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COURT OF APPEALS
DIVISION II

2016 NOV 15 AM 10:56

No. 49135-4-II STATE OF WASHINGTON

BY  _____
DEPUTY

**IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON**

MAURICE CRAIN

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES;

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This is a case, despite viable legal theories and all substantial evidence supporting such theories, the trial court disposed of this case in part under summary judgment standards. As shown herein, there is abundant evidence of material issues of fact as to the substantial factors that underlie the decision of Western State Hospital (“WSH”) and the Department of Social and Health Services (“DSHS) to terminate Petitioner, Maurice Crain, an African American who was not even a medical provider. The evidence presented below established, among other things that Petitioner was discharged related to his response to the patient in question (“R.K.”), who began choking on some food while he was stretched out on the floor of WSH forensic ward F1.

Crain was targeted for his alleged negligence and ethical violations by WSH and DSHS, as were a handful of other African American employees who were present for patient R.K.’s choking incident. R.K. was saved at WSH, largely due to the fast actions of Crain, yet died days later at St. Clare’s Hospital. Crain’s fiancé Licensed Practical Nurse Diane Parsons was also persecuted¹. That emergent event, and the subsequent death of patient R.K. (at a different hospital two days later), provided DSHS and WSH Chief Executive Officer and opportunist Ronald Adler

¹ RPN Diane Parsons is not African American, but is Mr. Crain’s lawful wife at the time of this writing.

(“former CEO Adler”)² a pretext to “clean house” and investigate with the intent to terminate Crain and other African American staff. These interagency investigations and firings were motivated by illegal racial animus, and the resulting hostility and retaliation that was endured by Mr. Crain is a matter of record.

Mr. Crain has no formal medical training, but took immediate action as a first responder, initiating techniques to clear the choking patient’s airway, and assisting LPN Diane Parsons, with cardiopulmonary resuscitation techniques for over 6 minutes before medical help arrived. Crain and Ms. Parsons were instrumental in preserving that patient’s life, and Crain, visibly shaken, was immediately congratulated for his efforts by RN3 Victoria David who was on duty during those emergent events. R.K. left Western State after being saved by Mr. Crain and his wife alive, and in stable condition.

Mr. Crain was just one of many hospital staff on duty who had become accustomed to that patient’s “baseline behavior” of lying in a prone position on the floor, yet of all the hospital staff on duty that day, Mr. Crain was the only one who stopped to visually assess the patient (while medical staff ignored R.K.) prior to the realization that R.K. was in need of assistance. Most importantly, Mr. Crain was cleared of any

² The Court should take notice that CEO Adler was terminated by Governor Inslee on or around April 12, 2016.

violations after a thorough investigation by the Department of Health (“DOH”), by Washington State Patrol (“WSP”), and Pierce County Prosecutor Philip K. Sorenson.³ Neither the Washington State Patrol or the Lakewood Police Department found any evidence of criminal negligence or wrongdoing that would support a charge. This evidence clearly gives rise to a significant and material issue of fact because the interagency investigations determined that Crain did nothing wrong, yet, DSHS/WSH was unwavering in their determination to terminate Mr. Crain.

This is a case of a troubled State agency that has acknowledged a systemic failure with respect to its emergency response protocol, but a State agency that has nevertheless employed highly nuanced rationale and internal documentation calculated to obfuscate the facts and substantiate Mr. Crain’s termination. This case has nothing to do with the actions taken by Mr. Crain’s union or the grievances and resolution accomplished by his union for the other employees. The issue is that the agency, DSHS, in collusion with WSH, targeted African Americans for termination, and did terminate them or force them to resign.

³Now Honorable Philip K. Sorenson, presiding.

There were significant issues of material fact to be decided by a jury of Crain's peers and this case should not have been dismissed on summary judgment.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred by misapplying summary judgment standards applicable to employment discrimination cases.

2. The Trial Court erred by dismissing Plaintiff's case based on disparate treatment discrimination, due to race, when, at a minimum, there are unresolved questions of fact as to whether or not Plaintiff's race played a role in the adverse employment decision to terminate him.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the Trial Court misapply the rules of summary judgment, when it dismissed on summary judgment grounds Plaintiff's claims for race based disparate treatment, wrongful termination, all of which violate of the provisions of Washington's Law Against Discrimination (WLAD), RCW 49.60.et.seq.?

IV. STATEMENT OF FACTS

A. Petitioner's Actions Were Heroic, He Did Nothing Wrong.

During the events that form the basis of this lawsuit, Mr. Crain had been working under the gainful employ of WSH for a period of greater than 23 years, with 6 of these as a Psychiatric Security Assistant ("PSA"). CR481.

At that time, Mr. Crain had been assigned to a forensic ward designated for patients who have been committed, including the criminally insane and those determined to be not competent to stand trial ("Ward F1"). CR159. This is the highest risk ward on the Western State campus. *Id.* On the evening of September 6, 2012, patient R.K., who had been assigned to Ward F1 for several weeks, was lying on the floor near his room. CR157. He was without teeth, and appeared very fragile, and was emaciated and malnourished. CR571. It is well documented that R.K. was in the habit of lying on the floor, or kneeling in a position similar to someone who is "praying." CR157. This was his "baseline behavior" or the "comfort zone for that patient, a fact that is widely corroborated⁴.

In the minutes leading up to the choking incident, while still on the ground, the patient R.K. showed no signs of distress. CR696, CR686, (Sealed Record/CR776).

Mr. Crain recounts the events that occurred during the dinner hour of September 6, 2012 as follows:

"[R.K.] was in line and laid down into a praying position in front of other patients impeding the meal line flow. Diane Parsons, LPN, walked up to him and asked him to stand up to which he did not respond, she then came and got me to assist with the patient in standing him up. I picked him up off the floor and walked him back to his room and continued to monitor the floor. The patient was given his food tray which was usual for this

CR422, CR440, CR449, CR456, CR474, CR481, (Sealed Record/CR774), CR495, CR502, CR509, CR520, CR526, CR540, CR546, CR549, CR568, CR560, CR583, CR580, CR586, CR603, CR609, CR694, CR686, CR705, CR711, CR188.

patient in his room so no one would bother him while he ate. He was a vulnerable patient and often bullied for food. He walked out of his room in a normal manner and again went into a praying position in front of his doorway with the left side of his face turned. The patient showed no signs of distress. I continued to monitor the ward, and walked up to the patient bending over to assure that he was ok. He was breathing so I continued to let him pray since this was not an unusual behavior for him and Western State Hospital has no policies against patients lying on the floor and emphasizes individualized treatment. Approximately four minutes and 36 seconds later Diane Parsons, LPN walked up to him and asked me for my assistance to get him off the floor because dinner was over and patients were coming out of the dining area going back to their rooms. I assisted her in getting him up at which point I heard a gurgling noise come from his chest, and then his mouth dropped open and some food began to spill out. Diane Parsons and I immediately laid the patient on his back and Ms. Parsons began stomach thrusts and mouth sweeps; she called for a code blue. The RN2 charge nurse and RN3 remained behind the nurse's station as Ms. Parsons and [I] continued to clear his airway. Ms. Parsons continued with stomach thrusts for approximately four minutes with no other licensed staff there to assist, I then relieved her and continued while she applied the AED on his chest and then CPR was started and the code blue team arrived. From the time the code blue was called until their arrival it took a total of 6 ½ minutes (not a timely response time). The AED never administered shocks because the patient still had a pulse. The airway was cleared by Ms. Parsons and me and the patient was revived by the code blue team. The RNs continued not to assist. The patient was then transported to St. Claire Hospital. When he left my ward (F1) he had spontaneous breathing and a positive air flow . . . He died two days later at St. Claire Hospital after being off the ventilator for at least 12 hours. The State cremated him without autopsy."

Decl. of Maurice Crain, CR722. (Emphasis added).

In the WSH confidential internal document *Narrative Report Sentinel Event #2012-0908* states "At the time of transport (17:42), [R.K.] was being ventilated with supplemental [oxygen] via an amu bag attached to an endotracheal tube." (Sealed Record/CR774). Dr. Ruiz-Paderes was a

responder to the Code Blue alert at WSH that day, and he also states in his report that “After intubation and resuming pulse and respiration patient [R.K.] was to be transferred to St. Clare Hospital.” CR662, CR465.

B. Petitioner Was Commended for his Efforts.

After Mr. Crain and LPN Parsons were relieved by the Code Blue team, Mr. Crain was visibly shaken. CR695. Fellow PSA Katherine Paulino observed that he was still “emotionally with” the patient following the emergency. *Id.* She states that it touched everyone in the room to see that immediate and heroic effort to save R.K.’s life on the part of Mr. Crain and his fiancé RPN Parsons. *Id.* No one who was actually present with medical certification believes that there was anything unethical or improper in Mr. Crain’s response to R.K.’s emergent circumstances. CR687; CR704, CR713.

Victoria David, an African-American woman and a Registered Nurse Level 3 (“RN3”) who was later forced to resign following these events, had been charged with medical supervision of the ward on that evening of September 6, 2012. CR711. She documented the choking incident in her Administrative Report of Incidents as follows:

“. . . He kneeled on the floor and laid down with his face on the floor. When staff attempted to assist him up he was found to be unresponsive. Staff assessed, determined [patient] was not breathing, food in mouth. Abdominal thrusts and ambubag and suction bag utilized. Code Blue called. AED administered. MD at site and MNC.

EMT came and continued to assist patient. When patient left to [St. Clare] hospital he had pulse PERLA [Pupils Equal and Reactive to Light and Accommodation] . . . [patient] was responding and had a heart rate by time left for St. Clare [Hospital]. All procedures and protocols were followed . . .” CR602.

LPN Diane Parsons, who was a first responder and was directly responsible for saving R.K.’s life, avers in her sworn declaration that when patient R.K. “When he left my ward . . . he had a pulse . . . spontaneous breathing and positive air flow . . . I vividly remember his eyes being open and he was capable of moving his head which does not indicate brain death.” Decl. of RPN Diane Parsons. CR486.

PSA Michelle Karimi states that “we worked tirelessly to cover all the procedures and protocol to save R.K. He left our ward and was still breathing.” CR478.

C. The Anatomy of a Racially Discriminatory Investigation: An Opportunity to “Clean House”

Mr. Crain explains under examination how he came to be reassigned by DSHS/WSH under pretext, which set into motion a highly nuanced machinery of termination:

“When I came in . . . I found out I was going to be reassigned, I came up to security, and then security told me that I had to talk to the RN3, so I couldn’t pass. So I had to wait- because I have to have my ID card to pass through two sets of double doors to get to my ward. Well, they told me to stop and wait. So people are walking by me, and they see me standing there, wondering what’s going on. So I have to wait, and then I get escorted into the RN3’s office, and then I’m told that I have been put on reassignment. So then I have to turn in my keys and

my badge except for I think I had one key, the W11 key- the WW1 key to get into the building, but all my other keys, my proxy card, everything is- I have to turn it all in. And it's demoralizing and it's sudden that . . . I had no prior warning that . . . was even going to happen to me. I didn't even know I was going to be put on reassignment." CR152.

Contemporaneous with Mr. Crain's account of the events the days following the choking incident, WSH Clinical Risk Reviewer Wendy Kraft was emailing various hospital administrators of DSHS/WSH on September 10, 2012, quietly alerting them to the possibility that the choking incident meets the definition of a "sentinel event". CR575. Shortly thereafter, the classified DSHS/WSH internal document titled *Narrative Report Sentinel Event #2012-0908* ("Sentinel Event Report") was disseminated to administrators and others with decision-making. (Sealed Record/CR773).

In the Sentinel Event Report, the author artfully characterizes patient R.K.'s descent to the floor as causally related to his having trouble breathing where the author states " . . . the failure to assess his physical status promptly after he went to the floor was identified as the predominant contributing factor the adverse clinical outcome." *Narrative Report Sentinel Event #2012-0908*.(Sealed Record/CR796). This suggestion that patient R.K. was in fact in distress for the duration of these events is reinforced to the reader in an effort to advance the case toward

the end result of Plaintiff's firing where the author states "[patient R.K.] appears to have been on the floor for several minutes before any distress was recognized . . . with no apparent recognition of the patient being in distress". (Sealed Record/CR783). The author asserts other "causal factors": that staff did not recognize that episode of being on the floor as "different", and that because patient R.K. was typically agitated when approached by staff, he concludes that patient R.K.'s silence should have "[raised] staff suspicion" that he may be in distress. (Sealed Record/CR789). These statements fly in the face of the sworn testimony of all persons who were viewed on camera in proximity to patient R.K. during or following his slow descent to the floor. CR691, CR699, CR708, CR631, CR438, CR144. Such hairsplitting statements also allow the author to "set the table" for former CEO Adler to set into motion the machinery of termination; they are subtle and malleable enough to be misconstrued, and just vague enough to be defensible under scrutiny. These efforts reveal a racial animus on the part of the Administration. So began the DSHS/WSH targeting effort to terminate Mr. Crain from his gainful employ of 23 years.

It is incidental to the investigations that in the Sentinel Event document important facts come to light relating to the events of September 6, 2012: (1) Upon reviewing the video recordings of that day, the author of

the Sentinel Event Report acknowledges that the cameras in use that day were not synchronized, therefore “[d]etermination of the exact chronology of events is hampered.” (2) the author of the Sentinel Event Report represents that “[n]o one knelt down to check him . . .” and further states that “none of the staff interviewed acknowledged having observed him on the floor prior to the initiation of the emergency response.” (Sealed Record/CR786). (Emphasis added.) This highly nuanced and carefully phrased statement is designed to obfuscate the fact that Maurice Crain is recorded by the Ward F1 video recordings as stopping and bending his knees to observe R.K.’s breathing for “about 5 seconds.”(Sealed Record/CR774)

It is important and useful to note that DSHS/WSH would have no legitimate reason to cite the fact that “[n]one of the staff interviewed acknowledged having observed him on the floor prior to the initiation of the emergency response” if those entities did not intend to use such information as a pretext to set into motion the investigative machinery toward that desired outcome of termination. (Sealed Record/CRR786). While it has been acknowledged that prior to the choking incident, there was nothing in R.K.’s chart “saying how long was okay for [R.K.] to be on the ground”, it is broadly confirmed even by those who were not present September 6, 2012 that laying on the floor was his “baseline” comfort

behavior. CR540. (explaining that the staff referred to R.K.'s laying down with all four limbs spread out as "star-fishing").⁵

The following Log of Ward F1 video recording for September 6, 2012 provides a finder of fact with comparative evidence that demonstrates the point that non-African Americans such as PSAs Katherine Paulina (of Pacific Islander descent) and Roberta Lopez (of Latin American descent) passed over patient R.K. without physically or verbally checking on his condition or providing him any care:

#2 CD Ward F1 Dining Area

#	TIME	COMMENTS
1	00:00	Katherine, in gray is sitting in dining area nearest the camera. Staffs Margaret (light blue top) and Diane (Purple Top) are standing in front of Katherine.
2	17:28	Diane goes to [patient R.K.'s] room. [patient R.K.] exits and sits on the floor in front of the nurses' station by a dining room table.
3	19:50	[patient R.K.] gets up from the floor and is escorted by Margaret to his room.
4	22:32	Margaret sits down to the right of the day area.
5	23:09	[patient R.K.] comes out of his room and goes down to the floor.
6	23:38	Maurice passes by [patient R.K.] and pauses for about 5 seconds.
7	24:04	Maurice passes by [patient R.K.] again and then goes towards the nurses' station.

See also ;CR571, CR422, CR440, CR449, CR456, CR475, CR482, (Sealed Record/ CR780), CR495, CR502, CR509, CR520, CR526, CR540, CR545, CR549, CR568, CR560, CR583, CR580, CR586, CR603, CR609, CR694, CR686, CR705, CR711, CR188

8	24:09	Margaret gets up from her chair walks towards patient and stands by [patient R.K.]
9	24:26	Maurice comes out of the nurses' stations passes by [patient R.K.]
10	24:38	Margaret moves from where PT. R.K. is laying and goes to nurses' station.
11	25:26	Margaret comes out from the nurses' station and passes by [patient R.K.]
12	26:06	Margaret and Diane pass by [patient R.K.]
13	26:20	Margaret passes by [patient R.K.] then looks at him from the distance.
14	26:22	This is possibly Katherine that is sitting to the front right of the nurses' station. Staff gets up from their chair and walks by [patient R.K.] with chair in hand and moves to the other side of ward and sits down. (This person had been sitting down in this area prior to [patient R.K.] going down to the floor)
15	26:33	Diane and Margaret enter [patient R.K.] room.
16	26:37	Diane looks down at [patient R.K.]
17	26:45	Margaret and Diane pass by [patient R.K.]
18	27:45	This looks like Maurice standing by [patient R.K.]
19	27:58	Margaret passes [patient R.K.] and then enters his room
20	28:26	Diane passes by [patient R.K.].
21	28:41	Katherine passes by [patient R.K.]
22	28:55	Victoria comes out from nurses' station; not sure if she is by [patient R.K.] room or looking at [patient R.K.]
23	29:15	Diane passes [patient R.K.]and goes to the nurses' station
24	29:47	Victoria walks away from [patient R.K.]goes towards the nurses' station
25	29:55	Not sure if this is Joseph standing by [patient R.K.]

26	30:05	Roberta passes [patient R.K.]
27	30:28	Margaret passes by [patient R.K.]
28	30:28	Victoria comes out from nurses' station and goes to where [patient R.K.] is laying.
29	30:38	Staff attempt to pick up [patient R.K.]
30	30:58	Victoria goes back to the nurses' station, while staff tend to [patient R.K.].

CR402.

Both PSA Katherine Paulino (of Pacific Islander descent) and PSA Roberta Lopez (of Latin American descent), were back to work following the investigation after a mere three months of reassignment, and there is no known evidence of any internal letter of admonishment or reprimand or intent to discipline ever issued to either of them in their respective personnel files, even as the African Americans were being subjected to the machinery of State interagency investigation. (Sealed Record/CR777), CR607, CR664.

Similarly, Joseph Laureta, RN2 who was present as Plaintiff and RPN Diane Parsons initially responded to the choking of patient R.K., never received any reassignment, or discipline, and letter of admonishment or reprimand whatever, and was never suspended without pay pending any investigation. CR486.

RN3 Victoria David states in her Administrative Report of Incidents that a very limited number of individuals were present at the time of the choking event: Victoria David, Maurice Crain, Diane Parsons, and Joseph Laureta. *Id.* at 2. These are the only people who were in close proximity during the initial response to R.K.'s emergent condition. *Id.*

However, Former Chief Executive Officer Ronald Adler ("CEO Adler") identified additional individuals who were placed under investigation following the choking incident, putatively on the basis that they walked by patient R.K. without assessing his condition. CR433. Both of the other people investigated following the death of patient R.K. were African-American, and had exceedingly little to do with the events as they unfolded, despite others who were not African American who were in view of R.K.'s baseline, comfort zone behavior that day and even stepped over R.K. as a matter of course. CR434, CR476, (Sealed Record/CR774)

It is important to note the fact that in the very same September 26, 2014 reply to Plaintiff's EEOC complaint mentioned above, CEO Adler refers to Victoria David as Caucasian, which significantly affected subsequent correspondence. CR433. Defendant intentionally intimates that Ms. David is Caucasian, but she is a mixed-race African American and clearly identified herself as African American. CR714. RN3 Victoria David considers herself African-American, and has never identified

herself otherwise on any document at any time. *Id.* Her father was a black man from South Carolina, and her mother is of German descent. *Id.* at 18.

Nevertheless, as a result of former CEO Adler's misrepresentation, the EEOC was also duped into believing that Victoria David is "Caucasian." CR572 In their letter of explanation to Plaintiff as to why his claim has been dismissed, the EEOC references that same language describing RN3 Victoria David as "Caucasian." CR605. So unchecked and unfettered is that power of Adler, that even a federal agency such as the EEOC is lulled into accepting his version of events as unassailable fact, beyond their scrutiny. CR605.

In similar fashion, Plaintiff's union, the Washington Federation of State Employees was tricked by Adler's mischaracterization of the class of people targeted, and as a result ultimately elected not to support Plaintiff with his claim for disparate treatment on that basis. CR572. This further evidences the reach of DSHS former CEO Adler, and demonstrates the ease with which a racist and illegal animus toward a protected class may be woven into the record's "fabric" for the purpose of a desired adverse employment decision.

D. Maurice Crain Was Still Fired Despite his Exoneration by The Department of Health, Washington State Patrol and Pierce County Prosecutor.

Plaintiff asks the finder of fact to consider the trauma, humiliation, and persecutory targeting of Plaintiff by former CEO Adler, in light of the fact that the Secretary of Health of the State of Washington Department of Health had already exonerated Plaintiff completely and unequivocally of any wrongdoing at the time of each of the following racist and pretextual writings to Mr. Crain. CR670. (Emphasis added).

On February 21, 2013, the Secretary of Health, on behalf of the State of Washington Department of Health, completed its investigation and review of Plaintiff's role in the choking and subsequent death of patient R.K. That agency stated that they have "closed this case without disciplinary action because the evidence does not support a violation."CR670. (Emphasis added.)

Similarly, the Pierce County Prosecutor's Office advised both the Washington State Patrol and the Lakewood Police Department that there was no evidence to support a charge of criminal negligence against Plaintiff, and that no charges would be filed. CR257.

Nevertheless, on September 17, 2013 a determined former CEO Adler sent Plaintiff a document titled *Notice of Intent to Discipline.* CR422. In that document, Adler states that "this action is a result of your

failure to assess a patient while positioned lying on the floor, and for your failure to follow protocol under your duties . . .” CR422. Adler recites in that same document that in November of 2012, an Interagency Referral Report was sent to the Lakewood Police and ultimately the Washington State Patrol for “review.” CR422. Former CEO Adler notes that voluminous interviews were conducted by those law enforcement agencies with various persons present on September 6, 2012 including Ward F1 patients who have been judged incompetent to stand trial, have mental illness, or who are otherwise criminally insane. CR159, CR426, CR667.

Further along in that same *Notice of Intent to Discipline* document, former CEO Adler proceeds to reference the Policies and Procedures Implicated during the choking and subsequent death of patient R.K., including Patient Rights, Patient Abuse, and Code of Ethics. CR426, CR616, CR622. CEO Adler is unwavering in his intent to oust Plaintiff regardless of his good faith effort to save patient R.K.’s life as determined by the Department of Health. *Id.*

On Halloween 2013, in a letter to Petitioner asking him to resign, former CEO Adler dictatorially passes personal judgment on Crain stating that he “had failed to properly assess patient R.K. and follow proper protocol when he was lying on the floor . . . despite you walking by him on several occasions.” CR437. In an attempt to overcome the exoneration

of Mr. Crain by both the Department of Health and the County Prosecutor as to negligence, Adler seizes on the opportunity to implicate language extracted from a prior *Last Chance Agreement* into which Plaintiff had entered with WSH. CR673, CR679. That *Last Chance Agreement* was based on prior, unrelated misconduct, and contained vague language prohibiting ethical violations. *Id.* Adler employs this language to construct a nuanced and difficult to penetrate argument: that Plaintiff misstated, in his original grievance meeting with WSH, the extent to which he had assessed patient R.K. in light of the grainy video footage of the same (showing Mr. Crain bending his knees to closely view patient R.K. for a period of “five seconds”). CR437, CR452. Former CEO Adler, this “ethical violation” is sufficient to justify removing Mr. Crain from his gainful employ of 23 years. *Id.*

In a DSHS letter responding to Petitioner regarding step 2 of the grievance process, that agency cites the same misstatement by Petitioner that he was “knelt down” to assess patient R.K., as a basis for concluding that Petitioner demonstrated “ethical dishonesty” and that such dishonesty forms a “nexus . . . to trigger the ethical requirements of the Last Chance Agreement. CR454. DSHS belabors this “egregious” act of dishonesty in five separate paragraphs therein. CR452.

In another letter generated by DSHS on February 12, 2014, regarding Petitioner's Step 3 grievance meeting and his continued effort to be rightfully restored to good standing despite the abuse he had suffered, that DSHS representative hands down a mere personal judgment in stating that they "believe there was complacency on the part of Mr. Crain, and that the consequences were tragic and indefensible." CR577.

Mr. Crain has attempted to memorialize, in his personal log, the investigation and some of his feelings, thoughts, and observations over this period of years during which he has been fighting to restore his good name:

- September 10, 2012. Various people have been coming on the ward to compliment us on our job with [R.K.] but he died; they assured us it wasn't our fault and our response to the situation was great since this never happens on the ward. I wish I could have done something more for him and find myself crying just because of the incident. [Ward] F1 is not used to this and he was breathing when he left so I just don't understand. At least nursing administration has consoled us (Julia and Kathleen) and other staff members like Bill Bungard and Betty. I called to check on Diane because she was off during this time. I know she liked Robert a lot. She said she was ok but it sounded like she was depressed as we all are over this. I will just keep praying for our ward and that we can move past this."
- October 1, 2012. We had a sentinel meeting. Victoria told us we did not need shop stewards but I felt as if I was being investigated. She just said this is regulation. I know I did my job to the best of my capabilities. I can't get this off my mind. I feel as if I am always being

watched now and I don't know why. The ward seems to be getting back to normal we are supporting each other through this.

- November 1, 2012. I have been reassigned! Just as my grieving process is starting to come to close! I feel as the wind [has] been taken out of me. Diane is off work. I will call her to let her know that everyone there that day has been reassigned. Administration said it's because [R.K.'s] family is trying to sue us so it's for our protection. I don't understand we did nothing wrong.
- November 9, 2012. I started at nursing administration and I feel as if I am on display in this room as everyone walks past. You are only up here if you do something wrong. People ask me and I just say I can't talk about it. . . I feel like I have been sent to the corner.
- December 20, 2012. The department of health investigated us today. Something tells me that there is more to the story. Why are they investigating my NAR? This is crazy! Bobby who interviewed told me that I probably will be cleared because he didn't see any neglect on my part. This is becoming crazier and crazier.
- February 16, 2013. Well at least the department of health knows I did nothing wrong. I know nursing administration doesn't wasn't me up here, just like I don't want to be here. Who wants to think about what happened every day? Is this Western States Hospital way of torturing me after 22 years. Is this some sort of retaliation? Why am I here for assisting a patient?! I have been told we should be cleared soon. I sure hope so! Maybe they are starting the process over every time they get a new CEO.
- July 1, 2013. A new CEO has started at Western State word is we will be cleared soon. I hope so because every day I feel like I am reliving the day of Robert's choking. Julia has talked to me about my sick time. I was respectful, I like Julia but it was almost like she was

telling me I was getting fired, she said that if I ever have to look for another job she wants to be able to say I had a good time. I didn't do anything wrong . . . Katherine (non-African American/Black) and Roberta (non-African American/Black) have been back on the ward for months now. Why not [James Smith], Diane [Parsons] and [me] (African American/Black or fiancé of African American/Black)? We were the ones assisting the patient. It feels racist at this point. So many things going through my mind I must keep a positive attitude.

- August 9, 2013. Joseph [Laureta] is back on the ward and he was barely even investigated. I guess it's all in who you know. He is not held accountable he was only the Charge nurse? How come he is not responsible? He did not assist the staff or assess the patient, his statement was Diane [Parsons] was already taking care of it.
- November 4, 2013. [James Smith] and Diane [Parsons] were terminated today, I heard Victoria [David] resigned. I know I am next I received my letter to go peacefully and resign or be terminated . . . I got my packet and all they are going off of is hearsay, not the people that were actually there.
- November 14, 2013. I have been terminated! I feel as though I have lost myself. I have worked at this job for 23 years, I took this job because I care about people . . . my heart aches for my staff and everything they have had to endure also. [CEO] Ron Adler said he would do all he could for me, I guess this is what he meant.

CR593.

Mr. Crain has been deeply humiliated by these events that have unfolded to determine the course of his life, and which have profoundly impacted it. CR154, CR593.

On April 19, 2013, Defendant's Motion for Summary Judgment was heard before the Honorable Susan Serko. After oral argument, Judge Serko granted Defendant's Motion for Summary Judgment with respect to all of Plaintiff's claims and dismissed Plaintiff's case with prejudice.

This appeal timely followed.

V. ARGUMENT

A. Rules Applicable to Motion for Summary Judgment and Discrimination Cases.

Appellate courts review a Trial Court's grant of summary judgment *de novo*, *Briggs v. Nova Services*, 166 Wn.2d 794, 801, 213 P.3d 910 (2009). When considering a motion for summary judgment, all facts must be considered in a light most favorable to non-moving party and all facts submitted and all readable inferences should be construed in such manner. See *Rice v. Offshore Systems, Inc.* 167 Wn. App. 77, 88, 272 P.3d 865 (2012), citing to *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 160, 991, P.2d 675 (2010). Summary judgment should rarely be granted in employment discrimination cases. *Id.* In order to overcome a motion for summary judgment in discrimination case there is no requirement that the aggrieved employee produced "smoking gun evidence of a discriminatory and/or a retaliatory intent. See *Rice v. Offshore Systems, Inc.* 167 Wn

App. at 89; *Selstead v. Washington Mutual Savings Bank* 69 Wn. App. 852, 860, 851 P.2d 716 (1993). Circumstantial, indirect and inferential evidence is sufficient to overcome an employer's motion for summary judgment in a discrimination case. *Id.*

The reason why summary judgment is disfavored in employment discrimination cases is because "the decision as to the employer's true motivation plainly is one reserved to the trier fact." See *Lowe v. City of Monrovia* 775 F.2d 998, 9008 – 09 (No. 9th Cir. 1985) citing to *Peacock v. Duval* 694 F.2d 664, 646 (9th Cir. 1982). It is well established that the "employer's intent to discriminate is a ""a pure question of fact to be left to the trier fact..." *Id.* An employer's true motivation in an employment decision is rarely easy to discern and "without a search inquiry into these motives, those acting for impermissible motives could easily mask their behavior behind a complex web of *post hoc* rationalizations." *Id.* ⁶ Because RCW 49.60.020 commands "liberal construction" needed statutory purposes summary judgment is rarely appropriate in WLAD cases when the evidence contains reasonable but competing inference of

⁶As Washington's law against discrimination (WLAD) has a specific provision demanding liberal construction similar federal law is only persuasive. See RCW 49.60.020. This is because the statutory mandate of liberal construction requires that the courts view with caution any construction which would narrow the coverage of the law and which would undermine its statutory purposes of deterring and eradicating discrimination in Washington – a public policy of the highest priority. See *Delotus v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 292 P.3d 779 (2013). (Rejecting the federally recognized "same act or inference" as being inconsistent with the WLAD.)

both discrimination and nondiscrimination that must otherwise be resolved by the jury. See *Frisino v. Seattle School District No. 1* 160 Wn. App. 765, 777, 249 P.3d 1044 (2011); see also *Martini v. Boeing Co.*, 137 Wn.2d. 357, 364, 971 P.2d 45 (1999); *Davis v. W. One Auto. Grp.*, 140 Wn. App. 449, 456, 166, P.3d 807 (2007).

Because of the lofty statutory purposes of RCW 49.60 et. seq. set forth within RCW 49.60.010 and the command of liberal construction set forth within RCW 49.60.020 the elements of a discrimination claim under the WLAD are straightforward, simple and relatively easy to prove. The elements of a disparate treatment claim under the WLAD are set forth within WPI which provides 330.01 which provide under the heading of “employment discrimination – disparate treatment – burden of proof” the following:

Discrimination employment on the basis of race and gender is prohibited. To establish his disparate treatment claim, plaintiff has the burden of proving each of the following propositions. (1) That the State of Washington (WSH) terminated plaintiff; and (2) that plaintiff’s race was a substantial factor in the State of Washington’s decision to terminate plaintiff ... (bracketed materials excluded; blanks filled in).

The ultimate burden of proof in a disparate treatment claim is not particularly onerous nor can it be given the commands of the statute. A

“substantial factor” as utilized within WPI 330.01 is defined in WPI 330.01.01 in the following terms:

“Substantial factor” means a significant motivating factor in bringing about the employer’s decision. Substantial factor does not mean the only factor or the main factor in the challenged factor decision. Substantial factor also does not mean that plaintiff would not have been hired/and/or not terminated but for her race and/or gender. (Bracketed material added.)

The substantial factor test was first adopted in the case of *Mackay v. Acorn Custom Cabinetry, Inc.* 127 Wn.2d 302, 898 P.2d 284 (1985). As explained in Justice Madsen’s dissent in the *Mackay* case under this standard an employee can prevail on a disparate treatment claim under the terms of the WLAD even if there were otherwise legitimate reasons supportive of the adverse employment decision:

As I understand the majority opinion, this full panoply of relief is available if the plaintiff proves that the discriminatory reason was a substantial factor in the employment decision. Substantial factor is a standard which permits a trier fact to find liability even if the employee would have been fired in any event for legitimate reasons. (*Mackay* 127 Wn.2d at 315.

Thus, when considering a motion for summary judgment the court always must be mindful as to whether or not the evidence creates a reasonable inference that a discriminatory or retaliatory motive was a substantial factor in the discharged decision, regardless of what

methodology of proof is being utilized by the aggrieved employee. See *Rice v. Offshore Systems, Inc.* 167 Wn. App. at 89.

Judge Sorensen simply got it wrong: “In looking at the facts as I know them, seems to me the only fact that weighs in Mr. Crain’s favor is that he is a member of a protected class. I don’t see any reason of animus because he’s a member of that protected class. They articulated a reason for why they were terminated him. That reason was a legitimate basis.” RP 16.

Under a substantial factor test, however, there is simply no requirement that the employee disproved the employer’s proffered reasons for the adverse action. Thus to the extent that the defense is suggesting plaintiff is obligated to prove “pretext” or the falsity of the employer’s justification such a proposition is plainly false. It simply makes no sense that to require an aggrieved employee at the summary judgment stage to prove something that otherwise does not have to be proved at time of trial. Given the fact that under a “substantial factor test” the employee can still prevail if in fact the evidence presented proves that a “substantial factor in an employment decision is an illegal motive, even if there are otherwise valid justifications for the adverse decision. It is simply counterintuitive given the standard applicable at time of trial to even suggest that plaintiff has a higher burden of proof at the summary judgment stage.

It is noted that it has been found to reversible error for a trial court to instruct a jury on anything but the above-referenced basic elements of a disparate treatment case. See *Johnson v. Chevron U.S.A., Inc.* 159 Wn. App. 18, 32-3, 244 P.3d 438 (2010) (reversible error to instruct jury that in order to prove race discrimination claim that the employee had to prove that he was “treated differently” from coworkers who were not disabled or not African American).

While it is true that disparity and treatment between those within or without a protected class are relevant in admissible evidence such evidence is not required. *Id.* See, for example, *Johnson v. DSHS* 80 Wn. App. 212, 226 – 27, 907 P.2d 1223 (1996).

Thus in the context of “disparate treatment” all that is required of plaintiff is to create a question of fact as to whether or not the employer treated some people less favorably than others because of either their race. Under *Johnson* a prima facie case of disparate treatment is established by showing;

- (1) He belongs to a protected class;
- (2) He was treated less favorably in the terms and conditions of his employment;
- (3) Then a similarly situated, non-protected employee, and
- (4) He and the non-protected “comparator” were doing the substantially the same work...

Alternatively, an employee can overcome summary judgment by presenting any evidence which suggests that there was an illegal motivation behind the adverse employment decision. See *Warren v. City of Carlsbad* 58 F.3d 439 (9th Cir. 1995) (derogatory comments indicating a stereotypical view based on race grounds is sufficient to create an inference of discriminatory motive, as does the fact that the employer utilized a “subjective criteria” in the decision-making process as noted in *Warren*, the use of “subjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized.” *Id* at 443, citing to *Jauregui v. City of Glendale* 852 F.2d 1128, 1136 (9th Cir. 1988). See also *Mackay, supra*, (derogatory comments regarding gender relevant in establishing disparate treatment case and; see also *Bennett v. Hardy* 113 Wn.2d 912, 74 P.2d 1258 (derogatory comments regarding protective characteristic evidence of disparate treatment).

Petitioner was treated differently. He was responsive to this emergency and he was not even a licensed medical providers, like the nurses and doctors who were on the ward and not terminated. A marked contrast, plaintiff’s performance was subject to strict scrutiny. (Disparate scrutiny can be indicia of an improper motive. See *Eldaghar v. City of New York* WL 2971467 (S.D.N.Y. 2008) citing to *Cross v. N.Y. City*

Transit Authority 417 F.3d 241, 250 (2d Cir. 2005). According to plaintiff the standards that were applied to him were much more exacting than those applied to his non-African American counterparts (with the exception of his Caucasian wife).

Although petitioner has no obligation to prove “pretext” pretext can be proven by a number of methodologies including a showing that (1) the employer’s reasons have no basis in facts; or (2) even if the employer’s reasons are based on fact, the employer was not motivated by those reasons; or (3) the reasons are insufficient to motivate the adverse employment decision. See *Kuyper v. State* 79 Wn. App. 732, 738 – 39, 904 P.2d 793 (1995); *Chen v. State* 86 Wn. App. 183, 190, 937 P.2d 612 (1997).

Beyond Crain’s cogent evidence of disparate treatment compared to his non-African American peers the evidence also suggests that the proffered reasons for the defendant to terminate him were protectorial.

It is safe to say, that petitioner’s declaration alone creates questions of fact as to whether or not “a substantial factor” in the decision to terminate him were his protected characteristics of being an African American male.

B. DSHS/WSH's Termination of Plaintiff and Other African American Employees Establishes an Issue of Material Fact Where Plaintiff Has Been Exonerated of Wrongdoing By the Department of Health and the County Prosecutor.

The substantial factor test was first adopted in the case of *Mackay v. Acorn Custom Cabinetry, Inc.* 127 Wn.2d 302, 898 P.2d 284 (1985). As explained in Justice Madsen's dissent in *Mackay*, under this standard an employee can prevail on a disparate treatment claim under the terms of the WLAD even if there were otherwise legitimate reasons supportive of the adverse employment decision:

As I understand the majority opinion, this full panoply of relief is available if the plaintiff proves that the discriminatory reason was a substantial factor in the employment decision. Substantial factor is a standard which permits a trier fact to find liability even if the employee would have been fired in any event for legitimate reasons. (*Mackay* 127 Wn.2d at 315.

New guidance with regard to RCW 49.60 claims has recently been provided by the Supreme Court's opinion in the case of *Scrivener v. Clark College*, 316 P.3d 495, 179 Wn.2d 1009 (2014.) In *Scrivener*, the Supreme Court held that in order to overcome summary judgment in an RCW 49.60 discrimination case when the employee is relying solely on circumstantial evidence a genuine issue of material fact can be created by either (1) showing that the employer's articulated reasons for its actions is pre-textual or (2) that all the employer's stated reason is legitimate, discrimination

nevertheless was a substantial motivating factor in the employment decision. Further, what the respondent appeared to be ignoring is the fact that appellant in this case has direct evidence of a discriminatory intent. Under Washington law discriminatory remarks made within the workplace are considered to be **direct evidence of a discriminatory intent**. See *Alonso v. Qwest Communication Co., LLC*, 178 Wn.App.734, 744, 315 P.2d 610 (2013), citing to *Johnson v. Express Rent and Own, Inc.*, 113 Wn.App.858, 862-63, 56 P.3d 567 (2002). Whether you are utilizing a circumstantial evidence test as outlined in *Scrivener* or when one is using a direct evidence to allege discrimination as discussed in *Alonso* (or a combination of both) all that is necessary in order to defeat an employer's motion for summary judgment in a discrimination case is the acknowledgment that there exists a genuine issue of fact with respect to whether or not an improper motive was a "substantial factor" in the adverse employment decision. In that regard the employee's burden on proper application of the law to overcome such a motion for summary judgment should be and is all but negligible. As set forth within *Scrivener*:

"Relatedly, summary judgment to an employer is seldom appropriate in the WLAD cases because of the difficulty of proving a discriminatory motive. **To overcome summary judgment, a plaintiff only needs to show that a reasonable jury can find the employee's protected trait was a substantial motivating factor in the**

employer's adverse actions. (Citations omitted) (Emphasis added)."

The *Scrivener* opinion went on to provide:

"An employee does not need to disprove each of the employer's articulated reasons to satisfy the pretext burden of production. Our case law clearly establishes that it is the plaintiff's burden at trial to prove the discrimination was a substantial factor in the adverse employment action, not the only motivating factor. An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable under the WLAD."

Citing to *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1985).

The *Mackey* standard was intended to be "strong medicine" in our fight against discrimination within our society and workplace. As noted in *Mackey* at 310 "Washington's law against discrimination contains a sweeping policy statement strong and condemning many forms of discrimination". By requiring a plaintiff to prove "pretext" at the summary judgment stage would be inconsistent with "Washington's disdain for discrimination," and it would be an action, which could reduce it to "mere rhetoric".⁷

⁷ Though the petitioner's case involved both "direct" and "circumstantial" evidence it is noted that the burden of establishing a prima facie case of disparate treatment is not onerous. *G. Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L. Ed. 2d 207 (1981). "The requisite degree of proof necessary to establish a prima facie case ... is minimal and does not even need to rise to a level of preponderance of the evidence. *Fulton v. DSHS*, 169 Wn. App. at 152, quoting, *Wallis v.*

Here, the petitioner presented proof that could be characterized as both "direct" and "circumstantial." There is abundant direct evidence indicating that Maurice Crain did everything that he possibly knew how to do for patient R.K. at the time of his choking event, and that other non-African American employees who were immediately present and who possessed medical training but did nothing to assist were favored heavily by DSHS/WSH administrators as the investigation unfolded. CR485.

There is also present circumstantial evidence, including highly nuanced and casuistic language employed by DSHS/WSH authors, intended to further entrench the idea of negligence and ethical violations in direct opposition to Plaintiff having been cleared by the Department of Health and the County Prosecutor, and an onslaught of communications originating from CEO Adler and DSHS Labor Relations Specialists which demonstrate a willingness to extract language from unrelated documents and a willingness to impute subjective ethical violations that manage to evade review under a negligence analysis. CR679, CR454, CR577.

J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994). The fact that the *McDonnell Douglas* case at its burden shifting approach involves a burden of production versus a burden of persuasion is an insufficient basis to apply a different approach at the summary judgment stage that otherwise then would be applicable at time of trial. Under any set of circumstances, a plaintiff in response to a summary judgment always has an obligation to create a genuine issue of fact with respect to the existence of an improper motive. It simply makes no sense that in order to meet that task a victim of discrimination must present proof different than that which otherwise would be presented at time of trial.

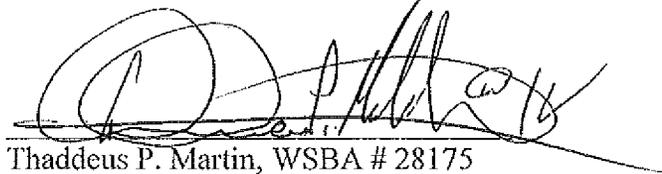
All that is necessary is that the employee “reasonably believes” that the conduct of which they are complaining about is discriminatory in order to file under the protections of the “opposition clause” of RCW 49.60210. *Renz v. Spokane Eye Clinic* PS 114 Wn. App. 611, 63 P.3d 106 (2002).

These facts give rise to a substantial issue of material fact on their face. The persecution of Maurice Crain and disparate treatment he suffered are a matter of record, and as such a finder of fact would properly have no choice but to conclude that Plaintiff reasonably believes he was being targeted illegally.

V. CONCLUSION

For the reasons stated above, it is respectfully prayed that the Appellate Court reverse the trial court's decision to dismiss plaintiff's wrongful termination case. This matter should be reversed and remanded for a trial on the merits.

RESPECTFULLY SUBMITTED this 11 day of November, 2016.

A handwritten signature in black ink, appearing to read 'Thaddeus P. Martin', is written over a horizontal line. The signature is stylized and somewhat cursive.

Thaddeus P. Martin, WSBA # 28175
Attorney for Appellant

CERTIFICATE OF SERVICE

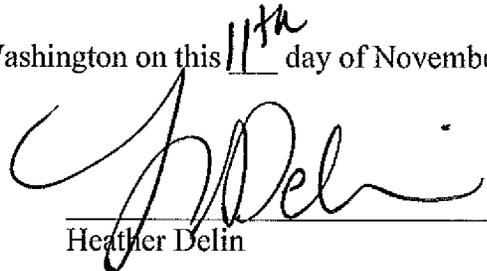
I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION AND THAT I PLACED FOR SERVICE OF THE FOREGOING DOCUMENT ON THE FOLLOWING PARTIES IN THE FOLLOWING MANNER(S):

Zebular Madison Attorney General's Office 1250 Pacific Ave, Ste 105 Tacoma, WA 98402

[XXX] by causing a full, true, and correct copy thereof to be E-MAILED to the party at their last known email address, per prior agreement of the parties, on the date set forth below followed by regular mail.

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

Executed at University Place, Washington on this 11th day of November, 2016.



Heather Delin