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NO. 73355-9-I

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

JAMES OSBORNE,
an Individual

Appellant,

v.

RECREATIONAL EQUIPMENT INC.,
a Washington Corporation,

Respondent.

Appeal from the Superior Court for King County
Cause No. 13-2-21642-6 SEA

APPELLANT'S REPLY BRIEF

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I. THE TRIAL COURT ERRED BY NOT REQUIRING REI TO PROVE ITS UNDUE BURDEN DEFENSE

REI's defense in this case rests upon the unsupported contention that Mr. Osborne was part of a mass layoff. REI relied on this fiction to improperly assert it had no duty to accommodate Mr. Osborne. There are two key problems with this argument: (1) there is no evidence Mr. Osborne was laid off; and (2) using layoff as the reason for Mr. Osborne's termination constitutes an undue burden defense on which REI bore the burden of proof. The trial court's failure to recognize these issues allowed REI to evade its legal obligations to Mr. Osborne by simply saying layoff over and over. But the law does not allow this baseless subterfuge as a defense to facilitate employers ridding themselves of disabled employees through the artifice of layoff. Had the trial court included the required undue burden instruction, thereby requiring REI to show Mr. Osborne's accommodation (his job) was eliminated for financial reasons, only one result was proper: directed verdict in favor of Mr. Osborne.

a. REI Targeted Mr. Osborne for Termination Months before it Considered Layoffs

REI argued, *ad nauseum*, that Mr. Osborne's separation was a part of larger scale layoff.[1] But the trial record provides no factual support for

[1] As noted in Appellant's opening brief, REI used the word layoff extensively during trial. REI's brief used the word layoff on eighty three occasions. The same was true at

this contention. Rather, the undisputed evidence shows Mr. Osborne's position was targeted for elimination months before layoffs were even considered. The clearest evidence of this fact was the interaction between Mr. Osborne, Mr. Dell'Orfano, and Ms. Bradley on December 13, 2012. During this meeting, Mr. Osborne was not told his separation was due to a layoff or restructuring. Instead, Mr. Dell'Orfano told Mr. Osborne:

> As of today, your position is being eliminated. We have made the decision that we need to create a position that will better define and manage IT Risk and Compliance program at REI. It has been determined that this position will require full time hours. To ensure the success, the position will require someone who has an extensive background...[2]

This proves REI eliminated Mr. Osborne's position to ***create another more expansive and expensive job***. At no point did anyone say Mr. Osborne was being laid off or that group separations might occur in the future. To the contrary, Mr. Osborne was told that ***his*** position was being eliminated because ***he*** did not have the physical capacity to fulfill the new role. Documents created in October 2012 further demonstrate that REI targeted Mr. Osborne for termination. For instance, on October 17, 2012, Mr. Melvin sent an email seeking to justify the new position (known as the "CPM" position).[3] Mr. Melvin identified Mr. Osborne as unsuitable

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summary judgment, where REI used the words "layoff" or "laid off" twenty two (22) times. *See*, VRP July 11, 2014, at pp. 26, 30, 32, 33, 35, 36, 37, 38, 40, 47, 48, and 52.

[2] *See*, Trial Ex. 189.

[3] *See*, Trial Ex. 55.

for this CPM position.[4] Two weeks later, Ms. Bradley stated the CPM job would replace Mr. Osborne's current position: "Here is a job that we need to have comp'd. See the explanation below as well as the org chart attached. It is a position we are currently filling with a consultant, we need to formalize this job and make it a permanent part of the security team..."[5] These emails prove REI decided to terminate Mr. Osborne no later than October 17, 2012.[6] This fact was corroborated by Mr. Ed Telders, who testified there was a two-month period prior to December 13, 2012, when management knew Mr. Osborne would be losing his job.[7]

All of this occurred months before anyone at REI mentioned the possibility of a layoff and is wholly inconsistent with the argument Mr. Osborne was part of a large-scale layoff in December 2012 or January 2013. In fact, the first time REI even raised the prospective of layoffs was on January 2, 2013, twenty-one days ***after*** Mr. Osborne was terminated.[8] Thereafter, it was not until February 22, 2013, more than two months ***after***

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[4] *Id.*

[5] *Id.*

[6] This is also supported by the following passage from Ms. Bradley's testimony: "Q: Right, but you were aware that Mr. Osborne was going to be terminated in November and you were aware about the reasons why he was going to be terminated, correct? A: The reasons why were because the work was going to be repurposed." CP 872, lines 20-25.

[7] *See*, VRP 2/10/15 p. 19, lines 18-24. Mr. Telders sent an internal email on November 16, 2012, indicating his intent to inform Mr. Osborne his position was being eliminated *See*, Trial Ex. 114. This never occurred because Mr. Telders was instructed not to provide notice to Mr. Osborne.

[8] *See*, Trial Ex. 59. This email was sent by Mr. Dell'Orfano the same day Mr. Osborne's termination technically become "effective" according to REI even though he had been terminated on December 13, 2012, and asked to leave the facility. This email proves REI was not considering layoffs between August 2012 and January 1, 2013.

Mr. Osborne's termination, that any layoffs actually took place. Other REI documents add further support for this timeline, including emails showing the company informed its IT department in August 2012, that layoffs were not expected. REI's notice specifically stated:

Does this mean there will be layoffs? No.[9]

REI's documents also show Mr. Osborne was only one of two employees separated in January 2013 and that there were no group separations between August and January 2013.[10] Instead, REI's internal documents listing its employee separations during this period show:

- 2 employees were separated in August 2012
- 0 employees were separated in September 2012
- 1 employee was separated in October 2012
- 0 employees were separated in November 2012
- 1 employees was separated in December 2012
- 2 employees were separated in January 2013[11]

This evidence disproves the notion that Mr. Osborne was laid off in December 2012 or January 2013.[12] By contrast, at no time has REI offered any evidence to connect Mr. Osborne's termination on December 13, 2012, to the large-scale layoffs that began on February 22, 2013. To the contrary, the evidence shows he was targeted for removal on October

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[9] *See*, Trial Ex. 73 (emphasis added).
[10] *See*, Trial Ex. 142.
[11] *See*, Trial Ex. 142.
[12] Compare Trial Ex. 142 and testimony from Ms. Clements that "...there were seven employees at headquarters within that same time frame whose jobs were eliminated..." CP 761, 835.

17, 2012, two weeks after his product liability case settled.[13] This evidence demonstrates that, had the trial court properly instructed the jury as to the defense of undue burden, REI could not have shown that economic or other hardship required it to terminate Mr. Osborne as part of financially driven mass layoffs.[14]

b. REI Raised the Undue Burden Defense by Arguing Financial Reasons Supported Terminating Mr. Osborne

Despite Mr. Osborne's objections and motions in limine, REI was allowed to assert it had no duty to accommodate Mr. Osborne, and even argue it could not accommodate him, because he was part of a mass layoff. In this way, REI excused its actions without having to prove that Mr. Osborne was part of a larger layoff or that the elimination of his job (the accommodation) was compelled by financial circumstances. This constituted an egregious error of law, because there was no difference between REI's layoff argument and an undue burden defense.[15] By refusing to instruct the jury that REI was required to prove its layoff claim,

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[13] Mr. Osborne's settlement with REI was executed at the end of September 2012. By October 17, 2012, Mr. Melvin had submitted his justification for the CPM position that would replace Mr. Osborne's position, a fact acknowledged by Ms. Bradley on October 30, 2012 ("it is the job that Jim Osborne is currently fulfilling"). *See*, Trial Ex. 55.

[14] REI incorrectly argues Mr. Osborne did not comply with RAP 10.3(g). Mr. Osborne cited to each challenged instruction in his assignments of error. *See*, Appellant's Opening Brief at p. 3, ¶¶ 4 and 5.

[15] The Washington Administrative Code defines layoffs to include any employer initiated action that results in an employee separation, employment in a lower salary range, reduction in work year, or reduction in work hours for reasons that are attributable to lack of funds, lack of work, or organizational change. *See*, WAC 357-46-005 and WAC 357-46-010.

the trial court left the jury with the improper impression that it was Mr. Osborne's duty to prove his accommodation was not an undue burden.

This is directly contrary to settled law which requires employers to prove undue burden, not the employee. This is critical because REI's layoff argument rests on the unfounded assertion the company could not afford to continue accommodating Mr. Osborne. To this point, REI contended that it was going through a period of slow sales in 2012 which, combined with tough economic conditions, required it to lower costs by reducing headcount.[16] For these reasons, REI argued it could not afford to retain Mr. Osborne's position, with its flexible schedule, lack of deadlines, and limited value added.[17] This constitutes an undue burden defense where it is undisputed that Mr. Osborne's job ***was*** his accommodation.

Nonetheless, REI was not required to meet any burden of proof as to layoff or its defense of undue burden. The jury was not even informed REI had any burden of proof. This raises serious policy concerns. Numerous courts have discussed the risk employers will use layoffs as a

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[16]*See*, Trial Ex. 59; *See also*, VRP 2/17/15 p. 49, lines 3-12; p. 61, lines 37; pp. 72-73, lines 22-25; 1-5; REI sought testimony from the plaintiff regarding the company's soft sales in 2012. *See*, Trial Ex. 343; *See also*, VRP 2/18/15, p. 81, lines 6-15, p. 82, lines 15-25, p. 83, lines 8-13. The issue of financial hardship and cost cutting was raised by both parties during opening arguments. *See*, VRP 2/3/15, p. 115, lines 15-24. *Id.*, p. 147, lines 17-20 [BY MR. SANDERS] ("Something that was different between 2012 and 2008 is that there was constant pressure to make sure that the costs were being controlled, and that value was being provided in exchange for paying compensation.").

[17] *See*, VRP 2/3/15, p. 149, lines 22-25 ("...And when you are laying off 100 people that have real jobs, you don't keep somebody on with make work..."); *See also*, VRP 2/3/15, p. 136, lines 6-9 ("Worked on four particular projects. No end dates. No urgency.")

pretext to discard disabled employees.[18] If REI's defense in this case is left unchecked, other employers will elect the same strategy to avoid liability for disability discrimination. Instead of working to find options to accommodate disabled employees, a company can simply eliminate their position, call it a layoff, and avoid any obligation to justify its actions.

The law cannot tolerate such a result which is the reason employers are required to prove an undue burden defense when layoff is used as a justification to remove an accommodation for a disabled employee. This is not an onerous obligation if employers follow the law; all that is required is commitment to an interactive dialogue. REI should have engaged Mr. Osborne in an interactive dialogue once it decided to eliminate his position in October 2012.[19] The requirement to engage in the interactive process is a touchstone of an employer's duty in an

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[18] This includes the Second, Fourth, Fifth, Seventh, and Eighth Circuit Courts of Appeals as well as California. *See*, *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1195 (7th Cir. 1997)("A RIF is not an open sesame to discrimination against a disabled person... Even if the employer has a compelling reason wholly unrelated to the disabilities of any of its employees to reduce the size of its work force, this does not entitle it to use the occasion as a convenient opportunity to get rid of its disabled workers...") *See also*, *Uffelman v. Lone Star Steel Co.* (5th Cir. 1989) 863 F.2d 404, 407–408.) *Hardin v. Hussmann Corp.*, 45 F.3d 262, 265-66 (8th Cir. 1995); *Herold v. Hajoca Corp.*, 864 F.2d 317, 320 (4th Cir. 1988); *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 358, 8 P.3d 1089, 1115 (2000) *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 204 (2d Cir. 1995)("...even during a legitimate reorganization or workforce reduction, an employer may not dismiss employees for unlawful discriminatory reasons.")..

[19] REI did not take these steps. REI knew that, if it did, Mr. Osborne would have found a way to identify value added work which would have required them to retain his employment, something they did not want after his product liability suit settled.

accommodation setting. [20] As soon as REI realized Mr. Osborne's accommodation was failing (because it was purportedly not meeting REI's business needs) it was required to re-engage Mr. Osborne. But REI did not take these steps and cannot evade its obligations by perseverating its layoff mantra without making any attempt to prove the claim.[21] Because the trial court did not give undue burden instruction, the jury was erroneously lead to believe that it was Mr. Osborne's burden to disprove undue burden as a part of showing a reasonable accommodation was available. This was a significant departure from Washington law; remand is necessary to remedy the confusion caused by failing to give the undue burden instruction.[22]

II. MR. OSBORNE IS ENTITED TO, AND THE LAW MANDATES, DIRECTED VERDICT IN HIS FAVOR

REI's prosecution of an undue burden defense by arguing Mr. Osborne was part of mass layoffs was prejudicial. The prejudice arose at

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[20] *See, Humphrey v. Memorial Hospitals Ass'n,* 239 F.3d 1128, 1138 (9th Cir 2001).

[21] That is especially true where Mr. Osborne was able to establish that at least five (5) other value added work assignment options were available and required attention, at the time REI decided to eliminate his position. *See*, VRP 2/9/15, p. 76-77, lines 23-25; 1-2; p. 78, lines 1-5.

[22] REI argues Mr. Osborne did not comply with RAP 10.4(c). This argument is misleading and disingenuous because the trial court failed to include either parties' proposed instructions as part of the clerks' papers. This required the parties to file a motion to settle the record, after Appellant's Opening Brief was filed. As a result, the parties' proposed instructions can now be found at CP 3221-3260 and 3262-3299 (*See also*, Appendix C and D). To avoid any confusion, Mr. Osborne has included Appendix A & B to this brief identifying each disputed instruction with the correct clerks' papers citation. Appellant's Opening Brief did include language from the Court's Instruction 7 (page 22 & 29); Mr. Osborne's Proposed 16 (p. 26); Mr. Osborne's Proposed Verdict Form (p. 26); Mr. Osborne's Proposed 14 (p. 30).

the beginning of this case and has tainted all of the proceedings since. REI never pled an undue burden defense and repeatedly stated it was not raising or prosecuting the defense.[23] Ultimately, this was a subterfuge whereby REI intended to pursue an undue burden defense vis-à-vis its layoff argument. However, the procedural fact is undisputed: REI never pled or claimed relief as a result of undue hardship. Since REI did not dispute underlying elements of Mr. Osborne's accommodation claim, it correspondingly had no defense as a matter of law.[24] Thus, liability in favor of Mr. Osborne should have been granted at summary judgment or no later than the close of REI's case by way of directed verdict.[25]

Accordingly, remand for entry of judgment in favor of Mr. Osborne is the most appropriate, efficient, and most importantly, just result in this case. Any other result would only serve to exacerbate the prejudice to Mr. Osborne and waste judicial resources. REI should not be allowed to profit from its strategic decision to prosecute undue burden while evading its obligations to prove the defense. These actions placed Mr. Osborne at a significant disadvantage. By not asserting the defense in its answer, Mr. Osborne had no reason to conduct discovery into the

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[23] *See*, CP 18-28; VRP 01/23/15, p. 58, lines 19-25.
[24] *See*, VRP 07/11/14, p. 39, lines 1-6.
[25] Mr. Osborne filed a motion for directed verdict and sought this court to review the trial court's decision on this issue. CP 2886-2916. This motion sets forth the law governing the defense as well as the lack of evidence to support a claim undue burden in this case.

defense. Had Mr. Osborne known REI intended to argue that financial conditions required his termination, he would have propounded written discovery and questioned witnesses on the issue. But because the defense was not pled or asserted at any time, none of these measures were pursued. As a result, Mr. Osborne was deprived of any opportunity to obtain evidence to challenge the defense. Instead, he was forced to pursue a moving target unveiled by REI for the first time at trial. The only way to rectify this harm is to remand this matter with instructions to enter a directed verdict in favor of Mr. Osborne on his accommodation claim.

III. REI WAS REQUIRED TO ENGAGE MR. OSBORNE ONCE IT DECIDED TO ELIMINATE HIS POSITION

a. Mr. Osborne's Position was His Accommodation

Perhaps the most important piece of evidence in this case is the uncontroverted fact that Mr. Osborne's IT Consultant Position *was his accommodation*. During trial, two senior HR managers confirmed this fact. Ms. Michelle Clements testified as follows:

> Q. Okay. I want to also be clear, I asked you whether or not the job, Mr. Osborne's job as an IT consultant, that IT consultant job, was the accomodation [sic][26]. And your answer, I believe, was yes at first. Is that -- do you suggest -- are you telling us that at some point that IT consultant position stopped being an accomodation? I mean, before he was fired?

[26] The misspelling of the word accommodation in the trial transcript is contained in the original and will not be corrected to keep citations accurate as transcribed.

> A. We created that job for Jim so that he could return to work. Have a goal. You know, something to work towards. It wasn't a role that existed. Over time with his tenure we actually moved him into roles with the same title that was doing work that was in existence. We weren't creating a job, per se. So it was the, I guess in terms of how you define that, there was no job when he originally returned to work. We created that for him.
>
> Q. And that was to accomodate him? That was the accomodation?
>
> A. Correct.
>
> Q. And it remained the accomodation until his last day on December 13th, 2012, correct?
>
> A. That's correct. We moved him into different roles.
>
> Q. But it still remained the accomodation?
>
> A. Correct.[27]

This testimony leaves no doubt that Mr. Osborne's position was his accommodation. Similarly, Mr. Mike Hulser, testified that, when REI eliminated Mr. Osborne's position, it eliminated his accommodation:

> Q. If it is true as it's been testified that the IT consultant position was the accomodation and you eliminate the job of IT consultant you've eliminated the accomodation; isn't that true? Yes or no?
>
> A. That's -- no. It is not totally true.
>
> Q. Why is -- tell me exactly why, if the job is the accomodation, and you eliminate the job you haven't eliminated the accomodation?

[27] *See*, VRP 2/17/15, pp. 91-92, lines 7-25; 1-6.

> A. Because there was other pieces to the accomodation. Not just that job. So there was the number of hours that the person was working. That James was working. There was the environment that James was working in and, et cetera. So there were other pieces, other than the job that was created at that time.
>
> Q. And by eliminating the job –
>
> A. Uh-huh.
>
> Q. -- you eliminated all of those pieces, correct? Not you, but REI?
>
> A. We eliminated all those pieces, correct.[28]

This testimony proves that Mr. Osborne's position was his accommodation. It also raises the question of why REI did not engage Mr. Osborne in an interactive dialogue once it decided to eliminate his IT Consultant position thereby eliminating his accommodation. Not only did REI not engage Mr. Osborne, it concealed its decision from him. The trial court recognized the import of this fact during trial:

> THE COURT: So why wouldn't I take that analysis, and again I go back to the testimony from the REI employees that the job itself, understanding that it's not as Mr. Davis has said, they didn't have to initially go to this length for this accomodation. But this was the accomodation they elected for Mr. Osborne. ***When the job itself is the accomodation, and that's being pulled away, right***? Because of the cost cutting, why then isn't the duty to look at other options that the date -- the -- I'm going to misquote the case. The Dean options. ***The Dean duty. Inform him of other job openings that may be available***. I mean, why

[28] *See*, VRP 2/18/15, pp. 20-21; lines 13-25; 1-10.

> wouldn't -- because we are talking about a hybrid here. Why wouldn't that apply?[29]
>
> * * * * * *
>
> THE COURT: But the job was built around the disability, wasn't it? I mean, the job was created for the disability?[30]

This passage illustrates the importance of the fact that Mr. Osborne's position was his accommodation. Thus, when REI decided to eliminate his accommodation in October 2012, it had an obligation (as noted by the trial court) to engage with Mr. Osborne and help him identify alternative options. REI has never explained why it did not follow the law in this regard instead arguing that layoffs are a panacea that excuses all of its legal obligations to disabled employees. But there is not a single Washington case that supports this argument. REI glosses over this point and further seeks to excuse its action by arguing that, because they did such a great job accommodating Mr. Osborne in previous years, they could unilaterally revoke his accommodation at any time: [BY MR. SANDERS] "...if you don't have to create a job, if you do create a job, you don't have to keep it going forever. You can stop it at any time without liability because you have gone beyond your legal obligations at that point. Right?"[31] Of course, there is not a shred of legal authority to

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[29] *See*, VRP 2/18/15 at pp. 181-182, pp 15-25; 1-2 (emphasis added).
[30] *See*, VRP 2/18/15, p. 182, lines 9-16.
[31] *See*, VRP 2/18/15, pp. 183-184, line 25; 1-5.

support this position. But this is terrifying to any disabled person being accommodated in the workplace. If true, any effective accommodation (for the employee) could be revoked at any time (by the employer) without notice or process. Put simply, this is not the law in Washington. To the contrary, the law holds that, when an employer becomes aware of problems with an accommodation, they have a legal duty to engage the employee in an interactive dialogue to identify possible alternatives.[32]

b. The Duty to Engage a Disabled Employee is Triggered when Business or Financial Needs Change

In this case, the record shows REI (at least pretextually) decided that Mr. Osborne's accommodation interfered with its business need for a CPM position. Under Washington law, this decision triggered REI's duty to notify Mr. Osborne, explore alternative options for him, and encourage him to pursue them. That is the holding in *Dean* as well as *Curtis,* the application of which Mr. Osborne explained at trial:

> ...the Bank first contends it had no duty to accommodate Ms. Curtis because the duty to accommodate a handicapped employee only rises after the person loses a job to a handicap. And this is, I think, the critical passage. It argues that Ms. Curtis' job was eliminated for reasons unrelated to her handicap. None of the Washington cases cited by the Bank, specifically state or imply that the Bank's contention is correct. So again, and my point there is again her job was

[32] *See*, *Dean v. Municipality of Metropolitan Seattle-Metro*, 104 Wn.2d 627 (1985); *Curtis v. Security Bank of Washington*, 69 Wn. App. 12 (1993); *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128 (2001); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

> eliminated, and the court ultimately finds that when that happens that triggers the duty. That triggers the duty to interact, to have a process, to sit her down, and in that case the Bank at least took the measure of saying, hey, we are eliminating your job. And what they failed to do there is identify open positions and encourage her to apply. So ultimately the Bank was held liable. In this case you don't even have that first step. You don't even have that notice to Mr. Osborne to just give him that chance, and he testified I think several times to that that all he is asking for is a chance, and that's what the accomodation [sic] processes, that's what the interactive dialog requires. Just give him a chance.[33]

The Court of Appeals in *Curtis* rejected the defendant's argument that the duty to accommodate would have only been triggered if Ms. Curtis had lost her job because of her handicap. Instead, the Court held there was an obligation to interact even if the job elimination was due to other reasons. Thus, *Curtis* applies in this case because, even if REI was correct in saying Mr. Osborne was let go for reasons other than his disability, it nonetheless had a duty to: (1) notify Mr. Osborne that his position was being eliminated (2) help him identify open positions[34], and (3) encourage him to apply. This process is critical. The law mandates that employees have a voice and role in the process because there may be options that neither party is aware of until a dialogue occurs. For

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[33] *See*, VRP 2/8/15, pp. 188-189, lines 12-25; 1-10.

[34] Or in this case other value added assignment as had been the case for the entire time since Mr. Osborn returned to work in 2008. In fact, the Mr. Osborne had conversations with multiple managers this issue and both agreed they would continue to look for other assignments and project he might performed, should any one task end. *See*, VRP 2/9/15, p. 77, lines 1-20; VRP 2/4/15, p. 188-189, lines 14-25; 1-23; Trial Ex. 116.

example, the federal government provides guidance on the process of determining the appropriate reasonable accommodation and notes that:

> However, in some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. For example, the individual needing the accommodation may not know enough about the equipment used by the employer or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the employer may not know enough about the individual's disability or the limitation that disability would impose on the performance of the job to suggest an appropriate accommodation. Under such circumstances, it may be necessary for the employer to initiate a more defined problems solving process…[35]

This authority echoes that announced in *Barnett*, *Humphries*, *Dean*, and *Curtis* for the simple reason that, without input from REI, Mr. Osborne could not know the business's changing needs. Without that information, or a dialogue with REI, he had no impetus to propose alternatives or seek out REI to identify solutions that neither one of them might have identified alone. REI works hard to avoid this analysis and instead cites an odd assemblage of termination cases from other jurisdictions. Thus, its citations are not controlling for purposes of this Court's review. But more fundamentally, REI's citations fall short because they are termination cases and thus do not address the

[35] *See*, 29 CFR Part 1630, Appendix to Part 1630 – Interpretive Guidance on Title I of the American with Disabilities Act, p 405.

accommodation analysis at issue in this case.[36] For example, REI relies heavily upon *Aponte Diaz v. Navieras Puerto Rico, Inc.*, 130 F. Supp. 2d 246, 253 (D.P.R. 2001). *Aponte* was not an accommodation case. To the contrary, the only issue in *Aponte* was whether "NPR terminated Aponte in whole or in part because he was disabled." *See*, *Aponte Diaz v. Navieras Puerto Rico, Inc.*, 130 F. Supp. 2d 246, 253 (D.P.R. 2001). This is another example of REI's efforts to apply a wrongful termination analysis.[37] REI attempts this sleight of hand because all of the Washington and Ninth Circuit cases on point undermine its position including, *Curtis*, *Dean*, *Goodman*, *Barnett*, and *Humphries*.

IV. WRONGFUL TERMINATION

a. The Proper Standard is Whether REI's Actions were Substantially Motivated by Mr. Osborne's Disability

The legal standard on summary judgment does not require employees to present a formulaic or rigorous threshold showing.[38] To the

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[36] *See*, *Daugherty v. City of El Paso,* 56 F.3d 695 (5th Cir. 1995); *Matthews v. See Commonwealth Edison Co.,* 128 F.3d 1194 (7th Cir. 1997); *Ware v. Mut Materials Co.,* 93 Wn. App. 639 (1999). *Cluff v. CMX Corporation, Inc.*, 84 Wn. App. 634 (1997).

[37] Mr. Aponte, unlike Mr. Osborne, presented no evidence of vacant positions or his qualified for the same. Similarly, *Aponte* included no discussion of the interactive process which speaks to the fact that *Aponte* is a wrongful termination case, not an accommodation case, and therefore has no value in the context of this case.

[38] The U.S. Supreme Court has cautioned, and Washington's Supreme Court has agreed that "The prima facie case method established in *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic or the exclusive means of proving a discrimination claim. Because the facts in employment discrimination cases vary, the *McDonnell Douglas* model for proving a plaintiff's prima facie case is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas,* 411 U.S. 791, 802 (n.

contrary, the elements of a discrimination claim "should be used flexibly to address the facts in different cases."[39] Numerous Washington Courts hold that disparate treatment claims are valid even when the employee was replaced by another disabled person.[40] As noted by this Court: "Disability cases in particular often involve situations where, because of the unique nature of the disability, there is no relevant comparison evidence."[41] As a result, the standard at summary judgment is not onerous and only requires a showing that a plaintiff: (1) suffered adverse work conditions; and (2) his or her protected class was a substantial factor in any such work conditions.[42] The Washington State Supreme Court has repeatedly held that to survive summary judgment a plaintiff is only required to demonstrate that a reasonable judge or jury *could* find their disability was

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13) (1973). Plaintiff's prima facie burden is "not onerous." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253(1981).

[39] *See, Johnson v. Dep't of Soc. and Health Servs.*, 80 Wn. App. 212, 227 n. 21 (1996); *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 33 (2010). The *McDonnell Douglas* elements should not be "viewed as providing a format into which all cases of discrimination must somehow fit." *Grimwood v. University of Puget Sound,* 110 Wn.2d 355, 363(1988).

[40] *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 33 (2010); *See also, Callahan v. Walla Walla Housing Authority*, 126 Wn. App. 812, 820 (2005)("Replacing a plaintiff who has a burdensome disability with a person less inconveniently disabled does not eliminate the possibility that the disability was a substantial factor.").

[41] *Id.*

[42] *See, Scrivener v. Clark College*, 181 Wn.2d 439, 441-442 (2014); *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 149-50 (2004); *Roeber v. Dowty Aerospace Yakima,* 116 Wn. App. 127, 135 (2003).The "requisite degree of proof necessary to establish a prima facie case ... is ***minimal*** and does not even need to rise to the level of a preponderance of the evidence." *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 889 (9th Cir.1994)(emphasis added).

a substantial factor in an adverse action.[43] Thus, "***the overriding question is whether the handicap was a reason for termination***."[44]

Contrary to REI's exhortations, the inquiry in this case boils down to a straightforward issue: Did Mr. Osborne's disability substantially motivate REI's decision to terminate his employment? The record in this case amply demonstrates that, for purposes of summary judgment, the answer is yes. That is especially true where there is ample evidence showing Mr. Osborne was treated less favorably than colleagues who were not disabled and/or had not initiated legal action against the company.[45]

b. Mr. Osborne was Treated Less Favorably than Non-Disabled Colleagues

The evidence submitted at summary judgment created a strong inference Mr. Osborne was treated less favorably than his colleagues in several respects. For example, REI provided two IT employees, Ms. Agatha Chen and Mr. Paul Trask, with advance notice of the elimination of their positions.[46] Unlike Mr. Osborne, these employees were allowed to remain on campus for well over a week, bring their affairs into order, and

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[43] *Riehl,* 152 Wn.2d at 149; *Mackay v. Acorn Custom Cabinetry, Inc.,* 127 Wn.2d 302, 307–08 (1995).
[44] *Cluff v. CMX Corpo, Inc.*, 84 Wn. App. 634, 638 (1997) [emphasis added]. *See also*, *Riehl*, *Mackey*, and *Roeber*.
[45] The question of pretext is ultimately "a pure question of fact." *Johnson v. Dep't of Soc. and Health Servs.*, 80 Wn. App. 212, 229 (1996). Appellant's Opening Brief recited the ample showing of pretext in this case including contradictory testimony regarding the reasons for Mr. Osborne's termination as well as the identity of the decision makers.
[46] *See*, CP 925.

plan for their separation.[47] REI even worked with these employees "to assist them with their transition to new roles within or outside of REI."[48]

Mr. Osborne did not receive any assistance when he was terminated on December 13, 2012, just four months later, without any notice. Instead, he was required to leave REI's headquarters immediately. REI also took steps to make sure ***no one*** looked for a new role for Mr. Osborne at the company.[49] Any reasonable juror could conclude that these facts evince disparate treatment towards Mr. Osborne.

This conclusion is further supported by the way REI treated numerous colleagues separated after Mr. Osborne. Many employees separated in February and March of 2013 received substantial advance notice as well as the opportunity to continue working for extensive periods of time.[50] This included Mr. Telders, who was afforded three weeks time to continue working at REI.[51] Other received two weeks' notice (Finance), three months' notice (Private Brands), and four months' notice

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[47] REI notified its IT department of the change on August 13, 2012, including the fact that the changes would be become effective four days later on August 17, 2012. By August 13, 2012, Mr. Trask and Ms. Chen already had received advance notice of the pending actions meaning they had (at least) more than one weeks' notice during which time they continued to work at REI headquarters. *See*, CP 925.
[48] *Id.*
[49] *See*, VRP 2/10/15, p. 48, lines 9-18.
[50] *See*, CP 924 which is the same document as Trial Ex. 60 (REI 1273).
[51] *Id.,* (notification date Feb 21; last day March 15). Two employees in the supply chain division were offered other positions.

(Visual). None of these employees were disabled like Mr. Osborne and none of them were required to leave REI's facilities the same day.

c. There is Compelling Evidence REI Retaliated Against Mr. Osborne for Suing the Company

Mr. Osborne's burden to establish retaliation at summary judgment required him to show: (1) he engaged in protected activity, (2) an adverse employment action was taken against him, and (3) there was a causal link between the former and the latter. *Delahunty v. Cahoon*, 66 Wn. App. 829, 839 (1992).[52] There has never been a dispute Mr. Osborne engaged in a protected activity or that he was subjected to an adverse action when his employment was terminated on December 13, 2012. Accordingly, the only issue with respect to Mr. Osborne's retaliation claim is whether there was sufficient evidence of causation.

As a matter of law, Mr. Osborne has raised issues of fact as to causation, for purposes of summary judgment, where "Proximity in time between the adverse action and the protected activity, coupled with evidence of satisfactory work performance and supervisory evaluations suggests an improper motive."[53] In this case, there is no dispute Mr. Osborne's performance was superb that he was terminated shortly after

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[52] *See*, *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 70 (1991); *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 481-482 (2009).
[53] *See*, *Kahn v. Salerno*, 90 Wn. App. 110, 130-131 (1998).

settling his product liability suit against REI.[54] On this record, the trial court erred in granting summary judgment because there was a genuine issue of material fact regarding the element of causation.[55]

REI quibbles about whether the protected activity was the filing of Mr. Osborne's lawsuit in 2010 or its settlement in September 2012. REI argues the court may only consider the filing of the lawsuit as causation. But REI cites no legal authorities to support its argument. That is because the ultimate issue is whether "the evidence could lead reasonable persons to reach more than one conclusion."[56] Thus, to defeat summary judgment, Mr. Osborne need only identify facts upon which a reasonable juror could conclude his protected activity motivated his termination. This standard is met by the fact jurors asked whether the lawsuit played a role in Mr. Osborne's termination *even though* he was not allowed to prosecute this claim. While this is not evidence that the trial court considered on summary judgment, it shows jurors could find a causal connection between the timing of Mr. Osborne's settlement and termination.

d. Mr. Osborne Properly Cited to the Record Submitted at the Summary Judgment Phase

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[54] *See*, CP 779-800

[55] Causation has been inferred when adverse employment actions were taken three, eight, and eleven months after an employee's protected activity *See*, *Yartzoff v. Thomas,* 809 F.2d 1371, 1376 (9th Cir. 1987); *Van Asdale v. International Game Technology*, 577 F.3d 989, 1003 (9th Cir. 2009); *Coszalter v. City of Salem,* 320 F.3d 968, 977 (9th Cir. 2003).

[56] *See*, *Sorproni v. Polygon Apartment Parnters*, 137 Wn.2d 319, 325 (1999).

REI's argument that Mr. Osborne "improperly relies on the trial record" is misleading and disingenuous. The majority of the citations to summary judgment materials were accurate as set forth in Appellant's Opening brief.[57] The contention that Mr. Osborne provided over ninety citations to the trial record is false.[58] REI calculated this figure by looking at footnote 117 in Appellant's opening brief. But this citation was not offered on evidentiary grounds but rather to emphasize how heavily REI relied on its layoff argument.[59] The same is true of the juror questions cited by Mr. Osborne which were cited to drive home an important point: The trial court errored in finding that no one could conclude REI retaliated against Mr. Osborne when a juror raised that exact concern. Beyond these two points, REI's argument falls flat. For example, footnotes 109, 110, 118, 119, 120, 121, 123, 124, and 136 were all accurately cited and submitted on summary judgment.[60] Footnote 114 properly cited to the

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[57] There were several exceptions where briefs were misidentified or trial exhibits were inadvertently transposed for those submitted at summary judgment Footnote 130 inadvertently cited Trial Ex. 79. The correct cite is Trial Ex. 60 which are also located at CP 923-924. However, the clerks' papers cite were filed under seal and thus not available. Regardless, they are the same document.

[58] Most of the exhibits used at the summary judgment hearing were also entered into the record at trial. Thus, any transposition of cites was harmless because either cite leads to the same document: Footnote 122 should have cited CP 761-762; 972-976. Footnotes 125 and 126 should have cited CP 761, 918, and 935. Footnote 128 should have cited CP 925. Footnote 131 should have cited CP 762; 953-954. Footnote 132 should have cited CP 747-777; CP 1225-1233. Footnote 135 should have cited CP 767-768; 1021 ¶ 49.

[59] Mr. Osborne inadvertently identified Trial Exhibit 78 in this same footnote. The citation should have been CP 880 from the summary judgment record.

[60] Footnote 108 properly included a summary judgment cite, but to the wrong brief. The proper citation is CR 747-768.

complaint, which trial court reviewed.[61] Footnotes 111, 112, 113, 115, 116, 127, 133, 134, and 137 cited and discussed case law and did not contain any factual citations.

V. REI WITHHELD RELEVANT EVIDENCE

The trial court's order denying Mr. Osborne's motion to compel was untenable where it is undisputed that: (1) REI misled Mr. Osborne regarding relevant discovery for well over six months and (2) relevant materials are still being withheld. For example, the withheld documents showed Mr. Telders attended an educational course regarding the accommodation of disabled employees just a few months before Mr. Osborne's termination.[62] Similarly, Ms. Clements testified there were policies regarding accommodation which were never produced in discovery![63] Without these materials, Mr. Osborne was not allowed equal access to the truth as required by the spirit and purpose of the rules of civil procedure.[64] REI also refused to confirm whether it produced relevant materials from the hard drives of Mr. Melvin, Mr. Baumann, Mr. Dell'Orfano, and Ms. Hanson. This raises serious concerns Mr. Osborne

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[61] Mr. Osborne's citation to the motions in limine again was to demonstrate there was no dispute regarding the date Mr. Osborne's product liability suit settled. Regardless, this fact was raised as part of summary judgment including. *See*, CP 764.

[62] *See*, CP 1438. The materials withheld by REI were relevant to a number of other issues, as more fully explained in Mr. Osborne's motion to compel and reply in support of his motion to compel. *See*, CP 1385-1396 and CP 2056-2062.

[63] *See*, CP 1479, lines 6-13.

[64] *See*, *Heidelbrink v. Moriwiki*, 38 Wn. App. 388, 393 (1984).

was deprived of materials that bear on ultimate issues at stake in this litigation. Because Mr. Osborne should have not been forced to try this case with only half of the truth, the trial court's decision should be reversed to ensure equal access to the truth is afforded to both parties.

VI. CONCLUSION

Remand for a new trial is necessary to rectify the numerous errors of law which misled the jury and severely prejudiced Mr. Osborne. This should include directions to enter judgment in favor of Mr. Osborne on his accommodation claim and to proceed with a new trial to decide the issues of: (1) liability for Mr. Osborne's termination claims and (2) damages as a result of REI's unlawful conduct.

Dated this February 22, 2016

Respectfully submitted,

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Mark R. Davis, WSBA #38713
Michael Scruggs, WSBA #19066
Attorneys for Appellant

Appendix A

1. Plaintiff's Proposed Instruction No. 10 (CP 3245-3246)
2. Plaintiff's Proposed Instruction No. 11 (CP 3247-3248)
3. Plaintiff's Proposed Instruction No. 13 (CP 3250-3251)
4. Plaintiff's Proposed Instruction No. 14 (CP 3252)
5. Plaintiff's Proposed Instruction No. 15 (CP 3253)
6. Plaintiff's Proposed Instruction No. 16 (CP 3254)
7. Plaintiff's Proposed Instruction No. Revised 17 (CP 2919)

PLAINTIFF'S PROPOSED INSTRUCTION NO. 10

Elements of Plaintiff's Claim – Reasonable Accommodation Cases

In this case, Plaintiff claims that Defendant unlawfully refused to give him a "reasonable accommodation." To succeed, Plaintiff must prove five elements by a preponderance of the evidence:

1. Plaintiff had a disability – This element has already been established by Plaintiff;

2. Defendant was aware of Plaintiff's disability at the time of Plaintiff's request -- This element has already been established by Plaintiff;

3. Plaintiff requested an accommodation -- This element has already been established by Plaintiff;

4. Plaintiff was qualified to perform the job -- This element has already been established by Plaintiff;

5. Defendant failed to provide Plaintiff with a reasonable accommodation.

If you find from your consideration of all the evidence that the remaining element, Number 5 above, has been proved by a preponderance of the evidence then your verdict should be for the Plaintiff and you should turn to the issue of Plaintiff's damages.

If you find that Plaintiff has failed to prove the remaining element, Number 5 above, by a preponderance of the evidence, your verdict should be for Defendant.

WPI 330.33 modified.

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See 42 U.S.C. §§ 12111(9) and 12112(a), and NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 15.2 (2001) ("Elements of ADA Employment Action"); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 1.5.2 (2000) ("Reasonable Accommodation Claim"); and EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 5.51C (2001) ("ADA - Reasonable Accommodation Cases")

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 11

Disability Discrimination—Reasonable Accommodation—Definition

Once an employer is on notice of an impairment, the employer has a duty to inquire about the nature and extent of the impairment. The employee has a duty to cooperate with his employer to explain the nature and extent of the employee's impairment and resulting limitations as well as his qualifications.

An employer must provide a reasonable accommodation for an employee with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. Similarly, an employer must continue to provide a reasonable accommodation for an employee with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. REI has not raised and is not claiming undue hardship in this case. Therefore, you are instructed not to consider any difficulty or financial cost to REI in continuing to provide a reasonable accommodation to Mr. Osborne. The obligation to reasonably accommodate applies to all aspects of employment, and an employer cannot deny an employment opportunity to an employee because of the need to provide reasonable accommodation.

There may be more than one reasonable accommodation of a disability.

A reasonable accommodation may include adjustments in the manner in which essential functions are carried out, work schedules, assignments, scope of work, and

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changes in the job setting or conditions of employment that enable the person to perform the essential functions of the job.

WPI 330.34 (MODIFIED); The range of possible reasonable accommodations, for purposes of establishing liability for failure to accommodate, can extend beyond those proposed. *See*, *Barnett*, 228 F.3d at 1115-16 (citing *Taylor*, 184 F.3d at 317-18 ("an employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations. In making that determination, the jury is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations.").

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 13

The Interactive Process

The law requires employers to engage disabled employees in a discussion about how an accommodation could be accomplished. This is called the '"interactive process or dialogue". The purpose of this process is to identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

The interactive process is mandatory and both parties have a duty to participate in good faith.

The interactive process requires an employer, in good faith to:

1) Notify the employee when the employee's position will be eliminated or a similar a change in business needs);

2) Discuss the employee's existing limitations;

3) Identify possible accommodations for those limitations, and,

4) Affirmatively assist the employee to find a reasonable accommodation.

If you find that REI did not engage Mr. Osborne in a good faith interactive process after deciding to eliminate his IT Consultant position, you must find for the Plaintiff.

29 C.F.R. § 1630.2(o) (3) "The purpose of this process is to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o) (3)); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), vacated on other grounds, 535 U.S. 391 (2002); *Humphrey*

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v. Memorial Hospitals Assoc., 239 F.3d 1128 (9th Cir. 2001); *Goodman v. Boeing*, 127 Wn. App. 401, 408 (1995); *Sommer v. DSHS*, 104 Wn.App. 160, 182, 174-175 (2001). *See also*, *Frisino v. Seattle School Dist. No. 1*, 160 Wn.App. 765, 782 (2011)("An employer may choose to make only one attempt at accommodation, but it risks statutory liability if that attempt is not effective and it cannot show that additional efforts are an undue burden"). *Curtis v. Security Bank*, 69 Wn. App. 12, 18 (1993), the Court held: "The handicapped worker requires treatment different from other non-handicapped employees if the purposes of RCW 49.60 are to be achieved. The employer must take 'positive steps' to accommodate the physical limitations of handicapped employees."

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 14

If you find that REI did not attempt to accommodate Mr. Osborne after it was determined he would be terminated then you must find for plaintiff if there were plausible accommodations available.

Humphrey v. Memorial Hospitals Assoc., 239 F.3d 1128, 1137-1138 (9th Cir. 2001). Kimbro v. Atlantic Richfield, 889 F.2d 869, 879 (9th Cir. 1989). See also, Barnett, 228 F.3d at 1115-16 (citing *Taylor*, 184 F.3d at 317-18 ("an employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations. In making that determination, the jury is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations."). "The interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome. That's not the proactive process intended.... "*Taylor v. Phoenixville School District*, 184 F.3d 296, 315 (3rd Cir. 1999).

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 15

Ongoing Duty of Employer

An Employer's duty to accommodate a disabled employee is a continuous duty that is not extinguished by one effort. In considering accommodations, an Employer must consider contemporaneously available accommodations at the time of termination but also those that will become available within a reasonable period in the future. If you find the Defendant did not consider reassignment to a position that reasonably would have existed in the reasonable future, then you must find for the plaintiff.

Dark v. Curry Co., 451 F.3d 1078 (9th Cir 2006); *Humphrey v. Memorial Hospitals Assoc.*, 239 F.3d 1128 (9th Cir. 2001); *Goodman v. Boeing*, 127 Wn. App. 401, 408 (1995); *See also, Frisino v. Seattle School Dist. No. 1*, 160 Wn.App. 765, 782 (2011); *Kimbro v. Atlantic Richfield*, 889 F.2d 869, 879 (9th Cir. 1989). The law does not allow an employer to reflect in hindsight about why it could not accommodate the plaintiff, after having failed to engage in the interactive process:

> The interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome. That's not the proactive process intended....

Taylor v. Phoenixville School District, 184 F.3d 296, 315 (3rd Cir. 1999). *Hendrick-Robinson v. Excel Corp.*, 154 F.3d 685 (7th Cir. 1998);(summary judgment for employer denied because it may not have participated in good faith in finding accommodations); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626 (7th Cir. 1998)(employer summary judgment denied because disputes of fact remained about breakdown in interactive process).

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 16

Continuing Duty

An employer's obligation to engage in the interactive process extends beyond one attempt at accommodation and continues when the employee asks for a different accommodation or when an employer becomes aware that the initial accommodation is failing and further accommodation is needed as would be the case if the employer was contemplating a decision to terminate an employee.

Stephanie M. GAMBINI, Plaintiff, v. TOTAL RENAL CARE, INC., d/b/a REI, Inc., a California corporation, Defendant., 2004 WL 5529346 (W.D.Wash.); Humphrey v. Memorial Hospitals Association, 239 F.3d 1128, 1138 (9th Cir. 2001), cited with approval in *Riehl v. Foodmaker, Inc.* 152 Wn.2d 138., 94 P.3d 930, 938 (2004); *See also Barnett v. U. S. Air, Inc.*, 228 F.3d 1105, 1112–14 (9th Cir.2000) (en banc) (holding that interactive process is a mandatory, not permissive, duty of the employer and that employer has duty to initiate interactive process in some circumstances), vacated on other grounds, 535 U.S. 391 (2002). *Curtis v. Security Bank*, 69 Wn. App. 12, 18 (1993), the Court held: "The handicapped worker requires treatment different from other non-handicapped employees if the purposes of RCW 49.60 are to be achieved. The employer must take 'positive steps' to accommodate the physical limitations of handicapped employees."

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PLAINTIFF'S REVISED PROPOSED INSTRUCTION NO. 17

Whereas equal treatment is expected for most employees, the law requires an employer to treat employees differently in order to eliminate barriers to the disabled. Providing preferences to disabled employees in the form of accommodations may be necessary to achieve the goal of equal opportunity. The fact that different treatment violates an employer's disability neutral policy does not make an accommodation unreasonable. An employer is liable for disability discrimination where it treats the disabled employee without regard to his disability.

US Airways, Inc., v. Barnett, 535 U.S. 391, 397 (2002). *See also*, *Gambini v. Total Renal Care*, 486 F.3d 1087, 1095 (9th Cir. 2007). "Unlike other types of discrimination where identical treatment is the gold standard, identical treatment is often not equal treatment with respect to disability discrimination." (*citing Holland v. Boeing*, 90 Wn.2d 384, 388 (1978) ("Identical treatment may be a source of discrimination in the case of the handicapped, whereas different treatment may eliminate discrimination against the handicapped and open the door to employment opportunities")); *Negron v. Snoqualmie Valley Hosp.* 86 Wash. App. 579, 585 (1997) (simply providing services to deaf patients in the same manner as other patients may be a violation of the WLAD.) *Dean v. Municipality of Metropolitan Seattle Metro,* 104 Wn.2d 627, 639 (1985).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 21

SPECIAL Verdict Form

1. Did REI fail to engage in the interactive process after deciding to terminate Mr. Osborne.

   YES _____ NO _____

   If your answer to Question 1 is "Yes", proceed to questions 2-6. Ifyour answer is "No", proceed to Question 2.

2. Did REI fail or refuse to accommodate Mr. Osborne when they terminated him on December 13, 2012.

   YES _____ NO _____

   If your answer to Question 1 is "Yes," proceed to Questions 2-5. If your answer to Question 1 is "No," sign and date the verdict form and return it to the bailiff.

3. The amount of past wages and benefits Mr. Osborne would have earned less actual and potential wages and benefits from other sources, is $_____.

4. The amount of future wages and benefits Mr. Osborne would have earned less actual and potential wages and benefits from other sources, is $_____.

5. Mr. Osborne's damages for past emotional distress caused by REI's failure to accommodate are $_____.

6. Mr. Osborne's damages for future emotional distress caused by REI's failure to accommodate are $_____.

   Sign and date the Special Verdict Form and return it to the bailiff.

DATE:_____

_____
Presding Juror

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Appendix B

1. Court's Instruction No. 5 (CP 3122-3123)
2. Court's Instruction No. 7 (CP 3125)
3. Verdict Form (CP 3134)

No. 5

Discrimination in employment on the basis of disability is prohibited. One form of unlawful discrimination is a failure to reasonably accommodate an employee's disability.

To establish his claim of discrimination on the basis of failure to reasonably accommodate a disability, Mr. Osborne has the burden of proving each of the following propositions:

(1) That he had an impairment that is medically recognizable or diagnosable or exists as a record or history – THE PARTIES AGREE THIS HAS BEEN PROVED; and

(2) That either:

(a) Mr. Osborne gave REI notice of the impairment; or

(b) no notice was required to be given because REI knew about Mr. Osborne's impairment; and

(3) That either:

(a) the impairment had a substantially limiting effect on

(i) his ability to perform his job or be considered for a different job; or

(ii) his ability to access conditions of employment; or

(b) Mr. Osborne has provided medical documentation to REI establishing a reasonable likelihood that working without an accommodation would aggravate the impairment to the extent it would create a substantially limiting effect; and

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

(5) That REI failed to reasonably accommodate the impairment.

In determining whether an impairment has a substantially limiting effect, a limitation is not substantial if it has only a trivial effect.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for the Mr. Osborne on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for REI on this claim.

No. 7

In the event that a position that exists for the purpose of providing a reasonable accommodation for an employee's disability is being eliminated, an employer must take affirmative steps and reasonably accommodate a disabled employee.

Affirmative steps include:

i. Discussing the employee's existing limitations;

ii. Assisting the employee in an internal job search;

iii. Sharing with the employee job openings or possibilities of reassignment within the company;

To reasonably accommodate the disabled employee in this circumstance, the employer must help the disabled employee fill an open position, or be reassigned, within the company so long as an open position or the possibility of reassignment exists and the employee is qualified for the open position or reassignment.

If the position that is being eliminated is not a position whose purpose is to provide the disabled employee with a reasonable accommodation at the time of its elimination, the obligation to reasonably accommodate the employee does not apply.

An employer is not required to give a disabled person priority over those who are not disabled when filling an open position or making a reassignment.

VERDICT FORM

1. Has Mr. Osborne proved by a preponderance of the evidence that REI failed to reasonably accommodate him?

   YES _____ NO _____

   If your answer to question 1 is "Yes," answer Questions 2 and 3. If your answer to Question 1 is "No," sign and date the verdict form and return it to the bailiff.

2. The amount of past and future wages and benefits Mr. Osborne lost as a result of REI's failure to reasonably accomodate, less actual and potential wages and benefits from other sources, is $_____.

3. Mr. Osborne's damages for emotional distress caused by REI's failure to reasonably accommodate are $_____.

Sign and date the Special Verdict Form and return it to the bailiff.

_____

PRESIDING JUROR

Appendix C

1. Plaintiff's Proposed Jury Instructions (CP 3221-3260)

THE HONORABLE SEAN O'DONNELL

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

JAMES OSBORNE, an individual, Plaintiff, v. RECREATIONAL EQUIPMENT INC., a Washington corporation, Defendant.	No. 13-2-21642-6 SEA PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

The Plaintiff respectfully proposes the following Jury Instructions. Citations are included.

RESPECTFULLY SUBMITTED this 2nd day of February, 2015.

By: */s/ Mark K. Davis*
Mark Davis, WSBA # 38713
Michael P. Scruggs, WSBA #19066
Attorney for Plaintiff James Osborne

s/ Michael E. Blue
Michael E. Blue, WSBA No. 22368
The Law Offices of Michael E. Blue, PS
3213 West Wheeler St #58
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Attorney for Plaintiff James Osborne

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 1

Advance Oral Instruction—Beginning of Proceedings

Part 1—Before Voir Dire of Prospective Jurors:

This is a civil case brought by plaintiff James Osborne against defendant REI. The plaintiff's lawyers are Mark K. Davis, Michael P. Scruggs and Michael E. Blue. The defendant's lawyers are James Sanders and Amy Kunkel-Patterson.

The plaintiff claims that the defendant failed to reasonably accommodate his disability in accordance with the law when he was terminated from his job at REI. The defendant REI denies this claim.

It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during this trial. Evidence is a legal term. Evidence includes such things as testimony of witnesses, documents, or other physical objects.

One of my duties as judge is to decide whether or not evidence should be admitted during this trial. What this means is that I must decide whether or not you should consider evidence offered by the parties. For example, if a party offers a photograph as an exhibit, I will decide whether it is admissible. Do not be concerned about the reasons for my rulings. You must not consider or discuss any evidence that I do not admit or that I tell you to disregard.

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The evidence in this case may include testimony of witnesses or actual physical objects, such as papers, photographs, or other exhibits. Any exhibits admitted into evidence will go with you to the jury room when you begin your deliberations. When witnesses testify, please listen very carefully. You will need to remember testimony during your deliberations because testimony will rarely, if ever, be repeated for you.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is contained in my instructions. You must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions.

Our state constitution prohibits a trial judge from making a comment on the evidence. For example, it would be improper for me to express my personal opinion about the value of a particular witness's testimony. Although I will not intentionally do so, if it appears to you that I have indicated my personal opinion concerning any evidence, you must disregard that opinion entirely.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

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In deciding this case, you will be asked to apply a concept called "burden of proof." The phrase "burden of proof" may be unfamiliar to you. Burden of proof refers to the measure or amount of proof required to prove a fact. The burden of proof in this case is proof by a preponderance of the evidence. Proof by a preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true.

During your deliberations, you must apply the law to the facts that you find to be true. It is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you think it ought to be. You are to apply the law you receive from my instructions to the facts and in this way decide the case.

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part 2—After Voir Dire:

Now I will explain the procedure to be followed during the trial.

First: The lawyers will have an opportunity to make opening statements outlining the testimony of witnesses and other evidence that they expect to be presented during trial.

Next: The plaintiff will present the testimony of witnesses or other evidence to you. When the plaintiff has finished, the defendant may present the testimony of witnesses or other evidence. Each witness may be cross-examined by the other side.

Next: When all of the evidence has been presented to you, I will instruct you on what law applies to this case. I will read the instructions to you out loud. You will have [individual copies of] the written instructions with you in the jury room during your deliberations.

Next: The lawyers will make closing arguments.

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a "verdict." Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of

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anyone discussing it. "No discussion" also means no e-mailing, text messaging, blogging, or any other form of electronic communications.

You will be allowed to take notes during this trial. I am not instructing you to take notes, nor am I encouraging you to do so. Taking notes may interfere with your ability to listen and observe. If you choose to take notes, I must remind you to listen carefully to all testimony and to carefully observe all witnesses.

At an appropriate time, the bailiff will provide a note pad and a pen or pencil to each of you. Your juror number will be on the front page of the note pad. You must take notes on this pad only, not on any other paper. You must not take your note pad from the courtroom or the jury room for any reason. At the end of the day, the note pads must be left in the jury room. While you are away from the courtroom or the jury room, no one else will read your notes.

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

You are not to assume that your notes are necessarily more accurate than your memory. I am allowing you to take notes to assist you in remembering clearly, not to substitute for your memory. You are also not to assume that your notes are more accurate than the memories or notes of the other jurors.

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After you have reached a verdict, your notes will be collected and destroyed by the bailiff. No one will be allowed to read them.

You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning. You may ask questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you ask any questions, remember that your role is that of a neutral fact finder, not an advocate.

Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question to determine if it is legally proper.

There are some questions that I will not ask, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a juror's question, or if I rephrase it, do not attempt to speculate as to the reasons and do not discuss this circumstance with the other jurors.

By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.

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Throughout this trial, you must come and go directly from the jury room. Do not remain in the hall or courtroom, as witnesses and parties may not recognize you as a juror, and you may accidentally overhear some discussion about this case. I have instructed the lawyers, parties, and witnesses not to talk to you during trial.

It is essential to a fair trial that everything you learn about this case comes to you in this courtroom, and only in this courtroom. You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence, and do not remain within hearing of such conversations. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.

Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, blogs, the internet, or radio or television broadcasts which may discuss this case or issues involved in this trial. If you start to hear or read information about anything related to the case, you must act immediately so that you no longer hear or see it. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case.

During the trial, do not try to determine on your own what the law is. Do not seek out any evidence on your own. Do not consult dictionaries or other reference materials. Do not conduct any research into the facts, the issues, or the people involved in this case. This means you may not use Google or other internet search engines to look into anything at all related to this case. Do not inspect the scene of any event involved in this case. If

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your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate. You must keep your mind clear of anything that is not presented to you in this courtroom.

During the trial, do not provide information about the case to other people, including any of the lawyers, parties, witnesses, your friends, members of your family, or members of the media. If necessary, you may tell people (such as your employer) that you are a juror and let them know when you need to be in court. If people ask you for more details, you should tell them that you are not allowed to talk about the case until it is over.

I want to emphasize that the rules prohibiting discussions include your electronic communications. You must not send or receive information about anything related to the case by any means, including by text messages, e-mail, telephone, internet chat, blogs, or social networking web sites.

In short, do not communicate with anyone, by any means, concerning what you see or hear in the courtroom, and do not try to find out more about anything related to this case, by any means, other than what you learn in the courtroom. These rules ensure that the parties will receive a fair trial.

If you become exposed to any information other than what you learn in the courtroom, that could be grounds for a mistrial. A mistrial would mean that all of the work that you and your fellow jurors put into this trial will be wasted. Re-trials are costly and

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burdensome to the parties and the public. Also, if you communicate with others in violation of my orders, you could be fined or held in contempt of court.

After you have delivered your verdict, you will be free to do any research you choose and to share your experiences with others.

Remember that all phones, PDAs, laptops, and other communication devices must be turned off while you are in court and while you are in deliberations.

Throughout the trial, you must maintain an open mind. You must not form any firm and fixed opinion about any issue in the case until the entire case has been submitted to you for deliberation.

As jurors, you are officers of this court. As such, you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

To accomplish a fair trial takes work, commitment, and cooperation. A fair trial is possible only with a serious and continuous effort by each one of us, working together.

Thank you for your willingness to serve this court and our system of justice. WPI 1.01.

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 2

Advance Oral Instruction—Preliminary Instruction on Claims and Defenses

I will now describe for you the basic elements of the claims and defenses that the parties intend to prove in this case. I am doing so for only one purpose: to help you evaluate the evidence as it is being presented.

Please remember that the claims and defenses might change during the course of a trial. For this reason, this instruction is preliminary only. It may differ from the final instructions you receive at the end of the trial. Your deliberations will be guided entirely by those final instructions.

The Plaintiff in this case is James Osborne. The Defendant is REI.

Mr. Osborne was employed by REI as an IT employee from May 1994 until December 13, 2012. Mr. Osborne became disabled due to a bicycle crash in 2007. He claims that in the fall of 2012 REI failed to reasonably accommodate his disability in violation of Washington law.

REI denies Mr. Osborne's claim and asserts that it treated him in accordance with the law.

WPI 1.01.03.

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 3

Conclusion of Trial—Introductory Instruction

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim or defense has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the

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quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so.

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These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

WPI 1.02.

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 4

Direct and Circumstantial Evidence

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

WPI 1.03.

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 5

Evidence for Limited Purpose

Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of and] may be considered by you only for the purpose of___ . It may not be considered by you for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

WPI1.06

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 6

Corporations and Similar Parties

The law treats all parties equally whether they are corporations or individuals. This means that corporations and individuals are to be treated in the same fair and unprejudiced manner.

WPI 1.07.

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 7

Concluding Instruction—For Special Verdict Form

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

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You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

WPI 1.11

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 8

Insurance and Collateral Sources

Whether or not a party has insurance, or any other source of recovery available, has no bearing on any issue that you must decide. You must not speculate about whether a party has insurance or other coverage or sources of available funds. You are not to make or decline to make any award, or increase or decrease any award, because you believe that a party may have medical insurance, liability insurance, workers' compensation, or some other form of compensation available. Even if there is insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to consider only those questions that are given to you to decide in this case.

WPI 2.13

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 9

Meaning of Burden of Proof—Preponderance of the Evidence

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

WPI 21.01.

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 10

Elements of Plaintiff's Claim – Reasonable Accommodation Cases

In this case, Plaintiff claims that Defendant unlawfully refused to give him a "reasonable accommodation." To succeed, Plaintiff must prove five elements by a preponderance of the evidence:

1. Plaintiff had a disability – This element has already been established by Plaintiff;

2. Defendant was aware of Plaintiff's disability at the time of Plaintiff's request -- This element has already been established by Plaintiff;

3. Plaintiff requested an accommodation -- This element has already been established by Plaintiff;

4. Plaintiff was qualified to perform the job -- This element has already been established by Plaintiff;

5. Defendant failed to provide Plaintiff with a reasonable accommodation.

If you find from your consideration of all the evidence that the remaining element, Number 5 above, has been proved by a preponderance of the evidence then your verdict should be for the Plaintiff and you should turn to the issue of Plaintiff's damages.

If you find that Plaintiff has failed to prove the remaining element, Number 5 above, by a preponderance of the evidence, your verdict should be for Defendant.

WPI 330.33 modified.

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See 42 U.S.C. §§ 12111(9) and 12112(a), and NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 15.2 (2001) ("Elements of ADA Employment Action"); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 1.5.2 (2000) ("Reasonable Accommodation Claim"); and EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 5.51C (2001) ("ADA - Reasonable Accommodation Cases")

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 11

Disability Discrimination—Reasonable Accommodation—Definition

Once an employer is on notice of an impairment, the employer has a duty to inquire about the nature and extent of the impairment. The employee has a duty to cooperate with his employer to explain the nature and extent of the employee's impairment and resulting limitations as well as his qualifications.

An employer must provide a reasonable accommodation for an employee with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. Similarly, an employer must continue to provide a reasonable accommodation for an employee with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. REI has not raised and is not claiming undue hardship in this case. Therefore, you are instructed not to consider any difficulty or financial cost to REI in continuing to provide a reasonable accommodation to Mr. Osborne. The obligation to reasonably accommodate applies to all aspects of employment, and an employer cannot deny an employment opportunity to an employee because of the need to provide reasonable accommodation.

There may be more than one reasonable accommodation of a disability.

A reasonable accommodation may include adjustments in the manner in which essential functions are carried out, work schedules, assignments, scope of work, and

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changes in the job setting or conditions of employment that enable the person to perform the essential functions of the job.

WPI 330.34 (MODIFIED); The range of possible reasonable accommodations, for purposes of establishing liability for failure to accommodate, can extend beyond those proposed. *See*, *Barnett*, 228 F.3d at 1115-16 (citing *Taylor*, 184 F.3d at 317-18 ("an employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations. In making that determination, the jury is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations.").

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 12

Essential Function—Definition

An essential function is a job duty that is fundamental, basic, necessary and indispensable to filling a particular position, as opposed to a marginal duty divorced from the essence or substance of the job.

In determining whether a function is essential to a position, you may consider, among others, the following factors:

(1) whether the reasons the position exists include performing that function;

(2) the employer's judgment as to which functions are essential;

(3) the judgment of those who have experience working in and around the position in question;

(4) any written job descriptions such as those used to advertise the position; and

(5) the amount of time spent on the job performing the particular function.

WPI 330.37

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 13

The Interactive Process

The law requires employers to engage disabled employees in a discussion about how an accommodation could be accomplished. This is called the '"interactive process or dialogue". The purpose of this process is to identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

The interactive process is mandatory and both parties have a duty to participate in good faith.

The interactive process requires an employer, in good faith to:

1) Notify the employee when the employee's position will be eliminated or a similar a change in business needs);

2) Discuss the employee's existing limitations;

3) Identify possible accommodations for those limitations, and,

4) Affirmatively assist the employee to find a reasonable accommodation.

If you find that REI did not engage Mr. Osborne in a good faith interactive process after deciding to eliminate his IT Consultant position, you must find for the Plaintiff.

29 C.F.R. § 1630.2(o) (3) "The purpose of this process is to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o) (3)); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), vacated on other grounds, 535 U.S. 391 (2002); *Humphrey*

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v. Memorial Hospitals Assoc., 239 F.3d 1128 (9th Cir. 2001); *Goodman v. Boeing*, 127 Wn. App. 401, 408 (1995); *Sommer v. DSHS*, 104 Wn.App. 160, 182, 174-175 (2001). *See also*, *Frisino v. Seattle School Dist. No. 1*, 160 Wn.App. 765, 782 (2011)("An employer may choose to make only one attempt at accommodation, but it risks statutory liability if that attempt is not effective and it cannot show that additional efforts are an undue burden"). *Curtis v. Security Bank*, 69 Wn. App. 12, 18 (1993), the Court held: "The handicapped worker requires treatment different from other non-handicapped employees if the purposes of RCW 49.60 are to be achieved. The employer must take 'positive steps' to accommodate the physical limitations of handicapped employees."

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 14

If you find that REI did not attempt to accommodate Mr. Osborne after it was determined he would be terminated then you must find for plaintiff if there were plausible accommodations available.

Humphrey v. Memorial Hospitals Assoc., 239 F.3d 1128, 1137-1138 (9th Cir. 2001). Kimbro v. Atlantic Richfield, 889 F.2d 869, 879 (9th Cir. 1989). See also, Barnett, 228 F.3d at 1115-16 (citing *Taylor*, 184 F.3d at 317-18 ("an employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations. In making that determination, the jury is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations."). "The interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome. That's not the proactive process intended.... "*Taylor v. Phoenixville School District*, 184 F.3d 296, 315 (3rd Cir. 1999).

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 15

Ongoing Duty of Employer

An Employer's duty to accommodate a disabled employee is a continuous duty that is not extinguished by one effort. In considering accommodations, an Employer must consider contemporaneously available accommodations at the time of termination but also those that will become available within a reasonable period in the future. If you find the Defendant did not consider reassignment to a position that reasonably would have existed in the reasonable future, then you must find for the plaintiff.

Dark v. Curry Co., 451 F.3d 1078 (9th Cir 2006); *Humphrey v. Memorial Hospitals Assoc.*, 239 F.3d 1128 (9th Cir. 2001); *Goodman v. Boeing*, 127 Wn. App. 401, 408 (1995); *See also, Frisino v. Seattle School Dist. No. 1*, 160 Wn.App. 765, 782 (2011); *Kimbro v. Atlantic Richfield*, 889 F.2d 869, 879 (9th Cir. 1989). The law does not allow an employer to reflect in hindsight about why it could not accommodate the plaintiff, after having failed to engage in the interactive process:

> The interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome. That's not the proactive process intended....

Taylor v. Phoenixville School District, 184 F.3d 296, 315 (3rd Cir. 1999). *Hendrick-Robinson v. Excel Corp.*, 154 F.3d 685 (7th Cir. 1998);(summary judgment for employer denied because it may not have participated in good faith in finding accommodations); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626 (7th Cir. 1998)(employer summary judgment denied because disputes of fact remained about breakdown in interactive process).

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 16

Continuing Duty

An employer's obligation to engage in the interactive process extends beyond one attempt at accommodation and continues when the employee asks for a different accommodation or when an employer becomes aware that the initial accommodation is failing and further accommodation is needed as would be the case if the employer was contemplating a decision to terminate an employee.

Stephanie M. GAMBINI, Plaintiff, v. TOTAL RENAL CARE, INC., d/b/a REI, Inc., a California corporation, Defendant., 2004 WL 5529346 (W.D.Wash.); Humphrey v. Memorial Hospitals Association, 239 F.3d 1128, 1138 (9th Cir. 2001), cited with approval in *Riehl v. Foodmaker, Inc.* 152 Wn.2d 138., 94 P.3d 930, 938 (2004); *See also Barnett v. U. S. Air, Inc.*, 228 F.3d 1105, 1112–14 (9th Cir.2000) (en banc) (holding that interactive process is a mandatory, not permissive, duty of the employer and that employer has duty to initiate interactive process in some circumstances), vacated on other grounds, 535 U.S. 391 (2002). *Curtis v. Security Bank*, 69 Wn. App. 12, 18 (1993), the Court held: "The handicapped worker requires treatment different from other non-handicapped employees if the purposes of RCW 49.60 are to be achieved. The employer must take 'positive steps' to accommodate the physical limitations of handicapped employees."

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 17

Whereas equal treatment is expected for most employees, the law requires an employer to treat employees unequally in order to eliminate barriers to the disabled. An employer is liable for disability discrimination where it treats the disabled employee without regard to his disability.

"Unlike other types of discrimination where identical treatment is the gold standard, identical treatment is often not equal treatment with respect to disability discrimination." *Gambini v. Total Renal Care*, 486 F.3d 1087, 1095 (9th Cir. 2007) (*citing Holland v. Boeing*, 90 Wn.2d 384, 388 (1978) ("Identical treatment may be a source of discrimination in the case of the handicapped, whereas different treatment may eliminate discrimination against the handicapped and open the door to employment opportunities")); *Negron v. Snoqualmie Valley Hosp.* 86 Wash. App. 579, 585 (1997) (simply providing services to deaf patients in the same manner as other patients may be a violation of the WLAD.) *Dean v. Municipality of Metropolitan Seattle Metro,* 104 Wn.2d 627, 639 (1985). *Curtis v. Security Bank*, 69 Wn. App. 12, 18 (1993), the Court held: "The handicapped worker requires treatment different from other non-handicapped employees if the purposes of RCW 49.60 are to be achieved. The employer must take 'positive steps' to accommodate the physical limitations of handicapped employees."

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 18

Damages—Employment Discrimination—Economic and Non-Economic

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If you find that REI failed to accommodate Mr. Osborne's disability, you must determine the amount of money that will reasonably and fairly compensate him for such damages as you find were proximately caused by REI's failure to accommodate.

If you find for Mr. Osborne, your verdict should consider the following elements:

(1) The reasonable value of lost past earnings and fringe benefits, from the date of REI's failure to accommodate to the date of trial;

(2) The reasonable value of lost future earnings and fringe benefits;

(3) The emotional harm to the plaintiff caused by REI's failure to accommodate, including emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish experienced and with reasonable probability to be experienced by the plaintiff in the future.

The burden of proving damages rests with Mr. Osborne, and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Any award of damages must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

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WPI 330.81 (modified); *Thompson v. Berta Enterprises,* 72 Wn. App. 531, 543, 864 P.2d 983, *review denied,* 124 Wn.2d 1028 (1994). *See also, Ellingson v. Spokane Mortgage,* 19 Wn.App. 48, 573 P.2d 389 (1978); *Dean v. Municipality of Metropolitan Seattle,* 104 Wn.2d 627, 639 (1985).

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 19

Damages—Proximate Cause

You may award only those damages that you find were "proximately caused" by REI's failure to accommodate Mr. Osborne. The term "proximate cause" means a cause that is related to the injury in two ways: (1) the cause produced the injury in a direct sequence unbroken by any new, independent cause, and (2) the injury would not have happened in the absence of the cause.

There may be more than one proximate cause of an injury. However, the amount of damages, if any, to which Mr. Osborne is entitled for a particular injury does not depend on whether there were multiple proximate causes for the injury or only one proximate cause for the injury. You may not award damages more than once for the same economic or emotional harm, even if you find that an unlawful act by REI proximately caused the harm.

WPI 15.01.01 (modified);

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 20

If you find that REI terminated Osborne in order to avoid the duty to reasonably accommodate him then you must find for the plaintiff.

RCW 49.60.180; WAC 162-22-025(3).

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 21

SPECIAL Verdict Form

1. Did REI fail to engage in the interactive process after deciding to terminate Mr. Osborne.

   YES _____ NO _____

   If your answer to Question 1 is "Yes", proceed to questions 2-6. Ifyour answer is "No", proceed to Question 2.

2. Did REI fail or refuse to accommodate Mr. Osborne when they terminated him on December 13, 2012.

   YES _____ NO _____

   If your answer to Question 1 is "Yes," proceed to Questions 2-5. If your answer to Question 1 is "No," sign and date the verdict form and return it to the bailiff.

3. The amount of past wages and benefits Mr. Osborne would have earned less actual and potential wages and benefits from other sources, is $_____.

4. The amount of future wages and benefits Mr. Osborne would have earned less actual and potential wages and benefits from other sources, is $_____.

5. Mr. Osborne's damages for past emotional distress caused by REI's failure to accommodate are $_____.

6. Mr. Osborne's damages for future emotional distress caused by REI's failure to accommodate are $_____.

   Sign and date the Special Verdict Form and return it to the bailiff.

DATE:_____

_____
Presding Juror

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Appendix D

1. Defendant's Proposed Jury Instructions (CP 3262-3299)

THE HONORABLE SEAN O'DONNELL

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

JAMES OSBORNE, an individual, Plaintiff, v. RECREATIONAL EQUIPMENT INC., a Washington corporation, Defendant.	No. 13-2-21642-6 SEA DEFENDANT RECREATIONAL EQUIPMENT, INC.'S PROPOSED JURY INSTRUCTIONS

Defendant Recreational Equipment, Inc. ("REI") respectfully proposes the following Jury Instructions. Citations are included.

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RESPECTFULLY SUBMITTED this 2nd day of February 2015.

s/ James Sanders
James Sanders, WSBA No. 24565
Amy Kunkel-Patterson, WSBA No. 45811
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099

Attorneys for Defendant
Recreational Equipment, Inc.

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PROPOSED INSTRUCTION A

Advance Oral Instruction — Beginning of Proceedings

I will explain the procedure to be followed during the trial.

First: The lawyers will have an opportunity to make opening statements outlining the testimony of witnesses and other evidence that they expect to be presented during trial.

Next: The plaintiff will present the testimony of witnesses or other evidence to you. When the plaintiff has finished, the defendant may present the testimony of witnesses or other evidence. Each witness may be cross-examined by the other side.

Next: When all of the evidence has been presented to you, I will instruct you on what law applies to this case. I will read the instructions to you out loud. You will have **individual copies of** the written instructions with you in the jury room during your deliberations.

Next: The lawyers will make closing arguments.

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a "verdict." Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. "No discussion" also means no e-mailing, text messaging, blogging, or any other form of electronic communications.

You will be allowed to take notes during this trial. I am not instructing you to take notes, nor am I encouraging you to do so. Taking notes may interfere with your ability to

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listen and observe. If you choose to take notes, I must remind you to listen carefully to all testimony and to carefully observe all witnesses.

At an appropriate time, the bailiff will provide a note pad and a pen or pencil to each of you. Your juror number will be on the front page of the note pad. You must take notes on this pad only, not on any other paper. You must not take your note pad from the courtroom or the jury room for any reason. When you recess during the trial, please **leave your notepad in the jury room.** At the end of the day, the note pads must be left **in the jury room.** While you are away from the courtroom or the jury room, no one else will read your notes.

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

You are not to assume that your notes are necessarily more accurate than your memory. I am allowing you to take notes to assist you in remembering clearly, not to substitute for your memory. You are also not to assume that your notes are more accurate than the memories or notes of the other jurors.

After you have reached a verdict, your notes will be collected and destroyed by the bailiff. No one will be allowed to read them.

You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning. You may ask questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you ask any questions, remember that your role is that of a neutral fact finder, not an advocate.

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Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question to determine if it is legally proper.

There are some questions that I will not ask, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a juror's question, or if I rephrase it, do not attempt to speculate as to the reasons and do not discuss this circumstance with the other jurors.

By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.

Throughout this trial, you must come and go directly from the jury room. Do not remain in the hall or courtroom, as witnesses and parties may not recognize you as a juror, and you may accidentally overhear some discussion about this case. I have instructed the lawyers, parties, and witnesses not to talk to you during trial.

It is essential to a fair trial that everything you learn about this case comes to you in this courtroom, and only in this courtroom. You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence, and do not remain within hearing of such conversations. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.

Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, blogs, the internet, or radio or television broadcasts which may discuss this case or issues involved in this trial. If you start to hear or read information about

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anything related to the case, you must act immediately so that you no longer hear or see it. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case.

During the trial, do not try to determine on your own what the law is. Do not seek out any evidence on your own. Do not consult dictionaries or other reference materials. Do not conduct any research into the facts, the issues, or the people involved in this case. This means you may not use **Google or other internet search engines** to look into anything at all related to this case. Do not inspect the scene of any event involved in this case. If your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate. You must keep your mind clear of anything that is not presented to you in this courtroom.

During the trial, do not provide information about the case to other people, including any of the lawyers, parties, witnesses, your friends, members of your family, or members of the media. If necessary, you may tell people (such as your employer) that you are a juror and let them know when you need to be in court. If people ask you for more details, you should tell them that you are not allowed to talk about the case until it is over.

I want to emphasize that the rules prohibiting discussions include your electronic communications. You must not send or receive information about anything related to the case by any means, including by text messages, e-mail, telephone, internet chat, blogs, or social networking web sites.

In short, do not communicate with anyone, by any means, concerning what you see or hear in the courtroom, and do not try to find out more about anything related to this case, by any means, other than what you learn in the courtroom. These rules ensure that the parties will receive a fair trial.

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If you become exposed to any information other than what you learn in the courtroom, that could be grounds for a mistrial. A mistrial would mean that all of the work that you and your fellow jurors put into this trial will be wasted. Re-trials are costly and burdensome to the parties and the public. Also, if you communicate with others in violation of my orders, you could be fined or held in contempt of court.

After you have delivered your verdict, you will be free to do any research you choose and to share your experiences with others.

Remember that all phones, PDAs, laptops, and other communication devices must be turned off while you are in court and while you are in deliberations.

Throughout the trial, you must maintain an open mind. You must not form any firm and fixed opinion about any issue in the case until the entire case has been submitted to you for deliberation.

As jurors, you are officers of this court. As such, you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

To accomplish a fair trial takes work, commitment, and cooperation. A fair trial is possible only with a serious and continuous effort by each one of us, working together.

Thank you for your willingness to serve this court and our system of justice.

WPI 1.01.

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PROPOSED INSTRUCTION B

Advance Oral Instruction—Preliminary Instruction on Claims and Defenses

I will now describe for you the basic elements of the claims and defenses that the parties intend to prove in this case. I am doing so for only one purpose: to help you evaluate the evidence as it is being presented.

Please remember that the claims and defenses might change during the course of a trial. For this reason, this instruction is preliminary only. It may differ from the final instructions you receive at the end of the trial. Your deliberations will be guided entirely by those final instructions.

The Plaintiff in this case is James Osborne. The Defendant is REI.

Mr. Osborne was employed by REI as an IT employee from 1994 until 2013. Mr. Osborne became disabled due to a bicycle accident in 2007. He claims that, after he became disabled, REI failed to reasonably accommodate his disability in violation of Washington law.

REI denies Mr. Osborne's claim and asserts that it treated him fairly and fully accommodated him in accordance with the law.

There are two additional things of which you should be aware. First, Mr. Osborne was laid off by REI on January 2, 2013. The Court has already ruled on Mr. Osborne's claims relating to his layoff and the layoff is not one of the issues to be decided by you in this trial.

Second, in June 2010, Mr. Osborne filed a lawsuit against REI and five other defendants relating to his 2007 bicycle accident. REI denied any fault and Mr. Osborne's

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lawsuit was settled in a voluntary mediation in August 2012. The claims from the bicycle lawsuit are not part of this lawsuit.

WPI 1.01.03.

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PROPOSED INSTRUCTION C

Ruling on Objections

There are rules that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence that I told you to disregard.

9th Circuit Model Civil Jury Instruction No. 1.10.

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PROPOSED INSTRUCTION D

No Transcript

During deliberations, you will have to make your decision based on what you recall of the evidence. You will not have a transcript of the trial. I urge you to pay close attention to the testimony that is given.

If at any time you cannot hear or see the testimony, evidence, questions or arguments, let me know so that I can correct the problem.

9th Circuit Model Civil Jury Instruction No. 1.13.

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PROPOSED INSTRUCTION E

Bench Conferences and Recesses

From time to time during the trial, it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury is present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Of course, we will do what we can to keep the number and length of these conferences to a minimum. I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

9th Circuit Model Civil Jury Instruction No. 1.18.

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PROPOSED INSTRUCTION NO. 1

Conclusion of Trial—Introductory Instruction

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim or defense has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness

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while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

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As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

WPI 1.02.

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PROPOSED INSTRUCTION NO. 2

Direct and Circumstantial Evidence

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

WPI 1.03.

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PROPOSED INSTRUCTION NO. 3

Corporations and Similar Parties

The law treats all parties equally whether they are corporations or individuals. This means that corporations and individuals are to be treated in the same fair and unprejudiced manner.

WPI 1.07.

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PROPOSED INSTRUCTION NO. 4

Meaning of Burden of Proof—Preponderance of the Evidence

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

WPI 21.01.

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PROPOSED INSTRUCTION NO. 5

Disability Discrimination—Reasonable Accommodation—Burden of Proof

Discrimination in employment on the basis of disability is prohibited. One form of unlawful discrimination is a failure to reasonably accommodate an employee's disability.

To establish his claim of discrimination on the basis of failure to reasonably accommodate a disability, Mr. Osborne has the burden of proving each of the following propositions:

(1) That he had an impairment that is medically recognizable or diagnosable or exists as a record or history; and

(2) That either:

(a) Mr. Osborne gave REI notice of the impairment; or

(b) no notice was required to be given because REI knew about Mr. Osborne's impairment; and

(3) That either:

(a) the impairment had a substantially limiting effect on

(i) his ability to perform his job or be considered for a different job; or

(ii) his ability to access conditions of employment; or

(b) Mr. Osborne has provided medical documentation to REI establishing a reasonable likelihood that working without an accommodation would aggravate the impairment to the extent it would create a substantially limiting effect; and

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

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(5) That REI failed to reasonably accommodate the impairment.

In determining whether an impairment has a substantially limiting effect, a limitation is not substantial if it has only a trivial effect.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for the Mr. Osborne on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for REI on this claim.

WPI 330.33.

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PROPOSED INSTRUCTION NO. 6

Disability Discrimination—Reasonable Accommodation—Definition

Once an employer is on notice of an impairment, the employer has a duty to inquire about the nature and extent of the impairment. The employee has a duty to cooperate with his employer to explain the nature and extent of the employee's impairment and resulting limitations as well as his qualifications.

The obligation to reasonably accommodate applies to all aspects of employment, and an employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation.

A reasonable accommodation may include adjustments in the manner in which essential functions are carried out, work schedules, scope of work, and changes in the job setting or conditions of employment that enable the person to perform the essential functions of the job.

WPI 330.34 (modified).

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PROPOSED INSTRUCTION NO. 7

Essential Function—Definition

An essential function is a job duty that is fundamental, basic, necessary and indispensable to filling a particular position, as opposed to a marginal duty divorced from the essence or substance of the job.

In determining whether a function is essential to a position, you may consider, among others, the following factors:

(1) whether the reasons the position exists include performing that function;

(2) the employer's judgment as to which functions are essential;

(3) the judgment of those who have experience working in and around the position in question;

(4) any written job descriptions such as those used to advertise the position; and

(5) the amount of time spent on the job performing the particular function.

WPI 330.37.

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PROPOSED INSTRUCTION NO. 8

Employer Has No Duty to Eliminate Essential Functions or Create a New Position

An employer is not required to change or eliminate the essential functions of a job as an accommodation to a disabled employee. Nor is an employer required to create a new position for a disabled employee.

Fey v. State, 174 Wn. App. 435, 452-53 (2013) (The WLAD does not require an employer to "revamp the essential functions of a job to fit the employee.");
Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 644 (2000) (same).

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PROPOSED INSTRUCTION NO. 9

No Duty to Continue Position Once Created

If an employer goes beyond its legal obligation and eliminates essential functions of an existing job or creates a new position for a disabled employee, the employer is not liable for failure to accommodate if it stops providing such accommodations.

Holbrook v. City of Alpharetta, 112 F.3d 1522, 1528 (11th Cir. 1997) (revocation of "accommodations that pertained to the essential functions of [plaintiff's] job was not violative of the ADA");

Meyers v. Conshohocken Catholic Sch., No. CIV.A.03-4693, 2004 WL 3037945, at *9 (E.D. Pa. Dec. 30, 2004) ("when an employer has exceeded the ADA's requirement of reasonable accommodation, its decision to discontinue the accommodation does not give the plaintiff a cause of action against it");

Holmes v. Cemcolift, Inc., No. 05-421, 2006 WL 2927642, at *5 (E.D. Pa. Oct. 11, 2006) ("Even assuming [the employer] accommodated Plaintiff's absences in the past, it was under no obligation to continue to do so.").

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PROPOSED INSTRUCTION NO. 10

No Duty to Accommodate in Layoff Scenario

The goal of the reasonable accommodation requirement is to give disabled employees equal footing with their abled-bodied peers. Disability law does not require that employers give disabled employees preferential treatment over other employees when making layoff decisions.

EEOC Enforcement Guidance: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, *available at* http://www.eeoc.gov/policy/docs/accommodation.html (last viewed June 27, 2014) ("The ADA requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the 'benefits and privileges of employment' equal to those enjoyed by similarly-situated employees without disabilities.");

Matthews v. Commonwealth Edison Co., 128 F.3d 1194, 1196 (7th Cir. 1997) (disability law does not require employers to give preferential treatment to disabled employees because in a layoff employers "must decide which qualified workers to retain; [an employer] can't retain them all... To require an employer to retain the least able because of disability would handicap the able-bodied." "Such handicapping, such discrimination in favor of the disabled, would invite [] criticism[] as 'reverse' discrimination on racial and sexual grounds-especially in a RIF case, where a better worker would lose a job to a worse one merely because the better worker had the good fortune not to be disabled.");

Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) (Employers need not give "disabled persons [] priority in hiring or reassignment over those who are not disabled.");

Ransom v. State of Arizona Bd. of Regents, 983 F. Supp. 895, 901 (D. Ariz. 1997) (Employers "need not reassign a disabled employee...for reasons such as lay off, better job opportunity, or convenience.");

Wong v. Pape Mach., Inc., 370 F. App'x 871, 873 (9th Cir. 2010) ("[The plaintiff's] interactive process claim fails because [disability law] does not require an employer to reasonably accommodate an employee after termination for a non-discriminatory reason.").

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PROPOSED INSTRUCTION NO. 11

After-Acquired Evidence

REI contends that it would have terminated Mr. Osborne's employment for an independent reason after REI learned that Ms. Osborne had accessed personal and confidential REI member information for reasons unrelated to his job. If REI proves by a preponderance of the evidence that it would have terminated Mr. Osborne for this reason, Mr. Osborne may not recover damages for lost wages and benefits that would have been paid or provided to him after the date REI would have made the decision to terminate Mr. Osborne.

Janson v. N. Valley Hosp., 93 Wn. App. 892, 900 (1999);
Urrutia v. BNSF Ry. Co., 2010 WL 4941446 at *1 (W.D. Wash. Nov. 30, 2010);
Goehle v. Fred Hutchinson Cancer Research Ctr., 100 Wn. App. 609, 621 (2000).

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PROPOSED INSTRUCTION NO. 12

Damages—Employment Discrimination—Economic and Non-Economic

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If you find that REI failed to reasonably accommodate Mr. Osborne's disability, you must determine the amount of money that will reasonably and fairly compensate him for such damages as you find were proximately caused by REI's failure to accommodate.

If you find for Mr. Osborne, your verdict should consider the following elements:

(1) The reasonable value of lost past earnings and fringe benefits, from the date of REI's failure to accommodate to the date of trial;

(2) The reasonable value of lost future earnings and fringe benefits;

(3) The emotional harm to the plaintiff caused by REI's failure to accommodate, including emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish experienced and with reasonable probability to be experienced by the plaintiff in the future.

The burden of proving damages rests with Mr. Osborne, and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Any award of damages must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure emotional distress, loss of enjoyment of life, humiliation, pain and suffering,

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personal indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

WPI 330.81 (modified).

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PROPOSED INSTRUCTION NO. 13

Damages—Proximate Cause

You may award only those damages that you find were "proximately caused" by REI's failure to accommodate Mr. Osborne. You may not award damages for harm proximately caused by REI's decision to lay off Mr. Osborne or by any other cause. The term "proximate cause" means a cause that is related to the injury in two ways: (1) the cause produced the injury in a direct sequence unbroken by any new, independent cause, and (2) the injury would not have happened in the absence of the cause.

There may be more than one proximate cause of an injury. However, the amount of damages, if any, to which Mr. Osborne is entitled for a particular injury does not depend on whether there were multiple proximate causes for the injury or only one proximate cause for the injury. You may not award damages more than once for the same economic or emotional harm, even if you find that an unlawful act by REI proximately caused the harm.

WPI 15.01.01 (modified);
Martini v. Boeing Co., 137 Wn.2d 357, 368 (1999) ("only lost pay which was proximately caused by an unlawful act of discrimination could be awarded");
Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 702 (2000) ("It is a basic principle of damages, both tort and contract, that there shall be no double recovery for the same injury.").

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PROPOSED INSTRUCTION NO. 14

Damages—Employment Discrimination—Future Lost Earnings (Front Pay)

In calculating damages for future wage loss you should determine the present cash value of salary, pension, and other fringe benefits from today until the time the plaintiff may reasonably be expected to retire, decreased by any projected future earnings.

WPI 330.82.

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PROPOSED INSTRUCTION NO. 15

Damages—Emotional Distress, If Any

If you find that REI failed to reasonably accommodate Mr. Osborne, you may, but are not required to, award him damages for emotional distress caused by REI's failure to accommodate. In determining an award for emotional distress, the law requires a reasonable basis for your computation. You may not award such damages based on speculation or conjecture, but only if Mr. Osborne satisfied his burden of proving actual emotional distress. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

Mr. Osborne has the burden to prove that REI's failure to accommodate him caused any emotional distress he suffered. To establish causation between REI's unlawful conduct, if any, and Mr. Osborne's claimed emotional distress, if any, the evidence presented by Mr. Osborne must be convincing enough to remove the issue from the realm of guesswork, speculation and conjecture. In other words, the evidence must be sufficient to establish that REI's failure to accommodate him "probably" or "more likely than not" caused Mr. Osborne's emotional distress, rather than that the conduct "might have," "could have," or "possibly did" cause the emotional distress. You may not award damages for emotional distress caused by Mr. Osborne's layoff or by any other cause other than REI's failure to accommodate.

Dean v. Metro. Seattle, 104 Wn.2d 627, 641 (1985) (plaintiff required to prove actual anguish or emotional distress in order to receive emotional distress damages);
Xieng v. Peoples Nat'l Bank, 63 Wn. App. 572, 582 (1991) (and cases cited therein), *aff'd*, 120 Wn. 2d 512 (1993).

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PROPOSED INSTRUCTION NO. 16

Damages—Mitigation—Wage Loss

Mr. Osborne has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

To establish a failure to mitigate, defendant, REI, has the burden of proving:

(1) There were openings in comparable positions available to Mr. Osborne after January 2, 2013;

(2) Mr. Osborne failed to use reasonable care and diligence in seeking those openings; and

(3) The amount by which damages would have been reduced if Mr. Osborne had used reasonable care and diligence in seeking those openings.

You should take into account the characteristics of Mr. Osborne and the job market in evaluating the reasonableness of Mr. Osborne's efforts to mitigate damages.

If you find that REI has proved all of the above, you should reduce your award of damages for wage loss accordingly.

WPI 330.83.

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PROPOSED INSTRUCTION NO. 17

Concluding Instruction—For Special Verdict Form

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give

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it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, *[ten] [five]* jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as *[ten] [five]* jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

WPI 1.11.

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Verdict Form

1. Has Mr. Osborne proved by a preponderance of the evidence that he was unable to perform the essential functions of his IT Consultant position with or without reasonable accommodation?

   YES _____ NO _____

   If your answer to Question 1 is "Yes," proceed to Question 2. If your answer to Question 1 is "No," sign and date the verdict form and return it to the bailiff.

2. Has Mr. Osborne proven by a preponderance of the evidence that he was qualified for and able to perform the essential functions of jobs at REI that were open at the time he became unable to perform the essential functions of his IT Consultant position?

   YES _____ NO _____

   If your answer to Question 2 is "Yes," answer Question 3. If your answer to Question 2 is "No," sign and date the verdict form and return it to the bailiff.

3. Has Mr. Osborne proven by a preponderance of the evidence that REI failed to take reasonable steps to make such open positions known to him so that he could apply for them?

   YES _____ NO _____

   If your answer to Question 3 is "Yes," answer Questions 4 and 5. If your answer to Question 3 is "No," sign and date the verdict form and return it to the bailiff.

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4. The amount of past and future wages and benefits Mr. Osborne would have earned in the job REI should have placed him in, less actual and potential wages and benefits from other sources, is $_____.

5. Mr. Osborne's damages for emotional distress caused by REI's failure to accommodate are $_____.

Sign and date the Special Verdict Form and return it to the bailiff.

_____

_____
Presiding Juror

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