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Court of Appeals
Division I
State of Washington

No. 73847-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

VICTOR WASHINGTON,

Plaintiff/Appellant,

v.

GROUP HEALTH COOPERATIVE,

Defendant/Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JEAN RIETSCHEL

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | INTRODUCTION..... | 1 |
| II. | RESTATEMENT OF ISSUES | 2 |
| III. | RESTATEMENT OF THE CASE..... | 2 |
| A. | Restatement of Facts..... | 2 |
| | 1. Washington’s Employment and Litigation History Prior To Accepting Employment with Group Health..... | 3 |
| | 2. Washington Accepts but Delays Employment with Group Health to Accommodate his Bankruptcy Petition..... | 4 |
| | 3. Washington Does Not Notify Group Health of Any Alleged Disability During his Onboarding with Group Health..... | 6 |
| | 4. Immediately After Beginning Employment with Group Health, Washington Becomes Argumentative with His Supervisor..... | 7 |
| | 5. Washington Resists Following Group Health’s Change Management Policy..... | 8 |
| | 6. Washington Modifies his Work Schedule Without Permission for Personal Reasons..... | 9 |
| | 7. Sims Documents Concerns with Washington’s Argumentative Attitude in Washington’s Second Quarter Performance Review..... | 11 |
| | 8. Washington is Unwilling to Attend Afternoon Work Meetings..... | 12 |
| | 9. Washington Objects to Performing his Fair Share of On-Call Work..... | 13 |
| | 10. Without Disclosing any Disability or Requesting a Reasonable Accommodation, Washington Refuses to Resume Working his Regular Schedule..... | 14 |
| | 11. Due to Washington’s Argumentative Nature and Failure to Comply with Established Procedures and Directives, Sims Decides to Terminate Washington’s Employment..... | 16 |
| | 12. Washington Protests his Termination; Group Health Thoroughly Investigates and Validates Sims’ Termination Decision..... | 19 |
| B. | Procedural History..... | 21 |
| | 1. Washington Sues Group Health Alleging Disability Discrimination and Retaliation..... | 21 |
| | 2. Washington Refuses During Discovery to Produce Records of his Military Service, Awards and Discharge..... | 22 |
| | 3. The Trial Court Enters an Order in Limine on Washington’s Prior Employment and Litigation History..... | 23 |

| | |
|--|----|
| 4. During Trial Washington Provides Testimony about His Military Service History that is Inconsistent with that Reflected On his Resumes Submitted to Group Health and Former Employers..... | 25 |
| 5. Washington Fails to Present Any Medical Evidence at Trial That he Had a Disability Requiring Reasonable Accommodation During his Employment with Group Health..... | 27 |
| 6. Group Health Elicits Testimony from Dr. Sullivan Suggesting that Washington May Have Sought a Diagnosis of Depression to Bolster His Claims Against Group Health; Washington Does Not Object..... | 30 |
| 7. During Closing Argument, Group Health Addresses Washington’s Bankruptcy Filing, Inconsistencies in His Testimony Regarding His Military Record and His Claimed Medical Diagnoses With No Objection from Washington..... | 31 |
| 8. The Jury Rules in Group Health’s Favor, Rejecting Washington’s Claims. | 33 |
| 9. The Trial Court Denies Washington’s Motion for a New Trial. | 34 |
| IV. ARGUMENT..... | 34 |
| A. Standard of Review..... | 34 |
| B. The Trial Court Did Not Abuse its Discretion in Denying Washington’s Motion for a New Trial..... | 36 |
| C. Washington Failed to Challenge Statements Made in Group Health’s Closing Argument in its Motion for New Trial and Was Not Unduly Prejudiced by Such Statements..... | 46 |
| V. CONCLUSION..... | 50 |

TABLE OF AUTHORITIES

STATE CASES

| | |
|--|------------|
| <i>Alcoa v. Aetna Cas. & Sur.</i> , 140 Wn.2d 517, 998 P.2d 856 (2000)..... | 36 |
| <i>Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.</i> , 140 Wn.2d 517, 998 P.2d 856 (2000)..... | 44, 49 |
| <i>Becker v. Cashman</i> , 128 Wn. App. 79, 114 P.3d 1210 (2005); CP 633-651..... | 37 |
| <i>Brown v. Safeway Stores</i> , 94 Wn.2d 359, 617 P.2d 704 (1980) | 48, 49 |
| <i>Burchfiel v. Boeing Corp.</i> , 149 Wn. App. 468, 205 P.3d 145 (2009)..... | 40 |
| <i>Faust v. Albertson</i> , 167 Wn.2d 531, 222 P.3d 1208 (2009)..... | 40 |
| <i>Harrell v. State ex rel. Dep’t of Soc. & Health Services, Special Commitment Ctr.</i> , 170 Wn. App. 386, 285 P.3d 159 (2012)..... | 35 |
| <i>Hojem v. Kelly</i> , 93 Wn.2d 143, 606 P.2d 275 (1980) | 35 |
| <i>Lian v. Stalick</i> , 106 Wn. App. 811, 25 P.3d 467 (2001) | 2 |
| <i>Locke v. City of Seattle</i> , 162 Wn.2d 474, 172 P.3d 705 (2007) | 35 |
| <i>Lodis v. Corbis Holdings, Inc.</i> , 172 Wn. App. 835, 292 P.3d 779 (2013) 35, 40, 43 | |
| <i>McCoy v. Kent Nursery, Inc.</i> , 163 Wn. App. 744, 260 P.3d 967 (2011)..... | 40 |
| <i>Mears v. Bethel Sch. Dist. No. 403</i> , 182 Wn. App. 919, 332 P.3d 1077 (2014) ... | 35 |
| <i>Teter v. Deck</i> , 174 Wn.2d 207, 274 P.3d 336 (2012)..... | 35, 44, 49 |
| <i>Warren v. Hart</i> , 71 Wn.2d 512, 429 P.2d 873 (1967)..... | 47 |

I. INTRODUCTION

Appellant Victor Washington asks this Court to vacate a unanimous jury verdict that he claims is not supported by the version of the facts *he* testified to at trial. Virtually every aspect of Washington’s version of the facts, however, was unsupported by Washington and disputed by testimony and evidence presented by Respondent Group Health Cooperative (“Group Health”). The jury’s verdict accurately—and reasonably—reflects that evidence. That Washington’s version of the facts was unsupported by the evidence and was not believed by the jury is not grounds for a new trial. Group Health’s counsel advocated its position in defense of Washington’s baseless claims; it did not engage in prejudicial misconduct denying Washington a fair trial.

Because the verdict is well supported by substantial evidence, the verdict must not be disturbed by this Court. The trial court did not abuse its discretion in denying Washington’s motion for a new trial on grounds of alleged prejudicial misconduct by Group Health or that the verdict was not supported by substantial evidence. The verdict should be upheld and Washington’s appeal denied.

II. RESTATEMENT OF ISSUES

A. Did the trial court abuse its discretion in denying Washington's motion for new trial where the jury had substantial evidence to conclude that Group Health did not discriminate against Washington on the basis of any disability or request for accommodation for any such disability? No.

B. Did the trial court abuse its discretion in denying Washington's motion for new trial by concluding that that Group Health did not engage in prejudicial misconduct in its cross examinations of Washington and Dr. Mark Sullivan? No.

C. May this Court properly refuse to consider Washington's claim that Group Health engaged in prejudicial misconduct through statements made during closing argument at trial when Washington failed to challenge any such statements with the trial court? Alternatively, is Washington's assertion without merit in any case? Yes on both counts.

III. RESTATEMENT OF THE CASE

A. Restatement of Facts.

This Court reviews the evidence supporting the jury's verdict in the light most favorable to Group Health as the prevailing party after a trial on the merits. See *Lian v. Stalick*, 106 Wn. App. 811, 824, 25 P.3d 467 (2001).

1. Washington's Employment and Litigation History Prior To Accepting Employment with Group Health.

Washington was employed by Tideworks Technology ("Tideworks") from 2004 until Tideworks terminated his employment in 2005. (Verbatim Report of Proceedings ("RP") 52-53, 55) After his termination and through his then-attorney, Washington sent Tideworks a demand letter (the "MacLeod Letter") alleging that Tideworks had discriminated against him in violation of the Washington Law Against Discrimination and the Americans with Disabilities Act and, as a result, had caused him "great emotional distress." (RP 223-226) and Trial Exhibit No. 56 ("Ex."). Through the MacLeod Letter, Washington informed Tideworks that "in lieu of insisting that Tideworks hold [his previously held] position open," he would consider accepting a settlement payment. *Id.* He closed the letter by stating that he "wish[ed] to avoid formal legal action unless there [was] no alternative." *Id.*

Washington was employed by Starbucks from 2006 until Starbucks terminated his employment in May 2008. (RP 57, 197) While he worked at Starbucks, Washington requested a letter from Starbucks' Human Resources Department confirming his employment. (Ex. 170) Trisha Berard, Starbucks Human Resources Manager, provided an "Employment Verification for Victor Washington," that confirmed: "Victor Washington

is currently employed by Starbucks Coffee Company as of August 31, 2006.” (Ex. 171)

In July 2008, Washington sued Starbucks for race discrimination and failure to accommodate him for a known disability. (Ex. 74, ¶¶ 8.3-8.4) In the complaint filed in the United State District Court for the Western District of Washington, Washington stated that he was “a former employee of Starbucks.” *Id.* at ¶ 3.1. Nowhere in the complaint does Washington allege that he was employed by Seattle’s Best Coffee. (Ex. 74)

2. Washington Accepts but Delays Employment with Group Health to Accommodate his Bankruptcy Petition.

In late 2011, Washington applied for a Systems Engineer position with Group Health. (RP 63-64) In his application and resume submitted to Group Health, Washington identified “Seattle’s Best Coffee” as his “current” employer. (RP 188-190; Exs. 71-72) Nowhere in his resume or on his application for employment did Washington identify Starbucks as a former employer.¹ *Id.* Additionally, in his application and resume

¹ Washington claims that it was his “understanding” that Starbucks and Seattle’s Best Coffee are one wholly owned entity and, thus, he was not being misleading when identifying Seattle’s Best Coffee as his employer. (RP 188-190; Ex. 71) Yet not a single document Washington produced during discovery in this matter related to his prior employment with Starbucks identify “Seattle’s Best Coffee” in any way. (RP 190-195; Ex. 161-163, 170-171) Furthermore, it is uncontested that Washington’s employment with Starbucks was terminated in May 2008 and, thus, that he was not employed but Starbucks (or Seattle’s Best Coffee) in late 2011 when he applied for employment with Group Health. (RP 57, 63-64, 197; Exs. 71-72)

Washington referred to himself by his middle name “Terrance,” as opposed to by his first name, “Victor.” (RP 195-; Exs. 71-72) All correspondence related to Washington’s employment with Starbucks refer to him by his first name, “Victor.” (RP 195-196; Ex. 161-163, 170-171)

On February 9, 2012, Group Health offered Washington a position as a Systems Engineer. (RP 219; Ex. 71, at 5) Washington accepted the position on that same day. (RP 219, 664; Ex. 130). It was the desire of Adam Burton (“Burton”), Group Health Technical Network Manager, that Washington begin his employment with Group Health as soon as possible. (RP 482, 491) As such, the offer letter extending Washington the position of Systems Engineer set forth a February 29, 2012 target start date for Washington to begin employment. (Ex. 71, at 5)

Yet, Washington did not begin his employment with Group Health until April 6, 2012. (Ex. 75) Washington testified that it was his desire to begin his employment at a later date because he had several tasks to accomplish before beginning his employment at Group Health, including completing his personal bankruptcy proceedings that he initiated on March 1, 2012. (RP 220) As a part of those proceedings, on March 15, 2012 Washington filed a declaration in the United States Bankruptcy Court in

which he swore under penalty of perjury that he had no prospect of income for the upcoming year.² (RP 220-221)

Washington did not object during trial to any questions Group Health posed to Washington related to his bankruptcy proceedings. (RP 220-222)

3. Washington Does Not Notify Group Health of Any Alleged Disability During his Onboarding with Group Health.

During Washington's employee onboarding at Group Health, Washington was asked to complete a "demographic information form." (PR 79-80; Ex. 4) The form included the following question: "Are you an individual with a disability?" (Ex. 4) When completing the demographic information form, Washington chose not to identify himself as having a disability and instead left the answer blank because he was "confused" by the question and "did not know exactly how to fill [it] out." (RP 80-81; Ex. 4) Yet, at the time he filled out the form, Washington believed himself to be disabled. (RP 80-81)

The demographic information form additionally included the following question: "Are you a disabled veteran?" (Ex. 4) Washington

² Notably, during trial Washington additionally testified that he performed contracting work for WaMu/Chase, Tech Staff, and Health Plan in 2010 and 2011. (RP 231) Yet, Washington acknowledged that he swore in his declaration to the bankruptcy court that he had no income in 2010. (RP 220)

was similarly “confused” by this question and, thus, left the answer blank. (RP 81-82). Yet, at the time he filled out the form, Washington did not consider himself to be a “disabled veteran.” (RP 81-82)

4. Immediately After Beginning Employment with Group Health, Washington Becomes Argumentative with His Supervisor.

Immediately after Washington began working as a Systems Engineer with Group Health, Washington began challenging the authority of his supervisor, Jon Sims. During their first meeting with one another, Washington became argumentative with Sims over his designated job title. (RP 404-405) Specifically, Washington disputed his designated title of Systems Engineer and asserted his belief that his designated title should instead be that of *Senior* Systems Engineer. (RP 404-405) In response, Sims reviewed with Washington his job description and explained that Washington had been hired as a non-senior Systems Engineer. (RP 404-405) Washington refused to accept Sims’ explanation and “elevated” the issue by going directly to Burton, Sims’ manager. (RP 357, 404-405) Burton similarly explained to Washington that he had been hired by Group Health to the position of a non-senior Systems Engineer. (RP 491) After meeting with Burton, Washington continued to challenge his designated title and met again with Sims to dispute his designation. (RP 405) Sims

had never before experienced a newly hired employee engage in such confrontational behavior. (RP 405)

5. Washington Resists Following Group Health's Change Management Policy.

As an employee in Group Health's Information Technology ("IT") department, Washington was required to follow Group Health's Change Management Policy. (RP 407-408; Ex. 111) The Change Management Policy generally requires IT personnel to get proposed network changes authorized before implementing them and to make a record of such network changes. (Ex. 111, at 2). To begin this process, employees are required to document their proposed changes in "change tickets." (RP 683) The Change Management Policy is designed to minimize the risk of disruptions to Group Health's business operations from changes to Group Health's network. *Id.* Because Group Health's business is caring for patients, the policy is ultimately designed to minimize the risk that a network failure will have a negative effect on patient care. *Id.* For this reason, a Change Management Group was established at Group Health to be responsible for ensuring compliance with the Change Management Policy. (RP 251)

During his employment with Group Health, Washington repeatedly resisted following the Change Management Policy. (RP 408-409) On one occasion, Washington proposed making a change to the network during

business hours. (RP 408-409) In response, Sims directed Washington to instead implement the change earlier in the morning to lessen the risk of interrupting network service. *Id.* Instead of following Sims' direction, Washington again went over Sims' head and asked for a meeting with Burton. (RP 409, 493-496; Ex. 77) During that meeting, Washington continued to resist following Sims' directions, but Burton reinforced that Sims was correct and directed Washington to make the change during non-business hours. (RP 495-496) Burton found this to be Washington's *modus operandi*, testifying that Washington was regularly "argumentative" and failed to accept direction. (RP 496-497)

In addition, Group Health's Change Management Group regularly had to remind Washington to update specific projects in accordance with the Change Management Policy. (RP 248-253; Exs. 62-70) For example, Washington was repeatedly reminded to keep his change tickets up to date. (RP 249-250; Exs. 62-63) Additionally, Washington was repeatedly reminded to close out his change tickets. (RP 251; Exs. 64-65)

6. Washington Modifies his Work Schedule Without Permission for Personal Reasons.

Washington was hired by Group Health to work from 7:30 to approximately 4:00 or 5:00 p.m., depending on whether he took a half hour or an hour for lunch. (RP 126, 277) In late June or early July, Washington

unilaterally changed his schedule to leave work earlier, at 1:00 p.m. (RP 126-127, 406) When Sims noticed, he asked Washington why he was leaving early. (RP 406) Washington explained that because his two young daughters were away for the summer with their mother in Australia, he had been waking up earlier and, therefore, it was more convenient for him to come to work earlier in the morning. *Id.* Washington did not inform Sims about any alleged medical conditions or that he needed the adjusted schedule as an accommodation for any such medical condition. (RP 406) Sims agreed to allow Washington to continue with his unilaterally adjusted work schedule on a trial basis, stating: “[W]ell, okay, we can give it a try and see if this works.” (RP 406)

In fact, Washington did not leave early for health reasons. He had only two medical appointments during the duration of his employment with Group Health. (RP 272-273) Instead, Washington sometimes left early to go on dates during the day. (RP 544) Washington told his coworker, Shain Hart, Senior Field Engineer, that he had recently joined an online dating site and was a looking for a “freak” with whom he could “pull tail,” slang for having sex. *Id.* During conversations with Hart concerning his dating life, Washington referred to himself as a “Mac Daddy” and a “ladies man.” *Id.*

Washington told Hart that he was going on dates a couple of times a week, at times during the afternoon.³ *Id.*

7. Sims Documents Concerns with Washington's Argumentative Attitude in Washington's Second Quarter Performance Review.

On July 13, 2012, Washington received a second-quarter performance review from Sims. (Ex. 9) In the review, Sims rated Washington as meeting expectations in some areas while noting areas for improvement in others. *Id.* At the time, Sims believed that he could have been more critical of Washington in the review but chose not to in an effort to be supportive of Washington to foster a better working relationship by coaching and mentoring him in a more positive direction. (RP 409-410) To this end, in the review Sims alluded to his concern with Washington's argumentative attitude, indicating that Washington was "still learning Group Health's systems and culture" and noting that he was "working to transition from a consultant to a member of a team." (Ex. 9)

³ Washington made these types of comments to Hart during their daily interactions. Washington's relationship with Hart was apparently so close that he felt comfortable driving to Hart's house after being terminated to ask Hart to sign off on a letter of reference that Washington had prepared. (RP 545-46)

8. Washington is Unwilling to Attend Afternoon Work Meetings.

There is an expectation that all members of Group Health's IT Department attend team meetings during core business hours. (RP 404, 497) As a direct result of Washington's self-imposed modified work schedule—whereby he left work at 1:00 p.m. (discussed above)—Washington was regularly not available to help the IT team address incidents on Group Health's network during business hours and other team members were required to attend team meetings in Washington's place. (RP 497) Both Sims and Burton took note of Washington's regular unavailability to attend afternoon meetings. (RP 410, 436, 497)

On July 17, 2012—four days after Sims gave Washington his Second Quarter Performance Evaluation (described above), Washington missed a 3:00 p.m. meeting, citing a “hard previous commitment” of a personal nature. (RP 280-281; Ex. 103) At no time, including at trial, did Washington claim that he missed the meeting for any health-related reason. (RP 282; Ex. 103) Shortly after Washington missed the July 17 meeting, Burton spoke to Sims about Washington's unavailability to attend afternoon meetings and stated to Sims: “[W]e need[] to talk with [Washington] because he's missing meetings that are happening later in the day.” (RP 503)

9. Washington Objects to Performing his Fair Share of On-Call Work.

All Network Engineers at Group Health, including Washington, were required to perform some “advanced trouble shooting support” work on an on-call basis. (RP 500-501; Ex. 3) On August 3, 2012, Burton advised Washington that it was his intention to assign Washington to “on-call” duty the following week. (RP 131-133, 501-502; Ex. 78) The assignment was the first time Washington had been required to be on-call since beginning his employment with Group Health in April 2012. (RP 501-502) Washington responded curtly, saying: “No one discussed this with me. My daughters have been away for two months and they are flying in this week. There are a couple slots where I will not be able to cover. This is only about 2 days [sic] notice.” (RP 501-502; Ex. 78) Burton was surprised and frustrated that Washington’s tone did not reflect his “best behavior”—particularly given that Washington was a “probationary employee”—and given that Washington’s failure to “pull his weight” required “the rest of the peers have to now pitch in and do more work.” (RP 502)

On August 6, 2012 while Sims was on vacation, Burton called Sims to discuss concerns about Washington’s performance and refusal to make himself available to be “on-call” as Burton had directed. (RP 412-413) To

Sims, Burton sounded “frustrated, and a little concerned” with respect to Washington’s refusal. (RP 413) Sims told Burton that he would speak with Washington when he returned from vacation. (RP 413)

10. Without Disclosing any Disability or Requesting a Reasonable Accommodation, Washington Refuses to Resume Working his Regular Schedule.

When Sims returned to work from vacation on the morning of August 8, 2012, Washington asked to speak with him. (RP 413) During their conversation, Washington complained to Sims about Burton’s directive that he be available for on-call work and requested that he be excused from on-call duty on the dates Burton previously identified because he had a doctor appointment and because his daughters were returning from Australia. (RP 413-414) Sims agreed to excuse Washington from the on-call duty and assigned another employee to cover the on-call shift. (RP 414)

Sims then informed Washington of his awareness that Washington had missed multiple afternoon meetings at which his attendance was required. (RP 214) As a result, Sims directed that Washington needed to resume his original schedule and remain in the office until at least 2:30 p.m. so that he would be able to attend such afternoon meetings. (RP 414). In response, Washington informed Sims that his directive was “unfair” and “wasn’t right” and “refused to change back” to his original work schedule. (RP 414) At no time during their conversation did Washington offer Sims

any reasonable excuse for why he was unable to remain in the office until 2:30 p.m. each day. (RP 415) Sims and Washington ended their conversation with no agreement as to Washington's schedule other than that they would discuss the subject again at a later time. *Id.* Sims had never before had a subordinate employee refuse to follow his direction regarding scheduling. *Id.*

The next day, August 9, 2012, Washington approached Sims as soon as Sims arrived to work that morning at approximately 6:00 or 7:00 a.m. (RP 136-137, 416) Washington told Sims that he was angry about their conversation the previous day, that Sims had treated him unfairly by requiring him to stay at work until 2:30 p.m. each day, and speculated that Sims must not trust him. (RP 416) Sims attempted to obtain information from Washington as to whether there was any reason Washington could not work until 2:30 p.m. on a regular basis, but was unable to "get anything. It was just a constant argument." (RP 418) Specifically, Sims recalls asking Washington whether he had any family or medical conditions that prevented him from staying at work until 2:30 p.m. each day, but Washington provided no information indicating that either was the case. *Id.* Washington referred only generally to his need to attend some upcoming medical appointments that were "heart-related." (RP 417-18) Washington did not inform Sims about the existence of any alleged medical conditions that were impacting

his ability to perform his job or that he needed an accommodation for any such conditions. (RP 417-418)

11. Due to Washington’s Argumentative Nature and Failure to Comply with Established Procedures and Directives, Sims Decides to Terminate Washington’s Employment.

During his contentious conversation with Washington on the morning of August 9, 2012 (described above), Sims decided to terminate Washington’s employment because he believed Washington was “a person that was argumentative” and entirely unwilling to compromise in any way with regard to his work and work schedule at Group Health. (RP 419) Indeed, as a direct result of his conversation with Washington on August 9—as well as his conversation with Washington the preceding day—Sims took note that earlier issues with Washington’s argumentative nature and insistence on doing this his own way had been part of a larger pattern, not isolated incidents. (RP 420)

Sims was unable to take immediate action regarding his decision to terminate Washington directly after their meeting because he had volunteered to cook breakfast for another employee’s retirement party that morning. (RP 367-369) In the meantime, while Sims was at the retirement breakfast Washington sent Sims and Burton an email titled “Medical Condition Notification.” (Ex. 102) In the email, Washington stated: “This is notification I have a medical condition that I have been seeing doctors

[sic] for some time. This morning I will be leaving early because I have a medical procedure undergo [sic] at UW Medicine.” *Id.* When Sims read Washington’s email, he understood it to refer to a single doctor appointment, for which Sims had already given Washington permission to attend during work hours. (RP 418-419, 724-725)

Sims returned to his desk at approximately 10:00 a.m. after the retirement breakfast, and contacted Amanda Gayles, IT Human Resources Consultant, to discuss his intention to terminate Washington and the reasons behind his decision, as well as to specifically inquire as to whether he was required to first put Washington on a performance improvement plan (“PIP”). (RP 369, 420) Gayles told Sims that he did not need to put Washington on a PIP because he was a probationary employee. (RP 420-421)

Sims additionally forwarded Washington’s “Medical Condition Notification” email to Gayles. (Ex. 102) Although Gayles perceived Washington’s email to be a simple request for permission to miss work for a single medical appointment, she took independent steps to determine whether Washington had need for an accommodation for a medical condition by reviewing Washington’s onboarding documentation—namely, the “demographic information form” asking individuals to identify if they were an individual with a disability. (RP 724-727; Ex. 4) Gayles found no

information indicating or suggesting that Washington was an individual with a disability who had requested or otherwise required any accommodation. (RP 727) After vetting Sims' proposed termination of Washington through a peer review process within Human Resources to ensure the decision was appropriate and lawful, as well as receiving approval on the decision from both Burton and Pete Raustein, Director of IT Enablement, Gayles notified Sims that he was approved to move forward with Washington's termination. (RP 727-731)

On Friday, August 10, 2012, with the approval of Gayles, Burton and Raustein, Sims terminated Washington's employment at Group Health. (RP 729-730; Ex. 10) At that time, Sims did not believe Washington was a person with a disability who required any accommodation, and at no time during Washington's employment did Washington inform Sims otherwise. (RP 434) In the termination memorandum Sims issued to Washington, Group Health cited five reasons for Washington's termination, namely, Washington's: (1) argumentative nature with regard to his job title and role; (2) reluctance to conform to Group Health's Change Management Policy; (3) reluctance to work with his peers to review network changes; (4) argumentative nature in arguing with leadership to accept standard working hours; and (5) conflict with management when discussing items of disagreement. (Ex. 10)

12. Washington Protests his Termination; Group Health Thoroughly Investigates and Validates Sims' Termination Decision.

On August 12, 2012—two days after Washington was notified of his termination—Washington contacted Group Health leadership by email and complained that he had been unlawfully terminated and denied a reasonable accommodation. (Ex. 19) In response to Washington's protest, Group Health undertook an investigation into Washington's claims. (RP 731-732). As a part of that investigation, Bonnie Butler, Human Resources Consulting Services Manager, spoke with Washington directly. (RP 446-448) During their conversation, Butler found Washington to be "very argumentative, and challenging" and noted that she understood "why leadership had taken the action they had" in terminating his employment. (RP 667-668; Ex. 25)

Additionally, as a part of Group Health's investigation, a number of Washington's co-workers were asked to provide their observations of Washington. (RP 734-735) Statements Group Health received from Washington's coworkers regarding their observations of Washington confirmed the bases upon which Sims' had terminated Washington's employment. Jim Keeffe, Network Engineer, reported that Washington "seemed angry" and aloof during team meetings. (RP 567-568) Keeffe agreed with Sims' decision to terminate Washington's employment. (RP

571) Rob Sumpter, a member of Washington's IT team at Group Health, noticed that a few weeks into Washington's tenure at Group Health, his demeanor changed. (RP 685-686, 687). Specifically, Sumpter noted that Washington stopped interacting with other members of the team and, on occasions when team members expressed disagreement with Washington, Washington would "disengage." (RP 687-688) Like Keeffe, Sumpter agreed with Sims' decision to terminate Washington. (RP 388) Hart—Washington's co-worker with whom Washington regularly conversed and shared information about his personal life—similarly reported noting that Washington did not engage with other members of the team and acted "standoffish" and, on at least one occasion, aggressively. (RP 539)

Group Health also investigated Washington's assertion that he had been arriving significantly earlier than his standard 7:30 a.m. start time. (RP 744). Group Health's building-access records, however, reflected that Washington had not been arriving as early to work as he had claimed and had not been working eight hours per day while employed at Group Health. (RP 406, 746; Ex. 104)

Additionally, through its investigation Group Health concluded that Washington had not asked for any reasonable accommodation while employed at Group Health. (RP 748; Ex. 12).

At the conclusion of the investigation, Gayles issued Washington a letter providing him with a summary of the outcome of the investigation, including Group Health's conclusion that Washington's claim that Group Health failed to accommodate him for a disability was without merit. (Ex. 12). Gayles invited Washington to contact her if he believed there was any additional documentation or information Group Health should consider in support of his allegations. (RP 748; Ex. 12). At no time did Washington contact Gayles to provide any additional information or otherwise dispute Group Health's investigative findings and conclusions. (RP 748)

B. Procedural History.

1. Washington Sues Group Health Alleging Disability Discrimination and Retaliation.

Washington filed his Complaint against Group Health on May 13, 2013 alleging that Group Health discriminated against him in violation of the WLAD by failing to reasonably accommodate him for an alleged disability and by terminating his employment. (CP 1-4) Washington additionally alleged that Group Health retaliated against him in violation of the WLAD. *Id.* Washington voluntarily dismissed his retaliation claim prior to trial, which commenced before Judge Jean A. Rietschel on June 1, 2015. (RP 1)

2. Washington Refuses During Discovery to Produce Records of his Military Service, Awards and Discharge.

On July 19, 2013, almost two years before the trial at issue, Group Health asked Washington to “[p]roduce all documents relating to [his] military service.” (Appendix to Appellant’s Brief, at 24-25 (Request for Production No. 12). On August 19, 2013, Washington responded that he was “not in possession of records related to his military service” and on that basis refused to produce any documents. *Id.* On March 26, 2014, Washington supplemented his responses to Group Health’s discovery requests and again certified that he had no records related to his military service. (*Id.*, 47-48)

One month before trial, Group Health’s counsel sent Washington’s counsel a link to the Department of Veterans Affairs (“VA”) website through which Washington could request a free replacement of his DD-214, which is a military document “that tells your dates of military service, any awards you received, your day of discharge, [and] your type of discharge.” (Appendix to Appellant Brief, at 1; RP 215) At no time did Washington attempt to obtain a replacement DD-214 to produce in response to Group Health’s discovery requests.⁴ (RP 215)

⁴ During trial, Sims testified that he used the same link to request his DD-214 a process that it took him approximately 15 minutes to complete. (RP 423)

3. The Trial Court Enters an Order in Limine on Washington's Prior Employment and Litigation History.

Prior to commencement of trial, Washington filed a motion in limine seeking to exclude the admission of evidence of his prior litigation, namely, the MacLeod Letter, Washington's complaint against Starbucks, and a Seattle Times article about Washington's settlement of his lawsuit against Starbucks. (CP 37-46) Group Health opposed Washington's motion, asserting that evidence of Washington's prior employment and litigation history was relevant to Washington's claims and Group Health's defenses thereto, as well as to Washington's credibility. (CP 132-142) The trial court "read all the cases that both parties ha[d] provided" before making a ruling. (RP 12) The court found that Washington had given evasive answers in his deposition regarding his prior employment and litigation history and that Washington had presented similar factual situations in the lawsuit against Starbucks and the MacLeod Letter. (RP 13)

As such, the court ruled that, though the McLeod Letter was inadmissible, Group Health could question Washington about his demand made to Tideworks via the McLeod letter for purposes of impeachment and to show Washington's knowledge. (RP 13-14) The Court ruled that the Starbucks complaint was similarly admissible for purposes of impeachment and to show Washington's knowledge. (RP 12-15) Finally, the Court ruled

that the Seattle Times article regarding Washington's settlement with Starbucks was inadmissible. *Id.* Notably, Washington does not challenge these rulings on appeal. *See* Appellant's Brief, at 1 (Assignment of Error and Issues Related to Assignment of Error).

At trial, Washington volunteered during his direct examination that he had become "seriously ill" during his employment with Tideworks, which is "the reason why [he] was terminated" from Tideworks. (RP 53) In response, Group Health then inquired of Washington during cross examination whether Washington had previously claimed wrongful termination from Tideworks based on an alleged disability. (RP 223) After Washington responded that he did not recall, Group Health presented Washington with the McLeod Letter to refresh his recollection. (RP 223-224) Specifically, Group Health asked Washington whether he had alleged via the McLeod Letter that he suffered severe emotional distress, as he alleged in his Complaint against Group Health. (RP 224) Washington did not object to Group Health's inquiries of Washington regarding the McLeod Letter. (RP 223-226)

4. During Trial Washington Provides Testimony about His Military Service History that is Inconsistent with that Reflected On his Resumes Submitted to Group Health and Former Employers.

At trial, Washington testified that he served in the Navy from 1984 until he was honorably discharged in 1991. (RP 208-209) Yet in Washington's resume, he represented to Group Health at the time of his application for employment that he served in the Navy from 1994 to 1998. (RP 209; Ex. 72) Similarly, Washington represented to his prior employer Starbucks that he served in the Navy from 1987 to 1991. (Ex. 165) In other words, presented with three opportunities to represent the dates of his military service, Washington gave three different date ranges.⁵ (RP 209; Exs. 72, 165)

In an effort to account for the discrepancies in Washington's representations regarding his military service, Group Health asked Washington on cross-examination why he had not produced his DD-214 during discovery. (RP 215) In response, Washington testified that his ex-wife took the DD-214 in the divorce and that he did not "believe that [he was] going to be getting [it] back any time soon." (RP 215). When Group

⁵ Washington similarly provided inconsistent information regarding his educational history. At trial, Washington testified that he graduated from college in 1996. (RP 46) Yet, in the resume Washington submitted to Group Health in support of his application for employment, Washington represented that he graduated from college in 1997. (RP 218)

Health then inquired whether Washington had requested a replacement DD-214 from the VA website, Washington testified that he had “no need.” (RP 215) Washington failed to answer Group Health’s inquiry as to whether it would have taken Washington a mere matter of minutes to request a new DD-214 in order to provide it in response to Group Health’s discovery request. (RP 216) Instead, in response to the inquiry, Washington offered to show Group Health and the jury his veteran’s card, which he claimed to have with him on the stand.⁶ (RP 216)

Ultimately, after receiving repeated evasive responses from Washington regarding his failure to produce his DD-214 during discovery, Group Health inquired: “I would think you would be proud of [your service] . . . is there a reason why you’re holding this back?” (RP 216)

⁶ Despite claiming to have the veteran’s card on his person at trial, Washington did not attempt to introduce it into evidence or even show it to the jury as an illustrative exhibit during his re-direct examination. (RP 292-306) Moreover, Washington had not produced a copy of the veteran’s card in discovery, claiming instead that he had no documents related to his military service in his possession. (Appendix to Appellant’s Brief, at 24-25) Throughout Group Health’s cross examination of Washington, Washington repeatedly—and wrongly—accused Group Health of misrepresenting the truth and tried to provide narrative and non-responsive explanations for his answers to Group Health’s questions. (*See e.g.*, RP at 253 (“... it misrepresents . . .”); 289:20-24 (“that’s a – I think a major misrepresentation.”). In response, Group Health invited Washington to “follow-up on anything [he] want[ed] to explain” in his re-direct examination. (RP 219) Washington, however, did not follow up to explain his military service or offer the evidence he includes in the Appendix to his opening brief, which was readily available during trial. *See generally* Appendix to Appellant’s Brief. Significantly, the copy of the veteran’s card produced with Appellant’s Brief does not indicate the dates of military service or type of discharge.

Washington objected to this question—which the Court sustained—but did not move to strike the inquiry from the record. (RP 217)

5. Washington Fails to Present Any Medical Evidence at Trial That he Had a Disability Requiring Reasonable Accommodation During his Employment with Group Health.

During trial, Washington testified that he suffers from a myriad of medical conditions that he alleges limited his ability to perform his job while at Group Health, including active sarcoidosis, which he testified was confirmed by a diagnosis from Dr. Ganesh Raghu. (RP 54-55, 59, 60-62). Yet, Washington presented no evidence at trial—in the way of medical records or testimony from any of his medical providers—to support his testimony in this regard. In notable contrast, Group Health presented evidence from Dr. Raghu and Dr. Andrea Jacobson, forensic psychologist, negating Washington’s claim.

a. Testimony from Dr. Raghu.

Dr. Raghu had been treating Washington since 2005. (RP 60) After treating Washington on July 9, 2008, Dr. Raghu characterized Washington in his medical records as “a gentleman who does not have a diagnosis of sarcoid.” (RP 705; CP 560-564) At that time, Dr. Raghu informed Washington that he possessed no objective evidence of sarcoidosis and, thus, that there was no need for Washington to be regularly seen by Dr.

Raghu for treatment. (RP 706) Dr. Raghu saw Washington again in 2008, at which time he again found no objective evidence that Washington had sarcoidosis. (RP 706; Ex. 90)

Dr. Raghu did not see Washington again until February 2013, after Washington's employment with Group Health had ended. (RP 708; CP 564-565) At that time, Dr. Raghu noted that there "was no objective evidence of functional impairment." (RP 709-710; CP 567-568) Washington nonetheless elected to undergo Magnetic Resonance Imaging ("MRI") and a computerized axial tomography ("CAT") scan to test for evidence of sarcoid. (RP 710-711; CP 568; Ex. 92) Those tests "did not have any characteristics typical of sarcoid." (RP 710-712; CP 569-570; Ex. 92) Thus, at that time, Dr. Raghu did not believe that Washington had active sarcoidosis. (RP 711-712, Exs. 91-92) Dr. Raghu advised Washington "not to be dwelling on the specific issue of whether he has sarcoidosis or not given that there is no indication." (Ex. 92)

Despite the lack of any objective indication that Washington had active sarcoidosis in February 2013, Dr. Raghu testified during trial that it was "likely" that Washington had sarcoidosis given his reported symptoms. (RP 714) Dr. Raghu, however, saw no "evidence to suggest that Mr. Washington was unable to work" or that he required any accommodation. (RP 713-717)

b. Testimony from Dr. Jacobson.

Dr. Jacobson testified during trial as an expert in forensic psychiatry with regard to a forensic examination of Washington she conducted at Group Health's request. (RP 584; Ex. 182) Prior to conducting her examination of Washington, Dr. Jacobson reviewed Washington's medical records and testified that she found no evidence in those medical records to suggest that Washington had a cardiac condition that interfered with his ability to perform his job at Group Health. (RP 585, 597) She testified similarly with respect to all of Washington's other alleged medical conditions, namely, that she found no evidence to suggest that his ability to perform his job at Group Health was impacted. (RP 597 (insomnia), 598 (hypogonadism), RP 598 (cataracts), RP 599 (obesity, dizziness and thyroid condition)).

Additionally, Dr. Jacobson testified that, during her examination of Washington, Washington reported that he "kept himself very busy after work, dating and doing things with friends" during the summer while working at Group Health while his daughters were away in Australia.⁷ (RP 653; Ex. 182)

⁷ Washington himself testified that during this period when he claimed to have needed an accommodation from Group Health, he was able to take care of his 80-year-old mother after work. (RP 280-281) Oddly, he then testified that he was not able "to do the same level of activity and functioning for Group Health in

6. Group Health Elicits Testimony from Dr. Sullivan Suggesting that Washington May Have Sought a Diagnosis of Depression to Bolster His Claims Against Group Health; Washington Does Not Object.

During trial, Washington presented testimony from Dr. Mark Sullivan, psychiatrist, in support of his claimed emotional distress. (RP 178-179, 451-461) Washington sought treatment from Dr. Sullivan for depression shortly before filing his Complaint against Group Health and shared with Dr. Sullivan details of stressors surrounding his “legal battle” with Group Health. (RP 262-265, 457-460; Ex. 31) Dr. Sullivan diagnosed Washington with depression—which he believed was caused in part by stressors related to Washington’s termination from and “legal battle” with Group Health—for which he prescribed Washington medication. (RP 457-460; Ex. 31)

On cross-examination, Group Health asked Dr. Sullivan whether he would be surprised to learn that, at the time Washington had reported to him in March 2013 that he was engaged in a “legal battle” with Group Health, that Washington’s lawsuit against Group Health had not yet been initiated. (RP 471-472; Ex. 31) Dr. Sullivan responded affirmatively and confirmed

the afternoon” as he did for his mother in the afternoon. (RP 282) Washington also testified that he could drive a car, care for his children, take care of his home, and hang out with friends, all tasks that are at odds with his claim that he could not work for Group Health in the afternoon. (RP 269-270).

that he had diagnosed Washington with depression by relying on Washington's representation that he was engaged in a stressful "legal battle." *Id.* As such, Dr. Sullivan conceded that it was possible that Washington had sought a diagnosis of depression from him in an effort to bolster his claims against Group Health. *Id.* At no time did Washington object to any question posed to Dr. Sullivan related to this topic. *Id.*

7. During Closing Argument, Group Health Addresses Washington's Bankruptcy Filing, Inconsistencies in His Testimony Regarding His Military Record and His Claimed Medical Diagnoses With No Objection from Washington.

In closing argument, Group Health argued that Washington had deliberately delayed his employment start date at Group Health in order to submit a declaration to the bankruptcy court swearing that he was unemployed. (Supplemental Report of Proceedings ("Supplemental RP") 2-3) Washington did not raise any objection to Group Health's assertions. *Id.*

During closing argument, Group Health additionally argued that Washington appeared to have purposely delayed his start date at Group Health for the purpose of falsely testifying to the bankruptcy court that he had no prospect of income. (Supplemental RP 3) Group Health additionally noted that, regardless of any delay in Washington's start date, as of March 15, 2012 when Washington presented such sworn testimony, he in fact had

a prospect of income during the upcoming year given his anticipated Group Health employment, making his sworn testimony to the bankruptcy court dishonest. (Supplemental RP 3) Washington did not raise any objection to Group Health's assertions. *Id.*

Further, during closing argument Group Health argued that Dr. Raghu testified that Washington is not disabled and is not limited in his ability to work. (Supplemental RP 10) Group Health similarly suggested that Washington may have sought a diagnosis of depression from Dr. Sullivan shortly before filing his lawsuit against Group Health in an effort to bolster his claims. (Supplemental RP 10) Each of Group Health's arguments are well supported by testimony of Dr. Raghu and Dr. Sullivan during trial. (RP 471-472, 706-712; Exs. 31, 92) Washington did not raise any objections to Group Health's assertions. *Id.*

Finally, during closing argument Group Health pointed out that because Washington had not produced any documentary evidence of his discharge from the Navy, there was no way of knowing whether "he was just being resistant in refusing . . . or if there's something fishy about his military experience." (Supplemental RP 5-6) Group Health did not claim that Washington had never served in the Navy; it merely pointed out a lack of documentary evidence to corroborate his testimony or explain why he gave inconsistent statements regarding his military service. *Id.* Group

Health highlighted for the jury that it had invited Washington's attorney to clarify any confusion created by Group Health's questions regarding Washington's military history during re-direct examination, which he did not do. (Supplemental RP 10-11) Group Health additionally reminded the jury that Washington could have shown the jury his veteran's card, which he allegedly had with him on the stand, but similarly chose not to do so. *Id.* Washington did not object to any of Group Health's arguments. *Id.*

The Court instructed the jury both before the trial and before closing arguments that "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." (CP 634-35)

8. The Jury Rules in Group Health's Favor, Rejecting Washington's Claims.

Following a seven-day trial, the jury returned a unanimous verdict in Group Health's favor on June 10, 2015, finding that Washington did not meet his burden of proving his failure-to-accommodate and disability-discrimination claims by a preponderance of the evidence. (CP 629, 703-704)

9. The Trial Court Denies Washington’s Motion for a New Trial.

After the trial, Washington moved for a new trial on three separate grounds. (CP 651-699) First, Washington argued that he had been unduly prejudiced by the admission of evidence of his bankruptcy on cross-examination. (CP 653-55) Second, Washington argued that Group Health acted improperly when questioning Dr. Sullivan by suggesting Washington had sought a depression diagnosis to bolster his claims against Group Health. (CP 655-58) Third, Washington argued that the verdict was contrary to the evidence. (CP 658-61)

The trial court found that “[t]he cross examinations of Plaintiff [regarding his bankruptcy] and Dr. Sullivan were not improper.” (CP 713) The court also found that the jury’s verdict was not contrary to the evidence. *Id.* Consequently, the trial court denied Washington’s motion. *Id.*

IV. ARGUMENT

A. Standard of Review.

This Court reviews the trial court’s denial of a motion for new trial for abuse of discretion.⁸ *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835,

⁸ Early in his opening brief, Washington initially—and erroneously—suggests that this Court’s standard of review of the trial court’s denial of Washington’s motion for new trial is de novo by asserting that the trial court “erred” in denying the motion. *See* Appellant’s Brief, at 1. He subsequently concedes that abuse of discretion is the applicable standard of review. *Id.*, at 26.

861, 292 P.3d 779 (2013). A trial court abuses its discretion when it fails to grant a new trial where the verdict is contrary to the evidence, *Locke v. City of Seattle*, 162 Wn.2d 474, 486, 172 P.3d 705 (2007), or when a party is unduly prejudiced by misconduct by the prevailing party. *Teter v. Deck*, 174 Wn.2d 207, 222, 274 P.3d 336 (2012).

“When a litigant unsuccessfully moves for a new trial on the ground that the verdict was contrary to the evidence, [the appellate court] review[s] the record to determine whether sufficient evidence supported the verdict.” *Mears v. Bethel Sch. Dist. No. 403*, 182 Wn. App. 919, 927, 332 P.3d 1077 (2014). “In this analysis [the appellate court] consider[s] the evidence in the light most favorable to the nonmoving party.” *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980). “[The appellate court] will not overturn the jury’s verdict so long as substantial evidence, viewed in a light most favorable to the [non-moving party], supports the jury’s verdict.” *Harrell v. State ex rel. Dep’t of Soc. & Health Services, Special Commitment Ctr.*, 170 Wn. App. 386, 409, 285 P.3d 159 (2012). “[The appellate court] defer[s] to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence.” *Lodis*, 172 Wn. App. at 861.

A parties’ request for a new trial on grounds of misconduct by the prevailing party may be granted only where the movant establishes “that the conduct complained of constitutes misconduct (and not mere aggressive

advocacy) and that the misconduct is prejudicial in the context of the entire record.” *Alcoa v. Aetna Cas. & Sur.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000).

B. The Trial Court Did Not Abuse its Discretion in Denying Washington’s Motion for a New Trial.

1. The Verdict is Well Supported by the Evidence.

The jury was presented with two claims at trial, namely, whether Group Health: (1) failed to reasonably accommodate Washington for a recognized disability; and (2) discriminated against Washington on the basis of a recognized disability by terminating his employment.⁹ The jury’s verdict finding that Washington failed to establish either claim is well supported by the evidence presented at trial by Group Health. Thus, the trial court did not abuse its discretion in denying Washington’s motion for a new trial on that basis.

⁹ In his opening brief, Washington wrongly suggests that the jury was also presented with claims for wrongful discharge in violation of public policy and retaliation. *See* Appellant’s Brief, at 27-28. No such claims were before the jury. (CP 703-704) Washington voluntarily dismissed his retaliation claim before trial. (RP 1; CP 703-704) Despite Washington’s detailed legal analysis asserting that he presented evidence at trial successfully establishing a claim for wrongful discharge in violation of public policy (*see* Appellant’s Brief, at 28-33), at no time did Washington assert any such claim against Group Health, and the jury did not consider or render any verdict on such a claim. (CP 1-4, 703-704)

a. Substantial Evidence Supports the Jury’s Verdict That Washington’s Failed to Establish His Failure-to-Accommodate Claim.

To prove a claim for failure to accommodate a disability under the WLAD, the employee must show that: (1) he had an impairment that limited his ability to perform the job; (2) he was qualified to do the job; (3) he gave the employer notice of the impairment and its substantial limitations; and (4) after notice, the employer failed to accommodate the impairment.¹⁰ *Becker v. Cashman*, 128 Wn. App. 79, 84, 114 P.3d 1210 (2005); CP 633-651 (Jury Instructions). To qualify for a reasonable accommodation under the WLAD, the employee’s impairment must exist in fact and it “must have a substantially limiting effect upon the individual’s ability to perform his or her job.” RCW 49.60.040(7)(d)(i).

Here, Washington failed to present any evidence at trial—in the form of medical records or otherwise—that he had a disability that limited his ability to perform his job at Group Health in any way. Notably, Washington did not present testimony from a single medical provider, nor did he offer a single medical record, substantiating his claimed disabilities and corresponding need for accommodation while employed at Group

¹⁰ In his opening brief, Washington erroneously claims that the *burden is on Group Health* “of proving by substantial evidence that it did not discriminate against Mr. Washington” on the basis of a disability. *See* Respondents’ Brief, at 6.

Health.¹¹ Instead, Washington relied solely on his own self-serving testimony that he suffers from a myriad of medical conditions that inhibited his ability to work while at Group Health and that he put Group Health on notice of the same. (RP 59-63, 126-138)

As an initial matter, his claim in this regard is contradicted by his own testimony that while employed with Group Health he was able to safely drive home, care for his kids, care for his house, and care for his mother after work. (RP 269-270, 281) Yet when asked whether he could perform the same level of work for Group Health that he could perform for his mother in the afternoons, Washington answered: “No.” (RP 281-282) In other words, there is ample evidence in Washington’s conflicting testimony alone for a jury to reasonably conclude that Washington simply did not want to work for Group Health in the afternoons, although he was physically and mentally able to do so.

Group Health additionally presented substantial evidence to support such a finding. Group Health offered evidence and testimony from Drs. Raghu and Jacobson in direct conflict with Washington’s claim that he was disabled while working at Group Health. (RP 705-717, 584-85, 597-99;

¹¹ Washington presented testimony from Dr. Sullivan in support of his claimed emotional distress damages, which reflected that Washington had been diagnosed with depression *after* his termination from Group Health. (RP 457-460; Ex. 31)

Exs. 90-93, 182) It additionally offered evidence and testimony refuting Washington's claim that he put Group Health on notice that he was disabled and required accommodation, such as the "demographic information form" on which Washington failed to identify himself as a disabled individual requiring accommodation (Ex. 4) and Sims' testimony contradicting Washington's claim that he sought a change in his schedule as a disability-related accommodation. (RP 406)

Washington's "Notice of Medical Condition" email sent to Sims and Burton *after* Sims' decided to terminate Burton's employment was perceived by Group Health as a request by Washington to miss work to attend a single medical appointment, after being carefully considered by Gayles. (RP 724-731) It was not, in contrast, a notice by Washington that he had a disability that impacted his ability to perform his job at Group Health that required accommodation.

In sum, Washington claims that the verdict is contrary to the evidence and should be overturned because it does not support *his* version of the evidence as presented at trial. The record is clear, however, that Group Health presented ample credible evidence in direct contrast with Washington's claims. As such, there was substantial evidence presented at trial from which the jury could reasonably conclude that Washington was not disabled, did not notify Group Health that he was disabled, and failed to

request an accommodation for any such disability. *See, e.g., McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 769, 260 P.3d 967 (2011) (in resolving claims that a jury’s verdict is contrary to the evidence, Court’s defer to the jury’s resolution of conflicting testimony); *Faust v. Albertson*, 167 Wn.2d 531, 538, 222 P.3d 1208 (2009) (when challenging a verdict based upon substantial evidence, the moving party “admits the truth of the opponent’s evidence and all inferences which can reasonably be drawn [from it]”) (citation omitted).

The trial court did not abuse its discretion in denying Washington’s motion for new trial. The verdict is well supported by substantial evidence presented at trial and should not be disturbed by this Court. *See Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 862, 292 P.3d 779 (2013) (no abuse of discretion in denying motion for new trial where verdict supported by substantial evidence viewed in the light most favorable to the non-moving party).

b. Substantial Evidence Supports the Jury’s Verdict That Washington Failed to Establish his Disparate Treatment Claim.

To prove disparate treatment on the basis of disability, Washington must show that he had a disability and that his disability was a substantial factor in Group Health’s decision to terminate his employment. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 492, 205 P.3d 145 (2009). Under the

WLAD, disability is an impairment that either (1) is medically cognizable or diagnosable; (2) exists as a record; (3) or is perceived to exist whether or not it exists in fact. RCW 49.60.040(7)(a). In the context of disparate treatment, impairment means a physiological disorder or condition. *Id.*

Washington failed to present evidence at trial from his medical providers or any other witness to support his contention that he had any impairment or that his alleged impairment was a substantial factor in Group Health's decision to terminate his employment. Instead, he relied on his own self-serving testimony in this regard. (RP 59-63) Group Health, in turn, offered testimony and evidence from Drs. Raghu and Jacobson, as well as from his co-workers and Washington himself, refuting Washington's testimony.

Additionally, Washington failed to present any evidence reflecting that Group Health's decision to terminate his employment was substantially motivated by any alleged disability. In contrast, Group Health presented ample evidence reflecting that Washington's termination decision was motivated by nothing other than legitimate non-discriminatory business reasons. Sims testified that he decided to end Washington's probationary employment because Washington was argumentative and failed to adhere to established procedures, protocols, and directives. Indeed, at trial Washington conceded that he had expressed anger towards Sims when Sims informed Washington that he needed to remain in the office until 2:30 p.m.

each day and effectively refused Sims' directive. (RP 242-243) Such defiant behavior alone was reasonable grounds for Washington's termination. Moreover, Sims credibly denied knowing that Washington was disabled and Washington produced no documentation showing that he notified Group Health about any disability. In fact, in the August 9, 2012 email Washington sent to Sims *after* Sims made the decision to terminate Washington's employment, Washington states only that he needed to leave work early on a single day in order to attend a doctor appointment. (Ex. 102)

Burton and others similarly testified that Washington was argumentative, resisted Group Health's established policies, and was a poor fit for the IT team. After Washington was terminated, Group Health's Human-Resources personnel conducted an investigation and confirmed these facts, concluding that Washington's termination was well-supported by legitimate and non-discriminatory reasons. (Ex. 12)

As with his failure-to-accommodate-disability claim, Washington seeks a new trial on his disparate treatment claim because the jury's verdict does not support *his* version of the evidence as presented at trial. The record is clear, however, that Group Health presented ample credible evidence in direct conflict with Washington's claims. As such, there was substantial evidence presented at trial from which the jury could reasonably conclude

that Washington was not disabled and that Group Health's decision to terminate his employment was not substantially motivated by any disability.

The trial court did not abuse its discretion in denying Washington's motion for new trial. The verdict is well supported by substantial evidence presented at trial and should not be disturbed by this Court. *See Lodis*, 172 Wn. App. at 862 (verdict must be affirmed when supported by substantial evidence viewed in the light most favorable to the non-moving party).

2. Washington Was Not Prejudiced by Group Health's Introduction of Evidence of Washington's Bankruptcy Or by its Cross Examination of Dr. Sullivan.

Washington claims that Group Health engaged in prejudicial misconduct by confronting Washington on cross-examination with evidence related to his bankruptcy filings.¹² *See* Appellant's Brief, at 18-19. He additionally claims that he was similarly prejudiced when Group Health asked Dr. Sullivan during cross-examination whether it was possible that Washington had manipulated him into a depression diagnosis to bolster his claims against Group Health. *See id.*, at 24-25. Neither of Washington's claims has any merit, and the trial court did not abuse its discretion in

¹² To the extent that Washington was caught off guard when confronted with evidence of his bankruptcy filings at trial, he has only himself to blame. Washington chose not to disclose his bankruptcy filing during discovery, leaving Group Health to discover it on its own. *See* Appendix to Appellant's Brief, at 16 (Interrogatory No. 7).

denying Washington's request for a new trial on these grounds. (CP 651-699, 713)

The trial court may grant a new trial where the prevailing party's misconduct materially affects the losing party's substantial rights. *See* CR 59(a)(2); *Teter v. Deck*, 174 Wn.2d 207, 222, 274 P.3d 336 (2012). To prevail, the losing party must show that: (1) the conduct complained of is misconduct; (2) the misconduct is prejudicial; (3) the moving party objected to the misconduct at trial; and (4) the misconduct was not cured by the court's instructions." *Teter*, 174 Wn.2d at 226. A trial court's decision on a motion for a new trial on such grounds is reviewed for an abuse of discretion. *Teter*, 174 Wn.2d at 222. "In this context, [the appellate court applies] a specialized test for an abuse of discretion and ask[s] whether the misconduct has created such a feeling of prejudice . . . in the minds of the jury as to prevent a litigant from having a fair trial." *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000) (internal quotations and citation omitted). Washington can make no such showing here.

Evidence of Washington's bankruptcy filing and sworn declarations was relevant to the veracity of the statements he made to Group Health when applying for employment, his overall credibility, his claim for economic damages, his claim for emotional distress damages, and Group Health's

after-acquired evidence defense.¹³ *See* ER 402. Such evidence was additionally admissible character evidence under ER 404(b) and 608(b)(1). Further, Group Health was within its rights to challenge Washington’s credibility by exposing on cross-examination what it reasonably believed to be prior false statements made under oath earlier in the proceedings. *See* ER 611(b) (cross examination may exceed the scope of direct with respect to “matters affecting the credibility of the witness”). Notably, Group Health’s inquiries regarding Washington’s bankruptcy received no objection from Washington’s counsel. (RP 220-223) For each of these reasons, Washington cannot show that Group Health engaged in misconduct in offering the evidence such that the trial court abused its discretion in denying Washington’s request for a new trial based on introduction of evidence of Washington’s bankruptcy.

Similarly, the trial court did not abuse its discretion in denying Washington’s request for a new trial based on Group Health’s cross-examination of Dr. Sullivan. Group Health’s counsel properly elicited from Dr. Sullivan that it was possible he had been duped by Washington into diagnosing him with depression based on stressors related to a “legal battle” with Group Health that had not yet ensued. (RP 471-472; Ex. 31) The

¹³ *See* CP 649 (Jury Instruction regarding Group Health’s After-Acquired Evidence Defense)

evidence suggests that this is exactly what occurred; there was no misrepresentation of any facts. Cross examination was based on Dr. Sullivan's records (or those of his resident) and the undisputed fact that the lawsuit was not filed until May 15, 2013. *Id.* Furthermore, the inquiries Washington disputes on appeal were asked of Dr. Sullivan at trial without any objection from Washington. (RP 471-472)

In his opening brief, Washington argues that he had submitted an intake questionnaire to the Equal Employment Opportunity Commission ("EEOC") at the time he sought treatment from Dr. Sullivan. *See* Appellant's Brief, at 23. If Washington believed such actions constituted the fierce "legal battle" he reported to Dr. Sullivan, he was free to have made that argument on re-direct examination. The fact that he did not do so suggests that neither he nor his attorney believed it to be meritorious.

For each of these reasons, Washington cannot show that Group Health engaged in misconduct in its cross examination of Dr. Sullivan at trial. The trial court did not abuse its discretion in denying Washington's request for a new trial.

C. Washington Failed to Challenge Statements Made in Group Health's Closing Argument in its Motion for New Trial and Was Not Unduly Prejudiced by Such Statements.

In his appellate briefing, Washington asserts for the first time that he was unduly prejudiced by statements made by counsel for Group Health

during closing argument related to his personal life, bankruptcy proceedings, and military service. *See* Appellant’s Brief, at 26. Washington’s challenge need not be considered by this Court on appeal where it was not raised before the trial Court and is without merit in any case.

a. Washington Failed to Object or Otherwise Raise These Issues in His Motion for New Trial.

“Issues not raised before the trial court will not be considered for the first time on appeal.” *Brown v. Safeway Stores*, 94 Wn.2d 359, 369, 617 P.2d 704 (1980); RAP 2.5(a) (court may decline to consider new issues raised by an appellant that were not raised to the trial court). As Washington concedes in his opening brief, “absent an objection to counsel’s remarks, the issue of misconduct cannot be raised for the first time in a motion for a new trial unless the misconduct is so flagrant that no instruction could have cured the prejudicial effect.” Appellant’s Brief, at 26 (quoting *Warren v. Hart*, 71 Wn.2d 512, 518-19, 429 P.2d 873 (1967)).

Here, Washington challenges a number of statements made by counsel for Group Health during closing argument at trial related to Washington’s personal life and credibility (*see* Appellant’s Brief, at 18, 22, 25), bankruptcy proceedings (*see id.*, at 19, 25), military service (*see id.*, at 18, 22, 25), as well as with regard to the testimony of Drs. Raghu and

Sullivan (*id.*, at 4-5, 22, 24). Notably, however, for each such challenged statement, the record of proceeding reflect that no objection was made by Washington during the proceedings. (Supplemental RP 1-10). Further, Washington did not challenge any of the statements in his motion for new trial. (CP 651-699) Because Washington failed to timely challenge Group Health’s statements before the trial court, the issue need not be considered by this Court. *See, e.g.*, RAP 2.5(a) (court may decline to consider new issues raised by an appellant that were not raised to the trial court); ***Brown v. Safeway Stores***, 94 Wn.2d 359, 369, 617 P.2d 704 (1980) (“Issues not raised before the trial court will not be considered for the first time on appeal.”).

b. Washington Cannot Show that He Was Unduly Prejudiced by Statements Made in Group Health’s Closing Argument.

Even if this Court were to consider Washington’s claim that Group Health’s counsel engaged in prejudicial misconduct by making assertions during closing argument warranting a new trial, Washington’s assertion has no merit and should be denied. As stated above, to prevail on the basis of prejudicial misconduct by opposing party, the losing party must show that: (1) the conduct complained of is misconduct; (2) the misconduct is prejudicial; (3) the moving party objected to the misconduct at trial; and (4) the misconduct was not cured by the court’s instructions. ***Teter***, 174 Wn.2d

at 226. It must further show that the misconduct created such a feeling of prejudice in the minds of the jury as to prevent a litigant from having a fair trial.” *Aluminum Co. of Am.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000) (internal quotations and citation omitted).

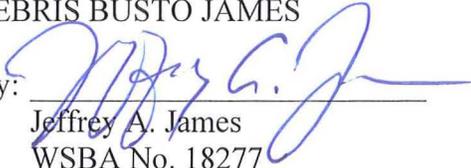
Washington can make no such showing here where he failed to object to any of the challenged statements at trial. (Supplemental RP 1-10) Further, though certainly (and appropriately) argumentative, all of the statements find support in the record evidence presented at trial. Washington additionally can make no showing that the statements created such a feeling of prejudice in the minds of the jury so as to prevent him from receiving a fair trial. As described in detail above, the jury had ample evidence to conclude that Group Health did not discriminate against Washington. Washington introduced no evidence supporting his own self-serving testimony that he had a disability that impacted his ability to perform his job at Group Health or put Group Health on notice of the same. Group Health, in turn, introduced substantial evidence showing that it had no notice of any disability requiring accommodation for Washington and that it terminated Washington for legitimate and non-discriminatory reasons. There was no prejudicial misconduct and judgment for Group Health should be affirmed.

V. CONCLUSION

Substantial evidence supports the jury's verdict and no prejudicial misconduct took place during trial. This Court should affirm the jury's verdict and deny Washington's appeal.

Dated this 31st day of May, 2016.

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KCSC Case No: 13-2-19841-0

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

VICTOR WASHINGTON,
Appellant,

v.

GROUP HEALTH
COOPERATIVE,
Respondent.

CERTIFICATE OF SERVICE

I, Holly Holman, certify under penalty of perjury under the laws of the United States and of the State of Washington that on May 31, 2016, I caused to be served the attached Respondent's Brief to the party listed below in the manner shown next to their name:

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/s/ Holly Holman
Holly Holman