

NO. 91494-0

SUPREME COURT OF THE STATE OF WASHINGTON

PATRICIA BLACKBURN, et al,

Plaintiffs/Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND
HEALTH SERVICES AND WESTERN STATE HOSPITAL,

Defendants/Respondents.

BRIEF OF RESPONDENT STATE OF WASHINGTON

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTER STATEMENT OF ISSUES2

III. COUNTER STATEMENT OF FACTS.....3

1. The Staffing Decision Is Made To Protect Staff And
Other Patients From Violent Assault.....3

2. The Employees Fail To Prove The Staffing Decision
Was An Adverse Employment Action.5

3. The Employees Failed To Prove Their Claims In A
Companion Federal Case.....8

IV. STANDARD OF REVIEW.....9

V. ARGUMENT AND AUTHORITY10

A. The Trial Court Correctly Concluded That The Staffing
Decision Did Not Result In An Adverse Employment
Action.....11

1. The Employees Do Not Show That RCW
49.60.180(4) Is Applicable Here.14

2. The Employees Suggestion That The Presence Of
Race In A Staffing Decision Makes It An Inherently
Adverse Employment Action Is Not Supported In
Law Or Policy.....17

a. Federal Law Does Not Support The Employees'
Assertion That The Presence Of Race Alone
Makes An Employment Decision An Adverse
Action.....17

b.	State Law Does Not Support The Employees' Assertion That The Presence Of Race Alone Makes An Employment Decision An Adverse Action.....	21
c.	The Employees' Arguments Are Not Only Legally Untenable, They Are Unworkable From A Policy Perspective.	22
3.	The Trial Court Correctly Determined That The Absence Of An Adverse Employment Action Here Meant There Was No "Facial Discrimination" Requiring The Hospital To Show A Bona Fide Occupational Qualification.....	25
a.	"Facial Discrimination" Is Proved Only When A Plaintiff Shows Both Elements Of A Disparate Treatment Claim.	26
b.	The Hospital Is Not Required To Make A BFOQ Defense Where There Is No Showing Of Facial Discrimination.....	28
4.	The Employees Fail To Prove The Staffing Decision Here Subjected Them To An Adverse Action.....	29
B.	Even If The Trial Court Erred In Concluding That Race Was Not A Substantial Factor In The Staffing Decision, Which It Did Not, That Error Makes No Difference To The Court's Verdict.	30
C.	There Is No Evidence That The Staffing Decision At Issue Was Sufficiently Severe Or Pervasive To Affect The Terms And Conditions Of Plaintiff's Employment.....	32
1.	The Staffing Decision Was Not Pervasive.	33
2.	The Staffing Decision Was Not Severe.....	37

D. Substantial Evidence Demonstrates That The Hospital’s Policy And Practice Is To Allow Clinicians To Exercise Professional Judgment In Order To Safely Manage A Ward.....40

E. Substantial Evidence Supports The Conclusion That The Employees’ Claimed Fears About Future Staffing Decisions Were Speculative, And Injunctive Relief Is Not Warranted.....47

F. The Employees Cannot Show An Assignment Of Error That Would Allow This Court To Remand For “Damages Only.”48

G. The Employees’ Request For Costs And Attorney Fees Is Limited To Fees And Costs On Appeal49

VI. CONCLUSION50

TABLE OF AUTHORITIES

Cases

<i>Alonso v. Qwest Commc'ns Co., LLC</i> , 178 Wn. App. 734, 315 P.3d 610 (2013)	12
<i>Ammons v. Wash. Dep't. of Soc. & Health Servs.</i> , 648 F.3d 1020 (9th Cir. 2011)	22, 24
<i>Antonius v. King Cnty.</i> , 153 Wn.2d 256, 103 P.2d 729 (2004).....	33
<i>Bauer v. Holder</i> , 25 F. Supp. 3d 842 (E.D. Va. 2014)	26
<i>Billings v. Madison Metropolitan School Dist.</i> , 259 F.3d 807 (7th Cir. 2001)	23
<i>Blair v. Wash. State Univ.</i> , 108 Wn.2d 558, 740 P.2d 1379 (1987).....	12
<i>Blaney v. Int'l. Assoc. of Machinists and Aerospace Workers, Dist. No. 160</i> , 151 Wn.2d 203, 87 P.3d 757 (2004).....	47, 49
<i>Bridgeport Guardians, Inc. v. Delmonte</i> , 553 F. Supp. 601 (D. Conn. 1982).....	20, 21
<i>Chuang v. University of Calif. Davis, Bd. of Trustees</i> , 225 F.3d 1115, (9th Cir. 2000)	12
<i>City of Olympia v. Drebeck</i> , 156 Wn.2d 289, 126 P.3d 289 (2006).....	15
<i>Crownover v. State ex rel. Dep't of Transp.</i> , 165 Wn. App. 131, 265 P.3d 971 (2011).....	13
<i>Davis v. W. One Automotive Group</i> , 140 Wn. App. 449, 166 P.3d 807 (2007).....	21, 22

<i>Domingo v. Boeing Employees' Credit Union</i> , 124 Wn. App. 71, 98 P.3d 1222 (2004).....	33
<i>Erwin v. Cotter Health Centers</i> , 161 Wn.2d 676, 167 P.3d 1112 (2007).....	9
<i>Fahn v. Civil Serv. Comm'n of Cowlitz Cty.</i> , 621 P.2d 1293 (1981).....	16
<i>Fahn v. Cowlitz Cnty.</i> , 93 Wn.2d 368, 610 P.2d 857 (1980).....	15, 28
<i>Faragher v. City of Boca Raton</i> , 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).....	36, 37
<i>Ferrill v. Parker Group, Inc.</i> , 168 F.3d 468 (11th Cir. 1999)	19, 21
<i>Fey v. State</i> , 174 Wn. App. 435, 300 P.3d 435 (2013).....	26
<i>Fischer v. Allstate Ins. Co.</i> , 136 Wn.2d 240, 252, 961 P.2d 350(1998).....	15
<i>Fisher Properties, Inc. v. Arden-Mayfair, Inc.</i> , 115 Wn.2d 364, 798 P.2d 799 (1990).....	9, 49
<i>Fisher v. Tacoma Sch. Dist. No. 10</i> , 53 Wn. App. 591, 769 P.2d 318 (1989).....	32
<i>Franklin Cnty. Sheriff's Office v. Sellers</i> , 97 Wn.2d 317, 646 P.2d 113 (1982).....	28, 29
<i>Gerdom v. Cont'l Airlines, Inc.</i> , 692 F.2d 603 (9th Cir. 1982)	39
<i>Glasgow v. Georgia-Pacific Corp.</i> , 103 Wn.2d 401, 693 P.2d 708 (1985).....	passim
<i>Healey v. Southwood Psychiatric Hospital</i> , 78 F.3d 128 (3d Cir. 1996)	28, 29

<i>Hegwine v. Longview Fibre Co., Inc.</i> , 162 Wn. 2d 340, 172 P.3d 688 (2007).....	passim
<i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172. 23 P.3d 440 (2001).....	12, 50
<i>Hunter v. Army Fleet Support</i> , 530 F. Supp. 2d 1291 (M.D. Ala. 2007)	20, 21, 22
<i>In re Stranger Creek and Tributaries in Stevens Cnty.</i> , 77 Wn.2d 649, 466 P.2d 508 (1970).....	30
<i>Int’l Union v. Johnson Controls, Inc.</i> , 499 U.S. 187, 111 S. Ct. 1196 (1991).....	26
<i>Johnson v. Dep’t. of Social and Health Svcs.</i> , 80 Wn. App. 212, 907 P.2d 1223 (1996).....	12
<i>King v. Riveland</i> , 125 Wn.2d 500, 886 P.2d 160 (1994).....	47
<i>Kirby v. City of Tacoma</i> , 124 Wn. App. 454, 98 P.3d 827 (2004).....	11, 13
<i>Knight v. Nassau Cnty. Civil Service Commission</i> , 649 F.2d 157 (2nd Cir. 1981)	19
<i>L.W. v. Grubbs</i> , 92 F.3d 894 (9th Cir. 1996)	24
<i>Lam v. Univ. of Hawai’i</i> , 40 F.3d 1551 (9th Cir. 1994)	39
<i>Lewis v. Doll</i> , 53 Wn. App. 203, 765 P.2d 1341 (1989).....	22
<i>Los Angeles Dep’t. of Water & Power v. Manhart</i> , 435 U.S. 702, 98 S. Ct. 1370 (1978).....	27
<i>Lovell v. Chandler</i> , 303 F.3d 1039 (9th Cir. 2002)	27

<i>Lunsford v. Saberhagen Holding, Inc.</i> , 166 Wn.2d 264, 208 P.3d 1092 (2009).....	49
<i>MacKay v. Acorn Custom Cabinetry, Inc.</i> , 127 Wn.2d 302, 898 P.2d 284 (1995).....	10, 12, 30
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).....	12
<i>Monterey Mech. Co. v. Wilson</i> , 125 F.3d 702 (9 th Cir. 1997);	23
<i>Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.</i> , 462 U.S. 669, 103 S. Ct. 2622 (1983).....	27
<i>Olsen v. Marriott Intern. Inc.</i> , 75 F. Supp. 2d 1052 (D. Ariz. 1999)	39
<i>Payne v. Children’s Home Soc. of Wash., Inc.</i> , 77 Wn. App. 507, 892 P.2d 1102 (1995).....	12
<i>Ridgeview Properties v. Starbuck</i> , 96 Wn.2d 716, 638 P.2d 1231 (1982).....	9
<i>Robel v. Roundup Corp.</i> , 148 Wn. 2d 35, 59 P.3d 611 (2002).....	10
<i>Sell v. U.S.</i> , 539 U.S. 166, 123 S. Ct. 2174 (2003).....	24
<i>Shannon v. Pay ‘N Save Corp.</i> , 104 Wn.2d 722, 709 P.2d 799 (1985).....	11
<i>Sims v. Montgomery Cnty. Comm’n</i> , 766 F. Supp. 1052 (M.D. Ala. 1990)	18, 21
<i>Sommer v. Dep’t. of Social and Health Servs.</i> , 104 Wn. App. 160, 15 P.3d 664 (2001).....	27
<i>State v. Hayes</i> , 81 Wn. App. 425, 914 P.2d 788 (1996).....	24, 34, 35

<i>State v. Homan</i> , 181 Wn.2d 102, 330 P.3d 182 (2014).....	10, 34, 41
<i>State v. McNeal</i> , 145 Wn.2d 352, 37 P.3d 280 (2002).....	10
<i>Tapper v. State Employment Sec. Dep't.</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	9
<i>Wash. State Bd. Against Discrimination v. Bd. of Directors, Olympia Sch. Dist. No. 1</i> , 68 Wn.2d 262, 412 P.2d 769 (1966).....	16
<i>Xieng v. Peoples Nat'l Bank of Washington</i> , 120 Wn.2d 512, 844 P.2d 389 (1993).....	50
<i>Youngberg v. Romero</i> , 457 U.S. 307, 102 S. Ct. 2452 (1982).....	24

Statutes

42 U.S.C. § 2000e-2.....	passim
RCW 49.60	8
RCW 49.60.030(2).....	47, 49
RCW 49.60.180	17
RCW 49.60.180(1).....	16
RCW 49.60.180(2).....	12
RCW 49.60.180(4).....	13, 14, 15, 16
RCW 49.60180(3).....	11, 12

I. INTRODUCTION

This case is about a brief staffing assignment over a single weekend to cover the breaks of other employees who were monitoring one of the most violent patients in Washington State's most violent workplace, Western State Hospital. It is about an employer, Respondent Western State Hospital (the Hospital), against whom there is no allegation of racial animus, trying to keep its employees and patients safe in a work environment where the patients are, by definition, irrationally and criminally violent, and where the patients and staff have competing constitutional and statutory rights. This case is not about far-reaching governmental segregation, and it is not about a "facially discriminatory" staffing policy, as the Petitioner-Employees (Employees) claim.

Instead, this is a straight-forward action for employment discrimination, and the Washington Law Against Discrimination, RCW 49.60, requires a plaintiff to prove the existence of an adverse employment action. After a six-day trial, in which the Employees, plaintiffs below, called 22 witnesses, they failed to convince the trier-of-fact that a brief, safety-based staffing decision subjected them to an adverse employment action. The Employees were unable to convince a federal district court or the Ninth Circuit of this proposition, either—yet continue to rely here upon the same federal authority they put before the federal courts. The

Employees have failed to prove their claims before every decision-maker who has reviewed this case because the isolated, limited staffing assignment made here to account for safety considerations does not constitute an adverse employment action. This Court should not disturb the verdict rendered below.

II. COUNTER STATEMENT OF ISSUES

1. Did the trial court err in concluding that the employees failed to prove they were subject to an adverse employment action? [Short Answer: No].
 - a. May an employee prove a claim of “facial discrimination” in the absence of an adverse employment action? [Short Answer: No].
 - b. Was the Hospital required to prove a bona fide occupational qualification defense where the Employees failed to prove an adverse action? [Short Answer: No].
2. If the trial court erred in its treatment of the substantial factor element of a disparate treatment claim, must the defense verdict be vacated? [Short Answer: No].
3. Did the trial court err in concluding that the employees’ failed to show that the staffing decision was sufficiently severe or pervasive to rise to the level of a hostile work environment? [Short Answer: No].
4. Was there any evidence to support a finding from the trier-of-fact that the Hospital has an ongoing policy and practice of “race-based staffing?” [Short Answer: No].

5. Did the trial court err in denying the Employees' injunctive relief? [Short Answer: No].

III. COUNTER STATEMENT OF FACTS

This case stems from events that took place over a single shift on a single weekend in April 2011.¹ All nine Employees worked the swing/evening shift on Ward F-5 in the Center for Forensic Services (CFS) at the Hospital, a state mental hospital. The Hospital, especially the CFS unit, is a violent workplace. Clerk's Papers (CP) 2710 (Finding of Fact (FOF) 3, 5).

1. The Staffing Decision Is Made To Protect Staff And Other Patients From Violent Assault.

Patient M.P. is a mentally-ill patient who was housed on Ward F-8 of CFS in April 2011. He was admitted to the Hospital after he was found Not Guilty By Reason of Insanity. CP 2710 (FOF 4). M.P. carries several psychiatric diagnoses and is a difficult patient to manage, uncompliant with taking his psychotropic medications and delusional. CP 2710 (FOF 4). At 6'4" and 230 pounds, he can be intimidating to staff. CP 2710 (FOF 4). He has a history of assaulting other patients and staff. CP 2710 (FOF 4). In late March 2011, M.P.'s delusions and aggressive behaviors were escalating. On Friday April 1, 2011, M.P.'s treatment team coordinator, Andy Prisco, informed supervising nurse Lila Rooks that

¹ The Hospital's statement of facts is primarily drawn from the trial court's findings of fact and conclusions of law. CP 2709-2712.

M.P. was making credible threats towards psychiatric security attendant (PSA) Marley Mann, an African-American, one of M.P.'s 2:1 monitors.² (Mr. Mann has never been a plaintiff to this suit). Mr. Prisco also reported direct quotes from M.P. that he was going to “f*** up any [n word] working with him.” Mr. Prisco did not believe that M.P. posed a credible threat to anyone other than Mr. Mann. CP 2710 (FOF 6). Nevertheless, executive nursing staff decided that M.P. should not have access to African American staff over the weekend in order to maintain safety on the ward. CP 2710 (FOF 7).

On Saturday, April 2, 2011, all but two of the nine plaintiffs were working the swing shift on Ward F-5. CP 2710 (FOF 8). Nurse Barbara Yates called Plaintiff Blackburn, the Ward F-5 charge nurse at the time, and directed that three of Ward F-5's PSAs were to work on three other wards. CP 2710 (FOF 9). When this occurs, the staff is selected based on a “pull list” to ensure staff are pulled from their home wards on an equal basis. CP 2710 (FOF 9). In making her request, Nurse Yates, acting upon a misunderstanding or overreaction, told Plaintiff Blackburn that a white staff person needed to go to Ward F-8, M.P.'s ward. CP 2710 (FOF 7-9). Blackburn refused, indicating the next three pull list staff were all persons

² The term “2:1 monitor” means that one patient is staffed with two attendants at a time. Due to safety concerns, Patient M.P. was regularly staffed 2:1 during the day and swing shifts, and 1:1 at night. *See* Report of Proceedings (RP) at 344:2-23, 353:12-23.

of color. Though Nurse Yates was not instructed by anyone to do so, she then directed that Plaintiff Blackburn send the person “with the lightest skin.” CP 2711 (FOF 10); Report of Proceedings (RP) 148. Plaintiff Blackburn again refused. Later, Nurse Yates selected Plaintiff Bonifacio Fornillos to work on Ward F-8, which he did without event. CP 2711 (FOF 10). M.P. did not commit any assaults over the weekend. On Monday, April 4, 2011 the staffing directive was rescinded. CP 2711 (FOF 12).

2. The Employees Fail To Prove The Staffing Decision Was An Adverse Employment Action.

The staffing decision was very brief in duration, and had limited practical effect. None of the Employees lost any salary, pay, or benefits as a result. CP 2711 (FOF 13). Two Employees were not even on-shift on April 2. CP 2710 (FOF 8). Seven of plaintiffs working that day were simply not “pulled” from their home ward according to the pull list, but instead performed the same tasks on their home ward that they would have performed on Ward F-8. *See* CP 2710. The remaining plaintiff, Bonifacio Fornillos, was pulled to Ward F-8 earlier than he otherwise would have been. But he had not yet been pulled to Ward F-8 on that shift, RP 657, and he completed his April 2 assignment on Ward F-8 without incident. CP 2711 (FOF 10). By April 3, 2015, M.P. was again staffed by African

American staff. Trial Exhibit (Tr. Ex.) 50.

Before trial, the Employees sought to obtain evidence showing that Hospital nurses engage in a “pattern or practice” of “racial staffing.” To this end, all 67 nurses employed at CFS in December 2014 were given a questionnaire agreed upon by the parties asking the nurses about their experience with race-based staffing decisions. *See* CP 2590-91; *see, e.g.*, Tr. Ex. 43. Thirty-nine nurses responded to the questionnaire, with 10 suggesting the nurse had made or knew of an alleged staffing decision that factored in race in the last six years. CP 2754-55, 2773-74. The Employees deposed those ten nurses, CP 2774, which led to a eleventh nurse with similar knowledge, Aboubacar Sidibe.

At trial, the Employees introduced testimony from Nurse Sidibe and four of the ten nurses they deposed: Miner Cancio, Stephanie Hibbard, Nancy Phelps, and Patricia Harrington.³ These nurses testified about “staff swaps,” in which a staff member steps in and performs a task that another staff member is having difficulty completing with a patient, in order to respond to safety needs on the wards and to respond to patient acuity.⁴

³ The Employees did not cite to any testimony from Patricia Harrington in their opening brief. *See* RP 688.

⁴ “Patient acuity” refers to the status of the patient’s psychiatric or medical needs. High acuity patients need additional support, intervention, and treatment. RP 32:2-20.

Critically, testimony from these five nurses revealed only a handful of incidents in which these staff-swaps were prompted in part by a patient's racial aggression. *See e.g.*, RP 173, 670. Nurse Cancio, for example, testified that she made the decision not to staff a female African American patient, L.B., with white men after L.B. attacked and severely injured a white male PSA. RP 719-20. While L.B. had expressed hatred for white men, she had no issues with white female staff or staff of any other minority group, and the staffing decision was therefore prompted by gender aggression as much as by, if not more so than, racial aggression. RP 722. Testimony also revealed that staff swaps are frequently made because a particular staff person triggers patient agitation or violence due to things like clothing color, resemblance to a family member, or height. *See e.g.* RP 670:5-6, 679:12-16.

This testimony did not depart from the Hospital's consistent position throughout this litigation—that while staff swaps acknowledging racial aggression are not common-place, the Hospital must maintain the ability of its clinicians to exercise professional judgment in managing the safety and welfare of the wards. CP 2639, 2141. None of the evidence at trial, therefore, established an “ongoing policy” of “race-based staffing.” And, at trial, none of the Employees could recall a time in which a similar staffing assignment was made after April 2011. CP 2711 (FOF 14).

Plaintiff Jose “Joey” Lopez now claims to have been assigned to patient L.B. on the basis of race because he is a person of color, but admitted that whites were assigned to patient L.B. RP 744:18-25.

In light of this evidence, the trial court ultimately concluded that the Employees failed to prove an adverse employment action, an essential element of their disparate treatment and hostile workplace claims under the Washington Law Against Discrimination (WLAD), RCW 49.60, the only claims the Employees brought to trial. CP 2711 (Conclusion of Law (COL) 5 (no adverse employment action), CP 2712 (COL 8 (conduct not severe or pervasive))). The trial court also concluded that race was not a substantial motivating factor in the staffing decision. CP 2712 (COL 6).

3. The Employees Failed To Prove Their Claims In A Companion Federal Case.

The Employees initially brought employment discrimination claims under 42 U.S.C. § 2000e-2¶ (Title VII) and WLAD, as well as other federal claims, before a federal district court. After the Hospital moved to dismiss the Employees state law claims on Eleventh Amendment grounds, the Employees voluntarily dismissed their state law claims and then refiled them in state court. Judge Leighton dismissed the remaining federal claims on summary judgment. The Ninth Circuit upheld this decision on July 27, 2015. The state law claims, meanwhile,

proceeded to trial in Pierce County Superior Court. The trial court's defense verdict is the subject of this appeal.

IV. STANDARD OF REVIEW

Determining the proper legal analysis for employment discrimination claims under the WLAD is a question of law reviewed *de novo*. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn. 2d 340, 348, 172 P.3d 688 (2007). “Analytically, resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts.” *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007) (quoting *Tapper v. State Employment Sec. Dep't.*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993)). Determining the applicable law and applying it to the facts are questions of law that are reviewed *de novo*. *Id.*

As to establishing the facts, where the trial court has weighed the evidence, appellate review is limited to determining whether the findings of fact are supported by substantial evidence. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799, 803 (1990) (citing *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982)). There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. *Fisher*, 115 Wn.2d at 369.

“Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise.” *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Unchallenged findings are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn. 2d 35, 42, 59 P.3d 611, 615 (2002). Moreover, the Hospital is entitled to have the evidence viewed in the light most favorable to upholding the verdict. *See State v. McNeal*, 145 Wn.2d 352, 359, 37 P.3d 280 (2002).

V. ARGUMENT AND AUTHORITY

Over one weekend in April 2011, senior nursing staff in the Center for Forensic Services (CFS) at the Hospital made a staffing decision in an effort to protect employees, manage a volatile psychiatric patient, and protect the patient. The Employees contend that this decision creates actionable claims under WLAD. Specifically, Employees claim the staffing decision at issue subjected them to race-based disparate treatment and race-based hostile work environments. At trial, the Employees bore the burden of proof on these claims. They were unable to meet that burden because they failed to show they were subject to an adverse employment action, a requisite element of both a disparate treatment and a hostile work environment claim. *MacKay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995) (discussing adverse action in the context of a disparate treatment claim); *Kirby v. City of Tacoma*, 124 Wn. App. 454,

465, 98 P.3d 827 (2004) (same); *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985) (discussing adverse action in the context of a hostile work environment claim).

The Employees ask this Court to depart from decades of state and federal law that requires an adverse action in order to prove “facial discrimination” in the employment context. This Court should decline the invitation to create a significant shift in employment law—particularly where the Ninth Circuit has already refused to do so. Moreover, there is no evidence of an on-going practice or policy of “racial staffing” at the Hospital, let alone substantial evidence of such a practice or policy that would justify disturbing the verdict below or imposing injunctive relief. The trial court’s verdict should stand.

A. The Trial Court Correctly Concluded That The Staffing Decision Did Not Result In An Adverse Employment Action.

The Employees brought a race-based disparate treatment claim against the Hospital under RCW 49.60180(3). CP 2669-72. Disparate treatment, which “is the most easily understood type of [employment] discrimination,” occurs when “the employer simply treats some people *less favorably* than others because of their race, color, religion, sex, . . . national origin” or other prohibited characteristic. *Shannon v. Pay ‘N Save Corp.*, 104 Wn.2d 722, 726, 709 P.2d 799 (1985) (emphasis added), *overruled sub*

silentio on other grounds by Blair v. Wash. State Univ., 108 Wn.2d 558, 740 P.2d 1379 (1987); *Alonso v. Qwest Commc'ns Co., LLC*, 178 Wn. App. 734, 743, 315 P.3d 610 (2013) (citing *Hegwine*, 162 Wn.2d at 354 n. 7).

Because a disparate treatment claim requires the plaintiff to show that, at root, he or she was treated less favorably than other employees, the claim requires a showing of an adverse employment action. *MacKay*, 127 Wn.2d at 310 (holding that in order to prevail a disparate treatment claim, a plaintiff must prove that (1) his or her protected-class status was a substantial factor in (2) an employer's adverse employment decision).⁵ Thus, an employee's burden at trial in a disparate treatment claim is to prove that the employee's protected-class status substantially motivated an adverse employment action. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 186, 187, 23 P.3d 440 (2001).⁶

“An actionable adverse employment action must involve a change in employment conditions that is more than an ‘inconvenience or alteration

⁵ *McKay* involved a claim brought under RCW 49.60.180(2), which prohibits the discharge or refusal to hire any person because of his or her protected class. In the context of a disparate treatment claim, Washington courts treat RCW 49.60.180(3), like its companion provisions, as requiring an adverse employment action in that it requires a material negative change in the terms and conditions of employment. See *Johnson v. Dep't. of Social and Health Svcs.*, 80 Wn. App. 212, 226-27, 907 P.2d 1223 (1996) (discussing a demotion). RCW 49.60.180(3) also provides a statutory basis for a hostile work environment claim. See *Glasgow*, 103 Wn.2d at 404-07; *Payne v. Children's Home Soc. of Wash., Inc.*, 77 Wn. App. 507, 510-11, 892 P.2d 1102 (1995). As explained below, the Employees hostile work environment claim also fails.

⁶ An adverse action is also required under Title VII. *Chuang v. University of Calif. Davis, Bd. of Trustees*, 225 F.3d 1115, 1123 (9th Cir. 2000); see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

of job responsibilities.” *Kirby*, 124 Wn. App. at 465. The action must be sufficiently severe to rise to the level of an adverse employment action. *Id*; *Crownover v. State ex rel. Dep’t of Transp.*, 165 Wn. App. 131, 148, 265 P.3d 971 (2011). Examples of an adverse action in an employment setting include a “demotion, or adverse transfer, or a hostile work environment that amounts to an adverse employment action,” *Kirby*, 124 Wn. App. at 465, and “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Crownover*, 165 Wn. App. at 148.

Here, the trier-of-fact appropriately concluded that the facts of this case did not rise to the level of an adverse employment action. The trial court found that the staffing decision affected one employee (Bonifacio Fornillos) on one shift, on one ward, on one day in April 2011. CP 2710-11 (FOF 8, 9, 10). The trial court found that no plaintiff lost any salary, pay, or benefits as a result of the staffing decision, and that the directive lasted no more than four days. CP 2711 (FOF 12, 13).

Despite the strength of this evidence, the Employees continue to insist they can show an adverse employment action. They argue before this Court that the staffing decision constitutes an adverse action because the staff swap here contravenes RCW 49.60.180(4). Alternatively, they claim that the presence of race alone in the staffing decision is inherently

an adverse employment action. Appellants' Opening Brief (App. Br.) at 31-38.⁷ That is, with regard to the latter argument, the Employees claim that if race was a substantial factor in this staffing decision, that is an adverse employment action in and of itself.

As will be discussed later in this brief, the Hospital does not concede that race was a substantial factor in the staffing decision here; safety was. But as will be explained below, even if race was arguably a substantial factor in the decision here, the Employees ask this Court to do what no court, state or federal, has done before—find that the presence of race alone constitutes an adverse employment action. Not only is this request legally untenable, asking this Court to disregard state and federal law, it is also problematic as a matter of policy for the Hospital, a state-run psychiatric facility. For the reasons that follow, this Court should not announce a new rule of law that does away with the adverse action element in employment discrimination cases.

1. The Employees Do Not Show That RCW 49.60.180(4) Is Applicable Here.

As an initial matter, Employees did not make any argument about RCW 49.60.180(4) below, and cannot raise this new issue of statutory

⁷ The Employees also argue that the trial court erred in concluding there was no adverse employment action because that conclusion was premised on the mistaken factual finding that the staffing decision only lasted a few days. The Employees argue that on the contrary the decision was part of a larger, on-going pattern or practice. App. Br. at 32. As will be argued below, substantial evidence does not support that assertion.

construction now. *Fischer v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350(1998). This Court should therefore disregard the Employees' argument about the effect of RCW 49.60.180(4) on their claims.

But even on the merits, RCW 49.60.180(4) does not provide a basis to vacate the trial court's verdict. The statute plainly explains that it is an unfair practice for any employer to discriminate among *prospective employees* on the basis of a protected class. RCW 49.60.180(4). None of the Employees here were prospective employees. The Employees read the language of the statute concerning application for employment or prospective employment out of the statute. But a reviewing court must "give effect to every word in a statute." *City of Olympia v. Drebeck*, 156 Wn.2d 289, 295, 126 P.3d 289 (2006). This Court should not disregard the language of RCW 49.60.180(4) limiting it adverse actions to those against prospective employees.

The provision has received little treatment in case law, but those cases that analyze it confirm that the statute deals with pre-employment limitations. In *Hegwine*, a plaintiff used RCW 49.60.180(4) to challenge an employer's request to disclose pregnancy as part of a pre-employment medical exam under after the plaintiff's disclosed pregnancy resulted in her employment offer being rescinded. *Hegwine*, 162 Wn.2d at 359. In *Fahn v. Cowlitz Cnty.*, 93 Wn.2d 368, 610 P.2d 857, 861 (1980) *amended*

sub nom. Fahn v. Civil Serv. Comm'n of Cowlitz Cty., 621 P.2d 1293 (1981), applicants for a deputy sheriff position challenged a pre-employment requirement that sheriff's deputies be at least 5'9. *Id.* at 370. The court noted that height requirements disproportionately affect women and some minority groups. *Id.* at 376. In *Wash. State Bd. Against Discrimination v. Bd. of Directors, Olympia Sch. Dist. No. 1*, 68 Wn.2d 262, 412 P.2d 769 (1966), a challenge was brought a school district's request that applicants for employment submit pre-employment photographs, which plaintiffs contended required "a graphic specification of the applicant's race or color" *Id.* at 263-64.

Hence, even if RCW 49.60.180(4) could as a matter of plain-language be read to ignore the focus on pre-employment activity, no court has read it in this manner. Moreover, a review of this case law reveals that the Employees are mistaken in arguing that RCW 49.60.180(4) has been interpreted to prohibit discriminatory behavior with no mention of adverse action. App. Br. at 31. Pre-employment requirements exclude individuals from hire—which is an adverse action as a matter of law, if related to protected status. RCW 49.60.180(1) (explaining that is an unfair practice to refuse to hire a person because of his or her protected status); *Hegwine*, 162 Wn.2d at 355 (explaining that employer conceded it refused to hire plaintiff because of her pregnancy, and this was an adverse action.

RCW 49.60.180 does not provide a statutory avenue by which the Employees can prevail on their disparate treatment claim without showing an adverse employment action.

2. The Employees Suggestion That The Presence Of Race In A Staffing Decision Makes It An Inherently Adverse Employment Action Is Not Supported In Law Or Policy.

The Employees argue that, even if the staffing decision here resulted in a mere temporary alteration in assignment, “when an assignment is expressly based on race, that carries a dignitary harm that amounts to an adverse employment action even in the absence of ‘evidence of termination, demotion, loss of pay or significant reassignment.’” App. Br. at 33. Thus, they argue that the presence of race in an employment decision makes it an inherently adverse action. The Employees can cite to no federal or state law that supports this novel proposition. Moreover, accepting this argument poses challenges from a policy perspective.

a. Federal Law Does Not Support The Employees’ Assertion That The Presence Of Race Alone Makes An Employment Decision An Adverse Action.

In support of their argument that the presence of race makes this staffing decision an inherently adverse employment action, the Employees rely on federal authority to argue that “assigning an employee to a task

based on race [violates federal discrimination law] even if it has no effect on salary, benefits, seniority, or job security.” App. Br. at 33. This authority is unavailing for two reasons.

First, the Ninth Circuit has ruled in the companion federal case to this state law claim that the facts here do not rise to the level of an adverse employment action under Title VII.⁸ Thus, it is unassailable that the federal law cited here by the Employees does not undermine the state trial court’s verdict.

Second, the cases cited by the Employees do not suggest that the presence of race alone constitutes an adverse action. In each case, the employer’s employment decision turned on something more than race alone. For instance, in *Sims v. Montgomery Cnty. Comm’n*, 766 F. Supp. 1052 (M.D. Ala. 1990), plaintiffs brought a claim of segregation based on a police department’s express policy of assigning black officers to work with black officers and white officers with white officers, and assigning black officers to patrol historically black areas of town only. *Sims*, 766 F. Supp. at 1085-86. The employer maintained this practice because it believed African American officers worked better with other African Americans. *Id.* at 1086. This repugnant stereotype resulted in black officers being treated as “special officers . . . not as full-fledged law enforcement officers for all the people of

⁸ This Court may take judicial notice of the Ninth Circuit’s ruling under ER 201, appended here as Attachment A.

the county.” *Id.* Likewise, in *Knight v. Nassau Cnty. Civil Service Commission*, 649 F.2d 157 (2nd Cir. 1981), although the plaintiff’s salary and benefits remained unchanged, he was permanently transferred from one position to another based on his employer’s belief that his race uniquely qualified him for the position. *Knight*, 649 F.2d at 162.

In *Ferrill v. Parker Group, Inc.*, 168 F.3d 468 (11th Cir. 1999), the plaintiff worked for a telephone marketing corporation, making “get-out-the-vote” calls for political candidates. The employer admitted that it engaged in “race-matching,” assigning African American employees to call African American voters and use a “black” script, while white employees were assigned to call white voters using a “white” script. *Ferrill*, 168 F.3d at 471. This resulted in the routine segregation of employees on the basis of race, and the plaintiff was permanently assigned to her position based on her race. *Id.*

In these cases, the presence of race alone did not constitute an adverse action—it was a job assignment based on the false belief, following from repugnant stereotypes, that the plaintiff’s race uniquely qualified him or her for the job. Here, no such calculation was present. The brief staffing decision turned on a mental patient’s credible threat of violence against African Americans. The Hospital’s voiced no perception that the employees’ race impacted their qualifications for the job.

Other federal cases cited by the Employees are equally distinguishable. In *Bridgeport Guardians, Inc. v. Delmonte*, 553 F. Supp. 601 (D. Conn. 1982), the plaintiffs challenged the consistent pairing of “black police officers . . . with other minority officers” and the practice of “permitting white, nonminority officers to avoid being paired with black partners.” *Id.* at 612. The court inferred that these pairing assignments were made on “white officers’ preference not to be assigned to black partners.” *Id.* Here, there is no allegation that the staffing decision was made in order to accommodate the racism of fellow co-workers.

Finally, in *Hunter v. Army Fleet Support*, 530 F. Supp. 2d 1291 (M.D. Ala. 2007), cited by the Employees, the court suggested that segregation would be an adverse action as a matter of law. There, the plaintiffs failed to prove their claim of segregation based on an employer’s purported purposeful maintenance of all-black airplane technician crews. But the court understandably took the opportunity to clarify that a “separate but equal” workplace is not permissible. *Hunter*, 530 F. Supp. 2d at 1295-96.

These cases do not stand for the proposition that simply because race is acknowledged in a staffing decision, a plaintiff has automatically

proven an adverse employment action.⁹ The very brief staffing assignment made here, which the trial court found was made in response to a mental patient's threat-level, is simply not analogous to these cases. And while a showing of segregation of the type contemplated in *Sims*, *Ferrill*, *Hunter* and *Bridgeport* has been deemed by courts to be an adverse action, that showing was not made by the Employees in the trial below, nor could they have shown it. No allegation was made that African-American employees are confined to one ward, one unit, one assignment, or one task.

b. State Law Does Not Support The Employees' Assertion That The Presence Of Race Alone Makes An Employment Decision An Adverse Action

The Employees also cite to no authority under WLAD that suggests the presence of race alone in a staffing decision must constitute an adverse employment action. The Employees claim that Washington courts recognize a broader definition of adverse action than do federal courts, citing *Davis v. W. One Automotive Group*, 140 Wn. App. 449, 166 P.3d 807 (2007). *Davis* makes no assertion about the relationship between WLAD and Title VII. And *Davis* is not a case where the presence of race alone constituted an adverse action. In *Davis*, the plaintiff claimed he was terminated following months of racially offensive comments from his

⁹ Neither is Employees' assertion that "nothing about these cases turned on the length or frequency of the discrimination," App. Br. at 36, supported by these courts' discussions of the facts of these cases.

supervisor and co-workers, and after experiencing the loss of status and benefits he earned. *Id.* at 453-55. He appealed the dismissal of his case on summary judgment, and the reviewing court remanded the case for trial. *Id.* at 461. Here, a trier-of-fact has determined that the complained-of conduct—dissimilar to the conduct in *Davis*—did not rise to the level of an adverse employment action.¹⁰

c. The Employees’ Arguments Are Not Only Legally Untenable, They Are Unworkable From A Policy Perspective.

Given the lack of authority supporting their position, the Employees, in essence, are asking this Court to create a new category of adverse action, based on the facts of a decision divorced from the severity of its consequences. App. Br. at 36. This Court should decline that invitation. The Employees cite no authority under WLAD or Title VII that stands for the proposition that a decision that acknowledges race is inherently an adverse action. Instead, the Employees cite to several cases that are not employment discrimination cases. App. Br. at 36 (citing *Lewis v. Doll*, 53 Wn. App. 203, 765 P.2d 1341 (1989); *Browning v. Slenderella Sys. of Seattle*, 54 Wn.2d 440, 341 P.2d 859, 861 (1959); *Monterey Mech. Co. v.*

¹⁰ The trial court came to this conclusion even having heard the plaintiffs’ testimony that the staffing decision was “deeply offensive and humiliating.” App. Br. at 37. But the employee’s “subjective view of the significance and adversity of the employer’s action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances.” *Hunter*, 530 F. Supp. 2d at 1294.

Wilson, 125 F.3d 702 (9th Cir. 1997); *Billings v. Madison Metropolitan School Dist.*, 259 F.3d 807 (7th Cir. 2001)). There are good policy reasons for why employment discrimination, unlike public accommodation, requires an adverse employment action.

Race is difficult to talk about, and decisions that acknowledge race may feel unpleasant. But there are times when such acknowledgment is appropriate and reasonable. If the Hospital cannot acknowledge that race may trigger safety concerns that in turn trigger staffing decisions even where no adverse action is present, the Hospital would be prohibited from making staff assignments in acute situations such as the following hypotheticals:

- A veteran was a prisoner of war for six years and was tortured by his captors throughout his captivity. The veteran is severely mentally ill and is committed to the Hospital. Due to his war experiences, he has an irrational but very fearful response to individuals of his captors' ethnic origin, which has resulted in him having heart attacks in the past. His doctor indicates that if he has another heart attack, he will almost certainly die. As a result, the doctor does not want staff of his captors' ethnic origin to work with him.
- An African-American man was repeatedly beaten by white youths when he was growing up. He is mentally ill and suffers episodes where he becomes racially and aggressively delusional against whites. He is later committed to the Hospital. On occasions when he becomes delusional and aggressive, experience has shown that non-white staff can calm him down, but the presence of white staff results in him physically attacking the white staff, severely injuring himself, the staff person, and/or neighboring patients in the process. As a result, his doctor

does not want white staff going in to serve this patient during such episodes.

Such scenarios illuminate the conflict between the Employees' argument and the following constitutional rights of others, which the Hospital must balance: right to safe work environment, *L.W. v. Grubbs*, 92 F.3d 894 (9th Cir. 1996), right to safe conditions while in a psychiatric hospital, *Ammons v. Wash. Dep't. of Soc. & Health Servs.*, 648 F.3d 1020 (9th Cir. 2011), right to avoid forced medication, *Sell v. U.S.*, 539 U.S. 166, 123 S. Ct. 2174 (2003), and right to avoid physical restraint, *Youngberg v. Romero*, 457 U.S. 307, 102 S. Ct. 2452 (1982).¹¹

Fortunately, WLAD does not require the Hospital to make staffing decisions that ignore safety, or infringe on the constitutional rights of its patients. As the trier-of-fact concluded, the conduct here was not sufficiently severe to rise to the level of an adverse employment action. Its verdict should stand.

¹¹ The Employees argue at various points, as they did at trial, that the Hospital could have forcibly medicated M.P. or put him in seclusion or restraints instead of making the staffing assignment. *See, e.g.* App. Br. at 29. They cite to the testimony of Dr. Geller in support of these assertions. *Id.* While it is true as a matter of procedure that the Hospital *could* have sought to forcibly medicate or restrain M.P., the fact remains that the patient presumptively has a right not to have such an outcome imposed upon him. Dr. Geller's testimony attacked the Hospital on the basis of the professional judgment of its clinicians, but the efficacy or wisdom of the Hospital's treatment decisions were not on trial here, nor should they have been. Nothing in Dr. Geller's testimony provided evidence about the elements of the Employees claims. The trial court was free to give such testimony less weight, even if unrebutted. *See State v. Hayes*, 81 Wn. App. 425, 430, 914 P.2d 788 (1996) (explaining that a "reviewing court must defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences therefrom.")

3. The Trial Court Correctly Determined That The Absence Of An Adverse Employment Action Here Meant There Was No “Facial Discrimination” Requiring The Hospital To Show A Bona Fide Occupational Qualification

As discussed, the Employees make the erroneous contention that a staffing decision that necessarily acknowledges race is inherently an adverse action. The Employees also make a somewhat related argument, contending that the acknowledgement of race makes the staffing decision “facially discriminatory.” App. Br. at 27. From this misconception, they mistakenly argue that the Hospital’s only defense to this alleged “race-based facial discrimination” is showing that race is a bona fide occupational qualification (BFOQ). *Id.* The Employees argue that because the Hospital did not pursue a BFOQ defense, the Employees should have prevailed as a matter of law. *Id.* The Employees are mistaken. “Facial discrimination” is simply a successful disparate treatment claim; no authority cited by the Employees suggests otherwise. It therefore assumes a showing of an adverse action. Because the Employees failed to prove an adverse employment action, *supra*, they likewise failed to show the staffing decision constituted “facial discrimination.” The BFOQ defense is therefore inapplicable.

a. “Facial Discrimination” Is Proved Only When A Plaintiff Shows Both Elements Of A Disparate Treatment Claim.

Under both state and federal law, facial discrimination requires a showing of both the elements of a disparate treatment claim: 1) an adverse action in which 2) the plaintiff’s status as a protected class member is a substantially motivating factor. *Hegwine*, 162 Wn.2d at 356-57 (describing as “facially discriminatory” a refusal to hire on the basis of sex); *Fey v. State*, 174 Wn. App. 435, 443-45, 447, 300 P.3d 435 (2013) (describing as “facially discriminatory” a refusal to promote on the basis of disability); *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 198, 111 S. Ct. 1196 (1991) (describing as “facially discriminatory” a refusal to hire or promote on the basis of sex); *Bauer v. Holder*, 25 F. Supp. 3d 842, 861 (E.D. Va. 2014) (describing as “facially discriminatory” a constructive discharge based on sex). Said another way, conduct is not “facially discriminatory” until it meets both elements of a disparate treatment claim.

The Employees cite to *no authority* that establishes that an employer’s acknowledgement of race in an employment decision alone, without an adverse action, makes it facially discriminatory. And they cite *no authority* that suggests an employer’s acknowledgement of race in an employment decision is itself an adverse action that renders the decision

facially discriminatory. See App. Br. at 25. *Lovell v. Chandler*, 303 F.3d 1039 (9th Cir. 2002) is a public accommodation case. *Sommer v. Dep't. of Social and Health Servs.*, 104 Wn. App. 160, 15 P.3d 664 (2001) involves the termination of an employee based on disability discrimination. *Los Angeles Dep't. of Water & Power v. Manhart*, 435 U.S. 702, 98 S. Ct. 1370 (1978) considered an employer's requirement that women contribute more to their pension funds than male employees because "women live longer than men." *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 103 S. Ct. 2622 (1983) concerned the disparity between an employer's medical coverage of female employees and female spouses of male employees.

The Employees therefore once again ask this Court to depart from decades of federal and state law and conclude that the mere acknowledgement of race in a staffing decision is enough to prove a disparate treatment claim and hence facial discrimination. For the reasons already discussed in this brief, this invitation is legally untenable and problematic as a matter of policy, and this Court should decline the invitation.

b. The Hospital Is Not Required To Make A BFOQ Defense Where There Is No Showing Of Facial Discrimination.

If a plaintiff proves “facial discrimination”—i.e., he or she proves their disparate treatment claim—an employer may avoid liability under WLAD by showing that the discriminatory action was a BFOQ. *See Hegwine*, 162 Wn.2d at 357-58; *Fahn*, 93 Wn.2d at 379-80. In the absence of an adverse action, therefore, not only is there no showing of “facial discrimination,” there is also no need for a defendant to rely on—let alone prove—a BFOQ defense. The Employees’ argument fails to acknowledge this reality. As discussed above, the Employees failed to prove an adverse action, and therefore failed to prove their disparate treatment claim, which necessarily means they failed to prove that the Hospital made a facially discriminatory decision. The Employees’ discussion regarding a BFOQ defense, including their citation to *Franklin Cnty. Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 646 P.2d 113 (1982) and *Healey v. Southwood Psychiatric Hospital*, 78 F.3d 128 (3d Cir. 1996), is therefore irrelevant to this case. App. Br. at 25-30.¹²

In fact, *Franklin* and *Healey* confirm that a BFOQ defense only becomes relevant when the two-part disparate treatment test is met. In *Franklin*, an employer’s decision not to hire an applicant for a position

¹² Likewise, the Employees’ attempts to dismantle a BFOQ defense the Hospital did not need to make are also irrelevant here. App. Br. at 28-30.

because she was a woman was challenged. *Franklin*, 97 Wn.2d at 321. In *Franklin*, therefore, the BFOQ defense was relevant because the employer discriminated when it refused to hire the plaintiff because of her sex. *Id.* at 328. There is nothing in *Franklin* to suggest the original trier-of-fact skipped the two-part disparate treatment test. *Id.*

In *Healey*, a female child-care specialist working at a child psychiatric hospital was assigned to the night shift because she was a woman, and the policy of the facility was to schedule both males and females to all shifts. *Healy*, 78 F.3d at 130. The night shift was a “less desirable shift, requiring more housekeeping chores and less patient interaction and responsibility.” *Id.*¹³ The Third Circuit held that the employer’s policy was therefore facially discriminatory, and that it must prove a BFOQ defense. *Id.* at 132.

Here, as explained above, there is no adverse employment action that renders this temporary staffing assignment facially discriminatory. The Hospital was not required to make a BFOQ defense, and the trial court did not err by not requiring it to do so.

4. The Employees Fail To Prove The Staffing Decision Here Subjected Them To An Adverse Action.

¹³ This case is further distinguishable from *Healey* in that the staff assignment there was not only undesirable, it was evidently permanent. Here, the staff swap at issue concerned a single patient, in a single shift, on a single weekend.

In sum, as explained, to prevail on a disparate treatment claim—i.e., to show facial discrimination—the plaintiff must prove an adverse employment action. This is black-letter law under both federal and state law, as made clear from the preceding sections of this brief. No court has ever held that an acknowledgement of race alone in a staffing decision is an adverse action. The Employees ask this Court to create a new rule of law and depart from settled state and federal authority without making a showing that such authority is incorrect or harmful.¹⁴ Moreover, the Employees’ invitation to do so presents troublesome policy considerations. Substantial evidence supports the trial court’s findings of fact with regard to the staffing decision at issue here, and the trial court’s corresponding conclusions of law should not be disturbed.

B. Even If The Trial Court Erred In Concluding That Race Was Not A Substantial Factor In The Staffing Decision, Which It Did Not, That Error Makes No Difference To The Court’s Verdict.

In a race-based disparate treatment claim, the plaintiff must show that his or her race was a substantial factor in the claimed adverse action. *MacKay*, 127 Wn.2d at 310. “Substantial factor” means a significant motivating factor in bringing about the employer’s decision. *Id.* The Employees do not dispute these standards. Using these standards, the trial

¹⁴ See, e.g., *In re Stranger Creek and Tributaries in Stevens Cnty.*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

court concluded that race was not a substantial factor in the Hospital's decision, but rather safety was. CP 2711-12. Nevertheless, the Employees argue that this conclusion is an error of law. The Employees argue that the trial court erred when it concluded "race could not be a 'substantial factor' unless the use of race was motivated by 'race-based animus or hostility.'" App. Br. at 39. But this is not the conclusion the trial court made. The Hospital argued that *in the absence of an adverse action*, a challenge to a decision acknowledging race at the very least must include a showing of race-based animus. *See, e.g.*, CP 2909-10. The Hospital alternatively argued with regard to the "substantial factor" element that race was not a substantial factor; safety was. CP 2922. The trial court adopted the latter formulation. CP 2712 (COL 6).

Hence, the trial court did not conclude that a showing of animus was required for the Employees to prevail, rendering the Employees' discussion on the question of animus irrelevant. App. Br. at 39-41. The trial court appropriately balanced the safety-based nature of the staffing decision against the Hospital's acknowledgement that M.P.'s race-based aggression prompted the decision, and properly concluded that safety—not race—was the substantial factor in the staffing decision.¹⁵

¹⁵ The Employees assert that "the State has admitted in open court that race was a factor." App. Br. at 41. This statement strips the Hospital's arguments below of

But critically, *even if the trial court erred in that determination*, its verdict would still stand because, as explained above, the Employees failed to prove the other element of their disparate treatment claim: an adverse employment action. If the trial court erred, that error was harmless. Consequently, this Court need not review the trial court's findings of fact and conclusions of law with respect to the substantial factor element of the Employees' disparate treatment claim.

C. There Is No Evidence That The Staffing Decision At Issue Was Sufficiently Severe Or Pervasive To Affect The Terms And Conditions Of Plaintiff's Employment.

In addition to their race-based disparate treatment claim, the Employees also brought a race-based hostile work environment claim against the Hospital. To establish a claim of hostile work environment based on race, an employee must prove: (1) that he/she was subjected to unwelcome hostile or abusive conduct; (2) that the conduct was based on the employee's race; (3) that the conduct was sufficiently severe to affect the terms and conditions of his/her employment, and (4) the hostile or abusive conduct is imputable to the employer. *See Glasgow*, 103 Wn.2d at 406;¹⁶ *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71,

context, in which the Hospital has always acknowledged that in this staffing decision, race was believed to be a flashpoint for the safety threat that spurred the decision.

¹⁶ In *Fisher v. Tacoma Sch. Dist. No. 10*, 53 Wn. App. 591, 595-96, 769 P.2d 318 (1989), *review denied*, *Fisher*, 112 Wn.2d 1027 (1989), the court explained that the

84, 98 P.3d 1222 (2004); *Antonius v. King Cnty.*, 153 Wn.2d 256, 261, 103 P.2d 729 (2004) (citing *Glasgow*, 103 Wn.2d at 406-07).

Here, the Employees failed to carry their burden under this standard at trial. Citing the very brief duration of the staffing decision, and the fact that the Employees had testified that to their knowledge this type of staffing decision had not happened before or since April 2, the trial court concluded that the Employees had not shown “severe or pervasive” activity. CP 2712 (COL 9, 10). The trial court’s findings were supported by substantial evidence, and it made no mistake of law in when it applied those facts. Its verdict should stand.

1. The Staffing Decision Was Not Pervasive.

Substantial evidence shows the staffing decision was very brief—made on April 1, 2011, communicated on April 2, and rescinded on April 4—and supports the court’s conclusion that the activity was not pervasive. Nurse Manager and RN4 Kelly Saatchi testified that Lila Rooks communicated the staffing decision on Friday, April 1, 2011. RP 384:15-19. All the Employees who worked at the Hospital that weekend testified that the staffing decision was communicated to them on April 2. RP 416, 525-26, 542-43, 598-99, 625, 652-53, 726-27. As early as April 3, 2011, African American staff members were assigned to the swing shift on Ward

test for a hostile work environment based on sex set forth in *Glasgow* applies to a race-based hostile work environment claim as well.

F-8. Tr. Ex. 50. Nurse Saatchi further testified that on Monday, April 4, 2011, she rescinded the staffing decision by letting the RN3s know it was no longer in effect. RP 387:11-17. The trial court specifically found that Nurse Saatchi was a credible witness. CP 2709. Finally, as the trial court noted, plaintiff Dennis Fant testified that plaintiff Polly Blackburn, the charge nurse on the Employees' ward, told Fant on Tuesday, April 5, 2011 that the staffing decision had been rescinded, and that Fant was assigned to Ward F-8 on April 5, 2011. CP 2712 (COL 9); RP at 633-34 (testimony of Dennis Fant). This is evidence of sufficient quantity to persuade a fair-minded person that the staffing decision was made on April 1, 2011, was communicated to the Employees on April 2, 2011, and was rescinded on Monday, April 4, 2011. *See Homan*, 181 Wn.2d at 106

In contrast, Employees' evidence does not undermine the trial court's findings. The Employees first cite to trial exhibits and testimony concerning a staff swap earlier in the week of M.P.'s assigned 2:1 monitors who are not plaintiffs in this case, Marley Mann and Eddie Griffin. App. Br. at 45 (citing Tr. Ex. 22, RP 321, Tr. Ex. 9).¹⁷ This staff

¹⁷ The Employees cite to hearsay statements of nurse Barbara Kaye in Tr. Ex. 9 that on Tuesday, March 29, 2011, Kelly Saatchi told her M.P. "was not to have any black staff assigned as his monitors until further notice." Tr. Ex. 9. The court did not err giving this hearsay statement less weight than Kelly Saatchi's own testimony. *See Hayes*, 81 Wn. App. at 430. Notably, Nurse Saatchi's first day in a new position at CFS was April 1, 2011, RP 378, so it is not even clear she was on duty in CFS on Tuesday, March 29, 2011, as Nurse Kaye's hearsay statements suggest. The Employees also suggest that Nurse Saatchi's statements in a Monday, April 4, 2011, email that "until you

swap was not the broader staffing decision that was made on April 1, 2011, and communicated to the Employees on April 2. The Employees also cite to plaintiff Matt Staley's testimony that in the week leading up to April 2-3, the staffing decision was "being discussed." Appellant's Opening Br. at 45. That is not evidence that its start-date preceded April 1.

Finally, Plaintiff Lopez testified he was asked to leave Ward F-8 on Thursday, April 7 because he was a person of color. RP 729-30. Mr. Lopez testified that he reported this event to his charge nurse, Polly Blackburn, when he returned to his home ward F-5. RP 740. No other witness corroborated Mr. Lopez's version of events, while several witnesses and exhibits showing contemporaneous documentation of events corroborated the April 1 through 4 timeline. This Court must defer to the trial court's apparent decision to give Mr. Lopez's testimony less weight. *See State v. Hayes*, 81 Wn. App. 425, 430, 914 P.2d 788 (1996) (explaining that a "reviewing court must defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences

hear further from me they should continue their assignment" is evidence that the decision lasted beyond April 4. App. Br. at 45 (citing Tr. Ex. 9). Nurse Saatchi's email was written at 8:25 a.m., and further stated that she hoped to have clarification later that day. Tr. Ex. 9. These statements in no way conflict with her testimony that she rescinded the decision on April 4.

therefrom.”). Hence, substantial evidence supports the trial court’s finding of fact regarding the length of the directive.¹⁸

At trial, the Employees argued that the evidence it presented of other people’s experiences with “racial staffing” showed pervasiveness. The trial court appropriately disregarded this evidence in rendering its verdict. As the Hospital argued at trial, evidence of other people’s experiences besides the plaintiffs’ is not relevant to the plaintiffs’ claims because a hostile work environment claim *requires the plaintiff to know the complained of action is occurring*. CP 2861-62 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (explaining that an “objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.”) (emphasis added) and *Glasgow*, 103 Wn.2d at 406-07 (explaining that the alleged “harassment” affect the conditions of the *plaintiff’s* employment)).

Similarly, Plaintiff Lopez’s testimony that he later learned about the staffing decision regarding L.B. does not disturb the trial court’s finding of fact No. 14 that “[s]ince April 2011, none of the plaintiffs have

¹⁸ With regard to the pervasiveness of the staffing decision, the Employees also submit their argument about an “ongoing pattern or practice of race-based staffing.” See App. Br. at 41-42. As the Hospital shows, *infra*, this assertion is not supported by substantial evidence.

been on a shift in which a similar staffing assignment was made.” CP 2711. First and foremost, there has been no showing that this safety-based staffing decision was discriminatory. Second, the staffing assignment regarding L.B. was not “similar” to the staffing assignment made with regard to M.P. in that it mostly indicated gender, not race. RP 722. Finally, Mr. Lopez learned of the staffing assignment regarding L.B. after it ended. RP 732. The trial court therefore could have disregarded this testimony under the standards announced in *Faragher* and *Glasgow*. Substantial evidence supports the trial court’s factual findings about the staffing directive, and the corresponding conclusions of law that the staffing decision was not pervasive.

2. The Staffing Decision Was Not Severe.

Employees also argue that even assuming the staffing decision was temporary, “racial staffing” is sufficiently severe to constitute a hostile work environment. App. Br. at 42. Similarly, they argue that “racial segregation” creates a hostile work environment. App. Br. at 42. Neither argument is applicable here.

The Employees’ relied-upon authority does not support the assertion that *this* staffing decision was sufficiently severe to rise to the level of a hostile work environment. In *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908 (7th Cir. 2010), cited by the Employees, a district’s

court's grant of summary judgment to an employer was reversed, because the circuit court concluded that no reasonable person could conclude the complained of race-based conduct was anything other than a hostile work environment. *Id.* at 912. The conduct at issue included a nursing home's policy of catering to the racial preference of its residents, and barring African-American employees from assisting those residents. *Id.* at 910. For every day of the plaintiff's three months of employment with the nursing home, she was reminded that her race barred her from working with certain residents. *Id.* at 911. And the plaintiff had to endure racially offensive remarks from racist residents. *Id.* Moreover, the nursing home's "practice of honoring the racial preferences of residents was accompanied by racially-tinged comments and epithets from co-workers." *Id.* This included use of the inexcusable "n-word." *Id.* On the strength of this evidence, the Seventh Circuit concluded that summary judgment in favor of the plaintiff was inappropriate.

The facts of this case are different in kind in every way from those of *Chaney*. The plaintiff in *Chaney* was subjected to the complained-of conduct every day she worked, a marked contrast to the staffing event here. Moreover, there are no allegations that co-workers participated in harassing behavior. Most importantly, in *Chaney* the residents asked not to be assisted by African American staff, and the facility agreed to that

request. Here, M.P—with an extensive history of violent assaults, including the one that got him committed to the Hospital as not guilty by reason of insanity—issued credible threats against African American PSAs and the facility acted in response to those threats. The critical distinction with *Chaney* is not the source of the patient’s racism or racial delusions, but the potential actions that follow from that belief—whether that behavior may jeopardize patient and staff safety. Under these circumstances, the severity of the claimed harassment here is not at all akin to that suffered by the plaintiff in *Chaney*. See *Glasgow*, 103 Wn.2d at 406-07 (explaining that whether harassment is sufficiently severe “to seriously affect the emotional or psychological well-being of an employee is a question to be determined with regard to the totality of the circumstances.”).¹⁹ Finally unlike *Chaney*, this case comes before this Court not on *de novo* review of a summary judgment dismissal, but after the Employees had their day in court—and the trier-of-fact determined that the complained-of conduct was not of sufficient severity to rise to the level of a hostile work environment.

¹⁹ For this reason, the situation here is distinguishable from the additional cases Employees cite regarding courts’ understandable disdain for employment discrimination based on “customer preference.” App. Br. at 43 (citing *Olsen v. Marriott Intern. Inc.*, 75 F. Supp. 2d 1052 (D. Ariz. 1999); *Lam v. Univ. of Hawai’i*, 40 F.3d 1551 (9th Cir. 1994); *Gerdome v. Cont’l Airlines, Inc.*, 692 F.2d 603 (9th Cir. 1982)). A civilly committed mental patient exhibiting dangerous and aggressive race-based delusions is no more a customer stating a preference than a drowning person is a customer of the coast guard stating a preference to be rescued.

Finally, the Employees argue that “racial segregation” creates a hostile work environment. This may be true as a matter of law, but the Employees failed to demonstrate that the facts here constitute “segregation.” And, their suggestion that the staffing decision here was especially problematic because it “tends to foster irrational bias and bigotry in the minds of the mentally ill patients,” treads into dangerous territory. Employees ask this Court to hold that, *as a matter of law*, the staffing decision here constituted a race-based hostile work environment because the decision was “bad medicine.” App. Br. at 43-44. This Court should decline the invitation to wade into the judgements of the Hospital’s clinical staff in designing treatment modalities for its roughly 827 patients. This is particularly true where, as explained elsewhere in this brief, the Hospital must also balance the competing constitutional interests of its patients with its staff. The Employees failed to prove at trial that the staffing decision at issue here was of sufficient severity or pervasiveness to rise to the level of a hostile work environment, and this court should not disturb the resulting defense verdict.

D. Substantial Evidence Demonstrates That The Hospital’s Policy And Practice Is To Allow Clinicians To Exercise Professional Judgment In Order To Safely Manage A Ward.

Throughout the life of this litigation, the Employees have repeatedly insisted, despite the lack of evidence supporting their claim,

that the Hospital maintains an “ongoing policy and practice” of “racial staffing.” *See* App. Br. at 20-21; CP 2616-17; CP 2655. The Employees made their case to the trial court below and failed to convince it that such a policy or practice is in place at the Hospital. They now claim that substantial evidence would have supported such a finding, and that the trial court erred when it declined to make such a finding.

The trial court did not err, and substantial evidence does not support the Employees’ assertions. *See Homan*, 181 Wn.2d at 106. Contrary to how it is characterized by the Employees, the testimony of Hospital CEO Ron Adler, Nurse Manager Lila Rooks, and other nursing supervisors and ward nurses did not provide substantial evidence of a “racial staffing” policy or practice in place at the Hospital.

In an attempt to create substantial evidence from the trial record, the Employees selectively cite to the testimony of Mr. Adler. App. Br. at 22-23. In response to Employees’ counsel’s question about whether the Hospital “reserves the right to give a directive that black employees not be assigned to work with a particular patient,” Mr. Adler qualified his affirmative answer by explaining this would be the case “[u]nder unusual circumstances.” RP at 31. Mr. Adler further explained that such a directive would be given where a staff member faced “imminent harm,” RP at 33. Finally, Mr. Adler explained that the decision to make a staff-

swap because of a patient's racial aggression would be based on individualized circumstances. RP 34:1-18. This is not substantial evidence of an ongoing policy or practice of "racial staffing."

Likewise unavailing is the Employees' claim that the testimony of Nurse Manager Lila Rooks supports their assertions. App. Br. at 23. Nurse Rooks did testify that in her 23 years at the Hospital, RP 158, there was one time, other than the incident at issue here, where she staffed African-American employees in response to a patient's racial delusions. RP 174-76. The record is silent on how long this decision was in place. Nurse Rooks also testified that it was "absolutely" unusual to make such a staffing decision. RP at 173. Two unusual staffing decisions based on a patient's racial aggression in a 23-year career is not substantial evidence of an ongoing policy or practice of "racial staffing."

Finally, the Employees attempt to undermine the trial court's well-supported findings by mischaracterizing the testimony of four additional nurses who spoke about limited instances in which a patient's racial aggression prompted a staffing decision. RP 316-67 (Nurse Phelps), RP 554-77 (Nurse Sidibe), RP 663-86 (Nurse Hibbard), RP 706-24 (Nurse Cancio).

For example, Nurse Cancio testified to the incident in which African American patient L.B., who expressed a dislike of white men,

repeatedly bashed a white male PSA's face into a metal door jam. RP 719-20. The PSA required emergency treatment, and never returned to work at the Hospital. RP 720-21, 723. After this experience, Nurse Cancio made the decision not to staff the patient with white men as long as the patient was on Nurse Cancio's ward.

The record, however, does not support the Employees' characterization that Nurse Cancio "testified that she racially staffed Plaintiff Lopez, without his knowledge, to work with [L.B.] because he is not white." App. Br. at 23 (citing Cancio's testimony at RP 717-18). There has been no showing that this safety-based staffing decision was discriminatory, and the staffing assignment regarding L.B. did not require non-whites to work with L.B. RP 722. Moreover, Mr. Lopez learned of the staffing assignment regarding L.B. after she transferred to another ward, RP 732, and Nurse Cancio could not remember with certainty if she had assigned him to work with L.B. before she was transferred. RP 718.

Similarly, the Employees' assertion that Nurse Stephanie Hibbard testified that she "assigns her staff based on their race to accommodate racism expressed by the patients on [her] wards" "on a regular basis" is flatly unsupported by the record. *See* App. Br. at 23 (citing RP 669-70, Tr. Ex. 43). Nurse Hibbard testified that on "a few" occasions, she has

swapped staff to perform tasks if she thinks staff is in danger as a result of a patient's racial aggression. RP at 670.

On a questionnaire regarding staffing decisions, Nurse Hibbard wrote, "Yes, patients do it frequently," in response to the question, "In the past six years, do you know of anyone who took into account a staff member's race or skin color when assigning staff to work with particular patients?" Tr. Ex. 43. She explained in a subsequent deposition that her answer meant that *patients* will frequently ask for staff members based on race or color. RP 669-70. Her answer as to how often and when that translated into a corresponding staffing assignment was unequivocally that it is infrequent and in response to a threat to the safety of the ward. RP 669-70. She further testified that staff-swaps are frequently occasioned by myriad circumstances, such as a patient's aggressive reaction to a perceived resemblance between the staff member and the patient's family member. RP 679:6-16.

Likewise unsupported by the record is the characterization that Nurse Nancy Phelps testified she "regularly engages in racial staffing." App. Br. at 24 (citing RP 326-28 et. seq.). Nurse Phelps could recall three specific instances in which a patient's racial aggression resulted in a staff-swap, one of which was the staff swap at issue here. RP 324:17-25, 326:17-330:4. She confirmed at trial that when she was asked during a

deposition whether she had “ever had patients who were of a racial minority who refused to accept meds from a white staff member,” she replied that “happens to me on a regular basis.” RP 332. She did not, however, testify that she regularly makes a corresponding staffing decision based on the patients’ actions. She explained that staff swaps occur at least monthly based on a host of factors: “race, sexual orientation, sex, whatever, just personality. Some patients don’t like certain staff for some reason, delusions. It can happen for various reasons.” RP 328:22-329:6. She did not testify that staff assignments based on a patients’ racial aggression happened monthly, or were pervasive or frequent. *See* RP 329:9-330:4.

Finally, without citation, the Employees further claim that Nurse Aboubacar Sidibe’s testimony established that “racial staffing has permeated employment” at the Hospital. App. Br. at 24. Nurse Sidibe testified that in seven years of employment with the Hospital, he has been “instructed not to provide medication to a certain patient because of [his] race” approximately six times. RP 555, 560 (recalling a few times, plus a few others beyond that). He explained that it is common “that we get this kind of situation [staff swaps] where I work, and not just for race.” RP 560. This is consistent with the other witnesses, who described that mentally ill patients’ delusions will arise from all kinds of antipathies and

fears, from something as prosaic to the color of a nurse's shirt, RP 670, to the more disturbing racial aggression. RP 328:22-329:6. Nurse Sidibe further described how he himself will step in for another staff member when an assaultive patient makes threats to that staff member. RP 566. He acknowledged that all employees at the Hospital are "basically all treated the same"—all employees are asked to swap out with other staff in order to manage patients safely. RP 566.

In sum, Employees point to *no* evidence in the record, let alone substantial evidence, that supports their assertion there is an "ongoing policy" of "race-based staffing." The lack of evidence at trial is not because Employees were thwarted in their efforts to obtain such evidence. The Employees engaged in extensive discovery, which revealed that out of approximately sixty nurses who work at CFS, only a handful experienced a staff swap prompted by a patient's acuity and racial delusions, each of whom testified at trial as detailed above. *See* CP 2590-91; CP 2754-55, 2773-74; *see, e.g.*, Tr. Ex. 43.

At most the testimony showed that nurses coincidentally and independently use professional judgment in making safety-based staffing decisions. This testimony did not depart from the Hospital's position throughout this litigation that while staff swaps precipitated by a patient's racial aggression are not common-place, the Hospital must maintain the

ability of its clinicians to exercise professional judgment in managing the safety and welfare of the wards. CP 2639, 2141. The trial court did not err in declining to find that the hospital maintains an “ongoing policy and practice” of “racial staffing.”

E. Substantial Evidence Supports The Conclusion That The Employees’ Claimed Fears About Future Staffing Decisions Were Speculative, And Injunctive Relief Is Not Warranted.

The Employees finally ask this Court to impose the injunctive relief they requested in their Complaint. Injunctive relief requires the plaintiff to show: (1) “a clear legal or equitable right”; (2) a “well-grounded fear of immediate invasion of that right” and (4) “that the acts complained of are either resulting in or will result in actual and substantial injury.” *King v. Riveland*, 125 Wn.2d 500, 515, 886 P.2d 160 (1994). In employment suits involving both legal and equitable claims, equitable relief is appropriate *where the plaintiff has proved a violation* of the WLAD. RCW 49.60.030(2) (stating that “any person” “injured by any act in violation” of WLAD may recover damages or any other appropriate remedy authorized by WLAD or Title VII); *Blaney v. Int’l. Assoc. of Machinists and Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 214, 87 P.3d 757 (2004) (noting that Title VII includes equitable remedies like injunctive relief). The Employees failed to prove a violation of WLAD at trial, and the trial court appropriately disregarded their request for relief.

The Employees have not shown such relief is appropriate now. They claim such relief is warranted because the Employees' fears about this type of staffing decision being made again are not speculative. In support of their claim that Employees' fears are not speculative, the Employees reiterate their assertions that the staffing decision lasted longer than April 1 through April 4, and that there is an "ongoing policy and practice of racial staffing." For the reasons discussed elsewhere in this brief, those assertions are not supported by substantial evidence.

F. The Employees Cannot Show An Assignment Of Error That Would Allow This Court To Remand For "Damages Only."

The Employees appear to claim this court may vacate the trial court's verdict as a matter of law, and remand this case for damages only. But many of the Employees' arguments are premised on their contention that the trial court's findings of fact were not supported by substantial evidence. They acknowledge that their contention that the record supports a finding that there is an ongoing policy and practice of "racial staffing" is governed by the substantial evidence standard. *See* App. Br. at 22 (arguing the trial court's failure to find such a policy is not supported by substantial evidence). And to the extent that Employees' challenge to the trial court's conclusions of law here rest on a challenge to the trial court's findings of fact, the Employees cite no authority that would allow this

Court to make factual findings in place of the trial court. *See Fisher Properties*, 115 Wn.2d at 369. If this Court finds reason to reverse the trial court’s verdict because it is unsupported by substantial evidence, the only proper remedy would be remand for a new trial.

At certain points, however, the Employees argue that the presence of race in the staffing decision means the Employees were subject to an adverse action. App. Br. at 24-38. But, as explained, these arguments invite this Court to create a novel rule of law, counseling against application of the new rule here. *See Lunsford v. Saberhagen Holding, Inc.*, 166 Wn.2d 264, 278-79, 208 P.3d 1092 (2009) (explaining that this Court has discretion to apply a new rule of law purely prospectively). A “damages only” remand is not warranted in this circumstance.

G. The Employees’ Request For Costs And Attorney Fees Is Limited To Fees And Costs On Appeal

An employee who proves a violation under WLAD is entitled to costs and attorney fees. RCW 49.60.030(2). But the Employees failed to prove a violation under WLAD at trial. At most, the Employees may recoup costs and attorney fees on appeal if they prevail before this Court—not their fees and costs at trial plus appeal costs and fees. *See Blaney*, 151 Wn.2d at 217 (explaining plaintiff losing WLAD issue at trial but prevailing on appeal was entitled to attorney fees on appeal).

VI. CONCLUSION

The WLAD “embodies a public policy of the highest priority.” *Hill*, 144 Wn.2d at 179 (quoting *Xieng v. Peoples Nat’l Bank of Washington*, 120 Wn.2d 512, 521, 844 P.2d 389 (1993)). It is thus of paramount importance that its provisions continue to apply to true acts of discrimination. Under Washington law, discrimination in the form of disparate treatment or hostile work environment requires a showing of an adverse effect on the terms and conditions of employment. At the close of trial, Employees failed to make this showing. The trial court’s verdict rested on substantial evidence and it made no mistakes of law. Its verdict should stand.

RESPECTFULLY SUBMITTED this 23rd day of September, 2015.

ROBERT W. FERGUSON
Attorney General

s/ GRACE C.S. O’CONNOR
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OID No. 91023
Assistant Attorney General
Attorney for Defendants/Respondents

PROOF OF SERVICE

I hereby declare that on this 23rd day of September, 2015, I caused to be electronically filed the foregoing document: Brief of Respondent State of Washington and I also served a copy on all parties or their counsel of record as follows:

- US Mail Postage Prepaid via Consolidated Mail Service
- ABC/Legal Messenger
- Hand Delivered
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DATED this 23rd day of September, 2015, at Tumwater, WA.

s/ Tina M. Sroor

TINA M. SROOR, Legal Assistant

ATTACHMENT A

FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

JUL 27 2015

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PATRICIA BLACKBURN; et al.,

Plaintiffs - Appellants,

v.

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES; et al.,

Defendants - Appellees.

No. 13-35920

D.C. No. 3:11-cv-05385-RBL

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted July 10, 2015
Seattle, Washington

Before: NGUYEN and FRIEDLAND, Circuit Judges and ZOUHARY,** District
Judge.

Nine employees of a state mental hospital in Washington (“Plaintiffs”) appeal the district court’s grant of summary judgment against them. We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Jack Zouhary, District Judge for the U.S. District Court for the Northern District of Ohio, sitting by designation.

Following entry of summary judgment, Plaintiffs brought suit in state court challenging the same race-based staffing practice at issue here. After a bench trial, the state court concluded that the duration of the staffing practice was limited to a single weekend. We give preclusive effect to that determination. *See Christensen v. Grant Cty. Hosp. Dist. No. 1*, 96 P.3d 957, 960-961 (Wash. 2004).

The individual defendants are entitled to qualified immunity with respect to Plaintiffs' equal protection claims under 42 U.S.C. § 1983 because, at the time they acted, it would not have been clear to a reasonable official that avoiding the assignment of African-American employees to care for a particular violent patient, when done temporarily in response to an imminent safety threat posed by the patient to African-American staff, violated the Equal Protection Clause. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083-85 (2011); *Johnson v. California*, 543 U.S. 499, 515 (2005); *Wittmer v. Peters*, 87 F.3d 916, 918-21 (7th Cir. 1996).¹ Under the specific facts of this case, Plaintiffs' claims under 42 U.S.C. §§ 1985 and 1986 also fail. *See Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971); *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1040 (9th Cir. 1991).

¹ To the extent any individual defendant misunderstood whether the patient's threat pertained to all African-American staff instead of one particular staff member, the mistake was a reasonable one. *See Rudebusch v. Hughes*, 313 F.3d 506, 514 (9th Cir. 2002) (explaining that the qualified immunity standard "allows ample room for reasonable error on the part of the official," including "mistakes of fact and mistakes of law" (brackets omitted)).

Plaintiffs' Title VII claim based on racial discrimination fails because a *de minimis* change in work assignments does not constitute an adverse employment action. *See Robino v. Iranon*, 145 F.3d 1109, 1110 (9th Cir. 1998). Plaintiffs have not demonstrated an entitlement to permanent injunctive relief because they have not shown an "immediate threat of substantial injury." *See Midgett v. Tri-City Metro. Transp. Dist. of Or.*, 254 F.3d 846, 850 (9th Cir. 2001).

Plaintiff Blackburn's retaliation claims under Title VII and the First Amendment fail because she did not suffer an adverse employment action. *See Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1112-13 (9th Cir. 2000); *Thomas v. City of Beaverton*, 379 F.3d 802, 807, 811 (9th Cir. 2004). Any challenge to the district court's dismissal of Plaintiffs' claim for retaliation under 42 U.S.C. § 1981 is waived due to Plaintiffs' failure to address that claim in their appellate briefing. *See, e.g., Dennis v. BEH-1 LLC*, 520 F.3d 1066, 1069 (9th Cir. 2008).

Plaintiff Dau's hostile work environment claim fails because the hospital took "remedial measures reasonably calculated to end the harassment." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1120 (9th Cir. 2004).²

² Plaintiffs' Motion to Correct the Record is DENIED because the document at issue was not before the district court. Defendants' Motion to Strike is GRANTED with respect to the reply brief's references to depositions in the state-court action, but DENIED in all other respects. Defendants' Motion for Judicial Notice is GRANTED with respect to the state-court's findings of fact and conclusions of law and the state-court judgment. We DENY the remainder of Defendants' request for judicial notice, as well as Plaintiffs' request for judicial notice, because additional

AFFIRMED.

state-court documents are not necessary to the determination of this case. *See Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006). Moreover, the documents proffered by plaintiffs are not judicially noticeable for the facts asserted therein because those facts are “subject to reasonable dispute,” and such disputes were resolved by the state court. *See* Fed. R. Evid. 201. Because we affirm on the merits, Defendants’ Motion to Dismiss the Appeal is DENIED as moot.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 31 2015

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Plaintiffs - Appellants,

v.

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DEPARTMENT OF SOCIAL AND
HEALTH SERVICES; et al.,

Defendants - Appellees.

No. 13-35920

D.C. No. 3:11-cv-05385-RBL
Western District of Washington,
Tacoma

ORDER

Before: NGUYEN and FRIEDLAND, Circuit Judges and ZOUHARY,* District
Judge.

The memorandum filed on July 27, 2015 is amended. Plaintiffs' Petition
for Panel Rehearing is DENIED. No further petitions for rehearing or rehearing en
banc will be entertained. Plaintiffs' motion to stay the mandate is DENIED.

* The Honorable Jack Zouhary, District Judge for the U.S. District Court for
the Northern District of Ohio, sitting by designation.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 31 2015

FOR THE NINTH CIRCUIT

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AMENDED MEMORANDUM*

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Plaintiffs have not demonstrated an entitlement to permanent injunctive relief because they have not shown an "immediate threat of substantial injury." *See Midgett v. Tri-Cty. Metro. Transp. Dist. of Or.*, 254 F.3d 846, 850 (9th Cir. 2001). Similarly, Plaintiffs' declaratory relief claim is not ripe for judicial resolution because Plaintiffs have failed to establish a likelihood of future injury. *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999).

Plaintiff Blackburn's retaliation claims under Title VII and the First Amendment fail because she did not suffer an adverse employment action. *See Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1112-13 (9th Cir. 2000); *Thomas v. City of Beaverton*, 379 F.3d 802, 807, 811 (9th Cir. 2004). Any challenge to the district court's dismissal of Plaintiffs' claim for retaliation under 42 U.S.C. § 1981 is waived due to Plaintiffs' failure to address that claim in their appellate briefing. *See, e.g., Dennis v. BEH-1 LLC*, 520 F.3d 1066, 1069 (9th Cir. 2008).

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AFFIRMED.

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