94747-3

Court of Appeals No. 73847-0-1

SUPREME COURT OF THE STATE OF WASHINGTON

VICTOR TERENCE WASHINGTON,

Plaintiff-Appellant,

v.

GROUP HEALTH COOPERATIVE,

Defendant-Respondent.

PETITION FOR REVIEW

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TABLE OF CONTENTS:

seeking to introduce that a party as litigious serves no other purpose to inflame the jury....[t]he charge of litigiousness is a serious one, likely to result in undue prejudice against the party charged," Outley, 837 F.2d at 592. 1) Is the Court of Appeals in err when they believe an Order of Limine is NOT a rolling objection? 2) And their opinion disregards Appellants brief regarding the Order of Limine and the prejudicial effect of GHC ignoring it? 3) And When defense violated the Order Limine under *Outley* is this Prejudiced under *Outley* and thus grounds for New Trial ?

ISSUE 6.....4

This Supreme Court's Allison v. Housing authority of Seattle (1991) *"stressed the desirability of conformity between the standards of causation for retaliatory discharge and for discrimination claims"* ? Is this Court of Appeals in conflict with this Supreme Court's *Allison* when it does not uniformly apply causation for retaliatory discharge under *Wilmot* v. *Kaiser Aluminum* to a WLAD disability discrimination claims as argued in Mr. Washington's brief ? Id.

ISSUE 7.....5

When Mr. Washington satisfies prima facie case of disability discrimination (*Washington v. Boeing)* for being terminated hours after he gave notice of heart issues and 3 weeks after he earn perfect performance reviews. Under this Supremes Court's *Scrivener v. Clark College*, Does the court if Appeals err when they do not apply *Scrivener* to the final Prong of Pretext for no temporal connection to termination as required under *Scrivener.* This final Prong establishes liability.

D. STATEMENT OF CASE

In a failure to accommodate a disability, the Court of Appeals found Mr. Washington notified GHC that *"He had Heart Issues"*. However, the Court of Appeals believes

notice of "Heart Issues" is not notice of a disability". This undermines the WLAD and is in opposition to legislative intent that the WLAD is a policy "of the Highest Priority". *Allison v. Housing Authority quoting RCW 49.60.* THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT The Court of Appeals conflicts with *Goodman v. Boeing, Martini v. Boeing, Sommer v. DSHS* and the GHC failed to accommodate Mr. Washington after he gave notice of his heart issues. And remand to Superior Court New Trial for damages only as per *Sommer v. DSHS.*

THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT: The Court of Appeals conclusions of law regarding "Substantial Evidence" Is ins conflict with the WLAD'S intent and is undermining the WLAD under RCW 49.60. THE WLAD STATES *"Washington's Law Against Discrimination contains a sweeping policy statement strongly condemning many forms of discrimination. RCW 49.60.010.....this chapter shall be construed liberally *86 for the accomplishment of the purposes thereof." ....., ' vindicating a policy `of the highest priority'"* The Court of Appeals conclusions of law conflict with this Supreme Court's, *RE Marriage Rideout, Port of Seattle v. PCHB and* THE LEGISLATIVE INTENT OF RCW 49.60 (*Allison v. Housing Authority.*)

THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD The Court of Appeals err when it determined Mr. Washington could not bring the issue of Wrongful Termination in Violation of Public Policy when the Washington State Supreme court reformulated this law during the appeal, under *Rose v. Anderson Hay* (Sept. 2015) and *Becker v. Community Health Services. See Anderson Hay & Grain., Becker v. Community Health Service.*

THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD: Order of Limine is long established rolling objection under law in this case Defense violated the Order Limine under *Outley,* 837 F.2d at 592. To "introduce *that a party* {Mr. Washington} *as litigious serves no other purpose to inflame the jury".* Appellant's brief Pg 50-53. The WLAD is *"a policy `of the highest priority'".* Which under RAP 13.4 this is of high public interest and importance. *Allison v. Housing Authority.*

The integrity and intent of the WLAD was subverted when Order limine under *Outley* was ignored at closing. Defense told the Jury, *"he did not tell them {GHC} he sued Starbucks.....he learned from prior litigation it is important to keep a paper trail"* Defense closing Pg. 11-12..

THE WASHINGTON SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT Under *Allisson v. Housing Authority of Seattle* the importance of *"conformity between the standards of causation for retaliatory discharge and for discrimination claim".* And

the WLAD is Public Policy of the highest priority, in which *Allisson* states the RCW "Supports a more liberal standard of causation". Under RAP 13.4(b)(4) states a petition involves an issue of substantial public interest that should be determined by the Supreme Court. The WLAD is of substantial interest as determine by this States Legislature when the wrote into RCW 49.60 is public Policy of Highest priority. This intersection of 13.4(b)(4) and the WLAD establish why to court should accept review.

ISSUE 7.....20

When Mr. Washington satisfies prima facie case of disability discrimination (*Washington v. Boeing)* for being terminated hours after he gave notice of heart issues and 3 weeks after he earn perfect performance reviews. Under this Supremes Court's *Scrivener v. Clark College*, Does the court if Appeals err when they do not apply *Scrivener* to the final Prong of Pretext for no temporal connection to termination as required under *Scrivener.* This final Prong establishes liability.

WASHINGTON STATE CASE LAW:

STATUES:

RULES:

A. IDENTITY OF PETITIONER

The petitioner is Victor Terence Washington, Appellant in the Court of Appeals Div. 1 and plaintiff in King County Superior court proceeding.

B. COURT OF APPEALS DECISION

Issues for Review concern the Washington State Law Against Discrimination (WLAD) RCW 49.60 disability discrimination, Failure to Accommodate Disability and Flagrant Prejudicial Misconduct of Court Appeals Division 1, 30 May 2017 decision against Appellant; Victor Terence Washington v. Group Health Co-op (GHC), No. 73847-0-1. The Court of Appeals denied timely motion to reconsider on 5 July 2017.

Issue on Appeal was Abuse of Discretion under CR 59 motion for new trial (1) Evidence did not match verdict. (2) Flagrant Prejudicial Misconduct.

In April 2017 Mr. Washington motioned via RAP 3.4 for Transfer of Interest. Washington State Insurance Commissioner in February 2017 Issued Final Order that Group Health Co-op transferred interest to Kaiser, GHC no longer exist per Order. Defense unexpectedly filed a motion and declaration that GHC interest was not transferred. This Petition for Review denotes the employer as GHC, however the Commissioners' Order says Kaiser. Court of Appeals denied RAP 3.4.

C. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Did Defense criminalize Mr. Washington in a Disability Discrimination case under (WLAD), to inflame, prejudice the Jury with misconduct so flagrant and ill-intentioned no instruction would have cured the prejudice? When Defense at closing referred to Appellant's (Mr. Washington) Military Service being fraudulent or *"Fishy"*, that his uneventful Bankruptcy, *" was one of the darker deceptions in this case"*. And extensive character vouching, numerous opinions that Mr. Washington was dishonest and that Mr. Washington who is African American is a Big Mac Daddy (successful pimp).

1. Did the misconduct materially affect Mr. Washington's substantial rights under CR 59(a), Alcoa v Aetna Gas, and deprived Mr. Washington of a fair trial ? Alcoa v. Aetna Cas. & Sur. Co., 998 P.2d 856 (Wash. 2000)

2. Under this Supreme Court's *Palmer v. Jensen*, 132 Wash.2d 193, 198, 937 P.2d 597 (1997) did the Court of Appeals *"neglect to analyze {CR 59(a)}....failed to undertake an independent review"* as required in Palmer ? Palmer v. Jensen, 132 Wash.2d 193, 198, 937 P.2d 597 (1997). The Court of Appeals neglected to analyze and discuss this key issue that Appellant briefed in great detail, including a motion for new evidence. And Court of Appeals did not decide this case as per RAP 12.1(a) "issues set forth in the briefs"

ISSUE 2: When the Court of Appeals found Mr. Washington explained to Mr. Sims (GHC Supervisor) *"that* he {Mr. Washington} *had heart issues..... heart related medical appointments.....{and} Washington e-mailed... "notifying them of a medical condition and appointment."*. Did the Court of Appeals err when it determined these statements are <u>NOT</u> "Notice of a Disability" under Goodman v. Boeing, Martini v. Boeing and Sommer v. DSHS; that states *"notice {disability} then triggers the employer's burden to take "positive steps" to accommodate the employee's.....to determine the nature and extent of the disability "* ?

Here the Court of Appeals determined substantial evidence Mr. Washington was disabled. To establish liability for failure to accommodate disability, the element remaining was "Notice of Disability". The Court of Appeals believed that the employer (GHC) being notified of "heart Issues by Mr. Washington and his email *"notifying them of a medical condition"* are not "Notice of Disability" as matter of law but *"a question of fact for the Jury"* Appeals opinion Pg. *16*

1. Did the Court of Appeals err that "Notice of Heart Issues" is not Notice of Disability.
2. Did the Court of Appeals Div. 1 err when it did not apply Martini v. Boeing (Div1) that has an identical fact pattern for "Notice of Disability" as this case.

3. Did the Court of Appeals err when they used Jury instructions instruction for their analysis and not the law as required under CR 59a7

ISSUE 3: Under this Supreme Court's *Re Marriage Rideout* the court found, *"written documentation can often be determined as a matter of Law"*. Re Marriage *Rideout*, 110 Wash. Regarding this failure to accommodate a disability case. Is an uncontested email where its' subject states, *"Medical Condition Notification"*, a question of law to determine if *"Medical Condition Notification"* constitutes "Notice of Disability" under RCW 49.60, *Goodman v. Boeing, Martini v. Boeing, Sommer v. DSHS* ?

1. And does this Supreme Court's Port of Seattle v. PCHB, 90 P.3d 659 (Wash. 2004) establish the standard of " *[t]he process of applying the law to the facts ... is a question of law and is subject to de novo review.*

2. Thus, did the Court of Appeals err when they found the email "Medical Condition Notification" was a Jury question to determine if it was "Notice of Disability". *Goodman*, 127 Wash.2d at 408, 899 P.2d 126, *Martini* at 457, 945 P.2d 248 , *Sommer v. Dep't of Soc. & Health Servs.*104 Wash.App.160, 170, 15 P.3d 664 (2001)

3. Did Court of Appeals Div 1 err when it did not apply Sommer v. DSHS (Div 1) that says "Simple Notice of a Disability" meets employee's burden however in this case Court of Appeals Div 1. Does consider Notice of Heart issues to be notice of disability.

ISSUE 4: After the verdict in this case, this Supreme Court reformulated the law of Wrongful Discharge in Violation of Public Policy under this Court's *Rose v. Anderson Hay and Becker v. Cmty. Health Sys.* 1) Does this Court's Brundridge v. Fluor Federal Services (Wash. 2008) allow an issue (Wrongful discharge in violation public policy) to be brought up for the first time, if the issue is based on new law established during the appeal. *Brundridge v. Fluor Federal Services*, Inc., 191 P.3d 879 (Wash. 2008). 2) And does RCW 49.60.020 and this Supreme Court's *Allison*

v. Housing Authority **(Wash. 1991) establish statutory impetus for the WLAD to " *be construed liberally for the accomplishment of the purposes thereof.* " *...a policy `of the highest priority'*.**

In *Rose and Becker* this Supreme Court abandoned the longstanding analysis for determining the adequacy of this tort. Before this change in law, Mr. Washington could not bring this issue in good faith. As a result of the reformulation, Mr. Washington in his Appeals brief argued Wrongful Discharge in Violation of Public policy. Appellant's opening brief 29-34. This Courts new standard under *Rose, Becker* determined that *Wilmot* should be applied in Wrongful termination cases to determine liability under causation and proximity time of protected activity and employment termination. *Wilmot v. Kaiser Aluminum & Chem Corp.,* 118 Wn.2d at 68-69. The Court of Appeals refused to consider the reformulated Wrongful Termination, they state *"record shows that he{Mr.Washington} makes this argument for the first time on appeal"*

ISSUE 5: Order Limine was in place by Appellant. The order Limine under Outley states, " *that seeking to introduce that a party as litigious serves no other purpose to inflame the jury....[t]he charge of litigiousness is a serious one, likely to result in undue prejudice against the party charged," Outley,* 837 F.2d at 592. 1) Is the Court of Appeals in err when they believe an Order of Limine is NOT a rolling objection? 2) And their opinion disregards Appellants brief regarding the Order of Limine and the prejudicial effect of GHC ignoring it? 3) And When defense violated the Order Limine under *Outley* is this Prejudiced under *Outley* and thus grounds for New Trial ?

<u>ISSUE 6</u>: This Supreme Court's Allison v. Housing authority of Seattle (1991) *"stressed the desirability of conformity between the standards of causation for retaliatory discharge and for discrimination claims"* ? Allison v. Housing Authority of City of Seattle, 821 P.2d 34

(Wash. 1991). Is this Court of Appeals in conflict with this Supreme Court's *Allison* when it does not uniformly apply causation for retaliatory discharge under *Wilmot* v. *Kaiser Aluminum* to a WLAD disability discrimination claims as argued in Mr. Washington's brief ? Id.

1. Is the Court of Appeals in err when it did not apply this Court's *Allison and Wilmot related to conformity of Standards of Causation.*

Allison v. *Housing Authority* established *Wilmot v. Kaiser,* should have been applied in this case when "proximity of time" is causation to establish improper motive and thus liability. Under *Wilmot* liability was established when a, *"worker filed a workers' compensation claim, that the employer had knowledge of the claim, and that the employee was discharged." Wilmot, at 69.* In this disability discrimination case there is proximity time of a few hours of Mr. Washington giving notice of heart issues (disability) and related work schedule needs. RP 394-395, Appeals opinion pg 7-8. Here, Mr. Washington told his supervisor he could not change his schedule due to heart related issues and was terminated a few hours later.

ISSUE 7:

When Mr. Washington satisfies prima facie case of disability discrimination (*Washington v. Boeing)* for being terminated hours after he gave notice of heart issues and 3 weeks after he earn perfect performance reviews. Under this Supremes Court's *Scrivener v. Clark College,* Does the court err when they do not apply *Scrivener* to the final Prong of Pretext for no temporal connection to termination as required under Scrivener ?

D. STATEMENT OF CASE

1. FACTUAL BACKGROUND DISABILITY DISCRIMINATION CASE

Issues are the Court of Appeals conclusions of law under WLAD for Disability Discrimination and Failure Accommodate a disability, are in conflict with Washington State Supreme Court

decisions and Appellate decisions as well. The Court of Appeals found Mr. Washington had "substantial evidence" of disability, which leaves the element of "notice of disability" to establish liability of Failure to Accommodate Disability. The Court of Appeals found Mr. Washington notified his Supervisor of heart issues on 8, 9 August 2012. RP 394-395, Appeals Opinion pg 7,8. However, **the court did not believe Notice of Heart issues was "Notice of Disability" as a matter of law.** Appeals opinion pg 7-8, 13-16.

Mr. Washington was terminated a few hours after he gave notice of heart issues and explained he needed an adjust work schedule for such. Appeals opinion Id, CP 415-417, 472-475, 487-492, RP 135-145, 367-375 Joint Statement of Evidence, Ex. 9, 11, 12. In addition to being terminated, Mr. Washington he experienced different terms and conditions. He was expected to have a "standard work schedule", whereas no else in Mr. Sims (GHC Supervisor) group had the requirement. CP 503-505, RP 374-376, Appellant's brief pg 39-43. The Court of Appeals believed different terms and conditions of employment in Disability Discrimination case, has nothing to do with disability discrimination. Id.

Ill-intentioned flagrant prejudicial misconduct by Defense Attorney was briefed by Appellant but bypassed and neglected by Court Appeals Div. 1. Appellant opening brief 17-26, 27, 44, Appendix; Appellant response 1-4, 19; Motion(s) for new evidence. The Court of Appeals did no review whatsoever. Mr. Washington motioned to admit new evidence. The Court of Appeals did no analysis or discussion to establish flagrant misconduct, this was neglected as well. The new evidence is the *Appendix section of Appellants brief.*

2. MR. WASHINGTON'S DISABILITY OF HEART ISSUES AND NEED FOR ACCOMMODATION OF A DISABILITY ADJUSTED WORK SCHEDULE.

More than 5 years before Mr. Washington worked at GHC, he was diagnosed with

medical conditions of Cardiomyopathy, Sarcoidosis, Hypogonadism and Sleep Apnea that go back to 2007. RP 452-53, 458, 699, 704, 715-717 CP 592, 595-601 JSE Ex. 121-123,127-28, Trial testimony of Dr. Mark Sullivan ("Dr. Sullivan"), part of University of Washington Medical Center's ("UWMC's") cardiology team, stated Mr. Washington is, *"in the cardiology clinic because he has Sarcoidosis and Heart Failure."*. RP 453, 458 JSE 80,121. And Mr. Washington's Pulmonologist, Dr. Raghu UWMC testified at trial as well. Dr. Raghu diagnosed Mr. Washington Sarcoidosis and his issues of chronic fatigue. RP 707, 710, 699, 714-16. Mr. Washington in late June 2012 was being effected by his medical conditions including his heart issues. RP 126-30, CP 652-53. Mr. Washington asked his GHC supervisor, John Sims ("Mr. Sims") for medical accommodation in the form of an adjusted work schedule to begin work earlier so he could do his job. This was the first time Mr. Washington needed or asked for Disability Accommodation RP 126-138,394-395. CP 472-473, JSE Ex. 20. Mr. Sims initially verbally granted Mr. Washington's request for a schedule change. The second time he gave notice of disability was 8,9 August 2012. The undisputed dates Mr. Washington gave notice of his disabilities is on 8 and 9 August 2012. RP 394-395. At trial Mr. Sims made it clear that Mr. Washington gave him **Notice of Heart issues** that he was seeing doctors for such. RP 394-395. And Mr. Washington also sent an email on 9 August 2012 with subject, "Medical Condition Notification". RP357-358, Joint Statement of Evidence (JSE) Ex. 9.

GHC Senior Manager Mr. Raustein, conceded at trial that GHC knew Mr. Washington needed accommodations and that *"some accommodations were made to that, to accommodate Mr. Washington. And that* ***there were issues with that,*** *and* ***he was being asked to move back*** *".*CP 309, RP 680-681, 394-395, Appellant Opening Brief pg 16-17. What Mr. Raustein describes here directly

relates to 9 Aug 2012, the day Mr. Raustein gave his approval for Mr. Sims to terminated Mr. Washington. This was the same day Mr. Sim's told Mr. Washington to change his schedule because it was "Inconvenient" for his manager Mr. Burton. CP 479, Appellant brief pg 11.

Mr. Washington gave Mr. Sims notice of Heart condition on 8 and 9 August 2012. RP 394-395, Appeals opinion pg 7-8. Several hours later on 9 August 2012, Mr. Sims went to Mr. Raustein to get his ok to termination. RP 328-329, CP 294-295 309-310, 472-475, 492, 518-519. When Mr. Washington needed the adjusted schedule, he discussed his heart issues and doctor appointments with Mr.Sims. RP 394-395, Appeals opinion pg 7-8. Again Mr. Raustein concedes that GHC knew Mr. Washington needed accommodations but they had some *"issues with that"* and then Mr. Washington was terminated. ".CP 309, RP 680-681, 394-395Appellant Opening Brief pg 16-17. The Court of Appeals did not consider or discus Mr. Raustein's concession which compounds the errors in the Opinion.

3. **COURT OF APPEALS FOUND EMPLOYER WAS NOTIFIED OF HEART ISSUES, HOWEVER THE COURT DID <u>NOT</u> FIND THIS TO BE "NOTICE OF DISABILITY".**

On 13 July 2012, Mr. Sims gave Mr. Washington all positive marks in his Performance review. CP 541-543, RP 345-357. The appeals court confirmed that "nothing negative" was in Mr. Washington's review. Appeals opinion pg. 11. Id Three weeks later on 8, August 2012, Mr. Sims returned from a two week vacation. CP 478-479 Mr. Sims in his deposition stated he rescinded Mr. Washington's accommodated schedule because it was "inconvenient" for Mr. Sim's manager Adam Burton ("Mr. Burton"). CP 479.

The Court of Appeals found on August 8, 2012, Mr. Sims told Mr. Washington to change his "work schedule". Mr. Sims confirmed at trial there were no standard schedule for

anyone in his group. CP 503-505, RP 374-376, Appeals court opinion. This Standard schedule issue was one of the reasons Mr. Sims terminated Mr. Washington. The Court of Appeals found when GHC told Mr. Washington to change his schedule that Mr. Washington " *explained to Mr. Sims{GHC}* ***that he had numerous doctor appointments in the future and that he had heart issues.***". Pg 7 Appeals Court opinion, RP 394-395.

The next day on 9 August 2012, the discussion resumed regarding Mr. Washington's schedule, in which Court of Appeals established that "*he*{Mr. Washington} *did mention a heart related medical appointment.*" Id, *Pg 8 Appeals Opinion.* This was the **Court of Appeals 2nd time** they found Mr. Washington notified and discussed his Heart Issues with GHC. Id, RP 394-395 The Court of Appeals findings of fact continue that *"Later that morning {9 August 2012}, Washington e-mailed Sims and Adam Burton, Sims'manager,* ***notifying them of a medical condition*** *and appointment.* Id. This is **the 3rd time Court Appeals** found Mr. Washington Notified GHC of either heart issues or medical conditions. Id.

The Court of Appeals factual determination found Mr. Washington notified his Supervisor (Mr. Sims) on 8 and 9 August 2012 "***that he* {Mr. Washington} *had heart issues***". Pg 7-8 Appeals Court Opinion, RP 394-395. In spite of the Court of Appeals own finding that GHC had notice of Mr. Washington's "Heart issues". The Court did not believe Notice of Heart issues was "Notice of disability" as a matter of law under the WLAD. The Court of Appeals said this was a Jury question. Appeals opinion pg. 13-16. The Court of Appeals finding of Facts establishes a time of proximity of a few hours of Mr. Washington giving "Notice of Disability" and being terminated. Appeals opinion pg 7-8.

Below is an timeline of the Court of Appeals findings on 8 and 9 August 2012:

a. **Morning on 8 August 2012**- The Appeals court found that Mr. Washington responded that it was *"unfair"* for Mr. Sims to change his schedule when as the court found he explained GHC Supervisor Mr. Sims, *"that he had **numerous doctor appointments in the future and that he had heart issues.**"pg 7 Appeals Opinion*, CP 473-476, 479 RP 415-417

b. **Morning of 9 August 2012-** Appeals court found that " *Sims and Washington resumed their discussion the next morning.... he did mention a heart related medical appointment...Later that morning, Washington e-mailed Sims and Adam Burton, Sims 'manager, **notifying them of a medical condition** and appointment."* RP 394-395, Pg 8 Appeals Opinion

Proximity of Time- Later on the same morning, of 9 August 2012, Appeals court states, *"Just a few hours later the court finds Defense began Washington's termination with a Group Health human resources consultant.* Id, RP 359-361 CP 487-492, 518-519

c. **10 August 2012**- The Court of Appeals found *"The next day, August 10, 2012"* Mr. Washington was terminated " Id, Ex 10, RP 354-355, 365-366

2. ILL INTENTIONED FLAGRANT PREJUDICIAL MISCONDUCT

Mr. Washington's brief detailed the actions of Defense Attorney that established Flagrant Prejudicial Misconduct.

a. Mr. Washington is a United State Navy Veteran. Defense counsel asked and received dozens of pages of Mr. Washington's Veteran Administration (VA) records from the VA that have Defense attorney's name and address on the cover page. JSE Ex. 118-120, **Appendix** of Opening Brief, **Motions for new evidence.**

Defense attorney ignored these Veteran documents that verified Mr. Washington was a US Military Veteran. Id. Defense closing 4-7. Defense attorney at Mr. Washington cross exam maliciously attack a Veteran as not being a Veteran. RP 214-217, defense closing 4-7. Simply put, Defense attorney went to lengths to get the Jury to believe Mr.

Washington was lying about being a US Military Veteran. This is detail and supported in Appellants Motion for new evidence and Appellants' response Motion for new evidence, Appendix of brief. Defense closing 4-7, RP 214-217. Appellants Brief 3-4,17-18, 20-21,26-27, 43-46, Appellants Response Brief 4, 14-15, 19; Motion(s) for New evidence.

b. Defense at closing dishonestly told the jury, there is something "fishy" about Mr. Washington's military service and continued with, ***"If Mr. Washington was a veteran you would think he would want to have that record to show to his daughters."*** *Defense Closing Pg 6*

c. Defense's flagrant misconduct was extensive to prejudice and inflame the jury against Mr. Washington. Defense communicated to the Jury that Mr. Washington likely engaged in Bankruptcy fraud during his uneventful bankruptcy. Closing 1-4, RP 220-224. At closing he told the Jury that Mr. Washington's Bankruptcy was ***"one of the darker deceptions that we heard in this case."*** Defense Closing pg 2. Defense told the Jury Mr. Washington who is African American is a ***"Big Mac Daddy"***. **(Successful Pimp)** RP 271, 544-545. Other actions at closing included character vouching, more than 15 creative ways of telling the Jury Mr. Washington is liar and defense attorney miss informed the Jury of respective burdens under the WLAD. See Defense closing.

d. GHC set the derogatory tone in their opening statement. Defense attorney stated that Mr. Washington's *"life is a pattern of arrogance and deception.....conduct reveals a plan here, to try and dupe you into awarding him money.....asking you, the jurors, to be his accomplices."*. RP 36, 40.

In spite of these issues being briefed by Appellant, the Appeals court said there were no contemporaneous objections therefore they were not going to review it further. Appellants Brief 27, 43-49, Appellants Response Brief 4, 14-15,19. This is baffling, since

the issue was that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

ISSUE 1: THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT In a Disability Discrimination case under the WLAD, referring to a Plaintiff's Military Service in the United States Navy being Fraudulent or "FISHY", that he is a Big Mac Daddy (Successful Pimp), that his Bankruptcy "Is one of the Darker Deceptions in this case". Are acts of Misconduct so Flagrant and Ill-Intentioned that the purpose was to effect the outcome of the trial and Subvert the WLAD. Under RCW 49.60 the WLAD is considered *"A policy of the highest priority"*. To maliciously attack a Military Veteran as not being a Veteran to influence a Jury Verdict would be a HIGH PRIORITY (RAP 13.4) to this States Citizens that this Court make it abundantly clear that defaming any Veteran in Washington State Courts is completely Unacceptable. This misconduct materially affected Mr. Washington's substantial rights, thus requires a New Trial under CR59(a), *Restraint of Glassmann,* 175 Wn.2d 696, 704, 286 P.3d 673 (2012), *State v. Walker* 180 Wn.2d 1002, 321 P.3d 1206 (2014), *Alcoa v. Aetna Cas. & Sur. Co.,* 998 P.2d 856 (Wash. 2000), *Warren v. Hart,* 71 Wash.2d 512, 518-19, 429 P.2d 873 (1967).

3. This Supreme Court establish criteria in *State v. Walker and Restraint of Glassman* When a defense attorney's *"misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice."*. In *Walker and Glassman* the Supreme Court found that the attorney actions *" Obfuscated from the facts of the issue to the jury.....served no legit purpose."* The court also found that the attorney injected *"prejudicial unadmitted evidence served no legitimate purpose". Restraint of Glasmann,* 175 Wn.2d 696, 704, 286 P.3d 673 (2012), *State v. Walker* 180 Wn.2d 1002, 321 P.3d 1206 (2014). This Supreme Court should accept review and apply the needed criteria to

this WLAD case that is *"policy of the highest priority". Allison v. Housing Authority of Seattle, RCW 49.60*

4. Attorney misconduct requires reversal if there is a substantial likelihood that it affect the verdict. *Glassman.* . This Supreme Courts *Alcoa v. Aetna Gas (2000)* grounds for granting a new trial are set forth at CR 59(a) and 59(a)(2) permits a new trial because of "[m]isconduct of a prevailing party.". The Attorney throughout trial, starting with Opening statement laid the foundation of the flagrant misconduct with, *"Washington's Conduct reveals a plan here, to try and dupe you into awarding him money....**asking you, the jurors, to be his accomplices.**".* RP 36, 40.

5. At the beginning of Defense Attorney's closing argument he use 3 or 22 transcript pages just on Bankruptcy. Another 2 pages on Mr. Washington lying about being a US Navy Veteran. Following is a excerpt from Defense's Closing:

> Bankruptcy was *"he {Mr. Washington} also hid income from the United States Bankruptcy Court under penalty of perjury so that he could avoid $650,000 in debt. Can you really believe him, when he says he can't find work?....., " Defense Closing Pg. 1-4.*

6. Opening and Closing should only be based only on relevant evidence that is on point with the issue at hand. Here the Issue is Disability discrimination. Defense attorney did not use or attempt to use any sort of probative argument based on sound reason. Defense attorney's actions were calculated to inflame the passions or prejudices of the jury. Misconduct that denies a fair trial is "per se prejudicial." *State v. Davenport,* 100 Wn.2d 757,762,675 P.2d 1213, 1216 (1984).

7. Defense Attorney manufactured a narrative that he can use again in some form to turn an un-expecting U.S. Veteran into a fraudulent Veteran. This is an **Outrageous** act that shows Defense attorney has no limits and the Rules of Professional conduct are meaningless to him. This requires this Supreme Court's attention to ensure NOT ONE US military Veteran's service is debased in Washington State Courts. There is no limit to what an attorney is capable of

doing if they are willing to maliciously and expertly defame a US Navy Veteran that served during time of War.

8. These instances of misconduct created a lens through which the jury would view Mr. Washington. The lens was to make Mr. Washington a criminal, one with no morality or decency. Appeals to passion and prejudice are directed at something other than reason. Any passions or prejudices awakened by a Defense Attorney's improper comments cannot be dealt with through the rational. The misconduct likely affected the jury's verdict. Attorney misconduct requires reversal if there is a substantial likelihood that it affected the verdict. In re *Glassmann,* 175 Wn.2d 696, 704, 286 P.3d 673, 678 (2012). Even if one does not object, error may be reviewed if it is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice.". This paragraph sourced part State v. Walker Petition for review.

Court of Appeals did not review the issues that were brief to determine if the acts were Prejudicial Misconduct so Flagrant as not to require objection. The Supreme Court in *Palmer v. Jensen,* 132 Wash.2d 193 (1997) found it unacceptable when a Court of Appeals neglected to do an independent analysis. This Supreme Court states that "The Court of Appeals limited its analysis...under CR 59(a)(5) and **neglected to analyze** other parts of Cr 59(a)." *Palmer* goes on to state that " ***The court accordingly failed to undertake an independent review***". This is the case here, although the circumstance and relative facts arguably more serious in this case. This Supreme Court should find Flagrant ill-intention misconduct that an instruction would not have cured the prejudice. And find **Defense's misconduct was Outrageous and remand for New Trial.**

ISSUE 2: In a failure to accommodate a disability, the Court of Appeals found Mr. Washington notified GHC that *"He had Heart Issues"*. However, the Court of Appeals believes notice of "Heart Issues" is not notice of a disability". This undermines the WLAD and is in opposition to legislative intent that the WLAD is a policy "of the Highest Priority". *Allison v. Housing*

Authority quoting RCW 49.60. **THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT The Court of Appeals conflicts with *Goodman v. Boeing, Martini v. Boeing, Sommer v. DSHS* and the GHC failed to accommodate Mr. Washington after he gave notice of his heart issues. And remand to Superior Court New Trial for damages only as per *Sommer v. DSHS.*** Another reason to accept review, is this decision will be citied often by employers and will create confusion with the WLAD and thus weaken it. Under GR 14.1(a), effectively Publishes all Appellate decisions after 1 March 2013. In particular the Court of Appeals decision has so many errors regarding Failure to Accommodate, Notice of Disability, Disability discriminate, Pretext, Causation, different terms and condition plus much more. The statue under RCW 49.60.010 *states* Discrimination, *" threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state."* As per RAP 13.4 this is of high public interest and importance. This Supreme Court should hold GHC was notified by Mr. Washington that he had Heart issues which is Notice of Disability. Thus liability of Disability discrimination.

GHC was required by law to Accommodate Mr. Washington by initiating the interactive process to determine the *"nature and extent"* of Mr. Washington Disabilities. The following are some of the conflicts this Court of Appeals decision has with controlling law:

1. "Notice of a Disability" under Goodman v. Boeing, requires*"notice {disability} then triggers the employer's burden to take "positive steps" to accommodate the employee's.....to determine the nature and extent of the disability "*. GHC was made aware of Mr. Washington Heart Issues . CP 592, 595, RP 61, 62, 138, 453-454, 715, Joint Statement of Evidence, Ex. 80, 121-123, 127, 128. Heart issues are uncontestable as an disability, under RCW 49.60.040(25)(a). Id. The Court of Appeals in one part of their opinion states Mr. Sims knew of Mr. Washington's Heart issues but in another part says Sims did not know there were issues with medical conditions. The Court of Appeals pg 7,8.

2. Court of Appeals Div 1 *Martini v. Boeing* has an identical fact pattern as this case here but with completely conflicting conclusions of Law. In *Martini* the court of appeals found *Martini* told a Boeing counselor (Higuchi) was he was beginning treatment for his Depression. The court found this constituted knowledge of disability that required Boeing to investigate further, thus Boeing Failed to Accommodate. Here GHC in the court of Appeals own findings establish two instances that GHC knew Mr. Washington had Heart issues and medical appointments for such. Appeals opinion pg 7,8.
3. The court used Jury instructions instruction for their analysis and not the law as required under CR 59a7. The Court of Appeals opinion states *"instructions, {that}Washington had the burden to prove the following factors:"* Pg 13 court of appeals opinion. The Court of Appeals wrote out the Jury instructions in their opinion and proceeded with applying the Jury instructions and not Law of *Goodman, Martini, Sommer etc. as required under CR 59a7.*

ISSUE 3: THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT: The Court of Appeals conclusions of law regarding "Substantial Evidence" Is ins conflict with the WLAD'S intent and is undermining the WLAD under RCW 49.60. THE WLAD STATES *" Washington's Law Against Discrimination contains a sweeping policy statement strongly condemning many forms of discrimination. RCW 49.60.010.....this chapter shall be construed liberally *86 for the accomplishment of the purposes thereof." ....,' vindicating a policy `of the highest priority'" The Court of Appeals conclusions of law conflict with this Supreme Court's, RE Marriage Rideout, Port of Seattle v. PCHB and* THE LEGISLATIVE INTENT OF RCW 49.60 (*Allison v. Housing Authority.*)

Under RAP 13.4(b)(4) the WLAD is by law a matter substantial public interest, and review be accepted because of such. The Court of Appeals conclusions of law of "substantial Evidence" conflict with this courts *Re Marriage of Rideout.* In ***Re Marriage Rideout***, it stated, ***"written documentation often can be determined as a matter of Law".*** *In Re Marriage of Rideout, 77 P.3d 1174 (Wash. 2003).* In this failure to accommodate a disability case, the question is if a

uncontested email with a subject that states, "Medical Condition Notification". Is this a issue of law or Jury question for "Notice of Disability" which thus establishes liability against GHC of failure to accommodate disability. The Court of Appeals believes this email "Medical Condition Notificaton" in which they describe as "***notifying them* {GHC} *of a medical condition* and *appointment.*" Is a Jury question. This is untenable, there is no credibility or fact issue for a jury here. The email document says what it says, and thus as per RE Marriage Rideout needs to reviewed as a matter of law. The Court of Appeals is abdicating its responsibility of determining matters of law under the WLAD to Juries. *Pg 8 Appeals Opinion*

In addition, under this Supreme Court's *Port of Seattle v. PCHB, 90 P.3d 659 (Wash. 2004)* established that *" [t]he process of applying the law to the facts ... is a question of law and is subject to de novo review."* This continues to show the Court of Appeals err not reviewing the email "Medical Condition Notification" as a matter law, to determine if the email was Notice of a Disability. The Court of Appeals should have reviewed de novo.

ISSUE 4: THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD The Court of Appeals err when it determined Mr. Washington could not bring the issue of Wrongful Termination in Violation of Public Policy when the Washington State Supreme court reformulated this law during the appeal, under *Rose v. Anderson Hay* (Sept. 2015) and *Becker v. Community Health Services.* See *Anderson Hay & Grain., 90975-0 (Wash. 2015, Becker v. Community Health Service Heath, No. 90946-6 (Wash. Sept. 17, 2015)*. This was in Appellants opening brief Pg 29-34.

In *Rose and Becker* this Supreme Court abandoned the longstanding analysis for determining the adequacy of this tort. Before this change in law, Mr. Washington could not bring this issue in good faith. The change in the law removed the barrier so to speak.

This Court's *Brundridge v. Fluor Service* discusses that a change in law during an Appeal can be brought up for the first time as Mr. Washington did in his opening brief. Brundridge v. Fluor Federal Services, Inc., 191 P.3d 879 (Wash. 2008).

1. Review is necessary for WLAD RCW 49.60.020 is being determine by the Court of Appeals contrary to the express written intent of the statue and this court which " *requires that "this chapter shall be construed liberally *86 for the accomplishment of the purposes thereof"* *Allison v. Housing Authority referencing RCW 49.60.020.* The Court of Appeals is construing WLAD and working against the WLAD when this case was not determined with the new law. as result. Courts Allison v. Housing states. *"a policy `of the highest priority'"* however the Court of Appeals view the WLAD case with no priority and constrained the WLAD.
2. And the Supreme Court should also accept review because this issue involves the intersection of numerous Washington State Supreme Court conclusions of law under Allison, Brudndige, Rose, Beck and Wilmot. The Supreme Court is needed to harmonize and coordinated these numerous Supreme Court decisions with respect to the WLAD and broad body of Law as well on Appeal.

ISSUE 5: THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD: Order of Limine is long established rolling objection under law in this case Defense violated the Order Limine under *Outley,* 837 F.2d at 592. To " *introduce that a party* {Mr. Washington} *as litigious serves no other purpose to inflame the jury".* Appellant's brief Pg 50-53. The WLAD is *"a policy `of the highest priority'".* Which under RAP 13.4 this is of high public interest and importance. *Allison v. Housing Authority.*

The integrity and intent of the WLAD was subverted when Order limine under *Outley* was ignored at closing. Defense told the Jury, *"he did not tell them {GHC} he sued Starbucks.....he*

learned from prior litigation it is important to keep a paper trail" **Defense closing Pg. 11-12.**

Here defense ignores Order of Limine with ill intent. This undermines the WLAD and does not portend well of for others who exert their WLAD rights on what they will experience. Appellant Brief 49-53. Hold Defense engaged in intention misconduct and remand for new trial.

ISSUE 6: THE WASHINGTON SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT Under *Allisson v. Housing Authority of Seattle* the importance of *"conformity between the standards of causation for retaliatory discharge and for discrimination claim"*. And the WLAD is Public Policy of the highest priority, in which *Allisson* states the RCW "Supports a more liberal standard of causation". Under RAP 13.4(b)(4) states a petition involves an issue of substantial public interest that should be determined by the Supreme Court. The WLAD is of substantial interest as determine by this States Legislature when the wrote into RCW 49.60 is public Policy of Highest priority. This intersection of 13.4(b)(4) and the WLAD establish why to court should accept review.

Allison v. Housing Authority further states *" Therefore, on balance, we believe the language of RCW 49.60 supports at least a more liberal standard of causation than the Court of Appeals'* Allison v. Housing Authority. This court instruction under Allison and RCW are clear that Court of Appeals needs apply WLAD liberally. This issue here show the Court of Appeals fails to follow this Courts instructions and are making decisions contrary to RCW and acting against the intent of the law.

This Supreme Court should Hold that in Washington v. GHC causation and proximity time of Mr. Washington's notice of disability (heart issues) and termination was a matter of hours. Thus GHC Mr. Washington termination is the act of disability discrimination under Allison and Wilmot, this case is remanded to Superior Court for New Trial for Damages only. Mr. Washington argued under Wilmot that causation and proximity in time applies here like Wilmot. Mr. Washington engaged in a protected activity under the WLAD and which is related to his disability of Heart issues. And Wilmot used causation and proximity time to determine liability as is the case in Mr. Washington's case of disability discrimination. Mr. Washington's case and Wilmot involved both

ISSUE 7:

When Mr. Washington satisfies prima facie case of disability discrimination (*Washington v. Boeing)* for being terminated hours after he gave notice of heart issues and 3 weeks after he earn perfect performance reviews. Under this Supremes Court's *Scrivener v. Clark College*, Does the court err when they don't apply *Scrivener* to the final Prong of Pretext for no *temporal connection to termination* as required under Scrivener. This final Prong establishes liability.

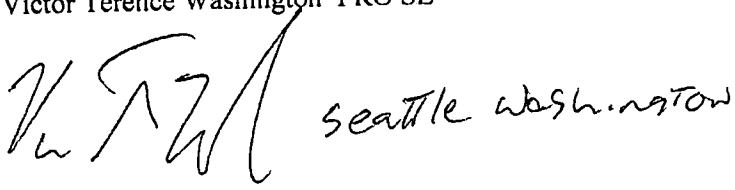
1. On 9 August 2012 Mr. Washington gave notice of his Heart Issues, and few hours later Mr. Sim's began termination which was 3 weeks after Mr. Washington earned perfect perform reviews (nothing negative). Is the Court in err when they determined "Substantial Evidence" for GHC's termination was an after the fact "termination memorandum" that any employer acting Improperly would have. And when under GR 14.1(a) which effectively Publishes all Appellate decisions will this undermine the WLAD and create confusion in future WLAD cases. *Appeals Opinion Pg 9*
2. When the court's "Substantial Evidence" analysis states "Mr. Sims testified that Washington did not identify any medical condition " Is this court in err and conflicts with itself when they established Mr. Washington had "heart issues' (pg 7,8) and then say "Sims did not identify any medical conditions" (pg 7).

All of the related Facts are discussed in the this Petition for Review's FACT Statement Pages 5-10.

CONCLUSION:
This Supreme Court should accept review and find that GHC engaged in Disability Discrimination and Failed to Accommodate Mr. Washington's disabilities (Heart Issues and more). The Court should also find that Defense engaged in misconduct so flagrant and ill-intentioned no instruction would have cured the prejudice. And find their conduct was Outrageous. Remand for New Trial.

DATED this 4 day of August 2017.

Victor Terence Washington PRO SE



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

VICTOR TERENCE WASHINGTON,)
Plaintiff,)
v.) NO. 13-2-19841-0 SEA
GROUP HEALTH COOPERATIVE,)
Defendants.)
)

SUPPLEMENTAL EXCERPT OF VERBATIM REPORT OF PROCEEDINGS

JURY TRIAL
JUNE 1, 2, 3, 4, 8, 9 & 10, 2015

JUDGE JEAN A. RIETSCHEL
KING COUNTY SUPERIOR COURT

Trial Counsel:

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Court is convened on Monday, June 1, 2015 in the matter of VICTOR T. WASHINGTON v. GROUP HEALTH COOPERATIVE, King County Superior Court Cause No. 13-2-19841-0 SEA, before the HONORABLE JEAN A. RIETSCHEL, Judge; DAVID H. BLACK, appearing on behalf of the Plaintiff, VICTOR T. WASHINGTON; JEFFREY A. JAMES and NATHANIEL E. BAILEY appearing on behalf of the Defendants, GROUP HEALTH COOPERATIVE.

The following is an excerpt containing a portion of defense closing argument of Jeffrey A. James heard on June 10, 2015 beginning at 9:51:

MR. JAMES: When I stood before you a week ago, I noted how in this life there's a lot of choices we can make. We can choose to succeed or you can choose to limit it. I mentioned to you how the evidence would show that Victor's -- Victor Washington's life is a pattern of poor choices, deceptions and earnings. You've now seen for yourself the bad choices Mr. Washington has made, including his choice to file this lawsuit. You've seen the utter lack of evidence to support any of his plans. You've seen Mr. Washington sit in that chair, and heard him misrepresent facts over and over. I kept my score sheet and came up with two pages of examples, and the list may be longer.

When I first stood here, I told you that we would show you the deceptive side of Mr. Washington, the argumentative side, the resistant, frustrating, I'm smarter than you side. I predicted that you would be as frustrated with his lack of straight answers by the end of this trial as his manager, his supervisor, his co-workers, and Human Resources personnel.

I'm not going to review all the evidence again. I think once was enough. But I do want to take a moment to highlight the lack of evidence supporting Mr. Washington's allegations. The lack of evidence that Mr. Sims did anything wrong, the lack of evidence showing Group Health should have to pay Mr. Washington a single penny.

Let's go back to the list of things I suggested you watch for at the beginning of this trial. Mr. Washington accepted a job offer, and immediately is asking for paid time off. Who does that? Who asks for a paid vacation before they even start working? Mr. Mallory noted that this was a red flag and highly unusual. But Mr. Washington told you why he was asking about this; he was already planning a trip to Australia. It had nothing to do with a surgery or medical condition. It had to do with Mr. Washington planning a vacation for Mr. Washington.

Then there's the concern about a credit check. We now know why he was concerned. He was planning to file for bankruptcy and he didn't want Group Health to find out. That bankruptcy filing is one of the darker deceptions that we heard about in this case. After he had accepted an offer with Group Health Cooperative on March 1st of 2012, Mr. Washington filed a Petition for Bankruptcy with the United States Bankruptcy Court. He sought to avoid $650,000 in debt.

On March 15th of 2012, Mr. Washington represented, under penalty of perjury, that he had no income whatsoever in 2010. That he had

$30,000 of income in 2011, and that he had a mere $1,000 of income in 2012. All the while simultaneously representing to Group Health Cooperative that he was continuously employed from 2006 to the present.

Mr. Washington also represented to the United State Bankruptcy Court that he was unemployed with no income, other than child support from his ex-wife. Now he may have been fudging on this point, because technically he hadn't started work yet at Group Health. We saw how he manipulated his start date. His manager, Adam Burton, wanted him to start as soon as possible. His background check was completed on March 15th -- or 14th. Yet for reasons known to no one but Mr. Washington, he delayed his start date until April 6th, a full three weeks. For someone who had no income, you would think that three weeks of pay, especially at the rate of pay at which he was going to be earning wages, would be a serious motivator.

But maybe Mr. Washington did consider his sworn oath for a moment, and did consider the consequences for lying to the United States Bankruptcy Court. Didn't stop him, but he appears to have taken some deliberate action to try and hedge his bets by timing the submission of his bankruptcy documents so that he technically was not yet employed.

There is no fudging, however, on question number 17 on the bankruptcy schedules, which directed him to describe any increase or decrease in income reasonably anticipated to occur within the

year following the filing of this document. Mr. Washington chose to leave this question blank. Mr. Washington chose to leave this question blank, and in doing so, withheld material information from the United States Bankruptcy Court. Material information that affected whether or not his debts would be discharged. He knew that he could start earning $104,000 as of March 14th, the day prior to him submitting this bankruptcy schedule.

And Mr. Washington was trying to blame his lawyer, as we heard, for the preparation of the documents. But the lawyer can only report what the client tells him. And Mr. Washington did not tell the truth. As a result, as you heard him testify, his debts were discharged on June 25th of 2012.

It is offensive to think that Mr. Washington at the time is earning $104,000 a year, and has already been paid roughly $30,000, and yet he withholds this information from the Court, leaving the Court to discharge his debts, and leaving his creditors with no recourse.

The United States Bankruptcy Court is not the only entity that Mr. Washington deceived. He deceived Group Health Cooperative to get a job. What is sad, is that had he been honest, he probably still would have been hired. But once he lied, he committed an act that leads to immediate termination when discovered.

As the evidence showed, that lie was discovered by his co-workers and his manager within days of his termination as they sought to understand his peculiar behavior after getting this

wrongful termination e-mail that he sent to executive management. They found a newspaper article describing his lawsuit against his former employer, which was not Seattle's Best Coffee, as he had represented to Group Health.

Using that talented mind of his, Mr. Washington had worked hard to hide his deception from Group Health. He used a different name for himself, and a different name for his former employer on his resume. And if he is ever forced to explain, he could claim his middle name really is Terence. And as you heard him say in this chair, Seattle's best coffee is Starbucks. Really. It's like saying Lexus is Toyota.

But it's actually much worse than that. Mr. Washington had reached out to Starbucks to get confirmation that he worked for Starbucks, and had a letter in his possession saying he was an employee of Starbucks.

There's no way around this one, ladies and gentlemen. Mr. Washington deliberately and intentionally lied. He lied as he sat in that chair, he lied on his resume, he lied in his deposition.

But it was the only intentional mis-statement he made on his resume. He lied about his experience at IBM. He lied about the dates of his military service. He even lied about the year he graduated from college.

With respect to the military service, this one is a real puzzler. We will never know if he was just being resistant in

refusing -- excuse me -- to follow directions, or if there's something fishy about his military experience. He had nearly three years from the date he started this lawsuit to produce evidence of his military service. Why wouldn't he produce the DD214, the Form we heard about, that reflects dates of service, type of discharge, awards and medals earned? He said his ex-wife took the records and his medals. So why wouldn't he go on line to get a DD214 if what he's telling you is true. You heard from Mr. Sims it took him 15 minutes to request a copy of his DD214. If he was a decorated war veteran, you would think he would want to have that record to show to his daughters. If he was a decorated war veteran, you would think he would want to present that to you as a way of bolstering his credibility.

I invited -- excuse me -- Mr. Washington sat in that chair and sought to say I have a veteran's card in my pocket. I invited his attorney to ask him about that when it was his turn to ask questions. We never saw the veteran's card. And in fact if there was a veteran's card in his wallet, why didn't he ever produce it to Group Health. It just doesn't add up.

Then there's the declaration he submitted under penalty of perjury to get his ex-wife to pay him more child support. On July 1st of 2011, he swore, under penalty of perjury, that he had been employed for the past three years, except for working for a few months as a contractor. By doing so, he confirmed that the information he gave to Group Health on his resume was a lie.

But remember what happened next? When I impeached him with his prior declaration, he admitted he also lied on the declaration. He said well, I actually worked three other contracting jobs that I didn't disclose. He said something about how they were in Australia so they didn't count. Yet apparently his wife's income that she was making in Australia did count, if that would give him more money in his pocket.

It seems that the oath to tell the truth under penalty of perjury is another thing that is confusing to Mr. Washington. And he tried to justify it all as he sat in that chair. He didn't think it was a big deal to lie about things. Clearly he didn't think it was a big deal to lie about other things to this jury. Yesterday you heard Mr. Washington lie over and over to you as I impeached him with his prior declarations.

So let's move to talking about the specific things he's not being truthful about with regard to his claims against Group Health. Mr. Sims told you that he confronted Mr. Washington when he discovered he was leaving early and asked him, what are you doing. Mr. Washington told Mr. Sims he was waking up early while his girls were gone and he was coming in early. Mr. Sims replied he had no problem with him coming in early while his girls were gone. Mr. Washington gave you a different story. He told you he rolled his chair over to Mr. Sims one day and told him all about his medical conditions and diseases. He said he needed reasonable accommodation for his medical conditions because he was waking up

early and it was affecting his various diseases. Mr. Sims denied that Mr. Washington said anything of the sort. Now one of them is telling the truth, and it's not Mr. Washington.

And here's one way we know for sure. In his letter to the executives on August 12th, Mr. Washington wrote that he told Adam Burton, not Mr. Sims, Adam Burton, about his medical conditions in July. Of course, that didn't happen either if you -- if you believe Mr. Burton.

Mr. Washington should have paid closer attention to the stories he was telling. Because not only did he get tangled up between what he allegedly told Mr. Sims and what he told Mr. Burton, but he forgot to come up with an explanation for why he would need to keep coming in early after his girls came home from Australia. On the contrary, he would need to be home in the morning to help get them ready for school.

He also overlooked that his access card swiping records show he was physically capable of working past 2:30, which is all Mr. Sims had asked him to do when they spoke first on August 8th, and then on August 9th. We also know from the access card swipes that Mr. Washington did not come in that early, despite his claims. In fact the first time he came in at 5:30 was July 26th. He only came in a total of three times before 5:30, and two of those were on August 9th when he was upset with Mr. Sims, and on August 10th, when he was terminated.

We also know that Mr. Washington was leaving early not because he was disabled, but to enjoy those summer afternoons, to date, to hang out with friends. And we know that if the schedule that Mr. Washington had created for himself were allowed to stand, as he certainly hoped it would, Mr. Washington was all set for the coming school year. He'd be able to be there to pick up his youngest daughter from school, even if traffic was bad, as we heard him testify in the video clip yesterday. It was all going good for Mr. Washington that summer. How many parents wouldn't want to make $104,000 a year and be able to have afternoons off to be with their children? For most of us life just doesn't work that way though.

Mr. Washington's desire for an adjusted work schedule had nothing to do with the need for a medical accommodation. The elephant in the room, as far as Mr. Washington goes, is a box, this box. This box of 1,600 medical records, 1,600 medical records. I invited Mr. Washington to go through this box to find one record, one record, that showed he was impaired, or had a disability while he was working for Group Health. One record that showed he had a need for accommodation. The box has been sitting there all trial. We didn't see one record, because he knows, and by now I think you know, there's no such record in here. 1,600 records, not a single one shows he was disabled or needed an accommodation.

Perhaps that explains why Mr. Washington didn't call any of his health care providers to come testify on his behalf. Let's let that sink in for a moment. Mr. Washington has the burden of proof

here. He must prove he is disabled, that he needs a reasonable accommodation to be able to do his job at Group Health, and that Group Health, John Sims in particular, was motivated to discriminate against him because he was disabled.

We heard what Mr. Washington -- excuse me -- we heard that Mr. Washington has been seen by roughly 100 providers. Where were they? Why didn't he call any of them to testify on his behalf? Why didn't he even call Doctor Raghu? We heard from Doctor Raghu, but it was because Group Health Cooperative called him to testify, not Mr. Washington.

I think we know why Mr. Washington didn't call his health care providers to testify; because he knew they wouldn't support him. You heard Doctor Raghu, Mr. Washington isn't disabled. There's no restriction on his ability to work. For that matter, you heard Mr. Washington say that as well yesterday in the video clip, under penalty of perjury.

The only health care provider Mr. Washington called to testify on his behalf was Doctor Sullivan, not to show that he was disabled while he was at Group Health, but to support his claim for emotional distress damages. As we saw, Mr. Washington manipulated Doctor Sullivan and his resident to get a diagnosis before he filed his lawsuit. Over and over he told them about his severe emotional distress caused by the litigation to get a diagnosis of major depression. The only problem is once again, he misrepresented facts and withheld the information. He didn't tell Doctor Sullivan

or his resident that there was no lawsuit. He didn't tell them he had sued Starbucks and claimed to have been unable to work due to extreme emotional distress for more than 11 months. He didn't tell them that he'd done a similar thing with respect to Tideworks. This is important information that might have resulted in a diagnosis of malinger. And that wasn't something Mr. Washington was looking for.

Mr. Washington -- excuse me -- has the burden of proving a number of things in this case, including that Group Health Cooperative knew he was disabled, and knew he needed reasonable accommodation. Ironically the two documents he submitted to Group Health Cooperative had the opposite effect of putting Group Health on notice. First, there was Exhibit 4, the demographic information form. This was his first opportunity to put Group Health on notice. They invited him to put them on notice. Yet he left it blank. This was a calculated move on his part. He claims the question was confusing. Really? If you're an individual with a disability, would you find that question to be confusing?

There's another document he never filled out, the Reasonable Accommodation Request Form. That would have put Group Health on notice. You heard Mr. Washington's counsel make various insinuations throughout the trial to the effect that Mr. Washington was not required to provide documentation to Group Health to support a request for accommodation. Remember, the comments of counsel are not evidence in this case.

The evidence is set forth in Exhibit 115, Group Health's Reasonable Accommodation Form. There it plainly spells out that Group Health can request medical documentation to support a need for a reasonable accommodation. Without medical documentation, an employer cannot know if an employee is necessarily telling the truth about needing help to do a job versus simply wanting to get out of doing a job.

As we heard, an employer is not required to accommodate an imaginary illness. That would be an example of what is referred to as an undue hardship. And we know that despite a boxful of medical records produced by Mr. Washington, there's no medical evidence that he needed any accommodation to do his job.

I mentioned two documents. The other document Mr. Washington submitted to Group Health is his e-mail entitled Medical Condition Notification. All it says is he had a doctor appointment, which Mr. Sims had already said he could go to. I refer to this as the CY e-mail for good reason.

Mr. Washington had just blown up at his supervisor. He knew he had crossed the line. He knew from his prior litigation that it's important to create a paper trail. And you can see evidence of this when you look at his complaint against Starbucks. Whatever his intention on August 9th of sending this e-mail, the e-mail itself fails to identify any impairment or need for accommodation. As Mr. Washington admitted, his e-mail could have been referencing other types of conditions that are non-impairments at all such as

obesity, or ED, or as we came to find out, that he had an EKG procedure that he was going to go through on that day.

We also know that Mr. Washington was claimed that he experienced fatigue in the afternoon is hardly evidence that he was disabled or impaired in any way. We heard him testify that he could work, that he could drive a car, that he could take care of his home, that he could take care of his daughters. We heard that he bragged about all the tail he was pulling down. We heard that he reported to his doctors that he had multiple sex partners and sought out a vasectomy as a more permanent form of contraception at the same time he's telling Doctor Sullivan that he has major depression.

We saw the documentation too. For example, the swiping records show he worked past 2:30 on occasions in July. We also saw the documentation about when he was asked to attend a meeting in the afternoon that was going to be scheduled for 3:00 that everyone else attended. But Mr. Washington said he couldn't attend it because he had a previous hard commitment. We know that previous hard commitment wasn't a medical appointment, had nothing to do with a disability. It was a personal commitment. Mr. Washington admitted that. Because we know that the only medical appointments he had during the time he was employed by Group Health were in April, right when he started, and he had an eye exam. And on August 9th when he had that EKG procedure, that's it. Any testimony

from Mr. Washington that he was needing to attend medical appointments is blatantly false.

But there's more. You actually saw Mr. Washington here every day until 4:00 p.m. You saw him sit in that chair and testify for a full day, from 9:00 until 4:00 p.m. Did you so much as see him yawn once? It is truly incredible that he wants you to believe he was disabled from working until 2:30 in the afternoon. It wasn't about that at all, as we know. It wasn't that he couldn't work in the afternoon, it was that he wanted to spend afternoons doing something for Victor Washington. And it wasn't working.

Mr. Washington emphasizes the timing of the termination decision in relation to his issuance of the medical notification e-mail, as if that somehow proves his case. In fact the evidence showed Mr. Sims had been thinking about the possibility that he would end up terminating Mr. Washington before he went on vacation. We know that from Mr. Raustein and Ms. Gayles, in addition to Mr. Sims. The final straw, to use the phrase used by Ms. Butler, was not the e-mail stating that Mr. Washington had a doctor appointment, it was Mr. Washington arguing for two days as to why it was unfair to require him to stay until 2:30 with the rest of the team, without providing a clear explanation to Mr. Sims as to why he couldn't.

You've been sitting here for over a week. Do you know why Mr. Washington couldn't stay until 2:30? If you can't answer that question, Mr. Washington has clearly not met his burden of proof.

How many times did you hear Mr. Washington accept responsibility for anything? How many times did you hear him blame others? He blamed his attorneys, he blamed his supervisor, his manager, Human Resources, his co-workers, his ex-wife, he even blamed Doctor Raghu for getting the chart record wrong, or so Mr. Washington said.

We've seen a pattern with Mr. Washington claiming he suffered extreme emotional distress to get money from his former employer. His own psychiatrist, Doctor Sullivan, acknowledged this pattern, and admitted Mr. Washington might be using him to simply bolster his claim. We heard Mr. Washington say that he saw Doctor Sullivan more than 20 times. Doctor Sullivan said oh, it was about 10 times, added up to about five hours.

Doctor Jacobson spent the most time with him, and spent the most time comparing his records. She went through all of these records. She compared his deposition testimony, she watched the videos. She was unable to confirm that he had suffered any psychological damage as a result of his termination from Group Health. She also concluded his illness are imaginary, he's not credible, he tried to gain the testing process, and that his personality is similar to how Mr. Sims perceived it; argumentative and confrontational. On this point there's universal agreement.

Ms. Butler reached this conclusion during her phone call with Mr. Washington. She called him manipulative and definitely not credible. Mr. Sumpter, Mr. Millan and Mr. Keefe all reached this

conclusion and documented that in their e-mails. Mr. Burton described him as rude and insubordinate. We know that Mr. Sims concluded from the termination letter that he was argumentative and that he wasn't working well with the team. Even Mr. Mallory found it noteworthy that before Mr. Washington started work, he was yelling at the Service Center employees over the phone.

It's also noteworthy that Ms. Butler, Mr. Mallory, Mr. Burton, and Mr. Sims do not work for Group Health Cooperative. They have no skin in this matter. They took time out of their lives to testify under oath about their observations of Victor Washington, without any opportunity for profit or loss, because it's the right thing to do, because they want to ensure that justice is done in this case.

Well Mr. Washington will tell you that none of these persons really worked closely with him, so they can't possibly be telling the truth. Do you remember his attorney making this point during opening statement? The only person who worked closely with Mr. Washington, he told you, was Mr. Hart. He promised that you would hear about this from Mr. Hart when he was called to testify. So what did Mr. Hart tell you?

Well he certainly told you things about Mr. Washington's love life that Mr. Washington withheld from you. And he could have only learned about those things from Mr. Washington. He told you he observed Mr. Washington making numerous changes to the network that could cause an impact on patient care. He told you he called out

the fact that Mr. Washington had not opened proper change tickets. He told you if he was Mr. Washington's supervisor, he would have terminated him.

Remember what Mr. Washington told you? He told you he never failed to follow the change management process. He told you he was never spoken to, and never received an e-mail about not following the change management process. We know that this is false. Mr. Burton and Mr. Sims met with him to discuss change management issues on June 7th. Let me be precise. Mr. Sims met with him to discuss change management issues, but Mr. Washington wouldn't accept what Mr. Sims said. So then he requested a private meeting with Mr. Burton, and Mr. Burton told him the same thing.

As for e-mails, we saw numerous e-mail reminders that Mr. Washington received about the need to follow the change management process and complete change tickets. For whatever reason following the change management process was beneath Mr. Washington. And clearly he lied about it in his testimony in front of you.

Then there's the reference letter. As Mr. Hart testified, he did not sign the letter that now bears his signature. It's clearly a forgery in the sense that Mr. Washington cut and pasted new text above Mr. Hart's signature. You can see for yourself when you examine it, that he did not even get the font right in his clumsy fraudulent attempt. The text itself is completely contrary to what Mr. Hart testified about, other than minor things about projects

they worked on. 'Cause remember what Mr. Hart said when one of you asked if you were given the choice, would you hire Mr. Washington? He was unequivocal. He said no.

Mr. Washington threw down the gauntlet on this one. He acknowledged that only one of them can be telling the truth. If you conclude it is not Mr. Washington, you should likewise conclude he was not telling the truth about anything else.

Then there's Mr. Washington's decision to use his daughter as a pawn in his claim for damages. Sadly we saw that he did the same thing in his divorce case when trying to gain money from his ex-wife. Mr. Washington's daughter should never have been dragged into this case. We are all sympathetic to a parents struggles. And no one would ever wish Mr. Washington's daughter ill. But Group Health is not responsible for anything regarding Mr. Washington's daughter.

Finally there is the mystery of how Mr. Washington supports himself and his two daughters and whether he's actually working. Given the current job market, his skills, his past experience, and the amount of time that has passed since his termination, it is incredible to suggest that he's unable to get a network engineering job. Remember, he was able to get high paying jobs after terminated from Tideworks and after terminating from Starbucks. Greg Mallory, who has no ties to this litigation, testified it would likely have taken Mr. Washington three to four weeks to get a job after his termination. So what is going on here?

One explanation is that Mr. Washington has another source of income, like the overseas contract jobs he told you about that he omitted from his sworn declaration in his divorce proceeding. In that matter he hid income from his ex-spouse and the Court because it would affect the amount of child support he received. He also hid income from the United States Bankruptcy Court under penalty of perjury so that he could avoid $650,000 in debt. Can you really believe him when he says he can't find work?

Another possibility is he doesn't want to work and that he's banking on all of you to provide him with a big payout. Remember how little he's actually worked in the past 10 years? Less than three years, despite not having any disability or restrictions on the ability to work, despite his educational background.

Again, it looks like he's banking on all of you to finance him so he doesn't have to get a job. And look at the job applications that he tardily produced in this case. You will see that he basically sent out form letters, or one sentence e-mails to a host of companies. Not exactly what you would expect someone to do who's applying for a job to earn over $100,000 a year. But the job market is so hot right now for network engineers, he really didn't have to do anything else.

What did we see in this stack of documents he produced after I pointed out he hadn't produced any documents yet? An e-mail showing employers had been trying to offer him opportunities. An e-mail showing an opportunity to earn over $100,000, provided he

was willing to relocate. Well who wouldn't relocate to support their family?

We also saw an e-mail from someone who was in a position to find him a job who pointedly noted that she had not heard from Mr. Washington since 2007. These are not the efforts of someone who's trying to find a job. And maybe the reason is because he's already working and he's just not telling you that. But he told Doctor Raghu.

You heard Doctor Raghu testify to that effect yesterday. Mr. Washington wants you to disregard that testimony. And there's no reason for concluding it is any more or less accurate than anything else you heard Doctor Raghu testify about. And according to Doctor Raghu, Mr. Washington is working full-time as an engineer as of March 2013.

Let me bring this to a close. There is no truth whatsoever to Mr. Washington's allegations against Group Health Cooperative. There's no truth whatsoever to Mr. Washington's accusations against John Sims. There's no truth whatsoever to Mr. Washington's stories. Group Health has done nothing wrong. It does not owe Mr. Washington a thing.

As I said at the beginning, life is full of choices. And you can choose to succeed or you can choose to lose. Mr. Washington has made his choices, and now it's your turn. You can choose to tell Mr. Washington the truth that he needs to hear. Tell him no. Tell him to go out and work for a living. Tell him to show his

children what it means to be responsible. Tell him enough is enough.

End of excerpt.

* * * * * * * * * * * * * *

CERTIFICATE OF COURT APPROVED TRANSCRIBER

STATE OF WASHINGTON)
: ss.
COUNTY OF MASON)

I, SHERI K. ESCALANTE, Notary Public and Court Approved Transcriber for the Superior Court of the State of Washington in and for the County of King, do hereby certify as follows:

THAT the foregoing **SUPPLEMENTAL EXCERPT OF** VERBATIM REPORT OF PROCEEDINGS, numbered from Page One through and including Page Twenty-One, is a true and correct excerpt of Defendant's closing argument heard on June 10, 2015 during the jury trial in the matter of **Victor T. Washington v. Group Health Cooperative**, King County Cause No. 13-2-19841-0 SEA, before the Honorable Jean A. Rietschel, Judge of the Superior Court of King County, sitting at the King County Courthouse, Seattle, Washington, on the date hereinbefore mentioned.

DATED at Allyn, Washington this _____ day of June, 2015.

SHERI K. ESCALANTE, CET-662
Notary Public and Court
Approved Transcriber

RICHARD D. JOHNSON,
Court Administrator/Clerk

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May 30, 2017

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CASE #: 73847-0-I
Victor Terence Washington, Appellant v. Group Health Cooperative, Respondent

King County, Cause No. 13-2-19841-0 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> "We affirm the judgment on the jury verdict and the denial of the motion for new trial."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

law

Enclosure

c: The Honorable Jean Rietschel

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

VICTOR TERENCE WASHINGTON, Appellant, v. GROUP HEALTH COOPERATIVE, Respondent.	)	No. 73847-0-I DIVISION ONE UNPUBLISHED FILED: May 30, 2017

Cox, J. — Victor Washington appeals the judgment on a jury verdict for Group Health Cooperative concerning his claims of disability discrimination and failure to accommodate. The trial court did not abuse its discretion in denying his motion for a new trial. Washington failed to preserve for review his challenges to allegedly prejudicial comments by Group Health's counsel during opening statement, cross-examination, and closing. Accordingly, we do not further address those challenges. We affirm.

In April 2012, Victor Washington began working for Group Health Cooperative as a probationary employee. Washington's supervisor, Jim Sims, learned that Washington had changed his assigned work schedule when he noticed Washington leave early. Sims later spoke with Washington and

approved this change. There was conflicting evidence whether Washington explained to Sims that he needed the schedule adjustment due to his disabilities.

On August 8, 2012, Sims instructed Washington to return to his original work schedule. Washington responded that he had numerous upcoming doctor appointments and that he had heart issues. They did not agree on the schedule that would apply.

Sims and Washington resumed their discussion the next morning. Washington claims to have explained his medical conditions and the effect they had on him. There was evidence at trial that this conversation was "contentious." Sims "rescinded" Washington's changed work schedule. Later that morning, Washington e-mailed Sims and Sims's manager notifying them of his medical condition. Sims did not recall whether he read Washington's e-mail.

Later that day, Sims discussed Washington's potential termination with a Group Health human resources consultant. The next day, Sims terminated Washington's employment.

Washington commenced this suit against Group Health, alleging violations of Washington's Law against Discrimination (WLAD). A jury returned a verdict for Group Health on the only two claims that went to trial: failure to accommodate and disability discrimination. Washington then moved pro se for a new trial or reconsideration. He argued that the jury verdict was contrary to the evidence. He also argued that Group Health's counsel committed certain prejudicial misconduct during Washington's and a physician's cross-examination. The trial court denied Washington's motion and entered its judgment on the jury verdict.

Washington appeals.

NEW TRIAL MOTION

Washington argues that the trial court abused its discretion by denying his motion for a new trial. We disagree.

"A strong policy favors the finality of judgments on the merits."[1] Under CR 59(a)(7), trial courts may order a new trial after a jury has returned its verdict where "there is no evidence or reasonable inference from the evidence to justify the verdict." If the appellant unsuccessfully moved for a new trial under this rule and argued that the verdict was contrary to the evidence, we determine whether sufficient evidence supports the verdict.[2]

Evidence is sufficient to support the verdict where it is substantial.[3] Substantial evidence is the "'quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.'"[4] We must view the evidence in

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[1] Harrell v. Dep't of Soc. and Health Servs., 170 Wn. App. 386, 408, 285 P.3d 159 (2012).

[2] Mears v. Bethel Sch. Dist. No. 403, 182 Wn. App. 919, 927, 332 P.3d 1077 (2014), review denied, 182 Wn.2d 1021 (2015).

[3] See id.

[4] McCleary v. State, 173 Wn.2d 477, 514, 269 P.3d 227 (2012) (quoting Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)).

favor of the nonmoving party.[5] Additionally, the jury makes credibility determinations, which we do not review.[6]

We review for abuse of discretion the trial court's denial of a motion for a new trial under CR 59(a)(7).[7]

Disability discrimination is at issue in this case. Under RCW 49.60.180, a disabled employee has a cause of action for certain types of discrimination. The employee may allege that the employer discriminated against him because of his disability.[8] The employee may also allege that the employer failed to accommodate his disability.[9] These were the only two claims that went to trial against Group Health.

Disability Discrimination

Washington argues that the jury's verdict on his disability discrimination claim is contrary to the evidence. We disagree.

Under WLAD, an employer cannot "discriminate against any person in compensation or in other terms or conditions of employment because of . . . the presence of any sensory, mental, or physical disability."[10]

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[5] Mears, 182 Wn. App. at 927.

[6] State v. Hart, 195 Wn. App. 449, 457, 381 P.3d 142 (2016), review denied, 187 Wn.2d 1011 (2017).

[7] Millies v. LandAmerica Transnation, 185 Wn.2d 302, 316, 372 P.3d 111 (2016).

[8] Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 145, 94 P.3d 930 (2004).

[9] Id.

[10] RCW 49.60.180(3); Riehl, 152 Wn.2d at 144-45.

Here, the trial court instructed the jury on the elements of a disability discrimination claim. According to those unchallenged instructions, Washington had the burden to prove the following factors:

> 1. That he has a disability;
> 2. That he is able to perform the essential functions of the job in question; and
> 3. That his disability was a substantial factor in Group Health Cooperative's decision to terminate him. Victor Washington does not have to prove that his disability was the only factor or the main factor in the decision. Nor does Victor Washington have to prove that he would have been retained but for his disability.[11]

The second element is not disputed on appeal.

Disability

Washington argues that he is disabled. The record shows evidence of a disability.

RCW 49.60.040(7)(a) defines a disability as "the presence of a sensory, mental, or physical impairment that: (i) Is medically cognizable or diagnosable; or (ii) Exists as a record or history; or (iii) Is perceived to exist whether or not it exists in fact." Under the statute, "impairment[s]" include cardiovascular, respiratory, and psychological disorders.[12]

Here, the trial court gave the jury a disability instruction consistent with the statute. Dr. Ganesh Raghu, a physician who treated Washington, testified at trial as a defense witness. He testified, as an expert, that he had clinically diagnosed Washington with sarcoidosis. He also testified that he did not confirm this diagnosis. And a later biopsy failed to show objective evidence of this condition.

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[11] Clerk's Papers at 644.

[12] RCW 49.60.040(7)(c)(i-ii).

We also note that Washington's medical records showed evidence of other medical conditions that could be classified as disabilities by the finder of fact.

We conclude there was, on this record, substantial evidence that Washington had a disability of sarcoidosis. This came in from Dr. Raghu, his treating physician and a defense witness at trial. Accordingly, Washington satisfied the first element of his disability discrimination claim.

Group Health argues that there was no evidence that Washington was disabled. The record, particularly the evidence provided at trial by its own expert witness, belies that argument. To the contrary, a jury could reasonably find, on this record, that Washington had a disability.

Discrimination and Rebuttal

Washington argues that he satisfied his next burden: to show that his termination was discriminatory. We conclude that he failed in this burden.

The employee bears the initial burden of making a prima facie case of unlawful discrimination.[13] Specifically, Washington had the burden to show that his disability was a substantial factor motivating Group Health's decision to terminate his employment.[14] Then the burden shifts to the employer to present "evidence that the employment action was based on legitimate, nondiscriminatory reasons to rebut the presumption of discrimination."[15] The

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[13] See Riehl, 152 Wn.2d at 150.

[14] Clerk's Papers at 644; see also Riehl, 152 Wn.2d at 149.

[15] See Riehl, 152 Wn.2d at 150.

employer's burden is one of production only.[16] If the employer satisfies its burden, the employee must show that the employer's reasons are pretext for discriminatory intent.[17]

At trial, Washington testified that he typically worked from 7:30 a.m. to 3:30 p.m. and asked Sims for an adjusted work schedule due to his medical conditions. Washington claims to have informed Sims of his difficulty staying asleep and his medical conditions.

Sims testified that Washington worked from 6:30 a.m. to 2:30 p.m. Sims became aware that Washington had unilaterally changed his schedule when he noticed Washington leave at 1:00 p.m. Sims asked Washington about this, and Washington explained that it was more convenient for him. Sims responded that it was "okay" and that they would "give it a try and see if this works." Sims testified that Washington did not identify any medical conditions or explain that he needed an adjusted schedule due to his disabilities.

On August 8, 2012, Sims instructed Washington to return to his original work schedule and leave at 2:30 p.m. Washington refused, responding that it was "unfair." When Sims asked for an explanation, Washington responded that he had numerous doctor appointments in the future and that he had heart issues. They could not agree on the schedule.

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[16] Id.

[17] Id.

Sims and Washington resumed their discussion the next morning. Sims did not recall at trial whether Washington used the word "accommodation." But he did mention a heart related medical appointment.

Washington testified that he explained his upcoming medical appointments, his heart condition, and the effect his medical conditions had on him.

Sims explained that he needed Washington "to be available" for meetings. The conversation was allegedly "contentious." But Sims "rescinded" Washington's changed work schedule.

Later that morning, Washington e-mailed Sims and Adam Burton, Sims's manager, notifying them of a medical condition and appointment. Sims did not recall whether he read Washington's e-mail.

Sims later discussed Washington's termination with a Group Health human resources consultant. The next day, August 10, 2012, Sims gave Washington formal notice of his employment termination. The notice stated the following:

> • Argumentative nature in accepting your job title and role: You were hired as a network engineer. Shortly after your start you began complaining about why you were not a "senior" engineer. This discussion took three days to resolve.
> • Reluctance to conform to Group Health's change management processes: You didn't want to open change tickets which document any systems changes. As you know, this is standard business practice for our work. It took three days of discussion to convince you to accept this standard work practice.
> • Reluctance to work with peers to complete a formal review process: Doesn't want to participate in the regular review process that involves major system's changes.
> • Argumentative nature in working with leadership to accept the standard working hours: You refuse to work the schedule you

> were hired to work. Shortly after starting your role, you changed your schedule and when asked by management to move back to your original schedule, you have refused[.]
>
> Based on your continued poor work behavior during your probationary period, your employment with Group Health is hereby terminated effective the date identified in the first paragraph of this memo.[18]

The jury heard Sims's testimony explaining his reasons for terminating Washington's employment. Sims testified that he started to recognize "a pattern" and that Washington was "argumentative and . . . wasn't going . . . to try to actually compromise . . . ." Sims further testified that he did not terminate Washington's employment due to his disability.

Other employees also testified about their interaction with, and impression, of Washington. For example, Burton expressed his concern to Sims about Washington's absence from meetings and Burton's dissatisfaction with Washington's work hours. Burton felt that Washington was not "pulling his share of the work" and was argumentative.

The jury found in its special verdict form that Washington did not meet his burden of proving his disability discrimination claim. This record supports that factual determination.

The termination memorandum and Sims's testimony at trial provided substantial evidence to demonstrate Group Health's legitimate and nondiscriminatory reasons to rebut the presumption of discrimination.

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[18] Report of Proceedings Vol. 2 (June 4, 2015) at 371-72; Trial Exhibit 10.

Washington argues that Sims treated him differently than other employees by "expecting him to have a standard schedule" while other employees did not. But Washington's schedule is irrelevant because it was not at issue in this case. The issue was whether Washington's disability was a substantial factor in Group Health's decision to terminate his employment, not readjust his schedule.

Pretext

Washington argues that he satisfied his burden of showing that Group Health's stated reasons were pretextual. We disagree.

An employee cannot establish that his employer's reasons are pretextual without evidence that the employer's articulated reason for its decision is "'unworthy of belief.'"[19] An employee may establish pretext if his employer's reasons "'(1) had no basis in fact, (2) were not really motivating factors for its decision, (3) were not temporally connected to the adverse employment action, or (4) were not motivating factors in employment decisions for other employees in the same circumstances.'"[20] The employee may also satisfy his burden by presenting sufficient evidence that discrimination was a substantial factor motivating the employer.[21]

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[19] Brownfield v. City of Yakima, 178 Wn. App. 850, 874, 316 P.3d 520 (2014) (quoting Kuyper v. Dep't of Wildlife, 79 Wn. App. 732, 738, 904 P.2d 793 (1995)).

[20] Scrivener v. Clark Coll., 181 Wn.2d 439, 447, 334 P.3d 541 (2014) (quoting Scrivener v. Clark Coll., 176 Wn. App. 405, 412, 309 P.3d 613 (2013), rev'd on other grounds, Scrivener, 181 Wn.2d 439, 442).

[21] Id.

An employer's lack of documentation regarding the employee's poor performance may provide "circumstantial evidence that the proffered discharge justifications were fabricated post hoc."[22] But "'[s]peculation and belief are insufficient to create a fact issue as to pretext. Nor can pretext be established by mere conclusory statements of a plaintiff who feels that he has been discriminated against.'"[23]

Here, Washington relies on the following facts to show that Group Health's stated reasons for terminating his employment were pretextual:

1) Washington did not receive a negative performance rating before his termination.
2) Sims did not provide documentation of any negative issues regarding Washington.
3) Sims allegedly knew of Washington's medical conditions when Washington requested an adjusted work schedule.
4) Sims began the process to terminate Washington's employment on the same day that Washington opposed his schedule readjustment.
5) Sims terminated Washington's employment shortly after receiving Washington's e-mail, which provided notification of his medical condition.

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[22] Griffith v. Schnitzer Steel Indus., Inc., 128 Wn. App. 438, 450, 115 P.3d 1065 (2005).

[23] Hines v. Todd Pac. Shipyards Corp., 127 Wn. App. 356, 372, 112 P.3d 522 (2005) (quoting McKey v. Occidental Chem. Corp., 956 F. Supp. 1313, 1319 (S.D. Tex. 1997) (court order)).

Whether these facts demonstrate that Group Health's reasons are "'unworthy of belief'" is at issue.[24] The trial testimony provided context in determining whether substantial evidence supports the jury's verdict.

Sims testified that Washington did not mention his medical conditions prior to their meetings in August. Sims also discussed his evaluation of Washington's performance, stating that he "could have been more critical" of Washington's performance. But because Washington was a new employee, Sims tried to "coach" and "steer" him. Sims also explained that Washington was argumentative about his work hours during their two meetings, which occurred after Washington's performance evaluation. Additionally, Washington had missed meetings after the performance evaluation and seemed withdrawn from the team during the meetings he attended.

Although Sims terminated Washington's employment soon after they discussed Washington's schedule and medical appointments, Sims testified that he made the decision due to Washington's behavior during these discussions. The jury was entitled to accept this testimony as credible, a determination not subject to our review.

In light of all the evidence presented to the jury, substantial evidence supports the jury's verdict that Washington "[d]id [not] meet his burden of proving his disability-discrimination claim by a preponderance of the evidence." Thus, Washington did not carry his final burden of showing that Group Health's stated reasons for his discharge were pretextual.

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[24] Brownfield, 178 Wn. App. at 874 (quoting Kuyper, 79 Wn. App. at 738).

Washington argues that the evidence "overwhelmingly showed that the termination was discriminatory" and that the jury did not have to choose between competing inferences. This simply is untrue in that the jury reasonably decided otherwise on the basis of substantial evidence.

Failure to Accommodate

Washington also argues that the jury's verdict on his accommodation claim is contrary to the evidence. We disagree.

Under WLAD, a disabled employee has a cause of action if he can demonstrate that his employer "failed to take steps reasonably necessary to accommodate the employee's disability."[25] "Employers have an affirmative obligation to reasonably accommodate the disability unless the employer can demonstrate that the accommodation would cause undue hardship to the employer's business."[26]

Here, the trial court instructed the jury on the elements of a failure to accommodate claim. According to those unchallenged instructions, Washington had the burden to prove the following factors:

> (1) That he had an impairment that is medically recognizable or diagnosable or exists as a record or history; and
> (2) That either
> (a) he gave Group Health Cooperative notice of the impairment; or
> (b) no notice was required to be given because Group Health Cooperative knew about his impairment; and

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[25] Sommer v. Dep't of Soc. and Health Servs., 104 Wn. App. 160, 172-73, 15 P.3d 664 (2001); see also RCW 49.60.180(2).

[26] Id. at 173.

(3) That the impairment had a substantially limiting effect on his ability to perform his job; and

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

(5) That Group Health Cooperative failed to reasonably accommodate the impairment.

. . . .[27]

On appeal, the parties dispute whether Washington presented substantial evidence to establish the first and seconds factors. As discussed previously in this opinion, Dr. Raghu's testimony and the medical record exhibits constitute substantial evidence of Washington's disabilities. Thus, Washington satisfied the first element of this claim. But we conclude that Washington failed to present substantial evidence to establish the second element—that he gave Group Health notice of his disability.

To satisfy the notice factor, the employee must inform his employer that a disability requiring accommodation exists.[28] The employee is not required to explain the full nature and extent of his disability.[29]

"[T]he employer's duty to determine the nature and extent of the disability does not impose an investigatory duty to question any employee suspected of a disability."[30] An employer's duty to inquire into an employee's disability "arises

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[27] Clerk's Papers at 643.

[28] Sommer, 104 Wn. App. at 173.

[29] Id.

[30] Goodman v. Boeing Co., 127 Wn.2d 401, 409, 899 P.2d 1265 (1995).

only after the employee has initiated the [accommodation] process by notice . . . ."[31]

Group Health provided substantial evidence that it lacked notice of Washington's disability. Sims testified that Washington did not mention his medical conditions prior to their first meeting in August. Additionally, Washington completed a "Demographic" questionnaire when he first started working for Group Health. The form had two disability questions and "yes" or "no" boxes for the employee to mark. The first question asked: "Are you an individual with a disability?" The second question asked: "Are you requiring a reasonable accommodation for a disability?" Washington did not mark any boxes.

At trial, Washington testified that he did not mark any boxes because he was "confused" and "did not know" how to complete the form. He explained that he informed a human resources employee about his medical conditions and disabilities. Washington told the employee that he was not requesting an accommodation at that point and did not believe he was "in need of that." The human resource employee allegedly told Washington to leave the boxes blank and that his supervisors would help him. The jury was entitled to decide whether this testimony was credible, a determination not subject to our review on appeal.

Washington also testified that he informed Sims of his medical conditions when he requested an adjusted work schedule. After Washington's meeting with Sims in August, Washington e-mailed Sims and Burton to notify them of a medical condition.

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[31] Id.

Determining whether Group Health had notice of Washington's disability was a question of fact for the jury.[32] The jury was entitled to determine what evidence was credible and what was not. From the conflicting evidence at trial, the jury found that Washington failed to "meet his burden" to establish his claim. Because this record shows there was substantial evidence to support that decision, there is no basis to overturn the trial court's discretionary determination to deny the motion for a new trial.

Washington argues that Group Health had an ongoing duty to accommodate him after it terminated his employment. But as we have discussed, Washington failed to establish the notice element of his claim. Because he failed to do so, there simply was no ongoing duty of Group Health.

COUNSEL MISCONDUCT

Washington argues that the trial court abused its discretion by denying his motion for a new trial due to Group Health's counsel's prejudicial misconduct. Because he failed to preserve this issue for review, we do not reach the substance of the claim.

CR 59(a)(2) permits a new trial due to the prevailing party's misconduct. Misconduct is distinct from merely aggressive advocacy.[33] "It is improper for

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[32] See Martini v. Boeing Co., 88 Wn. App. 442, 458, 945 P.2d 248 (1997), aff'd, 137 Wn.2d 357, 971 P.2d 45 (1999).

[33] Miller v. Kenny, 180 Wn. App. 772, 814, 325 P.3d 278 (2014).

counsel to invite the jury to decide a case based on anything other than the evidence and the law, including appeals to sympathy, prejudice, and bias."[34]

But absent an objection to counsel's comments, this claim "cannot be raised for the first time in a motion for a new trial unless the misconduct is so flagrant that no instruction could have cured the prejudicial effect."[35]

Here, Washington moved for a new trial after the jury entered its verdict. He argued in that motion that Group Health's counsel committed several specific acts of misconduct. Washington specifically referred to counsel's cross-examination regarding Washington's prior bankruptcy filing and Washington's physician. The trial court denied Washington's motion for a new trial, concluding that counsel's cross-examinations were proper.

We also note that Washington did not contemporaneously object to the comments he challenged in his motion for a new trial. This is an additional reason to deny relief on appeal.

On appeal, Washington raises new arguments that he did not make below. He now focuses on counsel's questions regarding Washington's former employers and a prior termination. Washington also focuses on counsel's alleged misconduct during opening statement and closing argument. The record shows that Washington failed to preserve these specific claims because he did not contemporaneously object. And he fails to demonstrate that any of these comments were flagrant and ill-intentioned, obviating the need for

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[34] M.R.B. v. Puyallup Sch. Dist., 169 Wn. App. 837, 858, 282 P.3d 1124 (2012).

[35] Sommer, 104 Wn. App. at 171.

contemporaneous objections. Thus, we will not consider these arguments any further.

RETALIATION, WRONGFUL DISCHARGE, AND DAMAGES

Washington contends that Group Health retaliated against him. This claim is not before us because Washington voluntarily dismissed it with prejudice before trial.

Washington also argues that Group Health terminated his employment in violation of public policy. But Washington did not assert this claim in his complaint, and the record shows that he makes this argument for the first time on appeal. Thus, we do not further consider this argument.[36]

Lastly, Washington asserts that Group Health cannot limit his damages because it cannot show that it discovered evidence of Washington's wrongdoing after it terminated his employment. Because there is no liability, damages are irrelevant.

We affirm the judgment on the jury verdict and the denial of the motion for new trial.

COX, J.

WE CONCUR:

[36] See RAP 2.5(a).

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Hi,
I have attached my Petition for review, closing argument of defense and the Court of Appeals opinion.

I talked with a clerk a couple days ago and she said to let you know I mailed the check.

Victor Washington

thanks

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Btw, I filed this online as well....I am being cautious by sending the email as well.... Thanks

On Fri, Aug 4, 2017 at 3:24 PM, Victor W. <vtwraider@gmail.com> wrote:

> Hi,
> I have attached my Petition for review, closing argument of defense and the Court of Appeals opinion.
>
> I talked with a clerk a couple days ago and she said to let you know I mailed the check.
>
> Victor Washington
>
> thanks