No. 76065-3-I

No. 96043-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARIA LUISA JOHNSON, CARMELIA DAVIS-RAINES, CHERYL MUSKELLY, PAULINE ROBINSON, ELAINE SEAY-DAVIS, TONI WILLIAMSON, and LYNDA JONES,

Plaintiffs/Petitioners,

v.

SEATTLE PUBLIC UTILITIES,
a department of the CITY OF SEATTLE,

Defendant/Respondent.

PETITION FOR REVIEW

THE SHERIDAN LAW FIRM, P.S.

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A. IDENTITY OF PETITIONERS / INTRODUCTION

The petitioners are Maria Luisa Johnson, Carmelia Davis–Raines, Cheryl Muskelly, Pauline Robinson, Elaine Seay–Davis, Toni Williamson, and Lynda Jones. They were employed by Seattle Public Utilities (SPU) as Utility Account Representatives (UARs). They worked in SPU's contact center, responding to Seattle City Light (SCL) and SPU customer requests for assistance or information regarding their bills and services. The petitioners ask this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

There is evidence in this record, which was only available after trial, that white jurors in King County are systematically overrepresented in the juror pool, while black jurors are systematically underrepresented, at the rate of about half of the black citizen voting age population (CVAP) in King County.

This Court, in addressing a Batson issue in Erickson, stated, "Though a pattern of striking multiple jurors may demonstrate racial animus, the Constitution forbids striking even a single prospective juror for a discriminatory purpose." City of Seattle v. Erickson, 188 Wn.2d 721, 732, 398 P.3d 1124 (2017) (quotation marks and citations omitted). Yet here, in a seven-plaintiff race discrimination case in which six of the

plaintiffs are black, none of the reachable venire was black. Thus, the defendant was never at risk of showing discriminatory intent in the jury selection, but achieved the same result—without saying a word the employer accused of race discrimination obtained a panel devoid of any black jurors to hear testimony and to deliberate on race discrimination claims by black plaintiffs against a mostly white management. RP (8/17 PM Rawlins) 202-03; RP (8/23 AM Rawlins) 491; RP (8/16 PM) 24.[1] This result is unjust and violates the Washington State Constitution, but if the Court of Appeals is to be believed, the bar for addressing these issues is currently so high that there exists no judicial framework for fixing this injustice.

We as a society cannot afford to allow loopholes in laws and procedures to permit injustice. Today more than ever, we need a frequent recurrence to fundamental principles because—today more than ever—it is essential to the security of individual rights and the perpetuity of free government. Const. art. I, § 32.

The problems in increasing diversity on our juror rolls are significant and difficult to solve through either court decisions or legislative action, but for this appeal they are not our problem and are not

[1] RP citations referencing "Rawlins" refer to the half-day report of proceedings that one the court reporters at trial, Ms. Rawlins, numbered consecutively, page 1 through 1308. The remaining RP citations reference the half-day report of proceedings that Ms. Girgus, the other court reporter, numbered individually, starting over at 1 with each trial day.

why we are here today. We are here because those problems, having gone unchecked, have denied the petitioners their day in court, and if this Court does nothing, injustice will prevail and discontent will ferment in all affected communities.

If the lack of diversity on the jury to which petitioners timely objected was not bad enough, the trial court took actions or failed to take actions that magnified the injustice—all of which were affirmed by the Court of Appeals. First, the trial court denied petitioners' objection and request to reconstitute the venire because the venire lacked diversity and was not representative of King County or of the petitioners as to racial composition. Second, the trial court denied petitioners' objection and request to reconstitute the venire because the venire (after hardship dismissals) was composed of an elite cross-section of the citizenry (including retirees and those whose companies would pay them a salary through a three-week trial); the court struck all workers who would not be paid if they sat on the jury rather than creating a trial schedule that may have permitted more diverse participation. Third, having acquiesced to (if not created) an environment that lacked diversity, the court failed to give two implicit bias jury instructions, which were designed to provoke juror introspection regarding implicit bias. Fourth, the trial court failed to give a "pretext" jury instruction used in the 8th Circuit, which would have

explained that false testimony can be considered in proving discrimination. Fifth, the court excluded the testimony of prominent scholar and expert witness Dr. Anthony Greenwald, who would have provided the jury with an understanding of implicit bias in the workplace—much needed given the jury composition. The errors here should be considered as cumulative.

This Court must take action to break the chains of injustice that affected this trial, and provide us all with guidance on how black plaintiffs may participate in the civil justice system without the deck being stacked against them. The only way to alleviate the injustice inherent in the current system is through concrete action based on a recurrence to fundamental principles because—today more than ever—it is essential to the security of individual rights and the perpetuity of free government. Const. art. I, § 32.

This petition for review should be accepted by the Supreme Court because the petition raises significant questions of law under the Constitution of the State of Washington; and involves issues of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b) (3) and (4). Upon review, the jury verdict should be set aside and a new trial granted with new rules for jury selection, jury instruction, and permitted expert testimony in a race discrimination case.

B. COURT OF APPEALS DECISIONS

1. On June 7, 2018, the Court of Appeals denied petitioners' motion for reconsideration in which petitioners asked for reconsideration based on the failure of the Court to consider in its opinion the 2016 Jury Survey Results, which addressed the same time period as the trial here but did not exist as a public record until after the opening brief was filed on appeal:

> [Petitioners] in their reply brief presented the Court with statistical data showing the systematic exclusion of African-Americans in King County.
>
> . . .
>
> The results of the juror demographic survey showed that the representation ratio of black or African-American jurors in King County Superior Court is approximately 0.5, while the representation of White jurors is over 1.0; meaning that white jurors in King County are systematically 'overrepresented' in the juror pool, while black jurors are systematically 'underrepresented' at the rate of about half of the citizen voting age population (CVAP) of African-Americans in King County. [*See* A-46 through 51.]

Mot. for Recons., at 2-3. A copy of the order denying petitioners' motion for reconsideration is in the Appendix at page A-37.

2. The opinion of the Court of Appeals was entered on May 14, 2018 (the "Opinion" or "Op."). The Opinion affirmed the trial court's denial of petitioners' objection and request to reconstitute the jury pool to establish a more diverse venire that was more representative of the petitioners, resulting in a jury that was approximately 20% non-Caucasian but lacked any black jurors in a case alleging race discrimination by six black

women. RP (8/15 PM Rawlins) 2-5. The Court held, "Johnson failed below and fails on appeal to identify **any deliberate exclusion or material departure from proper selection procedures**. Accordingly, Johnson fails in the burden to show any abuse of discretion by the trial court in declining to reconstitute the venire in this case." Op., at 6 (emphasis added). A copy of the Opinion is attached at the Appendix, pages A-1 through 36.

3. The Court of Appeals affirmed the trial court's systematic exclusion of all workers who would not be paid if they sat on the jury, rather than create a trial schedule that may permit more diverse participation, resulting in a less economically diverse cross section of the citizenry. RP (8/15 PM Rawlins) 4-5, 15; RP (8/15 AM) 38, 48. The Court of Appeals held, "Daily wage earners were not systemically excluded from the venire, but rather excused on the individualized basis of financial hardship. Johnson fails to show on this record that those excused were excused **on an improper basis**. … [and] While the court could have decided [that trial be held for two days a week as requested by petitioners], the choice not to is **far from an abuse of discretion**, given other competing considerations facing the court." Op., at 9 (emphases added).

4. The Court of Appeals affirmed the trial court's failure to give two implicit bias jury instructions, which would have provoked juror

introspection, and a third, which would have explained that false testimony can be used to prove discrimination. RP (9/12) 14-15; *see* CP 709 (Instruction No. 3); CP 711 (Instruction No. 4); and CP 720 (Instruction No. 13), attached at the Appendix, pages A-38 through 41. The Court of Appeals held, "the proposed instructions . . . are similar in substance to language in instruction number 1, requiring jurors to 'reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference.' " Op. at 32. In addition, the Court held, "proposed instructions explicitly referenced neuroscientific and social scientific evidence that was not adduced at trial. In their brief, petitioners connect the content of these instructions to Dr. Greenwald's testimony. Because the trial court excluded that testimony, it would mislead the jury to give instructions that replicated it." Id. As to the pretext instruction, the Court held, "this instruction accurately stated the law"; however, the Court followed prior Division I case law, holding that the instruction was not required. Id. at 34.

5. The Court of Appeals affirmed the trial court's exclusion of the expert testimony of Dr. Anthony Greenwald, who would have educated the jury on implicit bias—much needed given the jury's composition and the comments made by counsel. RP (8/15 PM Rawlins) 5; CP 5846; RP (8/5) 5-6. The Court of Appeals held, "The trial court properly recognized

the important policy concerns presented by the concept of implicit bias. But it also properly concluded that Dr. Greenwald's testimony consisted only of 'generalized opinions that are not tied to the specific facts of this case.' On this basis, it held that admission of the testimony 'would be confusing and misleading for the jury.' This was a perfectly permissible basis on which to exclude the testimony." Op., at 20-21 (footnote omitted).

C. ISSUES PRESENTED FOR REVIEW

1. Is an issue of substantial public interest presented by the systematic underrepresentation of black jurors in King County, which was recognized in State v. Evans, 100 Wn. App. 757, 762-63, 998 P.2d 373 (2000) and confirmed by the 2016 Jury Survey Results, and which the Opinion fails to recognize or address?

2. If institutional weaknesses create a venire in which no reachable black jurors are present in the venire, in a case involving black plaintiffs claiming race discrimination under the Washington Law Against Discrimination, then is a bright line rule needed to replace the Court of Appeals' "deliberate exclusion or material departure from proper selection procedures" standard, Op. at 6, to analyze whether the selection process resulted in a constitutional violation or was an abuse of discretion?

3. If current statutes permit the systematic exclusion of daily wage

earners owing to financial hardship (within the larger group of those with a financial hardship), then is a bright line rule needed to replace the Court of Appeals' standard that the absence of daily wage earners on a jury will be ignored in a case involving black petitioners claiming race discrimination under the Washington Law Against Discrimination, unless the petitioners can show "that those excused were excused **on an improper basis**," Op. at 9, and is the failure to find a solution for this problem a constitutional violation or an abuse of discretion?

4. If institutional weaknesses create a venire in which no reachable black jurors are present in the venire in a case involving black petitioners claiming race discrimination under the Washington Law Against Discrimination, then is it a constitutional violation or an abuse of discretion to fail to give an implicit bias jury instruction?

5. If institutional weaknesses create a venire in which no reachable black jurors are present in the venire in a case involving black petitioners claiming race discrimination under the Washington Law Against Discrimination, then is it an abuse of discretion to fail to give a pretext jury instruction? Should the holding of Farah v. Hertz Transporting, Inc., 196 Wn. App. 171, 177, 383 P.3d 552 (2016) be overturned?

6. If institutional weaknesses create a venire in which no reachable black jurors are present in the venire in a case involving black petitioners

claiming race discrimination under the Washington Law Against Discrimination, then is it an abuse of discretion to exclude an expert who would educate the jury on the issue of implicit bias?

7. Does the cumulative effect of the trial court's many errors here constitute a constitutional violation or an abuse of discretion?

D. STATEMENT OF THE CASE

1. Evidence that Blacks are Systematically Excluded from Jury Duty in King County was Ignored by the Court Below

Petitioners in their reply brief at the Court of Appeals cited juror demographic survey results presented at the 2017 Washington State Supreme Court Minority and Justice Commission Symposium, entitled, "Jury Diversity in Washington: A Hollow Promise or Hopeful Future?" which occurred the week after petitioners filed their opening brief at the Court of Appeals. The survey was conducted throughout 2016 with the assistance of the Administrative Office of the Courts and under a cover letter from the Chief Justice.[2]

The survey was conducted 16 years after the trial court in State v. Evans, 100 Wn. App. 757, 998 P.2d 373 (2000), took judicial notice that

[2] *See* Judge Steve Rosen, Remarks at Supreme Court Symposium, Jury Diversity in Washington: A Hollow Promise or Hopeful Future? (May 24, 2017), *at* https://www.tvw.org/watch/?eventID=2017051090, 1:07:00-1:10:20; 1:26:0-13. *See also* Judge Ed McKenna, *A judge explains why jury diversity is a work in progress,* THE SEATTLE TIMES, Feb. 2, 2018, 12:01 PM ("The survey data was collected over the course of a year, from February 2016 to February 2017...."), *available at* https://www.seattletimes.com/opinion/a-judge-explains-why-jury-diversity-is-a-work-in-progress/.

"there are no statistics available to King County Superior Court on the precise demographic representation of minorities on our jury venire because this information is not sought by the court in any of its information forms which all members of the jury venires are required to fill out when they appear for jury service," and that "jury venires in King County are not demographically representative of jurors of color in the county… based solely on the experience and observation of all of the judges in our court." Id., at 762–63.

The results of the 2016 juror survey showed that the representation ratio of black or African-American jurors in King County Superior Court is approximately 0.5, while the representation of white jurors is over 1.0; meaning that white jurors in King County are systematically "overrepresented" in the juror pool, while black jurors are systematically "underrepresented" at the rate of about half of the citizen voting age population (CVAP) of African-Americans in King County. A-51 through 55. Because the court below made no mention of the survey results in the opinion, petitioners sought reconsideration, which was denied. A-37.

2. The Petitioners Adopt and Supplement the Court's Statement of Facts

The petitioners accept the facts generally stated in the court's opinion with the following clarifications: the case was not about disparate

impact and neither was the employee petition (related to the retaliation claim), which was given short shrift by the court below. In fact, the petition captured the essence of petitioners' claims at trial:

> Creating a new policy that allows the City of Seattle to investigate employee's activities for the past 10 years is punitive! Employees, who engaged in the actions that are now deemed to be infractions of employment, should be 'Grandfathered in' and not investigated and judged for actions that were not infractions of employment at the time they were implemented.
>
> . . .
>
> We stand in solidarity asking for the voices of all the workers to be heard and that new polices not be used as punitive measures to reduce the people of color in the work place.

CP 5611; *see* admitted Trial Exhibit 46, A-60 through 61. Another fact central to the case and ignored by the court below was the impact of a $1 million theft of SPU funds under the same administration who petitioners argued caused the discipline of the help center employees as a means of diverting attention from SPU's failure to prevent that theft by claiming success in capturing the petitioners and others. Petitioners argued at trial that in response to media coverage of the theft ("Former City employee arrested in one-million dollar theft from Seattle Public Utilities")[3], SPU management issued the discipline given to the petitioners. CP 5625; *see* admitted Trial Exhibit 294, A-62 through 63. Evidence also showed that Guillemette Regan identified those persons as "groups of employees

[3] RP (8/17 PM Rawlins) 208-211.

clustered by race." CP 5611; see admitted Trial Exhibit 1, A-57.[4] The court below also ignored other facts presented by the petitioners showing management's favoritism of whites—Nick Pealy, a Deputy Director of Field Operations and Maintenance who reported directly to Director Hoffman. RP (8/17 PM Rawlins) 202-03. Both Director Hoffman and Pealy are Caucasian. Id. In 2011, Hoffman became aware that Pealy "had engaged in serious misconduct… with subordinate women" involving "improper conduct with female subordinates." Id.; RP (8/18 AM Rawlins) 353. Hoffman and SPU gave Pealy a $70,000 settlement package and a letter of reference, in contrast to Hoffman's treatment of the petitioners. *See* RP (8/18 AM Rawlins) 353-54.

3. Rulings During Voir Dire and Defense Opening Statement Abuses Magnified the Prejudice

During jury selection, after petitioners objected to the lack of diversity in the venire, they asked the court to reconsider the motion in limine ruling excluding Dr. Greenwald from testifying, arguing, "it is right along Justice Wiggins' statements" in Saintcalle. (8/15 PM Rawlins) 5. The court declined, stating, "I don't believe that Dr. Greenwald's opinions not play [sic] in this". Id. As described in his report, Dr. Greenwald could have educated the jury about how implicit biases "indicat[e] 'automatic

[4] Caucasian UAR Debra Warren was recommended for termination, but Hoffman gave her a 30-day suspension. *See* admitted Trial Exhibit 497 at the Appendix, page A-65.

preferences' (e.g., for White relative to Black Americans)." CP 323.

Not long after that, petitioners' counsel attempted to read the same portion of the Saintcalle opinion that he had read to the Court at the start of voir dire to educate the jury. RP (8/15 PM Rawlins) 34-35. Defendant objected, leading to a sidebar and to the court sustaining the objection to petitioners reading from the opinion without attributing the source for the purpose of discussing implicit bias. Id., at 74-75.

The predominantly white jury was repeatedly asked by defense counsel, Portia Moore,[5] if they "feel guilty for being white." RP (8/15 PM Rawlins) 63, 105. Turning the concept of implicit bias on its head, counsel asked who would start the mostly black plaintiffs "ahead at th[e] point of zero proof because of your concerns about implicit bias or guilt…?" RP (8/16 AM Rawlins) 106.

The theme continued in opening statement, when counsel for SPU said that petitioners "are trying to use their race and their age as an excuse," and began to quote Dr. Martin Luther King's "I have a dream" speech, drawing an objection that was sustained; followed by a remark about "Mr. Sheridan's efforts to make you feel guilty because you are not African-American." RP (8/16 PM) 14-15. Counsel went on to tell the jury

[5] The Court of Appeals was asked to take judicial notice of the fact that SPU's counsel, Ms. Moore, identifies as black; she lists many professional recognitions on her law firm's website, including her being "named one of the 'Most Influential Black Lawyers.'"

in opening: "Plaintiffs are going to throw a lot of documents and other evidence at you during this trial. And in doing so they are going to try and make you feel guilty because you are not African-American." Id., at 50-51. The attack was objected to and sustained, but defense counsel did not relent, telling the jury moments later, "Do not let the plaintiffs distract you or make you feel guilty." Id. While an objection was again sustained, Ms. Moore persisted with the attack, telling the jury "do not allow them to use their race or age as an excuse for not doing the right thing. There are plenty of legitimate cases of discrimination and retaliation in a workplace" leading to petitioners' third sustained objection. Id., at 51-52.

E. ARGUMENT

1. The Court of Appeals Erred by Failing to Consider the 2016 Jury Survey Results Showing the Systematic Exclusion of Black Citizens from King County Juries

This Court has relied on articles and journals in the past, and Saintcalle stands out as a case in which many articles were cited by the Court in support of the need to address implicit bias. State v. Saintcalle, 178 Wn.2d 34, 47, 309 P.3d 326 (2013), *abrogated by* City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017). The Court should consider the constitutional impact of the jury survey results, which confirm the continuing lack of juror diversity previously recognized in State v. Evans, 100 Wn. App. 757, 762–63, 998 P.2d 373 (2000).

2. A Bright Line Rule Is Needed To Replace The Court Of Appeals' Inadequate "Deliberate Exclusion Or Material Departure From Proper Selection Procedures" Analysis In Examining The Adequacy Of The Venire

"The right of trial by jury shall remain inviolate." Const. art. I, § 21. Without fair representation on the jury, a black plaintiff stands little chance of having a fair trial in a race discrimination case. We must face that these weaknesses may be viewed as institutional racism.

> Black revolutionary Stokely Carmichael and social scientist Charles Hamilton coined the phrase 'institutional racism' in their book Black Power. The term was prescient, anticipating the coming turn toward colorblindness and the idea that racism was only present if the intention was undeniable. Institutional racism, or structural racism, can be defined as the policies, programs, and practices of public and private institutions that result in greater rates of poverty, dispossession, criminalization, illness, and ultimately mortality of African Americans. Most importantly, it is the outcome that matters, not the intentions of the individuals involved. Institutional racism remains the best way to understand how Black deprivation continues in a country as rich and resource-filled as the United States.

TAYLOR, KEEANGA-YAMAHTTA. FROM #BLACKLIVESMATTER TO BLACK LIBERATION 8 (2016).

The Court of Appeals held, "Johnson failed below and fails on appeal to identify any **deliberate exclusion or material departure** from proper selection procedures." Op., at 6. The exclusion, whether deliberate or not, fosters institutional racism and is a denial of the right to trial by jury and equal protection. It is time for a recurrence to fundamental

principles; otherwise, our judiciary is fostering racial bias in jury selection and perhaps racism. "[N]ow is the time to begin the task of formulating a new, functional method to prevent racial bias in jury selection." Saintcalle, 178 Wn.2d at 52. The first step is to have black jurors in the venire.

3. A Bright Line Rule is Needed to Stem the Systematic Exclusion of Daily Wage Earners in Violation of State Law, the Right to Trial by Jury and Equal Protection, and which is an Abuse of Discretion

The Court of Appeals held that the absence of daily wage earners on a jury will be ignored in a case involving black plaintiffs claiming race discrimination under the WLAD, unless petitioners can show "that those excused were excused on an improper basis." Op., at 9. At the time of trial RCW 2.36.080(3) mandated, "A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status." *See* Appendix, at pages A-46 through 49. Jurors here, and in every longer trial, are routinely excluded because they won't earn a living if they sit on a jury. This means that virtually every potential juror who is paid hourly in lower paying jobs will be excused for financial hardship leaving the elites who work for large companies or government as jurors because they pay salaries for jury service—this is not a valid cross section. This violates the statute, the right to trial by jury, and equal protection. It is time for a recurrence to fundamental principles; otherwise,

our judiciary is fostering trial by elites. Possible solutions are to pay jurors at least the minimum wage to enable low-income workers to be jurors, or to have court fewer days each week so hourly workers can still work and earn a living wage (assuming that a minimum wage does that).

4. Failure to Give an Implicit Bias Jury Instruction in a WLAD Case is a Violation of the Right to Trial by Jury, Equal Protection and is an Abuse of Discretion

Too late for the petitioners, *three* Washington Pattern Jury Instructions have now been amended to add paragraphs on implicit bias. See WPI 1.01, 1.02, and 1.08. If institutional weaknesses create a venire in which blacks are underrepresented, and in which no reachable black jurors are present in the venire in a case involving black plaintiffs claiming race discrimination under the Washington Law Against Discrimination, then failure to give the instruction is a constitutional violation or an abuse of discretion—either way, the absence of the instruction may be viewed in this context as the product of institutional racism. A bright line rule of its use is needed now requiring the instruction in every case it is requested by a party.

5. Failure to Give a Pretext Jury Instruction in a WLAD Case is an Abuse of Discretion

If institutional weaknesses create a venire in which blacks are underrepresented, and in which no reachable black jurors are present in the venire in a case involving six black plaintiffs claiming race discrimination

under the Washington Law Against Discrimination, then it is at least an abuse of discretion to fail to give a pretext jury instruction that would address the difficult burden of the plaintiffs in a discrimination case. *See* Farah v. Hertz Transporting, Inc., 196 Wn. App. 171, 177, 383 P.3d 552 (2016) (pretext instruction is an accurate statement of the law, but not required), *review denied*, 187 Wn.2d 1023, 390 P.3d 332 (2017). The Farah holding should be overturned.

6. It is an Abuse of Discretion to Exclude an Expert Who Would Educate the Jury on the Issue of Implicit Bias

Petitioners sought the testimony of Dr. Greenwald, a prominent expert in the area of implicit bias. To ensure the admissibility of his testimony, petitioners modeled his potential testimony in accordance with federal case law, which approved his testimony because it was not specific to the facts of the case, but educated the jury on implicit bias. *Compare* Samaha v. Washington State Dep't of Transp., No. CV-10-175-RMP, 2012 WL 11091843, at *1 (E.D. Wash. Jan. 3, 2012), *with* CP 317-335.

The jury contained no African Americans, excluded lower income working people, and the trial court denied implicit bias and pretext instructions. Beyond understanding how petitioners' race played a substantial factor in SPU's actions, there was a critical need for the jury to understand implicit bias in order to make a careful and fair decision,

putting aside unconscious assumptions that disfavor blacks, which was even more important in this setting than in other cases. Ms. Moore's repeated comments that petitioners were trying only "to make you feel guilty because you are not African-American," RP (8/16 PM) 25, did not aid the effort at minimizing the jury's unconscious automatic assumptions, nor lessen the need for education on implicit bias. Here, Dr. Greenwald's testimony became even more crucial to a fair trial, yet was excluded. This was an abuse of discretion.

7. The Cumulative Effect of Errors Here Constitutes a Constitutional Violation or an Abuse Of Discretion

The cumulative prejudice is evident, and the Court should accept review and examine rulings below using a totality of circumstances approach as one would in other cases involving constitutional issues. *See*, Kentucky v. Whorton, 441 U.S. 786, 789, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979) (failure to give presumption of innocence instruction evaluated in light of the totality of the circumstances-including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors-to determine whether the defendant received a constitutionally fair trial).

F. CONCLUSION

For all of the foregoing reasons, review should be accepted.

Respectfully submitted this 6th day of July, 2018.

THE SHERIDAN LAW FIRM, P.S.

By: s/ John P. Sheridan

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DECLARATION OF SERVICE

Mark Rose states and declares as follows:

On July 6, 2018 I caused to be delivered a copy of the Petition for Review to be delivered via the Court's electronic delivery service to:

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No. 76065-3-I

No. _____

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARIA LUISA JOHNSON, CARMELIA DAVIS-RAINES, CHERYL MUSKELLY, PAULINE ROBINSON, ELAINE SEAY-DAVIS, TONI WILLIAMSON, and LYNDA JONES,

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SEATTLE PUBLIC UTILITIES,
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APPENDIX TO PETITION FOR REVIEW

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARIA LUISA JOHNSON; CARMELIA DAVIS-RAINES; CHERYL MUSKELLY; PAULINE ROBINSON; ELAINE SEAY-DAVIS; TONI WILLIAMSON; and LYNDA JONES, Appellants, v. SEATTLE PUBLIC UTILITIES, a department of the city of Seattle, a municipality, Defendant.	No. 76065-3-I DIVISION ONE UNPUBLISHED FILED: May 14, 2018

Cox, J. — Maria Luisa Johnson and others commenced this action following disciplinary action against them by Seattle Public Utilities (SPU) for violation of the City of Seattle's Ethics Code. The case went to trial, ending in a defense verdict. On appeal, Johnson and others challenge a series of discretionary decisions by the trial court. But they fail to show any abuse of discretion. Moreover, they fail in their burden to show that the trial court violated the constitutional provision barring comment on the evidence. We affirm.

Johnson, Carmelia Davis-Raines, Cheryl Muskelly, Pauline Robinson, Elaine Seay-Davis, Toni Williamson, and Lynda Jones (collectively, "Johnson") were employed by SPU as Utility Account Representatives (UARs). They worked in SPU's contact center, responding to Seattle City Light (SCL) and SPU customer requests for assistance or information regarding their bills and services. In that capacity, they had access to a database that SCL and SPU used to bill and store customer financial information. This access allowed them to waive fees, adjust account balances, and make payment arrangements for customers.

UARs are subject to the Seattle Ethics Code. Under that code, City employees may not "[p]articipate in a matter in which" the employee or an immediate family member has a financial interest.[1] They may not perform official duties when it could appear that their judgment is impaired due to personal or business relationships, without disclosure.[2] They may not use their jobs for purposes that are, or appear to be, primarily for personal benefit.[3] SPU's policy manual accordingly directed UARs to request a supervisor to provide maintenance for their own accounts or those of family or friends.

SPU discovered that certain employees had made transactions on their own utility accounts, and investigated the issue further. Guillemette Regan, SPU's Director of Risk and Quality Assurance, led the investigation. After investigating 217 SPU employees, she concluded that 77 had obtained access to

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[1] SMC 4.16.070(A)(1).

[2] SMC 4.16.070(A)(3).

[3] SMC 4.16.070(B)(1).

their own accounts or those of friends or family. Regan submitted investigation reports to SPU's Deputy Director of Customer Service, Susan Sanchez, who made disciplinary recommendations to SPU Director Ray Hoffman. Hoffman decided to terminate 10 employees and suspend 18.

Employees raised concerns during the investigation about its possible disproportionate impact on African-American employees. Several African-American employees signed a Petition of Solidarity to express their concern.

The record shows that Maria Luisa Johnson individually made 21 financial transactions on her own account. Williamson made 66. Muskelly made 24. Davis-Raines made 3. Jones made 1. Seay-Davis made 9.

SPU terminated Maria Luisa Johnson and Williamson. SPU would have terminated Muskelly but for his retirement. Davis-Raines and Jones were suspended for one day. Seay-Davis would have been suspended but retired.

The claims initially at issue in this lawsuit were disparate impact, race and age disparate treatment, and retaliation against those who signed the Petition of Solidarity. They dismissed the disparate impact claim pretrial. The parties do not appear to dispute that four of the plaintiffs are African-American and one is Filipino. The jury returned a defense verdict at trial.

This appeal followed.

JURY VENIRE COMPOSITION

Johnson argues that the trial court abused its discretion by declining to reconstitute the venire from which the jury was drawn. We hold that there was no abuse of discretion in this respect.

"It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court."[4] This policy, codified at RCW 2.36.080, "mandate[s] that the members of a jury panel be randomly selected."[5] And the Sixth and Fourteenth Amendments of the federal constitution similarly entitle litigants to a "petit jury selected from a fair cross section of the community."[6]

The right to a jury selected from a fair cross section of the local population does not entitle the litigant to any specific jury composition.[7] Nor is a litigant entitled to an exact cross section of the population.[8] Thus, the absence of selected jurors of any particular race does not violate this right and "is not sufficient of itself to establish racial prejudice."[9]

Because the jury panel must be randomly selected, challenges to the composition of the entire panel are limited. CrR 6.4(a) requires trial courts to only sustain such challenges made "for a material departure from the procedures prescribed by law for their selection." Without reference to CrR 6.4(a), the supreme court has held that "[w]here the selection process is in substantial

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[4] RCW 2.36.080(1).

[5] Brady v. Fibreboard Corp., 71 Wn. App. 280, 282, 857 P.2d 1094 (1993).

[6] Duren v. Missouri, 439 U.S. 357, 359, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).

[7] State v. Davis, 141 Wn.2d 798, 837, 10 P.3d 977 (2000).

[8] State v. Hilliard, 89 Wn.2d 430, 442, 573 P.2d 22 (1977).

[9] Davis, 141 Wn.2d at 837.

compliance with the statutes, the defendant must show prejudice. If there has been a material departure from the statutes, prejudice will be presumed."[10] And a selection process, even if not unconstitutionally discriminatory, "is still invalid if it systematically excludes a cognizable class of individuals."[11]

We review for abuse of discretion challenges to the venire process.[12]

Here, Johnson argues that the venire in this case does not reflect the racial composition of King County. Johnson cites to counsel's declaration below stating that only 2 percent of the 100 person venire in this case were Black or African American. Notably, there is no claim that there was a failure to randomly select the members of the venire.

After screening for hardships, the venire was reduced to 38 potential jurors that Johnson's counsel described as overwhelmingly White. Of these, eight identified as non-White. Counsel objected and proposed that the trial court pick a new, more diverse, panel. The court declined to reconstitute the venire.

The jury chosen included three jurors of color, who identified as Vietnamese, Mexican American, and East Indian. No jurors of Johnson's racial identities were chosen.

Johnson fails to present any legal authority to support the proposition that a venire is improper merely because it either fails to reflect a cross-section of the local population, or because it fails to include jurors of a party's race. As the trial

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[10] State v. Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991).

[11] State v. Clark, 167 Wn. App. 667, 674, 274 P.3d 1058 (2012).

[12] Id.

court correctly recognized, "unless there is evidence of deliberate exclusion from jury pools there is nothing that I can do."

Johnson failed below and fails on appeal to identify any deliberate exclusion or material departure from proper selection procedures. Accordingly, Johnson fails in the burden to show any abuse of discretion by the trial court in declining to reconstitute the venire in this case.

Johnson points to the lead opinion in State v. Saintcalle to support their position in this case.[13] That lead opinion is of little help here.

Only two justices signed the lead opinion. Thus, this opinion has no precedential effect on this case. The rest of the opinions reflect split views on various aspects of that case. The justices' splintered views on the question then before the court offer little help in addressing the issue in this case.

More importantly, Saintcalle is not helpful in addressing the issue here: constitution of the venire from which a jury is drawn. Rather, it concerned a Batson v. Kennedy challenge to the use of peremptory strikes against the sole African American member of a venire.[14] That is not at issue here.

Johnson argues extensively about the efforts made in society to attain greater diversity in the jury process and contends that "[i]t is at last time for such efforts to come to fruition." While this may be true, that does not mean that the

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[13] 178 Wn.2d 34, 309 P.3d 326 (2013), abrogated by City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017)).

[14] Saintcalle, 178 Wn.2d at 35. We note that the state supreme court recently promulgated a new rule, GR 37, to address peremptory challenges implicating racial or ethnic bias. That rule does not apply to the issues in this case.

trial court's decision in this case was an abuse of discretion under governing standards. That is the question before us, and Johnson fails in meeting the burden of showing such abuse.

TRIAL SCHEDULE

Johnson next argues that the trial court abused its discretion by excusing jurors who claimed financial hardship. Again, there is no showing of any abuse of discretion.

Under RCW 2.36.080(3), "[a] citizen shall not be excluded from jury service in this state on account of . . . economic status." RCW 2.36.100 further restricts a trial court from excusing otherwise qualified jurors "except upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary." Thus, while a juror may be excused for financial hardship, he or she may not be excluded because of his or her economic status. And a litigant has "no right to be tried by a particular jury or a particular juror."[15]

Johnson cites unhelpfully to the New Hampshire supreme court's opinion in State v. Ayer.[16] There, the court considered two statutes identical to RCW 2.36.080(3) and RCW 2.36.100, regarding exclusion for economic status and excusal for financial hardship.[17] The court explained that those excused for

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[15] Clark, 167 Wn. App. at 673.

[16] 150 N.H. 14, 31, 834 A.2d 277 (2003).

[17] Id.

financial status did not represent a recognized group with shared status.[18] The defendant, Daniel Ayer Sr., had identified that putative group as "jurors who would suffer economic difficulty as a result of having to serve for multiple weeks at the statutory rate of compensation."[19] That group, he argued, "included people who are self-employed, work on commission, or have a relatively low income."[20]

Instead of showing those commonalities, the record revealed "that the only thing this group shares in common is that they all raised a concern regarding the economic impact to themselves or their families of serving on a jury for three weeks."[21] The court reasoned that a self-employed person or a person working on commission might earn a substantial income, "the absence of which would impose a hardship upon that individual's ability to maintain his or her standard of living."[22] The trial court had neither discerned the jurors' economic status when it excused them nor relied on that basis for the decision.[23]

Here, the trial court excused numerous jurors for financial hardship. It explained that a juror could face such hardship if she:

> work[ed] for . . . an employer that does not compensate you, that – and missing that money would mean that you couldn't pay your primary bills. Your rent. Your utilities. Your food. That's a

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[18] Id. at 32.

[19] Id. (internal quotations omitted).

[20] Id.

[21] Id.

[22] Id.

[23] Id.

> hardship. Having less money at the end of the month for, you know, discretionary spending, not a hardship.[24]

Excusal on this basis is permitted under RCW 2.36.100. It does not offend any authorities of which we are aware. Daily wage earners were not systemically excluded from the venire, but rather excused on the individualized basis of financial hardship. Johnson fails to show on this record that those excused were excused on an improper basis.

Yet Johnson argues that the trial court should have remedied the problems presented by the jury compensation scheme. This argument goes to policy and is best resolved by the legislature.[25] Again, this fails to show any abuse of discretion by the trial court, the issue properly before us.

Johnson further contends in this argument that the trial court could have adopted the alternative trial schedule that they proposed, moving that trial be held for two days a week. While the court could have decided to do so, the choice not to is far from an abuse of discretion, given other competing considerations facing the court. Johnson utterly fails to present any authority that denial of this proposed schedule was an abuse of discretion. As the trial court correctly reasoned, "that mechanism, although that is appealing, would end up excluding all sorts of other people, who can't take off two months working two days a week, childcare issues, all kinds of other things."[26]

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[24] Report of Proceedings (August 15, 2016, K. Girgus) at 43.

[25] In re the Det. of J.N., 200 Wn. App. 279, 284, 402 P.3d 380 (2017).

[26] Report of Proceedings (August 15, 2016, D. Rawlins) at 4-5.

EXCUSAL OF JURORS

Johnson argues that the trial court abused its discretion by dismissing three jurors for cause. The record does not support this challenge.

A litigant may challenge a juror for cause when the juror expresses actual bias.[27] RCW 4.44.170 defines actual bias as "a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." That a juror has expressed "such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially."[28] The trial court may determine whether a litigant has successfully rehabilitated a juror that expresses actual bias.[29]

We review for abuse of discretion a trial court's decision on excusing jurors for cause.[30] This standard recognizes that the trial court is in the unique position to assess potential jurors' "tone of voice, facial expressions, body

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[27] RCW 4.44.190.

[28] Id.

[29] State v. Witherspoon, 82 Wn. App. 634, 638, 919 P.2d 99 (1996).

[30] Id.

language, or other forms of nonverbal communication."[31] We simply cannot and should not make those assessments as an appellate court.[32]

Here, Johnson argues that the trial court abused its discretion in dismissing jurors 8, 11, and 53.

Juror number 11 stated in voir dire that the fact that Johnson had commenced this action led them "to favoring for the plaintiffs to start off."[33] When Johnson's counsel attempted to rehabilitate, the juror explained that while they would strive to be impartial, they had "a bias from my past history of knowing individuals who work for the City of Seattle and some other Seattle City Light in the past. There is built up animosity, if you will, that is there."[34]

Juror number 8 stated that the defense would have "a really tough road to break down all of these stories of these people that I feel so strongly in their experiences."[35] The juror later repeated these concerns following Johnson's counsel's attempt at rehabilitation, stating "that the plaintiffs' side would want me on this jury, that the defense would have a very tough time. They have a tough

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[31] State v. Lawler, 194 Wn. App. 275, 287, 374 P.3d 278, review denied, 186 Wn.2d 1020 (2016).

[32] Id.

[33] Report of Proceedings (August 16, 2016, D. Rawlins) at 107.

[34] Id. at 125.

[35] Id. at 107.

road."[36] They explained that it would be "really hard to put aside" personal experiences and those of close friends with racial injustice.[37]

Defense counsel further asked this juror whether "if you were in my position and trying to pick a jury that was fair and unbalanced [sic], would you have any concerns about you sitting on this jury?"[38] Juror number 8 answered affirmatively.[39]

Juror number 53 initially stated that SPU was "going to have to prove" that plaintiffs' claims were insufficient.[40] After the trial court explained that the burden of proof properly lay on the plaintiffs, Juror number 53 explained that while they "agree[d] with everything that the judge said," they nonetheless maintained a "predisposition on my part that I am going to be empathetic with what I see as the victim in this case. It is just a knee-jerk reaction."[41] They understood the instruction on burden of proof to mean "that both sides equally need to prove their case."[42] This juror answered equivocally when asked whether they could put aside their bias and explained that "it would be a twist ending" if they found

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[36] Id. at 124.

[37] Id.

[38] Id. at 123.

[39] Id.

[40] Id. at 109.

[41] Id. at 112.

[42] Id. at 128.

for the defense.[43] They explained that they "would be surprised with if [sic] my mind was changed."[44]

The trial court did not abuse its discretion by dismissing these three jurors for cause. All three expressed actual bias towards supporting Johnson's position. The trial court asked defense counsel to justify the challenges made and allowed Johnson's counsel to attempt to rehabilitate. Based on the answers provided, and the circumstances and nonverbal communication that this court cannot assess, the trial court granted defense counsel's challenges. It determined that the attempted rehabilitation had been unsuccessful. We have no reason to second guess the trial judge in making these determinations, all of which seem amply supported by this record.

Johnson contends that the trial court dismissed these jurors on an improper "if you were in my spot" basis. This argument has no merit.

Defense counsel asked these three dismissed jurors whether they would choose such jurors if they were arguing for the defense. Such a question did not establish a novel basis for dismissal of jurors. It merely sought to discern whether the jurors held an actual bias against the defense.

DR. ANTHONY GREENWALD'S TESTIMONY

Johnson argues that the trial court abused its discretion by excluding Dr. Greenwald's testimony on implicit bias. There was no abuse of discretion in rejecting this proposed expert testimony.

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[43] Id. at 127.

[44] Id.

ER 702 requires a trial court to determine whether an expert's otherwise qualified testimony would be helpful to the trier of fact. Washington courts have provided extensive guidance on what renders expert testimony helpful. An expert's testimony is helpful if it assists the jury in "understanding matters outside the competence of ordinary lay persons."[45] And the court gauges the extent of that helpfulness on what the parties bear the burden of proving or disproving in a particular claim.[46] Further, the expert must also "ground his or her opinions on facts in the record."[47] When testimony may be "somewhat speculative . . . the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert."[48]

The trial court has wide discretion in deciding whether expert testimony is helpful.[49] "This court will not disturb the trial court's ruling '[i]f the reasons for admitting or excluding the opinion evidence are both fairly debatable.'"[50]

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[45] Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 600, 260 P.3d 857 (2011).

[46] See Colley v. Peacehealth, 177 Wn. App. 717, 728-29, 312 P.3d 989 (2013).

[47] Volk v. DeMeerleer, 187 Wn.2d 241, 277, 386 P.3d 254 (2016).

[48] Davidson v. Mun. of Metro. Seattle, 43 Wn. App. 569, 571-72, 719 P.2d 569 (1986).

[49] Stedman v. Cooper, 172 Wn. App. 9, 18, 292 P.3d 764 (2012).

[50] Moore v. Hagge, 158 Wn. App. 137, 155, 241 P.3d 787 (2010) (quoting Miller v. Likins, 109 Wn. App. 140, 147, 34 P.3d 835 (2001)).

Additionally, the trial court has discretion to exclude evidence "if its probative value is substantially outweighed by the danger of" confusing or misleading the jury.[51]

Here, Dr. Greenwald is a well-respected and widely published scholar of social psychology, cognitive psychology, and research methodology. He is a tenured faculty member in the University of Washington's psychology department. Johnson retained him to "provide expert witness testimony concerning psychological understanding of ***implicit bias***."[52]

Implicit bias is "a class of mental processes that function outside of conscious awareness."[53] This concept has superseded earlier academic understandings that people are guided solely by their explicit and conscious intentions.

To study this phenomenon, Dr. Greenwald developed a research method called the Implicit Association Test (IAT). Subjects have taken the IAT in various forms more than 17 million times. Its methodology and its results have received positive peer review in the relevant field.

Dr. Greenwald believed that his testimony would help the jury to "better understand the evidence as it relates to discriminatory intent, to counteract common misconceptions concerning the character of discriminatory intent, and to

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[51] ER 403.

[52] Clerk's Papers at 318.

[53] Id. at 320.

determine whether Plaintiffs' racial status provided a basis for Defendants' actions."[54]

He intended to testify that implicit bias is pervasive and is "often observed in more than 70% of Americans, most of whom genuinely and sincerely regard themselves as lacking in biases," "is scientifically established as a source of discriminatory judgment and decision making in personnel decisions," can influence "[d]iscretion-affording personnel evaluations that permit subjectivity in decision making," "operate[s] outside of (conscious) awareness," and "contribut[es] to discriminatory outcomes" that favor the in group.[55]

Dr. Greenwald expressed the belief that "these general principles and the opinions related to them . . . apply to the evaluation of the facts of this case."[56] Notably, he failed to identify anything in the record beyond the complaint that informed his knowledge of the facts of this case.

The parties do not appear to dispute either that Dr. Greenwald is qualified to offer this testimony or that it is based on reliable methods. The heart of the dispute is whether the testimony pertained to the facts of this case.

They identify three federal district court cases that examined the admission or exclusion of Dr. Greenwald's testimony under the federal rules of evidence in the context of employment discrimination actions. As this court has stated, "[t]he broad standard of abuse of discretion means that courts can

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[54] Id. at 322.

[55] Id. at 323-26.

[56] Id. at 335.

reasonably reach different conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case."[57]

The first of these cases, Samaha v. Washington State Department of Transportation, was decided by the United States District Court for the Eastern District of Washington.[58] In that case, Elias Samaha brought several claims under federal civil rights statutes and under the Washington Law Against Discrimination.[59] He alleged that he suffered disparate treatment, particularly in his performance evaluations, because of his Arab descent.[60]

Pretrial, the Department of Transportation moved to exclude Dr. Greenwald's testimony, arguing that Dr. Greenwald had neither applied his theories of implicit bias to the facts nor opined whether implicit bias informed the employment decisions at issue.[61]

The court disagreed, explaining that "[t]estimony that educates a jury on the concepts of implicit bias and stereotypes is relevant to the issue of whether an employer intentionally discriminated against an employee."[62] The court held that the testimony should not be excluded based on an Advisory Committee Note to FRE 702. This note advises that expert testimony as to "general principles,

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[57] Stedman, 172 Wn. App. at 18.

[58] 2012 WL 11091843 (E.D. Wash. Jan. 3, 2012).

[59] Id. at *1.

[60] Id.

[61] Id. at *2.

[62] Id. at *4.

without ever attempting to apply these principles to the specific facts of the case" may nonetheless help the factfinder.[63] This appears to be a discretionary reading of the federal rule, nothing more.

Two years later, the United States District Court for the Northern District of Illinois considered Dr. Greenwald's testimony in an employment discrimination case, Jones v. National Council of Young Men's Christian Associations.[64] It rejected that testimony, reasoning that it could not reliably support an opinion that the employer in that case, the National Council of the YMCA, was liable for employment discrimination.[65]

Considering the principle employed by the Samaha court, the Jones court explained that "[e]ven opinions about general principles have to be logically related to the factual context of a case to be admissible – those general principles must still 'fit' the case."[66] It noted the "substantial disconnect between the abstract testing from which Dr. Greenwald's 'general principle' is derived and the fact context of this case."[67] It explained that Dr. Greenwald's methodology tested the implicit bias of subjects against "virtual strangers in laboratory settings

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[63] Id. (quoting Fed. R. Evid. 702 advisory committee's note to the 2000 amendment).

[64] 34 F. Supp. 3d 896 (N.D. Ill. 2014).

[65] Id. at 901.

[66] Id. at 900.

[67] Id. at 901.

whom they will never meet or see again, with nothing at stake."[68] The employers in this case, by contrast "kn[e]w the people for whom they are making important decisions concerning their pay, promotions, and performance evaluations."[69] Under such circumstances, the testimony threatened to "blur, if not erase altogether, the line between hypothetical possibility and concrete fact."[70] As a result, even if the general principles "fit" the facts of the case, FRE 403 would support exclusion due to the risk of confusion to the jury.[71]

More recently, the United States District Court for the Western District of Pennsylvania considered Dr. Greenwald's testimony in Karlo v. Pittsburgh Glass Works, LLC.[72] Again, the employer sought to exclude Dr. Greenwald's testimony as unrelated to the facts of the case.[73] The court examined both Jones and Samaha.[74] It excluded the testimony, finding that Dr. Greenwald had not examined the facts of the case.[75] He had not spoken to anyone associated with the employer, visited its facilities, or "perform[ed] any independent, objective analysis on whether implicit biases played any role in the decisions to terminate

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[68] Id. at 900.

[69] Id.

[70] Id. at 901.

[71] Id.

[72] 2015 WL 4232600 (W.D. Pa. Jul. 13, 2015) vacated by 849 F.3d 61 (3rd Cir. 2017).

[73] Id. at *1.

[74] Id. at *6-7.

[75] Id. at *7.

the remaining Plaintiffs."[76] Because of this, and because the court held that implicit bias may not be relevant to a cause of action requiring a showing of ***intentional*** discrimination, the court excluded Dr. Greenwald's testimony.[77]

Dr. Greenwald's testimony in this case was analogous to that in Samaha, Jones, and Karlo. SPU raises similar concerns to those raised by the employers in those cases, albeit in the context of Washington's ER 702 and ER 403 rather than the federal counterparts. Federal courts are split on whether Dr. Greenwald's theories of implicit bias are relevant to claims such as those in this case that require a showing on discriminatory intent. And the superior court in this action was not bound to follow those federal courts. Rather, the court was free to apply ER 702 and ER 403, as it did. In doing so, we note that Johnson admitted in their motions in limine that "Dr. Greenwald will not state an opinion on the specifics of this case."[78]

The trial court properly recognized the important policy concerns presented by the concept of implicit bias. But it also properly concluded that Dr. Greenwald's testimony consisted only of "generalized opinions that are not tied to the specific facts of this case."[79] On this basis, it held that admission of the

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[76] Id.

[77] Id. at *9 (emphasis added).

[78] Clerk's Papers at 127.

[79] Report of Proceedings (August 5, 2016) at 5-6.

testimony "would be confusing and misleading for the jury."[80] This was a perfectly permissible basis on which to exclude the testimony.

KATHLEEN JEZIERSKI'S TESTIMONY

Johnson argues that the trial court abused its discretion by permitting Jezierski to testify despite SPU's disclosure violation. We disagree.

CR 26(b)(5) entitles a party to "'[d]iscovery of facts known and opinions held by experts" to the extent otherwise discoverable. King County LCR 26(k) implements this rule by requiring parties to "no later than the date for disclosure designated in the Case Schedule, disclose all" expert witnesses whom the party might call. Disclosure of expert witnesses must include "[a] summary of the expert's opinions and the basis therefore and a brief description of the expert's qualifications."[81] Parties must also, as appropriate, supplement their responses with the identity of experts expected to testify, "the subject matter on which the expert witness is expected to testify, and the substance of the expert witness's testimony."[82]

The trial court has discretion to impose sanctions for failure to comply with this rule.[83] Exclusion of the expert's testimony is one possible sanction if the

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[80] Id. at 6.

[81] LCR 26(k)(3)(C).

[82] CR 26(e)(1)(B).

[83] Johnson v. Mermis, 91 Wn. App. 127, 133, 955 P.2d 826 (1998).

proponent of the testimony engaged in willful intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.[84]

This court reviews for abuse of discretion a ruling on the imposition of sanctions.[85]

Here, the case schedule mandated disclosure of possible primary witnesses by February 2, 2016, and possible additional witnesses by March 21, 2016. Discovery cut off was set at May 23, 2016. On the cutoff date, SPU filed and served a disclosure of witnesses listing as an expert, "[a]n individual from COPC, Inc. [who] will provide expert testimony regarding call center standards and expectations."[86]

At trial on September 6, 2016, Johnson objected to Jezierski's testimony unless first being permitted to depose her the night before SPU expected to call her. They alleged that SPU had violated CR 26 and LCR 26.

SPU responded by referencing its May 23 disclosure. It explained that it intended to call Jezierski only as a rebuttal witness whom Johnson could have deposed in the months since the disclosure.

The trial court ruled that Johnson had three months since the disclosure, during which time Jezierski could have been deposed. It held that the disclosure had been sufficient.

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[84] Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 687-88, 132 P.3d 115 (2006).

[85] Mermis, 91 Wn. App. at 133.

[86] Clerk's Papers at 5824.

The trial court did not abuse its discretion in permitting Jezierski to testify without a last minute deposition. Johnson has not provided authority establishing any such abuse.

Johnson cites in rebuttal to Magana v. Hyundai Motor America.[87] But that case does not help.

There, Jesse Magana brought a products liability action against Hyundai after suffering severe personal injury allegedly caused by a seat back failure.[88] Pretrial, Magana requested production of documents indicating any such failures since 1980.[89] Hyundai provided incomplete responses, characterizing the specific requests as overly broad.[90] But Magana still prevailed at trial.[91] Hyundai appealed.[92] For reasons not relevant here, the case was remanded for retrial.[93]

Before retrial commenced, Magana made further requests for production.[94] Hyundai responded that several of these requests were over

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[87] 167 Wn.2d 570, 220 P.3d 191 (2009).

[88] Id. at 577-78.

[89] Id. at 577.

[90] Id.

[91] Id. at 578.

[92] Id.

[93] Id.

[94] Id. at 579.

burdensome.[95] It did not provide complete responsive discovery.[96]

Based on the insufficiency of discovery, Magana moved for a default judgment.[97] The trial court granted that motion, finding that Hyundai willfully violated CR 26, substantially prejudicing Magana, and that a lesser sanction would not do.[98] This court reversed the imposition of the default judgment but the supreme court reinstated it, holding that "[t]he Court of Appeals substituted its own discretion for the trial court's."[99] It was not the province of an appellate court to reverse the trial court's discretionary imposition of sanctions for a CR 26 violation so long as based on sufficient findings.[100]

This case stands for the proposition that the trial court has discretion to impose sanctions for violations of CR 26, so long as it complies with certain procedures not relevant here. In no way does Magana mandate the imposition of sanctions for any violations in this case.

One exception to this general rule applies to certain violations of CR 26(g). Sanctions for such violations are mandatory.[101] Johnson cites for this proposition

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[95] Id.

[96] Id.

[97] Id. at 580.

[98] Id. at 582.

[99] Id. at 590.

[100] Id.

[101] Wash. State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 355, 858 P.2d 1054 (1993).

to Washington State Physicians Ins. Exchange & Association v. Fisons Corporation.[102] But Johnson cites no comparable authority for the proposition that violations of CR 26(b), CR 26(e), or LCR 26(k) trigger mandatory penalties.[103] Nor is there any reasoned argument why the precedent set forth in Fisons should be extended beyond the rule relevant in that case. The claimed violation of CR 26(g) in the reply brief is too late to warrant this court's consideration.[104]

Johnson contends that they requested production of the resumes and reports of experts expected to testify. And they further contend that SPU declined to provide these documents. But they cite for this purpose to SPU's fourth response to requests for production dated September 30, 2015. Such a document, served several months before the cutoff dates noted above, is not relevant to compliance with those dates. Although SPU appears not to have supplemented this response, it identified Jezierski in the witness disclosure list.

Johnson summarily argues that Jezierski's testimony was inadmissible under ER 402, 403, 701, and the Frye v. United States test.[105] They allege that Jezierski relied on "junk science," that she had never testified as an expert

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[102] 122 Wn.2d 299, 355, 858 P.2d 1054 (1993).

[103] See Darkenwald v. Emp't Sec. Dep't, 183 Wn.2d 237, 248, 350 P.3d 647 (2015); RAP 10.3(a)(6).

[104] RAP 10.3(c); Basin Paving Co. v. Contractors Bonding and Ins. Co., 123 Wn. App. 410, 415, 98 P.3d 109 (2004).

[105] Brief of Appellants at 49-50 (citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).

before, and that she drew her opinions from a company database. This court does not address arguments so cursorily presented.[106]

COMMENT ON EVIDENCE

Johnson argues that the trial court unconstitutionally commented on a matter of fact. Because this argument was not preserved below and does not qualify for any exception for review, we disagree.

Under RAP 2.5(a)(3), a party may raise, for the first time on appeal, a manifest error affecting a constitutional right.[107] The party "must identify the constitutional error and show that it actually affected his or her rights at trial" in order to claim a manifest error affecting a constitutional right.[108] This requires that the party "make a plausible showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial."[109]

Article IV, section 16 of the Washington constitution provides that "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement."[110]

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[106] Bercier v. Kiga, 127 Wn. App. 809, 824, 103 P.3d 232 (2004).

[107] See State v. Lamar, 180 Wn.2d 576, 582, 327 P.3d 46 (2014).

[108] Id. at 583.

[109] Id.

[110] State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

Here, Johnson relies on this state constitutional provision to argue that the trial court committed reversible error. But the question is whether the record shows that any such error was "manifest." We conclude that it does not.

Unnamed individuals outside the courthouse distributed a pamphlet entitled "A Jury of Peers" that discussed jury nullification in relation to racial disproportionalities in the criminal justice system and incarceration. At least two potential jurors on the venire in this case received this pamphlet.

The trial court addressed this matter with counsel before summoning the venire. It described the pamphlet to counsel as neither attorney had seen it. While distinguishing this case from the criminal matters discussed in the pamphlet, the trial court suggested that potential jurors "may want to discuss these issues" with counsel during voir dire.

The trial court made similar remarks shortly after to the venire. It acknowledged to potential jurors that similar issues of racial disproportionality were "very much in the forefront in the media." Because the case involved employment discrimination, the trial court recognized that such issues may or may not appear relevant to the potential jurors. It explained that while such issues might not appear relevant to some potential jurors, they should "feel free to discuss it with the attorneys."

Johnson fails on this record to demonstrate that these remarks violated the constitutional prohibition in any way. The remarks did not show the court's view of the evidence nor otherwise offended the state constitution. The claimed error is not manifest. Accordingly, we do not further address this claim.

ER 1006

Johnson argues that the trial court abused its discretion by admitting exhibits 497, 498, 499, 501, and 502. We again disagree.

ER 1006 provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

The documents underlying such summaries must themselves be admissible.[111] But the inaccuracy of a summary under ER 1006 goes to weight, not admissibility.[112] An ER 1006 summary remains admissible even though a small portion is not supported by documentation when opposing counsel had the opportunity to cross-examine the authenticating witness.[113]

This court reviews for abuse of discretion the admission of a summary chart under ER 1006.[114] And it will only reverse due to evidentiary error if "it is reasonable to conclude that the trial outcome would have been materially affected had the error not occurred."[115]

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[111] State v. Marshall, 25 Wn. App. 240, 243, 606 P.2d 278 (1980).

[112] See BD ex rel. Jean Doe v. DeBuono, 193 F.R.D. 117, 130 (S.D.N.Y. 2000).

[113] 224 Westlake, LLC v. Engstrom Properties, LLC, 169 Wn. App. 700, 732, 281 P.3d 693 (2012).

[114] State v. Barnes, 85 Wn. App. 638, 658, 932 P.2d 669 (1997).

[115] Lutz Tile, Inc. v. Krech, 136 Wn. App. 899, 905, 151 P.3d 219 (2007).

At the threshold, Johnson fails to provide reasoned argument regarding the inadmissibility of exhibits 499 and 502. They further clarify in their reply brief that the reference to exhibit 499 was accidental. We deem the challenges to these two exhibits abandoned.[116]

Regarding exhibit 497, Johnson argues that the information for Tanisha Wagner is inaccurate. The exhibit indicates that she was suspended for 30 days in lieu of termination. Johnson argues that this is inaccurate because it fails to indicate that Wagner received the alternative discipline of suspension in exchange for entering a last chance agreement. But this does not render inaccurate the facts presented in the summary. To the extent it qualifies or complicates the facts presented, this goes to the summary's weight, not admissibility.

Regarding exhibit 498, Johnson brings two challenges. First, they argue that this short exhibit was not based on voluminous records. Second, they argue that the activity summary for Michael Mannery is inaccurate. That summary includes the line "Adj., svc orders, and notes on dad's acct." Johnson contends that this omits facts in the supporting documentation regarding seven service orders Mannery made on his father's account, and that Manner made a transaction that violated SPU Policy CS-106. These challenges lack merit.

Johnson fails to cite authority indicating some threshold of voluminousness the trial court must find to not abuse its discretion. The exhibit

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[116] See Holder v. City of Vancouver, 136 Wn. App. 104, 107, 147 P.3d 641 (2006).

does indicate service orders on Mannery's account. And Johnson fails to show how omission of an additional policy violation demonstrates an inaccuracy or prejudiced the result at trial.

Regarding exhibit 501, Johnson argues that admissible evidence did not support the summary of activity on Arece Hampton's account. That summary read "1. No trans on own acct; 2. Rreviewed [sic] trans related to shut off." The trial court reviewed Johnson's identical challenge below to the claim that no transactions were found on Hampton's own account and reasoned that it would require SPU to "prov[e] a negative." Because this would not be possible, the trial court ruled that the exhibit was admissible. As to the language about reviewing transactions related to shut off, Johnson fails to explain how such a minor omission of documentation would render the exhibit inadmissible or cause him prejudice. Nor do they explain their failure to challenge the authenticating witnesses on cross-examination.

JURY INSTRUCTIONS

Johnson argues that the trial court abused its discretion by not giving proposed instructions numbers 3, 4, and 13. We hold that the rejection of these proposed instructions was proper.

"Jury instructions are sufficient when they allow parties to argue their theory of the case, are not misleading, and, when taken as a whole, inform the

jury of the applicable law."[117] A trial court need not give a party's proposed instruction, even if accurate, if the instructions are otherwise sufficient.[118]

The party challenging the refusal to provide an instruction must also show prejudice.[119] The failure to give a proposed instruction is not prejudicial where the verdict would not have changed.[120]

This court reviews for abuse of discretion a trial court's ruling on jury instructions.[121]

Implicit Bias Instructions

Johnson argues that the trial court abused its discretion by not giving proposed instructions numbers 3 and 4 concerning implicit bias.

Proposed instruction no. 3 is over a page long. In summary, it explains to the jury that people hold automatic and biased assumptions. It references the work of social scientists in the field of implicit bias. On this basis, it urges jurors to reflect on their possible implicit bias, taking the time and exercising the focus to reach an objective result. It encourages jurors to imagine the parties "looked different" or "belonged to a different group." It asks jurors to consult with other jurors "who may have different backgrounds."

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[117] Farah v. Hertz Transp., Inc., 196 Wn. App. 171, 177, 383 P.3d 552 (2016).

[118] Id.

[119] Terrell v. Hamilton, 190 Wn. App. 489, 499, 358 P.3d 453 (2015).

[120] Id.

[121] Farah, 196 Wn. App. at 177.

Proposed instruction no. 4 reads:

> As we discussed in jury selection, growing scientific research indicates each one of us has 'implicit biases,' or hidden feelings, perceptions, fears[,] and stereotypes in our subconscious. These hidden thoughts often impact how we remember what we see and hear, and how we make important decisions. While it is difficult to control one's subconscious thoughts, being aware of these hidden biases can help counteract them. As a result, I ask you to recognize that all of us may be affected by implicit biases in the decisions that we make. Because you are making very important decisions in this case, I strongly encourage you to critically evaluate the evidence and resist any urge to reach a verdict influenced by stereotypes, generalizations, or implicit biases.[122]

Several reasons support the trial court's refusal to give these instructions. First, while the proposed instructions provide further neuroscientific elaboration, they are similar in substance to language in instruction number 1, requiring jurors to "reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference."[123] Johnson does not explain why this instruction was insufficient.

Second, these proposed instructions explicitly referenced neuroscientific and social scientific evidence that was not adduced at trial. In their brief, Johnson connects the content of these instructions to Dr. Greenwald's testimony. Because the trial court excluded that testimony, it would mislead the jury to give instructions that replicated it.

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[122] Clerk's Papers at 711.

[123] Id. at 5588.

Additionally, Johnson fails to show that they were prejudiced by the trial court's refusal to give these instructions, especially in light of instruction number 1.

Pretext Instruction

Johnson argues that the trial court abused its discretion by not giving proposed instruction no. 13 concerning pretext.

The challenged instruction reads:

> You may find that a plaintiff's age and/or race was a substantial factor in the defendant's decision to suspend, terminate, place on administrative leave, or threaten that plaintiff with suspension or termination if it has been proved that the defendants' stated reasons for either of the decisions are not the real reasons, but are a pretext to hide age and/or race discrimination.[124]

This court previously examined this instruction in Farah v. Hertz Transporting, Inc.[125] In that case, Muslim airport "shuttlers" were terminated for not punching out before prayer.[126] They commenced an action for employment discrimination and were represented by John Sheridan, Johnson's counsel here.[127] Sheridan proposed a pretext instruction substantively identical to proposed instruction number 13.[128]

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[124] Clerk's Papers at 720.

[125] 196 Wn. App. 171, 383 P.3d 552 (2016).

[126] Id. at 174.

[127] Id. at 173.

[128] Id. at 177.

This court held that this instruction accurately stated the law.[129] But it ultimately followed several federal appeals circuits that had held it was not required.[130] It determined that the arguments in its favor were not compelling enough to hold that it is an abuse of discretion to refuse to give the instruction.[131] The court's general instructions were sufficient for Farah to inform the jury of the applicable law and allow Farah to argue his theory of the case.[132]

Here, Johnson contends that this instruction was necessary "[g]iven the lack of diversity of the panel, the exclusion of implied bias evidence and jury instructions, and the errors that followed." The pretext instruction, Johnson contends, "would have helped the jury connect the dots to a discriminatory motive."

But this is not the standard. Johnson must demonstrate that the jury instructions presented were insufficient to allow them to argue their case, or were misleading or incomplete. They have not done so. Thus, as in Farah, it was not necessary that the trial court give proposed instruction number 13, and the failure to do so was not an abuse of discretion. Johnson does not show how the refusal to give this instruction prejudiced the result.

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[129] Id.

[130] Id. at 179-80.

[131] Id. at 180.

[132] Id.

Johnson goes on to argue that this court should overrule Farah. This court does not "overrule" the decisions of other panels. In any event, we do not disagree with the decision in that case.

Johnson also argues generally that the Washington Law Against Discrimination is more protective than federal employment discrimination law. While true, this adds nothing of substance to the arguments before us.

NEW TRIAL

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

This court reviews for abuse of discretion a trial court's denial of a new trial motion.[133] "The test for determining such an abuse of discretion is whether 'such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent [the] litigant from having a fair trial.'"[134]

Here, none of the alleged errors would have so prejudiced the jury as to deny Johnson a fair trial.

ATTORNEY FEES

Johnson argues that this court should award them attorney fees if they prevail under the Washington Law Against Discrimination, codified at RCW

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[133] Hickok-Knight v. Wal-Mart Stores, Inc., 170 Wn. App. 279, 324-25, 284 P.3d 749 (2012).

[134] Collins v. Clark County Fire Dist. No. 5, 155 Wn. App. 48, 81, 231 P.3d 1211 (2010) (quoting Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000)).

49.60.030(2). Because they do not prevail, we deny the request for fees on appeal.

We affirm the judgment on the jury verdict and deny the request for attorney fees on appeal.

COX, J.

WE CONCUR:

Dwyer, J.

Spearman, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MARIA LUISA JOHNSON; CARMELIA DAVIS-RAINES; CHERYL MUSKELLY; PAULINE ROBINSON; ELAINE SEAY-DAVIS; TONI WILLIAMSON; and LYNDA JONES, Appellants, v. SEATTLE PUBLIC UTILITIES, a department of the city of Seattle, a municipality, Defendant.	No. 76065-3-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellants, Maria Luisa Johnson, Carmelia Davis-Raines, Cheryl Muskelly, Pauline Robinson, Elaine Seay-Davis, Toni Williamson, and Lynda Jones, have moved for reconsideration of the opinion filed in this case on May 14, 2018. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

For the Court:

COX, J.P.T.

Judge

INSTRUCTION NO. ____

(PROPOSED) INSTRUCTION NO. 3

Our system of justice depends on the willingness and ability of judges like me and jurors like you to make careful and fair decisions. To reach a fair decision, it's important to put aside our automatic assumptions, called stereotypes or biases. Sometimes to do this, we all have to look at our thinking to be sure we are not unknowingly reacting to stereotypes or jumping to conclusions. Social scientists and neuroscientists studying the way our brains work have shown that, for all of us, our judgments are influenced by our backgrounds, experience, and stereotypes we've learned. Our first responses are like reflexes, and just like our knee reflexes, they are quick and automatic. Often, without our conscious awareness, these quick responses may mean that hidden biases influence how we judge people and even how we remember evidence or make judgments.

It is not enough to tell ourselves or the lawyers and judge during jury selection that we are open-minded. To reach a decision in this case it's important to be more reflective.

Social science research has taught us some ways to be more careful in our thinking about individuals and evidence:

► Take all the time you need to test what might be reflexive unconscious responses and to think carefully and consciously about the evidence.

► Focus on individual facts, don't jump to conclusions, which may often be biased by stereotypes.

► Try putting yourself in the other person's place.

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► Ask yourself whether your opinion of the parties or witnesses or of the case would be different if the people presenting looked different, if they belonged to a different group?

You must each decide this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds. Working together, a fair result can be achieved.

Draft of "Achieving Impartial Jury" Instruction, Criminal Justice Section of the American Bar Association, Panel Presentation, American Bar Association Annual Meeting, San Francisco, August 9, 2013, retrieved from http://www.americanbar.org/content/dam/aba/events/criminal_justice/annual2013/Implicit_Bias_aijpanel.doc , August 23, 2013

And see State v. Saintcalle, 178 Wn.2d 34 (2013)

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INSTRUCTION NO.

(PROPOSED) INSTRUCTION NO. 4

As we discussed in jury selection, growing scientific research indicates each one of us has "implicit biases," or hidden feelings, perceptions, fears and stereotypes in our subconscious. These hidden thoughts often impact how we remember what we see and hear, and how we make important decisions. While it is difficult to control one's subconscious thoughts, being aware of these hidden biases can help counteract them. As a result, I ask you to recognize that all of us may be affected by implicit biases in the decisions that we make. Because you are making very important decisions in this case, I strongly encourage you to critically evaluate the evidence and resist any urge to reach a verdict influenced by stereotypes, generalizations, or implicit biases.

Judge Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 Harv. L. & Pol'y Rev. 149-169, 169, FN 85 (2010)

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INSTRUCTION NO.____

(PROPOSED) INSTRUCTION NO. 13

You may find that a plaintiff's age and/or race was a substantial factor in the defendant's decision to suspend, terminate, place on administrative leave, or threaten that plaintiff with suspension or termination if it has been proved that the defendants' stated reasons for either of the decisions are not the real reasons, but are a pretext to hide age and/or race discrimination.

8th Circuit's Model Jury Instruction 5.20. http://juryinstructions.ca8.uscourts.gov/civil_instructions.htm; Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002) ("hold[ing] that in cases such as this, a trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may—but need not—infer that the employer's true motive was discriminatory"; and that the refusal to give an instruction identical to the 8th Circuit Court of Appeals' Model Instruction was not harmless error); *discussing with approval* Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280 (3rd Cir. 1998) ("It is difficult to understand what end is served by reversing the grant of summary judgment for the employer on the ground that the jury is entitled to infer discrimination from pretext ... if the jurors are never informed that they may do so.") *and* Cabrera v. Jakabovitz, 24 F.3d 372, 382 (2nd Cir.), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994). The Supreme Court of Iowa has likewise held that "[i]f a plaintiff … presents evidence of pretext, failure to provide a pretext instruction will result in prejudice." Deboom v. Raining Rose, Inc., 772 N.W.2d 1, 11 (Iowa 2009).

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Laws and Agency Rules

Washington State Constitution

Documents

PDF version of the Washington State Constitution
(1.2 MB)

PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the universe for our liberties, do ordain this constitution.

ARTICLE I
DECLARATION OF RIGHTS

SECTION 1 POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 4 RIGHT OF PETITION AND ASSEMBLAGE. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

SECTION 5 FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

SECTION 6 OATHS - MODE OF ADMINISTERING. The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME

No religious qualification shall be required for any public office, or employment, nor shall any person be incompetent as a witness, or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

SECTION 12 SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

SECTION 13 HABEAS CORPUS. The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion the public safety requires it.

SECTION 14 EXCESSIVE BAIL, FINES AND PUNISHMENTS. Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

SECTION 15 CONVICTIONS, EFFECT OF. No conviction shall work corruption of blood, nor forfeiture of estate.

SECTION 16 EMINENT DOMAIN. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided,* That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use. [**AMENDMENT 9,** 1919 p 385 Section 1. Approved November, 1920.]

SECTION 21 TRIAL BY JURY. The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

SECTION 22 RIGHTS OF THE ACCUSED. In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided,* The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed. [**AMENDMENT 10,** 1921 p 79 Section 1. Approved November, 1922.]

Original text — Art. 1 Section 22 RIGHTS OF ACCUSED PERSONS — *In criminal prosecution, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and, in no instance, shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.*

SECTION 23 BILL OF ATTAINDER, EX POST FACTO LAW, ETC. No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

SECTION 24 RIGHT TO BEAR ARMS. The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

SECTION 25 PROSECUTION BY INFORMATION. Offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, as shall be prescribed by law.

SECTION 26 GRAND JURY. No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order.

SECTION 27 TREASON, DEFINED, ETC. Treason against the state shall consist only in levying war against the state, or adhering to its enemies, or in giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or confession in open court.

SECTION 28 HEREDITARY PRIVILEGES ABOLISHED. No hereditary emoluments, privileges, or powers, shall be granted or conferred in this state.

SECTION 29 CONSTITUTION MANDATORY. The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

SECTION 30 RIGHTS RESERVED. The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.

SECTION 31 STANDING ARMY. No standing army shall be kept up by this state in time of peace, and no soldier shall in time of peace be quartered in any house without the consent of its owner, nor in time of war except in the manner prescribed by law.

SECTION 32 FUNDAMENTAL PRINCIPLES. A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.

SECTION 33 RECALL OF ELECTIVE OFFICERS. Every elective public officer of the state of Washington expect [except] judges of courts of record is subject to recall and discharge by the legal voters of the state, or of the political subdivision of the state, from which he was elected whenever a petition demanding his recall, reciting that such officer has committed some act or acts of malfeasance or misfeasance while in office, or who has violated his oath of office, stating the matters complained of, signed by the percentages of the qualified electors thereof, hereinafter provided, the percentage required to be computed from the total number of votes cast for all candidates for his said office to which he was elected at

RCW 2.36.080

Selection of jurors—State policy—Exclusion for race, color, religion, sex, national origin, or economic status prohibited.

*** CHANGE IN 2018 *** (SEE 2398-S.SL) ***

(1) It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with chapter 135, Laws of 1979 ex. sess. to be considered for jury service in this state and have an obligation to serve as jurors when summoned for that purpose.

(2) It is the policy of this state to maximize the availability of residents of the state for jury service. It also is the policy of this state to minimize the burden on the prospective jurors, their families, and employers resulting from jury service. The jury term and jury service should be set at as brief an interval as is practical given the size of the jury source list for the judicial district. The optimal jury term is one week or less. Optimal juror service is one day or one trial, whichever is longer.

(3) A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status.

(4) This section does not affect the right to peremptory challenges under RCW 4.44.130.

[2015 c 7 § 3; 1992 c 93 § 2; 1979 ex.s. c 135 § 2; 1967 c 39 § 1; 1911 c 57 § 2; RRS § 95. Prior: 1909 c 73 § 2.]

NOTES:

Severability—1979 ex.s. c 135: "If any provision of this amendatory act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1979 ex.s. c 135 § 12.]

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 2398

Chapter 23, Laws of 2018

65th Legislature
2018 Regular Session

JURY SELECTION--MEMBERSHIP IN PROTECTED CLASS

EFFECTIVE DATE: June 7, 2018

Passed by the House February 8, 2018
Yeas 98 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate February 27, 2018
Yeas 49 Nays 0

CYRUS HABIB

President of the Senate

Approved March 9, 2018 1:50 PM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Bernard Dean, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 2398** as passed by House of Representatives and the Senate on the dates hereon set forth.

BERNARD DEAN

Chief Clerk

FILED

March 9, 2018

Secretary of State
State of Washington

SUBSTITUTE HOUSE BILL 2398

Passed Legislature - 2018 Regular Session

State of Washington 65th Legislature 2018 Regular Session

By House Judiciary (originally sponsored by Representatives Kilduff, Graves, Jinkins, Sawyer, Pollet, Valdez, and Appleton)

READ FIRST TIME 01/26/18.

AN ACT Relating to jury selection; and amending RCW 2.36.080.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 2.36.080 and 2015 c 7 s 3 are each amended to read as follows:

(1) It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with chapter 135, Laws of 1979 ex. sess. to be considered for jury service in this state and have an obligation to serve as jurors when summoned for that purpose.

(2) It is the policy of this state to maximize the availability of residents of the state for jury service. It also is the policy of this state to minimize the burden on the prospective jurors, their families, and employers resulting from jury service. The jury term and jury service should be set at as brief an interval as is practical given the size of the jury source list for the judicial district. The optimal jury term is one week or less. Optimal juror service is one day or one trial, whichever is longer.

(3) A citizen shall not be excluded from jury service in this state <u>on account of membership in a protected class recognized in RCW</u>

49.60.030, or on account of ((~~race, color, religion, sex, national origin, or~~)) economic status.

(4) This section does not affect the right to peremptory challenges under RCW 4.44.130, the right to general causes of challenge under RCW 4.44.160, the right to particular causes of challenge under RCW 4.44.170, or a judge's duty to excuse a juror under RCW 2.36.110.

Passed by the House February 8, 2018.
Passed by the Senate February 27, 2018.
Approved by the Governor March 9, 2018.
Filed in Office of Secretary of State March 9, 2018.

--- END ---

Juror Data Issues Affecting Diversity

Jury Survey Results

Matthew J. Hickman, Ph.D.
Peter A. Collins, Ph.D.

Criminal Justice Department
Seattle University

Data I

Citizen Voting Age Population (CVAP)

- Estimates drawn from the Census Bureau 2010-2014 5-year American Community Survey:
  - Total number of persons, by race/ethnicity
  - Number 18 years of age or older, by race/ethnicity
  - Number of U.S. Citizens, by race/ethnicity
  - Number of U.S. Citizens 18 years of age or older, by race/ethnicity (CVAP)
- Census block groups are the lowest level of geographic aggregation for CVAP data

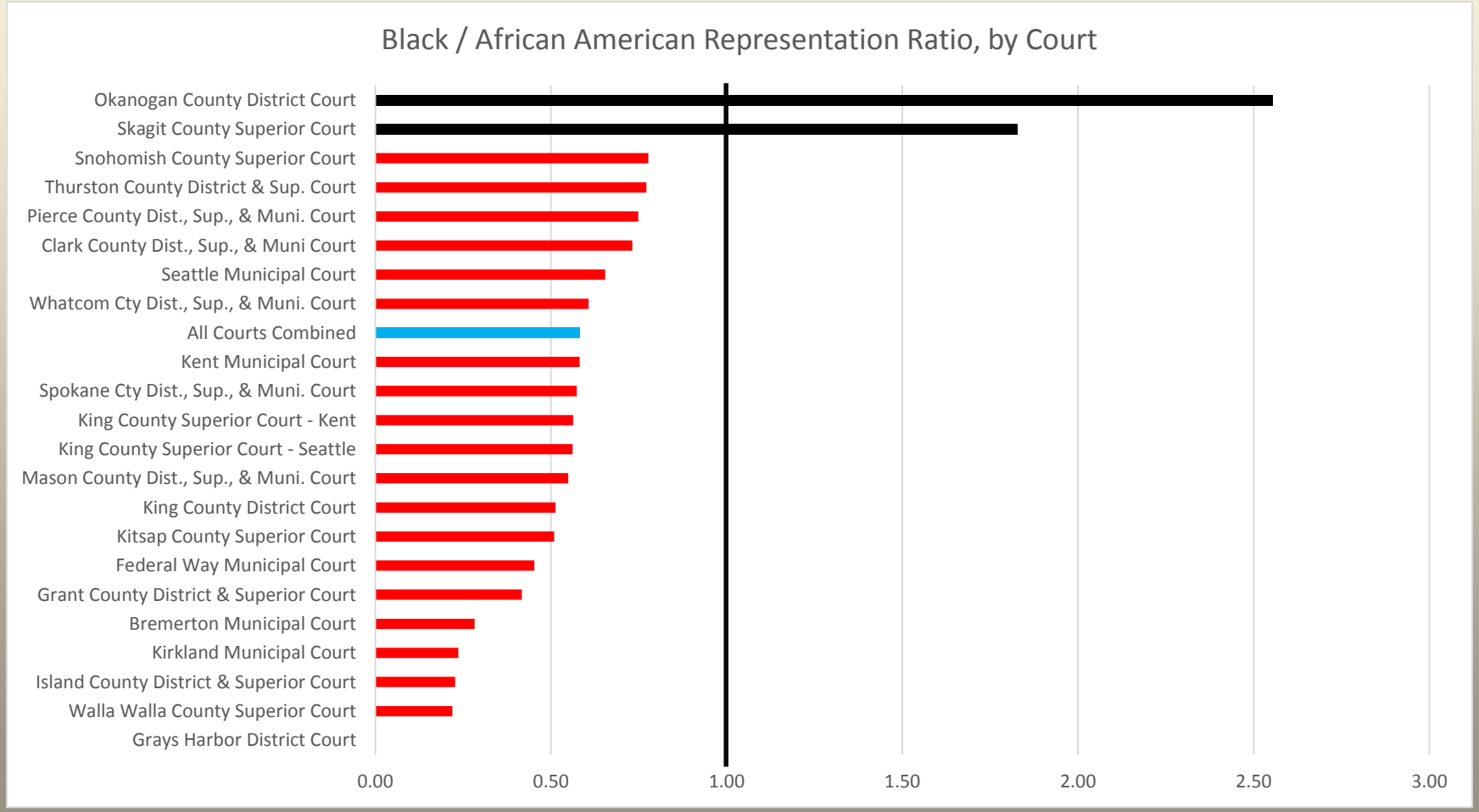
How to Interpret the Findings I

- All findings can be interpreted as **Ratios**: or, the survey percentage divided by the expected (CVAP) percentage.

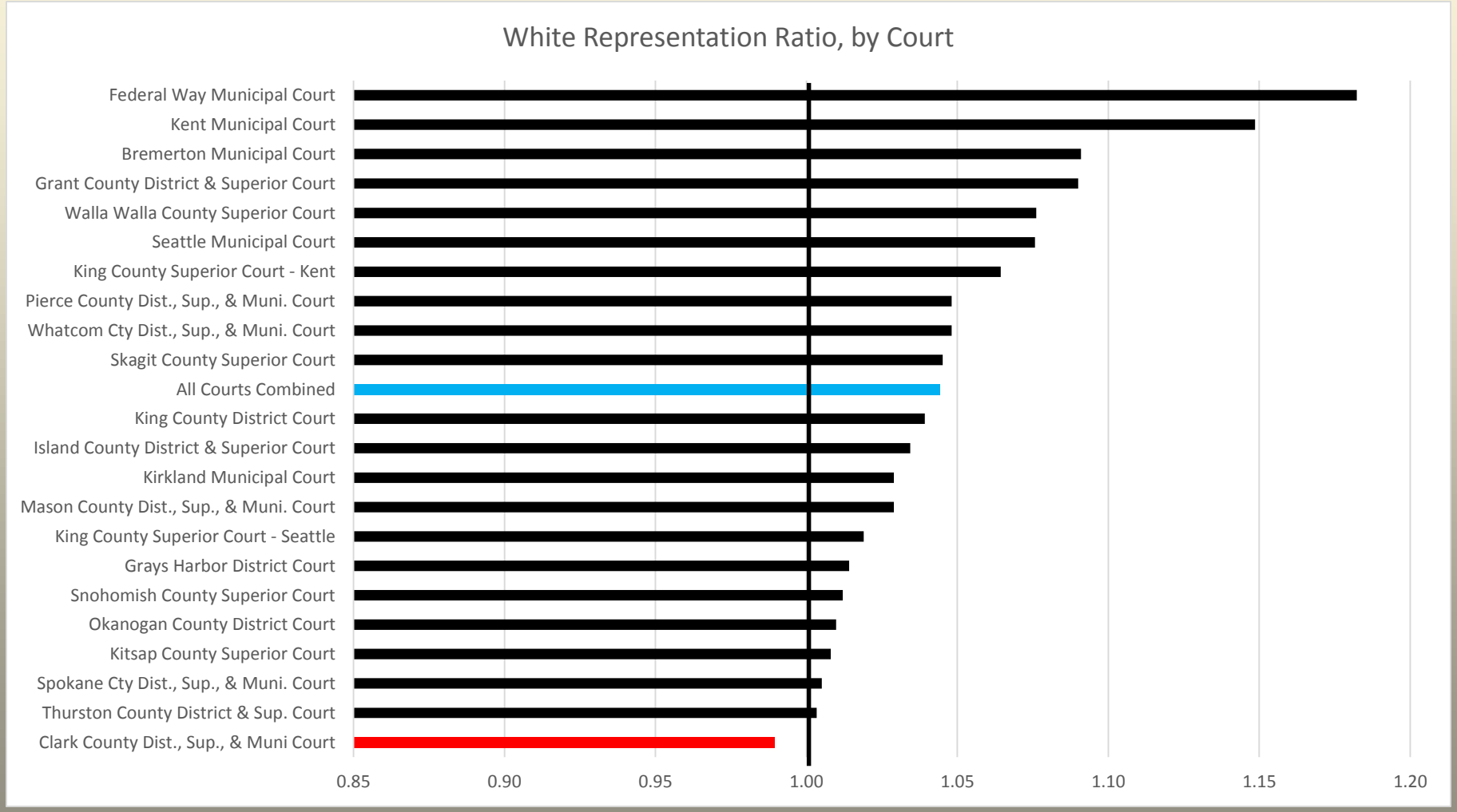
Equal to 1 = Juror demographics are reflective of population

- A score **Below 1** means ***underrepresented***
- A score **Above 1** means ***overrepresented***

Black/African American



White


White Representation Ratio, by Court
Federal Way Municipal Court
Kent Municipal Court
Bremerton Municipal Court
Grant County District & Superior Court
Walla Walla County Superior Court
Seattle Municipal Court
King County Superior Court - Kent
Pierce County Dist., Sup., & Muni. Court
Whatcom Cty Dist., Sup., & Muni. Court
Skagit County Superior Court
All Courts Combined
King County District Court
Island County District & Superior Court
Kirkland Municipal Court
Mason County Dist., Sup., & Muni. Court
King County Superior Court - Seattle
Grays Harbor District Court
Snohomish County Superior Court
Okanogan County District Court
Kitsap County Superior Court
Spokane Cty Dist., Sup., & Muni. Court
Thurston County District & Sup. Court
Clark County Dist., Sup., & Muni Court
0.85
0.90
0.95
1.00
1.05
1.10
1.15
1.20

CCSS Data Mining Investigation

2011-06	CCSS Data Mining Investigation
PREPARED BY (INCLUDE TITLE AND PHONE NUMBER):	Mary Denzel, Assistant City Auditor, 684-8158
PERSON(S) INTERVIEWED:	Guillemette Regan, SPU Director of Risk and Compliance, Seattle Public Utilities (SPU), 233-5008
AUDIT STAFF PRESENT:	Mary Denzel Megumi Sumitani Cindy Drake Ashaad ???
DATE OF MEETING:	5/22/2012
DATE PREPARED:	5/24/2012
DURATION OF MEETING:	1 ½ hours
PURPOSE OF INTERVIEW:	To provide Guillemette with the names of Seattle Public Utilities employees identified in our data mining process as having worked on their own account, or having an unusual number of broken payment arrangements on their own account.
REVIEWED BY:	Megumi Sumitani 5/25/12
Documents Requested:	
Action Items:	

Highlights of Discussion:

Mary showed Guillemette a summary of information from our data mining that warrants further investigation. See Attachment 1 for an overview of the information provided to Guillemette.

Guillemette drew a distinction in the levels of severity of offense between cases where an employee performs standard business activities on their own account or that of a family member, and an employee who financially benefits in a way not available to regular customers from a business activity performed on their own or a family member's account.

Discussion of notifying the City's Ethics and Elections Office. Mary explained that Kate Flack from the City's Ethics and Elections Office (Ethics) has been calling regularly to inquire about our findings from the data mining effort. Guillemette said that if Ethics comes in too soon it can impede and potentially destroy SPU's investigation process because SPU's discipline process with the employee(s) is incomplete. Guillemette noted that because Ethics' process is "so public", involving them before SPU has completed its investigation for possible disciplinary actions can "spoil" SPU's process.

SPU prefers that Ethics wait until Guillemette's Risk and Compliance staff have completed their investigation, written their report, and prepared a recommendation for the division director over the branch where the identified employee(s) work (this has been Susan Sanchez in the Customer Service branch for the recent series of investigations).

The division director then sends their recommendation to Ray Hoffman, the department director. Guillemette prefers that the employee has been advised about the outcome of the investigation and the branch director's disciplinary decisions before the report is sent to Ethics. This way Ethics can complete a report and make a recommendation, which will be additional information for the department head in making the department's final decision. [Auditor's note: City Auditor David Jones and Mary Denzel met with Wayne Barnett and Kate Flack from Ethics on 5/24/12. The Ethics staff agreed that this was the approach they prefer. They also informed Dave and Mary that they are not investigating any activity that occurred before 2008].

Guillemette said she will send the Office of City Auditor (OCA) her investigative reports at the same time she sends them to Ethics.

Evidence of wrongdoing by Seattle City Light (City Light or SCL) employees discovered during SPU's investigations. Guillemette expressed concern that City Light may not adequately follow up on investigating City Light employees identified during SPU's investigation process. Guillemette's team has passed along some names of City Light employees who appear to have engaged in questionable activity, but she does not know whether SCL has done further investigation or discipline of those employees.[1]

Mary said OCA met with SCL's Carol Butler and Kelly Enright on 5/21/12 to share the names of four SCL employees whose account activity raised concerns and warranted further investigation. Mary mentioned Jean Razon, Sherry Leaza Allen, and Erin Dixon. Guillemette recognized Jean Razon and Sherry Leaza Allen as names she had also forwarded to SCL.

Analytics. Guillemette said apart from the issue of employees working on their own accounts, she believes there is a problem with employees working on each others' accounts. She believes there are groups of employees clustered by race (African American, Filipino American, White American) who exchange favors for others within their cluster. Mary explained that we did not do an analytic that identified employees working on each others' accounts, only working on their own or family members' accounts.

Guillemette said another area where she sees suspicious activity, and which warrants further investigation, is with the EBZW code, which means delinquent debt amounts are automatically written off (small amounts, perhaps under $100) or "written off to collections" (which apparently means SPU writes it off in their books).

[1] One example is Sandra Scott, a manager in SCL Credit and Collections who is suspected of warning certain employees in SPU that they have been "red-flagged" by SPU and OCA. Ms. Scott attended a meeting with SPU and OCA early in the investigation process in late 2010 or early 2011 where certain names and transactions were discussed before SPU started formal investigations on them. Shortly after this meeting, two employees under investigation took actions to rectify their inappropriate account status.

Guillemette's staff have also noticed a pattern of employees running up debt on an account under the name of one family member, then changing the account name to another family member, and running up debt under that name.

SPU's investigation-discipline process. Guillemette explained that she has made a chart of the cases her staff have investigated showing the dollar amounts, the numbers of transactions, and the consequences of the behavior. She forwards this with her investigative report(s) to Susan Sanchez (the director of the Customer Service branch where the employees being investigated work). Susan Sanchez then makes a decision about the appropriate disciplinary action and writes a letter containing her decision. Then Guillemette meets with Susan, and Susan sends her recommendation to Ray Hoffman.

If the employee requests it, a Loudermill hearing will be held. A Loudermill hearing is an opportunity for an employee facing discipline to state their case to the department head.

After a Loudermill hearing (if requested), the department head makes a decision based on the investigative report, the branch director's recommendation letter, and any Ethics investigative report.

Other Areas Discussed. Guillemette said that SPU currently has about 12 individuals under investigation, She explained that what her unit has being doing is to look up "everything in CCSS" once a person has been identified as performing a suspicious transaction. She agreed that CCSS can only go so far in terms of identifying inappropriate transactions, that it's just a start, and that she and her staff look to gather other information, such as anecdotal information linking individuals to other individuals under SPU investigation. For example, Guillemette told us about Eric Bird, a manager in the public waste program, appears to have made a service order for another employee (who was with SPU but now with SCL) that resulted in a financial benefit for the employee.

Attachment 1.

Findings Summary, CCSS data mining
Mary Denzel, May 22, 2012

People who worked on their own accounts

Name/dept	Analytics Questions	Action	Date (approximate)	$
Luisa Johnson/SPU	16 (pmnt arr own acct) 17 (canceled " own acct)	Made and canceled payment arrangements on spouse's account	2005, 2006, 2008 (2), 2010	116.46, 155.5, 241.8, 199.02, 299.99
Debra Warren/SPU	16 (pmnt arr own acct) 17 (canceled " own acct)	Payment arrangement to spouse's acct Cancel pmnt arr to spouse's account	2002, 2007, 2009, 2010	47.37, 143.69, 121.76, 162.37, 141.06, 230.01, 139.54, 140.05, 121.76
Kimberly Monroe/SPU	13 (adj own acct) 14 (adj own acct) 16 (payment arr own acct)	Adj to account, her address, brother's name Adj to account, her address, brother's name Payment arrangement to sister's account	2010 2010 2003	Reversed $30 or $40 in late fees before they hit the account. $131
Tanisha Wagner/SPU	13 (adj own acct) 16 (pmnt arr own acct)	Account move from self to domestic partner Set up payment arrangement on own account, appears to have paid in full.	 2/11/2011	$16 set up fee $300.47 paid per plan
Vanessa Matlock/spu	16 (pmnt arr own acct)	Payment arrangements on spouse's account	2001-2006, 2010	60 line items
Maryam Mason/SPU	13 (adj own acct) 14 (adj own acct)	Charge for temp svc jumper, immediately removed, no CCSS service orders, no maxim work order. May have been done as demo during a training.	2009	137

Ex. 46

PETTION OF SOLIDARITY
LOCAL PTE 17
MEMBERS
December 20, 2012

As Employees of the City of Seattle we stand together in solidarity to send management the message that we deserve respect in the work place. As professionals employed by City of Seattle we are committed to providing the best service for the City and our Community. With the new efforts by the City of Seattle Human Resources Department to enforce the new policy title "Customer Utility Account Transactions" we have concerns over the intent of this policy and the impact of its implementation on the African American workers working for City of Seattle.

We understand that the City's objective is to ensure the resources of the City are used efficiently and wisely. It is of great concern that the City of Seattle Human Recourses Department would institute a new policy focusing on ensuring the Cities resources are used wisely by employees and make these policies retro-active.

As Employees of the City of Seattle we are prepared to support any policies created by the City to ensure efficiency. We are willing to work toward these efforts but are concerned if these efforts are designed to remove us from our positions. Creating a new policy that allows the City of Seattle to investigate employee's activities for the past 10 years is punitive! Employees, who engaged in the actions that are now deemed to be infractions of employment, should be "Grandfathered in" and not investigated and judged for actions that were not infractions of employment at the time they were implemented.

We are asking for a "Moratorium on terminations and investigations, a review of all employees terminated for this policy and bring them back to work based on "Past Practice" and the commitment to support the "Just Cause clause in the Union Contract that would allow employees to a process before termination. We have provided this petition to the Seattle/King County Branch NAACP and the United Black Christian Clergy, to present to you because of our concern for how the City of Seattle specifically Seattle Public Utilities Contact Center investigations are punitive, arbitrary and a direct violation of our union contract that adversely affect communities of color who have had a long work history of employment with the City of Seattle.

EXHIBIT 1
WIT: JACKSON
DATE: 5/9/16
Jolene C. Haneca CCR 2741

Exhibit 31
Witness Jones
Date 4-22-16
Buell Realtime Reporting
(206) 287-9066

JOHNSON071663

The present investigative process has caused employees to suffer serious health issues while enduring workplace bullying tactics such as; intimidation, humiliation, mistreatment of veteran employees. This has made our workplace a very hostile and stressful environment and the perpetrators depend on targets keeping quiet about the abusive behavior.

We stand in solidarity asking for the voices of all the workers to be heard and that new polices not be used as punitive measures to reduce the people of color in the work place.

BY SIGNING THIS PETITION YOU STAND IN SOLIDARITY AND AGREET TO THE WORDS ABOVE

NAME:

1. Lynda Jones
2. Kimberly A. Monroe
3. Laura Clark
4. Carmelia Baines
5. Cheryl Muskelley
6. Jane Williamson
7. Sharon Howard
8. Tamika Crawford
9. Tanisha Eagner
10. Pauline Robinson
11. [illegible]
12.
13.

Ex. 294

City of Seattle
Mike McGinn, Mayor
Seattle Public Utilities
Ray Hoffman, Director

News Release

Nov. 15, 2013
For Immediate Release:

Contact: Andy Ryan, (206) 684-7688
Pager: (206) 997-5972
andy.ryan@seattle.gov

Seattle Public Utilities concluding extensive billing audit

Department auditors reviewed 10 years of records

SEATTLE — Seattle Public Utilities (SPU) is concluding an extensive audit of unauthorized use of the department's billing system by some employees.

Misdeeds uncovered as a result of the audit, which began in late 2010, have resulted in the termination of eight SPU employees and the suspension of 15 others. Among the improper actions the dismissed employees were found to have engaged in were: manipulating payment arrangements to avoid penalties and credit action and waiving fees charged to their accounts.

Net losses to the utility resulting from the improper activity are estimated at $7,000.

The full-scale records review, which involved scrutinizing over a thousand utility accounts and many more thousands of data records, was ordered by SPU Director Ray Hoffman after routine accounting revealed an accounting discrepancy.

Hoffman said today that although the dollar losses uncovered by the audit turned out to be relatively small, SPU takes the public's trust very seriously—and any kind of misconduct by its employees is unacceptable.

"We knew that a thorough audit was an essential part of fixing our billing system," Hoffman said.

"We expect our employees to behave ethically and not use their positions to benefit themselves or family and friends. We have made substantial reforms—strengthening our accounting and training processes—and we are committed to making sure these kinds of problems do not reoccur."

"I am glad that Seattle Public Utilities responded forthrightly to make reforms and restore customer confidence," said Seattle City Councilmember Jean Godden, who chairs the council's Libraries, Utilities, and Center Committee. "I believe we are doing everything we can to ensure

—MORE—

such misdeeds cannot reoccur."

The City's Ethics Code, SMC 4.16, states that City employees are prohibited from using their official positions "for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit" of the employee.

City of Seattle Personnel Rule 1.3 outlines the process for disciplinary action regarding city employees, and requires a "fair and objective investigation" that produces evidence of the employee's violation of the Ethics Code, or department policy or procedure.

Since his confirmation as SPU's director, in May 2010, Hoffman has ordered a number of reforms in the department's utility billing business practices, policies, and procedures, including:

- Enhanced internal controls and monitoring of utility account transactions.
- Established a risk and quality assurance division to oversee management of the department's risk and ensure quality including following-through with prior audit recommendations.
- Implemented routine reviews of utility account adjustments and other forms of financial transactions made to customer utility accounts.
- Required employees who have access to the utility billing system to sign a confidentiality agreement that includes an ethics statement.
- Educated employees about their existing obligations under the Code of Ethics, which prohibit them from making adjustments on their own utility accounts or those of friends or family members.
- Reduced the number of staff who have access to the utility billing system.

In addition to the employees who have been terminated or suspended to date, disciplinary action is pending against one employee; and a second employee is under investigation.

Learn more about Seattle Public Utilities, at: http://www.seattle.gov/util.

Follow SPU on Twitter: www.twitter.com/SeattleSPU.

In addition to providing a reliable water supply to more than 1.45 million customers in the Seattle metropolitan area, SPU provides essential sewer, drainage, solid waste and engineering services that safeguard public health, maintain the City's infrastructure and protect, conserve and enhance the region's environmental resources.

—SPU—

SPU CCSS Investigation (2001-2013)
ER 1006 Summary No. 2: **SUSPENSIONS**

SPU Employees SUSPENDED for Making Improper Financial Adjustments to Utility Accounts

	Name	Gender	EEO Cat. / Race	Age on 2/1/11	Date Employ Started	Date Employ Ceased	Job Title on/about 2/1/11	Dept	Discipline Rec	Discipline Imposed	Date Discipline Imposed	Activity on Account
1	Bird, Eric Anthony	Male	Black/African American	38	10/15/2008	1/9/2014	Manager2, Utils	WS360	Demotion	Suspended 20 Days	10/24/12	1. 1 trans on sister's acct; 2. Requested trans on own and family acct; (girlfriend) from another EE.
2	Coffin, Jennifer Rebecca	Female	White	42	8/19/2002	1/31/2012	Util Act Rep I	WS340	Suspension 30 Days	Suspended 30 Days	12/01/11	pyars and notes on own acct.
3	Davis-Raines, Carmelia	Female	Black/African American	51	6/27/1988	N/A	Util Act Rep II	WS340	Suspension 3 Days	Suspended 1 Day	10/17/13	1. 80 pyars (67 failed); 2. Trans on own acct (svc orders, ucbcust, ucrhst, ucraddr).
4	Dorsey, Judith C	Female	Two or More Races (Black)	58	6/8/2001	N/A	Util Act Rep II	WS340	Suspension 30 Days	Suspended 15 Days	07/25/13	1. 1 late fee adj, notes, and svc orders; 2. pyar and misc on daughter's acct; 3. Trans on DP acct; 4. DP benefit ineligibility.
5	Flores, Teresa Christine	Female	American Indian/ Alaska Native	55	5/23/1994	N/A	Admin Spec I-BU	WS340	Suspension 1 Day	Suspended 1 Day	07/25/13	1. MISD to sister's acct; 2. UDP at EE address doesn't match application.
6	Haythorne, June A	Female	Black/African American	58	8/1/2001	N/A	Util Act Rep II	WS340	Termination	Suspended 21 Days	12/10/13	1. Sister works for CAMP as CSR in energy assist; 2. Many PYARs & misc trans on own and family
7	Holmes, Mark	Male	Black/African American	51	6/2/1992	N/A	Act Exec	WS360	Suspension 10 day	Suspended 10 Days	01/27/14	1. $241.00 adj to correct an error though no note; 2. 2 svc ords; 3. Many PYARs & adj by others for EE; 4. Req trans by EE in 2013.
8	Jones, Lynda R	Female	Black/African American	45	8/19/2002	N/A	Util Act Rep I	WS340	Suspension 3 Days	Suspended 1 Day	07/25/13	1. MISD on daughter's acct; 2. Misc entries on son's and daughter's accts.
9	Lea, Mark William	Male	Asian	40	4/23/2001	N/A	Util Act Rep I	WS340	Suspension 3 Days	Suspended 1 Day	08/15/13	1. 1 late fee adj; 2. 3 svc orders, 1 svc on own acct; 3. 2 notes on mother's acct, one is a credit.
10	Mack, Terrance D	Male	Black/African American	49	8/19/2002	4/24/2014	Util Act Rep I	WS340	Termination	Suspended 30 Days	07/30/13	1. 1 adj own acct (xtra G); 2. 4 svc orders; ucbcust etc.; and name change to initials TDM; 3. 4 srvc orders, etc to T Flores when living with; 4. 1 svc, 1 CoAp, 2 ucbcust on son's acct.
11	Mason, Maryam P	Female	Black/African American	36	10/6/2004	N/A	Mgmt Systs Anlyst	WS320	Suspension 20 Days	Suspended 5 Days	10/30/13	1. 2 pyars on brother's acct; 2. Svc orders own/related accts 3. Some activity done for testing purposes ($137).
12	Monroe, Kimberly L	Female	Black/African American	50	5/27/1998	N/A	Util Act Rep II	WS340	Termination	Suspended 30 Days	07/10/13	1. 3 late fee adj; 2. 4 pyars own acct in brother's name; 3. 1 pyar for sister.

SPU Employees SUSPENDED for Making Improper Financial Adjustments to Utility Accounts

	Name	Gender	EEO Cat. / Race	Age on 2/1/11	Date Employ Started	Date Employ Ceased	Job Title on/about 2/1/11	Dept	Discipline Rec	Discipline Imposed	Date Discipline Imposed	Activity on Account
13	Quartimon, Sherellis S	Female	Black/African American	41	9/21/1992	N/A	Util Act Rep I	WS340	Suspension 1 Day	Suspended 1 Day	04/29/14	1. Many adjs and 159 pyars on own acct (3/02 to 1/13) all but 4 failed; 2. Trans on her own acct and sister's acct.
14	Seay-Davis, Elaine L	Female	Black/African American	60	11/1/1994	10/8/2013	Util Act Rep II	WS340	Termination	Suspended if not retired	01/28/14	1. ucbcust, ucrtele entry to own acct; 2. Entries on family's and friend's accts incl 9 pyars.
15	Thompson, Ariska P	Female	Black/African American	49	7/29/1991	N/A	Util Svc Rep	WS360	Termination	Suspended 10 Days	11/01/13	1. No entries to own acct; 2. ucrtele on daughter's acct; 3. 50 trans for co-worker who did 18 for her.
16	Wagner, Tanisha	Female	Black/African American	27	11/7/2007	N/A	Util Act Rep I	WS340	Termination	Suspended 30 Days	07/30/13	1. 1 misd and pyars own acct; 2. 2 adj and multiple pyars on mother's acct; 3. Almost 2 yrs of ineligible DP benefits.
17	Warren, Debra L	Female	White	56	8/15/1990	N/A	Util Act Rep II	WS340	Termination	Suspended 30 Days	07/31/13	1. pyars and paid specials to own acct; 2. Notes and misc other trans for son and in-laws.
18	Wright, Gerold P (Pierre)	Male	Black/African American	38	6/6/2001	N/A	Util Svc Rep	WS360	Termination	Suspended 30 Days	12/11/13	1. No utility acct in EE's name; 2. Trans on mother's, co-worker's, and friend's accts.

Total Number of SPU Employees Suspended: 18

THE SHERIDAN LAW FIRM, P.S.

July 06, 2018 - 1:07 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Maria Luisa Johnson, et al., Appellants v. Seattle Public Utilities, et ano., Respondents (760653)

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- portiamoore@dwt.com
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