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No. 93883-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HASSAN FARAH, et al.,

Plaintiffs/Petitioners,

v.

HERTZ TRANSPORTING, INC., MATT HOEHNE,
and TODD HARRIS,

Defendants/Respondents.

MEMORANDUM OF AMICUS CURIAE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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I. INTERESTS OF AMICUS CURIAE

The Washington Employment Lawyers Association (WELA) is a chapter of the National Employment Lawyers Association. WELA comprises more than 160 attorneys who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life.

II. SUMMARY OF ARGUMENT

This Court should grant Hassan Farah's Petition for Review and hold that in a discrimination case under RCW 49.60 a trial court must give a requested pretext instruction pursuant to *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001), when one is supported by the evidence. Review is appropriate under RAP 13.4(b)(4): whether a court must give such an instruction is an issue of first impression in Washington and the subject of a federal circuit split in Title VII cases. The issue is also of the utmost importance to furthering the mandates of the Washington Law against Discrimination ("WLAD") and the right to a jury trial.

Contrary to what the court of appeals concluded, without a specific instruction juries are unlikely to understand they may infer unlawful discrimination from the falsity of the employer's reasons for its actions. Indeed, the United States Supreme Court has issued numerous opinions

over the past 40-plus years explaining and re-explaining this concept to judges. Pretext is an integral part of the anti-discrimination framework. A judge *must* deny an employer's motion for summary judgment (or judgment as a matter of law) where the jury can reasonably conclude the employer's explanation for its actions is a pretext for unlawful discrimination. Under the court of appeals' decision, the judge need not inform the jury of the very legal rule that entitles the plaintiff to get to the jury in the first place. Because the court of appeals' opinion undermines both the WLAD and right to a jury trial, this Court should grant review.

III. ARGUMENT

A. Juries Will Not Intuitively Understand that Proof of Pretext Can Establish Proof of Unlawful Discrimination.

Reeves v. Sanderson Plumbing Prods., Inc., holds that in a jury trial "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation" for an adverse employment action. 530 U.S. 133, 147 (2000) (emphasis in original). In *Hill* this Court took *Reeves* a step further and held that a prima facie case of discrimination plus evidence of pretext will "*ordinarily* suffice to require determination of the true reason for the adverse employment action by a fact finder in the context of a full trial. . . ." 144 Wn.2d at 186-87 (emphasis added).

It is undisputed that here plaintiffs proposed a legally correct pretext instruction based on the holdings of *Hill* and *Reeves*. It is also undisputed that the evidence presented at trial supported a pretext instruction. In rejecting the necessity to give a pretext instruction, the appellate court reasoned that juries will understand based on general jury instructions and attorneys' arguments that they can infer unlawful discrimination if they do not believe the employer's reasons for its actions. *Farah v. Hertz Transporting, Inc.*, 196 Wn. App. 171, 383 P.3d 552, 558 (2016). The court of appeals was wrong.

The past four decades of anti-discrimination jurisprudence demonstrate that it is not intuitive or obvious—even for judges with the benefit of extensive legal briefing—that proof of pretext is a sufficient basis for the jury to infer discrimination.[1]

[1] The Supreme Court first tackled this question in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). It held a plaintiff who had established a prima facie case of discrimination could prevail at trial by showing that the employer's stated reason for its actions was in fact a pretext. *Id.* at 804. The Court held that at trial Green "must be afforded a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons . . . were in fact a cover[-]up for a racially discriminatory decision." *Id.* at 805.

In *Texas Dep't of Community Affairs v. Burdine*, the Court ruled that one of the primary purposes of a trial in a Title VII case is to provide the plaintiff with "the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. . . . She may succeed in this either directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. 248, 256 (1981).

The Court revisited the *McDonnell Douglas-Burdine* framework in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The Court "granted certiorari to determine whether, in a suit alleging intentional race discrimination in violation of . . . Title VII of the Civil Rights Act of 1964, . . . the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff." *Id.* at 504. The Court said no, 5-4. The majority made clear, however, that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of discrimination." *Id.* at 511 (emphasis in original).[2]

Hill v. BCTI Income Fund-I, adopted a modified "hybrid-pretext" approach for the WLAD. 144 Wn.2d at 194. Consistent with Title VII and WLAD precedent, *Hill* sets forth two separate, but interrelated, ways in which a plaintiff may prove discrimination. First, the plaintiff may submit evidence that directly shows the employer was motivated by a discriminatory animus. Second, the plaintiff may prove discrimination by showing that the employer's explanation for its adverse employment action is a pretext. *Id.* at 179-80. Sufficient evidence of *either* type, or

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[2] *St. Mary's Honor Ctr.* did not put to rest judicial confusion about the relationship between a finding of pretext and unlawful discrimination. As this Court recounted at length in *Hill*, after *St. Mary's Honor Ctr.*, "[f]ederal circuits found themselves split into three camps" regarding this question: (1) pretext only (evidence of pretext always sufficient to support jury finding of discrimination); (2) pretext-plus (evidence of pretext never sufficient to support jury finding of discrimination); and (3) hybrid-pretext (evidence of pretext may support jury finding of discrimination). 144 Wn.2d at 182-83. In *Reeves* the U.S. Supreme Court unanimously endorsed the third option. *Id.* at 183-84 (citing *Reeves*, 530 U.S. at 140, 147-48).

from a combination of both types, requires a jury trial on the plaintiff's discrimination claim. *Scrivener v. Clark College*, 181 Wn.2d 439, 446-448, 334 P.3d 541 (2014).

Fell v. Spokane Transit Auth. holds that "[t]he question of pretext is generally a question for the trier of fact when there are competing inferences of discrimination." 128 Wn.2d 618, 642, 911 P.2d 1319 (1996). There this Court further recognized that the plaintiff must be given the opportunity at trial to prove that the employer's claimed reasons for its actions are "a mere pretext for discrimination." *Id.* at 643. How can a jury decide the "question of pretext" without an instruction telling the jury that pretext is a question that it must decide, what pretext means, and the legal significance of the plaintiff's proof of pretext?

Failing to instruct the jury that it may infer discrimination from evidence of pretext requires jurors to intuit a subtle legal principle that continues to stymie even the ablest judges.[3] As the Tenth Circuit observed, jury confusion on this point is likely and it is "unreasonable . . . to expect that jurors, aided only by the arguments of counsel, will intuitively grasp a point of law that until recently eluded federal judges who had the benefit of such arguments." *Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002). And, given the "inordinate amount of ink that

[3] *See, e.g., Scrivener v. Clark College*, 176 Wn. App. 405, 309 P.3d 613, (2013), *rev'd* 181 Wn.2d 439, 334 P.3d (2014).

has been spilled over the question of how a jury may use its finding of pretext, it would be disingenuous to argue that it is nothing more than a matter of common sense." *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 281 (3d Cir. 1998).

General instructions informing the jury that they should find for the plaintiff if the plaintiff shows that a discriminatory motive as a substantial factor in the employer's decision do nothing to solve this problem. As the Third Circuit explained, absent a pretext instruction, "jurors who found no evidence fitting the examples of circumstantial evidence referred to in the [general jury instruction] but who disbelieved the employer's explanation could reasonably conclude that there was no evidence on which they would be permitted to base a plaintiff's verdict." *Smith*, 147 F.3d at 280; *see also Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 578 (5th Cir. 2004) (holding that a "permissive pretext instruction was not substantially covered in the [general] charge as a whole"). Juries who are instructed that the plaintiff must prove that the employer was substantially motivated by a discriminatory factor will naturally look for evidence directly proving an improper motive—and not necessarily for evidence that the employer lied about its motives.[4]

[4] The federal circuit courts which have held that a pretext instruction is not mandatory have largely done so without even considering the possibility of juror confusion. *See, e.g., Fite v. Digital Equip. Corp.*, 232 F.3d 3, 7 (1st Cir. 2000); *Gehring v. Case Corp.*,

In this case, the court of appeals decided that the substantial possibility of juror confusion was "not compelling enough" to require a pretext instruction and that "[t]he court's general instructions were sufficient for Farah to inform the jury of the applicable law." *Farah*, 383 P.3d at 560. This reasoning places the jury in the intolerable position of having to intuit a legal principle that this Court and the U.S. Supreme Court have had to explain and re-explain time and again.

Kastanis v. Educational Employees Credit Union, 122 Wn.2d 483, 494-95, 859 P.2d 26, 865 P.2d 507 (1993), does not support the court of appeals' decision and its reliance on that case was misplaced. *See Farah*, 383 P.2d at 558.[5] Unlike the shifting burden instruction, a pretext instruction is easy to understand and avoids the confusion associated with shifting burdens.[6]

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43 F.3d 340, 343 (7th Cir. 1994); *Moore v. Robertson Fire Prot. Dist.*, 249 F.3d 786, 789–90 (8th Cir. 2001); *Browning v. United States*, 567 F.3d 1038, 1040 (9th Cir. 2009), *cert. denied*, 559 U.S. 1067 (2010).

[5] In *Kastanis* this Court rejected the employer argument that the trial court should have instructed the jury that the plaintiff *must prove* that the employer's explanation was a pretext for discrimination. Because the plaintiff does not have to prove pretext in order to prove discrimination, *Scrivener*, 181 Wn.2d at 446-448, such an instruction would have been legally erroneous.

[6] The court of appeals reasoned that "[i]nstructions on pretext or shifting burdens would create 'needless confusion.'" 383 P.3d at 557 (quoting *Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 524, 832 P.2d 537 (1992), *aff'd on other grounds*, 123 Wn.2d 98, 864 P.2d 937 (1994)). *See also* Response to Petition for Review at 10. But the jury instruction rejected in *Burnside* as confusing addressed not only pretext but also the elements of "the 'prima facie case' the 'burden of persuasion,' and the 'shifting burden of production.'" *Burnside*, at 524 (citing *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979)). The

"This court has held that the purpose of the WLAD—to deter and eradicate discrimination in Washington—is a policy of the highest order." *Fraternal Order of the Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 246, 59 P.2d 655 (2002). The Court should accept review and hold that achievement of this public policy requires that trial court judges give an appropriate pretext instruction where, as here, the plaintiff requests such an instruction and the evidence warrants one.

B. The *Farah* Decision Undermines the Right to a Jury Trial.

Under the Washington Constitution, "[t]he right of trial by jury shall remain inviolate." Wash. Const., Art. I, § 21.7. "The term 'inviolate' connotes deserving of the highest protection" and "indicates that the right must remain the essential component of our legal system that it has always been." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). The right "must not diminish over time and must be protected from all assaults to its essential guaranties." *Id.*

It is axiomatic that each party in litigation is entitled "to have their theories of the case presented to the jury by proper instructions" where there is evidence to support them. *Dabroe v. Rhodes Co.,* 64 Wn.2d 431,

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court correctly concluded that "[i]t creates needless confusion to instruct the jury on these burdens." *Id.* But, as the court of appeals acknowledged, a simple pretext instruction avoids the complexity of shifting burden instructions. 383 P.3d at 557-58.

435, 392 P.2d 317 (1964). That right is not "affected by the fact that the law is covered in a general way by the instructions given." *DeKoning v. Williams*, 47 Wn.2d 139, 141, 286 P.2d 694 (1955). The basis for this principle is the constitutionally-protected right to a jury trial. *Cf. Allen v. Hart*, 32 Wn.2d 173, 175, 201 P.2d 145 (1948).

Fell, Hill, and *Scrivener* all establish that under the WLAD a plaintiff may prevail at trial simply by showing that the employer's reason(s) for its actions are a pretext for discrimination. A judge must decide an employer's motion for summary judgment under CR 56 or a motion for judgment as a matter of law under CR 50 based on that well-established legal rule. But if the jury in the same case is not instructed that it may find discrimination based on the plaintiff's proof that the employer's explanation for its conduct is a pretext, the result is that the jury may decide the case under a different legal standard and one less favorable to the plaintiff than the judge was legally required to apply.

A court's failure to instruct a jury that the plaintiff's proof of pretext may establish discrimination effectively creates two different legal rules in discrimination cases: one for the judge and one for the jury. Without a pretext instruction a jury will have no way of knowing that the law requires consideration of pretext evidence in deciding whether the plaintiff has proven discrimination. The arguments of plaintiffs' counsel

cannot possibly be a substitute for an instruction informing the jury of this legal principle. The judge instructs jurors that they "must disregard anything the lawyers say that is at odds with . . . the law in my instructions" WPI 1.01 (2012). A jury who looked to the arguments of plaintiff's counsel for the law governing the plaintiff's discrimination claim would violate the court's instructions. Thus the trial court's failure to give a pretext instruction when the evidence warrants it effectively prevents a discrimination plaintiff from presenting his or her theory of the case to the jury in violation of the constitutional right to jury trial.

IV. CONCLUSION

This Court should grant Farah's petition for review and hold that it is an abuse of discretion for a trial court not to give a pretext instruction when the plaintiff requests one and the evidence warrants it. Any other outcome will jeopardize both the anti-discrimination mandates of the WLAD and the constitutional right to jury trial.

RESPECTFULLY SUBMITTED this 12th day of January 2017.

WASHINGTON EMPLOYMENT
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By:

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2017, I emailed a copy of Memorandum of Amicus Curiae Washington Employment Lawyers Association in Support of Petition for Review to:

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

DATED at Seattle, Washington on this 12th day of January 2017.

Janet Francisco