

NO. 360907-7-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION TWO

HELEN TUCKER-SLATER,

Appellant,

vs.

CITY OF LAKEWOOD,

Respondent.

APPELLANT'S REPLY BRIEF

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COURT OF APPEALS
DIVISION II
08 FEB - 1 AM 9:59
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I. INTRODUCTION

Appellant, Helen Tucker-Slater, files this brief in response to the brief filed by Respondent, City of Lakewood. Respondent's response fails to rebut the clear reversible errors committed by the trial court. The undisputed facts and binding precedent demonstrate that the trial court committed reversible error in the following orders:

- Federal law clearly establishes that an employee can bring claims for hostile work environment based on retaliation even when the employee claims that her termination was unlawful retaliation. Federal law is instructive with regard to Washington's Laws Against Discrimination.
- Slater's retaliation claim included all of conduct she complained about in her August 28, 2002 email. The trial court watered down Slater's complaints to the single incident of the co-worker's use of the "N" word on August 23, in total disregard of the law regarding protected conduct.
- It is undisputed that Slater was fired immediately after sending the August 28 email. Respondent characterizes the email as "threatening" and therefore justifying its decision to fire Slater for reporting unlawful employment practices.
- Slater's reasonably believed that she was reporting unlawful employment practices when she sent the August 28 email. Slater was not required to prove that her complaints were about conduct that was in fact unlawful.
- Given the erroneous jury instructions, the jury could not find retaliation based on the trial court's limitation of the evidence and the erroneous jury instruction on retaliation.

- The jury verdict in favor of Respondent was against the weight of the evidence.

II. ARGUMENT

A. **This Court Should Rule That A Hostile Work Environment Based on Retaliatory Acts Is A Cognizable Claim Under RCW 49.60.210 In Addition to the Retaliatory Discharge Claim.**

Several federal courts, including the Ninth Circuit, have allowed claims for a hostile work environment based on retaliatory acts under Title VII. Washington's Law Against Discrimination forcefully condemns retaliation against employees for opposing discrimination. RCW 49.60.210, unlike RCW 51.48.025, which prohibits retaliatory discharge for filing a workers compensation claim, contains no language recognizing an employer's right to discharge an employee for other reasons besides retaliation for opposing discrimination. *Allison v. Housing Authority*, 118 Wn.2d 79, 98, n.5, 821 P.2d 34 (1991). Moreover, RCW 49.60.020 requires that the Law Against Discrimination be liberally construed to accomplish its purposes. *Id.*

The Washington State Supreme Court, in *McClarty v. Totem Electric Co.*, 157 Wn.2d 214, 137 P.3d 844 (2006), recently reaffirmed the doctrine of looking to federal courts and Title VII for guidance in interpreting the Washington Law Against Discrimination ("WLAD"), when it adopted the federal definition of "disability". In doing so, the Court noted that "[t]his court has held that federal law is instructive with regard to our state discrimination laws."

The Court further noted that it was appropriate to adopt the federal definition of disability given that the federal and Washington laws were enacted nearly contemporaneously and directed at the same issue. *McClarty v. Totem*

Electric, 157 Wn.2d at 228, citing *Clarke v. Shoreline School District No. 412*, 106 Wn. 2d 102, 118, 720 P.2d 793 (1986) (when Washington statutes or regulations have the same purpose as their federal counterparts, we will look to federal decisions to determine the appropriate construction). *Id.*

1. A Retaliatory Hostile Work Environment Is Independent Of the Ultimate Employment Decision – Termination.

Respondent maintains that there cannot be a claim for retaliatory hostile work environment where the plaintiff is not fired. By its terms, RCW 49.60.210 includes a claim for retaliation short of discharge.

RCW 49.60.210 provides:

"It is an unfair practice for any employer. . . to discharge. . . or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter."
(Emphasis supplied)

Thus, the statutory scheme under Washington's Law Against Discrimination includes a prohibition of discriminating against employees for opposing perceived unlawful employment practices. The statutory basis for the retaliatory hostile work environment claim is the notion that discriminatory ridicule or abuse can so infect a workplace that it alters the terms or conditions of the plaintiff's employment. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986). Harassment is obviously actionable when based on race and gender. Harassment as retaliation for engaging in protected activity should be no different—it is the paradigm of discriminatory treatment that is based on retaliatory motive and is reasonably likely to deter the complainant and others from engaging in protected activity.

What is necessary in retaliatory harassment claims is evidence that the challenged discriminatory acts or harassment adversely affected the terms, conditions, or benefits of the plaintiff's employment. *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001).

None of the cases, which have recognized a retaliatory hostile work environment support Respondent's argument that where the employee is terminated, a claim for hostile work environment cannot lie. Only the Fifth and Eighth Circuits have held that only "ultimate employment decisions" such as hiring, firing, demotion, and promoting can constitute actionable adverse employment actions. However, in light of the recent Supreme Court holding in *Burlington Northern and Sante Fe Railway v. White*, 548 U.S. ___, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006), those decisions are no longer good law.

The Court's substantive holding was:

"We conclude that the anti-retaliation provision of Title VII does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

Id. 126 S.Ct. at 2409.

In *Richardson v. New York State Dept. of Corrections*, 180 F.3d 426, 444, 446 (2nd Cir. 1999), the plaintiff made separate claims of retaliatory transfer and retaliatory hostile work environment, and those claims were upheld separately.

In this case, it is particularly appropriate for plaintiff to assert separate and independent claims of retaliatory hostile work environment and retaliatory termination.

First of all, the hostile work environment consists of a series of discrete acts orchestrated by one supervisor occurring over a period of several months. The retaliatory termination was a single discrete incident caused by another supervisor based on plaintiff's complaint just one day before her termination. As such, the hostile work environment and retaliatory termination in this case must be viewed for what they are: two separate and independent harms.

2. The Retaliatory Harassment Was Severe or Pervasive.

Respondent, for the first time, raises the argument that the retaliatory harassment was not severe or pervasive. Respondent did not raise this argument before the trial court and thus is foreclosed from making this argument at the appellate level. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). Slater nonetheless addresses the argument in the event the Court considers the issue.

The retaliatory harassment must be severe or pervasive. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). The disjunctive phrasing means that "severity" and "pervasiveness" are alternative possibilities; some harassment may be severe enough to contaminate an environment even if not pervasive; other, less objectionable conduct will contaminate the workplace only if it is pervasive. *Jensen v. Potter*, 435 F.3d 444, 449 fn. 3 (3rd Cir. 2005).

Slater received a disproportionate share of the workload as a result of complaining about the attempted change in her disability accommodation. She did not receive assistance from the victims advocate office assistant despite complaints to supervisor about lack of assistance and heavy workload. These were daily

occurrences over the remaining seven (7) months of Slater's employment.

On May 23, 2002, despite the fact that she had performed exceedingly well as a contract employee and having worked under the same parameters of the contract for 4 of the 6 months of probationary period, her supervisor, just as she had telegraphed 4 months earlier, advised Slater that she [Slater] did not pass probation. Slater's supervisor extended the probationary period an additional 3 months, May 20 to August 20, in order to give the supervisor more time to observe Slater's work.

In late July 2002, the supervisor, Booker-Hay emailed Slater that she had been doing well for the past few weeks and requested that she continue on that path. However, Booker-Hay again extended the probationary period for an additional 3 months, from August 20 to November 20, to give her [the supervisor] more time for observation. The evidence strongly suggests that Booker-Hay was attempting to force Slater to quit, which she refused to do.

In addition to the above, from January 2002 until her termination, the victims advocate office assistant refused to provide clerical assistance to Slater, although she provided assistance to the other two victims advocates. Slater's numerous complaints to Booker-Hay about the lack of assistance went unheeded. When Slater continued her complaints about the discriminatory conduct she was subjected to, her working conditions and responsibilities deteriorated further.

When she complained about Booker Hay's attempts to change her accommodated work schedule, she was told that she probably would not pass probation. This comment was made to Slater on or about January 31, 2002. Her job responsibilities immediately changed with Slater receiving a disproportionate share of the workload and no clerical assistance which the other two victim advocates

received. See *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 191 (3rd Cir. 2003) (reversed the grant of judgment as a matter of law to the ADA retaliation plaintiff. The court held that a good-faith request for an accommodation is protected even if the employee is not disabled"); *Wright v. CompUSA, Inc.*, 352 F.3d 472, 477-78 (1st Cir. 2003) (the court held that requesting an accommodation is a protected activity).

Despite several complaints about the workload and the lack of clerical assistance, Slater's complaints went unremedied. This was consistent behavior by Ms. Slater's supervisor, Anita Booker-Hay, who also fell short in her supervisory responsibilities when she failed to take affirmative steps to remedy the work environment after Slater's complaint about the word "Nigger" being used openly and unnecessarily in the workplace in the fall of 2001.

To cinch the matter, Slater offered evidence that these incidents contributed to physical and psychological problems that required treatment, thus underscoring the negative effect on her work performance. She began to suffer migraine headaches more frequently and caused the migraines to last longer. The migraines began to last longer than 8 hours, which caused Slater to increase her medications. She was treated for depression and anxiety and prescribed medication by her physician. Although Slater has suffered from sleep apnea all her life, the increased work-related stress caused her tonsils to become so inflamed that her physician was concerned that she could die in her sleep if they became larger. This led to the surgery in March 2002.

The record here contains evidence of harassment that a jury might well find severe and pervasive.

B. Jury Instructions

1. Jury Instruction No. 11

In this instruction, the trial court instructed the jury that Slater could establish unlawful retaliation only if she was opposing what she reasonably believed to be discrimination on the basis of race. The instruction was not supported by substantial evidence in the record.

No evidence warranted the limitation in Instruction 11, and it was prejudicial error to submit it to the jury in that form. *E.g., State v. Clausing*, 147 Wn.2d 620, 627, 56 P.3d 550 (2002) (“It is prejudicial error to submit an issue to the jury that is not warranted by the evidence.”)

No legal or factual basis existed to instruct the jury to limit its consideration to whether Slater only opposed discrimination based on race when she sent the August 28 email to her supervisors. The trial court then compounded this error by limiting the jury’s consideration of whether Slater was opposing conduct she reasonably believed to be race discrimination to the single incident of the co-worker using the racial slur on August 23, totally disregarding Slater’s earlier complaints about the use of the racial slur by the City Attorney and an Assistant City Attorney.

The jury was understandably confused, as evidenced by its question during deliberations regarding Instruction 11.

For several days, the jury listened to a pattern of retaliatory conduct by Booker-Hay. It also viewed on several occasions the August 28 email in its entirety. Yet the jury was instructed to limit its consideration to the one complaint about the use of the racial slur in the workplace.

The instruction as given ignored Slater's August 28 email in its entirety except for her complaint about the coworker's use of the "N" word in the workplace on August 23. The trial court, without explanation, refused to allow the jury to consider the email in its entirety.

Instruction 11 is obviously erroneous under RCW 49.60.210, in omitting Slater's complaints about unlawful retaliation in the instruction. The Legislature intended that employees, like Slater, who complain about discrimination and retaliation, practices forbidden by RCW 49.60, are protected from further discrimination and retaliation. Instruction 11 instead told the jury that only Slater's complaint about one incident of perceived discrimination was protected from retaliation.

2. Jury Instruction No. 13

Respondent does not dispute that the August 28 email was the basis for Slater's termination. Rather, respondent argues the truth or falsity of the content of the email and that the primary reason for Slater's termination was her recent complaint about the unnecessary use of the "N" word by a coworker in the workplace. No per se rule exists that speech to be protected must be truthful. *Skaarp v. City of North Las Vegas*, 320 F.3d 1040, 1043 (9th Cir. 2003) (a First Amendment retaliation claim).

The court erroneously carved out one incident, the co-worker's unnecessary use of the "N" word in the workplace on August 23, that Slater complained about from her August 28 email, and withheld from the jury's consideration the entirety of Slater's complaints in that email. It is undisputed that the August 28 email was protected activity.

In *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969-70 (9th Cir. 2002), the Ninth Circuit reversed the grant of summary judgment to the Title VII and Washington law defendant on plaintiff's retaliation claim. Little alleged she was raped by a potential client of her employer, that her guaranteed pay was cut by one third immediately after she informed her supervisor, who had been pressing her to get a contract with that client by any means necessary, and that she was fired within two days when she said she was unwilling to accept the pay cut. The Ninth Circuit stated: "It is unnecessary that the employment practice actually be unlawful; opposition thereto is protected when it is based on a *reasonable belief* that the employer has engaged in an unlawful employment practice. *Id.* at 969.

The Ninth Circuit further held that Little had established the "protected speech or activity" element of her prima facie case: "The district court correctly found that Little could have reasonably believed that, in reporting the rape to Scott, she was opposing an unlawful employment practice. "Given Little's belief that her relationship with Guerrero was strictly business, and that she met with him because it was part of her job as a Windermere employee, her belief that Windermere was required to take action in response to his assault of her was eminently reasonable." *Id.* at 970.

The court held that the proximate timing of the adverse action –two minutes after plaintiff reported the incident- satisfied the "causation" prong. *Id.*

In this case, the City Attorney's admission that Slater's complaint about the co-worker's use of the "N" word on August 23, 2002 was a factor in Slater's termination coupled with Respondent's admission that the August 28 email

triggered Slater's termination was sufficient evidence for the jury to find retaliation, but for the erroneous jury instruction, which they were reminded they had to follow.

Slater did not need to prove that her protected activity was the sole factor motivating respondent's decision. *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991); *Allison v. Housing Authority*, 118 Wn.2d 79, 821 P.2d 34 (1991); *Washington v. Boeing Co.*, 105 Wn.App. 1 (2000).

Thus, there was no reasonable basis for the jury to conclude that respondent did not retaliate against Slater when it fired her immediately after she sent the email, and the jury's verdict was against the weight of the evidence.

3. Jury Instruction No. 15

Respondent maintains that Instruction 15 was a correct statement of the law regarding retaliation if no reasonable person could have viewed the coworker's gratuitous use of the word "nigger" in a public workplace on August 23, 2002 as race discrimination. Further, Respondent incorrectly represents to the Court that Slater argued at trial that the primary evidence supporting the retaliatory termination was the "N" word incident on August 23, 2002.¹

Respondent and the trial court confused the requirements necessary to establish that conduct is actionable under RCW 49.60.180 (or Title VII) with the "reasonable belief" requirement for actionable retaliation claims. Harassment is actionable where the conduct is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Clark County School District v. Breeden*, 532 U.S. 268, 270, 121 S.Ct. 1508, 149

¹ Respondent's citation to the record correctly states Slater's argument throughout the proceedings that she was terminated in retaliation for sending the August 28, 2002 email.

L.Ed.2d 509 (2001). Conduct is not actionable under Title VII if no reasonable person could have believed the incident violated Title VII's standard. *Id.* at 271.

The "no reasonable person" standard relates to a determination of whether a violation of the law has occurred. It is not the standard in retaliation cases. See *Little v. Windermere Relocation, Inc.*, *supra*, 301 F.3d at 970.

In order for harassment to be actionable, "the work environment must both subjectively and objectively be perceived as abusive." *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995). The objective severity of the harassment is evaluated from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. *Burlington Northern and Sante Fe Railway Co. v. White*, 548 U.S. ___, 126 S.Ct. 2405, 2415, 165 L.Ed.2d 345 (2006) (The determination of whether a reasonable worker would be chilled by the employer's action is to be made in the light of all the facts. Behavior that might seem trivial in one context could be material in another. An example provided by the court: A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children."); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (Justice Scalia stated: "We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances); *Nichols v. Azteca Rest. Enters. Inc.*, 256 F.3d 864, 879 (9th Cir. 2001) (consistent with our holding in *Ellison*, we analyze objective hostility in this case from the perspective of a "reasonable man." 924 F.2d at 879, n.11); *Ellison v. Brady*, 924 F.2d 872, 879-80 (9th Cir. 1991) (when evaluating the severity and

pervasiveness of sexual harassment ... the perspective of the victim should be the focus of the inquiry).

However, in retaliation cases, when judging a plaintiff's complaint, the standard is whether the plaintiff "reasonably believed" there was unlawful conduct. "A reasonable belief by the employee, rather than an actual unlawful employment practice, is all that need be proved to establish a retaliation claim." *Ellis v. City of Seattle*, 142 Wn.2d 450, 461, 13 P.3d 1065 (2000), citing *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994). "Ellis is not required to prove an actual an actual WISHA violation. All he has to do is prove the City terminated him for making a WISHA complaint." *Id.*

In *Bryant v. Aiken Regional Medical Centers, Inc.*, 333 F.3d 536, 544 (4th Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004), the court found that plaintiff "clearly" engaged in protected activity when she complained to both her immediate supervisor and a hospital officer about her suspicion that she had not been promoted because of racial discrimination.

Similarly, in this case Slater was not required to prove that the underlying conduct she complained about was an actual violation of the law. Respondent did not dispute that Slater reasonably believed that the City had engaged in unlawful employment practices. Nor could it under the circumstances of this case. In 2001, less that a year before she complained about the co-worker's use of the racial slur in the workplace, Slater had immediately complained to Booker-Hay, her supervisor, about the use of the racial slur in the workplace by the highest management person in the office, the City Attorney, and an Assistant City Attorney. The supervisor did absolutely nothing.

Slater's belief that the laws of Washington entitled her to work in an environment where she was not subjected to hearing other employees use an offensive racial slur, one of the most offensive racial slurs, is certainly reasonable. Then when the coworker unnecessarily blurted out the racial slur in the workplace, coupled with the ongoing harassment she was receiving from her supervisor after complaining about the supervisor's efforts to change the work accommodation, Slater's belief that the work environment was becoming increasingly hostile was eminently reasonable. See *Benoit v. Technical Mfg. Corp.*, 331 F.3d 166, 175 (1st Cir. 2003) (employee engaged in protected activity when he complained to his supervisors about perceived racial discrimination).

An erroneous belief that an employer engaged in an unlawful employment practice is reasonable ... if premised on a mistake made in good faith. A good faith mistake may be one of fact or law." *Moyo v. Gomez*, 40 F.3d at 984.

4. Jury Instruction No. 18

Respondent argues that it was proper for the trial court to instruct the jury that a reasonable person is not a hyper-sensitive or overly sensitive person, noting that the trial court indicated that it was giving the instruction because Slater "acknowledged that she could read the "N" word but could not listen to "the N word."

Again this instruction repeats the error in Instruction No. 15 in that "reasonable belief" rather than "reasonable person" is the standard in retaliation cases. Slater reasonably believed that the City allowing employees to use the "N" word in the workplace was creating a hostile work environment. This is not disputed. She had complained earlier to her immediate supervisor about the use

of the racial slur in the workplace by the City Attorney and Assistant City attorney. Nothing was done. She had made her sentiments known to the coworker about the offensiveness of the racial slur prior to the August 23 incident. Yet, the coworker, singled Slater out and unnecessarily repeated the racial slur.

Respondent never presented any admissible evidence to suggest that the co-worker's repeating the racial slur was benign. Slater immediately reported the incident to the City Attorney. When she heard nothing further, Slater put her complaints in writing and sent the August 28 email summarizing her complaints of hostile work environment and retaliation.

Notwithstanding the use of the racial slur in police reports, Slater reasonably believed that she did not have to be subjected to hearing the racial slur repeated in the workplace, a public workplace. The reasonableness of Slater's beliefs is further supported by her immediately reporting the use of the racial slurs to her supervisors.

5. Jury Instruction No. 19

Jury Instruction 19 did not inform the jury of the applicable Washington Law under which an employee's complaint about retaliation is protected activity.

Instruction 19 states in part:

... In this case, for plaintiff's complaint to be a protected activity, the complaint must have been about something that a reasonable person would believe to be racial discrimination.

CP 422.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (1973) sets forth the familiar three-stage, burden shifting test. However, once a trial on the merits has occurred, the issues of whether the plaintiff established a prima facie case and whether defendant produced legitimate non discriminatory reasons are moot, and the question becomes whether the plaintiff produced sufficient evidence to allow the jury to reasonably find that the defendant intentionally retaliated against the plaintiff because of her statutorily protected conduct. *EEOC v. Kohler Co.*, 335 F.3d 766, 773 (8th Cir. 2003).

The trial court erred as a matter of law in instructing the jury “You may not find in favor of plaintiff unless she proves that defendant unlawfully discriminated against her.” The instruction also incorrectly fails to include retaliation in its listing of protected categories. Instruction 20 regarding the requirement that she prove racial discrimination was not supported by substantial evidence or any evidence.

Neither Washington law nor federal law requires a plaintiff to prove that the underlying complaint was unlawful in order for employees to be protected from retaliation. Rather, she need only prove that she reasonably believed that the complained of conduct was unlawful. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn.App. 611, 618, 60 P.3d 106 (2002) (citing *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988)).

The jury’s inquiry was to focus on Slater, and whether it was reasonable for her to believe that Title VII or RCW 49.60 was violated when defendant’s employees openly repeated the word “Nigger” in the workplace, that when she complained about this conduct, nothing was done, and when Slater’s supervisor began a campaign of harassment after Slater complained about the supervisor’s

attempt to undo the reasonable accommodation for her disability. See *Navy Federal Credit Union*, 424 F.3d at 406-07; *Peters v. Jenney*, 327 F.3d 307, 320 (4th Cir. 2003).

It is clear that employees are protected from employer retaliation if they oppose conduct that, if repeated, could amount to a hostile work environment. See *Alexander v. Gerhardt Enterprises, Inc.*, 40 F.3d 187, 190, 195-96 (7th Cir. 1996) (concluding that employee had reasonable, good faith belief that Title VII violation was in progress when co-worker, on single occasion, said “if a nigger can do it, anybody can do it, “ and apologized shortly thereafter).

The court in *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890 (7th Cir. 2004), stated:

“The purpose of requiring that plaintiffs reasonably believe in good faith that they have suffered discrimination is clear. Title VII was designed to protect the rights of employees who in good faith protest the discrimination they believe they have suffered and to ensure that such employees remain free from reprisals or retaliatory conduct ...

The court further stated:

“We emphasize that this decision sets a low bar for receiving Title VII protection. Protection is not lost simply because an employee is mistaken on the merits of his or her charge. Protection also is not lost if an employee drafts a complaint as best he or she can but does not state an effective legal claim.”

Id. at 892

There can be no question that Slater reasonably believed that the use of the “N” word in the workplace was unlawful or that opposing the attempted elimination of her disability accommodation was unlawful. Respondent does not dispute this and offered no evidence to rebut the reasonableness of Slater’s belief. The City nonetheless fired her – for simply reporting the use of this extremely

offensive word and other unlawful employment practices – and they thereby contravened her rights under RCW 49.60.210.

7. Jury Instruction No. 21

The trial court erred in giving Instruction 21 because the instruction did not properly inform the jury of the applicable Washington law, which proscribes unlawful employment practices. The employer is subject to liability if it “discharges or otherwise discriminates against any person because he or she has opposed any practices *forbidden by this chapter* ... RCW 49.60.210. The instruction also amounted to a comment on the evidence.

8. Jury Instruction No. 22

Instruction 22 contained the same errors, which were previously objected to and exceptions taken. Employment decisions cannot be based on retaliation. The error was repeated in the second, third, fourth and fifth paragraphs of the Instruction. RP 946-947. The trial court changed the fifth paragraph but left the errors in the other paragraphs unchanged.

C. The Trial Court Erred When it Ruled on Slater’s Motion for a New Trial Without Conducting An Evidentiary Hearing Because There Was Substantial Evidence That Members of the Jury Were Biased Against African-Americans.

Respondent contends that the evidence fails to establish facts that support a claim of racial prejudice among the jurors. That contention is erroneous. While respondent submitted the declarations from seven (7) jurors, respondent only submitted a declaration from one of the three jurors responsible for making the racially charged statements. That juror states that she does not recall making the statements attributed to her. She does not deny making the statements.

Defendant presented no declaration from Ms. Lucich or Ms. Nichols. Thus, the statements attributed to all three jurors are undisputed.

The foundation of the statements was about race and race only. The three- (3) jurors had no other argument. In the greatest moment of shouting, Ms. Lucich actually said "black people" rather than "they" in one of her tirades about "their kind" and how "they" make their money and what "they" are doing to the court system. She had to be taken out of the room to cool off. This was a moment of true disclosure of the juror's prejudiced feelings.

There was no discussion during the deliberations about the McDonald case. A reference to the McDonald case came up during a break and was never repeated during the deliberations. If the reference to "they" was a reference to people who unjustifiably bring lawsuits and seek large sums of money, it would have been unnecessary for Juror No. 10, Charlotte Holiday, to mention that she was married to a black man, had a bi-racial son, and that she resented race being brought into the deliberations.

To repeat, Ms. Nichols commented about Helen Slater, "She's guilty as hell. I know their kind."

Ms. Smithlin commented "We can't let them get away with this. They will continue to do these things if we let them." The essence of her comments was her belief that blacks do this kind of thing all the time and she was tired of black people going to court over these matters. Depuydt specifically recalled the gist of Smithlin's comments. In the context of her statements, "they" was not used as a reference to people who unjustifiably bring lawsuits for large sums of money.

Ms. Lucich threw temper tantrums throughout the deliberations and

constantly made comments like “Look what ‘they’ are doing to this country. Look what ‘they’ are doing to the court system. This is the way ‘they’ make their money.” She actually used the term black or black people in the height of one of her temper tantrum. She seemed frustrated that some of the other jurors did not view blacks the way she did. Ms. Lucich repeatedly turned to Depuydt and asked, “Don’t you see what they are doing?”

These comments are similar to the comments made in *State v. Jackson*, 75 Wn.App. 537, 540, where the court of appeals reversed the trial court’s denial of the motion for a new trial. (“There are a lot more coloreds now (at home) then[sic] there ever used to be.” The worst part of the reunion was that I had to socialize with the coloreds.” “You know how those coloreds are.”)

1. Juror Misconduct Relating to Racial Bias or Stereotypes Does Not Inhere in the Verdict.

Washington courts have been very clear that racial bias or prejudice do not inhere in the verdict or impeach it. *State v. Jackson*, 75 Wn.App. 537, 543, 879 P.2d 307 (1994) *reconsideration denied, review denied*, 126 Wn.2d 1003, 891 P.2d 37 (1995); *Seattle v. Jackson*, 70 Wn.2d 733, 738, 425 P.2d 385 (1967); *Allison v. Department of L&I*, 66 Wn.2d 263, 265, 401 P.2d 982 (1965). Under Washington law, the right to a jury trial includes the right to an unbiased and unprejudiced jury. *State v. Jackson, supra*, 75 Wn.App. at 543, citing *State v. Parnell*, 77 Wn.2d 503, 507, 508, 463 P.2d 134 (1969) (“More important than speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors”).

In *State v. Jackson*, 75 Wn.App. at 542, the court stated that actual bias is

defined by RCW 4.44.170 (2) as follows:

[T]he existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.

Although in *State v. Jackson*, the question of whether or not the jurors had any bias towards blacks or Afro-Americans [sic] was never asked during voir dire, the court nevertheless concluded that the juror should have revealed his feelings about African-Americans during voir dire. *State v. Jackson*, 75 Wn.App. at 543, citing *Gordon v. Deer Park School District 414*, 71 Wn.2d 119, 426 P.2d 824 (1967).

In *Gordon*, the court asked the jury panel the following question: Now I want to ask you a few questions and if your answer is yes, would you please raise your hand and counsel can make note of that and they will ask you more about it later on ... Do any of you have any preconceived notions when you come into a case of this kind that would cause you to have any feelings or prejudices for either party in this action or against either party in this action?

No juror indicated any preconceived feeling or prejudice for or against any of the parties.

Id. at 121.

A juror's misrepresentation or failure to speak when called upon during voir dire regarding a material fact constitutes an irregularity affecting substantial rights of the parties. In this case, similar to the question asked of the jury panel in *Gordon*, the jurors were asked whether they could judge the case impartially and fairly and whether anyone had any preconceived notions for or against either party. When the three-(3) jurors failed to respond in voir dire, their failure related to a material question and the appropriate remedy is to grant a new trial.

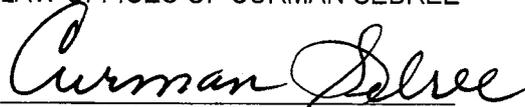
Robinson v. Safeway Stores, 113 Wn.2d 154, 159, 776 P.2d 676 (1989), citing

Gordon v. Deer Park School District 414, 71 Wn.2d 119, 122, 426 P.2d 824
(1967).

Accordingly, the Court should grant held an evidentiary hearing prior to
ruling on plaintiff's motion for a new trial.

DATED this 31st day of January 2008.

LAW OFFICES OF CURMAN SEBREE

A handwritten signature in cursive script that reads "Curman Sebree". The signature is written in black ink and is positioned above the printed contact information.

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2008, I electronically served and mailed **Appellant's Reply Brief** to the following:

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08 FEB - 1 AM 9:59
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