

No. 65713-5-1

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

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JERRY WILLIAMS, individually,

Appellant,

vs.

BOSE CORPORATION, a Delaware corporation; DON CHRISTENSEN
and "JANE DOE" CHRISTENSEN, and the Marital Community
Composed thereof

Respondents.

REPLY BRIEF

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A. Introduction

Bose opens its brief claiming that Williams' appeal brief is "a transparent attempt to inflame the Court" and Williams' statement of facts simply "mischaracterizes the trial of this case." Bose argues on page one of its brief that the evidence only "established that the manager in question made racially inappropriate comments on a few *isolated occasions* and immediately apologized to Williams and stopped his behavior when counseled by management." The Bose brief further states that the manager's conduct did not "create such a dramatic change in his [Williams] employment conditions that it would amount to an adverse employment action," and that even "Williams himself did not find the complained of behavior 'offensive.' "

Bose ignores reality and misstates both the facts and the law.

This is a case in which an African American Bose' employee suffered a constant and daily barrage of racial slurs, racial *jokes*, racial music and other forms of racial put-downs and insults. This is a case in which a Bose' store manager, later demoted to assistant manager for unrelated reasons, hurled racial slurs, including the derogatory words, *nigger* and *boy*, made demeaning comments, such as slavery being the fault of African Americans, played audio books and songs referencing the word *nigger*, and performed *Sambo*, *blackface* and *Buckwheat* routines.

United States Supreme Court Justice Louis Brandeis once said, “The logic of words should yield to the logic of realities.” Here, the facts are clear and the realities even clearer. In its response brief, Bose uses words to cloud realities. *Nigger* is a word. It is clear that Christensen used the word in Williams’ presence on many occasions. *Boy* is a word. It is also clear that Christensen used that word as well in Williams’ presence on many occasions. These words insult and demean, especially when used by a Caucasian in the presence of an African American. The logic of these words creates the logic of realities. These realities suggest that the person saying these words does not respect the person to whom the words are directed and causes harm. That is the logic of the realities.

The Defendants’ actions constituted harassment, racial discrimination, disparate treatment, and an infliction of emotional distress. The Defendants actions further created a hostile work environment for which Williams should be compensated and Bose should be rebuked.

B. The Facts (Words and Realities)

Williams’ was employed at Bose for more than eighteen months. RP 05052010 47:3-12,121:4-8. Christensen was not just a fellow employee, he was the Bose store manager, the highest position at the store. Christensen was later demoted to assistant manager, holding the second highest position at the store. RP 05042010 84:2-4. 105:2-6.

Williams and Christensen spent a great deal of time together because they opened the store. *Id.* 34:4-23.

Christensen used the word *nigger* in Williams' presence frequently, often calling him *boy* as well. Christensen's racist barrage was constant, not isolated, as claimed by Bose. RP 05052010 23:16-28-25, 29:1-17, 34:15-23, 35:20-36:24, 37:24-38:10, 29:18-30:11, 39:14-41:7, 54:5-13, 56:8-25. In addition to the racist slurs, Christensen argued that slavery was not wrong and was the fault of African Americans. *Id.* He also committed overt racist acts in many other ways. *Id.*

When Williams first complained to Robin Ramos, the store's assistant manager, he was told not to "rock the boat." *Id.* 26:17-27-5.

In November 2007, Williams complained to Autry-Schiffgens, who in turn reported the matter to Mike Krassner, to whom Christensen reported. RP 05052010 41:8-22, 141:7-152:24; 05102010 154:12-16.

In February 2008, Williams complained to Marissa Abrams and Jim Donnellan in Bose's Human Resources Department. RP 05052010 155:3- 162:4. Then, although Christensen stopped using the word *nigger*, racist conduct continued until Williams resigned. 05062010 93:24-95:9.

C. Argument

1. **Bose claims that Christensen made “Racially Inappropriate Comments Only on a Few *Isolated Occasions.*” This Is Not True. Christensen’s use of the words *nigger* and *boy*, and his telling of racial jokes, were not isolated incidents. *They were frequent incidents.***

Bose claims that Christensen only made “racially inappropriate comments on a few *isolated occasions.*” Williams testified that it was “a daily barrage of jokes and comments.” RP 051010 8:4-22. A review of the record shows that Bose’s claim that Christensen’s inappropriate comments were made on only *isolated occasions* is not true.

- Williams said Christensen’s use of the word *nigger* was frequent. RP 05052010 56:8-25
- Christensen constantly told *nigger* jokes in Williams’ presence. 05052010 23:16-28-25
- Christensen frequently swore, “sweet chocolate Christ” or, “sweet chocolate Jesus” in Williams’ presence. RP 05052010 29:1-12
- Several times, Christensen referred to Williams as *boy*. RP 05052010 29:13-17
- Christensen constantly played a song in Williams’ presence, because it used the term *nigger* multiple times in its lyrics. RP 05052010 35:20-36:24, 37:24-38:10, 54:5-13

- Several times, Christensen did a *Buckwheat* or *Sambo* routine in Williams' presence. RP 05052010 39:14-41:7
 - Christensen constantly argued that slavery was the fault of African Americans. RP 05052010 29:18-30:11
- Nor was Williams the only one to testify to Christensen's behavior.
- Robin Ramos said Christensen told employees that slavery of was not wrong and that the slave masters took better care of slaves than did the slaves' own families. *Id.* 23:15-26-14.
 - Ramos testified that Christensen put on Ramos' hat and jacket began jigging while saying *mammy* and doing a *blackface* routine. Williams witnessed this incident and was not amused by it. *Id.* 18:24-21:4.
 - Dawn Crozier, manager of the Rockport shoe store located near the Bose Bellevue store, testified that she heard Christensen make racial jokes, and added that it was often. *Id.* 61:5-67:2.
 - She overheard Christensen say he would not hire a Bose African American applicant because the applicant was not just *black*, he was *ghetto black*. *Id.* 62:24-63:21.
 - Shawn Riibe, a former employee at the Bose Bellevue store confirmed that Christensen engaged in racially discriminatory and harassing behavior. *Id.* 135:3-16.

- Riibe testified that Christensen referred to African Americans as *niggers* in front of Williams on approximately 10 different occasions that he heard. He knew Williams was offended by Christensen's inappropriate conduct. *Id.* 135:25-146:8.
- According to Riibe, Christensen engaged in racial joking at least once a week. *Id.*
- Another former Bose employee, Collin Sarchin, testified he heard Christensen make racial jokes containing the word *nigger* and other racially inappropriate jokes. *Id.* 182:25-193:12. Sarchin heard Christensen say the *nigger* approximately five times. *Id.*
- Katherine Autrey-Schiffgens testified she was offended by Christensen's behavior. RP 050610 153:17-155-1, 164:9-173:20, 181:16-191:20.

These were not "isolated occasions" as Bose claimed. As witnesses have testified, it was *frequent, not on rare occasions, approximately 10 occasions, approximately five times, and at least once a week.* The logic of words yields to become the logic of realities.

2. **Bose claims that the manager's [Christensen's] conduct did not "create such a dramatic change in his [Williams'] employment conditions that It would amount to an adverse employment action." Williams**

suffered a constant barrage of “adverse employment actions.”

Bose denies that Christensen’s racially charged actions, especially as Williams’ immediate supervisor and as the manager of the Bose’ store Williams worked in, did not rise to an “adverse employment action.”

First, on page one of its brief, Bose argues, “[n]or did the challenged conduct create such a dramatic change in his [Williams’] employment conditions that it would amount to an adverse employment action.” But, nowhere does the law require a “dramatic change” to create an adverse employment action. A dramatic change is not required to constitute an adverse employment action. Nor is it required to constitute or prove an element of harassment.

Second, on page one of Bose’ brief, the Defendant claims, “Williams never suffered an actual adverse employment action” and on page 28 the Defendant claims, “he [Williams] did not identify a *single* adverse employment action taken against him.”

In *Burlington Northern & Santa Fe Railway Co. v. White*, the United States Supreme Court held that an “adverse employment act” is any act which might “dissuade a reasonable worker from making or

supporting a charge of discrimination.” *Id.* 548 U.S. 53, 67-8 (2006)¹ (resolving contradictory holdings among the circuits in Title VII cases and reviewing the issue of how harmful an “adverse employment action” must be in order to constitute retaliation). *Id.* at 60.

The Supreme Court found some circuits, namely the Fifth and the Eighth, had adopted a restrictive approach they called the “ultimate employment decision” standard, which limited actionable retaliatory conduct to acts “ ‘such as hiring, granting leave, discharging, promoting, and compensating.’ ” *Id.* at 60 (citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (CA5 1997) and *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (CA8 (1997))). At the same time, other circuits, namely the Seventh and the District of Columbia, *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (CA7 2005) and *Rochon v. Gonzales*, 438 F.3d 1211, 1217-18 (CADC 2006)), had applied a less limiting standard, one where an “ ‘employer’s challenged action would have been material to a reasonable employee,’ ” which “would likely have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’ ” *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. at 60.

¹ The Supreme Court cited *Rochon v. Gonzales*, 438 F.3d 1211, 1217-18 (CADC 2006) quoting *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (CA7 2005).

The U.S. Supreme Court sided with the later circuits, finding that an “adverse employment act” is any act which might “dissuade a reasonable worker from making or supporting a charge of discrimination.” *Id.* at 67-8.

From the Supreme Court’s ruling it is apparent that Bose’s claim that, “he [Williams] did not identify a *single* adverse employment action taken against him,” is false. Bose is relying on a definition of “adverse employment action” that the Supreme Court thoroughly rejected, that “adverse employment actions” must be actions directly relating to “hiring, granting leave, discharging, promoting, and compensating.”² After the 2006 case of *Burlington Northern & Santa Fe Railway Co. v. White*, decided after *Robel v. Roundup Corp.*, 148 Wn.2d 35, 74 n. 24, 59 P.3d 611 (2002), *Kirby v. City of Tacoma*, 124 Wn.App. 454, 465, 98 P.3d 827 (2004) and *Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729 (2005), it is apparent that the definition of “adverse employment actions” is much broader than what Bose argues.

² The U.S. Supreme Court quoting from Fifth and Eighth Circuit cases which had applied the more restrictive definition of “adverse employment action” they called the “ultimate employment decision” standard, which limits actionable retaliatory conduct to acts “such as hiring, granting leave, discharging, promoting, and compensating.” *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. at 60 (citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (CA5 1997) and *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (CA8 (1997))).

One of the questions the Supreme Court resolved was, how harmful does an “adverse employment act” have to be. An “adverse employment act” is not, contrary to Bose’s argument, one of the “ultimate employment decision[s]” previously held by the Fifth and Eighth Circuit, but simply an action that would reasonably dissuade Williams from making a charge of discrimination.

This could have an effect on *Kirby v. City of Tacoma* and *Robel v. Roundup Corp.*, which held that:

Washington courts have defined "adverse employment action." According to our Supreme Court, discrimination is "an actual adverse employment action, such as a demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action." *Robel v. Roundup Corp.*, 148 Wash.2d 35, 74 n. 24, 59 P.3d 611 (2002).

Kirby v. City of Tacoma, 124 Wn.App. 454, 98 P.3d at 833.

Although it seems that *Burlington Northern & Santa Fe Railway Co. v. White* on the one hand and *Kirby v. City of Tacoma* and *Robel v. Roundup Corp.* on the other hand, can be read in harmony, to the extent that the above statement from *Kirby v. City of Tacoma* and *Robel v. Roundup Corp.*, restricts the definition of “adverse employment acts” to one narrower than found by the Supreme Court’s in *Burlington Northern & Santa Fe Railway Co. v. White*. It can no longer be good law.

Here, Christensen was the Bose manager in Bellevue. He was, at first, the Bose' store manager, and thus, Williams' manager. Later, he was demoted for unrelated reasons to Bose's assistant store manager, but still, William's immediate supervisor. His actions were the actions of Bose' management. His actions were the actions of Williams' employer. And, here, it is simple. Christensen's abusive behavior, in Williams' presence, constituted "adverse employment act[s]".³

3. **Bose claims that even "Williams himself did not find the complained of behavior 'offensive.'" Williams was offended as were his fellow employees**

³ To the extent that Bose argues there is some distinction between discrimination issues and retaliation issues in defining "adverse employment action," the definition of "adverse employment actions being interpreted more broadly in retaliation claims than in discrimination claims, Bose would be wrong. The Supreme Court explained the basis of and the scope of the wider breadth of the term, "adverse employment actions" in retaliation cases, "the Court explains today in *CBOCS West, Inc. v. Humphries*, ante, at 13 [___ U.S. ___, 128 S.Ct. 1951, 1954-55, 170 L.Ed.2d 864 (2008)], *Burlington N. & S. F. R. Co. v. White*, 548 U. S. 53, 63-65 (2006), states that "we have since explained that anti-discrimination and anti-retaliation provisions are indeed conceptually distinct, and serve distinct purposes." *Post*, at 4 (dissenting opinion). But as the Court explains today in *CBOCS West, Inc. v. Humphries*, ante, at 13, "[i]n *Burlington* . . . we used the status/conduct distinction to help explain why Congress might have wanted its explicit Title VII anti-retaliation provision to sweep more broadly (*i.e.*, to include conduct *outside* the workplace) than its substantive Title VII (status based). anti-discrimination provision. *Burlington* did not suggest that Congress must separate the two in all events." *Gomez-Perez v. Potter*, No. 06-1321 fn 1 (U.S. 5/27/2008) (2008).

Bose argues that Williams did not find the use of the words *nigger* and *boy* in his presence offensive. Nor did he find the *racist jokes* or arguments that *slavery was not wrong and was the fault of African Americans*, offensive. In all of this, the word that comes to mind is *ludicrous*.

Williams was offended. RP 050510 24:14-25:19, 050610 119:4-21, 051010 8:4-22 and 66:2-67:21. We know this through the testimony of Michael Krassner, the manager of Bose's Bellevue store after Christensen was demoted:

Q. What did you learn from Jerry [Williams]?

A. Would you like me to read it?

Q. Yes.

A. "Don makes comments that are too graphic. He makes black jokes, jokes about Jesus, Jewish jokes, and Indian jokes. He steps outside of boundaries when making these jokes and does not know when to censor himself. He points out racial groups and goes way overboard. On 11-4-2007 he made the comment of "Come on, boy, you, too," referring to the bowling party. Don does lots of "boy" jokes around Jerry which offends him because it's a black racial slur. Jerry cleans the store and tries to ignore him. It's frustrating as a daily barrage of jokes and comments.

BY MR. MARTIN:

Q. And did Jerry refer to in his context that these were a constant, daily barrage of jokes and comments?

A. That's the very last line. "It's frustrating as a constant daily barrage of comments."

RP 051010 8:4-22.

Many other Bose employees were, as well, offended. In fact, Bose would be hard-pressed to find any Bose' employee, other than Don

Christensen, who did not find Christensen's *racially charged name calling, racial jokes and other racially negative communications* offensive. In fact, Bose cannot point to a single employee, other than Don Christensen, who would say they heard Christensen's bigotry and found it to their liking.

Among those who found Christensen's words and actions to be offensive was Shawn Riibe. He testified, as follows:

Q. And did you ever while working at Bose with Jerry hear Don Christensen tell jokes that were racial in nature?

A. Yes.

Q. What kind -- can you describe to the best of your recollection the kinds of jokes that you heard?

A. Well, some of them were racist. Some of them were religious. As far as details of the jokes themselves, I don't remember, unfortunately.

Q. Did you ever observe Don Christensen tell jokes about African Americans?

A. Yes.

Q. And were they offensive jokes?

A. From what I remember, yes.

Q. Did he ever tell those jokes in front of you and Jerry?

A. Yes.

Q. Did you--when he told those kinds of jokes, did you make any observations? Did Jerry Williams tell you how he felt about those jokes?

A. Yeah. I mean, as soon as Don would walk away, we would look at each other. There wasn't anything specifically said, but we each knew that we were kind of offended by it. We felt it wasn't right or even needed to be said.

RP 050410 135:25-136:24.

Q. When Mr. Christensen engaged in racial behavior in front of Jerry Williams, did you observe in Jerry Williams any emotional impact or effect based on your observations?

A. Yes.

Q. Can you describe that to the jury?

A. Basically his face would just kind of go blank, like, did he really just say that? And you could tell he was a little offended by it at the time.

A. Did you ever notice Jerry Williams doing things to keep busy to stay away from Mr. Christensen?

A. Yes.

Id. 142:14-25.

Collin Sarchin testified:

Q. When you overheard Mr. Christensen engage in racial joking with respect to different ethnicities or African Americans, how did that make you as a Bose employee feel?

A. Slightly uncomfortable; however, I didn't take any responsibility for it.

Q. Explain you "didn't take any responsibility for it."

A. I noted it. I didn't report it.

Q. You did feel it was inappropriate?

A. That's correct.

Q. Were you offended by it?

A. I was not personally offended by it.

Q. Aside from you personally, did you find the conduct in and of itself offensive?

A. Yes.

Id. 187:4-19.

Bose' argued that Williams did not find the use of the words *nigger* and *boy* offensive in his presence, and that he did not find offensive the *racist jokes* or arguments that slavery was not wrong and that it was the fault of African Americans.

Williams, in fact, was deeply offended. Each employee who heard Christensen's racial slurs and jokes was offended.

4. **Bose' argument that Williams did not complain about Christensen's use of the word *nigger* or *boy* as well as other racial slurs and *jokes*. Contrary to Bose's argument that Williams asked to have *his hours increased and resigned with a letter that spoke of his experience at Bose as "great."* It was not In Williams upbringing or character to be a complainer or a quitter.**

Williams was born in and spent much of his early childhood in Mississippi during the 1980s and 1990s. *Id.* 9:24-16:9, 25:11-17. He heard the word *nigger* and *boy* used frequently, many times directed at him. *Id.*

During the time when I grew up there, I actually had an opportunity to see a lot of things that made me grow up very fast. At that time, period-- my mother-- when she got down there, she didn't have an opportunity to work, so the first thing she ended up doing is going on welfare. She took care of two kids on welfare.

All of us came out to be better than what we were as we went through that experience, but it was probably one of the most hardest experiences I have ever gone through in my life, especially seeing the segregation during the time period I was down there.

It pretty much was a two-sided track. There was a railroad and there was a black side and there was a white side. So pretty much it was a constant every day that you went to school you had to cross railroad tracks into the white area.

When you crossed the railroad tracks over into the white area, you experienced what you would call everyday segregation. They would call you "nigger" while you were walking across the track or school. It was something I got accustomed to when I was young, so I was able to see it. I

didn't know what it meant at 5 years old, 6 years old, 7 years old, going up to 13.
RP 05052010 10:6-11:4⁴

Williams grew up not complaining. In Mississippi, you simply did not complain. You simply blocked it out.

I heard him make jokes. I got to the point where I was like I'm going to block this stuff out now because I know I'm in my stages of trying to get through this, so let me block it out. There were jokes made, but it was to the point where I had checked out on listening to what he was saying at that point with his friend.

Id. 60:13-19.

But, after months of just blocking it out, the first time Williams did complain, he was rebuffed by the store assistant manager, Robin Ramos.

“Don’t rock the boat,” Ramos told him. *Id.* 26:17-27-5.

But, still you could not quit.

My mother has never taught me to quit. I was not going to give up, stop the plans that I had, for somebody doing something to me. It was like if I – you first start quitting something, you will always be quitting something in your life.

I felt like, why should I quit? I need to finish what I came here to do and move on to the next step. But I feel even at the point when I did quit, I wasn't ready to do it on my terms. I felt like it was more -- I had no choice because it kept progressively getting worse. I felt like at that point

⁴ “A child born to a Black mother in a state like Mississippi has exactly the same rights as a white baby born to the wealthiest person in the United States. It's not true, but I challenge anyone to say it is not a goal worth working for.” Thurgood Marshall, Justice, United States Supreme Court.

that I was single, working in the field by myself. I felt like it was just me, and then I felt like there was the staff.

Id. 41:25-42:12.

Then why the resignation letter about his “great” experience at Bose?

When I wrote that letter, I was thinking on behalf of do I want to be negative and say all negative stuff about Bose in this letter, or can I be a professional about it and put professional words in it? That's what I did.

The way I explained it, I had a great relationship with the staff, whether it was John, Collin, Nse, Katherine; I felt like my relationship was decent with them because everybody was open in that way. With the management staff, like I said, I don't dislike Don and I don't dislike Krassner. I don't agree with the way they treated people, but that doesn't mean that you have to dislike them. You just work. That's what I look at it as. It's just work to me.

Id. 43:8-21.

Williams is a product of the South. A man who heard the word *nigger* hurled at him at an early age. As a boy he could not understand how anyone could hate you because of the color of your skin. RP 05052010 11:10-25. As a man he had found his own way to deal with overt racism. Shut it out. Don't complain. Don't quit. Make the best of a bad situation. And, when you leave for a better job, resign like a professional--“put professional words in it.”

5. **The Trial Court Erred in Not Granting Williams' Motion for a New Trial on the Issue of Harassment**

Williams has met all four elements of harassment,⁵ substantial justice has not been done, CR 59(a)(9), and the jury's verdict was contrary to the law, CR 59(a)(7).

Bose argues that there was "overwhelming" evidence presented that "Williams did not view Christensen's conduct as offensive or abusive."

First, employer's actions need not be abusive, only unwelcome.

Second, it is a stultifying argument to make that an African American does not find it unwelcome to have his Caucasian manager use the derogatory terms, *nigger* or *boy* in his presence.

As to the first element of Williams' harassment claim, Williams was offended. He so testified. RP 050510 24:14-25:19, 050610 119:4-21, 051010 8:4-22 and 66:2-67:21. Michael Krassner testified, "Don makes comments that are too graphic. He makes black jokes, jokes about Jesus, Jewish jokes, and Indian jokes. He steps outside of boundaries when making these jokes and does not know when to censor himself. He points

⁵ In order to establish a prima facie claim for harassment, a plaintiff must show that he suffered harassment that was (1) unwelcome, (2) because he was a member of a protected class, (3) affected the terms and conditions of his employment, and (4) was imputable to the employer. *Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004).

out racial groups and goes way overboard. On 11-4-2007 he made the comment, "Come on, boy, you, too," referring to the bowling party. Don does lots of *boy* jokes around Jerry which offends him because it's a black racial slur. Jerry cleans the store in an attempt to try to ignore Christensen. It's frustrating as a daily barrage of jokes and comments." *Id.* 8:4-22. Williams' fellow employees testified that he was offended. RP 050410 135:25-136:24, 142:14-25, 187:4-19.

Most importantly, and contrary to Bose' argument that Williams was not offended by Christensen's racist slurs,⁶ there were no Bose' employees who supported this outlandish argument.

As to the second element of Williams' harassment claim, Williams is African American, a protected class. Bose does not dispute this fact.

As to the third element of Williams' harassment claim, Christensen's and Bose's actions affected the terms and conditions of Williams' employment at Bose. Bose argues, on page 38 of its brief, that Christensen's racist slurs occurred only on "isolated occasions" and therefore could not have affected the terms and conditions of Williams' employment at Bose.

"Although a single act can be enough, generally, repeated incidents create a stronger claim of hostile environment, with the strength of the

⁶ Also, see Section C 3 above.

claim depending on the number of incidents and the intensity of each incident.” *King v. Bd. of Regents of Univ. of Wisconsin Sys.*, 898 F.2d 533, 537 (7th Cir. 1990). Here, there was not a single act.

Contrary to Bose’s argument, Christensen’s racist slurs were not isolated. They were frequent, constant and pervasive. See Section C 1 above and the testimony of Williams, Robin Ramos, Dawn Crozier, Shawn Riibe, Collin Sarchin, and Katherine Autrey-Schiffgens. Also, see the testimony of Michael Krassner, Christensen’s immediate boss:

Don makes comments that are too graphic. He makes black jokes, jokes about Jesus, Jewish jokes, and Indian jokes. He steps outside of boundaries when making these jokes and does not know when to censor himself. He points out racial groups and goes way overboard. On 11-4-2007 he made the comment of "Come on, boy, you, too," referring to the bowling party. Don does lots of "boy" jokes around Jerry which offends him because it's a black racial slur. Jerry gets by by cleaning the store and trying to ignore him. It's frustrating as a daily barrage of jokes and comments.

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Virtually every employee at Bose’s Bellevue store and even Bose’s management, through Michael Krassner, admitted that Christensen’s actions affected the terms and conditions of Williams’ employment at Bose.

As to the fourth element of Williams’ harassment claim, Christensen was the Bose manager in its Bellevue store. Christensen’s actions were imputable to Bose. Bose made no argument to the contrary.

The court should reverse the trial court's order and grant Williams a new trial on his claim of harassment.

6. **The Trial Court erred in granting Bose' and Christensen's Motion for Summary Judgment on the Issues of Racial Discrimination-Disparate Treatment, Unlawful Retaliation, Negligent Supervision, Negligent Infliction of Emotional Distress and Intentional Infliction of Emotional Distress-Outrage**

a. **Racial Discrimination/Disparate Treatment**

Bose claims Williams failed to present any evidence of disparate treatment and racial discrimination. But, this was a summary judgment.

Bose has the burden of proving there are no genuine issues of material fact, and all material evidence and reasonable inferences therefrom must be considered in the light most favorable to Williams. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

The only element of Williams' racial discrimination and disparate treatment claim⁷ that Bose disputes is that Williams suffered an "adverse employment act."

An adverse employment act is any act which might "dissuade a reasonable worker from making or supporting a charge of discrimination."

⁷ An employee must present evidence from which a reasonable trier of fact could find the employer's (1) intentional discriminatory actions, (2) were a substantial factor, (3) leading to an adverse employment action. See *Kastanis v. Educ. Emp. Union*, 122 Wn.2d 483, 491, 859 P.2d 26, 865 P.2d 507 (1993) and *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 71, 821 P.2d 18 (1991).

Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. at 67-8.

The U.S. Supreme Court has rejected the more restrictive definition of “adverse employment action” urged by Bose. See Section C 2 above for a more thorough discussion of this issue.

When viewed in the best light towards Williams, where Williams has presented evidence from which a reasonable trier of fact could find Christensen’s acts constituted an adverse employment action and with Bose having failed to meet its burden of proof to show there is no material issue of fact, the trial court should reverse the trial court’s ruling on summary judgment on Williams’ claim of racial discrimination and disparate treatment.

b. **Retaliation**

In light of Bose’s arguments on the issue of retaliation and in light of the expanded definition of “adverse employment action” under ***Burlington Northern & Santa Fe Railway Co. v. White***, Williams has nothing to add to his opening brief.

The court should reverse the trial court’s ruling on Bose’s motion for summary judgment on Williams’ retaliation claim and set the matter for a new trial.

c. **Common Law Claims**

Assuming that *Batacan v. Reliant Pharm., Inc.*, 228 Fed.Appx. 702, 705-6 (9th Cir. 2007) and *Francam v. Costco Wholesale Corp.*, 98 Wn.App. 845, 864-5, 991 P.2d 1182(2000), are the current laws, and they appear to be, in addition to the arguments set forth in Williams' opening brief, to the extent the court reverses the harassment, racial discrimination and disparate treatment, or retaliation claim, it should also reverse each of the common law claims.

7. **The Trial Court erred in excluding the testimony of Dr. Albert Black**

Contrary to Bose's assertions, Dr. Black would not have testified on the ultimate legal issues of this case. Also, contrary to Bose's assertions, Dr. Black is imminently qualified to testify on issues within his expertise of sociology. And finally, contrary to Bose's assertions, Dr. Black would not have been asked to provide a definition of "hostile work environment."

What is even more important, and as stated in Williams' opening brief, Dr. Black would have been asked to testify about "Christensen's actions and the inactions of Bose management in the context of an African American rather than that of a Caucasian being on the receiving end of Christensen's verbal hand grenades." See Williams' Opening Brief at 44.

8. **The Trial Court erred in admitting the testimony of Brandy Miller**

While the court did not see fit to allow Dr. Black's testimony, it did allow the reading of Dr. Miller's deposition, which when looked at in the context of the defense counsel's entire line of questioning, which line of questioning was to attempt to have Dr. Miller testify that Williams either lied to the Arlington Police Department about his mental and emotional distress or, without any supporting evidence whatsoever, that Williams was a sociopath and should not be believed by the jury.

To this testimony, Bose claims that "Dr. Miller only brought up the issue of Williams being some sort of sociopath in response to general questions about the circumstances in which a psychologist might be able to detect severe emotional distress in an individual." Bose Response Brief at 47.

But, that is not true. Dr. Miller used the term "sociopath" six times in the 2 ½ pages Williams quoted in his opening brief.

This testimony was highly prejudicial. It constituted such a high degree of unfair prejudice that its admission mandates a new trial.

D. Conclusion

The United States has come a long way in overcoming racism in the workplace but it still has a long way to go. Minorities have made great

strides in the workplace, but today there is still a very low percentage of minorities, compared to Caucasians, in corporate America.

In the late 1990s, Texaco paid \$176 million in a highly publicized race-discrimination lawsuit because of comments made about African Americans at a corporate meeting. The award was a wake-up call to many in corporate America who believed that expressions of racism were a thing of the past. However, instead of being gone, racism has just become less open and overt. Today, it is simply more subtle and still underlies much of today's workplace behavior.

Here, the words *nigger* and *boy* shows proof that Christensen's racism was open and overt. "The logic of words should--must--yield to the logic of realities."

For all of the reasons stated above, each of Williams' claims should be reversed and this matter remanded to the trial court for a new trial.

RESPECTFULLY SUBMITTED at Lakewood, Washington, this

24th day of April 2011.

THADDEUS P. MARTIN & ASSOCIATES, LLC

By 
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Attorney for Appellant

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No. 65713-5-1

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

JERRY WILLIAMS, individually,

Appellant,

vs.

BOSE CORPORATION, a Delaware corporation; DON CHRISTENSEN
and "JANE DOE" CHRISTENSEN, and the Marital Community
Composed thereof

Respondents.

CERTIFICATE OF SERVICE - REPLY BRIEF

LAW OFFICES OF THADDEUS P. MARTIN & ASSOCIATES

Thaddeus P. Martin, WSBA # 28175

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Of Attorneys for Appellant

ORIGINAL

CERTIFICATE OF SERVICE

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

Portia Moore Sheehan Sullivan-Weiss Roger Leishman 1201 3rd Ave Ste 2200 Seattle, WA
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[XXX] by causing a full, true, and correct copy thereof to be E-MAILED to the party at their last known email address, per prior agreement of the parties, on the date set forth below followed by regular mail.

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

Executed at Tacoma, Washington on the 24 day of April, 2011.



Corie Hanson, Paralegal