY OF SEATTLE, a municipal corporation, Respondent.	No. 76478-1-I DIVISION ONE UNPUBLISHED OPINION FILED: August 6, 2018

APPELWICK, C.J. — Monroe brought suit alleging failure to accommodate, disability discrimination and harassment, and retaliation. She argues that the trial court should have granted a new trial based on jury misconduct, that the trial court's jury instructions were in error, and that the trial court erroneously excluded hearsay. We affirm.

FACTS

Aloncita Monroe was an employee of the City of Seattle (City) in the Public Utilities division. In 2011, she exhibited strange behavior at work. She appeared overly nervous, was using exaggerated hand gestures, and her pupils were constricted. The City ordered a fitness for duty exam[1] (FFDE). Monroe failed, in part because she tested positive for unprescribed drugs.

[1] An FFDE is a medical examination used to determine whether an employee can safely perform his or her job.

Monroe's physician informed the City that Monroe suffered from major depression and anxiety disorder. The physician's letter acknowledged that Monroe had used unprescribed medication to help deal with stress. And, the letter stated that Monroe's ability to function was limited due to her condition, especially with respect to front desk duties. The City agreed to accommodate her under the Americans with Disability Act[2] (ADA), by either providing reasonable accommodation for her within her current job title or another job title by identifying job vacancies with duties that she could perform.

The City began the accommodation process to find a suitable position for Monroe. It ultimately placed her in an Administrative Specialist I position with the Seattle Department of Transportation (SDOT), and her physician approved the job. Monroe began work in her new position on November 7, 2012. Her supervisor was Paul Jackson.

On February 8, 2013, Monroe's colleague who worked in the same office space observed Monroe acting strangely. That employee described her behavior as strange physical movements, walking aimlessly, staring at her computer monitor without producing work, gazing at the ceiling repeatedly, and talking and mumbling loudly to herself. Another colleague stated that Monroe made an odd request to ride along with SDOT crews, and was "dancing around his office in circles bobbing her head up and down."

Employees reported this to Jackson. After Jackson personally observed Monroe's behavior, he alerted the SDOT safety office. Safety Officer Scott Jensen,

[2] 42 U.S.C. §§ 12101-12213.

determined that an FFDE was warranted. Jackson and Jensen met with Monroe and told her that they were seeking an FFDE. Jackson and Jensen informed her that declining to undergo the FFDE could result in disciplinary action. They gave Monroe an opportunity to call her union representative from the privacy of another room, but she was unable to reach the union. Monroe decided to refuse the FFDE, and signed the consent form memorializing her refusal.[3]

After Jackson collected her belongings, Monroe went into the employee locker room. Jackson testified that he knocked on the locker room door after about 7 to 10 minutes, and when Monroe opened the door she was on the phone with her union representative. Monroe handed Jackson the phone, and the union representative stated that Monroe was ready to undergo the FFDE. Jackson responded that, because Monroe had already signed the form declining the FFDE, the FFDE was no longer possible unless he received instructions from his superiors. The union representative stated that someone would soon contact Jackson, and Jackson returned to his office.

After that, Jackson testified, Monroe could not be located at the office and her car was no longer in the parking lot. Monroe contradicted this. She testified that she then met Jackson in a common area, handed her badge to over him, and left the building. No FFDE occurred. Monroe was terminated.

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[3] Monroe's testimony took a different tone. She testified that, when she was contemplating whether to accept or decline the FFDE, it seemed Jackson had "snapped" and that she was intimidated and fearful.

Monroe filed a complaint for damages under the Washington Law against Discrimination[4] (WLAD). She alleged failure to accommodate, discrimination based on disability, gender, and sex, a hostile work environment, and retaliation. The claims proceeded to trial, and the jury returned a verdict in favor of the City.

After the verdict, Monroe moved for a new trial. The motion was based on one juror's suspicions that the jury may have deliberated without him and Monroe's argument that the jury instructions were erroneous. The trial court denied the motion. Monroe appeals.

DISCUSSION

Monroe makes four arguments. First, she argues that a new trial was warranted, because a juror provided a declaration that stated he believed that the other jurors deliberated without him. Second, she argues that jury instruction 13 misstated the law, because it stated that a disparate treatment plaintiff must be able to perform the essential functions of her job. Third, she argues that the trial court erred by not giving a jury instruction on implicit bias, pretext for termination, and the City's continuing duty to accommodate. Finally, she argues that the trial court erred in excluding evidence of the reputation and history of one of the City's key witnesses, Monroe's supervisor.[5]

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[4] Ch. 49.60 RCW.

[5] She also seeks attorney fees if she prevails. But, because we affirm the trial court, Monroe is not entitled to attorney fees. Likewise, we need not address the City's cross appeal.

I. Juror Misconduct

Monroe first argues that the trial court erred by denying a mistrial due to juror misconduct. That motion relied in part[6] on allegations of misconduct from one juror, who was the only African American juror. The facts alleged by that juror were as follows:

> I also[7] felt that there was misconduct in the jury deliberation process. We deliberated by going through the jury verdict form. The failure to accommodate claim was first. Three of us voted "yes," meaning we voted in favor of Ms. Monroe on that claim, which caused the group to go on to the next claim, and then come back and revisit the first claim. Each time three of us voted "yes." I voted in favor of a "yes" vote to each of the claims. We were told by Judge Erlick not to deliberate when anyone was out of the room. Toward the end of the morning, I went to the bathroom. I was in there for a few minutes. As I went to open the bathroom door to rejoin the group, I could hear the jurors talking, but I could not hear what was being said. When I opened the door, everyone stopped talking, and two of the jurors looked at me with guilty expressions. Then, someone said, "let's do another vote." Without any argument or explanation, one of the jurors who had voted "yes" with me on the first claim, switched her vote to "no." Within seconds, the foreperson hit the buzzer and we were done without further discussion. I felt like this was a rigged outcome, and that the group convinced her to change her mind out of my presence.

Monroe contends that this evidence warrants a new trial. The State responds that Monroe has provided no evidence of misconduct, but merely speculation. And, in any event, the State argues, any such misconduct would inhere in the verdict.

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[6] The majority of the issues that Monroe raised in her motion for mistrial related to jury instructions and evidentiary decisions. But, on appeal, Monroe's mistrial argument is based solely on juror misconduct.

[7] The juror's declaration also stated that he felt the deliberations went too fast, and the jurors did not adequately consult exhibits. But, Monroe relies primarily on this quoted portion of the juror's declaration.

Courts generally do not inquire into the internal process by which the jury reaches its verdict. Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 204, 75 P.3d 944 (2003). In considering whether to declare a mistrial based on alleged juror misconduct, courts must ask whether the facts alleged "inhere in the verdict." Long v. Brusco Tug & Barge, Inc., 185 Wn.2d 127, 131, 368 P.3d 478 (2016). The party alleging such juror misconduct has the burden to show that misconduct occurred. State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). 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). Appellate courts analyze whether misconduct inheres in the verdict de novo. Long, 185 Wn.2d at 131.

The individual or collective thought processes leading to a verdict inhere in the verdict and cannot be used to impeach a jury verdict. Breckenridge, 150 Wn.2d at 204-05. Thus, 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. Id. at 205.

Long presents an example of alleged misconduct that inheres in the verdict and does not warrant a new trial. The court was provided with "the somewhat conflicting declarations of four jurors, which characterize what one or two of their fellow jurors said based on their disclosed [life] experiences." 185 Wn.2d at 138. The court held that this did not warrant setting aside the verdict. Id. at 137. It cited the fact that the jurors' recollections of what occurred were conflicting. Id. at 138.

And, it went on to hold that setting aside a verdict based solely on jurors offering their own life experiences was not warranted in light of the policy in favor of stable verdicts. Id.

The evidence does not warrant setting aside the verdict here, either. Monroe offers a single declaration that is based on suspicion alone as to what was discussed. The juror did not hear a discussion. He did not have knowledge that a discussion of issues did occur. He infers that it did from the expressions on other jurors' faces when he returned. This does not amount to the "strong, affirmative showing" of misconduct necessary to overcome the policy in favor of stable verdicts.[8] Monroe cites no case where a court has ever afforded such relief based on mere suspicion that misconduct of this nature may have occurred. Monroe does not carry her heavy burden to disturb the jury's verdict.[9]

II. Jury Instructions

Monroe argues that the trial court erred in instructing the jury. First, she argues that instruction 13 misstated the law. Second, she argues that the trial

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[8] Monroe also contends that the jury's conduct violated RCW 4.44.300. That statute permits a jury to separate unless good cause is shown to sequester the jury. Id. Our Supreme Court has instructed that if a jury is separated in violation of RCW 4.44.300, a presumption arises that the defendant has been prejudiced. State v. Smalls, 99 Wn.2d 755, 766, 665 P.2d 384 (1983). Monroe claims that she is entitled to this presumption. But, here one juror left merely to use the restroom. Monroe has not established that RCW 4.44.300 was violated.

[9] Monroe seems to suggest in her brief that an evidentiary hearing would be warranted. But, she did not request one. Her motion below sought a new trial. Her assignment of error clearly states, "The trial court erred in denying plaintiff a new trial based on juror misconduct." The trial court's decision being reviewed is whether it erred in denying a mistrial. Whether further fact finding was warranted is not before us.

court erred by not giving additional jury instructions on: (1) implicit bias, (2) pretext for termination, and (3) an employer's continuing duty to accommodate.

A. Misstatement of Law: "Essential Functions"

Monroe argues that instruction 13 misstated the law. That instruction set forth the elements of Monroe's disability discrimination claim: (1) that Monroe has a disability, (2) that she was able to "perform the essential functions of the job in question with reasonable accommodation," and that (3) the disability was a substantial factor in her termination. Monroe argues that this instruction was error, because it included the "essential functions" element. This court reviews whether a jury instruction reflects an accurate statement of the law de novo. Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 635, 244 P.3d 924 (2010).

Instruction 13 matched, verbatim, 6A Washington Practice: Washington Pattern Jury Instructions: Civil 330.32, at 375 (6th ed. 2012) (WPI). Monroe acknowledges this. Thus, her argument is that WPI 330.32 misstates Washington law.

In support of this argument, Monroe cites Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 33, 244 P.3d 438 (2010). In that case, Johnson alleged that his former employer discharged him due to his disability and race. Id. at 21. In addressing whether the jury was properly instructed, the court reasoned that "Johnson was required to prove only that his race or disability was a substantial factor in Chevron's decisions." Id. at 33.

Monroe argues that this quote establishes that an employee need not also prove that he or she could perform the essential functions of his or her job. But,

the context of the quote shows otherwise. The court made the statement in holding that it was error to require Johnson to prove that he was treated differently than other employees. Id. at 32-33. And, although the instructions included an essential functions element, the court did not address that portion of the instructions, and thus did not hold that it was error. Id. at 32 n.31, 33.

And, the essential functions element is drawn from another case, Havlina v. Dep't of Transp., 142 Wn. App. 510, 517, 178 P.3d 354 (2007). There, the Court reasoned that "WLAD's prohibition against disability discrimination does not apply if the disability prevents the employee from properly performing his job." Id. And, it specifically mentioned essential functions: "If an employee is not able to perform the essential functions of his job, the agency's responsibility to accommodate the employee is limited to making a 'good faith' effort to locate a job opening for which the employee is qualified." Id. (emphasis added).

Under Havlina, WPI 330.32 does not misstate the law. The trial court's inclusion of an essential functions element in instruction 13 was not error.

B. Jury Instructions not Given

Monroe argues that the trial court erred by not instructing the jury on: (1) implicit bias, (2) pretext for termination, and (3) the employer's continuing duty to accommodate. A trial court's decision on whether to give a particular instruction is reviewed for an abuse of discretion. Terrell v. Hamilton, 190 Wn. App. 489, 498, 358 P.3d 453 (2015)

1. Implicit Bias

Monroe argues that the facts of this case warranted an implicit bias instruction to the jury, because, among other things, Monroe is an African American plaintiff, and there was only one juror who was African American. Washington courts have recently expressed concern over implicit bias that can affect the equitable administration of justice. See, e.g., In re Marriage of Black, 188 Wn.2d 114, 134-35, 392 P.3d 1041 (2017) (holding that implicit biases affected a judgment); State v. Saintcalle, 178 Wn.2d 34, 49, 309 P.3d 326 (2013) ("[W]e should recognize the challenge presented by unconscious stereotyping in jury selection and rise to meet it."), abrogated on other grounds by City of Seattle v. Erickson, 188 Wn.2d 721, 734-35, 398 P.3d 1124 (2017).

But, this instruction is similar in substance to instruction one, which instructed jurors to "reach your decision based on the facts proved to you and on the law given to you, not sympathy, bias, or personal preference." Monroe cites no Washington authority that has ever found error in not giving an implicit bias instruction. And, Monroe was able to and did address her implicit bias theory in her closing argument. The trial court did not abuse its discretion in declining to give the instruction.

2. Pretext

Monroe further argues that the trial court should have given an instruction on the possibility of using a false pretext for firing an employee due to a disability. Monroe's offered pretext instruction stated, "You may find that the plaintiff's disability was a substantial factor in the defendant's decision terminate [sic] the

plaintiff if it has been proved that the defendant' [sic] stated reasons for the decision is [sic] not the real reasons, but is a pretext to hide disability discrimination." Monroe argues that, because of the paucity of African American jurors and the lack of an implicit bias instruction, the pretext instruction "would have helped the jury connect the dots to a discriminatory motive."

Monroe argues that this case warrants a different result than Farah v. Hertz Transporting, Inc., 196 Wn. App. 171, 383 P.3d 552 (2016), review denied, 187 Wn.2d 1023, 390 P.2d 332 (2017). There, Farah and his co-plaintiffs were "shuttlers" for Hertz Transporting at Sea-Tac airport. Id. at 174. They brought suit against Hertz for nationality and religious discrimination, because Hertz required them to clock out while engaging in their Muslim prayers. Id. at 175. Farah unsuccessfully requested a pretext instruction nearly identical to the pretext instruction requested by Monroe, except the term "disability" was replaced by "religion or national origin." Id. at 177. The Court of Appeals surveyed competing federal decisions, some of which endorsed the instruction, and some of which held that the instruction might confuse the jury. Id. at 179-80. It ultimately held that, "while 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.

The same is true here. To the extent that Monroe's theory of the case was that the City had presented a pretextual reason for terminating her, she had the opportunity to present that theory during her case in chief. And, in her closing arguments, she articulated her theory of pretext to the jury.

The trial court did not abuse its discretion in denying Monroe's proposed pretext instruction.

3. Continuing Duty to Accommodate

Monroe also contends that the trial court should have given an instruction that explicitly informed the jury about the City's continuing duty to accommodate. Monroe's proposed instruction 30 stated,

> The duty to accommodate is a continuing duty that is not exhausted by one effort. Trial and error may be necessary as part of the interactive process to satisfy the employer's burden. The employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed.
>
> If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship. The employer has an obligation to affirmatively take steps to help the disabled employee continue working at the existing position or attempt to find a position compatible with the limitations.

The trial court declined to give the instruction, because it believed this issue was adequately addressed in instruction 10. Instruction 10 stated that "[a]n employer must provide a reasonable accommodation for an employee with a disability. . . The obligation to reasonably accommodate applies to all aspects of employment, and . . . . [t]here may be more than one reasonable accommodation of a disability."

Monroe's argument on this continuing duty instruction fails. First, instruction 10 was a correct statement of the law. No Washington case has found an abuse of discretion for not using continuing duty to accommodate language in the jury

instruction. She instead cites a single federal case, Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1138 (9th Cir. 2001), where the court observed that employers have a continuing duty to accommodate. That a federal court made this comment does not establish that the trial court here abused its discretion in not giving a continuing duty instruction.

Second, Monroe was able to argue her theory of the case without the proposed instruction 30. In closing argument, she quoted the City's disability resource guide: " 'The obligation to provide reasonable accommodation is on-going and may arise at any time during an individual's employment.' " She also stated in closing that "she was not succeeding, and they needed the right to accommodation [sic], it is on-going, they needed to give her that accommodation."

We hold that the trial court did not abuse its discretion in denying any of Monroe's proposed instructions.

III. Exclusion of Evidence about Supervisor

Monroe next argues that the trial court erred in excluding evidence related to Jackson, who was her supervisor and also one of the City's key witnesses.

The trial court redacted an e-mail in which Monroe stated that she had heard rumors that Jackson had a history of sexual harassment with females.

In another writing, Monroe referenced Jackson being a "womanizer and a big bully," Jackson asking if Monroe was married, and Monroe catching Jackson staring at her. The trial court redacted these references, as well. It found the evidence should be excluded under ER 403, in part because Monroe's sexual

discrimination claim had been dismissed and because Monroe had already established her concerns about Jackson's behavior.[10]

Under ER 403, a trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice or because it is cumulative. This court gives a trial court considerable discretion in applying ER 403. Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). It will reverse an ER 403 decision only in the exceptional circumstance of a manifest abuse of discretion. Id.

Monroe points out that the evidence of stories she had heard about Jackson and her own experiences interacting with Jackson would have given better context for her actions. But, she was not denied the opportunity to explain her actions. In her trial testimony about the events leading to her termination, Monroe testified, "I never had a man of Paul's size be rude to me or disrespectful to me." She testified that he raised his voice to a level she had never heard, and she felt intimidated.

Here, Monroe's sexual discrimination claim had been dismissed. Only the evidence going to the dismissed claim was excluded. Absent that claim, evidence of prior uncomfortable or inappropriate encounters of a sexual nature between

[10] In her brief, Monroe contends that the trial court excluded the evidence as hearsay. The record shows that the City moved to exclude in part based on hearsay, but it primarily argued that the statements' "tiny probative value . . . is overwhelmed by the unfair prejudice." And, the trial court did not discuss the hearsay argument at length, but cited ER 403 and mentioned that the evidence "opens up a whole . . . collateral can of worms," and "I think you have established her concerns [about Jackson]." This shows that the trial court excluded the evidence based on ER 403. Hearsay was, at most, a secondary ground for the ruling.

Jackson and Monroe, or rumors about Jackson's personal conduct, would have been highly prejudicial to the City.[11]

The trial court did not violate its considerable discretion in applying ER 403. We affirm.

WE CONCUR:

[11] Monroe also argues that the evidence should have been admitted because it was critical to proving her retaliation claim. But, as the City points out, instruction 17 required Monroe to prove only that (1) she requested an accommodation due to disability or made a complaint about conduct, and (2) that request or complaint was a substantial factor in her termination. It did not require Monroe to specifically prove that her complaint related to protected conduct. Thus, any evidence that Monroe made a complaint about conduct was necessarily about protected conduct. The evidence was not necessary for the retaliation claim, and the trial court did not abuse its discretion in excluding it.

INSTRUCTION NO. 13

Discrimination in employment on the basis of disability is prohibited.

To establish her claim of discrimination on the basis of disability, Ms. Monroe has the burden of proving each of the following propositions:

(1) That she has a disability;

(2) That she is able to perform the essential functions of the job in question with reasonable accommodation; and

(3) That her disability was a substantial factor in Defendant's decision to terminate her. Ms. Monroe does not have to prove that disability was the only factor or the main factor in the decision. Nor does Ms. Monroe have to prove that she would have been retained but for her disability.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for Ms. Monroe on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for Defendant on this claim.

INSTRUCTION NO.____

(PROPOSED) INSTRUCTION NO. 15

Discrimination in employment on the disability is prohibited. The law protects persons with disabilities, which includes persons who suffer depression and anxiety.

To establish her discrimination claim, the plaintiff has the burden of proving each of the following propositions:

(1) That the plaintiff was terminated; and

(2) That the plaintiff's disability was a substantial factor in the decision to terminate the plaintiff.

If you find from your consideration of all the evidence that each of the propositions stated above has been proved, your verdict should be for the plaintiff. On the other hand, if either of the propositions has not been proved, your verdict should be for the defendant.

WPI 330.01 (6th ed.) (modified); RCW 49.60.205.

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INSTRUCTION NO.

(PROPOSED) INSTRUCTION NO. 4

As we discussed in jury selection, growing scientific research indicates each one of us has "implicit biases," or hidden feelings, perceptions, fears and stereotypes in our subconscious. These hidden thoughts often impact how we remember what we see and hear, and how we make important decisions. While it is difficult to control one's subconscious thoughts, being aware of these hidden biases can help counteract them. As a result, I ask you to recognize that all of us may be affected by implicit biases in the decisions that we make. Because you are making very important decisions in this case, I strongly encourage you to critically evaluate the evidence and resist any urge to reach a verdict influenced by stereotypes, generalizations, or implicit biases.

Judge Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 Harv. L. & Pol'y Rev. 149-169, 169, FN 85 (2010)

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INSTRUCTION NO.____

(PROPOSED) INSTRUCTION NO. 17

You may find that the plaintiff's disability was a substantial factor in the defendant's decision terminate the plaintiff if it has been proved that the defendant' stated reasons for the decision is not the real reasons, but is a pretext to hide disability discrimination.

Farah v. Hertz Transporting, Inc., No. 73268-4-I, 2016 WL 5719836, at *4 (Wash. Ct. App. Oct. 3, 2016) (while 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). 8th Circuit's Model Jury Instruction 5.20. http://juryinstructions.ca8.uscourts.gov/civil_instructions.htm; Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002) ("hold[ing] that in cases such as this, a trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may—but need not—infer that the employer's true motive was discriminatory"; and that the refusal to give an instruction identical to the 8th Circuit Court of Appeals' Model Instruction was not harmless error); *discussing with approval* Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280 (3rd Cir. 1998) ("It is difficult to understand what end is served by reversing the grant of summary judgment for the employer on the ground that the jury is entitled to infer discrimination from pretext ... if the jurors are never informed that they may do so.") *and* Cabrera v. Jakabovitz, 24 F.3d 372, 382 (2nd Cir.), *cert. denied,* 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994). The Supreme Court of Iowa has likewise held that "[i]f the plaintiff … presents evidence of pretext, failure to provide a pretext instruction will result in prejudice." Deboom v. Raining Rose, Inc., 772 N.W.2d 1, 11 (Iowa 2009).

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INSTRUCTION NO. ____

(PROPOSED) INSTRUCTION NO. 30

The duty to accommodate is a continuing duty that is not exhausted by one effort. Trial and error may be necessary as part of the interactive process to satisfy the employer's burden. The employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed.

If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship. The employer has an obligation to affirmatively take steps to help the disabled employee continue working at the existing position or attempt to find a position compatible with the limitations.

Frisino v. Seattle School Dist. No. 1, 160 Wn. App. 765, 779-82, 249 P. 3d 1044 (2011) (emphasis added); *Humphrey v. Mem'l Hospitals Ass'n,* 239 F.3d 1128, 1138 (9th Cir.2001); EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Oct. 17, 2002), *available at* https://www.eeoc.gov/policy/docs/accommodation.html#intro; *Griffith v. Boise Cascade. Inc.*, 111 Wn. App. 436, 442, 45 P.3d 589 (2002).

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American Bar Association

Principles for Juries and Jury Trials

(revised 2016)

PREAMBLE

The American jury is a living institution that has played a crucial part in our democracy for more than two hundred years. The American Bar Association recognizes the legal community's ongoing need to refine and improve jury practice so that the right to jury trial is preserved and juror participation enhanced. What follows is a set of 19 Principles that define our fundamental aspirations for the management of the jury system. Each Principle is designed to express the best of current-day jury practice in light of existing legal and practical constraints. It is anticipated that over the course of the next decade jury practice will improve so that the Principles set forth will have to be updated in a manner that will draw them ever closer to the ideals to which we aspire.

B. **A unanimous decision should be required in all criminal cases heard by a jury.**

C. **At any time before verdict, the parties, with the approval of the court, may stipulate to a less-than-unanimous decision. To be valid, the stipulation should be clear as to the number of concurring jurors required for the verdict. In criminal cases, the court should not accept such a stipulation unless the defendant, after being advised by the court of his or her right to a unanimous decision, personally waives that right, either in writing or in open court on the record.**

PRINCIPLE 5 – IT IS THE DUTY OF THE COURTS TO ENFORCE AND PROTECT THE RIGHTS TO JURY TRIAL AND JURY SERVICE

A. **The responsibility for administration of the jury system should be vested exclusively in the judicial branch of government.**

1. **All procedures concerning jury selection and service should be governed by rules and regulations promulgated by the state's highest court or judicial council.**

2. **A unified jury system should be established wherever feasible in areas that have two or more courts conducting jury trials. This applies whether the courts are of the same or of differing subject matter or geographic jurisdiction.**

3. **Responsibility for administering the jury system should be vested in a single administrator or clerk acting under the supervision of a presiding judge of the court.**

B. **Courts should collect and analyze information regarding the performance of the jury system on a regular basis in order to ensure:**

1. **The representativeness and inclusiveness of the jury source list;**

2. **The effectiveness of qualification and summoning procedures;**

3. **The responsiveness of individual citizens to jury duty summonses;**

4. **The efficient use of jurors; and**

5. **The reasonableness of accommodations being provided to jurors with disabilities.**

PRINCIPLE 6 – COURTS SHOULD EDUCATE JURORS REGARDING THE ESSENTIAL ASPECTS OF A JURY TRIAL

A. Courts should provide orientation and preliminary information to persons called for jury service:

1. Upon initial contact prior to service;

2. Upon first appearance at the courthouse; and

3. Upon reporting to a courtroom for juror voir dire.

B. Orientation programs should be:

1. Designed to increase jurors' understanding of the judicial system and prepare them to serve competently as jurors;

2. Presented in a uniform and efficient manner using a combination of written, oral and audiovisual materials; and

3. Presented, at least in part, by a judge.

C. The court should:

1. Instruct the jury on implicit bias and how such bias may impact the decision making process without the juror being aware of it; and

2. Encourage the jurors to resist making decisions based on personal likes or dislikes or gut feelings that may be based on attitudes toward race, national origin, gender, age, religious belief, income, occupation, disability, marital status, sexual orientation, gender identity, or gender expression.

D. Throughout the course of the trial, the court should provide instructions to the jury in plain and understandable language.

1. The court should give preliminary instructions directly following empanelment of the jury that explain the jury's role, the trial procedures including note-taking and questioning by jurors, the nature of evidence and its evaluation, the issues to be addressed, and the basic relevant legal principles, including the elements of the charges and claims and definitions of unfamiliar legal terms.

2. The court should advise jurors that once they have been selected to serve as jurors or alternates in a trial, they must consider only the applicable law and evidence presented in court, and must refrain from communicating about the case with anyone outside the jury room until the trial is over and the jury has reached a verdict. This instruction should explain that the ban on outside communication is broad, encompassing not only oral discussions in person or by phone, but also communications through e-mails, texts, Internet postings, blog postings, social media websites like Facebook or Twitter, and any other method for sharing information about the case with another

RCW 4.44.300

Care of jury while deliberating.

During deliberations, the jury may be allowed to separate unless good cause is shown, on the record, for sequestration of the jury. Unless the members of a deliberating jury are allowed to separate, 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 or her ability, keep the jury separate from other persons. The officer shall not allow any communication to be made to them, nor make any himself or herself, unless by order of the court, except to ask them if they have agreed upon their verdict, and the officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on.

[**2003 c 406 § 17;** Code 1881 § 229; **1877 p 48 § 233; 1869 p 57 § 233; 1854 p 166 § 194;** RRS § 349.]

NOTES:

Rules of court: *Cf. CR 47(i), 51(h).*

*Admonitions to jury, separation: RCW **4.44.280**.*

THE SHERIDAN LAW FIRM, P.S.

September 10, 2018 - 10:52 AM

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