

FILED

NOV 21 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29912-1-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, COMMUNITY COLLEGES OF SPOKANE,

Appellants/Respondents,

v.

MARK FEY,

Respondent/Appellant

APPELLANTS/RESPONDENTS' OPENING BRIEF

ROBERT M. MCKENNA
Attorney General

AMY C. CLEMMONS
Assistant Attorney General
WSBA# 22997
Office of the Attorney General
Torts Division
1116 W. Riverside Ave
Spokane, WA 99201
(509) 458-3545

FILED

NOV 21 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29912-1-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, COMMUNITY COLLEGES OF SPOKANE,

Appellants/Respondents,

v.

MARK FEY,

Respondent/Appellant

APPELLANTS/RESPONDENTS' OPENING BRIEF

ROBERT M. MCKENNA
Attorney General

AMY C. CLEMMONS
Assistant Attorney General
WSBA# 22997
Office of the Attorney General
Torts Division
1116 W. Riverside Ave
Spokane, WA 99201
(509) 458-3545

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR	2
III.	FACTUAL STATEMENT OF THE CASE.....	2
	A. It Was Undisputed That Good Business Practices Required The Use Of CDL Equipment For Grounds Work.....	2
	B. All Managers And Union Officials Agreed That The Grounds Lead Position Should Require A CDL.....	3
	C. The Grounds Job Description Required A CDL.....	5
	D. Fey Could Not Get A CDL And There Was No Accommodation That Would Enable Him To Legally Drive The CDL Vehicles, Including The Assigned International	6
	E. Fey’s Applications For Promotion.....	6
	F. In 2007, Fey Failed To Identify A Disability Or Request Accommodation.....	7
	G. The Accommodation Suggested By Fey At Trial Required The Reassignment Of The CDL Equipment	8
	H. Evidence Presented Regarding Damages.....	10
IV.	PROCEDURAL STATEMENT OF THE CASE.	11
V.	STANDARD OF REVIEW.....	12
VI.	FEY’S DISABILITY DISCRIMINATION CLAIM SHOULD BE DISMISSED AS A MATTER OF LAW	13
	A. The Community Colleges Is Entitled to Dismissal Of Fey’s Claim As A Matter Of Law Because A CDL Is A Bona Fide Occupational Qualification	13
	B. The Trial Court Erred As a Matter of Law By Ruling That A Reasonable Accommodation Claim Does Not Require A Promotional Applicant To Be Qualified For The Job.....	15

1.	The Employer Has The Right To Set The Essential Job Duties And/Or Qualifications, Not The Employee.....	17
2.	Requiring The Employer To Eliminate Or Reassign Job Duties Is Not A Reasonable Accommodation As A Matter Of Law	18
VII.	THE TRIAL COURT ERRED BY FAILING TO PROPERLY INSTRUCT THE JURY ON THE CORRECT STANDARD UNDER THE LAW	20
A.	The Trial Court Failed to Instruct The Jury On The Bona Fide Occupational Qualification Defense	21
B.	The Trial Court Erred By Eliminating Proximate Cause From Consideration	21
C.	The Trial Court Erred By Omitting The Necessary Element That Fey Be A “Qualified Applicant” From The Instructions	23
D.	The Trial Court Erred By Failing To Instruct The Jury On The Correct Standard Under The Law	24
1.	The trial court’s refusal to allow the jury to be instructed that the employer can hire the most qualified applicant.....	24
2.	The Trial Court Erred By Failing To Instruct The Jury That The Employer Had To Have Timely Notice Of The Disability	25
3.	The Trial Court Erred By Failing To Instruct The Jury That The Employer Does Not Have A Duty To Investigate For A Disability	25
4.	The Trial Court Erred By Omitting The Full Definition Of A Disability	26
5.	The Trial Court Failed To Instruct The Jury On The Correct Duty In An Accommodation Case.....	26
6.	The Trial Court Failed To Properly Instruct The Jury That Not Engaging In The Interactive Process Is Not A Failure To Accommodate.....	27
7.	The Instructions Improperly Inferred Fey Had Multiple Claims	27

8. The Affirmative Duty To Discuss Accommodation Instructions Were Misleading	28
9. The Trial Court Failed To Accurately Instruct The Jury That The Employer Is Not Required To Modify Qualification Standards	28
10. The WPI Was Altered To Fit Fey’s Argument	29
11. The Trial Court Failed To Define Conditions Of Employment	29
12. The Trial Court Refused To Instruct The Jury That Reassignment of Job Duties Is Not A Reasonable Accommodation	30
13. The Trial Court Failed To Instruct The Jury That Compliance With The Law and Contracts Should Be Considered.....	30
14. The Trial Court Refused To Give A Definition of Essential Functions	30
15. The Trial Court Failed To Properly Instruct The Jury On The Correct Standard For An Undue Hardship Defense.	31
16. The Special Verdict Form Failed To Allow Any Consideration Of The Applicable Defenses.....	31

VIII. THE TRIAL COURT’S RULINGS AT TRIAL AND POST TRIAL WERE INCONSISTENT WITH THE LAW AND EVIDENTIARY PRINCIPLES CREATING A MANIFEST ABUSE OF DISCRETION

A. The Trial Court Erred By Allowing Fey’s Expert To Offer Opinions On The Law	32
B. The Trial Court Erred By Excluding Evidence Of The Employer’s Legitimate Business Needs.....	35
C. The Trial Court Erred By Excluding Any Evidence That Fey Was Not Qualified For The Grounds IV Position.....	35
D. Defendants Were Prohibited From Presenting Any Evidence Regarding Qualification For Other Promotional Opportunities	40
E. Relevant Testimony On The Accommodation Claim Was Excluded	40

F. Relevant Evidence Was Excluded About Emotional Distress Damages And Mitigation.....	42
G. The Collective Errors Amount To An Unconstitutional Comment On The Evidence	43
H. The Trial Court Erred By Awarding An Additur.....	43
I. The Trial Court Erred By Awarding Unreasonable Attorney’s Fees	45
IX. CONCLUSION	46

TABLE OF AUTHORITIES

Cases

<i>Absher Const. Co. v. Kent School Dist. No. 415</i> , 79 Wn. App. 841, 917 P.2d 1086 (1995).....	46
<i>Alger v. Mukilteo</i> , 107 Wn.2d 541, 730 P.2d 1333 (1987).....	21
<i>Barber v. Nabors Drilling U.S.A., Inc.</i> , 130 F.3d 702, (5th Cir. 1978)	20
<i>Barker v. Advanced Silicon Materials, LLC, (ASIMI)</i> , 131 Wn. App. 616, 128 P.3d 633 (2006).....	36
<i>Barnett v. U.S. Air, Inc.</i> , 157 F.3d 744 (9th Cir. 1998)	27, 28
<i>Bass v. City of Tacoma</i> , 90 Wn. App. 681, 953 P.2d 129 (1998).....	19
<i>Bates v. UPS</i> , 511 F.3d 974 (9th Cir. 2007)	19
<i>Blair v. Washington State University</i> , 108 Wn.2d 558, 740 P.2d 1379 (1987).....	46
<i>Brady v. The Daily World</i> , 105 Wn.2d 770, 718 P.2d 785 (1986).....	14

<i>Brand v. Dep't of Labor and Indus.</i> , 139 Wn.2d 659, 989 P.2d 1111 (1999).....	46
<i>Briggs v. Nova Services</i> , 166 Wn.2d 794, 213 P.3d 910 (2009).....	29
<i>Carle v. McChord Credit Union</i> , 65 Wn. App. 93, 827 P.2d 1070 (1992).....	14
<i>Clarke v. Shoreline School Dist. No 412, King County</i> , 106 Wn.2d 102, 720 P.2d 793 (1986).....	17, 18
<i>Colbert v. Moomba Sports, Inc.</i> , 163 Wn.2d 43, 176 P.3d 497 (2008).....	22
<i>Cox v. Charles Wright Academy, Inc.</i> , 70 Wn.2d 173, 422 P.2d 515 (1967).....	44
<i>Dalton v. Subaru-Isuzu Automotive, Inc.</i> , 141 F.3d 667 (7th Cir. 1998)	17
<i>Dark v. Curry County</i> , 451 F.3d 1078 (9th Cir. 2006)	19, 20, 27
<i>Davis v. Microsoft Corp.</i> , 149 Wn.2d 521, 70 P.3d 126 (2003).....	16, 20, 28, 30
<i>Dean v. Municipality of Metropolitan Seattle</i> , 104 Wn.2d 627, 708 P.2d 393 (1985).....	16, 26, 28
<i>Dedman v. Washington Personnel Appeals Board</i> , 98 Wn. App. 471, 989 P.2d 1214 (1999).....	17, 18, 19
<i>Doe v. Boeing Co.</i> , 121 Wn.2d 8, 846 P.2d 531 (1993).....	18, 19
<i>Doe v. New York University</i> , 666 F.2d 761, 776-77 (C.A. N.Y. 1981).....	14
<i>EEOC v. United Parcel Serv.</i> , 424 F.3d 1060 (9th Cir. 2005)	19, 24, 30
<i>ESCA Corp. v. KPMG Peat Marwick</i> , 86 Wn. App. 628, 939 P.2d 1228 (1997).....	22

<i>Fibreboard Paper Prods. Corp. v. N.L.R.B.</i> , 379 U.S. 203, 85 S. Ct 398, 13 L.Ed.2d 233 (1964).....	29
<i>First Natl. Maintenance Corp. v. N.L.R.B.</i> , 452 U.S. 666, 101 S.Ct. 2573 (1981).....	29
<i>Ford Motor Co. v. N.L.R.B.</i> , 441 U.S. 488, 99 S. Ct. 1842, 60 L.Ed.2d 420 (1979).....	29
<i>Franklin County Sheriff's Office v. Sellers</i> , 97 Wn.2d 317, 646 P.2d 113 (1982).....	13
<i>Frye v. United States</i> , 293 F. 1013 (D.C. Cir. 1923).....	32
<i>Goodman v. Boeing Co.</i> , 127 Wn.2d 401, 899 P.2d 1265 (1995).....	25, 26
<i>Goucher v. J.R. Simplot</i> , 104 Wn.2d 662, 709 P.2d 774 (1985).....	22
<i>Griffith v. Boise Cascade, Inc.</i> , 111 Wn. App. 436, 45 P.3d 589 (2002).....	19, 20
<i>Harris v. Groth</i> , 31 Wn. App. 867, 645 P.2d 1104 (1982).....	43
<i>Havlina v. State, Department of Transportation</i> , 142 Wn.App. 510, 178 P.3d 354 (2008).....	18
<i>Hegwine v. Longview Fibre Co.</i> , 162 Wn.2d 340, 172 P.3d 688 (2007).....	13
<i>Hennagir v. Utah DOC</i> , 587 F.3d 1255 (10th Cir. 2009)	27
<i>Hensley v. Eckerhart</i> , 461 U.S. 424, 103 S.Ct. 1933 (1983).....	46
<i>Herring v. DSHS</i> , 81 Wn. App. 1, 914 P.2d 67 (1996).....	19, 36
<i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172, 23 P.3d 440 (2001).....	16, 19, 20

<i>Hoffer v. State</i> , 110 Wn.2d 415, 755 P.2d 781 (1988).....	21
<i>Holland v. Boeing</i> , 90 Wn.2d 384, 583 P.2d 621 (1978).....	25
<i>Hue v. Farmboy Spray Co., Inc.</i> , 127 Wn.2d 67, 896 P.2d 682 (1995).....	12, 21
<i>Jackson v. City of Chicago</i> , 414 F.3d 806, 811 (7th Cir. 2005)	17
<i>Janson v. North Valley Hospital</i> , 93 Wn. App. 892, 971 P.2d 67 (1999).....	36
<i>Jonson v. Chicago, St. P. & P.R.Co.</i> , 24 Wn. App. 377, 601 P.2d 951 (1979).....	22
<i>Kaech v. Lewis County Pub. Util. Dist. No. 1</i> , 106 Wn. App. 260, 23 P.3d 529 (2001).....	22
<i>Kastanis v. Education Employees Credit Union</i> , 122 Wn.2d 483, 859 P.2d 26 (1994).....	46
<i>Kastanis v. Educational Employees Credit Union</i> , 122 Wn.2d 483, 859 P.2d 26 (1993).....	16
<i>Kees v. Wallenstein</i> , 161 F.3d 1196 (9th Cir. 1998)	25
<i>Kellogg v. Union Pacific R. Co.</i> , 233 F.3d 1083 (8th Cir. 2000)	24
<i>King County Fire Prot. Dist. No. 16 v. Housing Authority</i> , 123 Wn.2d 819, 872 P.2d 516 (1994).....	33
<i>Kohn v. Georgia-Pacific Corp.</i> , 69 Wn. App. 709, 850 P.2d 517 (1993).....	22
<i>Kuyper v. State</i> , 79 Wn. App. 732, 904 P.2d 793 (1995).....	36
<i>Leeper v. Dep't of Labor & Indus.</i> , 123 Wn.2d 803, 872 P.2d 507 (1994).....	21

<i>Lloyd v. Swifty Transp., Inc.</i> , 552 F.3d 594 (7th Cir. 2009)	36
<i>Mackay v. Acorn Custom Cabinetry, Inc.</i> , 127 Wn.2d 302, 898 P.2d 284 (1995).....	25
<i>MacSuga v. County of Spokane</i> , 97 Wn. App. 435, 983 P.2d 1167 (1999).....	passim
<i>Mason v. Frank</i> , 32 F.3d 315 (8th Cir. 1994)	24
<i>Matthews v. Commonwealth Edison Co.</i> , 128 F.3d 1194 (7th Cir. 1997)	14
<i>McClarty v. Totem Elec.</i> , 157 Wn.2d 214, 137 P.3d 844 (2006).....	19
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).....	14, 16
<i>Nichols v. Lackie</i> , 58 Wn. App. 904, 795 P.2d 722 (1990).....	44
<i>Nordstrom, Inc. v. Tampourlos</i> , 107 Wn.2d 735, 733 P.2d 208 (1987).....	46
<i>Palmer v. Jensen</i> , 132 Wn.2d 193, 937 P.2d 597 (1997).....	44
<i>Progressive Animal Welfare Soc. v. University of Washington</i> , 114 Wn.2d 677, 790 P.2d 604 (1990).....	45
<i>Pulcino v. Federal Express Corp.</i> , 141 Wn.2d 629, 9 P.3d 787 (2000).....	19, 20
<i>Queen City Farms, Inc. v. Cent. Natl Ins. Co. of Omaha</i> , 126 Wn.2d 50, 882 P.2d 703 (1994).....	32
<i>Raspa v. County of Gloucester</i> , 191 N.J. 323, 924 A.2d 435 (2007)	17
<i>Rhodes v. URM Stores, Inc.</i> , 95 Wn.App. 794, 977 P.2d 651 (1999).....	14

<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004).....	16, 25
<i>Robinson v. Safeway Stores, Inc.</i> , 113 Wn.2d 154, 776 P.2d 676 (1989).....	43
<i>Rose v. Hanna Mining Co.</i> , 94 Wn.2d 307, 616 P.2d 1229 (1980).....	13, 14
<i>Rufo v. Dave & Busters, Inc.</i> , 2007 WL 247891 (6th Cir. 2007)	36
<i>Safeco Ins. Co. v. McGrath</i> , 63 Wn. App. 170, 817 P.2d 861 (1991).....	32
<i>Schmidt v. Cornerstone Investments, Inc.</i> , 115 Wn.2d 148, 795 P.2d 1143 (1990).....	45
<i>School Bd. of Nassau County, Fla. v. Arline</i> , 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987).....	31
<i>School Bd. of Nassau County, Fla. v. Arline</i> , 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987).....	19
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	22
<i>Sharpe v. American Tel. & Tel. Co.</i> , 66 F.3d 1045 (9th Cir. 1995)	31
<i>Sharpe v. American Tel. A. Tel. Co.</i> , 66 F.3d 1045, (9th Cir. 1995)	18
<i>Sherman v. State</i> , 128 Wn.2d 164, 905 P.2d 355 (1995).....	14
<i>Smith v. Midland Brake, Inc., a Div. of Echlin, Inc.</i> , 180 F.3d 1154 (10th Cir. 1999)	24
<i>Snyder v. Med. Serv. Corp.</i> , 145 Wn.2d 233, 35 P.3d 1158 (2001).....	23
<i>State v. Becker</i> , 132 Wn.2d 54, 935 P.2d 1321 (1997).....	43

<i>State v. Dolan</i> , 118 Wn. App. 323, 73 P.3d 1011 (2003).....	32
<i>State v. Foster</i> , 91 Wn.2d 466, 589 P.2d 789 (1979).....	43
<i>State v. Lane</i> , 125 Wn.2d 825, 889 P.2d 929 (1995).....	43
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	13
<i>State v. Thomas</i> , 123 Wn. App. 771, 98 P.3d 1258 (2004).....	32
<i>State v. Vander Houwen</i> , 163 Wn.2d 25, 177 P.3d 93 (2008).....	21
<i>Terrel C. v. State</i> , 120 Wn. App. 20, 84 P.3d 899 (2004).....	33
<i>Thomas v. French</i> , 99 Wn.2d 95, 659 P.2d 1097 (1983).....	12
<i>Tinjum v. Atlantic Richfield Co.</i> , 109 Wn. App. 203, 34 P.3d 855 (2001).....	13, 14
<i>Trompler, Inc. v. N.L.R.B.</i> , 338 F.3d 747 (7th Cir. 2003)	29
<i>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	33

Statutes

29 U.S.C. § 794.....	17
42 U.S.C. § 12111(10).....	24
5 U.S.C. § 7103(a)(14).....	29
RCW 49.60.040(7)(e)	26
RCW 49.60.180	13, 14, 15
WAC 162-16-240.....	13, 15

WAC 446-65-020.....15

Other Authorities

WPI 15.0121, 22, 23

WPI 330.3326, 29

WPI 330.3423, 29, 30

WPI 330.3528

WPI 330.3630, 31

WPI 330.8123

Rules

RAP 10.4(c)21

I. INTRODUCTION

This case involves Plaintiff Mark Fey's claim that he was not interviewed for a promotion into a Grounds and Nursery Specialist IV (GNS IV) position with the Community Colleges of Spokane (Colleges) which required operating equipment requiring a commercial driver's license (CDL) because he could not obtain a CDL due to his diminished. Defendants moved to dismiss this case as a matter of law based upon the bona fide occupational qualification (BFOQ) defense. The court denied the motions finding the BFOQ defense presented an issue of fact. However, at trial, the court dismissed the BFOQ defense without any pending motion or supporting authority and refused to instruct the jury on the Colleges' applicable defenses. In addition, the trial court eliminated one of the prima facie elements of a disability discrimination claim that required Fey to be qualified for the promotion.

The real question in this case is whether as a matter of law an employer is required to waive, alter, or reassign legitimate non-discriminatory job qualification standards as an accommodation, or whether an employee has the burden to prove that a reasonable accommodation exists that would enable the employee to meet the qualification standards. The trial court allowed this case to proceed to a jury under a theory that the employee does not have to qualify for the promotion, and the employer has a duty to eliminate qualification standards as an accommodation. In addition, the court committed numerous errors before, during, and after trial by ruling on motions, jury instructions, and evidence; engaging in unconstitutional comments on the evidence; and structuring evidentiary rulings and the special verdict form in such a way that the jury was prohibited from finding in favor of the Defendant Colleges.

The Appellants respectfully request this Court grant judgment in favor of the Colleges as warranted by law or in the alternative, order a new trial with proper instructions and evidentiary rulings.

II. ASSIGNMENTS OF ERROR

1. Whether the trial court erred by failing to rule that a commercial driver's license is a BFOQ as a matter of law?

2. Whether the trial court erred as a matter of law by failing to allow the jury to consider the Colleges' affirmative defenses of BFOQ, undue burden, and proximate cause?

3. Whether the trial court erred by eliminating an element of a prima facie case that disabled applicants must prove they are qualified for the promotion either with or without accommodation?

4. Whether the trial court erred by finding that an employer has a duty to assume that diminished eyesight constitutes a disability?

5. Whether the trial court erred by incorrectly instructing the jury on the law?

6. Whether the trial court's rulings on evidentiary matters and motions were prejudicial and contrary to the applicable legal standards?

III. FACTUAL STATEMENT OF THE CASE

A. **It Was Undisputed That Good Business Practices Required The Use Of CDL Equipment For Grounds Work**

The Community Colleges of Spokane (Colleges) operates two campuses, Spokane Falls (Falls) and Spokane Community College (Spokane Community). Each has its own separate grounds staff that performs seasonal work suited to the particular campus. RP 822, 441, 779. Snow removal is a priority of the grounds crews, as it must be accomplished quickly and with

maximum efficiency to insure safe access to the campuses by students, staff and the public. RP 310, 459-460, 488, 573-575, 577, 822-24, 859.

The Colleges owns at least four vehicles that require a commercial drivers' license (CDL) for lawful operation, three have plows and one is a water truck. CP 777; RP 442-443; Ex. 171, 172, 173, 174. The simultaneous full-time operation of the three CDL plows is "critical to [the] ability to make the campuses accessible" in the winter. RP 815:5-10.¹ In a bad winter, the three large CDL-rated plows "were the only way we were able to continue business." Ex. 2, 12, 160, 162; RP 574, 505, 532-533, 564, 467, 782, 798-799, 785-789, 815, 824.

Equipment is purchased to fit the needs of the area to which it is assigned. RP 451, 784-785, 818-821, 830-831, 833-834. The CDL vehicles were the best equipment for plowing the campus streets and the large parking lots. RP 725, 785, 822, 825 725, 732, 830-834, 847. The weight of the CDL plows is necessary to effectively plow the large parking areas which are plowed in a "Zamboni" style, which entails continuously pushing large volumes of snow in a circular pattern. RP 451-452, 459-460, 469, 470-471, 722-723, 787-788, 830-831. For budget reasons, the Colleges had to use the CDL vehicles already it owned. RP 470, 591, 822, 825, 848. Fey conceded that replacing the vehicles was not reasonable. RP 1016, 1018.

B. All Managers And Union Officials Agreed That The Grounds Lead Position Should Require A CDL

Until 2007 Spokane Community Colleges believed that the large of vehicles could be legally operated by drivers without CDL's if they were operated on private property. RP 819, 825, 859-860. In 2007, however, the Colleges were informed by WSP officer, Larry Pasco, that the campuses are not private property, and the CDL-rated vehicles would need to be operated by properly licensed drivers. RP 819, 822-824, 862. In November 2007, the Colleges did not have

¹ The numbers after the ":" refer to specific line numbers.

sufficient drivers with CDL's for normal operations. The Falls campus had one Maintenance Technician with a CDL, Jim Labish. RP 452-453, 456, 825-834, 845.² Spokane Community campus regularly used two CDL vehicles for winter grounds operations and had no employees on staff with the commercial license. RP 286, 789, 826-829.³ In 2007 management noted that Spokane Community actually needed to purchase a third CDL plow for timely snow removals, so the business plan was to purchase another CDL vehicle as soon as the budget allowed. RP 727; CP 16-24, 268-271, 466-468; Ex. 26.⁴

It was clear, logical, and most economical to require the grounds staff to get CDL's, because operating snow plows was their primary function.⁵ RP 310, 488, 573-575, 577, 822-24, 859. Seven managers and two union officials negotiated and unanimously agreed that a CDL license should be a minimum qualification for the grounds positions. RP 310:16-21, 463, 566-567, 569, 573-575, 577-578, 609:16-21, 813, 815, 822-24, 859-863, 866-867. In an effort to give current employees every opportunity to meet the new requirement, the union negotiated giving employees a 6-month grace period to acquire a CDL at the expense of the Colleges. RP 511-512, 566-567, 859-861. Non-qualifying employees hired before September 2007 were grandfathered into their current positions, but all new hires and promotions had to meet the new

² Jim Labish, who was hired to drive the bus, had a CDL. RP 719-720. In 2006, when the bus was sold, he became a Maintenance Technician responsible for repairing and maintaining the buildings, with the special assignment to drive CDL vehicles since he already had a CDL license. RP 720-722,728. He has 38 years on the job and a CDL grounds worker will take over the CDL work when he retires. RP 444, 450-457.

³ The two plows assigned to Spokane Community College, the International, weighing over 43,000 pounds, and the Kodiak, weighing 29,100 pounds, required CDL's.

⁴ In management's discussions about equipment needs, it was determined that they "would prefer to add more heavy equipment/CDL type vehicles for our snow removal rather than get away from CDL vehicles." Ex. 26, p. 02020020. The budget has not allowed for the purchase of a new CDL plow between 2007 and trial, but it continues to be part of the business plan. CP 466-468.

⁵ Fey admitted snow removal was the "primary" full-time duty of the grounds crews during the winter. RP 277, 282. All witnesses agreed that snow removal and sanding were the primary responsibility of the grounds staff and that the grounds staff did not have any other duties when there was snow on the ground. RP 282, 467-468, 783.

requirements.⁶ RP 891. There was no motive to require the grounds staff to have CDL's other than legal compliance, best business practices, and safety reasons. RP 463, 574, 578, 822-824, 829, 878-879, 532, 608.

Fey conceded that it was prudent to hire grounds staff that could legally drive the CDL vehicles owned by the Colleges. RP 274, 284:17-22, 286, 293:17-19. "I'm acknowledging the fact that, if you have a CDL vehicle, a CDL driver needs to drive it." RP 286.⁷ Fey was satisfied with being grandfathered into his Grounds III position at the Falls, which was assigned to drive a non-CDL vehicle. RP 258, 263, 296; Ex. 11.

C. The Grounds Job Description Required A CDL

The terms of the grounds positions set out in a written job description, subjecting everyone to the same requirements consistent with Civil Service laws. RP 311, 811, 821-822. The GNS IV written position description required that an employee must be physically able to operate "a variety of ... grounds maintenance equipment" including "motorized equipment such as trucks, dump trucks ...other heavy equipment required for groundwork," and "perform assigned duties in a manner consistent with applicable laws" which required a CDL."⁸ Ex. 12, 13, 160; RP 859.

The GNS IV, as lead, was required to be able to perform all GNS II and GNS III duties to fill in during absences and for training. Ex. 12, 13, RP 412:3-5. The GNS IV promotional position was assigned to operate the International, a CDL-rated plow at the Spokane Community campus. RP 526, 553, 609, 790-791, 530-531, 825. Paul Wittkopf, the man leaving the position, was always assigned to drive the International. RP 790-791, 825, 857-858, 862. As soon as a

⁶ It was undisputed that under the collective bargaining agreement non-qualifying employees, like Fey, can be terminated if they did not meet the job requirements. RP 533, 535, 883, 891, Ex. 155, 159.

⁷ Fey was hired at the Falls campus in 2000 as a sprinkler maintenance technician, a position which did not require a CDL. RP 230-231. In 2005, the position was converted into a GNS III. RP 231-233.

⁸ The dump truck used for various grounds duties required a CDL. RP 442-444, 454.

qualified GNS IV employee passed the grace period, the new employee was assigned to drive the International. RP 546, RP 552-553.⁹ On May 29, 2009, because the 6-month grace period created an operational burden, it was eliminated; and all applicants were required to have a CDL upon hiring. Ex. 13; RP 550, 825-831, 845. Management's position was that only employees who met the minimum qualifications in the written job description would be interviewed. RP 569:11-13, 887-888. Fey's counsel conceded that the CDL requirement was a "qualification standard, condition of employment" and not a job duty. RP 968:19-21.

D. Fey Could Not Get A CDL And There Was No Accommodation That Would Enable Him To Legally Drive The CDL Vehicles, Including The Assigned International

It was undisputed that Fey could not obtain a CDL and there was no accommodation that would enable him to legally drive the CDL vehicle assigned to the GNS IV position at Spokane Community. RP 228, 526, 553, 609, 674, 790, 1009:10-12; CP 105, 107-112; Ex. 12, 13, 32.¹⁰

E. Fey's Applications For Promotion

In 2007 and 2010, Fey applied to be promoted to the GNS IV position at Spokane Community College, knowing it required a CDL. Ex. 7, 12, 13, 32; RP 257, 271. Because Fey did not have nor could he get a CDL, his application was screened by Human Resources as not meeting qualifications. RP 904; Ex. 11. Fey agreed that it was reasonable for his employer to require certain positions to have a CDL and to hire the most qualified candidate. RP 313-314. Fey was treated the same as other applicants. RP 311:1-5, 313, 754-755, 860-863.

⁹ Between January 2008 and January 2009, Cary Abbott was hired with the condition that he obtain a CDL within 6 months. RP 511-512, Ex. 155. He failed to, so he was demoted out of the position as not qualifying. *Id.*; RP 517, 533. A temporary employee with a CDL and independent contractors were hired to operate the International while Abbott was in the 6-month grace period. RP 516:12-15, 536-537, 793, 798-799, 827-829. Abbott's demotion was upheld under the collective bargaining agreement in a union grievance, which recognized that Abbott did not qualify for the job without obtaining a CDL. RP 535.

¹⁰ Plaintiff testified that he just wanted to be treated like anyone else. RP 355. At trial, when Fey was asked "Was there anything the employer could do that would enable you to legally drive a CDL vehicle?" the court prevented the answer on the basis that it was outside the scope. RP 356:24 – p. 357:2. Fey did answer this question in his deposition which was part of the summary judgment materials admitting that there was no accommodation that would enable him to legally drive the CDL vehicles. CP 107-112.

F. In 2007, Fey Failed To Identify A Disability Or Request Accommodation

In November 2007 Fey submitted a form indicating he did not pass the CDL exam, with a box marked due to “Eye disorders or impaired vision.” Ex. 6. The form did not identify any medical diagnosis, nor did Fey identify any claimed disability, and his coworkers and supervisor were unaware he had any disability. RP 421, 446-447, 458, 734, 880-881. Fey refused to respond to questions about what the problem was, and when asked, he told his employer it was none of their business. RP 250, 265, 419, 421. Dr. Hander, Fey’s medical expert, testified that he did not have the ability to diagnose Fey with any condition. RP 668, 670. However, he “believed” Fey’s vision impairment (correctable to 20/40 in one eye and 20/50 in the other) was consistent with symptoms of Stargardt’s disease. RP 670:14-15, 668.

Dr. Hander admitted in testimony that Fey’s employer could not tell anything about Fey’s eye condition or conclude that Fey was disabled from the form Fey provided. Ex. 6; RP 675-676, 679:17-19. Fey’s complaint asserted that he was discriminated against because he had macular degeneration, but Dr. Hander confirmed that Fey did not have macular degeneration as claimed. RP 664-675; CP 3:1-3.

In 2007, Fey never indicated to his employer that he had any alleged disability. RP 458-459, 881. Fey admits that he never sought any accommodation in 2007. CP 104; RP 271.¹¹ Fey’s first claim that he had a disability or wanted accommodation was on February 16, 2010, when Fey stated that he had an unidentified “genetic disease which affects the vision of the eye” and he wanted the CDL requirement of the job “waived.” RP 885-886; Ex. 32. Dr. Hander testified there was nothing that would enable Fey to drive CDL equipment. RP 682:11-13.¹²

¹¹ Q. Did you ask for a reasonable accommodation?

A. I didn’t need to ask for accommodation for anything. RP 271:22-23.

¹² Q. Is there anything that somebody could do that would enable him to get a commercial driver’s

G. The Accommodation Suggested By Fey At Trial Required The Reassignment Of The CDL Equipment

Other than asking his employer to waive the CDL requirement in 2010, no other accommodation was ever requested by Fey. CP 105, 107-112; RP 271, 302, 304, 309, 311-312, 880-881. Fey was advised that the job position requires the operation of CDL equipment and the requirement could not be waived. Ex. 26, 29. Fey was given the option to request an institutional review of the CDL requirement, but he never did. Ex. 29. The union would not file a grievance on his behalf for not being interviewed for the position because he did not meet the minimum qualifications. RP 313, 569, 578.

At trial, Fey suggested two accommodations: 1) switch his smaller V-box sander assigned to the Falls campus with the larger CDL International assigned to Spokane Community; or 2) require the Maintenance Mechanics to get CDL's instead of the grounds employees. Ex. 32, 271-272. However, it "wouldn't make any sense to transfer [the vehicles] to the other campus." RP 451:9-13. Fey's suggested equipment swap would prevent efficient and timely snow removal operations. RP 452:12-19, 460-461, 468-69, 490, 551-552, 757-758, 829-834.

The fleet manager, Renee Harrison, who purchased, managed, and assigned all the vehicles, wanted to use only the large CDL vehicles on the larger parking areas to prevent damaging the vehicles. *Id.*, RP 451, 818- 819, 825, 833-834. Smaller vehicles could not hold up to pushing the heavier snow loads and were not assigned to the larger parking areas. Ex. 26, 181, 182; CP 23-24, 52-88, 466-468.¹³ With the use of smaller vehicles, the snow removal would not get done timely and it would be virtually impossible to do at all with five inches of snow or more. *Id.*, RP 403, 405, 407, 452, 469, 722-725, 732, 787-788, 833-834, 847.

license?

A. No. RP 682:11-13.

¹³ Fey's counsel conceded in closing that it was not asking the jury to find the necessary work could be done with smaller vehicles (referring to vehicles smaller than the V-box sander). RP 1018:5-10.

It was undisputed that the Spokane Community campus had a greater need for CDL vehicles, with four times as many large parking lots to plow in the Zamboni style because they were surrounded by sidewalks and streets. RP 405, 407, 442-443, 452, 463, 469, 508, 542-543, 547, 574, 578, 722-727, 730-732, 785-788, 813, 815, 822-24, 830-831, 833, 848, 860, 862-863; Ex. 172, 181, 182.¹⁴ In addition, Spokane Community's grounds crew was also responsible for plowing all the off-campus facilities, including four additional locations at Hillyard, Esmerelda, Apprenticeship, and Felts Field. RP 834-835. The International plow had the largest sanding capacity, holding 10 yards of sand, and it was the only vehicle in the fleet big enough to handle the sanding needs at Spokane Community. RP 547, 732, 785-788, 832. Assigning a smaller vehicle would require additional trips to get loads of sand and inordinately increase the time needed to complete the sanding beyond what was acceptable for safety reasons.¹⁵ RP 459-460, 469, 722-725, 757-758, 786-788, 813, 815, 830-834.

In contrast to the Spokane Community campus, most of the parking lots on the Falls are narrow and surrounded by dirt, rough area, or hillsides, which allow smaller plows to remove snow in short up and down strips, called cornrow style, easily disposing of snow over the hill or into the rough. Ex. 181; RP 551, 722-727, 784-785, 830-834, 847-848. The V-box sander was assigned to plow narrow areas in the cornrow fashion, not large areas in a Zamboni style like the International. RP 292, 452, 469, 724-725, 727, 729-732; Ex. 172, 183, 182.¹⁶ The V-box only carried 5-6 yards of sand. RP 288, 787.

¹⁴ Fey did not challenge the fact that the plowing needs at the Spokane Community College campus presented a greater need for CDL equipment. RP 722-727. He had no idea what the plowing needs were on that campus, because he had never worked there before. RP 284-285.

¹⁵ Plowing and sanding needed to be completed in a tight time frame to allow campus to open on time, typically between 3:00 a.m. and 6:00 a.m. Once cars got into the lot, it would prevent sanding and plowing activities, and if snow was not timely removed, then it presented safety and liability concerns. RP 722-727.

¹⁶ Smaller campus areas are plowed with smaller ½-ton and ¾-ton trucks or small golf-cart-sized vehicles with plows attached. RP 724-725, Ex. 175, 177.

H. Evidence Presented Regarding Damages

Fey never presented any evidence that he was more qualified for the GNS IV promotional position than other applicants. RP 221-718. Fey was aware his supervisor would not support him in promoting to a lead position even before the CDL requirement went into effect. RP 477; CP 35-51, 346. Fey's counsel repeatedly conceded that there was no evidence that Fey would have gotten the promotion. RP 78-79, 170-171, 1057-1058. Despite all this, Fey claimed he should receive economic damages of more than \$80,000 in lost wages, claiming that he would have received the promotion to the GNS IV position if he had been interviewed. RP 617.

Fey and his wife testified that he was very happy with his GNS III job and asserted the claimed emotional distress was because he was prevented from promoting for the rest of his life; in spite of this he did not look for higher paying jobs outside of state agencies. RP 383:5-8. RP 279-280, 345-356, 376-377, 383. Fey lost a number of other internal promotions to positions for which he was qualified, unrelated to the CDL requirement, but he testified that he was not frustrated about losing those. RP 336-337, 381, 620-624, 743.

There were credibility issues relating to Fey. Fey testified that he did not interview for the higher paying Maintenance Mechanic position in 2008, whereas his wife and the individual who interviewed him for the position testified that he did. RP 337, 381, 743. Fey claimed that he had macular degeneration, which was later discounted by his doctor. RP 276, 375-376, 458:15-17. Fey claimed he read with a magnifying glass at work, but none of his coworkers ever saw him use a magnifying glass. RP. 276, 458:11-17. Fey claimed he was not aware of his performance issues or the communication problems, but Fey's supervisor and coworkers who were not allowed to testify to the concerns, made Fey aware of these concerns, documented them, and provided the documentation to Fey. RP 294-297, 335, 474-475. A number of his coworkers also witnessed Fey lying to his supervisor. CP 472-477.

IV. PROCEDURAL STATEMENT OF THE CASE.

Defendants moved for summary judgment on the following bases: 1) the CDL requirement was a BFOQ; 2) the requested accommodation to reassign the CDL requirements was not a reasonable accommodation as a matter of law, and 3) Fey failed to meet his prima facie case because there was no accommodation that would enable Fey to qualify for a promotion requiring a CDL. CP 89-139. The trial court denied the motion for summary judgment stating there were issues of fact.¹⁷ RP 33-34. Fey's Complaint pled two claims: 1) disparate impact/treatment; and 2) failure to accommodate. CP 1-6. Before the start of trial, Fey voluntarily dismissed the disparate treatment/disparate impact claim, conceding the CDL requirement itself was non-discriminatory. RP 86; CP 456-457. Defendants' motions for a Directed Verdict were denied.¹⁸ RP 88-89, 715-717, 939-1003.

The reasonable accommodation claim proceeded to trial where the trial court dismissed the BFOQ defense and did not submit it to the jury. RP 959.¹⁹ The Community Colleges objected to the court's instructions 2, 5, 10, 11, 12, 13, 14, 15, 16, 17, 19 and the special verdict form and excepted that the court did not give Defendants' instructions 2, 4, 6-8, 10-20, 22-38. RP 963-981, 1064; CP 330-358, 431-436, 437-448, 608-626, 664-685. The jury concluded that pursuant to the instructions, the Colleges failed to engage in the mandatory duty to discuss accommodation and awarded economic damages of \$7,549 and emotional distress damages of zero ("0"). RP 1067-1068, CP 649-653, CP 637-641.

Plaintiff demanded \$50,000 emotional distress damages based upon the premise that Fey

¹⁷ The asserted factual issues remaining were not identified.

¹⁸ Once Fey conceded that the CDL requirement was not discriminatory, there was no basis to argue that the application of the non-discriminatory CDL requirement should be waived as a reasonable accommodation as a matter of law.

¹⁹ Plaintiff never filed any authority or a motion requesting that the BFOQ affirmative defense could be dismissed as a matter of law. Fey's counsel argued that the BFOQ defense was an issue of fact for the jury. RP 109, 951.

was frozen in his position and prevented from ever promoting, and sought future lost wages of \$56,517. RP 1025-1026. The jury declined these damages, but after trial, the court awarded the requested \$50,000 in emotional distress damages as an additur. CP 604-607, 642-648, CP 900-907.²⁰ After trial, Fey sought all fees and costs, including those incurred on Fey's unsuccessful claims. CP 654-663, SCP 800-899; CP 900-907. The trial court awarded all fees and costs requested with no reduction for the unsuccessful claims. SCP 898-899; CP 900-907.

V. STANDARD OF REVIEW

On appeal, errors of law and errors in the instructions are reviewed *de novo* and constitute reversible error where they prejudice a party. *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). "Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied." *Hue* 127 Wn.2d at 92. An erroneous jury instruction is presumed to be prejudicial and is grounds for reversal unless it can be shown that the error was harmless. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).

Fey's case at trial was premised on an incorrect theory under the instructions that an employer is required to treat disabled applicants for employment more favorably than other applicants by adjusting the job qualifications to fit the employee instead of requiring the employee to qualify for the job. RP 1003, 1014; CP 304-323. The jury was not correctly instructed on the legal standard for liability or any applicable defenses. Therefore the errors of law were not harmless.

Reversal is also required if it appears reasonably probable that the cumulative effect of

²⁰ The transcript filed by the court reporter of the hearing proceedings on 5-27-2011 inadvertently did not include both the decisions rendered by the Court that date. The corrected transcript was filed on 10-28-2011.

the errors materially affected the outcome of the trial. *State v. Russell*, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). The cumulative errors by the trial court in both the instructions and the evidentiary rulings resulted in a manifest abuse of discretion in this case warranting reversal. If the Court of Appeals dismisses this case as a matter of law pursuant to Section VI, then the other errors set out in Sections VII and VIII become moot.

VI. FEY'S DISABILITY DISCRIMINATION CLAIM SHOULD BE DISMISSED AS A MATTER OF LAW

A. The Community Colleges Is Entitled to Dismissal Of Fey's Claim As A Matter Of Law Because A CDL Is A Bona Fide Occupational Qualification

RCW 49.60.180 provides that: "It is an unfair practice for any employer to refuse to hire any person because of the presence of any sensory, mental, or physical disability unless based on a bona fide occupational qualification." [emphasis ours]. A bona fide occupational qualification [BFOQ] is a legitimate reason to deny employment to an individual with a disability. *Rose v. Hanna Mining Co.*, 94 Wn.2d 307, 311, 616 P.2d 1229 (1980). The Defendant is not liable as a matter of law where a bona fide occupational qualification exists. WAC 162-16-240 (2010); *Tinjum v. Atlantic Richfield Co.*, 109 Wn. App. 203, 209-210, 34 P.3d 855 (2001).

To establish this defense, an employer must prove that the challenged employment practice significantly correlates with the fundamental requirements of the job or "will contribute to the accomplishment of the purposes of the job." WAC 162-16-240 (2010); *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 355, 172 P.3d 688 (2007). A BFOQ exists where "all or substantially all persons in the excluded class would be unable to efficiently perform the duties, and the essence of the operation would be undermined by hiring anyone in that excluded class." *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 326, 646 P.2d 113 (1982). An employer is entitled to judgment as a matter of law when the applicant's

particular disability precluded proper performance of the job in question. RCW 49.60.180; *Rose*, 94 Wn.2d at 311. The *McDonnell-Douglas* shifting burden test provides that once the employer establishes a legitimate business reason for the job qualification, then the plaintiff has the burden to prove that the legitimate reason is actually a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Carle v. McChord Credit Union*, 65 Wn. App. 93, 101, 827 P.2d 1070 (1992); *Sherman v. State*, 128 Wn.2d 164, 198, 905 P.2d 355 (1995); *Doe v. New York University*, 666 F.2d 761, 776-77 (C.A. N.Y. 1981) (“The employee bears the ultimate burden of proving by a preponderance of the evidence that, despite the handicap, he or she is otherwise qualified.”)

“A rule of an employer requiring a pilot to have good vision or a truck driver a valid driver’s license bears more heavily on the disabled than on the able-bodied, but it is reasonable and so is permitted.” *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997). Safety regulations applicable to truck drivers are a bona fide occupational qualification, providing an absolute defense to a disability discrimination claim. *Tinjum*, 109 Wn.App at 209-210 (A blanket policy to not hire insulin-dependent diabetics for commercial transportation positions falls squarely under a bona fide occupational qualification defense). Reasonable business policies applied to truck drivers constitute a BFOQ. *Rhodes v. URM Stores, Inc.*, 95 Wn.App. 794, 801, 977 P.2d 651 (1999); *Brady v. The Daily World*, 105 Wn.2d 770, 718 P.2d 785 (1986). Contrary to the established law on the BFOQ defense, the trial court dismissed the BFOQ defense in this case, commenting that the defense would apply to a pilot’s license, but not to licensing requirements for truck drivers. RP 959. There was no motion or authority to support the dismissal of the BFOQ defense in this case. *Id.*

Washington law requires individuals operating commercial vehicles to meet minimum

safety requirements, which include passing a medical examination with specific vision requirements in order to operate commercial vehicles. WAC 446-65-020. The Colleges owned four commercial-rated vehicles that were assigned to the grounds staff. Management and the union unanimously agreed that a CDL was a necessary requirement for the GNS IV position.

Fey does not dispute that his employer can require certain job positions to obtain a CDL. He conceded that since the Colleges owned grounds equipment which required a CDL, it would be preferable and “certainly reasonable” to require certain positions to have a CDL. RP 286:20-21, 313:20-22, 1059:2. Fey admitted that he is not aware of the CDL being required for anything other than legitimate business reasons. CP 104:22-25. In addition, Fey’s counsel conceded that “Yes, there’s a business need to have some people drive to have CDL’s. Absolutely. They have some CDL trucks. That’s undisputed.” RP 95:19-22, 101:21-23. At the start of trial, Fey dismissed his disparate treatment claim consistent with this concession.

Based upon the undisputed fact that the CDL job qualification was set for legitimate business reasons, the BFOQ affirmative defense should be ruled upon as a matter of law pursuant to RCW 49.60.180 and WAC 162-16-240 (2010). The Community Colleges established a legitimate business need for CDL drivers, and there is no evidence produced by Fey that indicates the CDL qualification which all applicants were subject to was a pretext for discrimination. Therefore, this Court should rule on this affirmative defense as a matter of law.

B. The Trial Court Erred As a Matter of Law By Ruling That A Reasonable Accommodation Claim Does Not Require A Promotional Applicant To Be Qualified For The Job.

The law on disability discrimination clearly requires applicants to be qualified for the position, under either a disparate treatment or reasonable accommodation theory. However, in this case the trial court incorrectly ruled that a reasonable accommodation claim did not require Fey to prove he was “qualified.” RP 166; CP 449-451.

For a disability discrimination claim, the plaintiff must first establish a prima facie case of discrimination by showing that he or she 1) was within a protected group, 2) suffered adverse employment action, 3) was replaced by a person outside the protected group, and 4) was **qualified for the job**. *McDonnell Douglas*, 411 U.S. at 802; *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 490, 859 P.2d 26 (1993). To establish a prima facie case for failure to reasonably accommodate a disability, the employee must show that 1) he or she had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job; 2) he or she was **qualified to do the job**; 3) he or she gave the employer notice of the abnormality and its substantial limitations; and 4) after notice, the employer failed to adopt available measures that were necessary to accommodate the abnormality. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004). When the employee fails to establish any of the above elements of a prima facie case, the employer is entitled to judgment as a matter of law. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 192-93, 23 P.3d 440 (2001) (overruled on other grounds).

“It is not discrimination to deny a job to a [disabled] person who is unqualified” for the position. *MacSuga v. County of Spokane*, 97 Wn. App. 435, 444, 983 P.2d 1167 (1999); *see also Dean v. Municipality of Metropolitan Seattle*, 104 Wn.2d 627, 641, 708 P.2d 393 (1985). The term “qualified individual with a disability” means an individual with a disability who, with or without a reasonable accommodation, can perform all of the essential functions of the position. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 533 fn 5, 70 P.3d 126 (2003). There were no authorities cited by Fey in arguing that he did not have to be qualified for the promotion. RP 159-166. Fey acknowledges “he meets all of the selection criteria for the GNS4 position **except** that he is unable to get a CDL...” CP 210:4-7. This admission alone demonstrates Fey’s

inability, as a matter of law, to state a prima facie case of discrimination.

1. The Employer Has The Right To Set The Essential Job Duties And/OR Qualifications, Not The Employee

Washington law looks to the federal Rehabilitation Act, 29 U.S.C. § 794, for guidance in disability discrimination cases and follows federal precedent which clearly establishes that: “an employer may discharge a handicapped employee who is unable to perform an essential function of the job, *without attempting to accommodate that deficiency.*” *Clarke v. Shoreline School Dist. No 412, King County*, 106 Wn.2d 102, 117-18, 720 P.2d 793 (1986). Washington law provides that an employer should be able to establish the essential functions/qualifications of the position, not the employee. *Clarke*, 106 Wn.2d at 119; *Jackson v. City of Chicago*, 414 F.3d 806, 811 (7th Cir. 2005). An employer is not required to negotiate or discuss the terms or requirements of a job position as a possible accommodation. As noted by the Seventh Circuit in examining the vast expanse of federal disability discrimination cases:

[W]e have been unable to find a single ADA or Rehabilitation Act case in which an employer has been required to reassign a disabled employee to a position when such a transfer would violate a legitimate, nondiscriminatory policy of the employer, ... and for good reason. The contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees.

Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 679 (7th Cir. 1998).

“An employee must possess the bona fide occupational qualifications for the job position that employee seeks to occupy in order to trigger an employer’s obligation to reasonably accommodate the employee...” *Raspa v. County of Gloucester*, 191 N.J. 323, 327, 924 A.2d 435 (2007). As a matter of law, the employer does not have to eliminate job qualification standards as an accommodation. *Dedman v. Washington Personnel Appeals Board*, 98 Wn. App. 471, 485, 989 P.2d 1214 (1999).

If, rather than defending the reasonableness of the accommodation it chose, [the employer] were required to prove that [the employee's] proposed accommodation would have imposed an undue burden, [the employee] would effectively be choosing the accommodation, not [the employer].

Sharpe v. American Tel. A. Tel. Co., 66 F.3d 1045, 1050 (9th Cir. 1995).

The employer is not required to alter or switch the essential functions of the job as defined by the employer. *Dedman, supra* at 485, citing *Sharpe*, 66 F.3d at 1050; *Doe v. Boeing Co.*, 121 Wn.2d 8, 20, 846 P.2d 531 (1993); *Clarke*, 106 Wn.2d at 121 (or to create a job where none exists). “If an employee is not able to perform the essential functions of his job, the agency’s responsibility ...is limited to making a “good faith” effort to locate a job opening for which the employee is qualified.” *Havlina v. State, Department of Transportation*, 142 Wn.App. 510, 517, 178 P.3d 354 (2008). In this case, Fey was accommodated by being allowed to continue working as a GNS III at the Falls where he was assigned equipment that did not require a CDL, which as admitted by Fey, was a reasonable accommodation.

The law does not require the Community Colleges to eliminate a CDL license as a minimum qualification for the promotional GNS IV position at Spokane Community so Fey could promote. The Community Colleges has the right to decide the appropriate assignment of its CDL equipment. Fey does not get to require his employer to eliminate job qualification standards set for legitimate business reasons under the guise that it is a reasonable accommodation. Fey is required to prove that there is a reasonable accommodation that would enable him to meet the qualifications of the position sought.

2. Requiring The Employer To Eliminate Or Reassign Job Duties Is Not A Reasonable Accommodation As A Matter Of Law

The above BFOQ/prima facie case arguments are dispositive in this case, but even if this Court assumes that the employer had a duty to accommodate unqualified applicants, Fey still fails to identify a reasonable accommodation. The law does not require an employer to shift the

CDL job responsibilities to other employees or to perform the work with smaller, less efficient equipment. *EEOC v. United Parcel Serv.*, 424 F.3d 1060 (9th Cir. 2005).²¹ Switching the assigned CDL-rated vehicle to the other campus would require the employer to use its equipment in a less efficient manner and prevent efficient snow removal operations pursuant to its current business plan. This is not a reasonable accommodation as a matter of law. *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 644, 9 P.3d 787 (2000), overruled on other grounds by *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006).

Washington law clearly does not require an employer to eliminate or reassign essential job functions to others in order to accommodate an employee with a disability. *MacSuga*, 97 Wn. App. at 442; *Dedman*, 98 Wn. App. at 484-485 (the employer was not required to accommodate an employee where the disability rendered the employee “unable to perform an essential function of the job and thus jeopardized the safe and orderly operation” of the employer.); *Bass v. City of Tacoma*, 90 Wn. App. 681, 688, 953 P.2d 129 (1998), as amended, --- Wn. App. ---, 976 P.2d 1248, review denied, 137 Wn.2d 1005, 972 P.2d 466 (1999); *Herring v. DSHS*, 81 Wn. App. 1, 30, 914 P.2d 67 (1996); *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 n. 17, 107 S.Ct. 1123, 1131 n. 17, 94 L.Ed.2d 307 (1987); *Clarke, supra*; *Boeing*, 121 Wn.2d at 18. Requiring elimination of an indispensable task or role would be tantamount to altering the very nature or substance of the job, and such was not the intent of the discrimination laws. *Pulcino*, 141 Wn.2d at 644 (“An employer, ... is not required ... to eliminate or reassign essential job functions.”); *Hill*, 144 Wn.2d at 193; *Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006); *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 45 P.3d 589 (2002). Paying another

²¹ In *Bates*, cited by Fey, UPS had hearing requirements it was imposing on drivers over and above DOT licensing requirements for safety reasons. The court addressed a stay and injunctive relief. *Bates v. UPS*, 511 F.3d 974 (9th Cir. 2007). The injunction against UPS was vacated, and the case was remanded for the court to consider evidence of the employer’s business necessity for the job requirement. *Id.*

employee to do the essential work is not a reasonable accommodation as a matter of law. *MacSuga*, 97 Wn. App. at 442; *Pulcino*, 141 Wn.2d at 644; *Hill*, 144 Wn.2d at 193; *Dark*, 451 F.3d 1078; *Griffith*, 111 Wn. App. 436.

For example, an employer was not required to eliminate one element of the job that required the operation of heavy machinery for an employee with epilepsy, even though he could do the other functions of the job. *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 709 (5th Cir. 1978). Disability Discrimination laws do not require an employer to change the way it normally does the job. *Davis*, 149 Wn.2d at 536. In *Davis*, exactly as in this case, the plaintiff wanted the employer to restructure a position to better fit his medical needs. *Davis*, 149 Wn.2d at 536. The court noted:

In effect, what Davis asks this court to do is redefine for Microsoft its systems engineer position; but just as the WLAD does not authorize Davis or this court to tell Microsoft how to set its selling objectives and customer service goals, the WLAD does not permit Davis or this court to tell Microsoft how to organize its work force and structure individual jobs to meet those targets.

Davis, 149 Wn.2d at 536.

It is undisputed that the snow removal operations at the Falls and Spokane Community campuses are different due to the size and individual characteristics of the campuses. Vehicles are assigned to plow certain areas based upon the legitimate business needs. Similar to the court in *Davis*, the courts should not direct that the Community Colleges has to alter the best use of its CDL-rated equipment and perform snow removal in a slower, less efficient, less safe manner with smaller equipment. The courts should not be allowed to second guess a legitimate employment decision; and they should only look at whether the decision itself was a pretext for discrimination. *Davis, supra*. In this case, it is undisputed that the CDL requirement was placed on the GNS IV position at Spokane Community for legitimate business reasons.

VII. THE TRIAL COURT ERRED BY FAILING TO PROPERLY INSTRUCT THE

JURY ON THE CORRECT STANDARD UNDER THE LAW

Jury instructions are sufficient if they permit each party to argue its theory of the case, are not misleading, and when read as a whole, properly inform the jury of the applicable law. *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 809, 872 P.2d 507 (1994). Erroneous statements of the applicable law amount to reversible error when there is prejudice to a party. *Hue*, 127 Wn.2d at 92. The instructions in this case contained numerous prejudicial errors of law eliminating all of the Colleges' applicable defenses and misinforming the jury on the correct liability standard. Pursuant to RAP 10.4(c), the jury instructions are attached as Appendixes A through C, with pertinent WPI's attached as Appendix D.

A. The Trial Court Failed to Instruct The Jury On The Bona Fide Occupational Qualification Defense

Jury instructions are improper if they do not permit the defendants to argue their theories of the case. *State v. Vander Houwen*, 163 Wn.2d 25, 28, 177 P.3d 93 (2008) (It was reversible error to not give instructions on an applicable defense). The BFOQ defense applies directly to the licensing standard at issue in this case. The trial court committed prejudicial error by refusing to give any instructions on the BFOQ defense, including Defendants' proposed instructions numbered 6, 7, 15, and 37. CP 338, 346, 613, 623. This error alone prevented a fair trial and warrants overturning the jury verdict.

B. The Trial Court Erred By Eliminating Proximate Cause From Consideration

Lack of proximate cause alone presents an alternative grounds for a defense verdict. To establish proximate cause, a claimant must prove that the unlawful conduct caused in a direct sequence, unbroken by any independent cause, the injury complained of. *Hoffer v. State*, 110 Wn.2d 415, 424, 755 P.2d 781 (1988) (citing *Alger v. Mukilteo*, 107 Wn.2d 541, 545, 730 P.2d 1333 (1987)). WPI 15.01 defines proximate cause. "Proximate cause under Washington law

recognizes two elements: cause in fact and legal causation. Cause in fact refers to the ‘but for’ consequences of an act — the physical connection between an act and an injury.” Comments to WPI 15.01.

Legal causation involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. It is a much more fluid concept, grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008); *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998). The focus is on “whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.” *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d at 478–79. ... Thus, legal causation ***should not be assumed to exist*** every time a duty of care has been established.” *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d at 479–80. [emphasis ours].

Comments to WPI 15.01.

Whenever there is potentially more than one proximate cause of an injury, it is error for the trial court not to instruct the jury on proximate cause. *Goucher v. J.R. Simplot*, 104 Wn.2d 662, 676, 709 P.2d 774 (1985); *Jonson v. Chicago, St. P. & P.R.Co.*, 24 Wn. App. 377, 601 P.2d 951 (1979). An employee is entitled to lost wages for such period of time as the employee is able to prove with reasonable certainty were proximately caused by the wrongful act. *Kohn v. Georgia-Pacific Corp.*, 69 Wn. App. 709, 850 P.2d 517 (1993). Damages that are not reasonably certain or that are speculative in nature are not recoverable. *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228 (1997), *aff'd*, 135 Wn.2d 820, 959 P.2d 651 (1998) (The proof of damages must not be speculative or self-serving); *Kaech v. Lewis County Pub. Util. Dist. No. 1*, 106 Wn. App. 260, 276, 23 P.3d 529 (2001), review denied, 1079 145 Wn.2d 1020, 41 P.3d 485 (2002).

Even as admitted by Fey, there was no evidence he would have gotten this promotion regardless of his vision. RP 78-79, 170-171, 1057-1058. Proximate cause was definitely in dispute. However, Fey argued and the trial court agreed that Fey did not have to prove

proximate cause. The jury was allowed to assume that the loss of the interview automatically caused lost wages regardless of whether Fey would have otherwise been selected for the promotion.²² The trial court erroneously eliminated proximate cause from the instructions.

It is clear under WPI 330.81 on damages that a jury should “determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find **were proximately caused** by the acts of the defendant.” Appx. D. The trial court omitted the term “proximately caused” from the pattern instruction given. Appx. C. CP 590. In addition, the trial court refused to give the definition of proximate cause set out in WPI 15.01, as recommended by WPI 330.81. CP 624; RP 1064. The trial court further refused to give instructions that Fey’s damages were limited to those proven to be caused by unlawful discrimination, not other claimed stress in the work place, declining to give Defendants’ instructions. 19-20. CP 350-351. The trial court gave no explanation for this dramatic deviation from the well-researched and supported pattern instruction. Failure to properly instruct the jury on proximate cause and damages is reversible error.

C. The Trial Court Erred By Omitting The Necessary Element That Fey Be A “Qualified Applicant” From The Instructions

As set out above, the plaintiff has the burden to prove in an accommodation case that he was a qualified applicant, able to meet the minimum qualifications of the job. *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 240, 35 P.3d 1158 (2001). The standard WPI on reasonable accommodation suggests the use of the term “qualified applicant” in the reasonable accommodation instruction. WPI 330.34. Despite this being a clear requirement under the law and a part of the pattern instruction, the trial court specifically found that Fey did not have to be qualified for the position. RP 983-985. The instructions given by the court used the term

²² The trial court excluded any evidence by the Colleges that established Fey would not have gotten the promotion if interviewed because he was not otherwise qualified for the job. RP 983-984.

“employee” instead of “qualified applicant” from the instruction addressing the duty to accommodate. Court’s instruction 14, CP 587. Contrary to the law, Fey’s counsel argued under the instructions given that Fey did not have to meet the qualifications of the GNS IV job. RP 1059:8-10. The fact that a disabled individual still has to be qualified for the job is clear under the law, and it was prejudicial error to take this required element out of the instructions.

D. The Trial Court Erred By Failing To Instruct The Jury On The Correct Standard Under The Law

The trial court refused to give numerous instructions properly advising the jury of the correct standard under the law as set out above in section VI, including failing to give the instructions as follows:

1. The trial court’s refusal to allow the jury to be instructed that the employer can hire the most qualified applicant.

Defendants’ instruction 23 was a correct statement of the law that an employer is entitled to hire the most qualified applicant. CP 354. The law provides that “[a]n employer has no duty ... to hire [a disabled employee] in preference to a more qualified employee.” *MacSuga, supra* at 444; 42 U.S.C. § 12111(10); cf. *Kellogg v. Union Pacific R. Co.*, 233 F.3d 1083, 1089 (8th Cir. 2000); *Mason v. Frank*, 32 F.3d 315, 319 (8th Cir. 1994). (It must follow that an employer is not required to make accommodations that would subvert other, more qualified applicants for the job.); *Smith v. Midland Brake, Inc., a Div. of Echlin, Inc.*, 180 F.3d 1154, 1181-1182 (10th Cir. 1999), citing, *Kelly*, concurring, H.R.Rep. No. 101-485(II), at 55-56 (1990); *E.E.O.C. v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1027-28 (7th Cir. 2000) (“A policy of giving the job to the best applicant is legitimate and nondiscriminatory.”).

Fey admitted that someone with a CDL is more versatile, and he expected to be prevented from promoting into positions that might require operation of CDL equipment. All of Fey’s coworkers and supervisors would have testified, if permitted, that all other candidates had better

leadership skills than Fey. CP 16-22, 35-51, 268-271, 472-477.²³ It was prejudicial error for the court to refuse to provide an instruction on this applicable law, and Fey’s counsel was permitted to argue in closing, contrary to the law, that being the most qualified for the promotion is “irrelevant.” RP 1058:4-6.

2. The Trial Court Erred By Failing To Instruct The Jury That The Employer Had To Have Timely Notice Of The Disability

A plaintiff must demonstrate the employer knew about the disability at the time of the discriminatory act. *Kees v. Wallenstein*, 161 F.3d 1196, 1199 (9th Cir. 1998); *Riehl*, 152 Wn.2d at 149, citing *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995). Under the law, the duty of reasonable accommodation does not arise until the employer is aware of plaintiff’s disability. *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408, 899 P.2d 1265 (1995); *Holland v. Boeing*, 90 Wn.2d 384, 391, 583 P.2d 621 (1978).

Fey testified that he did not consider himself disabled in 2007. His doctor testified that there was no documentation that indicated Fey was disabled in 2007. Fey’s supervisors and coworkers testified that they were not aware of Fey having any disability. Fey’s counsel argued that the medical expert’s diagnosis, which was provided for the first time at trial, provided notice of a disability. RP 906, 1036-1037. This argument was contrary to law. The Colleges specifically requested that the court put a qualification or time frame in the instructions and/or the special verdict form indicating that the Community Colleges had to have knowledge of the disability in 2007. RP 963-981. (Defs.’ instrs. 4, 25, 29, 31) CP 334, 433, 439, 617. The trial court erred by refusing to give any instruction on the required timing of the notice. RP 940-941.

3. The Trial Court Erred By Failing To Instruct The Jury That The Employer Does Not Have A Duty To Investigate For A Disability

The employer’s duty to determine the nature and extent of the disability “does not impose

²³ See also the trial court’s evidentiary rulings discussed in section VIII below.

an investigatory duty to question any employee suspected of a disability.” *Goodman*, 127 Wn.2d at 408-409. Contrary to this, Fey’s counsel argued and his expert testified that the employer does have an investigatory duty to find out if an employee is disabled. RP 694–697, 1014. The trial court refused to instruct the jury on an accurate statement of the law as quoted in *Goodman*, *supra.*, and allowed Fey’s counsel to argue that the employer had a duty to investigate. (Defs.’ instrs. 29); CP 439, RP 934-1003, 1014.

4. The Trial Court Erred By Omitting The Full Definition Of A Disability

It was prejudicial error for the trial court to eliminate the portion of WPI 330.33 that states “In determining whether an impairment has a substantially limiting effect, a limitation is not substantial if it has only a trivial effect.” WPI 330.33, notes on use, RCW 49.60.040(7)(e) Court’s instruction 10, CP 583.

5. The Trial Court Failed To Instruct The Jury On The Correct Duty In An Accommodation Case

The employee has a duty to make the employer aware of his qualifications, to apply for all jobs that might fit his abilities, and to accept reasonably compensatory work he could perform. *Dean*, 104 Wn.2d at, 637-38 (1985). “If there is a factual question whether the parties cooperated in the reasonable accommodation process, Washington law is unclear how non-cooperation impacts the burden of proof. It may be appropriate to instruct the jury as follows: ‘You may consider whether a party cooperated in this process in good faith in evaluating the merit of that party’s claim that a reasonable accommodation did or did not exist.’” Comments to WPI 330.33. The trial court refused to instruct the jury on the employee’s duty. Defs.’ instr. 8, 14; CP 339, 345; RP 934-1003.²⁴ Compounding the prejudice of not giving these instructions, the court’s instruction 12 altered the language in the WPI expanding the employer’s duty beyond

²⁴ The evidence of Fey’s failure to cooperate was also excluded by the trial court, the details of which are set out below in Section VIII.

what's provided in the WPI. CP 585.

6. The Trial Court Failed To Properly Instruct The Jury That Not Engaging In The Interactive Process Is Not A Failure To Accommodate

The instructions given by the court failed to make it clear that Washington law provides “The failure of an employer to engage in an interactive process is not a violation of the Washington Law Against Discrimination. Rather, the failure to engage in an interactive process **must lead** to the failure to identify a reasonable accommodation that enabled the employee to perform all the essential functions of the job.” *Dark*, 451 F.3d at 1088; *Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 752-753 (9th Cir. 1998), overruled on other grounds, 535 U.S. 391 (2002); *Hennagir v. Utah DOC*, 587 F.3d 1255, 1256 (10th Cir. 2009). Here there was no accommodation that would enable Fey to do the GNS IV job. The trial court prejudicially erred by improperly instructing the jury on the law in this area, by refusing to give Defendants’ instructions 4, 7, 8, 13, 14, 15, 25, 29, 31, in addition to altering the WPI in instruction number 12. RP 934-1003; CP 335, 338, 339, 344, 345, 346, 433, 439, 617.

7. The Instructions Improperly Inferred Fey Had Multiple Claims

The trial court’s claims instructions to the jury misleadingly made it look like Fey had multiple separate “claims” against the Colleges including: 1) “failing to engage in the mandatory interactive process...;” 2) “failing to consider plaintiff for the Grounds and Nursery 4 position when he was able to perform the essential functions of the position;” (this statement assumes he was qualified for the job) and 3) “failing to consider altering the Grounds and Nursery 4 conditions of employment to accommodate the plaintiff’s disability” (which is not required under the law as set out above in section VI.). In addition, the claims instruction did not identify any applicable defenses by the Colleges. CP 599, RP 963-981. The court’s instruction 10 eliminated the language from the WPI that “One form of unlawful discrimination is a failure to reasonably

accommodate an employee's disability" which created further confusion inferring Fey had more than one claim with no applicable defenses

8. The Affirmative Duty To Discuss Accommodation Instructions Were Misleading

The instructions and special verdict form were premised on the argument that the failure to engage in the interactive process itself was discrimination and eliminated Fey's requirement to prove a reasonable accommodation existed. CP 637-641, 649-653. As set out above in section VI-B, if Fey does not prove an accommodation exists that would allow him to meet all of the qualifications of the job, then there is no duty to discuss accommodation. *MacSuga*, 97 Wn. App. at 442; *Dean*, 104 Wn.2d at 637. There is no per se employer liability for failing to initiate discussions with an employee if no reasonable accommodation is available. *MacSuga*, 97 Wn. App. at 443, citing *Barnett*, 157 F.3d at 752. The comments to WPI 330.35 further recognize that there is no affirmative obligation to initiate accommodation discussions with an unqualified applicant. WPI 330.35, comments, citing *Davis*, *supra*. Therefore, the instructions on the affirmative duty given by the trial court were misleading. CP 572-593; RP 1015.

9. The Trial Court Failed To Accurately Instruct The Jury That The Employer Is Not Required To Modify Qualification Standards

Despite the law clearly not requiring an employer to alter qualification standards, the jury was instructed to the contrary in several instructions that varied significantly from the pattern instructions. The law distinguishes between job duties and minimum qualification standards. In the pattern instruction given by the trial court, language was incorrectly added to the WPI indicating that the employer does not have to alter essential functions, but should alter qualification standards. Court's Instr. no. 13. CP 586. Under this modified pattern instruction, Fey's counsel was permitted to argue that the CDL qualification could be altered as a reasonable accommodation, and Fey's expert Fred Cutler testified that altering the CDL requirement was a

reasonable accommodation under the law.²⁵ RP 1003, 1016, 1018.

10. The WPI Was Altered To Fit Fey’s Argument

WPI 330.33 identifies the elements of a reasonable accommodation claim, and element (4) requires Fey to prove “That [he] *would have* been able to perform the essential functions of the job in question with reasonable accommodation.” The “would have” language reflects that a reasonable accommodation would have enabled him to qualify for the job. The WPI language was adjusted ever so slightly in the Court’s instruction 10 taking out the “would have” language. CP 583. The change in the WPI supported Fey’s counsel’s argument that the employer had the duty to alter the CDL requirement, versus an accommodation enabling Fey to qualify for the job.

11. The Trial Court Failed To Define Conditions Of Employment

WPI 330.34 as written describes a change in “conditions of employment” as a reasonable accommodation. This instruction does not use the term “conditions of employment” to mean minimum job qualifications standards. In this case the employer’s job description identified the licensing qualification standards as a “condition of employment.” Fey was permitted to argue, pursuant to the instruction given, that it was a reasonable accommodation to alter or waive the licensing requirement. CP 587; RP 1003, 1009-1010, 1014-1015. The Community Colleges pointed out the confusion that would be created by this instruction and suggested either defining “conditions of employment” as recommended under federal pattern instructions, or changing the term to refer to physical conditions or work place setting, to reflect the accurate meaning of the term.²⁶ CP 620; Defs.’ instr. 34; RP 934-1003. Conditions of employment as used in WPI

²⁵ Section VII-L is addressed below in Cutler’s testimony.

²⁶ 5 U.S.C. § 7103(a)(14); *Briggs v. Nova Services*, 166 Wn.2d 794, 803-4, 213 P.3d 910 (2009), citing *Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 498, 99 S. Ct. 1842, 60 L.Ed.2d 420 (1979), (quoting *Fibreboard Paper Prods. Corp. v. N.L.R.B.*, 379 U.S. 203, 223, 85 S. Ct 398, 13 L.Ed.2d 233 (1964) (Stewart, J., concurring)). Managerial decisions include the choice of one’s supervisor, *Trompler, Inc. v. N.L.R.B.*, 338 F.3d 747, 749 (7th Cir. 2003); and the wisdom of company practices, *First Natl. Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666, 676, 101 S.Ct. 2573 (1981).

330.34 does not include licensing requirements as argued by Fey, and absent any clarification of this point, the instruction erroneously permitted a conclusion contrary to the law.

12. The Trial Court Refused To Instruct The Jury That Reassignment of Job Duties Is Not A Reasonable Accommodation

The court refused to give any instructions consistent with Washington law that the employer is not required to reassign job duties or reorganize its work force as an accommodation, as set out in Defendants' proposed instructions 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 23, 30, 34, 35; RP 934-1003; CP 613, 338, 339, 342, 343, 344, 345, 346, 347, 348, 354, 441, 620, 621. This prevented the Colleges from arguing its theory of the case. The law clearly does not require an employer to shift essential job responsibilities to other employees or perform the job in a less efficient manner as Fey was allowed to argue under the instructions given in this case. RP 1003; *EEOC v. United Parcel Serv.*, 424 F.3d 1060 (9th Cir. 2005); *Davis*, 149 Wn.2d at 536.

13. The Trial Court Failed To Instruct The Jury That Compliance With The Law and Contracts Should Be Considered

In looking at factors the employer can consider in the accommodation process, the comments to WPI 330.36 recognize that language should be added to the WPI, if any requirements of law or contract are applicable. Civil service laws, the law on commercial drivers licenses, and the collective bargaining agreement all needed to be considered by the employer in this case. However, despite the comments to the WPI recommending this addition to the pattern when applicable, the trial court refused to give any instructions consistent with WPI 330.36 or give an instruction with the applicable legal or contractual provisions. CP 343-344, 353, 436, 445, 588, 612, 614, 616, 621; RP 934-1003. Defs.' instrs. 12, 13, 18, 22, 24, 27, 28, 35.

14. The Trial Court Refused To Give A Definition of Essential Functions

The WPI provides the following note with regard to defining essential functions: "An

essential functions instruction may be appropriate depending on the facts and circumstances of the particular case.” WPI 330.33, note on use. The trial court refused to give a definition of essential functions that was agreed to be the correct definition by both parties in prior briefing. CP 120-136, 201-222, 342.

15. The Trial Court Failed To Properly Instruct The Jury On The Correct Standard For An Undue Hardship Defense.

The issue of undue hardship does not arise until after Fey meets his prima facie requirement to prove a reasonable accommodation exists that would enable him to perform the job. *Sharpe v. American Tel. & Tel. Co.*, 66 F.3d 1045, 1050 (9th Cir. 1995). Only after a lawful and reasonable accommodation is identified, which did not occur in this case, would the question have to be asked whether that accommodation creates an undue burden on the employer. However, if this Court finds that a reasonable accommodation includes altering or reassigning the CDL qualification requirement, then the Community Colleges is entitled to claim that the proposed accommodation creates an undue hardship. *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 n. 17, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). The jury should have been instructed on the undue hardship defense, including the consideration of legal, safety or contractual requirements, pursuant to WPI 330.36 (5th Ed.). Defs.’ instr. 12, CP 343, RP 963-981. The instructions given prejudicially altered the undue hardship burden of proof by requiring Defendants to prove the financial burden was “unreasonably high” without any authority to support altering the standard. CP 423, 588; RP 934-1003.²⁷

16. The Special Verdict Form Failed To Allow Any Consideration Of The Applicable Defenses

The special verdict form was written in the fashion of a directed verdict for Fey, asking

²⁷ The plaintiff’s proposed instruction did not indicate or note that it was a modification of the WPI. CP 423.

leading questions that did not require consideration of all the elements as set out in the instructions. The wording of the questions did not allow the jury to consider any of the Colleges' defenses. CP 599-600. In answering the question "Did the employer provide a reasonable accommodation?" the question could be answered "no" because no reasonable accommodation existed. The special verdict form did not allow the jury to find discrimination, undue burden, proximate cause, or make any finding on mitigation. CP 599-600; RP 934-1003.

VIII. THE TRIAL COURT'S RULINGS AT TRIAL AND POST TRIAL WERE INCONSISTENT WITH THE LAW AND EVIDENTIARY PRINCIPLES CREATING A MANIFEST ABUSE OF DISCRETION

Although the above legal arguments preclude this Court from having to reach the evidentiary issues below, the cumulative effect of the multiple errors warrants a new trial on any remaining issue of fact.

A. The Trial Court Erred By Allowing Fey's Expert To Offer Opinions On The Law

Every expert opinion offered must be based upon sufficient scientific or technical knowledge and expertise. *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011, 1014 (2003). ER 702 requires that the witness be qualified as an expert and that any opinion testimony must be "based on a theory generally accepted by the scientific community" and "helpful to the fact-finder." *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). The testimony of an expert should concern matters beyond the common knowledge and understanding of the average layperson and not mislead the jury. *State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004), *review denied*, 154 Wn.2d 1026 (2005). A speculative expert opinion lacking adequate foundation is inadmissible. *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991), *review denied*, 118 Wn.2d 1010 (1992); *Queen City Farms, Inc. v. Cent. Natl Ins. Co. of Omaha*, 126 Wn.2d 50, 104, 882 P.2d 703 (1994).

Testimony from an expert commenting on the law is specifically impermissible. *Wash.*

State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 344, 858 P.2d 1054 (1993) (“Legal opinions on the ultimate legal issue before the court are not properly considered under the guise of expert testimony.”); ER 704, *King County Fire Prot. Dist. No. 16 v. Housing Authority*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). It is error for the trial court to allow consideration of legal opinions on the ultimate legal issue under the guise of expert testimony. *Terrel C. v. State*, 120 Wn. App. 20, 84 P.3d 899 (2004).

Defendants moved in limine to exclude Fred Cutler’s testimony because it was not based upon any scientific or technical knowledge and was solely an opinion on the applicable law based upon facts which were well within the jury’s understanding. CP 359-366, 384-386. Fey’s counsel argued that a vocational expert should be able to testify to what’s required under the law. RP 67. The trial court held he would allow the legal opinion testimony because the jury would be instructed that they could either accept or reject the expert opinion and the accommodation terms would be in the instructions. RP 71. Defense counsel sought a standing objection to all of Mr. Cutler’s testimony. RP 688; CP 360-363. Fred Cutler, was permitted to testify that: 1) a CDL was not an essential function of the job. RP 688; 2) once Fey failed the CDL test, his employer had knowledge of a disability, RP 696; 3) Fey did not need to do anything to request accommodation, and Fey only needed to request accommodation “if he knew he was being discriminated against;” RP 696, 699:17-18; 4) the law requires an employer to engage in the interactive process which is not negotiable, and in his opinion the Colleges did not engage in the interactive process. RP 694-695:4-9; 5) in his opinion, the written job description did not specify that the trucks to be driven might be CDL vehicles; therefore, a CDL was not properly listed as a duty by the Colleges. RP 689; 6) in his opinion, there was “virtually no difference” between Fred Hale’s position at the Falls campus and the GNS IV position at the Spokane Community campus.

RP 692. However, Mr. Cutler admitted that he had no information from any source regarding the job duties at the Spokane Community College campus, and he just assumed they were the same. RP 284-285, 287, 692, 702-715; 7) he submitted as an expert that snow removal could be done with smaller non-CDL trucks, although he had no experience or expertise in snow removal. RP 703-704²⁸; 8) “it’s the employer’s responsibility ...to give [an employee] fair consideration for promotion....”, and the employer needs to “facilitate that worker’s ability ... to be promoted” even if that means altering the job duties. RP 693; 9) the employer must provide accommodation unless it is “a huge” financial onus on the employer. *Id.*; 10) the law on accommodation requires an employer to “determine whether or not the essential tasks of that job” could be modified or “assign it to a different worker.” RP 694; 11) it was a reasonable accommodation in 2007 to assign the duty of operating the CDL vehicles to somebody who had a CDL, instead of the GNS IV position. RP 697:19-21; 12) reassigning the CDL duties was “the easiest thing in the world to do.” RP 698:5-6; 13) a CDL was an arbitrary requirement by the employer, and the essential job task “could clearly be done without it.” RP 700; 14) having to bring in other employees to do the CDL snow removal “would be a reasonable accommodation.” RP 702; and 15) the Community Colleges clearly did not accommodate Fey in the Spokane Community College promotional position. RP 705. Cutler’s testimony was not proper expert testimony under ER 702 or *Frye* because it lacked any foundation or technical expertise and offered incorrect opinions on the law.

Given Fey’s claim and Cutler’s opinion that a reasonable accommodation was to switch the smaller V-box sander assigned to the Falls campus with the larger International assigned to the Spokane Community Campus, Cutler was asked on cross-examination whether the two vehicles are designed to be suitable for different plowing needs? RP 712. Plaintiff’s counsel

²⁸ His expert opinion that it could be done with smaller vehicles was based upon his general ability to see snow removal in the winter like any member of the public could and because he owned part of a building complex that needed to be plowed. RP 703.

objected that “this is not within this witness’ knowledge.” RP 712:18-19. The trial court sustained the objection and did not allow cross-examination. RP 712. The trial court also did not allow cross-examination to point out that the job description required the applicant to be physically able to do the required work. RP 713:2-6. One of the jurors proposed a question for Mr. Cutler relating to whether there were sufficient other staff with CDL’s to drive the CDL vehicles. RP 713-714, CP 469-471. Plaintiff argued the question was beyond the scope, and the trial court did not allow the jury question to be asked. RP 714. Allowing Fred Cutler’s opinion testimony on the law and the ultimate facts, without any technical expertise, was reversible error.

B. The Trial Court Erred By Excluding Evidence Of The Employer’s Legitimate Business Needs

The employer’s business plan in creating the CDL requirement for the GNS IV position established that the use of smaller trucks with heavier snow loads had proven to be problematic, causing damage and costly repairs to smaller vehicles; therefore, the Colleges planned to purchase additional CDL vehicles as soon as the budget allowed. CP 23-34, 466-468, Ex. 26. Fey’s counsel argued in motions in limine that the Colleges’ business plan bolstered the claim that a CDL was necessary. RP 92. The trial court granted Fey’s motion in limine and excluded any mention of the business plan. RP 92-104, CP 449-451. There was no identified reason for the exclusion. The trial court just expressed that it was not sure what the evidence would show and found that the need for more CDL equipment in the future could only be considered after the equipment was actually purchased. RP 102-104. This ruling prejudicially prevented the jury from hearing facts favorable to the the Colleges’ side of the case.

C. The Trial Court Erred By Excluding Any Evidence That Fey Was Not Qualified For The Grounds IV Position

An employee’s performance is an essential part of a discrimination case because an employee must prove that he or she is qualified for the promotion sought. *Barker v. Advanced*

Silicon Materials, LLC, (ASIMI), 131 Wn. App. 616, 128 P.3d 633 (2006); *Kuyper v. State*, 79 Wn. App. 732, 735, 904 P.2d 793 (1995). It is clear that poor performance or employee misconduct can render an employee unfit for promotion. *Rufo v. Dave & Busters, Inc.*, 2007 WL 247891 (6th Cir. 2007); *Janson v. North Valley Hospital*, 93 Wn. App. 892, 971 P.2d 67 (1999). Specifically, coworkers' statements about their observations of work performance are admissible in addressing the relevant inquiry of qualifications in an employment discrimination case. *Herring*, 81 Wn. App. at 22.

Lloyd v. Swifty Transp., Inc., 552 F.3d 594 (7th Cir. 2009) is a disability discrimination case with facts similar to this case. Lloyd was a truck driver with a disability who wanted to be promoted to a lead truck driver position. *Id.* Like Fey, he had a poor attitude and was uncooperative as evaluated by supervisors. *Id.* These were performance considerations necessary for promotion to a lead position that required the ability to get along well with others. *Lloyd, supra* at 601-602. Lloyd, unlike Fey, was able to get a waiver from the DOT to drive a truck; however, he was not qualified for the lead duties because he was not meeting his employer's legitimate employment expectations. *Lloyd, supra*. The discrimination law does not eliminate the disabled employee's need to perform well in order to get promoted, and the court may not infringe upon the qualities the employer considers essential. *Lloyd, supra*.

In this case, the GNS IV position was the lead position responsible for directing and training other employees. Ex. 12, 13; RP 412, 510, 558. It was undisputed that the predominate duties required good leadership skills, good relations with coworkers and supervisors, accountability, trustworthiness, and strong communication skills. RP 315-316, 414-417, 422, 449-450, 795, 797, 886; Ex. 12,13. Fey's counsel argued that Fey did not have to be qualified or doing satisfactory work to be promoted and moved to exclude any evidence of Fey's poor work

performance or lack of qualifications as being prejudicial to Fey's claim. CP 324-329, 396-401; RP 78-80, 159:17-20. Fey's counsel argued that his performance was not relevant because he was not claiming that he would have gotten the promotion. RP 78-79, 85. This argument was made, in spite of the fact that Fey sought \$80,000 in economic damages on the premise that he would have gotten the promotion. RP 82-83. The Colleges argued that Fey's abilities and performance were relevant to: 1) his qualification for promotion, 2) challenging Fey's credibility based upon Fey's testimony that he was an excellent employee, and 3) proximate cause and damages. RP 78-83, 89, CP 324-329, 396-401, 413-417. The court initially denied the motion in limine finding that a disabled applicant had to be otherwise qualified and performing satisfactorily.²⁹ RP 80:19-23. The trial court reversed its decision the first day of trial finding Fey's poor performance was too prejudicial, and that whether Fey was qualified for the promotion was not relevant. RP 30-33, 159, 166-167. Fey's counsel argued that there is "nothing about him being the most qualified person," and argued that Fey did not have to prove causation. RP 416:12-15. The trial court agreed with Fey's counsel and prohibited the testimony. RP 417. The court noted in making this ruling that the Community Colleges should be allowed to argue that the employer considered other applicants to be more qualified. RP 169. However, before the defense case started, Fey's counsel argued that it did not matter whether other applicants were more qualified because Fey was not interviewed. RP 169-170. The trial court altered the ruling to further exclude any evidence of any applicants' qualifications. RP 170. All of the evidence that demonstrated that Fey did not qualify for the lead position, regardless of his vision and that other applicants were more qualified, was excluded from evidence at trial. CP 16-22, 23-51, 268-271, 466-468, 472-477, 479, 480; RP 78-83, 89, 159, 162-170, 172, 314:25-

²⁹ The trial court initially ruled that "I think there is some relevance to adverse employment performance... [noting that] most relevant evidence ... has some prejudicial content to it." RP 91.

315:1, 316-334, 339, 353, 344-345, 353:4-8, 391, 413-417, 477, 479-480, 572, 578, 646-648, 651-655, 715-719, 738:2-5, 886-887, 921-923, 958, 983, 1051:8-13, RP 795, 797.³⁰

In arguing the motion in limine regarding performance, the trial court noted that poor performance would be admissible if Fey opened the door by indicating that he was a good employee.³¹ At trial, Fey testified that he was an excellent employee with great communication skills who worked hard and was well qualified for the promotion. RP 268:7-15, 316; 276; 316, 337-339, 346:14-19,³² RP 337-339,³³ RP 317, 337-339, 344.³⁴ In addition Fey's wife painted Fey as a great guy to work with, testifying over objection, that Fey readily forgave people, always communicated well, and could make friends on the fly. RP 374-375. Both of Plaintiff's experts, an economist and a vocational expert, were allowed to testify over objection that Fey was qualified for the promotion. RP 621-622, 692.³⁵

After Fey's case presented him as a great employee, the Colleges pointed out that Fey opened the door and that for a fair trial the defense witnesses should be allowed to contradict this

³⁰ The district director of HR who is in charge of job descriptions and recruitment was asked "Would Mr. Fey have been hired if he didn't meet the qualifications then?" RP 748, 754. It was the Human Resources Director's job to make that determination. *Id.* Plaintiff objected that the question sought speculation, and the trial court sustained the objection. RP 754.

³¹ The trial court noted that if Fey brought up good performance, then it would put him in a "favorable light" and asked wouldn't that "open the door for the defendant to introduce evidence in rebuttal to show that that really wasn't quite the case?" Plaintiff's counsel responded "possibly," but "I do not think that his performance is at issue in this case." RP 81. Fey's counsel conceded "if Mr. Fey opens the door on testimony and says, 'I was a good worker and I worked hard,' then he could be challenged on that." RP 82.

³² Fey testified that he was more qualified for the grounds lead and his supervisor, Arden Crawford, "knows I'm more qualified." RP 346. Crawford's testimony clearly identified that Hale was more qualified and that he would not support or recommend Fey for a lead position. CP 35-51.

³³ Fey claimed that no one ever addressed his communication skills with him. Fey's supervisor, Arden Crawford, would have testified, if allowed, that Fey's communication was a frequent problem addressed with Fey. CP 35-51, 472-477.

³⁴ Fey denied under oath that he had any specific instances of misconduct or communication problems with supervisors, coworkers or faculty, contrary to the evidence that was excluded from trial. CP 472-477.

³⁵ Fey's economist, qualified to do economic calculations, without any foundation was permitted to testify over objection whether Fey had the level of skill to be promoted. RP 621. Fey's counsel argued in response to the objection that Mr. West "reviewed significant information in this case," and the court allowed the testimony. RP 621:15-17, 622, 627. Mr. West was not permitted on cross examination to respond to the following questions: 1) "Do you have any factual information if he had a CDL that he would have gotten that promotion?" RP 627:15-18. 2) "Did any of the documentation provided to you indicate he [Fey] would get that promotion?" RP 627:20-24. 3) "Did you ever talk to anyone who interviewed the people for the grounds and nursery specialist IV to compare his qualifications to those applicants?" RP 626:19-24.

testimony. RP 317-330. Despite this, all evidence of Fey's poor performance and lack of abilities to be a lead was excluded by the trial court. CP 16-22, 35-88, 268-271, 396-401, 466-468, 472-477; RP 78-85, 89, 159, 162-168, 172, 317-334, 339, 353, 344-345, 391, 413-417, 477, 479-480, 572, 578, 646-648, 651-655, 715-719, 738, 886-887, 921, 958, 983, 1051. The trial court initially noted that Arden Crawford, Fey's direct supervisor, could provide "limited" testimony to contradict Fey's testimony that he was an excellent employee. RP 333-334. However, the trial court actually struck Mr. Crawford's testimony that Fey was not an excellent employee, telling the jury to disregard the testimony. RP 477. The trial court prevented Mr. Crawford from testifying to whether he would give Fey the required recommendation for the internal promotion. RP 479-480, 886.³⁶

Fey received a written disciplinary warning within the six months prior to his application for promotion but this document was excluded from evidence.³⁷ Ex. 150, RP 958. The trial court also excluded documentation that another employee was demoted out of the GNS IV position for failing to obtain a CDL. Ex. 155, 158; RP 882-883.

The trial court ruled that the Community College could not put on any defense relating to Fey's performance, qualifications for the job or his abilities to perform the promotional position. RP 651:11-13, 715-719, 921-923, 958, 983:22-24; CP 472-477. On the other hand, the trial court held that Fey could argue he was qualified for the promotion.³⁸ RP 168 ll. 19-22. It was error and extremely prejudicial to allow only one side of the case into evidence.

³⁶ Since the trial court did not allow any response to Fey's assertion that he was an excellent employee and since the trial court ruled that whether Fey was qualified for the promotion was not relevant, the Colleges moved to exclude the presentation of any evidence of lost wages by Fey. RP 167-168. This motion was not granted. *Id.*

³⁷ Fey inaccurately portrayed this event in his trial testimony as a simple malfunction of the sprinkler equipment that his supervisor did not understand, and that was not his fault. RP 344-345. The exhibit established that the discipline was for failing to follow his supervisor's directions. Ex. 150.

³⁸ "Are the plaintiffs going to be allowed to argue that he was the most qualified and he should have gotten this job?" RP 168. The court responded "that's what I understand they intend to argue." RP 168.

D. Defendants Were Prohibited From Presenting Any Evidence Regarding Qualification For Other Promotional Opportunities

In 2003 and again in 2008, Fey applied for a higher paying Maintenance Mechanic position for which he qualified. RP 336-337, 743. The Maintenance Mechanic position did not require a CDL, and Fey was interviewed for that job. *Id.* However, testimony that Fey was better suited for the Maintenance Mechanic position than the GNS IV position was not permitted. RP 478-79, 743, 745:2-7, 921-923, CP 472-477.³⁹

E. Relevant Testimony On The Accommodation Claim Was Excluded

The trial court prevented the following relevant testimony:

1. Fey was asked whether there was there anything his employer could do that would enable him to drive a CDL vehicle. Plaintiff objected, and the objection was sustained. RP 356-357;

2. Fey was asked “Is it true that you didn’t ask for accommodation in 2007 because it never crossed your mind?” RP 352 ll. 15-20. Plaintiff objected that it had been asked and answered, and the court sustained the objection. RP 352. Fey had in fact previously avoided responding to the question, and did not have to admit, consistent with his deposition testimony, that he actually did not ask for accommodation.⁴⁰ CP 505-506.

3. Fey was asked “Other than asking your employer to waive the CDL requirement in your February 2010 letter, was there any other accommodation that you asked for? Counsel objected, and the objection was sustained, as previously answered which it was not. RP 352, 221-352.

4. Cary Abbott was on leave during the winter and did not know who drove the CDL

³⁹ Fey testified that he was not interviewed for the maintenance mechanic job. RP 337. Fey’s counsel objected to the testimony by the person who interviewed Fey that Fey was in fact interviewed for the Maintenance Mechanic position, and the court sustained the objection. RP 744:9-14.

⁴⁰ Q. Did you ask for a reasonable accommodation?

A. I didn’t need to ask for accommodation for anything. RP 271:22-23.

vehicles when he could not legally drive them or what it cost the colleges to have someone fill in for him due to his inability to drive a CDL vehicle.⁴¹ RP 527. The trial court allowed Mr. Abbott to testify on Fey's direct over a foundation objection that in his opinion not having a CDL did not present any hardship. RP 515-516, 527. When asked questions on cross regarding the basis for his opinion that it did not present any hardship, plaintiff objected and the trial court sustained the objections. RP 534. On the other hand, the trial court prevented the college management, who had the knowledge and were responsible for overseeing all the grounds work, from testifying to whether operating the CDL vehicles was an essential part of the job. RP 798.

5. Fey and Fred Cutler, neither of whom had any knowledge of the equipment needs at Spokane Community College, were allowed to testify that smaller non-CDL vehicles could be used at Spokane Community. RP 284-285, 292, 692. Renee Harrison was the fleet manager in charge of assessing equipment needs, maintaining equipment, and purchasing and assigning equipment to both campuses. RP 818, 833-834. In attempting to address with Ms. Harrison the primary claim by Fey that the V-box sander (a smaller 23,000 lb. vehicle) could just be swapped with the International (a 43,000 pound vehicle), the court interrupted her testimony of his own initiative without any objection and directed defense counsel to move away from this crucial testimony. RP 798, 832-834.

6. Mr. Kuhl was asked, "When the grounds keepers are working in the winter and there's snow, do they have any other duties?" Plaintiff objected, and the trial court sustained the objection.⁴² RP 739, 740 ll. 7-11.

7. The trial court prevented any testimony by the Colleges' WSP officer Larry Pasco

⁴¹ SCC had to hire outside contractors and a temporary employee while Abbott was in the grace period to get his CDL.

⁴² Maintenance mechanics have a full time work to perform in the winter taking care of buildings without any snow removal duties.

about CDL requirements, which vehicles those requirements apply to, and the advice he gave the managers at the Community Colleges prior to 2007 about CDL's. RP 42, 47; CP 9-13, 388-391, 396-406.⁴³

8. Dr. Hander, Plaintiff's medical expert, was identified after the discovery cutoff for the first time in the Joint Trial Management Report. *Id.*, RP 51. Defendants moved to strike the expert as untimely. RP 51, 119-120. In response, the trial court struck the Colleges' timely identified expert, Larry Pasco, and allowed Dr. Hander's testimony. RP 53-54. In response to the objection that Dr. Hander was first identified the week before trial, Fey's counsel argued that they provided Dr. Hander's medical records the week before trial, and there would not be any surprise. RP 119-120. Dr. Hander testified to a potential diagnosis of "Stargardt's" that had never previously been claimed or disclosed. RP 670.

9. The College managers responsible for overseeing grounds work and the employees who were actually charged with performing the grounds duties were prevented from testifying regarding whether snow removal was an essential function of the grounds position. RP 721.

F. Relevant Evidence Was Excluded About Emotional Distress Damages And Mitigation

Fey claimed he was angry about not getting the GNS IV promotion. He was asked whether he was so angry that he applied for any position outside the Community Colleges. RP 350. The Plaintiff objected that this was not relevant, and the trial court sustained the objection. RP 350 ll. 16-20. On direct, Fey's wife was allowed to testify that someone at work told Fey he would have to stay in one job for the rest of his career. RP 377-382. When asked on cross who allegedly said Fey had to stay in one job, the Plaintiff objected that was not her testimony and the

⁴³ After striking the College's timely identified lay and expert witness, Larry Pasco's testimony on CDL standards, the trial court noted that he would allow Fey in his lay opinion to testify to the CDL status. RP 54, 62. It was undisputed that Fey had no knowledge or expertise on CDL classifications, and Fey acknowledged that he had no reason to dispute the WSP conclusions that were not admitted into evidence. RP 240, 248, 281.

objection was sustained. RP 377 ll. 18-21, RP 381 ll. 20-24. Fey was asked whether he looked for “equal-pay opportunities similar to the Grounds IV or higher since November 2007 to seek any other promotions that you did qualify for that did not require a CDL?” Plaintiff objected, and the trial court sustained the objection. RP 351:23 – 352:4.

G. The Collective Errors Amount To An Unconstitutional Comment On The Evidence

Art. IV, §16 of the Washington State Constitution provides that: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” This section prevents a trial judge from conveying to a jury his or her personal attitudes toward the merits of the case. *State v. Foster*, 91 Wn.2d 466, 481, 589 P.2d 789 (1979). In particular, “a court cannot instruct the jury that matters of fact have been established as a matter of law.” *State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1997). Instructions that emphasize certain aspects of a case may properly subject a trial judge to the charge of commenting on the evidence. *Harris v. Groth*, 31 Wn. App. 867, 645 P.2d 1104, *aff’d*, 99 Wn.2d 438, 663 P.2d 113 (1982). Comments on the evidence are presumed to be prejudicial. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); *In re Detention of R.W.*, 98 Wn. App. 140, 144, 988 P.2d 1034 (1999).

The judge started the case with a speech about how the court would reasonably accommodate the jury. RP 128 ll. 1-4. The erroneous comments, and rulings on evidence and instructions, including the improperly augmented pattern instructions, clearly inserted the Judge’s personal views or attitudes about this case. The cumulative effect of the errors amounts to a comment on the evidence which is presumed to be prejudicial.

H. The Trial Court Erred By Awarding An Additur

If a jury verdict is “within the range of credible evidence,” the trial court has no discretion to find that passion or prejudice affected the verdict for the purpose of ordering an additur. *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 161–62, 776 P.2d 676 (1989). Juries

have considerable leeway in assessing damages, and a verdict will not be lightly overturned. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997); *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967) (the law gives strong presumption of adequacy to the verdict). A judge can order a new trial on damages when “the verdict indicates that a jury disregarded the court’s instructions,” or the jury “must have ignored uncontroverted evidence.” *Nichols v. Lackie*, 58 Wn. App. 904, 907, 795 P.2d 722 (1990); *Palmer*, 132 Wn.2d at 193. Neither occurred here.

An award of no general damages is supported by the evidence when there is either minimal injury or a question regarding the proximate cause of damages. In *Palmer*, a child was injured in a rear-end vehicle collision caused by the defendant. The jury awarded damages in amounts exactly equal to the claimed special damages. The Supreme Court affirmed the award of no general damages as to the child, who sustained only “minimal” injuries. *Palmer*, 132 Wn.2d at 197, (reversing the trial court with regard to the mother where significant evidence existed of uncontroverted pain and suffering). An award of no general damages is also appropriate when proximate cause is disputed. *Cox*, 70 Wn.2d at 177.

In this case, Fey submitted that his claimed \$50,000 in emotional distress and anger was related solely to the fact that he would never be promoted. RP 1025. Fey’s attorney argued that he was “stuck” “frozen” in his career “forever,” which warranted emotional distress damages of \$50,000. RP 1025-1026. The evidence at trial showed that: 1) Fey was not even clear on the basis for his claimed emotional distress; RP 298, 349; 2) Fey was not limited from promoting, and he was in fact eligible for promotion to a Maintenance Mechanic position that was a higher paying job; 3) he never attempted to seek a higher paying job outside of the community colleges; 4) he and his wife both testified how happy he was in his current GNS III job; 5) there was no

evidence that the loss of the interview actually proximately caused the loss of the promotion, since Fey was not otherwise qualified for the promotion; 6) Fey had lost out on several other promotions to positions not requiring a CDL, before and after 2007, and he testified that he had no emotional distress from the loss of other promotions; and 7) there were credibility issues with Fey which would justify a jury not believing his claimed emotional distress damages.

The jury felt required under the instructions to award some amount of damages for the Community Colleges failure to engage in the mandatory interactive process. CP 637-641, 649-653. They denied any future wage loss, clearly finding that Fey was not forever prevented from promoting as claimed. CP 599-600. The jury found zero emotional distress damages which is consistent with the minimal injury of not being interviewed for one promotion out of several, especially when it was never established that Fey was qualified for the job.

The trial court's identified basis for his additur award was that he believed in his own personal view that Fey appeared distressed during his testimony. CP 900-907. However, it is an abuse of discretion for the trial court to substitute its view of emotional distress for the jury's when the evidence in the record is controverted. The evidence establishes that Fey was not frozen in his position as claimed. The trial court did not apply the correct standard for awarding an additur by substituting his personal view of credibility for that of the jury, as opposed to identifying "uncontroverted" evidence that mandated an award of damages.

I. The Trial Court Erred By Awarding Unreasonable Attorney's Fees

When fees are awarded, the trial court has discretion to determine the reasonableness of an award of attorney's fees in light of the particular circumstances of each case. *Progressive Animal Welfare Soc. v. University of Washington*, 114 Wn.2d 677, 688, 790 P.2d 604 (1990); *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990). The trial court may not simply rely upon the billing records of the attorney seeking fees. *Nordstrom, Inc.*

v. Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). A fee award should not include time “spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.” *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995). The court must segregate those hours from the hours spent on the successful claims. *Brand v. Dep’t of Labor and Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (1999); *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933 (1983); *Kastanis v. Education Employees Credit Union*, 122 Wn.2d 483, 502, 859 P.2d 26, amended by 865 P.2d 507 (1994); see also *Blair v. Washington State University*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987).

The trial court failed to make any segregation for the claims upon which Fey was unsuccessful or the significant unproductive and duplicative work. CP 654-663; CP 900-907. Of glaring note is the fact that Plaintiff triple billed for three attorneys, one of whom never did any work on the case. In addition, significant fees and costs attributable solely to the lost claim for future damages of over \$80,000, a claim which was unsuccessful at trial, were awarded in full. The trial court allowing all fees and costs, including those on the unsuccessful claims, does not meet the obligation of the court to properly segregate time and expenses. CP 654-663, 767-771; CP 900-907.

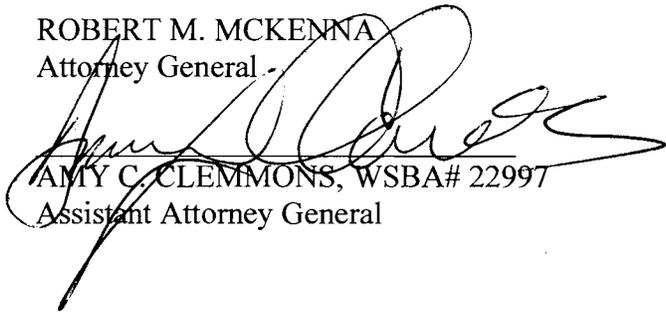
IX. CONCLUSION

An employee does not have the prerogative to redesign a promotional position to eliminate certain qualifications so the job better fits the employee. It is undisputed that Fey cannot obtain a CDL, and therefore, with or without accommodation, he is unable to meet the qualifications of the GNS IV job. The employer is not required to redesign the position to operate in a less safe and less efficient manner, or reassign job functions to other employees. Therefore, Appellants, the State of Washington, Community Colleges of Spokane, respectfully request this Court dismiss Fey’s claim for reasonable accommodation pursuant to the law as set

out herein. The instructions given and the evidentiary rulings in this case were erroneous and so prejudicial that the Community Colleges of Spokane was completely prevented from putting on any defense in this case. The cumulative errors warrant a new trial if this Court finds any remaining issue of fact for trial.

RESPECTFULLY SUBMITTED this 21 day of November, 2011.

ROBERT M. MCKENNA
Attorney General -



AMY C. CLEMMONS, WSBA# 22997
Assistant Attorney General

CERTIFICATE OF SERVICE

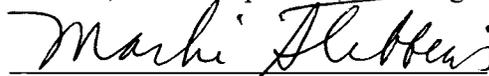
I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Appellants/Respondents' Opening Brief was hand delivered and filed at the following addresses:

Court of Appeals of Washington, Division III
500 North Cedar Street
Spokane, Washington 99201-2159

And one copy delivered to:

William Powell
Powell, Kuznetz & Parker
316 W. Boone, Rock Pointe Tower, Suite 380
Spokane, WA 99201

DATED this 21 day of November, 2011 at Spokane, Washington.


MARKI STEBBINS

RECEIVED

NOV 21 2011

POWELL, KUZNETZ
& PARKER, P.S.

NO. 29912-1-III

NOV 21 2011

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

STATE OF WASHINGTON, COMMUNITY COLLEGES OF
SPOKANE,

Appellants/Respondents,

v.

MARK FEY,

Respondent/Appellant

**APPENDIXES OF
JURY INSTRUCTIONS**

NO. 29912-1-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, COMMUNITY COLLEGES OF
SPOKANE,

Appellants/Respondents,

v.

MARK FEY,

Respondent/Appellant

APPENDIX A- PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

FILED

MAR 18 2011

THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, SPOKANE COUNTY

MARK FEY,

Plaintiff,

No. 09-2-05589-5

vs.

PLAINTIFF'S PROPOSED
JURY INSTRUCTIONS

STATE OF WASHINGTON,
COMMUNITY COLLEGES OF
SPOKANE,

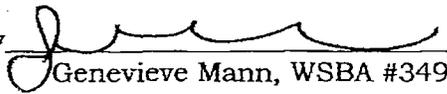
CITED

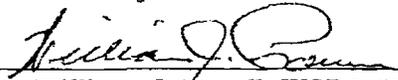
Defendants.

Plaintiff, Mark Fey, by and through his attorneys, Genevieve Mann and William J. Powell, of Powell, Kuznetz & Parker, P.S., and pursuant to CR 51, submits the following proposed jury instructions.

Dated this 16th day of March, 2011.

POWELL, KUZNETZ & PARKER, P.S.

By 
Genevieve Mann, WSBA #34968
Attorneys for Plaintiff

By 
William J. Powell, WSBA #672
Attorneys for Plaintiff

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS - 1

LAW OFFICE OF
POWELL, KUZNETZ & PARKER
A PROFESSIONAL SERVICE CORPORATION
316 W. BOONE, ROCK PONTE TOWER, STE. 300
SPOKANE, WASHINGTON 99201-2345
PHONE: (509)455-4151
FAX: (509)455-8522

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law that I give you to the facts that you decide have been proved, and in this way decide the case. By applying the law to the facts, you will be able to decide this case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted,] during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

[Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.]

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during

trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 2

This is a civil action brought by plaintiff Mark Fey against his employer, Community Colleges of Spokane ("CCS"). Plaintiff claims that CCS failed to accommodate his disability. Plaintiff also claims that CCS discriminated against him because of his disability. He seeks an award of damages for these claims.

Defendant denies plaintiff's claims.

INSTRUCTION NO. 3

The law treats all parties equally whether they are government entities or individuals. This means that government entities and individuals are to be treated in the same fair and unprejudiced manner.

WPI 1.07 (modified)

INSTRUCTION NO. 4

Any act or omission of an employee within the scope of authority is the act or omission of the employer.

WPI 50.03 (modified)

INSTRUCTION NO. 5

The plaintiff claims that the defendant discriminated against him in one or more of the following respects:

- By failing to engage in the mandatory interactive process required for reasonable accommodation of his disability.
- By failing to consider plaintiff for the Grounds and Nursery 4 position when he was qualified to perform the duties of the position.
- By failing to consider altering the Grounds and Nursery 4 position conditions of employment to accommodate plaintiff's disability.
- By treating plaintiff less favorably than other employees.

The defendant denies these claims. The defendant further denies that plaintiff was injured or sustained damage.

INSTRUCTION NO. 6

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed unless admitted by the opposing party; and you are to consider only those matters that are admitted or are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

WPI 20.05

INSTRUCTION NO. 7

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. 8

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

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.

INSTRUCTION NO. 9

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

WPI 2.10

INSTRUCTION NO. 10

Discrimination in employment on the basis of disability is prohibited.

To establish his claim of discrimination on the basis of failure to accommodate his disability, plaintiff has the burden of proving each of the following propositions:

- (1) That he had a disability;
- (2) That defendant was aware of the disability;
- (3) That he was able to perform the essential functions of the job in question with reasonable accommodation; and
- (4) That defendant failed to reasonably accommodate plaintiff's 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 the plaintiff on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

INSTRUCTION NO. 11

Disability means the presence of a sensory, mental, or physical impairment that:

- (1) Is medically cognizable or diagnosable; or
- (2) Exists as a record or history; or
- (3) Is perceived to exist whether or not it exists in fact.

A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity.

WPI 330.31 (modified)
RCW 49.60.040(7)

INSTRUCTION NO. 12

If a disability is not known to the employer, the employee must give the employer notice of the disability. The employer then has an affirmative obligation to engage in the interactive process. The employer has a duty to inquire regarding the nature and extent of the disability, and the employee has a duty to cooperate with the employer's efforts by explaining the employee's disability and qualifications. The employer must then take positive steps to accommodate the employee's limitations.

WPI 330.35 (modified);
Davis v. Microsoft, 149 Wn.2d 521, 527 (2003); *Goodman v. Boeing*, 127 Wn.2d 401, 407-08 (1995); *Snyder v. Medical Service Corp. of Eastern Washington*, 145 Wn.2d 233; *Dean v. Municipality of Metropolitan Seattle-Metro*, 104 Wn.2d, 627, 637-38 (1985).

INSTRUCTION NO. 13

Essential functions are the fundamental job duties of the employment position. Essential functions are not qualification standards.

Davis v. Microsoft, 149 Wash.2d 521, 533 (2003); *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 990 (9th Cir.2007).

INSTRUCTION NO. 14

Under Washington law, the employer must provide a reasonable accommodation for an employee with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. The obligation to reasonably accommodate applies to all aspects of employment, and an employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation.

A reasonable accommodation may include adjustments in job duties, work schedules, scope of work, and changes in the job setting or conditions of employment that enable the person to perform the essential functions of the job.

There may be more than one reasonable accommodation of a disability. A reasonable accommodation may include adjustments in job duties, work schedules, scope of work, and changes in the job setting or conditions of employment that enable the person to perform the essential functions of the job.

INSTRUCTION NO. 15

An employer is not required to accommodate an employee's disability if it would impose an undue hardship on the operation of the employer's business. The defendant has the burden of proving that an accommodation would impose an undue hardship on the defendant.

The cost or difficulty of accommodating an employee with a disability will be considered to be an undue hardship on the conduct of the employer's business only if it is unreasonably high in view of the size of the employer's business, the value of the employee's work, whether the cost can be included in planned remodeling or maintenance, and the requirements of contracts.

INSTRUCTION NO. 16

Discrimination in employment on the basis of disability is prohibited.

To establish his claim of discrimination on the basis of disability, the plaintiff has the burden of proving each of the following propositions:

- (a) that he had a disability;
- (b) that he was able to perform the essential functions of the job in question with reasonable accommodation; and
- (c) that his disability was a substantial factor in defendant's decision not to promote him. Plaintiff does not have to prove that disability was the only factor or the main factor in the decision. Nor does plaintiff have to prove that he would have been promoted but for his 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 the plaintiff on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant on this claim.

INSTRUCTION NO. 17

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, you must determine the amount of money which will reasonably and fairly compensate the plaintiff for such damages as you find were caused by the acts of the defendants.

If you find for the plaintiff, you should consider the following elements:

- (1) The reasonable value of lost past earnings and fringe benefits, from the date of the wrongful conduct to the date of trial;
- (2) The emotional harm to the plaintiff caused by the defendant's wrongful conduct, including emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish experienced and with reasonable probability to be experienced by the plaintiff in the future.

The burden of proving damages rests with the party claiming them, and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

INSTRUCTION NO. 18

In calculating damages for future wage loss you should determine the present cash value of salary, pension, and other fringe benefits from today until the time plaintiff may reasonably be expected to retire.

WPI 330.82 (modified)

INSTRUCTION NO. 19

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the

answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

SUPERIOR COURT, STATE OF WASHINGTON, SPOKANE COUNTY

MARK FEY,

Plaintiff,

No. 09-2-05589-5

vs.

STATE OF WASHINGTON,
COMMUNITY COLLEGES OF
SPOKANE,

SPECIAL VERDICT FORM

Defendants.

We, the jury, answer the questions submitted by the Court as follows:

Question No. 1: Does plaintiff, Mark Fey, have a disability?

Answer: Yes _____
No _____

Question No. 2: Was defendant aware that plaintiff, Mark Fey, has a disability?

Answer: Yes _____
No _____

If your answer to **both** Question No. 1 and 2 is "yes", answer Question Nos. 3, 4 **and** 5. If your answer to either Question No. 1 or 2 is "no", sign the verdict form.

Question No. 3: Did defendant engage in an interactive process to find an accommodation which would fit with plaintiff's disability?

Answer: Yes _____
No _____

Question No. 4: Did defendant reasonably accommodate plaintiff's disability?

Answer: Yes _____
No _____

Question No. 5: Was plaintiff's disability a substantial factor in defendant's decision not to promote plaintiff?

Answer: Yes _____
No _____

If your answer to **either** Question No. 3 or 4 is "no", answer Question No. 6. If your answer to Question No. 5 is "yes", answer Question No. 6. If your answer to **both** Question No. 3 and 4 is "yes", **and** your answer to Question No. 5 is "no", sign the verdict form.

Question No. 6: What is the amount of plaintiff's damages?

Answer:

Lost Wages \$ _____

Emotional Distress \$ _____

Date: _____, 2011

Presiding Juror

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

FILED

FEB 28 2011

THOMAS R FALLOQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, SPOKANE COUNTY

MARK FEY,

Plaintiff,

No. 09-2-05589-5

vs.

PLAINTIFF'S PROPOSED
JURY INSTRUCTIONS

STATE OF WASHINGTON,
COMMUNITY COLLEGES OF
SPOKANE,

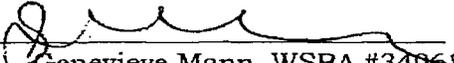
Defendants.

CITED

Plaintiff, Mark Fey, by and through his attorneys, Genevieve Mann and William J. Powell, of Powell, Kuznetz & Parker, P.S., and pursuant to CR 51, submits the following proposed jury instructions.

Dated this 18th day of February, 2011.

POWELL, KUZNETZ & PARKER, P.S.

By 
Genevieve Mann, WSBA #34968
Attorneys for Plaintiff

By 
William J. Powell, WSBA #672
Attorneys for Plaintiff

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS - 1

LAW OFFICE OF
POWELL, KUZNETZ & PARKER
A PROFESSIONAL SERVICE CORPORATION
316 W. BOONE, ROCK POINTE TOWER, STE. 380
SPOKANE, WASHINGTON 99201-2346
PHONE: (509)455-4151
FAX: (509)455-8522

INSTRUCTION NO. _____

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law that I give you to the facts that you decide have been proved, and in this way decide the case. By applying the law to the facts, you will be able to decide this case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses[, and the exhibits that I have admitted,] during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

[Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.]

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during

trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. _____

This is a civil action brought by plaintiff Mark Fey against his employer, Community Colleges of Spokane ("CCS"). Plaintiff claims that CCS failed to accommodate his disability. Plaintiff also claims that CCS discriminated against him because of his disability. He seeks an award of damages for these claims.

Defendant denies plaintiff's claims.

INSTRUCTION NO. _____

The law treats all parties equally whether they are government entities or individuals. This means that government entities and individuals are to be treated in the same fair and unprejudiced manner.

WPI 1.07 (modified)

INSTRUCTION NO. _____

The plaintiff claims that the defendant discriminated against him in one or more of the following respects:

- By failing to engage in the mandatory interactive process required for reasonable accommodation of his disability.
- By failing to reasonably accommodate plaintiff's disability by not considering him for the Grounds and Nursery 4 position when he was qualified to perform the duties of the position.
- By failing to consider altering the Grounds and Nursery 4 position conditions of employment to accommodate plaintiff's disability.
- When defendant refused to accommodate plaintiff's disability, he was treated less favorably than other employees.

The defendant denies these claims. The defendant further denies that plaintiff was injured or sustained damage.

INSTRUCTION NO. _____

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed unless admitted by the opposing party; and you are to consider only those matters that are admitted or are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

WPI 20.05

INSTRUCTION NO. _____

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. _____

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

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.

INSTRUCTION NO. _____

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

WPI 2.10

INSTRUCTION NO. _____

Discrimination in employment on the basis of disability is prohibited.

To establish his claim of discrimination on the basis of failure to accommodate his disability, plaintiff has the burden of proving each of the following propositions:

- (1) That he had a disability;
- (2) That defendant was aware of the disability;
- (3) That the disability had a substantially limiting effect on his ability to do the job;
- (4) That he was able to perform the essential functions of the job in question with reasonable accommodation; and
- (5) That defendant failed to reasonably accommodate plaintiff's 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 the plaintiff on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

INSTRUCTION NO. _____

Disability means the presence of a sensory, mental, or physical impairment that:

- (1) Is medically cognizable or diagnosable; or
- (2) Exists as a record or history; or
- (3) Is perceived to exist whether or not it exists in fact.

A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity.

WPI 330.31 (modified)
RCW 49.60.040(7)

INSTRUCTION NO. _____

If a disability is not known to the employer, the employee must give the employer notice of the disability. The employer then has a duty to inquire regarding the nature and extent of the disability, and the employee has a duty to cooperate with the employer's efforts by explaining the employee's disability and qualifications. The employer must then take positive steps to accommodate the employee's limitations.

WPI 330.35

INSTRUCTION NO.

When put on notice of an employee's disability, an employer has an affirmative obligation to engage in an interactive process for the purpose of determining the extent and nature of the employee's impairment, and the employer and employee have an affirmative duty to work together to find an accommodation which would fit with the employee's disability.

Davis v. Microsoft, 149 Wn.2d 521, 527 (2003); *Goodman v. Boeing*, 127 Wn.2d 401, 407-08 (1995); *Snyder v. Medical Service Corp. of Eastern Washington*, 145 Wn.2d 233; *Dean v. Municipality of Metropolitan Seattle-Metro*, 104 Wn.2d, 627, 637-38 (1985).

INSTRUCTION NO. _____

Essential functions are the fundamental job duties of the employment position. Essential functions are not qualification standards.

Davis v. Microsoft, 149 Wash.2d 521, 533 (2003); *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 990 (9th Cir.2007).

INSTRUCTION NO. _____

Under Washington law, the employer must provide a reasonable accommodation for an employee with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. The obligation to reasonably accommodate applies to all aspects of employment, and an employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation.

A reasonable accommodation may include adjustments in job duties, work schedules, scope of work, and changes in the job setting or conditions of employment that enable the person to perform the essential functions of the job.

There may be more than one reasonable accommodation of a disability. A reasonable accommodation may include adjustments in job duties, work schedules, scope of work, and changes in the job setting or conditions of employment that enable the person to perform the essential functions of the job.

INSTRUCTION NO. _____

An employer is not required to accommodate an employee's disability if it would impose an undue hardship on the operation of the employer's business. The defendant has the burden of proving that an accommodation would impose an undue hardship on the defendant.

The cost or difficulty of accommodating an employee with a disability will be considered to be an undue hardship on the conduct of the employer's business only if it is unreasonably high in view of the size of the employer's business, the value of the employee's work, whether the cost can be included in planned remodeling or maintenance, and the requirements of contracts.

WPI 330.36

INSTRUCTION NO. _____

Discrimination in employment on the basis of disability is prohibited.

To establish his claim of discrimination on the basis of disability, the plaintiff has the burden of proving each of the following propositions:

(a) that he had a disability;

(b) that he was able to perform the essential functions of the job in question with reasonable accommodation; and

(c) that his disability was a substantial factor in defendant's decision not to promote him. Plaintiff does not have to prove that disability was the only factor or the main factor in the decision. Nor does plaintiff have to prove that he would have been promoted but for his 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 the plaintiff on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant on this claim.

INSTRUCTION NO. _____

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, you must determine the amount of money which will reasonably and fairly compensate the plaintiff for such damages as you find were caused by the acts of the defendants.

If you find for the plaintiff, you should consider the following elements:

- (1) The reasonable value of lost past earnings and fringe benefits, from the date of the wrongful conduct to the date of trial;
- (2) The emotional harm to the plaintiff caused by the defendant's wrongful conduct, including emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish experienced and with reasonable probability to be experienced by the plaintiff in the future.

The burden of proving damages rests with the party claiming them, and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

INSTRUCTION NO. _____

In calculating damages for future wage loss you should determine the present cash value of salary, pension, and other fringe benefits from today until the time plaintiff may reasonably be expected to retire.

WPI 330.82 (modified)

INSTRUCTION NO. _____

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the

answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

SUPERIOR COURT, STATE OF WASHINGTON, SPOKANE COUNTY

MARK FEY,

Plaintiff,

vs.

STATE OF WASHINGTON,
COMMUNITY COLLEGES OF
SPOKANE,

Defendants.

No. 09-2-05589-5

SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the Court as follows:

Question No. 1: Does plaintiff, Mark Fey, have a disability?

Answer: Yes _____
No _____

Question No. 2: Was defendant aware that plaintiff, Mark Fey, has a disability?

Answer: Yes _____
No _____

If your answer to **both** Question No. 1 and 2 is "yes", answer Question Nos. 3, 4 **and** 5. If your answer to either Question No. 1 or 2 is "no", sign the verdict form.

Question No. 3: Did defendant engage in an interactive process to find an accommodation which would fit with plaintiff's disability?

Answer: Yes _____
No _____

Question No. 4: Did defendant reasonably accommodate plaintiff's disability?

Answer: Yes _____
No _____

Question No. 5: Was plaintiff's disability a substantial factor in defendant's decision not to promote plaintiff?

Answer: Yes _____
No _____

If your answer to **either** Question No. 3 or 4 is "no", answer Question No. 6. If your answer to Question No. 5 is "yes", answer Question No. 6. If your answer to **both** Question No. 3 and 4 is "yes", **and** your answer to Question No. 5 is "no", sign the verdict form.

Question No. 6: What is the amount of plaintiff's damages?

Answer:

Lost Wages \$ _____

Emotional Distress \$ _____

Date: _____, 2011

Presiding Juror

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

FILED

MAR 24 2011

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, SPOKANE COUNTY

MARK FEY,

Plaintiff,

vs.

STATE OF WASHINGTON,
COMMUNITY COLLEGES OF
SPOKANE,

Defendants.

No. 09-2-05589-5

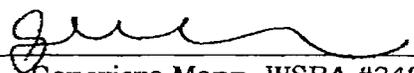
**PLAINTIFF'S PROPOSED
ALTERNATE JURY
INSTRUCTIONS**

CITED

Plaintiff Mark Fey, by and through his attorneys, Genevieve Mann and William, J. Powell, of Powell, Kuznetz & Parker, P.S., and pursuant to CR.51, submits the following proposed alternate jury instructions.

Dated this 24th day of March, 2011.

POWELL, KUZNETZ & PARKER, P.S.

By 
Genevieve Mann, WSBA #34968
Attorneys for Plaintiff

**PLAINTIFF'S PROPOSED ALTERNATE JURY
INSTRUCTIONS - 1**

LAW OFFICE OF
POWELL, KUZNETZ & PARKER
A PROFESSIONAL SERVICE CORPORATION
316 W. BOONE, ROCK POINTE TOWER, STE. 380
SPOKANE, WASHINGTON 99201-2346
PHONE: (509)455-4151
FAX: (509)455-8522

INSTRUCTION NO. PA-2

This is a civil action brought by plaintiff Mark Fey against his employer, Community Colleges of Spokane ("CCS"). Plaintiff claims that CCS failed to accommodate his disability. He seeks an award of damages for this claim.

Defendant denies plaintiff's claim.

INSTRUCTION NO. PA-5

The plaintiff claims that the defendant discriminated against him in one or more of the following respects:

- By failing to engage in the mandatory interactive process required for reasonable accommodation of his disability.
- By failing to consider plaintiff for the Grounds and Nursery 4 position when he was able to perform the essential functions of the position.
- By failing to consider altering the Grounds and Nursery 4 conditions of employment to accommodate plaintiff's disability.

The defendant denies these claims. The defendant further denies that plaintiff was injured or sustained damage.

INSTRUCTION NO. PA-10

Discrimination in employment on the basis of disability is prohibited.

To establish his claim of discrimination on the basis of failure to accommodate his disability, plaintiff has the burden of proving each of the following propositions:

- (1) That he had a disability;
- (2) That defendant was aware of the disability;
- (3) That the disability had a substantially limiting effect on the plaintiff's ability to apply or be considered for a job;
- (4) That he was able to perform the essential functions of the job in question with reasonable accommodation; and
- (5) That defendant failed to reasonably accommodate plaintiff's 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 the plaintiff on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

INSTRUCTION NO. PA- 11

Disability means the presence of a sensory, mental, or physical impairment that:

- (1) Is medically cognizable or diagnosable; or
- (2) Exists as a record or history; or

A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity.

WPI 330.31 (modified)
RCW 49.60.040(7)

INSTRUCTION NO. PA-14

Under Washington law, the employer must provide a reasonable accommodation for an employee with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. The obligation to reasonably accommodate applies to all aspects of employment, and an employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation.

There may be more than one reasonable accommodation of a disability. A reasonable accommodation may include adjustments in job duties, work schedules, scope of work, and changes in the job setting or conditions of employment that enable the person to perform the essential functions of the job.

SUPERIOR COURT, STATE OF WASHINGTON, SPOKANE COUNTY

MARK FEY,

Plaintiff,

No. 09-2-05589-5

vs.

STATE OF WASHINGTON,
COMMUNITY COLLEGES OF
SPOKANE,

SPECIAL VERDICT FORM

Defendants.

We, the jury, answer the questions submitted by the Court as follows:

Question No. 1: Does plaintiff, Mark Fey, have a disability?

Answer: Yes _____
No _____

Question No. 2: Was defendant aware that plaintiff, Mark Fey, has a disability?

Answer: Yes _____
No _____

If your answer to **both** Question No. 1 and 2 is "yes", answer Question Nos. 3 **and** 4. If your answer to either Question No. 1 or 2 is "no", sign the verdict form.

Question No. 3: Did defendant engage in an interactive process to find an accommodation which would fit with plaintiff's disability?

Answer: Yes _____
No _____

Question No. 4: Did defendant reasonably accommodate plaintiff's disability?

Answer: Yes _____
No _____

If your answer to **either** Question No. 3 or 4 is "no", answer Question No. 5. If your answer to **both** Question No. 3 and 4 is "yes", sign the verdict form.

Question No. 5: What is the amount of plaintiff's damages?

Answer:

Lost Wages \$ _____

Emotional Distress \$ _____

Date: _____, 2011

Presiding Juror

FILED

MAR 29 2011

THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, SPOKANE COUNTY

MARK FEY,

Plaintiff,

No. 09-2-05589-5

vs.

PLAINTIFF'S PROPOSED
ALTERNATE JURY
INSTRUCTIONS

STATE OF WASHINGTON,
COMMUNITY COLLEGES OF
SPOKANE,

CITED

Defendants.

Plaintiff Mark Fey, by and through his attorneys, Genevieve Mann and William, J. Powell, of Powell, Kuznetz & Parker, P.S., and pursuant to CR 51, submits the following proposed alternate jury instructions.

Dated this 25th day of March, 2011.

POWELL, KUZNETZ & PARKER, P.S.

By



Genevieve Mann, WSBA #34968
Attorneys for Plaintiff

PLAINTIFF'S PROPOSED ALTERNATE JURY
INSTRUCTIONS - 1

LAW OFFICE OF
POWELL, KUZNETZ & PARKER
A PROFESSIONAL SERVICE CORPORATION
318 W. BOONE, ROCK POINTE TOWER, STE. 300
SPOKANE, WASHINGTON 99201-2348
PHONE: (509)456-4151
FAX: (509)455-8522

INSTRUCTION NO. PA-20

Mr. Fey's performance, either positive or negative, was not at issue in this case. The Community Colleges of Spokane did not consider him for the position solely because he could not obtain a Commercial Driver's License due to a medical condition. It is irrelevant and you should not consider plaintiff's performance when you evaluate his claim that defendant failed to accommodate his disability.

FILED

MAR 29 2011

THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, SPOKANE COUNTY

MARK FEY,

Plaintiff,

No. 09-2-05589-5

vs.

PLAINTIFF'S PROPOSED
ALTERNATE JURY
INSTRUCTIONS

STATE OF WASHINGTON,
COMMUNITY COLLEGES OF
SPOKANE,

CITED

Defendants.

Plaintiff Mark Fey, by and through his attorneys, Genevieve Mann and William, J. Powell, of Powell, Kuznetz & Parker, P.S., and pursuant to CR 51, submits the following proposed alternate jury instructions.

Dated this 24th day of March, 2011.

POWELL, KUZNETZ & PARKER, P.S.

By


Genevieve Mann, WSBA #34968
Attorneys for Plaintiff

PLAINTIFF'S PROPOSED ALTERNATE JURY
INSTRUCTIONS - 1

LAW OFFICE OF
POWELL, KUZNETZ & PARKER
A PROFESSIONAL SERVICE CORPORATION
316 W. BODINE, ROCK PONTIE TOWER, STE. 380
SPOKANE, WASHINGTON 99201-2346
PHONE: (509)456-4151
FAX: (509)455-8522

INSTRUCTION NO. PA-2

This is a civil action brought by plaintiff Mark Fey against his employer, Community Colleges of Spokane ("CCS"). Plaintiff claims that CCS failed to accommodate his disability. He seeks an award of damages for this claim.

Defendant denies plaintiff's claim.

INSTRUCTION NO. PA-5

The plaintiff claims that the defendant discriminated against him in one or more of the following respects:

- By failing to engage in the mandatory interactive process required for reasonable accommodation of his disability.
- By failing to consider plaintiff for the Grounds and Nursery 4 position when he was able to perform the essential functions of the position.
- By failing to consider altering the Grounds and Nursery 4 conditions of employment to accommodate plaintiff's disability.

The defendant denies these claims. The defendant further denies that plaintiff was injured or sustained damage.

INSTRUCTION NO. PA-10

Discrimination in employment on the basis of disability is prohibited.

To establish his claim of discrimination on the basis of failure to accommodate his disability, plaintiff has the burden of proving each of the following propositions:

- (1) That he had a disability;
- (2) That defendant was aware of the disability;
- (3) That the disability had a substantially limiting effect on the plaintiff's ability to apply or be considered for a job;
- (4) That he was able to perform the essential functions of the job in question with reasonable accommodation; and
- (5) That defendant failed to reasonably accommodate plaintiff's 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 the plaintiff on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

INSTRUCTION NO. PA- 11

Disability means the presence of a sensory, mental, or physical impairment that:

- (1) Is medically cognizable or diagnosable; or
- (2) Exists as a record or history; or

A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity.

WPI 330.31 (modified)
RCW 49.60.040(7)

INSTRUCTION NO. PA-14

Under Washington law, the employer must provide a reasonable accommodation for an employee with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. The obligation to reasonably accommodate applies to all aspects of employment, and an employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation.

There may be more than one reasonable accommodation of a disability. A reasonable accommodation may include adjustments in job duties, work schedules, scope of work, and changes in the job setting or conditions of employment that enable the person to perform the essential functions of the job.

SUPERIOR COURT, STATE OF WASHINGTON, SPOKANE COUNTY

MARK FEY,

Plaintiff,

No. 09-2-05589-5

vs.

STATE OF WASHINGTON,
COMMUNITY COLLEGES OF
SPOKANE,

SPECIAL VERDICT FORM

Defendants.

We, the jury, answer the questions submitted by the Court as follows:

Question No. 1: Does plaintiff, Mark Fey, have a disability?

Answer: Yes _____
No _____

Question No. 2: Was defendant aware that plaintiff, Mark Fey, has a disability?

Answer: Yes _____
No _____

If your answer to **both** Question No. 1 and 2 is "yes", answer Question Nos. 3 **and** 4. If your answer to either Question No. 1 or 2 is "no", sign the verdict form.

Question No. 3: Did defendant engage in an interactive process to find an accommodation which would fit with plaintiff's disability?

Answer: Yes _____
No _____

Question No. 4: Did defendant reasonably accommodate plaintiff's disability?

Answer: Yes _____
No _____

If your answer to **either** Question No. 3 or 4 is "no", answer Question No. 5. If your answer to **both** Question No. 3 and 4 is "yes", sign the verdict form.

Question No. 5: What is the amount of plaintiff's damages?

Answer:

Lost Wages \$ _____

Emotional Distress \$ _____

Date: _____, 2011

Presiding Juror

NO. 29912-1-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, COMMUNITY COLLEGES OF
SPOKANE,

Appellants/Respondents,

v.

MARK FEY,

Respondent/Appellant

**APPENDIX B – DEFENDANTS’ PROPOSED JURY
INSTRUCTIONS**

RECEIVED
MAY - 3 2011
POWELL, KUZNETZ
& PARKER, P.S.

FILED
MAY 03 2011
THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

STATE OF WASHINGTON
SPOKANE COUNTY SUPERIOR COURT

MARK FEY,

Plaintiff,

vs.

STATE OF WASHINGTON,
COMMUNITY COLLEGES OF
SPOKANE,

Defendants.

NO. 09-2-05589-5

DECLARATION OF AMY CLEMMONS

I, Amy C. Clemmons, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am over the age of 18 and am competent to testify as to the facts recited herein;
2. I am an Assistant Attorney General representing the defendants in the above entitled action;
3. On 3/28/11, the last day of trial, Defendant presented revised instructions to account for Plaintiff's voluntary dismissal of one of his claims, and additional instructions responsive to issues that arose during trial and in response to the

DECLARATION OF AMY CLEMMONS

ORIGINAL

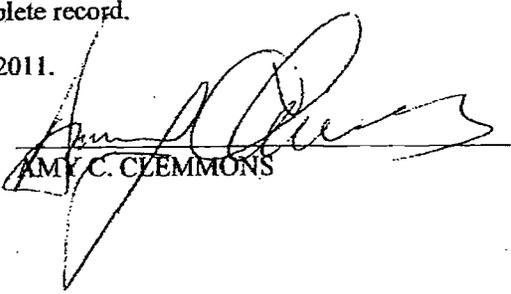
ATTORNEY GENERAL OF WASHINGTON
West 1116 Riverside Avenue
Spokane, WA 99201-1194
(509) 456-3123

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

discussions with the Court on Friday, 3/25/11. These instructions were filed with the clerk in the courtroom. The judge indicated that he would not consider the instructions filed on March 28, 2011.

- 4. In checking the court docket, these instructions that were filed during trial do not appear on the docket.
- 5. An additional copy of these instructions which were discussed on the record are attached hereto to ensure a complete record.

DATED this 3rd day of May, 2011.



AMY C. CLEMMONS

PROOF OF SERVICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

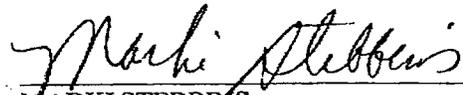
I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

US Mail Postage Prepaid to: Genevieve Mann
William Powell
Powell, Kuznetz & Parker
316 W. Boone, Rock Pointe Tower, Suite 380
Spokane, WA 99201

Hand Delivered to:

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3 day of May, 2011.


MARKI STEBBINS

DEFENDANTS' INSTRUCTION REVISED NO. 2

Plaintiff Mark Fey is suing the Defendant, State of Washington, Community Colleges of Spokane, relating to his failure to be hired for the Grounds and Nursery Specialist 4 (GNS4) position at Spokane Community College. The plaintiff claims the defendant discriminated against him based upon a disability by failing to reasonably accommodate a disability. Plaintiff seeks monetary damages. The defendant claims that plaintiff could not meet the bona fide occupational qualifications of the job. Defendant further denies the alleged discrimination and claimed damages.

DEFENDANTS' INSTRUCTION REVISED NO. 5

Discrimination in employment on the basis of disability is prohibited.

To establish his claim of discrimination on the basis of disability, Mr. Fey has the burden of proving each of the following propositions:

- (1) That he had a disability;
- (2) That the Community Colleges of Spokane was aware of the disability;
- (3) That the disability had a substantially limiting effect on his ability to do his job;
- (4) That he was able to perform the essential functions of the job in question with reasonable accommodation; and
- (5) That the Department of Transportation failed to reasonably accommodate his disability.

If you do not find for Community Colleges of Spokane on the bona fide occupational qualification defense, and 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 Mr. Fey on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the Community Colleges of Spokane on this claim.

[only modification: "If you do not find for CCS on the BFOQ defense and" added]
WPI 330.33 (5th ed.) (modified)

DEFENDANTS' INSTRUCTION REVISED NO. 6

It is unlawful for an employer to refuse to hire any person because of such person's disability. It is a defense to Mr. Fey's disability discrimination refusal-to-hire/promote claim if the requirement of obtaining a Commercial Drivers License (CDL) is a bona fide occupational qualification for the GNS4 position at Spokane Community College.

To establish that its requirement is a bona fide occupational qualification, Community Colleges of Spokane has the burden of proving each of the following propositions:

- (1) That Community Colleges of Spokane applies the requirement uniformly to all applicants or candidates for the job from September 12, 2007, and after; and
- (2) That all or substantially all individuals who fail to meet the requirement are unable to perform the job safely, efficiently, or lawfully.

If you find from your consideration of all of the evidence that the Community Colleges of Spokane has proved that its decision not to hire Mr. Fey as the GNS4 at Spokane Community College was based upon a bona fide occupational qualification, then you must find in favor of Community Colleges of Spokane. If, however, you find from your consideration of all the evidence that the Community Colleges of Spokane has failed to prove either proposition (1) or (2), then you must consider whether Mr. Fey meets his burden of proving that the Community Colleges of Spokane failed to reasonably accommodate a disability.

DEFENDANTS' INSTRUCTION REVISED NO. 18

State civil service employees have transfer opportunities under the following regulations.

WAC 357-19-180 – Permanent employees may request to transfer to another position in the same class or a different class with the same salary range maximum as long as the employee meets the competencies and other position requirements. The employer may require the employee to serve a trial service period following a transfer.

WAC 357-19-180

DEFENDANTS' INSTRUCTION REVISED NO. 21

The plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

To establish a failure to mitigate, defendants have the burden of proving:

- (1) There were openings in comparable positions available for plaintiff elsewhere;
- (2) The plaintiff failed to use reasonable care and diligence in seeking other openings; and
- (3) The amount by which damages would have been reduced if plaintiff had used reasonable care and diligence in seeking other openings.

You should take into account the characteristics of the plaintiff and the job market in evaluating the reasonableness of the plaintiff's efforts to mitigate damages.

If you find that the defendant has proved all of the above, you should reduce your award of damages for wage loss accordingly.

DEFENDANTS' INSTRUCTION REVISED NO. 24

Washington law provides that:

- 1) "Commercial driver's license" (CDL) means a license issued to an individual under chapter 46.20 RCW that has been endorsed in accordance with the requirements of this chapter to authorize the individual to drive a class of commercial motor vehicle.
- 2) Commercial motor vehicle" means a motor vehicle that:
 - (a) Has a gross vehicle weight rating of 11,794 kilograms or more (26,001 pounds or more) inclusive of a towed unit with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds or more); or
 - (b) Has a gross vehicle weight rating of 11,794 kilograms or more (26,001 pounds or more); If the GVWR of any unit cannot be determined, the actual gross weight will be used. If a vehicle with a GVWR of less than 11,794 kilograms (26,001 pounds or less) has been structurally modified to carry a heavier load, then the actual gross weight capacity of the modified vehicle shall be used.

DEFENDANTS' INSTRUCTION NO. 31

The duty of reasonable accommodation does not arise until the employer is aware of respondent's disability and physical limitations.

DEFENDANTS' INSTRUCTION NO. 32

A reasonable accommodation must be to the individual's disability rather than to a personal preference.

DEFENDANTS' INSTRUCTION NO. 33

An accommodation consisting of a transfer to a different supervisor is considered unreasonable as a matter of law.

WPI 330.34 note, *Snyder v. Medical Svcs. Corp.*, 145 Wn.2d 233, 35 P.3d 1158 (2000)

DEFENDANTS' INSTRUCTION NO. 34

Conditions of employment are defined as things affecting working conditions. The phrase does not, however, include managerial decisions, which lie at the core of entrepreneurial control. The term is intended to address factors impacting employee benefits, physical conditions, or the environment in which the work is performed.

5 U.S.C. 7103(a)(14); *Briggs v. Nova Services*, 166 Wn.2d 794, 803-4, 213 P.3d 910 (2009), citing *Ford Motor Co. v. National Labor Relations Board*, 441 U.S. 488, 498, 99 S. Ct. 1842, 60 L.Ed.2d 420 (1979), (quoting *Fibreboard Paper Prods. Corp. v. National Labor Relations Board*, 379 U.S. 203, 223, 85 S. Ct. 398, 13 L.Ed.2d 233 (1964) (Stewart, J., concurring)). Managerial decisions include the choice of one's supervisor, *Trompler*, 338 F.3d at 749, and the wisdom of company practices, cf. *First National Maintenance Corp.*, 452 U.S. at 676, 101 S. Ct. 2573

DEFENDANTS' INSTRUCTION NO. 35

The Employer will determine when a position will be filled, the type of appointment to be used when filling the position, and the skills and abilities necessary to perform the duties of the specific position within a job classification. The Employer will consider internal promotional candidates prior to considering other candidates. Consideration will be limited to employees who have the skills and abilities required for the position.

DEFENDANTS' INSTRUCTION NO. 36

The Community Colleges of Spokane is a governmental entity. A governmental entity can act only through its officers and employees. Any act or omission of an officer or employee is the act or omission of the governmental entity.

DEFENDANTS' INSTRUCTION NO. 37

A bona fide occupational qualification defense exists when all or substantially all persons in the class would be unable to efficiently perform the duties of the position and the essence of the operation would be undermined by hiring anyone in the excluded class.

WPI 330.04, *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 646 P.2d 113 (1982).
In *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 172 P.3d 688 (2007) (current as of October 2010)

DEFENDANTS' INSTRUCTION NO. 38

The term "proximate cause" means a cause which in a direct sequence unbroken by any superseding cause, produces the event complained of and without which such event would not have happened.

STATE OF WASHINGTON
SPOKANE COUNTY SUPERIOR COURT

MARK FEY,
Plaintiff,

NO. 09-2-05589-5

vs.

REVISED SPECIAL VERDICT FORM

STATE OF WASHINGTON, COMMUNITY
COLLEGES OF SPOKANE,

Defendants.

WE, the Jury, make the following answers to the questions submitted by the Court:

(Answer "yes" or "no")

Question No. 1: Do you find that a commercial drivers' license is a bona fide occupational qualification for the Grounds and Nursery Specialist 4 position at Spokane Community College?

Answer: _____

If your answer is "yes", please go to the end of the verdict form and sign the verdict. If your answer is "no", please go to question No. 2.

Question No. 2: Do you find that plaintiff, Mark Fey, has a disability and that the Defendant had notice of the disability?

Answer: _____

If you answered "yes", go to question No. 3. If you answered "no", please go to the end of the verdict form and sign the verdict.

Question No. 3: Did the Defendants State of Washington, Community Colleges of Spokane fail to reasonably accommodate Mark Fey's disability?

Answer: _____

Go to question No. 4.

Question No. 4: Was the failure to accommodate Mark Fey's disability a proximate cause of injury or damage to Plaintiff, Mark Fey?

Answer: _____

If your answer to question 4 is "no", please go to the end of the verdict form and sign the verdict.
If your answer to question 4 is "yes", go to question No. 5.

Question No. 5: What do you find to be Plaintiff's amount of damages proximately caused by discrimination?

Answer:

\$ _____ (Economic damages, if any)

\$ _____ (Emotional distress damages, if any).

Go to question No. 6.

Question No. 6: Do you find that plaintiff Mark Fey failed to mitigate his damages, if any.
If so, please reduce the amount of damages based upon the amount Mr. Fey could reasonably have mitigated his damages?

Total damages after reduction for mitigation: \$ _____

Sign and return this verdict.

DATED this ____ day of March, 2011.

Presiding Juror

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

RECEIVED
MAR 18 2011
POWELL, KUZNETZ,
& PARKER, P.S.

FILED
MAR 18 2011
THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

STATE OF WASHINGTON
SPOKANE COUNTY SUPERIOR COURT

MARK FEY,

Plaintiff,

vs.

STATE OF WASHINGTON,
COMMUNITY COLLEGES OF
SPOKANE,

Defendants.

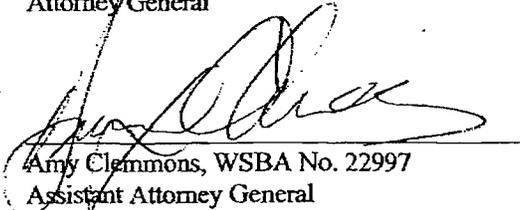
NO. 09-2-05589-5

DEFENDANTS' SUPPLEMENTAL
PROPOSED JURY INSTRUCTIONS

Defendants STATE OF WASHINGTON, COMMUNITY COLLEGES OF
SPOKANE, submit the attached supplemental proposed jury instructions.

DATED this 15th day of March, 2011.

ROBERT M. McKenna
Attorney General



Amy Clemmons, WSBA No. 22997
Assistant Attorney General
Attorneys for Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

PROOF OF SERVICE

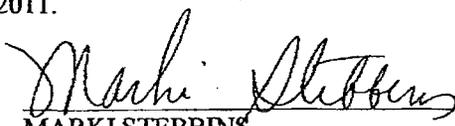
I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

US Mail Postage Prepaid to: Genevieve Mann
William Powell
Powell, Kuznetz & Parker
316 W. Boone, Rock Pointe Tower, Suite 380
Spokane, WA 99201

Hand Delivered to:

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18 day of March, 2011.


MARKI STEBBINS

DEFENDANTS' PROPOSED INSTRUCTION NO. 25

The failure of an employer to engage in an interactive process is not a violation of the Washington Law Against Discrimination. Rather, the failure to engage in an interactive process must lead to the failure to identify a reasonable accommodation that enabled the employee to perform all the essential functions of the job.

See WPI 330.33

See Dark v. Curry County, 451 F.3d 1078, 1088 (9th Cir. 2006) (interpreting ADA)

See Barnett v. U.S. Air, Inc., 157 F.3d 744, 752-753 (9th Cir. 1998), overruled on other grounds,
535 U.S. 391 (2002) (interpreting ADA)

See Hennagir v. Utah DOC, 587 F.3d 1255, 1256 (10th Cir. 2009) (interpreting ADA)

DEFENDANTS' PROPOSED INSTRUCTION NO. 26

The law against disability discrimination does not apply where an employee's disability prevents the employee from performing the essential functions of the position.

See Clarke v. Shoreline Sch. Dist., 106 Wn.2d 102, 117-118 (1986)
See Easley v. Sea-Land Service, Inc., 99 Wn. App. 459, 465-467 (2000)
See Dedman v. PAB, 98 Wn.App. 471, 482-484 (1999)
See MacSuga v. Spokane County, 97 Wn. App. 435, 444 (1999)

DEFENDANTS' INSTRUCTION NO. 27

Disqualification means a prohibition against driving a commercial motor vehicle

Serious traffic violation means: Driving a commercial motor vehicle without obtaining
a commercial driver's license.

RCW 46.25.010 (8) (18 (d))

DEFENDANTS' INSTRUCTION NO. 28

Private road or driveway includes every way or place in private ownership and used for travel of vehicles by the owner or those having express or implied permission from the owner, but not by other persons.

RCW 46.04.420

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

FILED
MAR 24 2011
THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

STATE OF WASHINGTON
SPOKANE COUNTY SUPERIOR COURT

MARK FEY,

Plaintiff,

vs.

STATE OF WASHINGTON,
COMMUNITY COLLEGES OF
SPOKANE,

Defendants.

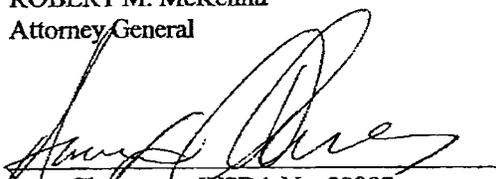
NO. 09-2-05589-5

DEFENDANTS' PROPOSED SECOND
SUPPLEMENTAL JURY
INSTRUCTIONS

Defendants STATE OF WASHINGTON, COMMUNITY COLLEGES OF
SPOKANE, submit the attached proposed jury instructions which were submitted to the trial
judge during the course of the trial

DATED this 23rd day of March, 2011.

ROBERT M. McKenna
Attorney General



Amy Clammors, WSBA No. 22997
Assistant Attorney General
Attorneys for Defendants

DEFENDANTS' PROPOSED SECOND
SUPPLEMENTAL JURY
INSTRUCTIONS

ORIGINAL

ATTORNEY GENERAL OF WASHINGTON
West 1116 Riverside Avenue
Spokane, WA 99201-1194
(509) 456-3123

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

PROOF OF SERVICE

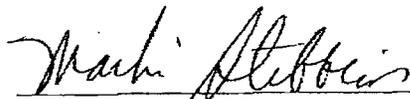
I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

US Mail Postage Prepaid to: Genevieve Mann
William Powell
Powell, Kuznetz & Parker
316 W. Boone, Rock Pointe Tower, Suite 380
Spokane, WA 99201

Hand Delivered to: *Courtroom 204*

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24 day of March, 2011.


MARKI STEBBINS

DEFENDANTS' INSTRUCTION NO. 29

The employer's duty to determine the nature and extent of the disability does not impose an investigatory duty to question any employee suspected of a disability. The employer's duty to inquire arises only after the employee has initiated the process by notice and extends only to assuring the employer sufficient information to accommodate the disability.

DEFENDANTS' INSTRUCTION NO. _____

The employer's duty to determine the nature and extent of the disability does not impose an investigatory duty to question any employee suspected of a disability. The employer's duty to inquire arises only after the employee has initiated the process by notice and extends only to assuring the employer sufficient information to accommodate the disability.

DEFENDANTS' INSTRUCTION NO. 30

An employer is not required to reorganize its workforce or structure individual jobs.

Davis, 149 Wn.2d at 536, 70 P.3d 126

DEFENDANTS' INSTRUCTION NO. ____

An employer is not required to reorganize its workforce or structure individual
jobs.

DEFENDANTS' INSTRUCTION NO. 24

Washington law provides that:

- 1) "Commercial driver's license" (CDL) means a license issued to an individual under chapter 46.20 RCW that has been endorsed in accordance with the requirements of this chapter to authorize the individual to drive a class of commercial motor vehicle.
- 2) Commercial motor vehicle" means a motor vehicle that:
 - (a) Has a gross vehicle weight rating of 11,794 kilograms or more (26,001 pounds or more) inclusive of a towed unit with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds or more); or
 - (b) Has a gross vehicle weight rating of 11,794 kilograms or more (26,001 pounds or more); If the GVWR of any unit cannot be determined, the actual gross weight will be used. If a vehicle with a GVWR of less than 11,794 kilograms (26,001 pounds or less) has been structurally modified to carry a heavier load, then the actual gross weight capacity of the modified vehicle.

RCW 46.25.010 (3), (6), (12)

DEFENDANTS' INSTRUCTION NO. ____

Washington law provides that:

- 1) "Commercial driver's license" (CDL) means a license issued to an individual under chapter 46.20 RCW that has been endorsed in accordance with the requirements of this chapter to authorize the individual to drive a class of commercial motor vehicle.
- 2) Commercial motor vehicle" means a motor vehicle that:
 - (a) Has a gross vehicle weight rating of 11,794 kilograms or more (26,001 pounds or more) inclusive of a towed unit with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds or more); or
 - (b) Has a gross vehicle weight rating of 11,794 kilograms or more (26,001 pounds or more); If the GVWR of any unit cannot be determined, the actual gross weight will be used. If a vehicle with a GVWR of less than 11,794 kilograms (26,001 pounds or less) has been structurally modified to carry a heavier load, then the actual gross weight capacity of the modified vehicle.

DEFENDANTS' INSTRUCTION NO. 27

Driving a commercial motor vehicle without obtaining a commercial driver's license is a serious traffic violation.

RCW 46.25.010 (8) (18 (d))

DEFENDANTS' INSTRUCTION NO. _____

Driving a commercial motor vehicle without obtaining a commercial driver's license is a serious traffic violation.

DEFENDANTS' INSTRUCTION NO. 38

The term "proximate cause" means a cause which in a direct sequence unbroken

09-2-05589-5

by any superseding cause, produces the event complained of and without which such event would not have happened.

WPI 15.01

INSTRUCTION NO. _____

The term "proximate cause" means a cause which in a direct sequence unbroken by any superseding cause, produces the event complained of and without which such event would not have happened.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

FILED
MAR 07 2011
THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

STATE OF WASHINGTON
SPOKANE COUNTY SUPERIOR COURT

MARK FEY,

Plaintiff,

vs.

STATE OF WASHINGTON,
COMMUNITY COLLEGES OF
SPOKANE,

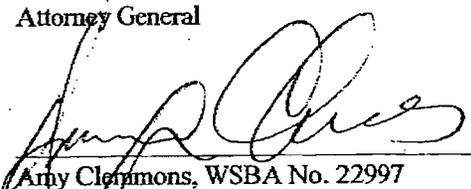
Defendants.

NO. 09-2-05589-5

DEFENDANTS' PROPOSED JURY
INSTRUCTIONS

Defendants STATE OF WASHINGTON, COMMUNITY COLLEGES OF
SPOKANE, submit the attached proposed jury instructions which were submitted to the trial
judge during the course of the trial.

DATED this 7th day of March, 2011.

ROBERT M. McKenna
Attorney General

Amy Clemmons, WSBA No. 22997
Assistant Attorney General
Attorneys for Defendants

DEFENDANTS' PROPOSED JURY
INSTRUCTIONS

ORIGINAL ATTORNEY GENERAL OF WASHINGTON
West 1116 Riverside Avenue
Spokane, WA 99201-1194
(509) 456-3123

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

PROOF OF SERVICE

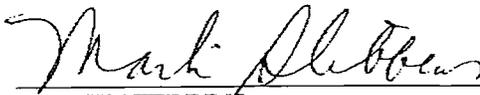
I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

US Mail Postage Prepaid to: Genevieve Mann
William Powell
Powell, Kuznetz & Parker
316 W. Boone, Rock Pointe Tower, Suite 380
Spokane, WA 99201

Hand Delivered to:

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7 day of March, 2011.



MARKI STEBBINS

DEFENDANTS' INSTRUCTION NO. 1

The law treats all parties equally whether they are government entities or individuals. This means that government entities and individuals are to be treated in the same fair and unprejudiced manner.

DEFENDANTS' INSTRUCTION NO. 2

Plaintiff Mark Fey is suing the Defendant, State of Washington, Community Colleges of Spokane, relating to his failure to be hired for the Grounds and Nursery Specialist 4 (GNS4) position at Spokane Community College. The plaintiff claims the defendant (1) failed to reasonably accommodate a disability; and (2) discriminated against him based upon a disability. Plaintiff seeks monetary damages. The defendant claims that plaintiff could not meet the bona fide occupational qualifications of the job. Defendant further denies the alleged discrimination and claimed damages.

DEFENDANTS' INSTRUCTION NO. 3

The foregoing is merely a summary of the claims of the parties. You are not to take the same as proof of the matters claimed and you are to consider only those matters which are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

DEFENDANTS' INSTRUCTION NO. 4

In determining whether or not a party is liable, you are instructed that this issue is to be determined by the facts and circumstances as they appeared at the time of the party's acts or omissions and not by what the facts and circumstances may appear to have been after the time of the occurrence. In other words, in determining whether or not a party is liable, the party is entitled to have his or her conduct in that regard judged by what a reasonably careful person would have done or not done under the circumstances then confronted, without the benefit of hindsight.

DEFENDANTS' INSTRUCTION NO. 5

Discrimination in employment on the basis of disability is prohibited.

To establish his claim of discrimination on the basis of disability, Mr. Fey has the burden of proving each of the following propositions:

- (1) That he had a disability;
- (2) That the Community Colleges of Spokane was aware of the disability;
- (3) That the disability had a substantially limiting effect on his ability to do his job;
- (4) That he was able to perform the essential functions of the job in question with reasonable accommodation;
- (5) That his requested accommodation was medically necessary and reasonably available to the employer at the time; and
- (6) That the Department of Transportation failed to reasonably accommodate his 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 Mr. Fey on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the Community Colleges of Spokane on this claim.

DEFENDANTS' INSTRUCTION NO. 6

It is unlawful for an employer to refuse to hire any person because of such person's disability. It is a defense to Mr. Fey's disability discrimination refusal-to-hire claim if the requirement of obtaining a Commercial Drivers License (CDL) is a bona fide occupational qualification for the GNS4 position at Spokane Community College.

To establish that its requirement is a bona fide occupational qualification, Community Colleges of Spokane has the burden of proving each of the following propositions:

- (1) That Community Colleges of Spokane applies the requirement uniformly to all applicants or candidates for the job from 2007 and after; and
- (2) That all or substantially all individuals who fail to meet the requirement are unable to perform the job safely, efficiently, and lawfully.

If you find from your consideration of all of the evidence that the Community Colleges of Spokane has proved that its decision not to hire Mr. Fey as the GNS4 at Spokane Community College was based upon a bona fide occupational qualification, then you must find in favor of Community Colleges of Spokane. If, however, you find from your consideration of all the evidence that the Community Colleges of Spokane has failed to prove either proposition (1) or (2), then you must consider whether Mr. Fey meets his burden of proving that the Community Colleges of Spokane discriminated against him based upon a disability or failed to reasonably accommodate a disability.

DEFENDANTS' INSTRUCTION NO. 7

A bona fide occupational qualification (BFOQ) exists when a particular quality will contribute to the accomplishment of the purposes of the particular job in question.

Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 355, 172 P.3d 688 (2007)
Shannon v. Pay 'N Save Corp., 104 Wn.2d 722, 731, 709 P.2d 799 (1985)
WAC 162-16-240

DEFENDANTS' INSTRUCTION NO. 8

A disabled worker has a duty to cooperate with his employer in efforts to reasonably accommodate his physical limitations and by accepting reasonable work the employee could perform.

Dean v. Metro, 104 Wn.2d 627, 637, 708 P.2d 393 (1985)
Molloy v. City of Bellevue, 71 Wn. App. 382, 391, 859 P.2d 613 (1993)
Michelson v. Boeing Co., 63 Wn. App. 917, 922, 826 P.2d 214 (1991)
Sinmerman v. U-Haul Co., 57 Wn. App. 682, 687, 789 P.2d 763 (1990)
Calhoun v. Liberty Northwest Ins. Co., 789 F. Supp. 1540, 1547 (W.D. Wash. 1992)
29 C.F.R. §1630.9 and §1630.14(c)
29 C.F.R. App. §1630.9 and §1630.14(c)

DEFENDANTS' INSTRUCTION NO. 9

The defendant has asserted that it made a good faith effort to reasonably accommodate the plaintiff's disability. You must decide in favor of the defendant if it demonstrates by a preponderance of the evidence that:

- (1) The plaintiff informed the defendant that reasonable accommodations were needed because of his disability;
- (2) The defendant made a good faith effort and consulted with the plaintiff, to identify and make a reasonable accommodation that would provide the plaintiff with an equally effective opportunity; and
- (3) The reasonable accommodation would not cause an undue hardship on the operation on the defendant's business.

DEFENDANTS' INSTRUCTION NO. 10

Under Washington law, an employer must provide a reasonable accommodation for a qualified applicant with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. The obligation to reasonably accommodate applies to all aspects of employment, and an employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation.

There may be more than one reasonable accommodation of a disability.

A reasonable accommodation may include adjustments in job duties, work schedules, scope of work, and changes in the job setting that enable the person to perform the essential functions of the job.

DEFENDANTS' INSTRUCTION NO. 11

The essential functions of a job are the position's fundamental duties. Essential functions do not include the marginal or incidental functions of the job. In determining whether a function is essential to a position, you should consider:

- (1) Whether the reason the position exists is to perform that function;
- (2) The employer's judgment as to which functions are essential;
- (3) The judgment of those who have experience working in and around the position in question;
- (4) Any written job descriptions such as those used to advertise the position; and
- (5) The amount of time spent on the job performing the particular function.

DEFENDANTS' INSTRUCTION NO. 12

An employer is not required to accommodate an employee's disability if it would impose an undue hardship on the operation of the employer's business. Community Colleges of Spokane has the burden of proving that an accommodation would impose an undue hardship on their operations.

An accommodation is an undue hardship if the cost or difficulty is unreasonable, considering:

- (1) The size of and the resources available to the employer;
- (2) Requirements of law;
- (3) Safety and liability risks; and
- (4) The requirements of contracts.

DEFENDANTS' INSTRUCTION NO. 13

The prohibition against discrimination because of a disability shall not apply if the particular disability prevents the proper performance of the particular worker involved.

DEFENDANTS' INSTRUCTION NO. 14

An employer is required to provide accommodations which are medically necessary to perform the essential functions of the job.

An employer is not required to provide the specific accommodation requested by the employee. When an employer offers an accommodation that is reasonable, its legal obligation is satisfied.

Doe v. Boeing, 121 Wn.2d 8, 20, 846 P.2d 531 (1993)
Griffith v. Boise Cascade, Inc., 111 Wn.App. 436, 443, 45 P.3d 589 (2002)
Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 640, 9 F.3d 787 (2000)

DEFENDANTS' INSTRUCTION NO. 15

An exception exists to disability discrimination when the particular disability prevents the proper performance of the particular job in question. An employer may exclude a disabled person from a job if the disability would prohibit the proper performance of an essential function of that job.

DEFENDANTS' INSTRUCTION NO. 16

The law does not require an employer to eliminate, remove, modify or reassign essential job functions to others in order to accommodate an employee with a disability.

An employer also is not required to change the nature of the employer's operation as an accommodation.

Davis v. Microsoft Corp., 149 Wn.2d 521, 536, 70 P.3d 126 (2003)
MacSuga v. County of Spokane, 97 Wn. App. 435, 444, 983 P.2d 1167, 1172 (1999)
Pulcino v. Federal Express, 141 Wn.2d 629, at 644, 9 P.3d 787 (2000), overruled on other grounds by *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006) ("An employer, ... is not required ... to create a new position, to alter the fundamental nature of the job, or to eliminate or reassign essential job functions.")
Hill, 144 Wn.2d at 193
Dark v. Curry County, 451 F.3d 1078 (9th Cir. 2006)
Griffith v. Boise Cascade, Inc., 111 Wn. App. 436, 45 P.3d 589 (2002),
(An employer is not required to remove or modify essential functions of a position in order to accommodate an employee.)

DEFENDANTS' INSTRUCTION NO. 17

An employer may discharge a handicapped employee who is unable to perform an essential function of the job. It is not reasonable to require an employer to shift the essential job responsibility to other employees or perform the job in a less efficient manner.

DEFENDANTS' INSTRUCTION NO. 18

State civil service employees have transfer opportunities under the following rules.

WAC 356-30-200 – Between classes – Approval. (1) A transfer of a permanent employee from a position in one class to a position in another class having the same salary range may be made upon approval of the director of personnel that the employee has the minimum qualifications for the position to which transfer is proposed. The director of personnel may require a qualifying examination.

(2) A permanent employee may also apply promotionally for positions in other class series which by definition are transfers. Employees who transfer under the provisions of this subsection shall serve a trial service period.

WAC 356-30-200

DEFENDANTS' INSTRUCTION NO. 19

Plaintiff is not entitled to recover damages for ordinary emotional distress any employee occasionally experiences in the workplace. Plaintiff is entitled to recover only that emotional distress, if any, that is proved to have been caused by unlawful discrimination.

DEFENDANTS' INSTRUCTION NO. 20

Damages for litigation-induced stress are not recoverable as emotional distress damages. Anxiety is an unavoidable consequence of the litigation process, and the plaintiff chose to pursue litigation cognizant of the emotional costs involved.

Cicogna v. Cherry Hill Board of Education, 143 N.J. 391, 671 A.2d 1035 (1996)
School District v. Nilsen, 271 Or. 461, 534 P.2d 1135 (1975)
Buoy v. ERA Helicopters, Inc., 771 P.2d 439 (Alaska 1989)
Torres v. Automobile Club, 41 Cal. App. 4th 468, 43 Cal. Rptr. 2d 147 (1995)
Clark v. United States, 660 F. Supp. 1164 (W.D. Wash. 1987), aff'd, 856 Fed.2d 1433 (9th Cir. 1988)

DEFENDANTS' INSTRUCTION NO. 21

The plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

To establish a failure to mitigate, defendants have the burden of proving:

- (1) There were openings in comparable positions available for plaintiff elsewhere after the defendant failed to transfer Fey to the GNS4 position at SCC;
- (2) The plaintiff failed to use reasonable care and diligence in seeking other openings; and
- (3) The amount by which damages would have been reduced if plaintiff had used reasonable care and diligence in seeking other openings.

You should take into account the characteristics of the plaintiff and the job market in evaluating the reasonableness of the plaintiff's efforts to mitigate damages.

If you find that the defendant has proved all of the above, you should reduce your award of damages for wage loss accordingly.

DEFENDANTS' INSTRUCTION NO. 22

Washington law provides the following with regard to physical qualifications for a commercial drivers license:

(1) If the medical examiner or physician finds any physical condition listed in Title 49 CFR 391.41 (b)(1) through (13) that is likely to interfere with the driver's ability to operate or control a motor vehicle safely, it shall be the responsibility of the driver to immediately forward a copy of the driver's medical examination to the Department of Licensing, Responsibility Division, Medical Section, P.O. Box 9030, Olympia, WA 98507-9030. Upon receipt of the medical examination, the department of licensing will review and evaluate the driver's physical qualifications to operate the class of motor vehicle the person intends to drive.

(2) The department of licensing shall send a notice of determination to the driver. A department of licensing clearance notification shall be sufficient cause for the medical examiner to issue a medical examiner's certificate.

(3) A failure by the driver to furnish a copy of the medical examination to the department of licensing as required above shall result in no clearance action being taken by the department of licensing.

DEFENDANTS' INSTRUCTION NO. 23

An employer has the right to select the most qualified person for a position. A disabled individual does not have a right to a promotion over a more qualified candidate.

MacSuga v. Spokane, 97 Wn.App. 435, 444, 983 P.2d 1167 (1999),
review denied, 140 Wn.2d (2000)
42 U.S.C. § 12111(10)

Clarke v. Shoreline Sch. Dist. No. 412, 106 Wn.2d 102, 121, 720 P.2d 793 (1986)
Dean, 104 Wn.2d at 638, 708 P.2d 393(1985)

Kellogg v. Union Pacific R.R. Co., 233 F.3d 1083, 1089 (8th Cir.2000)
Mason v. Frank, 32 F.3d 315, 319 (8th Cir.1994)

(It must follow that an employer is not required to make accommodations that would subvert other, more qualified applicants for the job.)

DEFENDANTS' INSTRUCTION NO. 24

Washington law provides that:

- 1) "Commercial driver's license" (CDL) means a license issued to an individual under chapter 46.20 RCW that has been endorsed in accordance with the requirements of this chapter to authorize the individual to drive a class of commercial motor vehicle.
- 2) Commercial motor vehicle" means a motor vehicle that:
 - (a) Has a gross vehicle weight rating of 11,794 kilograms or more (26,001 pounds or more) inclusive of a towed unit with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds or more); or
 - (b) Has a gross vehicle weight rating of 11,794 kilograms or more (26,001 pounds or more);
- 3) "Gross vehicle weight rating" (GVWR) means the value specified by the manufacturer as the maximum loaded weight of a single vehicle. The GVWR of a combination or articulated vehicle, commonly referred to as the "gross combined weight rating" or GCWR, is the GVWR of the power unit plus the GVWR of the towed unit or units. If the GVWR of any unit cannot be determined, the actual gross weight will be used. If a vehicle with a GVWR of less than 11,794 kilograms (26,001 pounds or less) has been structurally modified to carry a heavier load, then the actual gross weight capacity of the modified vehicle.

STATE OF WASHINGTON
SPOKANE COUNTY SUPERIOR COURT

MARK FEY,
Plaintiff,

NO. 09-2-05589-5

vs.

SPECIAL VERDICT FORM

STATE OF WASHINGTON, COMMUNITY
COLLEGES OF SPOKANE,

Defendants.

WE, the Jury, make the following answers to the questions submitted by the Court:

(Answer "yes" or "no")

Question No. 1: Do you find that a commercial drivers' license is a bona fide occupational qualification for the Grounds and Nursery Specialist 4 position at Spokane Community College?

Answer: _____

If your answer is "yes", please go to the end of the verdict form and sign the verdict. If your answer is "no", please go to question No. 2.

Question No. 2: Do you find that plaintiff, Mark Fey, has a disability?

Answer: _____

If you answered "yes", go to question No. 3. If you answered "no", please go to the end of the verdict form and sign the verdict.

Question No. 3: Did the Defendants State of Washington, Community Colleges of Spokane fail to reasonably accommodate Mark Fey's disability?

Answer: _____

Go to question No. 4.

Question No. 4: Did the Defendant State of Washington, Community Colleges of Spokane, discriminate against Plaintiff, Mark Fey, because of a disability?

Answer: _____

If your answer is "no" to both questions No. 3 and No. 4, please do to the end of the verdict form and sign the verdict. If you answered either question No. 3 or question No. 4 "yes", then go to question No. 5.

Question No. 5: Was the discrimination and/or failure to accommodate Mark Fey's disability a proximate cause of injury or damage to Plaintiff, Mark Fey?

Answer: _____

If your answer to question 5 is "no", please go to the end of the verdict form and sign the verdict. If your answer to question 5 is "yes", go to question No. 6.

Question No. 6: What do you find to be Plaintiff's amount of damages proximately caused by discrimination?

Answer:

\$ _____ (Economic damages, if any)

\$ _____ (Emotional distress damages, if any).

Go to question No. 7.

Question No. 7: Do you find that plaintiff Mark Fey failed to mitigate his damages, if any. If so, please reduce the amount of damages based upon the amount Mr. Fey could reasonably have mitigated his damages?

Total damages after reduction for mitigation: \$ _____

Sign and return this verdict.

DATED this _____ day of March, 2011.

Presiding Juror

STATE OF WASHINGTON
SPOKANE COUNTY SUPERIOR COURT

MARK FEY,

Plaintiff,

vs.

STATE OF WASHINGTON, COMMUNITY
COLLEGES OF SPOKANE,

Defendants.

NO. 09-2-05589-5

SPECIAL VERDICT FORM

WE, the Jury, make the following answers to the questions submitted by the Court:

(Answer "yes" or "no")

Question No. 1: Do you find that a commercial drivers' license is a bona fide occupational qualification for the Grounds and Nursery Specialist 4 position at Spokane Community College?

Answer: _____

If your answer is "yes", please go to the end of the verdict form and sign the verdict. If your answer is "no", please go to question No. 2.

Question No. 2: Do you find that plaintiff, Mark Fey, has a disability?

Answer: _____

If you answered "yes", go to question No. 3. If you answered "no", please go to the end of the verdict form and sign the verdict.

Question No. 3: Did the Defendants State of Washington, Community Colleges of Spokane fail to reasonably accommodate Mark Fey's disability?

Answer: _____

Go to question No. 4.

Question No. 4: Did the Defendant State of Washington, Community Colleges of Spokane, discriminate against Plaintiff, Mark Fey, because of a disability?

Answer: _____

If your answer is "no" to both questions No. 3 and No. 4, please do to the end of the verdict form and sign the verdict. If you answered either question No. 3 or question No. 4 "yes", then go to question No. 5.

SECTION 2

Court's Instructions to the Jury

NO. 29912-1-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, COMMUNITY COLLEGES OF
SPOKANE,

Appellants/Respondents,

v.

MARK FEY,

Respondent/Appellant

APPENDIX C – COURT’S JURY INSTRUCTIONS

FILED

MAR 29 2011

THOMAS R FALLOQUIST
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

MARK FEY

Plaintiff,

No. 2009-02-05589-5

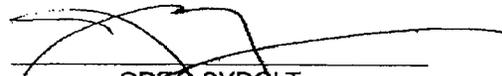
vs,

STATE OF WASHINGTON,
COMMUNITY COLLEGES OF
SPOKANE,

Defendants,

COURT'S INSTRUCTIONS TO THE JURY

3/28/11
DATE


GREG SYPOLT
SUPERIOR COURT JUDGE

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law that I give you to the facts that you decide have been proved, and in this way decide the case. By applying the law to the facts, you will be able to decide this case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witnesses. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during

trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 2

This is a civil action brought by plaintiff Mark Fey against his employer, Community Colleges of Spokane ("CCS"). Plaintiff claims that CCS failed to accommodate his disability. He seeks an award of damages for this claim.

Defendant denies plaintiff's claim.

INSTRUCTION NO. 3

The law treats all parties equally whether they are government entities or individuals. This means that government entities and individuals are to be treated in the same fair and unprejudiced manner.

INSTRUCTION NO. 17

Any act or omission of an employee within the scope of authority is the act or omission of the employer.

INSTRUCTION NO. 5

The plaintiff claims that the defendant discriminated against him in one or more of the following respects:

- o By failing to engage in the mandatory interactive process required for reasonable accommodation of his disability.
- o By failing to consider plaintiff for the Grounds and Nursery 4 position when he was able to perform the essential functions of the position.
- o By failing to consider altering the Grounds and Nursery 4 conditions of employment to accommodate plaintiff's disability.

The defendant denies these claims. The defendant further denies that plaintiff was injured or sustained damage.

INSTRUCTION NO. 6

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed unless admitted by the opposing party; and you are to consider only those matters that are admitted or are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

INSTRUCTION NO. 7

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. 8

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

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.

INSTRUCTION NO. 9

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 73

Discrimination in employment on the basis of disability is prohibited.

To establish his claim of discrimination on the basis of failure to accommodate his disability, plaintiff has the burden of proving each of the following propositions:

- (1) That he had a disability;
- (2) That he either: gave notice of the disability to defendant; or no notice was required to be given because defendant was aware of the disability;
- (3) That the disability had a substantially limiting effect on the plaintiff's ability to apply or be considered for a job;
- (4) That he was able to perform the essential functions of the job in question with reasonable accommodation; and
- (5) That defendant failed to reasonably accommodate plaintiff's 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 the plaintiff on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

INSTRUCTION NO. 11

Disability means the presence of a sensory, mental, or physical impairment that:

- (1) Is medically cognizable or diagnosable; or
- (2) Exists as a record or history;

A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity.

INSTRUCTION NO. _____

If a disability is not known to the employer, the employee must give the employer notice of the disability. The employer then has an affirmative obligation to engage in the interactive process. The employer has a duty to inquire regarding the nature and extent of the disability, and the employee has a duty to cooperate with the employer's efforts by explaining the employee's disability and qualifications. The employer must then take positive steps to accommodate the employee's limitations.

INSTRUCTION NO. 13

The term "essential function" is defined as a job duty that is fundamental, basic, necessary, and indispensable to filling a particular position, as opposed to a marginal duty divorced from the essence or substance of the job. An employer is not required to eliminate an essential function of a job to accommodate a disabled employee.

Essential functions are not qualification standards.

INSTRUCTION NO. _____

Under Washington law, the employer must provide a reasonable accommodation for an employee with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. The obligation to reasonably accommodate applies to all aspects of employment, and an employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation.

There may be more than one reasonable accommodation of a disability. A reasonable accommodation may include adjustments in job duties, work schedules, scope of work, and changes in the job setting or conditions of employment that enable the person to perform the essential functions of the job.

INSTRUCTION NO. 15

An employer is not required to accommodate an employee's disability if it would impose an undue hardship on the operation of the employer's business. The defendant has the burden of proving that an accommodation would impose an undue hardship on the defendant.

The cost or difficulty of accommodating an employee with a disability will be considered to be an undue hardship on the conduct of the employer's business only if it is unreasonably high in view of the size of the employer's business, the value of the employee's work, whether the cost can be included in planned remodeling or maintenance, and the requirements of contracts.

INSTRUCTION NO. 16

The plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

To establish a failure to mitigate, defendants have the burden of proving:

- (1) There were openings in comparable positions available for plaintiff elsewhere after the defendant failed to promote Fey to the GNS4 position at SCC;
- (2) The plaintiff failed to use reasonable care and diligence in seeking other openings; and
- (3) The amount by which damages would have been reduced if plaintiff had used reasonable care and diligence in seeking other openings.

You should take into account the characteristics of the plaintiff and the job market in evaluating the reasonableness of the plaintiff's efforts to mitigate damages.

If you find that the defendant has proved all of the above, you should reduce your award of damages for wage loss accordingly.

INSTRUCTION NO. 17

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, you must determine the amount of money which will reasonably and fairly compensate the plaintiff for such damages as you find were caused by the acts of the defendants.

If you find for the plaintiff, you should consider the following elements:

(1) The reasonable value of lost past earnings and fringe benefits, from the date of the wrongful conduct to the date of trial;

(2) The emotional harm to the plaintiff caused by the defendant's wrongful conduct, including emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish experienced and with reasonable probability to be experienced by the plaintiff in the future.

The burden of proving damages rests with the party claiming them, and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

INSTRUCTION NO. 10

In calculating damages for future wage loss you should determine the present cash value of salary, pension, and other fringe benefits from today until the time plaintiff may reasonably be expected to retire.

INSTRUCTION NO. 19

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

FILED
MAR 29 2011
THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, SPOKANE COUNTY

MARK FEY,

Plaintiff,

No. 09-2-05589-5

vs.

STATE OF WASHINGTON,
COMMUNITY COLLEGES OF
SPOKANE,

Defendants.

SPECIAL VERDICT FORM

NO SUMMARY
NO JUDGMENT
RCW 4.64.030

We, the jury, answer the questions submitted by the Court as follows:

Question No. 1: Did plaintiff, Mark Fey, have a disability?

Answer: Yes X
No _____

Question No. 2: Was defendant aware that plaintiff, Mark Fey, had a disability?

Answer: Yes X
No _____

If your answer to **both** Question No. 1 and 2 is "yes", answer Question Nos. 3 **and** 4. If your answer to either Question No. 1 or 2 is "no", sign the verdict form.

Question No. 3: Did defendant engage in an interactive process to find a reasonable accommodation which would fit with plaintiff's disability?

Answer: Yes _____
No X_____

Question No. 4: Did defendant reasonably accommodate plaintiff's disability?

Answer: Yes _____
No X_____

If your answer to **either** Question No. 3 or 4 is "no", answer Question No. 5. If your answer to **both** Question No. 3 and 4 is "yes", sign the verdict form.

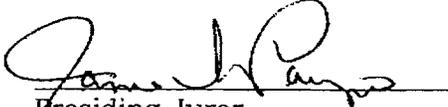
Question No. 5: What is the amount of plaintiff's damages?

Answer:

Lost Wages \$ 7,549.00

Emotional Distress \$ 0

Date: 3-28 -, 2011


Presiding Juror
James L. Payne #3

NO. 29912-1-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, COMMUNITY COLLEGES OF
SPOKANE,

Appellants/Respondents,

v.

MARK FEY,

Respondent/Appellant

APPENDIX D – CORRECT WPI'S

[Click here for easy edit version](#)



6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.33 (5th ed.)

Washington Practice Series TM
Current Through the 2011 Update

Washington Pattern Jury Instructions--Civil
Washington Supreme Court Committee On Jury Instructions

Part XVI. Employment
Chapter 330. Employment Discrimination

WPI 330.33 Disability Discrimination—Reasonable Accommodation—Burden of Proof

Discrimination in employment on the basis of disability is prohibited. One form of unlawful discrimination is a failure to reasonably accommodate an employee's disability.

To establish [his] [her] claim of discrimination on the basis of failure to reasonably accommodate a disability, _____ has the burden of proving each of the following propositions:

(1) That [he] [she] had an impairment that is medically recognizable or diagnosable or exists as a record or history; and

(2) That either

(a) the employee gave the employer notice of the impairment; or

(b) no notice was required to be given because the employer knew about the employee's impairment; and

(3) That either:

(a) the impairment [has] [had] a substantially limiting effect on

(i) [his] [her] ability to [perform his or her job] [apply for a job] [be considered for a job]; or

(ii) [his] [her] ability to access [equal benefits] [privileges] [terms] [or] [conditions] of employment; or

(b) the plaintiff has provided medical documentation to the employer establishing a reasonable likelihood that working without an accommodation would aggravate the impairment to the extent it would create a substantially limiting effect;

and

(4) That [he] [she] would have been able to perform the essential functions of the job in question with reasonable accommodation; and

(5) That the employer failed to reasonably accommodate the impairment.

In determining whether an impairment has a substantially limiting effect, a limitation is not substantial if it has only a trivial effect.

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 the plaintiff [on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for the employer [on this claim].

NOTE ON USE

Use this instruction with WPI 330.31, Disability Discrimination—Definition of Disability—Disparate Treatment Cases. This instruction is designed to be used together with WPI 330.34 (Disability Discrimination—Reasonable Accommodation—Definition) and WPI 330.37 (Essential Function—Definition) or, alternatively, WPI 330.36 (Disability Discrimination—Undue Hardship).

When the plaintiff also makes a claim of disparate treatment based on disability, also use this instruction, rather than WPI 330.01, Employment Discrimination—Disparate Treatment—Burden of Proof.

An essential functions instruction may be appropriate depending on the facts and circumstances of the particular case. When there is a disagreement as to the essential functions of the position, use

WPI 330.37, Essential Function—Definition.

This instruction may need to be modified for cases involving medical necessity. See discussion in the Comment below.

COMMENT

In 2007, the Legislature adopted new definitions of disability and impairment in an accommodation analysis. RCW 49.60.040(7). See discussion in the Comment to WPI 330.01, Employment Discrimination—Disparate Treatment—Burden of Proof. The instruction was rewritten in 2010 to use the new statutory language.

For purposes of an accommodation analysis, “a limitation is not substantial if it has only a trivial effect.” RCW 49.60.040(7)(e).

When duty to accommodate arises. Pursuant to RCW 49.60.040(7)(d), the duty to accommodate arises in two general circumstances: (1) when the impairment has a substantially limiting effect on the employee's ability to perform the duties of the position or affect other aspects of his/her employment opportunities; (2) when there is medical evidence that failure to accommodate a known impairment will aggravate the impairment, limiting the employee's ability to perform the job or affect other aspects of his/her employment opportunities.

In impairment cases, the Legislature clarified that the impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply for or be considered for a position, or the individual's access to equal benefits, privileges, or terms or conditions of employment, RCW 49.60.040(7)(d)(i). In the aggravation of impairment cases, the employee must notify the employer of the impairment, and provide medical documentation that establishes a reasonable likelihood that by engaging in the employee's job function without an accommodation “would aggravate the impairment to the extent, that it would create a substantially limiting effect.” RCW 49.60.040(7)(d)(ii).

The duty of reasonable accommodation does not arise until the employer is “aware of respondent's disability and physical limitations.” Goodman v. Boeing Co., 127 Wn.2d 401, 408, 899 P.2d 1265 (1995), quoting Holland v. Boeing Co., 90 Wn.2d 384, 391, 583 P.2d 621 (1978). If the disability is not otherwise known to the employer, the employee must give the employer notice of the disability; the employer then must take “positive steps’ to accommodate the employee's limitations.” Goodman v. Boeing Co., 127 Wn.2d at 408. Once notice is given, the employer has a duty to inquire regarding the nature and extent of the disability, while the employee has a duty to cooperate with the employer's efforts by explaining the employee's disability and qualifications. 127 Wn.2d at 408-09; Hume v. American Disposal Co., 124 Wn.2d 656, 880 P.2d 988 (1994).

If there is a factual question whether the parties cooperated in the reasonable accommodation process, Washington law is unclear how non-cooperation impacts the burden of proof. It may be appropriate to instruct the jury as follows: “You may consider whether a party cooperated in this process in good faith in evaluating the merit of that party's claim that a reasonable accommodation did or did not exist.” This latter sentence is taken from a pattern jury instruction from the federal Third Circuit. See Third Circuit Model Civil Jury Instruction 9.1.3, Elements of an ADA Claim—Reasonable Accommodation (caveat: other aspects of the Third Circuit's instruction are based on federal law that may not be compatible with Washington law).
[Current as of October 2010.]

Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

6A WAPRAC WPI 330.33

END OF DOCUMENT

(c) 2011 Thomson Reuters. No Claim to Orig. US Gov. Works

[Click here for easy edit version](#)



6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.34 (5th ed.)

Washington Practice Series TM
Current Through the 2011 Update

Washington Pattern Jury Instructions--Civil
Washington Supreme Court Committee On Jury Instructions

Part XVI. Employment
Chapter 330. Employment Discrimination

WPI 330.34 Disability Discrimination—Reasonable Accommodation—Definition

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

An employer must provide a reasonable accommodation for [a qualified applicant] [an employee] with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. The obligation to reasonably accommodate applies to all aspects of employment, and an employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation.

[There may be more than one reasonable accommodation of a disability.]

A reasonable accommodation may include adjustments in the manner in which essential functions are carried out, work schedules, scope of work, and changes in the job setting or conditions of employment that enable the person to perform the essential functions of the job.

NOTE ON USE

Select the bracketed designation in the second sentence as appropriate to the facts of the case.

The bracketed sentence is to be used in an appropriate case when there is a disagreement as to which of several accommodations might be considered reasonable.

The list of accommodations in the instruction's final paragraph is not exclusive.

Use this instruction together with WPI 330.33 (Disability Discrimination—Reasonable Accommodation—Burden of Proof), and in appropriate cases with WPI 330.36 (Disability Discrimination—Undue Hardship) and WPI 330.37 (Essential Function—Definition).

COMMENT

The instruction was revised in 2010. The primary change was to add the instruction's first paragraph on the interactive process created by the employer's and employee's duties in exploring reasonable accommodations. See the Comment to WPI 330.33, Disability Discrimination—Reasonable Accommodation—Burden of Proof (also addressing other issues related to this instruction).

With regard to the bracketed sentence, see Doe v. Boeing Co., 121 Wn.2d 8, 846 P.2d 531 (1993), in which the court stated that "the Act does not require the employer to offer the precise accommodation which [the plaintiff] requests." 121 Wn.2d at 20.

If an employee becomes disabled and cannot be accommodated in his or her position, the employer must take affirmative steps to help the employee identify and apply for any vacant position for which the employee is qualified. Davis v. Microsoft Corp., 149 Wn.2d 521, 536-37, 70 P.3d 126 (2003); Clarke v. Shoreline School Dist. No. 412, 106 Wn.2d 102, 120, 720 P.2d 793 (1986); Dean v. Municipality of Metropolitan Seattle-Metro, 104 Wn.2d 627, 636, 708 P.2d 393 (1985); see also Havlina v. Washington State Dept. of Transp., 142 Wn.App. 510, 178 P.3d 354 (2007) (the individual

state agency is the employer, not the State of Washington). "The employee's reciprocal duties include informing the employer of his qualifications, 'applying for all jobs which might fit his abilities,' and 'accepting reasonably compensatory work he could perform.'" Davis v. Microsoft Corp., 149 Wn.2d at 537 (quoting *Dean*).

A requested accommodation to transfer to a different supervisor is considered unreasonable as a matter of law. See Snyder v. Medical Service Corp. of Eastern Washington, 145 Wn.2d 233, 35 P.3d 1158 (2000); see also RCW 49.60.040(7)(d), and the Comment to WPI 330.33, Disability Discrimination—Reasonable Accommodation—Burden of Proof.

For an additional discussion of reasonable accommodation issues, see Pulcino v. Federal Express Corp., 141 Wn.2d 629, 9 P.3d 787 (2000); Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 23 P.3d 440 (2001).

[Current as of October 2010.]

Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

6A WAPRAC WPI 330.34

END OF DOCUMENT

(c) 2011 Thomson Reuters. No Claim to Orig. US Gov. Works

[Click here for easy edit version](#)



6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.35 (5th ed.)

Washington Practice Series TM
Current Through the 2011 Update

Washington Pattern Jury Instructions--Civil
Washington Supreme Court Committee On Jury Instructions

Part XVI. Employment
Chapter 330. Employment Discrimination

WPI 330.35 Disability Discrimination—Reasonable Accommodation—Employer Notice and Employee's Duty to Cooperate

(WITHDRAWN)

COMMENT

The instruction was withdrawn in 2010. This topic is now covered in other instructions in this chapter.

[Current as of October 2010.]

Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

6A WAPRAC WPI 330.35

END OF DOCUMENT

[Click here for easy edit version](#)



6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.36 (5th ed.)

Washington Practice Series TM
Current Through the 2011 Update

Washington Pattern Jury Instructions--Civil
Washington Supreme Court Committee On Jury Instructions

Part XVI. Employment
Chapter 330. Employment Discrimination

WPI 330.36 Disability Discrimination—Undue Hardship

An employer is not required to accommodate an employee's disability if it would impose an undue hardship on the operation of the employer's business. _____ has the burden of proving that an accommodation would impose an undue hardship on _____.

An accommodation is an undue hardship if the cost or difficulty is unreasonable, considering:

- (1) The size of and the resources available to the employer;
- (2) Whether the cost can be included in planned remodeling or maintenance; and
- (3) The requirements of contracts.

NOTE ON USE

Under certain circumstances, non-cost factors also may support an undue hardship instruction. This instruction should be modified as necessary under such circumstances.

Use this instruction with WPI 330.34, Disability Discrimination—Reasonable Accommodation—Definition.

COMMENT

Employer's burden. This instruction is based on WAC 162-22-075, which provides as follows:

An employer, employment agency, labor union, or other person must provide reasonable accommodation unless it can prove that the accommodation would impose an undue hardship.

An accommodation will be considered an undue hardship if the cost or difficulty is unreasonable in view of:

- (1) The size of and the resources available to the employer;
- (2) Whether the cost can be included in planned remodeling or maintenance; and
- (3) The requirements of other laws and contracts, and other appropriate considerations.

If the restrictions of "other laws" are a part of the employer's argument about undue hardship, the jury should be specifically instructed as to the requirements of the other laws at issue. The instruction likewise will need to be modified to address any "other appropriate considerations" that might apply to a given case.

Failure to give this instruction may be error if there is an issue of reasonableness of accommodation or undue hardship. Erwin v. Roundup Corp., 110 Wn.App. 308, 40 P.3d 675 (2002). Erwin implicitly approved the former version of this instruction.

Jurors may be confused if the court fails to inform them that the defendant must prove that a proposed accommodation would be an undue hardship. See Easley v. Sea-Land Service, Inc., 99

Wn.App. 459, 471-72, 994 P.2d 271 (2000). See Griffith v. Boise Cascade, Inc., 111 Wn.App 436, 442-43, 45 P.3d 589 (2002) (an accommodation may be an undue burden on the defendant and therefore unreasonable). See also Wheeler v. Catholic Archdiocese of Seattle, 65 Wn.App. 552, 829 P.2d 196 (1992), reversed on other grounds, 124 Wn.2d 634, 880 P.2d 29 (1994).
[Current as of October 2010.]

Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

6A WAPRAC WPI 330.36

END OF DOCUMENT

(c) 2011 Thomson Reuters. No Claim to Orig. US Gov. Works

[Click here for easy edit version](#)



6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.81 (5th ed.)

Washington Practice Series TM
Current Through the 2011 Update

Washington Pattern Jury Instructions--Civil
Washington Supreme Court Committee On Jury Instructions

Part XVI. Employment
Chapter 330. Employment Discrimination

WPI 330.81 Damages—Employment Discrimination—Economic and Non-Economic

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, _____, you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the acts of the defendant[s], _____.

If you find for the plaintiff, [your verdict shall include the following undisputed items:

(here insert undisputed items and amounts)

In addition] you should consider the following elements:

- (1) [The reasonable value of lost past earnings and fringe benefits, from the date of the wrongful conduct to the date of trial;]
- (2) [The reasonable value of lost future earnings and fringe benefits;]
- (3) [The physical harm to the plaintiff;] [and]
- (4) [The emotional harm to the plaintiff caused by the [defendant's] [defendants'] wrongful conduct, including [emotional distress] [loss of enjoyment of life] [humiliation] [pain and suffering] [personal indignity, embarrassment, fear, anxiety, and/or anguish] experienced and with reasonable probability to be experienced by the plaintiff in the future.]

The burden of proving damages rests with the party claiming them, and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Any award of damages must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure [emotional distress] [loss of enjoyment of life] [humiliation] [pain and suffering] [personal indignity, embarrassment, fear, anxiety, and/or anguish]. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

NOTE ON USE

Use the first bracketed phrase when there are undisputed items of damages.

Use the bracketed paragraphs regarding elements of compensatory damages for which there is an evidentiary basis in the case. Do not use the numbers in the instruction; they are set out for discussion purposes. The numbered paragraphs include the most common elements of damages in employment discrimination cases. For guidance as to other damage issues, see WPI 30.05, Measure of Damages—Elements of Noneconomic Damages—Disability and Disfigurement, through WPI 30.09.02, Measure of Economic Damages—Elements of Future Damages—Domestic Services/Nonmedical Expenses.

If there is a claim for wage loss, use the instruction with WPI 331.83, Damages—Mitigation—Wage Loss. If there is an issue regarding the amount of damages for emotional distress attributable to the defendant, it may also be appropriate to give a version of WPI 30.17 (Aggravation of Pre-Existing Condition) or WPI 30.18 (Previous Infirm Condition), and/or WPI 33.02 (Avoidable Consequences—

Failure to Secure Treatment).

When there is a claim for future lost wages, using paragraph (2), use this instruction with WPI 330.82, Damages—Discrimination—Future Lost Earnings (Front Pay). Practitioners should note that there are offsets against economic damages, including earned income and failure to mitigate. See WPI 330.83 (Damages—Mitigation—Wage Loss), and/or WPI 33.03 (Avoidable Consequences—Property or Business), or WPI 303.06 (Contract—Mitigation of Damages) for instructions on mitigation.

For a definition of proximate cause, use WPI 15.01, Proximate Cause—Definition, or WPI 15.01.01, Proximate Cause—Definition—Alternative.

COMMENT

This instruction is based upon RCW Chapter 49.60, WPI 30.01.01, and numerous cases more specifically analyzing damage issues.

As in a typical personal injury case, the burden of proving damages rests with the plaintiff. In employment discrimination cases, plaintiffs are entitled to recover for personal injuries for emotional distress, humiliation, and pain and suffering. See Ellingson v. Spokane Mortg. Co., 19 Wn.App. 48, 573 P.2d 389 (1978); Dean v. Municipality of Metropolitan Seattle-Metro, 104 Wn.2d 627, 708 P.2d 393 (1985). Cf. Cagle v. Burns and Roe, Inc., 106 Wn.2d 911, 726 P.2d 434 (1986) (wrongful termination). Plaintiffs must also prove economic damages.

A plaintiff may recover damages for emotional distress so long as he or she presents evidence sufficient to support a damages award. Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 116 P.3d 381 (2005). Plaintiff must produce "evidence of anguish and distress." 155 Wn.2d at 181. The plaintiff need only produce "sufficient evidence to convince an 'unprejudiced, thinking mind' of his anguish." 155 Wn.2d at 181. Such evidence can be provided by the plaintiff's own testimony; evidence from a health care professional is not required to prove emotional distress. 155 Wn.2d at 181. Corroboration is helpful, but the jury is the ultimate decision maker. 155 Wn.2d at 181.

In some cases a plaintiff may recover damages for injuries sustained outside the limitations period. Adopting the reasoning in National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), the court in Antonius v. King County held that in a hostile work claim, an employer may be liable for acts of harassment which occurred outside the three-year statute of limitations so long as one or more acts of harassment occurred within the limitations period. Antonius v. King County, 153 Wn.2d 256, 103 P.3d 729 (2005). It is the court's responsibility to determine whether acts "are part of the same actionable hostile work environment." 153 Wn.2d at 271.

Under RCW Chapter 49.60, damages might be taxable income to the plaintiff. A plaintiff may recover an offset for the federal income tax consequences of a damages award under RCW 49.60.030 (2). Blaney v. International Association of Machinists And Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 87 P.3d 757 (2004) (the offset is recoverable under RCW 49.60.030(2)'s "other appropriate remedy" language rather than as actual damages).

Disability benefits are not offset against wage loss if the disability benefits are a fringe benefit. Xieng v. Peoples Nat. Bank of Washington, 120 Wn.2d 512, 844 P.2d 389 (1993). Disability benefits may be an offset against past and future wage loss when used as an indemnification by the employer against future liability. 120 Wn.2d at 525-26. Xieng discusses how to analyze when disability may be considered indemnification. Unemployment compensation benefits are not an offset against an award of damages for economic loss, because they come from a collateral source. Hayes v. Trulock, 51 Wn.App. 795, 803-804, 755 P.2d 830 (1988); Johnson v. Weyerhaeuser Co., 134 Wn.2d 795, 799-800, 953 P.2d 800 (1998); see also Wheeler v. Catholic Archdiocese of Seattle, 65 Wn.App. 552, 568-69, 829 P.2d 196 (1992) (dictum), reversed on other grounds, 124 Wn.2d 634, 880 P.2d 29 (1994).

An employer's immunity under RCW Title 51, the workers compensation statutes, does not preclude a claim for damages under RCW Chapter 49.60 for physical injuries and emotional harm. Goodman v. Boeing Co., 127 Wn.2d 401, 899 P.2d 1265 (1995). It is important to note that there will often be offsets of or subrogation to workers compensation benefits. See Goodman v. Boeing Co., supra; Wheeler v. Catholic Archdiocese of Seattle, 124 Wn.2d 634, 880 P.2d 29 (1994); and Reese v. Sears Roebuck & Co., 107 Wn.2d 563, 731 P.2d 497 (1987), overruled on other grounds in Phillips v. City of Seattle, 111 Wn.2d 903, 766 P.2d 1099 (1989).

An employee who successfully proves a violation of RCW 49.60.180(3) has a claim for damages

under this statute. The employee is not required to prove a separate claim that he or she was discharged or constructively discharged in order to seek damages for front and back pay. Martini v. Boeing Co., 137 Wn.2d 357, 363-64, 367-69, 370-72, 971 P.2d 45 (1999); RCW 49.60.030(2). [Current as of October 2010.]

Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

6A WAPRAC WPI 330.81

END OF DOCUMENT

(c) 2011 Thomson Reuters. No Claim to Orig. US Gov. Works

[Click here for easy edit version](#)



6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.01 (5th ed.)

Washington Practice Series TM
Current Through the 2011 Update

Washington Pattern Jury Instructions--Civil
Washington Supreme Court Committee On Jury Instructions

Part II. Negligence—Risk—Misconduct—Proximate Cause
Chapter 15. Proximate Cause

WPI 15.01 Proximate Cause—Definition

The term “proximate cause” means a cause which in a direct sequence [unbroken by any superseding cause,] produces the [injury] [event] complained of and without which such [injury] [event] would not have happened.

[There may be more than one proximate cause of an [injury] [event].]

NOTE ON USE

This instruction is the standard definition of proximate cause. For alternative wording, see WPI 15.01.01, Proximate Cause—Definition—Alternative.

When the substantial factor test of proximate causation applies, use WPI 15.02, Proximate Cause—Substantial Factor Test, instead of WPI 15.01 or WPI 15.01.01.

Use bracketed material as applicable. Use the bracketed phrase about a superseding cause when it is supported by the evidence. If this bracketed phrase is used, then WPI 15.05, Negligence—Superseding Cause, must also be used.

The last sentence in brackets should be given only when there is evidence of a concurring cause. If the last sentence is used, it may also be necessary to give WPI 15.04, Negligence of Defendant Concurring with Other Causes.

COMMENT

Elements of proximate cause. Proximate cause under Washington law recognizes two elements: cause in fact and legal causation. See Christen v. Lee, 113 Wn.2d 479, 507, 780 P.2d 1307 (1989); Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985), and cases cited therein. Cause in fact refers to the “but for” consequences of an act — the physical connection between an act and an injury. WPI 15.01 describes proximate cause in this factual sense. Hartley v. State, 103 Wn.2d at 778. The question of proximate cause in this context is ordinarily for the jury unless the facts are undisputed and do not admit reasonable differences of opinion, in which case cause in fact is a question of law for the court. Baughn v. Honda Motor Co., Ltd., 107 Wn.2d 127, 142, 727 P.2d 655 (1986); Estate of Bordon ex rel. Anderson v. State, Dept. of Corrections, 122 Wn.App. 227, 95 P.3d 764 (2004) (estate could not show that, but for negligent supervision, parolee would have been in jail and unable to kill plaintiff decedent); Estate of Jones v. State, 107 Wn.App. 510, 15 P.3d 180 (2000) (jury question whether had juvenile offender's score been non-negligently calculated, he would have been in prison and unable to murder plaintiff decedent).

Legal causation involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. It is a much more fluid concept, grounded in policy determinations as to how far the consequences of a defendant's acts should extend. Colbert v. Moomba Sports, Inc., 163 Wn.2d 43, 176 P.3d 497 (2008); Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 951 P.2d 749 (1998). The focus is on “whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose

liability." Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d at 478-79. This inquiry depends on "mixed considerations of logic, common sense, justice, policy, and precedent." See Hartley v. State, 103 Wn.2d at 779; Tyner v. State Dept. of Social and Health Services, Child Protective Services, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). The existence of a duty does not necessarily imply legal causation. Although duty and legal causation are intertwined issues (see Taggart v. State, 118 Wn.2d 195, 226, 822 P.2d 243, 258 (1992)), "[l]egal causation is, among other things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise. Thus, legal causation should not be assumed to exist every time a duty of care has been established." Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d at 479-80.

There have been many attempts to define "proximate cause." In Washington it has been defined both as a cause which is "natural and proximate," Lewis v. Scott, 54 Wn.2d 851, 341 P.2d 488 (1959), and as a cause which in a "natural and continuous sequence" produces the event, Cook v. Seidenverg, 36 Wn.2d 256, 217 P.2d 799 (1950). Some jurisdictions, in an effort to simplify the concept of proximate cause for jurors, have substituted the term "legal cause." See, e.g., Connecticut's civil jury instruction 3.1-1 and Restatement (Second) of Torts § 9 (1965). However, the "direct sequence" and "but for" definition adopted in this instruction is firmly entrenched in Washington law. See Alger v. City of Mukilteo, 107 Wn.2d 541, 730 P.2d 1333 (1987) ("direct sequence"); Tyner v. State Dept. of Social and Health Services, Child Protective Services, 141 Wn.2d at 82 ("but for").

Superseding cause. The pattern instruction includes the bracketed phrase "unbroken by any superseding cause." Prior to 2009, this phrase was worded as "unbroken by any new independent cause." The committee rewrote this phrase so that the instruction better integrates with the wording of WPI 15.05. No change in meaning is intended — the phrase "unbroken by any new independent cause" is an expression of the doctrine of superseding cause. See Humes v. Fritz Companies, Inc., 125 Wn.App. 477, 499, 105 P.3d 1000 (2005). The bracketed phrase should be used only when there is evidence of the doctrine's applicability. See Humes v. Fritz Companies, Inc., 125 Wn.App. at 499 n.5.

Negligence concurring with other causes. An instruction combining parts of WPI 15.01 and 15.04, Negligence of Defendant Concurring with Other Causes, was approved in Stevens v. Gordon, 118 Wn.App. 43, 74 P.3d 653 (2003) (WPI 15.04 was previously numbered as WPI 12.04).

Substantial factor test. Section 431 of the Restatement (Second) of Torts sets forth the substantial factor test of proximate cause, under which a defendant's conduct is a proximate cause of harm to another if that conduct is a substantial factor in bringing about the harm. In Blasick v. City of Yakima, 45 Wn.2d 309, 274 P.2d 122 (1954), the Supreme Court rejected this approach in favor of the "but for" definition contained in WPI 15.01 for general negligence actions. Courts continue to reject the substantial factor test except in limited circumstances. Fabrique v. Choice Hotels Intern., Inc., 144 Wn.App. 675, 183 P.3d 1118 (2008) (salmonella exposure); Gausvik v. Abbey, 126 Wn.App. 868, 107 P.3d 98 (2005) (negligent investigation of child abuse). For a more detailed discussion of the substantial factor test and the types of cases to which it applies, see WPI 15.02, Proximate Cause—Substantial Factor Test.

Multiple proximate causes. Using WPI 15.01 without the last paragraph is error if there is evidence of more than one proximate cause. Jonson v. Chicago, M., St. P. and P. R. Co., 24 Wn.App. 377, 601 P.2d 951 (1979).

An instruction setting forth the legal effect of multiple proximate causes is necessary when both sides raise complex theories of multiple causation. Goucher v. J.R. Simplot Co., 104 Wn.2d 662, 709 P.2d 774 (1985); Brashear v. Puget Sound Power & Light Co., Inc., 100 Wn.2d 204, 667 P.2d 78 (1983). Failure to give WPI 15.04, Negligence of Defendant Concurring with Other Causes, may be reversible error even though WPI 15.01 is given including the bracketed last paragraph. WPI 15.01 does not inform the jury that the act of another person does not excuse the defendant's negligence unless the other person's negligence was the sole proximate cause of the plaintiff's injuries. Brashear v. Puget Sound Power and Light Co., Inc., supra (failure to give WPI 15.04 was reversible error); Jones v. Robert E. Bayley Const. Co., Inc., 36 Wn.App. 357, 674 P.2d 679 (1984) (failure to give WPI 15.04 was error, but harmless given the jury's special verdict findings), overruled on other grounds in Brown v. Prime Const. Co., Inc., 102 Wn.2d 235, 684 P.2d 73 (1984). In Torno v. Hayek, 133 Wn.App. 244, 135 P.3d 536 (2006), it was not error to refuse WPI 15.04 where both defendants admitted liability (successive car accidents) but disagreed on which defendant caused particular medical expenses.

Foreseeability. It is error to add to WPI 15.01 the words "even if such injury is unusual or

unexpected.” Blodgett v. Olympic Sav. and Loan Assoc'n, 32 Wn.App. 116, 646 P.2d 139 (1982). It is improper to inject the issues of foreseeability into the definition of proximate cause. State v. Giedd, 43 Wn.App. 787, 719 P.2d 946 (1986); Blodgett v. Olympic Sav. and Loan Association, supra.

Whether to supplement the pattern instructions on proximate cause. The preferred practice is to use the proximate cause language from the applicable pattern instruction or instructions. See Stevens v. Gordon, 118 Wn.App. at 53; Humes v. Fritz Companies, Inc., 125 Wn.App. at 498. Washington case law has occasionally approved instructions that supplement WPI 15.01 with more specific language as to what does, or does not, constitute proximate cause. See, e.g., Vanderhoff v. Fitzgerald, 72 Wn.2d 103, 107-08, 431 P.2d 969 (1967); Young v. Group Health Co-op. of Puget Sound, 85 Wn.2d 332, 340, 534 P.2d 1349 (1975); Richards v. Overlake Hosp. Medical Center, 59 Wn.App. 266, 277-78, 796 P.2d 737 (1990); Safeway, Inc. v. Martin, 76 Wn.App. 329, 885 P.2d 842 (1994).

Practitioners should use care in deciding whether to expand upon the standards in the pattern instructions. Such modifications are not always necessary, and they need to be written neutrally so as to avoid unduly emphasizing one party's theory of the case. See Ford v. Chaplin, 61 Wn.App. 896, 899-901, 812 P.2d 532 (1991).

[Current as of June 2009.]

Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

6 WAPRAC WPI 15.01

END OF DOCUMENT

