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NO. ~~360907-7-II~~

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COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION TWO

HELEN TUCKER-SLATER,

Appellant,

vs.

CITY OF LAKEWOOD,

Respondent.

APPELLANT'S OPENING BRIEF

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I. SUMMARY OF APPEAL

Defendant, City of Lakewood, abruptly terminated Plaintiff Helen Slater on August 29, 2002, immediately after Slater sent an email complaining about the use of the "N" word in the workplace and retaliatory conduct. Defendant admitted that Slater's complaint about the use of the "N" word in the workplace on August 23, 2002, was a factor in the decision to discharge Slater. RP 876-77.

The trial court granted summary judgment dismissing the race, age, and disability discrimination claims. Slater did not challenge and agreed to the dismissal of these claims. The trial court further dismissed the racially hostile work environment claim on summary judgment, but initially left the retaliatory hostile work environment and the retaliatory discharge claim for trial. Upon defendant's motion for reconsideration, the trial court granted summary judgment on Slater's retaliatory hostile work environment claim, specifically ruling that only the retaliatory discharge claim would be left for trial.

The chronology in this case compels the conclusion that Ms. Slater was terminated in retaliation for complaining about conduct she believed to be unlawful employment practices:

Friday	August 23	Co-worker openly uses the "N" word in the workplace. Slater immediately complains to the city attorney.
Monday –	August 26	Slater does not report to work.
Wednesday –	August 28-	Slater puts complaint in writing to city attorney and her supervisor.
Thursday –	August 29	Slater abruptly terminated in the morning.

Given the strong likelihood that Slater would prevail on her retaliatory discharge claim, the defense turned this retaliation trial into a race discrimination trial before the all white jury. This case demonstrates that when a judge gives conflicting jury instruction, jury instructions that misstate the law, and parcels the protected activity into a single complaint about the use of the "N" word in the workplace, injustice can follow.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in giving Instruction 11.
2. The trial court erred in giving Instruction 13.
3. The trial court erred in giving Instruction 15.
4. The trial court erred in giving Instruction 18.
5. The trial court erred in giving Instruction 19.
6. The trial court erred in giving Instruction 20.
7. The trial court erred in giving Instruction 21.
8. The trial court erred in giving Instruction 22.
9. The trial court erred in excluding from the jury's consideration the sum total of the protected activity, the August 28, 2002 email.
10. The trial court erred in admitting hearsay testimony regarding the use of the "N" word by nonparty individuals outside the workplace.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in granting the City's Motion for Reconsideration dismissing Slater's Retaliatory Hostile Work Environment Claim because the claim was "subsumed by the retaliatory termination claim?"
2. Was jury Instruction 11 erroneous in telling the jury that Slater could only recover for unlawful retaliation if she proved that she was opposing what she reasonably believed to be discrimination on the basis of race?
3. Was jury Instruction 11 erroneous in telling the jury that Slater could only recover for unlawful retaliation if a substantial factor in the decision to terminate was Slater's opposition to what she reasonably believed to be discrimination on the basis of race?
4. Did the trial court err in giving Instruction 13 limiting the jury's consideration of whether there was retaliation against Slater to the "N" word incident on August 23, 2002?
5. Did the trial court err in giving Instruction 13 limiting the jury's consideration of whether there was retaliation against Slater to Slater's discharge from employment on August 29, 2002?
6. Did the trial court err in giving Instruction 15 telling the jury that Slater contended that the use of the "N" word on August 23, 2002 was race discrimination and that it must find that the City did not retaliate against Slater if the jury determined that no reasonable person could have considered the coworker's use of the "N" word on August 23 to be race discrimination?

7. Was Jury Instruction 18 an erroneous statement of the law and a comment on the evidence?
8. Was Jury Instruction 19 erroneous and confusing because it incorrectly stated the applicable Washington law regarding protected activity?
9. Was jury Instruction 20 erroneous and confusing in telling the jury that Slater could not recover for unlawful retaliation unless she proved that the City unlawfully discriminated against her and in its incorrect definition of a legitimate, nondiscriminatory reason for discharging an employee?
10. Was jury Instruction 21 an impermissible comment on evidence?
11. Did the trial court err in giving Instruction 22 because it misstates the law and confused the jury?

IV. STATEMENT OF THE CASE

A. The Players

Helen Tucker-Slater (BF)- Victim Advocate

Dan Heid (WM)- former City Attorney (left in December 2001)

Anneke Berry (WF)- Former Assistant City Attorney

Anita Booker-Hay (BF)- Assistant City Attorney, Slater's immediate supervisor

Michelle Galaz (WF)- Former full time Victim Advocate

Karen Burgess (WF) – Former part-time Victim Advocate

Rainbow Carrington Thomas (AF) – Former Victim Advocate assistant

Heidi Horst Wachter – Current City Attorney (2/02 to present)

Debra Young – Human Resources Director

B. Employment History

Helen Tucker-Slater is a 60 year-old African American female. CP 181-182; RP 282. Slater received her Bachelor of Science degree in Community Health with a minor in Psychology from Central Washington University (“CWU”) in 1999 at the age of 52. She received her Masters of Science degree in Physical Education, Health & Leisure studies with a specialization in Addictions from CWU in August 2000. RP 290-291. Slater also has an Associate Degree in Criminal Justice from Pierce Community College. She maintained a grade point average of 3.5 or above in all of her educational pursuits beyond high school. CP 182 .

Slater worked as an intern for the City of Lakewood in 1997. RP 284. She began her employment with the City of Lakewood as a Community Advocate Interviewer on November 1, 2000 as a contract employee. RP 300. In this position, Slater was responsible for interviewing victims of domestic violence over 18 years of age. The interview notes were thereafter used by the legal department to assist in prosecuting offenders. CP 182; RP 302; 311.

As a result of Slater’s successful work as a contract employee, on November 20, 2001, the City hired her as a Victim Advocate in a permanent position. CP 182; RP 324. Her employment as a Victim Advocate was subject to a six- (6) month probationary period. However, Slater continued to be paid with

grant funds and her employment through March 31, 2002 was governed by the parameters of the grant, interviewing female domestic violence victims over the age of 18. CP 182; RP 322; 326; 474.

1. Fall 2001 Incident

In the fall 2001, Slater was summoned into the office of then City Attorney, Dan Heid. Also present in Heid's office was an assistant City Attorney, Anneke Berry. The two attorneys engaged Slater in a conversation where both attorneys openly used the N-word. According to Slater, the two attorneys initially quizzed her about the offensiveness of the word and why an African-American would use the word. Thereafter they engaged in a general discussion openly repeating the word "Nigger." The actual word was used several times in this conversation and was not limited to what the witness had said in court. CP 183; Ex. # 61.

Slater immediately left the office, went home and telephoned her supervisor, Anita Booker-Hay, upset and complaining about the offensiveness of the conduct and the fact that she had been subjected to hearing the use of the word not only from lawyers, but from the head of the legal department. Booker-Hay is African-American. Heid was Booker-Hay's immediate supervisor. CP 183; RP 766.

Rather than addressing the situation, Booker-Hay placed the onus on Slater to confront the City Attorney or to go to Human Resources. RP 792-793. Booker-Hay did neither and simply ignored the situation and her responsibilities.

CP 184; RP 767. Booker-Hay testified that Slater was upset about the incident, "concerned enough about it that she called me at home." RP 766.

The City of Lakewood did not have a policy in 2001 or 2006 addressing racial harassment. CP 239, p. 42, Dep. of Debra Jane Young, RP 797. According to the City's Sexual Harassment Policy, an employee believing he or she is being sexually harassed should report to the conduct to her immediate supervisor. RP 796. The policy requires the supervisor to promptly investigate the complaint. *Id.*

2. Attempted Change in Work Schedule

On or about January 30, 2002, Booker-Hay attempted to revise Slater's work schedule, from 10:00 a.m. until 6:30 p.m. to 8:30 a.m. until 5 p.m. Slater had worked the different schedule because of her disability. RP 334-337. When Slater was unable to get Booker-Hay to continue her schedule accommodation, Slater spoke to Mike McKenzie, then acting City Attorney. McKenzie advised Slater that he saw no reason why her hours needed to be changed and authorized her to continue her same work schedule. RP 351-353; Ex. # 8. When Slater later spoke to Booker-Hay on January 31, 2002, about her conversation with McKenzie, Booker-Hay, visibly upset, advised Slater that it was okay and that she [Slater] probably would not pass probation. CP 186-187; RP 357-358.

In January 2002, Slater was diagnosed with obstructive sleep apnea. Even though she had suffered from sleep apnea before her employment with the City of Lakewood, she had never had an obstruction. Swollen tonsils caused the

obstruction. On February 28, 2002, she began a three-week medical leave for surgery related to her obstructive sleep apnea and a period of recuperation. RP 376. She initially returned to work on a part-time basis for a couple of weeks. She returned to full-time employment in April 2002. CP 187; RP 380-381.

3. Change in Job Duties

In January 2002, Anita Booker-Hay, the supervisor for the Victim Advocates, decided to revise the duties of the various victim advocates and the support person. Slater's job description went through several iterations with the final version being presented to her on or about April 5, 2002. CP 185-186; RP 358-364.

As of April 8, 2002, Slater's responsibilities for contact more than quadrupled. Slater maintained a log of her work progress on the in-custody calendar after she was first notified that her job duties were being changed to require her to contact domestic violence victims where the defendants were to be arraigned on Monday. CP 186; RP 415-416. The following is taken from Slater's log and is illustrative of her workload for the Tuesday arraignment calendar:

<u>DATE</u>	<u>TOTAL CASES</u>	<u>TOTAL CONTACTS</u>
April 9, 2002	52	38
April 16, 2002	52	33
April 23, 2002	83	66
April 30, 2002	64	40
May 7, 2002	105	78
May 14, 2002	95	69

CP 186; RP 478; Ex. # 54.

4. May 23, 2002 Performance Evaluation and First Extension

In May 2002, Slater's immediate supervisor, Booker-Hay presented Slater with her six-month probationary evaluation. In its conclusion, the review stated:

"Helen has provided great service to the Lakewood Community as a Community Advocate Interviewer. The next step in her evolution as a Victim Advocate will be to learn how all of the legal department's processes work and how she can best fit into those necessary parameters. Because she was out of the office for some time following the adoption of the new victim advocate protocols, she has not had a lot of time to learn to perform all of the duties assigned. Based upon this, I recommend an extension of her probationary period for another three months. During that time period, I will have a better opportunity to observe Helen and her performance of specific duties."

CP 211-212; Ex. # 53.

The February 2002 absence referred to in the performance evaluation was for the previously mentioned surgery and was covered by the Family Medical Leave Act. CP 210;187.

Just as Booker-Hay had telegraphed on January 31, 2002, when the Acting City Attorney overruled the attempted change in Slater's schedule, Slater did not pass probation. Rather, her probation was extended an additional three (3) months, from May 20, 2002, until August 20, 2002. CP 188; RP 465.

The regular Monday morning staff meeting began at 9:00 a.m. and generally ran 35-45 minutes. The in-custody calendar frequently was not available before 8 a.m. on Monday morning. The legal assistant created and worked the

new files for that calendar before Slater could have access to the new files. The new cases would not have been on the calendar, which was run on Thursday or Friday of the previous week because those arrests occurred on Friday evening, Saturday, and Sunday, after the previously runned calendar. CP 188. Because of this, there was no way of determining the number of cases that would appear on the Monday calendar. CP 189.

Further an advocate could not determine whether or not there were victims or witnesses who were connected to the case without actually reviewing the particular file. In the revised job description dated 04/05/02, Slater was directed: **"It does not matter whether the case is an arraignment or pretrial. Be warned that the court-generated calendar does not always list all of the charges. You will need to look at the actual criminal file and compare the calendar with the charging document."** CP 189; RP 477; Ex. # 54.

Slater's log revealed she had performed the following work on the Monday in-custody calendar (which everyone acknowledged was the largest load) up to the performance evaluation:

February 4, 2002	28 cases	1 dv
March 25, 2002	33 cases	6 dv
April 1, 2002	23 cases	0 dv
April 8, 2002	38 cases	Arr + PTR 23
April 15, 2002	49 cases	Arr + PTR 28
April 22, 2002	29 cases	Arr + PTR 22
April 29, 2002	42 cases	Arr + PTR 23
May 6, 2002	52 cases	Arr + PTR 33
May 13, 2002	32 cases	Arr + PTR 17

May 20, 2002

30 cases

Arr + PTR 20

CP 189; RP 457-459; Ex. # 54.

In addition to making the contacts on the above cases, Slater was required to pull the files in order to make the contacts. The other victim advocates received assistance from the Rainbow Thomas, the Victim Advocate Assistant. Thomas refused to provide any assistance to Slater. CP 186;189.

Booker-Hay never reviewed Slater's log or the files assigned to Slater to verify the quantity of work Slater performed. Nor did she dispute Slater's log. RP 803-805; 849. Yet, she reported to the City Attorney that she had quantified the workloads and that Slater was actually doing less work than the other victim advocates. CP 189-190. In each file, there was documentation reflecting who made the contact, the number of contact attempts, and the date, time, and result of the contact. CP 190; RP 484. Booker-Hay testified that Slater was very good with documentation. RP 803.

In May 2002, Slater complained about the performance appraisal and extension of the probation with the new City Attorney, then Heidi Horst (now Heidi Wachter). Slater complained that she was the oldest, the only black, and that she was required to do more work than the other two victims' advocates, who are white and younger. She requested assistance from the staff support person who refused assistance to Slater while providing assistance to Slater's coworkers. Slater complained several times about the lack of clerical assistance and the

heavier workload. Nothing was done to remedy the situation. CP 190; RP 383-384; 420-424.

5. Second Probation Extension – August 20 – November 20, 2002

On July 1, 2002, Slater met with Wachter and her supervisor, Booker-Hay regarding a second extension of the probationary period for an additional 3 months. This would mean a total of 12 months probation. During that meeting Slater again complained about unlawful employment practices. CP 190.

On July 29, 2002, Booker-Hay extended the probationary period an additional three months. Wachter and the City's Human Resources Director, Debra Young, approved the second extension. At that time, Booker-Hay advised Slater that **"I explained to her that for the last few weeks she had been doing well and that to continue on that path would be useful."** CP 191; Ex. # 58.

Between July 29, 2002, and August 29, 2002, the date of Slater's termination, there had been no further meetings or complaints about Slater's work performance. Indeed, the City presented nothing to demonstrate that there were issues with her performance during this time or a deterioration of her performance. RP 492.

6. August 23, 2002 Racial Slur Incident

On Friday, August 23, 2002, the victims' advocate assistant, Rainbow Thomas, approached Slater. Thomas, who refused to provide assistance to Slater

and who had demonstrated some hostility towards Slater, openly and unnecessarily used the word "Nigger", telling Slater, "She called him a Nigger." CP 192; RP 557. There was no need for the assistant to repeat what was contained in the police report as Slater had previously worked the file and was familiar with the contents of the file. CP 192; RP 557.

Moreover, at a conference the previous year, Slater had explained to Thomas that the use of that word was very offensive to her and she did not want that word repeated in her presence. CP 192; RP 557. Booker-Hay testified that there was some tension between Thomas and Slater. RP 762-763.

Notwithstanding this admonition and Slater's prior complaint to her supervisor about the use of the word in the workplace, Thomas explicitly and unnecessarily uttered the word. CP 192; RP 558.

Slater immediately, on August 23, complained to Wachter, the City Attorney. CP 192; RP 559. Slater's immediate supervisor, Booker-Hay, was not present in the office at the time. RP 764, 796. Wachter questioned Slater about the context in which the racial slur was made. Slater, who was already agitated about Thomas' conduct, became more upset and began experiencing cluster migraines. She advised Wachter that she was getting a migraine and told her that she was leaving for the day. CP 192; RP 559-560.

Wachter testified that Thomas' use of the "N" word in the workplace in the manner that she did was inappropriate. RP 882. Yet Thomas was never

counseled, never reprimanded, never investigated to determine if she had engaged in similar conduct, and she never apologized to Slater. RP 883-885. Indeed, no one ever apologized to Slater or talked to her about what kind of work environment she could expect at the City. RP 879.

7. August 28, 2002 Email to Supervisors

Slater was absent from work on Monday, August 26. Having heard nothing further from anyone about the August 23 incident, on August 28, 2002, Slater sent an email to Booker-Hay and the Wachter regarding her previous complaint and the recent complaint about the use of racial slurs in the workplace and retaliation. CP 193; RP 556. Slater testified that she wanted to put her complaints in writing because her supervisor had ignored her earlier complaint and nothing was done to remedy the situation. Her earlier verbal complaint to Booker-Hay and to Wachter regarding the fall 2001 incident resulted in no action from the City. CP 193; RP 249; 556.

The August 28 email sent to Wachter and Booker-Hay stated:

Dear Madams:

I reported in the Fall 2001 to Anita Booker-Hay that racial slurs were being used by personnel in the Legal Department, namely Dan Hyde [sic] and Anneke Berry. I soon after began to suffer reprisals from that information. My Hyde would not give me a reference unless I continued to work for the City of Lakewood. Anneke Berry started questioning my professionalism and stated that I was not performing by [sic] duties in a timely fashion, namely the Monday a.m. in-custody calendar, which was not true. That information found its' [sic] way into my six-month probation wherein I was not passed

I had previously applied for the position of Ombudsman in September 2001 and was given favorable references from Dan Hyde, Anita Booker-Hay and Chief Saunders. Later when the position was re-opened, Chief Saunders informed me in May 2002 that he could not recommend me for the position and had been called by Human Resources and told not to.

I mentioned to Heidi Horst in May 2002 that I was concerned that nothing had been done about the racial slurs and her comment was that she needed to know exactly and in what context the racial slurs were made. I have tried to forget that anguished day. I had worked for the city in a contract position for over a year and for reasons I suspect are retaliatory in nature, I am unable to pass probation. The job description was revised twice but did not go into effect until after March 2002. I was not passed on probation by Anita Booker-Hay because I had been out for approved emergency surgery on my throat. I was extended another three (3) months and when I questioned her about the probation she [sic] comment was that there was no grievances or appeals for not passing probation. I commented to the unfairness of that extension. How can one be penalized for taking family medical leave when it was totally necessary.

On August 23, 2002 Rainbow Carrington-Thomas engaged me in a conversation using racial slurs. I reported this information to Heidi Horst and again she was concerned about the context in which the racial slurs were made.

I am deeply concerned that I have brought to your attention on more than once [sic] occasion my feelings that the work environment has become a hostile working place and was told by Heidi and Anita that it was not. As a result of reporting these concerns, retaliation and reprisals have been the result. It is unconscionable that this type of behavior has been condoned and tolerated.

I am experiencing cluster migraines which only subside for a few hours since the horrible ordeal that I was put through on Friday. I am now leaving for the day in hopes of obtaining some relief with increased dosages of pain medications.

Sincerely

Helen P. Tucker-Slater

cc: Beverly Johnson-Grant
Law Offices of Grant & Grant

CP 228; Ex. # 61.

8. August 29, 2002 Termination

On August 29, 2002, Wachter, Booker-Hay, and the City's Human Resources Director, Debra Young, summoned Slater to an unscheduled meeting. Wachter told Slater that she "was not going to work out" and that they were going to let her go. CP 193; RP 562. Wachter testified that she made the decision to terminate Slater's employment and that the decision was made without discussion with Slater's immediate supervisor, Booker-Hay. CP 180; RP 885-886.

Booker-Hay confirmed that Wachter did not discuss the decision to terminate Slater prior to communicating the decision to Booker-Hay. RP 776. Wachter further testified that she made the decision on the same day that Slater was terminated, August 29, RP 885-886, and that Slater's complaint about the coworker's use of the "N" word August 23 was a factor in her decision to terminate her employment. RP 876-877.

C. Trial Court Proceedings

1. Pretrial Proceedings

Slater initiated this lawsuit complaining of age discrimination, disability discrimination, race discrimination, racially hostile environment, and retaliation

claims. The retaliation claims included a retaliatory hostile work environment and retaliatory discharge.

Defendant untimely moved for summary judgment seeking dismissal of plaintiff's complaint and all of her claims. Slater did not challenge and agreed to the dismissal of the following: (1) race discrimination disparate treatment claim, (2) the age discrimination claim, and (3) the disability disparate treatment claim. She challenged the dismissal of the race-based hostile work environment claim, and the retaliation claim.

On September 20, 2006, the trial court granted summary judgment dismissing all of plaintiff's claims except the retaliation claims, specifically, the hostile work environment and retaliatory discharge.

On defendant's motion for reconsideration seeking dismissal of the retaliatory hostile work environment, the trial granted summary judgment dismissing the retaliatory hostile work environment claim stating that the environment claim was "subsumed by the retaliatory discharge claim." The trial court, over Slater's objections, further ruled that only the retaliatory discharge claim will be tried. CP 338.

2. *The Jury Instructions*

Several jury instructions are fraught with legal error and the errors were sufficiently prejudicial to warrant reversal of the judgment against Slater on her retaliation claim.

Namely, the trial court erred in giving Instruction 11 because the instruction (1) did not properly inform the jury of the applicable Washington law (under which an employee is afforded protection from adverse employment actions when she complains in good faith about conduct she believes to be unlawful employment practices, including unlawful retaliatory conduct); (2) was not supported by substantial evidence or any evidence; and (3) was confusing and misleading to the jury (which asked a very confused question about it and rendered a confused verdict).

The trial court also erred in giving Instruction 13 because the instruction incorrectly excluded from the jury's deliberation evidence presented to the jury regarding other employees' use of the "N" word in the workplace. The instruction further amounted to a comment on the evidence.

The trial court erred in giving Instruction 15 because the instruction misstates the law in that it directs the jury to find that there was no retaliation if no reasonable person could conclude that the coworker's use of the "N" word in the workplace was race discrimination. The instruction failed to properly instruct the jury on retaliation and protected activity and lowered the City's burden below the standards established by Washington law.

The trial court erred in giving Instruction 18 because the instruction amounts to a comment on the evidence.

The trial court erred in giving Instruction 19 because the instruction did not properly inform the jury of the applicable Washington law under which an employee's complaints about retaliation are also protected activity. In this case, Slater's August 28, 2002 email complaints were broader than complaints about what she reasonably believed to be a racially hostile work environment. She also complained about the retaliation that followed her complaint about Booker-Hays' attempt to undo the accommodation the City had made previously for her disability. In this case, the trial court erroneously instructed the jury that Slater's complaints had to be about racial discrimination in order to be a protected activity.

The trial court erred in giving Instruction 20 because the instruction did not properly inform the jury of the applicable Washington law regarding unlawful retaliation and was not supported by substantial evidence or any evidence. The instruction gave the jury free rein to find for the City unless Slater proved that the City unlawfully discriminated against her, rather than the City unlawfully retaliated against her.

The trial court erred in giving Instruction 21 because the instruction did not properly inform the jury of the applicable Washington law, which proscribes unlawful employment practices. The instruction also amounts to a comment on the evidence.

The trial court erred in giving Instruction 22 because the instruction did not properly inform the jury of the applicable Washington law, which proscribes

unlawful employment practices. The instruction also amounts to a comment on the evidence.

3. Admission of Hearsay Evidence

Over plaintiff's objections, the trial court admitted the following inadmissible evidence: Police report of Michael Fuller, Ex. # 126; and an out-of-court unsworn statement by Dan Heid dated September 25, 2002, Ex. # 113. This evidence was prejudicial to plaintiff.

4. Post-trial Proceedings

Slater filed a post-trial motion seeking a new trial after uncovering evidence of racial bias on behalf of three (3) jurors. The trial court denied the motion for a new trial and declined to hold an evidentiary hearing to determine jury bias. The court entered judgment for defendant.

V. ARGUMENT

A. Standards of Review

On an appeal from summary judgment, the standard of review is *de novo*. The appellate court engages in the same inquiry as the trial court. See e.g., ***Hisle v. Todd Pac. Shipyards Corp.***, 151 Wn.2d 853, 93 P.3d 108 (2004). All facts and reasonable inferences therefrom are construed in the light most favorable to the nonmoving party. ***Vallandigham v. Clover Park Sch. Dist. No. 400***, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

This Court's review is *de novo* when reviewing jury instructions to determine whether they correctly and completely informed the jury of the applicable law. See, e.g., **Griffin v. West RS, Inc.**, 143 Wn.2d 81, 87, 18 P.3d 558 (2002). Jury instructions are not improper or insufficient if they are supported by substantial evidence, are not misleading, allow the parties to argue their theories of the case and, when read as a whole, properly inform the jury of the applicable law. See, e.g., **State v. Clausing**, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002); **Goodman v. Boeing Co.**, 75 Wash. App. 60, 68, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401 (1995). When determining whether substantial evidence supports an instruction, review is *de novo*, and it "is prejudicial error to submit an issue to the jury that is not warranted by the evidence. **Clausing**, 147 Wn.2d at 626-27. Finally, the propriety of giving a misleading or confusing instruction is reviewed for abuse of discretion; giving a misleading instruction is not reversible error unless it affects or presumptively affects the verdict. See, e.g., **Goodman**, 75 Wash.App. at 68.

The admission or exclusion of evidence is reviewed for an abuse of discretion. See, e.g., **Washburn v. Beatt Equip. Co.**, 120 Wn.2d 246, 283, 840 P.2d 860 (1992).

B. The Trial Court Erred in Granting Summary Judgment on The Retaliatory Hostile Work Environment Claim Because The Hostile Work Environment Was Not Subsumed in the Retaliatory Discharge Claim.

The trial court erred when it granted summary judgment dismissing Slater's retaliatory hostile work environment claim indicating that the hostile work environment claim was "subsumed" in the retaliatory discharge claim, and that only the retaliatory discharge would go to trial.

The standard of review for this Court is *de novo* review, undertaking the same analysis as did the trial court. In considering the propriety of a summary judgment, the Court is obliged to accept the facts alleged by Slater as true, and review those allegations in the light most favorable to her. ***Vallandigham v. Clover Park School District No. 400***, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

1. A Retaliation-Based Hostile Work Environment is Cognizable Under RCW 49.60.210.

Whether RCW 49.60.210 supports a retaliation-based hostile work environment claim is an issue of first impression in this state. In ***Robel v. Roundup Corp.***, 148 Wn.2d 35, 43, 59 P.3d 611 (2002), the Washington Supreme Court, in a case of first impression in this state, held that the antidiscrimination statute supports a disability-based hostile work environment claim. In determining whether the antidiscrimination statute supported a disability claim based on a hostile work environment, the court looked to federal cases construing analogous federal statutes. *Id.*¹

¹ Washington has not yet recognized a cause of action for retaliatory hostile work environment. However, our Supreme Court in ***Antonious v. King County***, 153 Wn.2d 256, 270, 103 P.3d 729 (2004) adopted the analysis in ***Nat'l R.R. Passenger Corp. v. Morgan***, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) for liability on a hostile work environment claim. ***Morgan*** involved a

A retaliation claim predicated upon a hostile work environment is cognizable under RCW 49.60.210.²

The statutory basis for this claims is the notion that discriminatory ridicule or abuse can so infect a workplace that it alters the terms or conditions of the plaintiff's employment. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986). Harassment is obviously actionable when based on race and gender. Harassment as retaliation for engaging in protected activity is no different—it is the paradigm of discriminatory treated that is based on retaliatory motive and is reasonably likely to deter the complainant and others from engaging in protected activity.

A plaintiff in a retaliation-based hostile work environment case must prove (1) that she complained about conduct she reasonably believed to be unlawful (protected activity); (2) that the harassment was unwelcome; (3) that it was

claim of employment discrimination based on race, while *Antonious* involved a claim of sexual harassment. Moreover, in *McClarty v. Totem Electric Co.*, 157 Wn.2d 214, ____ P.3d ____ (2006), the Washington Supreme Court reaffirmed the doctrine of looking to federal courts and Title VII for guidance in interpreting the Washington Law Against Discrimination ("WLAD"). The Court noted that "[t]his court has held that federal law is instructive with regard to our state discrimination laws." The Court further noted in a disability case that it was appropriate to adopt the federal definition of disability given that the federal and Washington laws were enacted nearly contemporaneously and directed at the same issue. *McClarty v. Totem Electric*, 157 Wn.2d at 228, citing *Clarke v. Shoreline School District No. 412*, 106 Wn. 2d 102, 118, 720 P.2d 793 (1986) (when Washington statutes or regulations have the same purpose as their federal counterparts, we will look to federal decisions to determine the appropriate construction).

² See *Jensen v. Potter*, 435 F.3d 444 (3rd Cir. 2005); *Noviello v. City of Boston*, 398 F.3d 76, 90 (1st Cir. 2005); *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001); *Ray v. Henderson*, 217 F.3d 1234, 1244-45 (9th Cir. 2000); *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 446 (2nd Cir. 1999); *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998); *Knox v. Indiana*,

because of her protected activity; (4) that it affected the terms or conditions of employment; and (5) that it is imputable to the employer. *Robel v. Roundup Corp.*, 148 Wn.2d at 45 (applying *Glasgow v. Georgia Pacific Corp.*, 103 Wn.2d 401, 712, 693 P.2d 708 (1985) factors to disability-based hostile work environment). See also *Jensen v. Potter*, 435 F.3d 444, 449 (3rd Cir. 2005); *Haubry v. Snow*, 106 Wn.App. 666, 675, 31 P.3d 1186 (2001).

The City does not dispute that Slater presented sufficient evidence to establish the elements of her retaliatory hostile work environment claim. In late January 2002, Slater complained to the Acting City Attorney, Mike McKenzie, that Booker-Hay, Slater's immediate supervisor, was attempting to undo the accommodation the City had made for her disability regarding her hours of work. McKenzie immediately overruled Booker-Hay. When Booker-Hay learned that she had been overruled, her response to Slater was: "Well, you probably won't pass probation." RP 357-358. The first element, protected activity, is satisfied.

To satisfy the second element, proof that the conduct was "unwelcome," Slater must show that she "did not solicit or incite it" and viewed it as "undesirable or offensive." *Glasgow*, 103 Wn.2d at 406; cf. WPI 330.23 (requiring jury to find that plaintiff proved "that this language or conduct was unwelcome in the sense that the plaintiff regarded the conduct as undesirable and offensive, and did not solicit or incite it"). This element is fully met in the record in this case. That she

93 F.3d 1327, 1334-35 (7th Cir. 1996); see also *Morris v. Oldham County Fiscal Court*, 201 F.3d

viewed the harassment as undesirable and offensive was made clear in her reports to the City Attorney in May 2002 and the physical impact the harassment had on her.

The third element, that the harassment occurred because of the protected activity, requires the protected activity to be the motivating factor for the unlawful harassment. Booker-Hay told Slater after she complained to McKenzie that she [Slater] probably wouldn't pass probation. Booker-Hay thereafter began a campaign of harassment against Slater.

2. The Discrimination Was Severe or Pervasive

The fourth element is satisfied when the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. *Glasgow*, 103 Wn.2d at 406.

Slater received a disproportionate workload as a result of complaining about the attempted change in her disability accommodation. She did not receive assistance from the victims advocate office assistant, Rainbow Thomas, despite several complaints to Booker-Hay about lack of assistance and heavy workload. Thomas refused to provide clerical assistance to Slater, although she provided assistance to the other two victim advocates. Slater's numerous complaints to Booker-Hay about the lack of assistance went unheeded.

791-92 & n.8 (6th Cir. 2000) (holding that retaliatory harassment by a supervisor is actionable).

On May 23, 2002, Booker-Hay extended the probationary period an additional 3 months, May 20 to August 20, in order to give the supervisor more time to observe Slater's work.

In late July 2002, the supervisor, Booker-Hay emailed Slater that she had been doing well for the past few weeks and requested that she continue on that path. However, Booker-Hay again requested that the probationary period be extended for an additional 3 months, from August 20 to November 20, to give her more time for observation.

On August 29, 2002, the City Attorney, not Slater's supervisor, abruptly terminated Slater's employment after receiving on August 28 Slater's email complaining of a hostile work environment and retaliation. Wachter did not discuss her decision to terminate Slater with Booker-Hay, Slater's supervisor prior to making the decision.

The harassment's severity or pervasiveness inquiry has both a subjective and objective components. See **Faragher v. City of Boca Raton**, 524 U.S. 775, 787, (1998); **Adams v. Able Bldg. Supply, Inc.**, 114 Wn.App. 291, 297, 57 P.3d 280 (2002).

The Court can quickly dispense of the subjective prong. Slater testified that her supervisor's actions increased the frequency of her migraine headaches, anxiety attacks, and stress-induced use of her sick leave. This evidence would

support a finding that Slater subjectively viewed the work environment to be hostile. See **Harris v. Forklift Systems, Inc.**, 510 U.S. 17, 21-22 (1993).

The objective prong relates to retaliation that would have detrimentally affected a reasonable person. In **McGinest v. GTE Service Corp.**, 360 F.3d 1103 (9th Cir. 2004), the Ninth Circuit reiterated its prior holding in **Ellison v. Brady**, 924 F.2d 872 (9th Cir. 1991), that in evaluating the significance of conduct at issue, courts must consider that conduct from the perspective of the plaintiff:

The inquiry thus becomes: Did the plaintiff suffer retaliatory harassment sufficiently severe or pervasive to alter her employment conditions? **Washington v. Boeing**, 105 Wn.App. 1, 10, 19 P.3d 1041 (2000).

When Slater complained about her immediate supervisor's attempts to change her accommodated work schedule, she was told that she probably would not pass probation. This comment was made to her on or about January 31, 2002. Her job responsibilities were changed with Slater receiving a disproportionate share of the workload and no clerical assistance which the other two victim advocates received.

The increased workplace stress caused Slater to suffer migraine headaches more frequently and caused the migraines to last longer. The migraines began to last longer than 8 hours, which caused Slater to increase her medications. She was treated for depression and anxiety and prescribed medication by her physician. Although Slater suffered from sleep apnea all her

life, the increased work-related stress caused her tonsils to become so inflamed that her physician was concerned that she could die in her sleep if they became larger. This led to the surgery in February 2002.

3. Employer Liability

If supervisors or managers create the hostile work environment, the employer is strictly liable. *Burlington Industries v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998); *Glasgow v. Georgia-Pacific*, 103 Wn.2d 401, 693 P.2d 708 (1985) (“Where an owner or manager is the harasser, the conduct is automatically imputed to the employer).

This element is met because Booker-Hay, a manager of the City, engaged in the harassment.

4. A Retaliatory Hostile Work Environment Is Independent Of the Ultimate Employment Decision – Termination.

In *Burlington Northern & Sante Fe Ry. v. White*, 548 U.S. ____, 126 S.Ct. 2405 (2006), the Supreme Court held that a plaintiff can establish retaliation by showing that, in response to a complaint of harassment or discrimination, she experienced a materially adverse employment action that “might have dissuaded a reasonable worker” from complaining about discrimination or harassment. See *White*, 126 S.Ct. at 2415.

Thus, any action that is materially adverse to one’s employment that might persuade a reasonable worker from complaining constitutes retaliation. And if the

conduct or similar conduct is continuous or repeated, it affects the terms and conditions of the employee's employment and can constitute a hostile work environment. See *Ray v. Henderson*, 217 F.3d 1234, 1244-45 (9th Cir. 2000). What is necessary in retaliatory harassment claims is evidence that the challenged discriminatory acts or harassment adversely affected the terms, conditions, or benefits of the plaintiff's employment. *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001).

None of the federal cases cited or analyzed in defendant's motion for reconsideration none of the cases which have recognized a retaliatory hostile work environment support defendant's argument that where the employee is terminated, a claim for hostile work environment cannot exist.³

In this case, it is particularly appropriate for Slater to assert separate and independent claims of retaliatory hostile work environment and retaliatory termination. First of all, the hostile work environment consists of a series of continuing acts orchestrated by one supervisor occurring over a period of several months. The retaliatory termination was a single discrete incident caused by another supervisor based on plaintiff's complaint just one day before her termination. As such, the hostile work environment and retaliatory termination in

³ Only the Fifth and Eighth Circuits have held that only "ultimate employment decisions" such as hiring, firing, demotion, and promoting can constitute actionable adverse employment actions. However, these cases are no longer good law in light of *Burlington Northern & Santa Fe Ry. V. White*, 548 U.S. ____, 126 S.Ct. 2405, 2414, (2006).

this case should have been viewed for what they are: two separate and independent harms.

Indeed, in one of the cases cited by defendant in support of its argument, the plaintiff made separate claims of retaliatory transfer and retaliatory hostile work environment, and the claims were upheld separately. See ***Richardson v. New York State Dept. of Corrections***, 180 F.3d 426, 444, 446 (2nd Cir. 1999).

C. Jury Instructions

1. ***The Trial Court Erred in Giving Instruction 11.***

Under Washington law, an employee is afforded protection from adverse employment actions when she complains in good faith about conduct she believes to be unlawful employment practices, including unlawful retaliatory conduct.

RCW 49.60.210 (1) provides:

"It is an unfair practice for any employer. . . to discharge. . . or otherwise discriminate against any person because he or she has opposed any practices *forbidden by this chapter*, or because he or she has filed a charge, testified, or assisted in any *proceeding under this chapter*." (*emphasis supplied*)

"A discharge will support an award of damages when (1) the employee engaged in a statutorily protected activity, (2) an adverse employment action was taken, and (3) the statutorily protected activity was a substantial factor in the employer's adverse employment decision. ***Schonauer v. DCR Entertainment***, 79 Wn.App. 808, 827, 905 P.2d 392 (1995).

An employee complaining about what she believes to be unlawful retaliation is provided the same protection from adverse employment actions as an employee who complains about discrimination.

Slater requested a jury instruction incorporating these objections, Plaintiff's Proposed Instruction 11, which was rejected by the trial court.

After a lengthy colloquy, the court resolved to give the court's Instruction 11, which provides:

To establish a claim of unlawful retaliation by defendant city, plaintiff has the burden of proving each of the following propositions:

- (1) That plaintiff was opposing what she reasonably believed to be discrimination on the basis of race; and
- (2) That a substantial factor in the decision to terminate was plaintiff's opposition to what she reasonably believed to be discrimination.

If you find from your consideration of all of the evidence that each of these propositions have been proved, then your verdict should be for plaintiff. On the other hand, if any one of these propositions has not been proved, your verdict should be for defendant city.

Plaintiff does not have to prove that her opposition was the only factor or the main factor in defendant city's decision, nor does she have to prove that she would not have been terminated but for her opposition.

CP 414.

Instruction 11 is obviously erroneous under RCW 49.60.210, in omitting Slater's complaints about unlawful retaliation in the instruction. The Legislature intended that employees, like Slater, who complain about discrimination and

retaliation, practices forbidden by RCW 49.60, are protected from further retaliation. Instruction 11 instead told the jury that only Slater's complaint about discrimination was protected from retaliation. This was error.

The error in Instruction 11 prejudiced Slater. The instruction ignored Slater's August 28 email in its entirety except for her complaint about the coworker's use of the "N" word in the workplace on August 23. The trial court, without explanation, refused to allow the jury to consider the email in its entirety. The instruction also erroneously limited the jury's consideration to disparate treatment race discrimination, directed the jury to ignore the pattern of retaliation that existed for the remaining eight (8) months of Slater's employment, and shifted the focus of the trial to race discrimination.

a. The Trial Court Erred in Giving Instruction 11 Because The Instruction Was Not Supported by Substantial Evidence.

The court erred when it instructed the jury that Slater could establish unlawful retaliation only if she complained about race discrimination because the instruction was supported by substantial evidence in the record. The court ruled *in limine* that the jury could not hear evidence of race discrimination, and the trial court had dismissed Slater's racially hostile environment claim because the conduct was not sufficiently severe or pervasive. RP (September 22, 2006) 30-31. See also, *Glasgow v. Georgia Pacific Corp.*, 103 Wn.2d 401, 406, 693 P.2d 708 (1985).

Complying with these orders, Slater did not produce any evidence of race discrimination or racially hostile environment, and Slater consistently argued that this was not a race discrimination case. Thus, no evidence warranted the limitation in Instruction 11, and it was prejudicial error to submit it to the jury. *E.g.*, ***State v. Clausing***, 147 Wn.2d 620, 627, 56 P.3d 550 (2002)(“It is prejudicial error to submit an issue to the jury that is not warranted by the evidence.”)

b. The Court’s Instruction 11 Confused and Misled the Jury Because It was not Supported by Law or Fact. The Trial Court erred in Failing to Give Plaintiff’s Proposed Instruction 11.

As noted above, no legal or factual basis existed to instruct the jury to determine whether Slater only opposed discrimination based on race, yet the trial court did so. Moreover, it compounded this error by limiting the jury’s consideration of race discrimination to the August 23 incident. The jury was understandably confused, as evidenced by its question during deliberations regarding Instruction 11.

Instruction 11 was confusing and misleading to the jury, which asked a very confused question about the instruction and rendered a confused verdict. For several days, the jury listened to a pattern of retaliatory conduct by Booker-Hay. It also viewed on several occasions the August 28 email in its entirety. Yet the jury was instructed to limit its consideration to complaints about race discrimination.

During deliberations, the jury submitted the following question:

"Looking at Instruction 11 & questions 1 & 2 from page 1.

Instruction 11 Question 2

That a substantial factor in the decision to terminate was plaintiff's opposition to what she reasonably believed to be discrimination.

Page 1 Q.2: Was retaliation a substantial factor in plaintiff's discharge from employment.

These seem rephrasings of the same basic thing. But on page 1 there is a question we are supposed to answer before question 2.

How can we do this if we must answer what seems to be the same question (rephrased) in Instruction 11 before answering the questions on page 1."

CP 434.

The trial court reviewed the inquiry, instructed the jury to read the instructions as a whole, and answer the questions on the verdict form in the order as directed. CP 435.

The jury's confusion was inevitable, where the court instructed it to determine whether Slater was discriminated against based on race when such a claim was not supported by any evidence, let alone substantial evidence. The trial court erred by refusing to give Plaintiff's Proposed Instruction 11.

2. *The Trial Court Erred In Giving Instruction 13 Because The Instruction Incorrectly Excluded From The Jury's Deliberation Evidence Presented To The Jury Regarding Other Employees' Use of The "N" Word in The Workplace.*

The instruction further amounted to a comment on the evidence. The trial court erred in giving Instruction 13 limiting the jury's consideration of whether there was retaliation against Slater to the "N" word incident on August 23, 2002.

The trial court erred in giving Instruction 13 limiting the jury's consideration of whether there was retaliation against Slater to Slater's discharge from employment on August 29, 2002.

Even if Slater was precluded from asserting a claim for retaliatory hostile work environment, the prior retaliation was admissible as background evidence and to demonstrate motive.

Counsel for plaintiff strongly objected to Instruction 13 and took several exceptions to the instruction. She argued that the instruction was a comment on the evidence and that it misstated the evidence presented to the jury. The court erroneously carved out one incident, the August 23 incident, that Slater complained about from her August 28 email which further allowed the defense to turn Slater's retaliation case into a race discrimination case. RP 901; 925; 929. Plaintiff offered her proposed Instruction 14 as the correct instruction.

3. *Jury Instruction 15 Erroneously Told the Jury To Find The That There Was No Retaliation If No Reasonable Person Could Conclude That The Coworker's Use of The "N" Word In The Workplace On August 23 Was Race Discrimination.*

The instruction is clearly erroneous. The instruction failed to instruct the jury on the applicable Washington law regarding retaliation and protected activity.

The instruction also lowered the City's burden below the standards established by Washington law.

Counsel excepted to Instruction 15 in that it was an erroneous statement of plaintiff's contentions and that it was an incorrect statement of the applicable law with respect to the reasonable belief standard for retaliation cases. Counsel further excepted to this instruction on the basis that it was a comment on the evidence. RP 903-905; 907-908. Counsel offered Plaintiff's Proposed Instruction 6 as the correct instruction. RP 905.

4. *The Trial Court Erred In Giving Instruction 18 Because The Instruction Amounted To A Comment On The Evidence.*

Counsel excepted to Instruction 18 on the grounds that it was an incorrect statement of the applicable law on retaliation, that the reasonable belief standard was the standard in retaliation cases, rather than the reasonable person, and that the instruction was a comment on the evidence. RP 907-909; 922-923. Plaintiff requested her proposed Instruction 14 incorporating these objections.

5. *Jury Instruction 19 Did Not Inform The Jury of The Applicable Washington Law Under Which An Employee's Complaint About Retaliation Is Protected Activity.*

The trial court restricted the trial to Slater's retaliatory discharge claim. The basis for the claim was the August 28 email Slater sent to Wachter and Booker-Hay. Instruction 19 states in part:

... In this case, for plaintiff's complaint to be a protected activity, the complaint must have been about something that a reasonable person would believe to be racial discrimination.

CP 422.

In the email, Slater's complaints were broader than complaints about what she reasonably believed to be a racially hostile environment. She also complained about the retaliation that followed her complaint about Booker-Hays' attempt to undo the accommodation the City had made previously for her disability. In this case, the trial court erroneously instructed the jury that Slater's complaints had to be about racial discrimination in order for the complaints to be protected activity. That was a clear error of law.

The instruction also repeats the same error contained in Instructions 15 and 18 by using the "reasonable person" standard, rather than whether Slater reasonably believed the conduct to be unlawful.⁴

Counsel for plaintiff excepted to Instruction 19 on the same grounds that she argued throughout the colloquy that this was not a racial discrimination and that the retaliation standard was "reasonable belief" rather than "reasonable person." She argued that the claim in the case was a retaliation claim and that

⁴ This focus on the personal perspective of the plaintiff carries through into other causes of action under RCW 49.60, including a claim of retaliation under Section .210. WPI 330.05 sets forth the elements of a claim for retaliation. The first element of that instruction requires proof: "that plaintiff was opposing what he/she reasonably believed to be discrimination on the basis of [age] [creed] [disability] [marital status] [national origin] [race] [sex] [or] [was [providing information to] [participating in] a proceeding to determine whether discrimination or retaliation had occurred] ... " Here again, the focus is on the reasonable belief of the plaintiff.

any instructions referring to plaintiff's claim as a racial discrimination claim were erroneous. Instruction 19 is erroneous in that it repeats the reasonable person standard and erroneously tells the jury that for plaintiff's complaint to be protected activity, the complaint must be to racial discrimination. RP 907-908; 923.

6. ***The Trial Court Erred in Giving Instruction 20 Because Washington Law Does Not Require That Slater Prove She Was Discriminated Based on Race to Prove Retaliation and Slater Presented No Evidence That She Was Discriminated Against Based on Race.***

The trial court erred as a matter of law in instructing the jury "You may not find in favor of plaintiff unless she proves that defendant unlawfully discriminated against her." The instruction also incorrectly fails to include retaliation in its listing of protected categories. Instruction 20 was not supported by substantial evidence or any evidence.

Based on Washington law and federal law, a plaintiff is not required to prove that the underlying complaint was unlawful. Rather, she need only prove that she reasonably believed that the complained of conduct was unlawful. Also, if the plaintiff establishes a prima facie case of retaliation, the burden then shifts to the employer to produce admissible evidence of a legitimate reason for the discharge. ***Renz v. Spokane Eye Clinic, P.S.***, 114 Wn.App. 611, 618, 60 P.3d 106 (2002) (citing ***Grimwood v. University of Puget Sound, Inc.***, 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988)).

Again, RCW 49.60.210 provides:

"It is an unfair practice for any employer. . . to discharge. . . or otherwise discriminate against any person because he or she has opposed any practices *forbidden by this chapter*, or because he or she has filed a charge, testified, or assisted in any *proceeding under this chapter*." (*emphasis supplied*)

A discharge will support an award of damages when (1) the employee engaged in a statutorily protected activity; (2) defendant discharged her or took some other adverse employment action against her; and (3) the statutorily protected activity was a substantial factor behind defendant's adverse action.

Washington v. Boeing Co., 105 Wn.App. 1, 14 (2000); ***Allison v. Housing Authority***, 118 Wn.2d 79, 95, 821 P.2d 34 (1991).

a. **To Prove Retaliation, Slater Only Needed to Prove That She Reasonably Believed The Complained of Conduct Was Unlawful.**

The Court's inquiry must focus on Slater, and whether it was reasonable for her to believe that Title VII or RCW 49.60 was violated when defendant's employees openly repeated the word "Nigger" in the workplace, and when her supervisor began a campaign of harassment after Slater complained about the supervisor's attempt to undo the reasonable accommodation for her disability.

See ***Navy Federal Credit Union***, 424 F.3d at 406-07; ***Peters v. Jenney***, 327 F.3d 307, 320 (4th Cir. 2003).

When the cumulative nature of such an environment is properly considered, it is clear that employees are protected from employer retaliation if they oppose conduct that, if repeated, could amount to a hostile work environment.

See **Alexander v. Gerhardt Enterprises, Inc.**, 40 F.3d 187, 190, 195-96 (7th Cir. 1996) (concluding that employee had reasonable, good faith belief that Title VII violation was in progress when co-worker, on single occasion, said “if a nigger can do it, anybody can do it, “ and apologized shortly thereafter).

It is not necessary that the conduct complained of be unlawful. “An employees who opposes employment practices reasonably believed to be discriminatory is protected by the opposition clause whether or not the practice is actually discriminatory. See **Renz v. Spokane Eye Clinic P.S.**, 114 Wn.App. 611,618, 60 P.3d 106 (2002).

There can be no question that Slater reasonably believed that the use of the “N” word in the workplace was unlawful or that opposing the elimination of her disability accommodation was unlawful. The City nonetheless fired her – for simply reporting the use of this extremely offensive word and other unlawful employment practices – and they thereby contravened her rights under RCW 49.60.210.

7. The Trial Court Erred in Giving Instruction 21 Because The instruction Did Not Inform The Jury of The Applicable Washington Law That Proscribes Unlawful Employment Practices. The Instruction Also Amounted to A Comment On the Evidence.

The trial court erred in giving Instruction 21 because the instruction did not properly inform the jury of the applicable Washington law, which proscribes

unlawful employment practices. The instruction also amounts to a comment on the evidence.

Counsel excepted to Instruction 21 on the basis that it was a comment on the evidence. RP 919. Counsel for plaintiff requested that plaintiff's proposed Instruction 14 incorporating these objections.

8. *The Trial Court Erred in Giving Instruction 22 because the Instruction Did Not Inform The Jury of The Applicable Washington Law Which Proscribes Unlawful Employment Practices. The Instruction Also Amounts to A Comment On The Evidence.*

The trial court erred in giving Instruction 22 because the instruction did not properly inform the jury of the applicable Washington law, which proscribes unlawful employment practices. The instruction also amounts to a comment on the evidence.

Instruction 22 contained the same errors which were objected to and exceptions taken. Employment decisions cannot be based on retaliation. The error was repeated in the second, third, fourth and fifth paragraphs of the instruction. RP 946-947. The trial court changed the fifth paragraph but left the errors in the other paragraphs unchanged.

D. *Plaintiff's Counsel Adequately Preserved the Objections to the Challenged Jury Instructions.*

The issue before this Court is not simply whether Instructions 11, 13, 15, 18, 19, 20, 21, and 22 correctly or incorrectly stated the law. They were obviously

incorrect. Rather, the issue is whether plaintiff's objections to the instructions preserved this issue for review.

Plaintiff's counsel consistently argued against the interpretation of the statute incorporated into the above instructions. Counsel's exceptions to Instruction 11 were as follows:

MS. SEBREE: And may I inquire why are we striking the "retaliatory"?

THE COURT: Because the retaliation, alleged retaliation, didn't occur until August 29.

MS. SEBREE: But the email, which was the basis for the conduct on the 29th, makes allegation of discrimination and retaliation ...

RP 929.

MS. SEBREE: And this is, in fact, an accurate statement of the law. If a person opposes a practice believed to be retaliatory, that person is protected by RCW 49.60.210.

Counsel for plaintiff strongly objected to Instruction 13 and took several exceptions to the instruction. She argued that the instruction was a comment on the evidence and that it misstated the evidence presented to the jury. The court erroneously carved out one incident, the August 23 incident, that Slater complained about from her August 28 email which further allowed the defense to turn Slater's retaliation case into a race discrimination case. RP 901; 925; 929. Plaintiff offered her proposed Instruction 14 as the correct instruction.

Counsel excepted to Instruction 15 in that it was an erroneous statement of plaintiff's contentions and that it was an incorrect statement of the applicable

law with respect to the reasonable belief standard for retaliation cases. Counsel further excepted to this instruction on the basis that it was a comment on the evidence. RP 903-905; 907-908. Counsel offered Plaintiff's Proposed Instruction 6 as the correct instruction. RP 905.

Counsel excepted to Instruction 18 on the grounds that it was an incorrect statement of the applicable law on retaliation, that the reasonable belief standard was the standard in retaliation cases, rather than the reasonable person, and that the instruction was a comment on the evidence. RP 907-909; 922-923. Plaintiff requested her proposed Instruction 14 incorporating these objections.

Counsel for plaintiff excepted to Instruction 19 on the same grounds that she argued throughout the colloquy that this was not a racial discrimination and that the retaliation standard was "reasonable belief" rather than "reasonable person." She argued that the claim in the case was a retaliation claim and that any instructions referring to plaintiff's claim as a racial discrimination claim were erroneous. Instruction 19 is erroneous in that it repeats the reasonable person standard and erroneous tells the jury that for plaintiff's complaint to be protected activity, the complaint must be to racial discrimination. RP 907-908; 923.

Counsel's exceptions to Instruction 20 were that the instruction omitted retaliation as a protected category arguing that an employer is not permitted to discharge a person based on retaliation. This error was repeated in the second and third sentence of the instruction. Counsel for plaintiff throughout the trial

made it clear that Slater was not making a claim for discrimination and that the instructions that referred to discrimination and omitted retaliation were erroneous. RP 945.

Counsel excepted to Instruction 21 on the basis that it was a comment on the evidence. RP 919. Counsel for plaintiff requested that plaintiff's proposed Instruction 14 incorporating these objections.

Instruction 22 contained the same errors which were objected to and exceptions taken. Employment decisions cannot be based on retaliation. The error was repeated in the second, third, fourth and fifth paragraphs of the Instruction. RP 946-947. The trial court changed the fifth paragraph but left the errors in the other paragraphs unchanged.

E. The Court Should Hold A New Trial is Required Regardless of The Technical Specificity of Slater's Objections to Instructions 11, 13, 15, 18, 19, 20, 21, and 22.

Defendant might argue that Slater's exceptions failed to preserve the errors of the challenged jury instructions. We disagree for the reasons explained above, but even if Slater's exceptions to the above jury instructions were not technically perfect, the Court should hold that a new trial is required because of the errors in the instructions.

The trial court appropriately acknowledged that he was made aware of Slater's concerns about the jury instructions. Everyone was keenly aware of the issues presented by Slater's retaliation claim and argued the issues at great

length, in pre-trial proceedings, in the lengthy arguments over defendant's motions in limine, in lengthy arguments over the admission of evidence, and in the lengthy colloquy over the challenged jury instructions.

Under these circumstances, an appellate court should reach the issue presented by jury instructions incorporating errors of law, that were confusing, conflicting, and were not supported by substantial evidence in the record. The Court should reverse and remand for a new trial.

F. The Trial Court Erred in Ruling That Slater Could Only Use the August 23, 2002 Incident to Prove Retaliation.

On August 28, 2002, Slater sent an email to complaining about the City's employees' use of the "N" word in the workplace and retaliation. The City admitted in closing argument to the jury that it fired Slater for sending the email. RP 876-877.

In reporting the use of the "N" word in the workplace, Slater was reasonably opposing a potential racially hostile work environment. A hostile work environment is unique among the employment practices that contravene the statutes in that such an environment normally develops through a series of separate acts, which might not, standing alone, violate Title VII. Indeed, such an environment is usually the sum of several parts. See **National R.R. Passenger Corp. v. Morgan**, 536 U.S. 101, 117, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). And whether a hostile work environment exists in fact can be a bit of a moving

target; there is no "mathematically precise test." See *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 22 (1993).

G. The Trial Court Erred When it Denied Slater's Motion for a New Trial Because There Was Substantial Evidence That Members of the Jury Were Biased Against African-Americans.

On February 15, 2007, the jury reached a verdict in favor of the City.

Slater uncovered evidence of juror misconduct and bias and moved for a new trial.

Slater is entitled to a new trial on the basis that Jurors Nos. 1, 11, and 13 made comments during deliberations that revealed racial bias and that the jurors intentionally concealed their prejudice. CP 441-442; 461-462.

The right to a jury trial includes the right to an unbiased and unprejudiced jury. A trial by jury, one or more of whose members are biased or prejudiced, is not a constitutional trial. *Seattle v. Jackson*, 70 Wn.2d 733, 738, 425 P.2d 385 (1967); *Allison v. Department of Labor & Industries*, 66 Wn.2d 263, 265, 401 P.2d 982 (1965). See also *Gordon v. Deer Park School District 414*, 71 Wn.2d 119, 121-22, 426 P.2d 824 (1967).

RCW 4.44.170(2) defines actual bias as:

"The existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging."

Under this definition, the issue of actual bias goes to whether a particular juror's state of mind is such that he or she can try a case impartially and without

prejudice to a party. **State v. Jackson**, 75 Wn.App. 537, 542-43, 879 P.2d 307 (1994), citing **Brady v. Fibreboard Corp.**, 71 Wn.App. 280, 283, 857 P.2d 1094 (1993), *review denied*, 123 Wn.2d 1018 (1994).

In this case, the statements, taken as a whole, create a clear inference of racial bias. In particular, the statements of Juror No. 1, Juror No. 11 and Juror No. 13 reveal their aversion to African-American's right to use the court system and a predisposition toward stereotyping African-Americans as a group. These statements demonstrate that these three jurors held certain discriminatory views, which could affect their ability to decide the plaintiff's case fairly and impartially.

The foundation of the statements was about race and race only. The three- (3) jurors had no other argument. In the greatest moment of shouting, Ms. Lucich actually said "black people" rather than "they" in one of her tirades about "their kind" and how "they" make their money and what "they" are doing to the court system. She had to be taken out of the room to cool off. This was a moment of true disclosure of the juror's prejudiced feelings.

There was no discussion during the deliberations about the McDonald case. A reference to the McDonald case came up during a break and was never repeated during the deliberations. If the reference to "they" was a reference to people who unjustifiably bring lawsuits and seek large sums of money, it would have been unnecessary for Juror No. 10, Charlotte Holiday, to mention that she

was married to a black man, had a bi-racial son, and that she resented race being brought into the deliberations.

To repeat, Ms. Nichols commented about Helen Slater, "She's guilty as hell. I know their kind."

Ms. Smithlin commented "We can't let them get away with this. They will continue to do these things if we let them." The essence of her comments was her belief that blacks do this kind of thing all the time and she was tired of black people going to court over these matters. Depuydt specifically recalled the gist of Smithlin's comments. In the context of her statements, "they" was not used as a reference to people who unjustifiably bring lawsuits for large sums of money.

Ms. Lucich threw temper tantrums throughout the deliberations and constantly made comments like "Look what 'they' are doing to this country. Look what 'they' are doing to the court system. This is the way 'they' make their money." She actually used the term black or black people in the height of one of her temper tantrum. She seemed frustrated that some of the other jurors did not view blacks the way she did. Ms. Lucich repeatedly turned to Depuydt and asked, "Don't you see what they are doing?"

These comments are similar to the comments made in ***State v. Jackson***, 75 Wn.App. 537, 540, where the court of appeals reversed the trial court's denial of the motion for a new trial. ("There are a lot more coloreds now (at home)

then[sic] there ever used to be." The worst part of the reunion was that I had to socialize with the coloreds." "You know how those coloreds are.")

In **State v. Jackson**, 75 Wn.App. at 542, the court stated that actual bias is defined by RCW 4.44.170(2) as follows:

[T]he existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.

Although in **State v. Jackson**, the question of whether or not the jurors had any bias towards blacks or Afro-Americans [sic] was never asked during voir dire, the court nevertheless concluded that the juror should have revealed his feelings about African-Americans during voir dire. **State v. Jackson**, 75 Wn.App. at 543, citing **Gordon v. Deer Park School District 414**, 71 Wn.2d 119, 426 P.2d 824 (1967).

In **Gordon**, the court asked the jury panel the following question:

Now I want to ask you a few questions and if your answer is yes, would you please raise your hand and counsel can make note of that and they will ask you more about it later on ... Do any of you have any preconceived notions when you come into a case of this kind that would cause you to have any feelings or prejudices for either party in this action or against either party in this action?

No juror indicated any preconceived feeling or prejudice for or against any of the parties.

Id. at 121.

The **Gordon** court concluded that the prejudice of the juror, who was prejudiced in favor of teachers, caused an irregularity in the proceedings, which materially affected the substantial rights of the plaintiff. The court affirmed the trial court's granting of a new trial on this ground.

A juror's misrepresentation or failure to speak when called upon during *voir dire* regarding a material fact constitutes an irregularity affecting substantial rights of the parties. In this case, similar to the question asked of the jury panel in **Gordon**, the jurors were asked whether they could judge the case impartially and fairly and whether anyone had any preconceived notions for or against either party. When the three-(3) jurors failed to respond in *voir dire*, their failure related to a material question and the appropriate remedy is to grant a new trial.

Robinson v. Safeway Stores, 113 Wn.2d 154, 159, 776 P.2d 676 (1989), citing **Gordon v. Deer Park School District 414**, 71 Wn.2d 119, 122, 426 P.2d 824 (1967).

In **Smith v. Kent**, 11 Wash.App. 439, 443-45, 523 P.2d 446 (1974), the plaintiff was injured by a rock that was thrown from a dump truck traveling in front of the plaintiff's automobile. During *voir dire*, one juror failed to reveal his experience as a truck driver when asked about previous employment. The court found this misrepresentation warranted granting a new trial.

None of the jurors indicated any preconceived feeling or prejudice for or against any of the parties. The jurors' failure to raise their hands in answer to the

court's question relating to feelings of prejudice misled plaintiff's attorney into believing that they had no feeling or prejudice either for or against African-Americans. This irregularity and bias in the proceedings materially affected the substantial rights of Slater and warranted a new trial.

The Court abused its discretion by denying Slater's motion for a new trial. Alternatively, the Court should have held an evidentiary hearing to determine juror bias. A new trial should be granted.

H. A New Trial is Required Because The Evidence Does Not Justify The Verdict, The Jury Was Erroneously Instructed, At Least Three Jurors Openly Expressed Biased Against African-Americans, And Substantial Justice Was Not Done.

CR 59(a) allows a court to grant a new trial in the following circumstances:

- (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;
- (8) Error in law occurring at the trial and objected to at the time by the party making the application;
- (9) That substantial justice has not been done.

A trial judge has discretion in ruling on a new trial motion. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). The trial court's basic obligation in ruling on a motion for new trial is to "see that justice prevails." *Olpiniski v. Clement*, 73 Wn.2d 944, 951, 442 P.2d 260 (1968); see also *Barth v. Rock*, 36 Wn. App. 400, 674 P.2d 1265, review denied, 101 Wn.2d 1014 (1984).

The trial court abused his discretion in denying the motion for a new trial. The errors in the instructions and juror bias in the proceedings materially affected the substantial rights of Slater and warranted a new trial or at a minimum, a hearing in accordance with ***State v. Jackson***, *supra*, 75 Wn.App. 537, 879 P.2d 307 (1994).

An additional incident resulted in a miscarriage of justice. The trial court dismissed Slater's racially hostile environment claim and granted the City's motion in limine to preclude Slater from delving into other comments and conduct of a racial nature. The evidence really had nothing to do with Slater's retaliation claim. Yet the trial court allowed the defense to turn the retaliatory discharge trial into a race discrimination trial and gave the defense ammunition in the jury instructions, *i.e.*, telling the jury that they could only find for Slater if Slater proved she was discriminated against on the basis of race.

The seeds planted by the defense bore unexpected fruit when the trial court allowed detailed hearsay testimony regarding use of the racial slur by an African-American male in an unrelated criminal proceeding and the criminal background of the defendant in that case. These errors combined with the racial bias of three jurors severely prejudiced Slater.

This case had the dynamic of a jury being instructed on the wrong law, jury instructions not supported by substantial evidence, the admission of racial evidence from unrelated criminal proceedings, and juror bias.

The Court should reverse and remand for a new trial.

I. **Slater Requests Fees and Costs On Appeal.**

Slater requests fees and costs on appeal pursuant to RCW 49.60.030(2) and RAP 18.1. RCW 49.60.030(2) provides that the prevailing plaintiff in an action under RCW 49.60 shall recover reasonable attorney's fees and costs. The statute is mandatory, and no discretion exists as to whether fees will be allowed.

Here, Slater should prevail. The Court therefore should grant Slater reasonable attorney fees and costs on appeal. Slater will comply with RAP 18.1(d).

VI. **CONCLUSION**

For the reasons stated above, the Court should reverse and remand for retrial.

DATED this 28th day of September 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2007, I electronically served and mailed **Appellant's Opening Brief** to the following:

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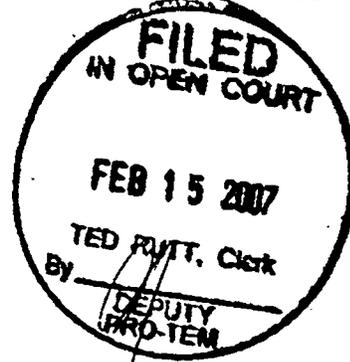
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APPENDIX 1



05-2-12912-9 26986450 CTINJY 02-18-07



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

HELEN P. TUCKER-SLATER,

NO. 05-2-12912-9

Plaintiff,

v.

CITY OF LAKEWOOD, a Municipal
corporation,

Defendant.

THE COURT'S INSTRUCTIONS TO THE JURY

DATED this 17 day of February, 2007

WALDO STONE, JUDGE PRO TEMPORE
PIERCE COUNTY SUPERIOR COURT

INSTRUCTION NO. 1

It is your duty to determine the facts in this case from the evidence produced in court. It also is your duty to accept the law from the judge, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The evidence you are to consider during your deliberations consists of the testimony that you have heard from the witnesses, and the exhibits that I have admitted, during the trial. If the 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 has been proven, 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 judge 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 while testifying; any personal interest that the witness might have in the outcome of 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 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.

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 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 the court. You not let your emotions overcome your rational thought process. You must reach your decision based on the facts proven 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.

INSTRUCTION NO. 2

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 or circumstantial evidence in terms of their weight or value in the finding of the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 3

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

INSTRUCTION NO. 4

The defendant City of Lakewood is a corporation. A corporation can only act through its officers and employees.

Any act or omission of an officer or an employee is the act or omission of the city.

INSTRUCTION NO. 5

A "manager" is a person who has the authority and power to affect hours, wages and working conditions. "Management" means one or more managers.

INSTRUCTION NO. 6

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 7

You must not discuss or speculate about whether any party has insurance or other coverage available. Whether a party does or does not have insurance has no bearing on any issue that you must decide. You are not to make, decline to make, increase or decrease any award because you believe that a party does or does not have medical insurance, workers' compensation, liability insurance or some other form of coverage.

INSTRUCTION NO. 8

You are not to make, decline to make, increase or decrease any award because you believe that the Plaintiff did or did not receive unemployment benefits, retirement benefits, or medical insurance.

INSTRUCTION NO. 9

The term "proximate cause" means a cause which in a direct sequence unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

There may be one or more proximate causes of an injury.

INSTRUCTION NO. 10

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, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. 11

To establish a claim of unlawful retaliation by defendant city, plaintiff has the burden of proving each of the following propositions:

- (1) That plaintiff was opposing what she reasonably believed to be discrimination on the basis of race; and
- (2) That a substantial factor in the decision to terminate was plaintiff's opposition to what she reasonably believed to be discrimination.

If you find from your consideration of all of the evidence that each of these propositions have been proved, then your verdict should be for plaintiff. On the other hand, if any one of these propositions has not been proved, your verdict should be for defendant city.

Plaintiff does not have to prove that her opposition was the only factor or the main factor in defendant city's decision, nor does she have to prove that she would not have been terminated but for her opposition.

INSTRUCTION NO. 12

“Substantial factor” means a significant motivating factor in bringing about the employer’s decision.

INSTRUCTION NO. 13

The alleged "N" word incident for you to consider in determining whether there was retaliation against plaintiff is the alleged "N" word incident involving Rainbow Thomas on August 23, 2002.

The alleged retaliation for you to consider is plaintiff's discharge from employment on August 29, 2002.

INSTRUCTION NO. 14

Evidence and testimony containing background information was presented for your consideration.

You may not use evidence of plaintiff's prior physical condition to determine whether defendant city retaliated against plaintiff.

You may use evidence of plaintiff's prior physical condition only in determining damages.

INSTRUCTION NO. 15

Plaintiff contends that, on August 23, 2002, Rainbow Thomas spoke the "N" word in her presence and that Ms. Thomas' use of the "N" word was race discrimination.

If you determine that no reasonable person could have considered Ms. Thomas' use of the "N" word to be race discrimination, then you must find that defendant city did not retaliate against plaintiff and you should answer "no" to Question No. 1.

If you determine that a reasonable person could have considered Ms. Thomas' use of the "N" word to be race discrimination, then you should use your judgment to answer "yes" or "no" to Question No. 1 as to whether defendant city retaliated against plaintiff.

INSTRUCTION NO. 16

You have heard background testimony concerning the rate of pay, working schedules, volume of work, timeliness of work and an incident relating to the Michael Fuller case.

You may use this evidence in considering the motivations of Ms. Slater, Ms. Booker-Hay and Ms. Wachter but you may not use this evidence to determine that retaliation did or did not occur.

INSTRUCTION NO. 17

The law protects an employee who opposes employment practices reasonably believed to be discriminatory whether or not the practice is actually discriminatory. Plaintiff need not prove that her complaints were to behavior that would violate the law against discrimination. An erroneous belief that an employee engaged in an unlawful employment practice is reasonable if premised on a mistake made in good faith.

INSTRUCTION NO. 18

In deciding whether a complaint is about something that a reasonable person would believe to be racial discrimination, you are instructed that a reasonable person is not a hyper-sensitive or overly-sensitive person.

INSTRUCTION NO. 19

An employee does not automatically engage in a protected activity every time the employee makes an internal complaint to an employer. In this case, for plaintiff's complaint to be a protected activity, the complaint must have been about something that a reasonable person would believe to be racial discrimination.

INSTRUCTION NO. 20

A legitimate, non-discriminatory reason for discharging an employee is any reason or explanation unrelated to an employee's age, sex, marital status, race, creed, color, national origin or physical disability.

The ultimate burden of persuading you that defendant intentionally discriminated against plaintiff remains at all times with plaintiff.

You may not find in favor of plaintiff unless she proves that defendant unlawfully discriminated against her.

INSTRUCTION NO. 21

The Washington discrimination statute does not obligate an employer to accord preference to employees within a protected class (i.e., age, sex, marital status, race, creed, color, national origin or physical disability). Rather, the employer has discretion to choose among equally-qualified employees, providing the decision is not based upon unlawful criteria. The fact that you may think that the employer misjudged the qualifications of plaintiff does not in itself expose the employer to liability under the Washington discrimination statute.

It is not unlawful for an at-will employee to be discharged because she was perceived to have misbehaved.

INSTRUCTION NO. 22

The law does not permit you to substitute your judgment about plaintiff's abilities for the judgment of the defendant about plaintiff's abilities.

The law only requires that the employer not make its employment decision based on race, national origin, gender, age or disability.

The law does not prohibit any action – even if subjective or unfounded – as long as race, , national origin, gender, age or disability is not the reason.

It is not unlawful to make employment decisions based upon poor job performance, erroneous evaluations, personal conflicts or even unsound business practice so long as the decisions are not the result of discrimination based on the plaintiff's race, national origin, gender, age or disability.

Your task is to determine whether plaintiff's termination was the result of retaliation. You are not to review the wisdom or fairness of an employer's business judgment unless you find intentional retaliation.

INSTRUCTION NO. 23

If your verdict is for the plaintiff and you find that:

1. Before the events that plaintiff complains of in this case, she had a physical condition that was causing pain or disability; and

2. Because of the events plaintiff complains of in this case, the pain or disability was aggravated,

then you should consider the degree to which the condition or the pain or disability was aggravated by the events that plaintiff complains of.

However, you should not consider any condition or disability that may have existed prior to the events that plaintiff complains of, or from which the plaintiff may now be suffering that was not caused or contributed to by this occurrence.

INSTRUCTION NO. 24

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 your verdict is for plaintiff, you must determine the amount of money that will reasonably and fairly compensate plaintiff for such damages as you find were proximately caused by the acts of defendant.

If you find for plaintiff, your verdict shall include the following items:

- (1) the reasonable value of lost past earnings and fringe benefits, from the date of the wrongful conduct to the date of trial; and
- (2) the emotional harm to plaintiff caused by defendant's conduct, 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 plaintiff in the future.

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

Your award must be based upon evidence and not upon speculation,

guess or conjecture. The law has not furnished us with 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.

INSTRUCTION NO. 25

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3 Upon retiring to the jury room for your deliberations, first select a presiding juror. The
4 presiding juror will see that your discussion is sensible and orderly, that you fully and fairly
5 discuss the issues submitted to you, and that each of you has an opportunity to be heard and to
6 participate in the deliberations upon each question before the jury. You will be given the
7 exhibits admitted into evidence and these instructions. You will also be given a special verdict
8 form that consists of several questions for you to answer.
9

10 You must answer the questions in the order in which they are written and according to
11 the directions on the form. It is important that you read all of the questions before you begin
12 answering and that you follow the directions exactly. Your answer to some questions will
13 determine whether you are to answer all, some or none of the remaining questions.
14

15 During your deliberations you are free to discuss any notes that you have taken during
16 the trial. However, do not assume that your notes are any more or less accurate than your
17 memory or the notes and memory of your fellow jurors. You will need to rely on your notes
18 and memory as to the testimony presented in this case. Testimony will rarely if ever be
19 repeated for you during your deliberations.
20

21
22 If you need to ask the Court a question that you've been unable to answer among
23 yourselves after reviewing the evidence and the instructions, write the question simply and
24 clearly, the presiding juror should sign it and date the question, and give it to the bailiff.
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1 In your question to the Court, do not indicate how your deliberations are proceeding.
2 Do not state how the jurors have voted on any particular question, issue or claim or in any other
3 way express your opinions about the case.
4

5 In order to answer any question on the special verdict form, ten (10) jurors must agree
6 upon the answer. It is not necessary that the jurors who agree upon the answer be the same
7 jurors who agree on the answer to any other question so long as ten (10) jurors agree to each
8 answer.
9

10 When you finish answering the questions according to the directions on the special
11 verdict form, the presiding juror must sign the form whether or not the presiding juror agrees
12 with the verdict. The presiding juror will then tell the bailiff that the jury has reached a verdict
13 and the bailiff will bring you back into court where your verdict will be announced.
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INSTRUCTION NO. 26

The plaintiff 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 has the burden of proving:

- (1) There were openings in comparable positions available for plaintiff elsewhere after defendant terminated her; and
- (2) Plaintiff failed to use reasonable care and diligence in seeking those openings; and
- (3) The amount by which damages would have been reduced if plaintiff had used reasonable care and diligence in seeking those openings.

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

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

APPENDIX 2



05-2-12912-9 26958537 PLPIN 02-12-07

Honorable Waldo Stone

FILED
IN COUNTY CLERK'S OFFICE
A.M. FEB 12 2007 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

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

HELEN P. TUCKER-SLATER,

Plaintiff,

vs.

CITY OF LAKEWOOD,

Defendant.

NO. 05-2-12912-9

**PLAINTIFF'S PROPOSED
JURY INSTRUCTIONS**

(With Citations)

DATED this 12th day of February 2007.

LAW OFFICES OF CURMAN SEBREE

By Curman Sebree
Curman Sebree, WSBA #11959
Attorney for Plaintiff

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26INSTRUCTION NO. 1
INTRODUCTORY INSTRUCTION

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the judge, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The evidence you are to consider consists of the sworn testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence which either was not admitted or which was stricken by the court.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witness and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight. The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

Counsel's remarks, statements and arguments are intended to help you understand the

1 evidence and apply the law. They are not evidence, however, and you should disregard any
2 remark, statement or argument that is not supported by the evidence or the law as given to you
3 by the judge.

4 The lawyers have the right and the duty to make any objections that they deem
5 appropriate. Such objections should not influence you, and you should make no presumption
6 because of those objections.

7 The Judge has a duty to rule on admissibility of evidence. Do not concern yourself with
8 the reasons for these rulings. You will disregard any evidence that was not admitted or stricken
9 by the court.

10 The law does not permit a judge to comment on the evidence in any way. A judge
11 comments on the evidence if a judge indicates by words or conduct a personal opinion as to the
12 weight or believability of the testimony of a witness or of other evidence. Though I have not
13 intentionally done so, if it appears to you that I have made a comment during either the trial or
14 the giving of these instructions, you must disregard the apparent comment entirely.

15 Jurors have a duty to consult with one another and to deliberate with a view to reaching
16 a verdict. Each of you must decide the case for yourself but only after an impartial
17 consideration of the evidence with your fellow jurors. In the course of deliberations, you
18 should not hesitate to re-examine your own views and change your opinion if you are
19 convinced it is erroneous. You should not surrender your honest conviction as to the weight or
20 effect of the evidence solely because of the opinions of your fellow jurors, or for the mere
21 purpose of returning a verdict.

22 You are officers of the court and must act impartially and with an earnest desire to
23 determine and declare the proper verdict. Throughout your deliberations you will permit
24 neither sympathy nor prejudice to influence you.

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26 WPI 1.02 (Adapted)

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INSTRUCTION NO. 2

All parties are equal before the law whether they are government entities or individuals. Each is entitled to the same fair and unprejudiced treatment as any individual would be under like circumstances.

WPI 1.03

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INSTRUCTION NO. 3
LIABILITY OF CORPORATION

The defendant City of Lakewood is a corporation. A corporation can only act through its officers and employees.

Any act or omission of an officer or an employee is the act or omission of the city.

WPI 50.18 (Adapted)

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INSTRUCTION NO. 4

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which the witness has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

WPI 1.03.

INSTRUCTION NO. 5
EXPERT TESTIMONY

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

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WPI 2.10

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INSTRUCTION NO. 6

Plaintiff claims that defendant retaliated against her in the terms and conditions of her employment and by terminating her employment in violation of the Washington law against retaliation because she complained about conduct she reasonably believed to be unlawful employment practices.

Plaintiff claims that defendant's conduct was a proximate cause of injuries and damage to the plaintiff.

Defendant denies these claims. The defendant further alleges that plaintiff was discharged from her employment for legitimate, non-discriminatory reasons.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed; and you are to consider only those matters that are admitted or established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

WPI 20.02 (modified)

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INSTRUCTION NO. 7
PROXIMATE CAUSE

The term proximate cause means a cause that was a substantial factor in bringing about the injury or event even if the result would have occurred without it.

WPI 15.02

INSTRUCTION NO. 8

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, that the proposition on which that party has the burden of proof is more probably true than not true.

You must base your decision on all of the evidence, regardless of which party presented it.

WPI 21.01 (Modified)

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INSTRUCTION NO. 9
EVIDENCE FOR LIMITED PURPOSE

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the following testimony by the plaintiff:

1. That in the fall 2001 then City Attorney Dan Heid, and former Assistant City Attorney, Anneke Berry, used the N-word several times in a discussion with her; and
2. That prior to August 2002, alleged retaliatory actions were taken against plaintiff because of complaints prior to August 2002.

This background evidence may be considered by you only for the purpose of evaluating the motives of Booker-Hay and Wachter, and for the purpose of determining whether in August 2002, plaintiff reasonably believed that conduct she complained about was unlawful.

The discussion of the evidence during your deliberation must be consistent with this limitation.

WPI 1.06 (modified)

INSTRUCTION NO. 10

MANAGER AND MANAGEMENT

DEFINITION

A "manager" is a person who has the authority and power to affect hours, wages, and working conditions. "Management" means one or more managers.

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WPI 330.24

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INSTRUCTION NO. 11

RETALIATION

It is unlawful for an employer to retaliate against a person for opposing what the person reasonably believed to be discrimination or retaliation or for providing information to or participating in a proceeding to determine whether discrimination or retaliation occurred.

To establish a claim of unlawful retaliation by the defendant, plaintiff has the burden of proving each of the following propositions:

(1) That the plaintiff opposed conduct or behavior that she reasonably believed to be discrimination and retaliation;

(2) That the defendant took action regarding the plaintiff's employment that was adverse to the plaintiff; and

(3) That the plaintiff's opposition to what she reasonably believed to be discrimination and retaliation was a substantial factor in the defendant's decision to take the adverse employment action.

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 plaintiff on her retaliation claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

Plaintiff does not have to prove that her opposition was the only factor or the main factor in the defendant's decision, nor does plaintiff have to prove that she would not have been terminated but for her opposition.

WPI 330.05 (Adapted); *Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 898 P.2d 284

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(1995); *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991);
Allison v. Housing Authority, 118 Wn.2d 79, 821 P.2d 34 (1991); *Washington v. Boeing Co.*,
 105 Wn.App. 1 (2000).

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INSTRUCTION NO. 12

ADVERSE ACTION

For the purpose of the previous instruction, an action is an adverse employment action if it is reasonably likely to deter an employee from engaging in protected activity.

Burlington Northern & Santa Fe Railway, 548 U.S. ____, 126 S.Ct. ____, 165 L.Ed.2d 345 (2006).

INSTRUCTION NO. 13

SUBSTANTIAL FACTOR

Substantial factor means a significant motivating factor in bringing about the employer's decision. Substantial factor does not mean that retaliation was the only factor or the main factor in defendant's decision to treat plaintiff less favorably with respect to her terms and conditions of employment or that the plaintiff would have been treated more favorably with respect to the terms and conditions of employment "but for" retaliation.

WPI 330.01.01 (modified)

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INSTRUCTION NO. 14

The law protects an employee who opposes employment practices reasonably believed to be discriminatory and retaliatory whether or not the practice is actually discriminatory or retaliatory. Plaintiff need not prove that her complaints were to behavior that would violate the law against discrimination. An erroneous belief that an employer engaged in an unlawful employment practice is reasonable if premised on a mistake made in good faith.

Ellis v. City of Seattle, 142 Wn. 2d 450, 13 P.3d 1065 (2000); *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn.App. 611, 60 P.3d 106 (2002); *Kahn v. Salerno*, 90 Wn.App. 110, 951 P.2d 321 (1998); *Moyo v. Gomez*, 32 F.3d 1382, 1385 (9th Cir. 1994).

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26INSTRUCTION NO. 15
CAUSAL LINK

Causation may be established based on the timing of the relevant actions. Specifically, when adverse employment decisions are taken within a reasonable period of time after complaints of discrimination have been made, retaliatory intent may be inferred.

Passantino v. Johnson & Johnson, 212 F.3d 493, 507 (9th Cir. 2000); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375-76 (9th Cir. 1987); *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991).

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INSTRUCTION NO. 16

DAMAGES -- EMPLOYMENT DISCRIMINATION --
ECONOMIC AND NON-ECONOMIC

5 It is the duty of the Court to instruct you as to the measure of damages. By instructing
6 you on damages, the Court does not mean to suggest for which party your verdict should be
7 rendered. If your verdict is for the plaintiff, you must determine the amount of money that will
8 reasonably and fairly compensate the plaintiff for such damages you find were caused by the
9 acts of defendant.

10 If you find for the plaintiff, you should consider the following elements:

- 11
- 12 (1) The reasonable value of lost past earnings and fringe benefits, from the date of
13 the wrongful conduct to the date of trial;
- 14 (2) The reasonable value of lost future earnings and fringe benefits;
- 15 (3) The physical harm to the plaintiff; and
- 16 (4) The emotional harm to the plaintiff caused by the defendant's wrongful conduct,
17 including emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal
18 indignity, embarrassment, fear, anxiety, and/or anguish experienced and with reasonable
19 probability to be experienced by the plaintiff in the future.

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21 The burden of proving damages rests with the party claiming them, and it is for you to
22 determine, based upon the evidence, whether any particular element has been proved by a
23 preponderance of the evidence.

24

25 Your award must be based upon evidence and not upon speculation, guess, or
26 conjecture. The law has not provided us with any fixed standards by which to measure

1 emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal
2 indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters, you
3 must be governed by your own judgment, by the evidence in the case, and by these instructions.
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5 WPI 330.81 (Adapted)
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INSTRUCTION NO. 17

MITIGATION OF DAMAGES

Plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or to reduce damages. To establish a failure to mitigate wage loss, the defendant has the burden of proving:

1. That there were openings in comparable positions available for the plaintiff elsewhere after her employment with the City of Lakewood ended;
2. That the plaintiff failed to use reasonable care and diligence in seeking those openings; and
3. The amount by which damages would have been reduced if plaintiff had used reasonable care and diligence in seeking those openings.

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

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

WPI 330.83

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INSTRUCTION NO. 18

AGGRAVATION OF PRE-EXISTING CONDITION

If your verdict is for the plaintiff and if you find that:

1. Before the events that plaintiff complains of in this case, she had a physical condition that was causing pain or disability; and

2. Because of the events plaintiff complains of in this case, the pain or disability was aggravated,

then you should consider the degree to which the condition or the pain or disability was aggravated by the events that plaintiff complains of.

However, you should not consider any condition or disability that may have existed prior to the events that plaintiff complains of, or from which the plaintiff may now be suffering that was not caused or contributed to by this occurrence.

WPI 30.17 (modified)

INSTRUCTION NO. 19

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3 Upon retiring to the jury room for your deliberations, first select a presiding juror. The
4 presiding juror will see that your discussion is sensible and orderly, that you fully and fairly
5 discuss the issues submitted to you, and that each of you has an opportunity to be heard and to
6 participate in the deliberations upon each question before the jury. You will be given the
7 exhibits admitted into evidence and these instructions. You will also be given a special verdict
8 form that consists of several questions for you to answer.
9

10 You must answer the questions in the order in which they are written and according to
11 the directions on the form. It is important that you read all of the questions before you begin
12 answering and that you follow the directions exactly. Your answer to some questions will
13 determine whether you are to answer all, some or none of the remaining questions.
14

15 During your deliberations you are free to discuss any notes that you have taken during
16 the trial. However, do not assume that your notes are any more or less accurate than your
17 memory or the notes and memory of your fellow jurors. You will need to rely on your notes
18 and memory as to the testimony presented in this case. Testimony will rarely if ever be
19 repeated for you during your deliberations.
20

21 If you need to ask the Court a question that you've been unable to answer among
22 yourselves after reviewing the evidence and the instructions, write the question simply and
23 clearly, the presiding juror should sign it and date the question, and give it to the bailiff.
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1 In your question to the Court, do not indicate how your deliberations are proceeding.
 2 Do not state how the jurors have voted on any particular question, issue or claim or in any other
 3 way express your opinions about the case.
 4

5 In order to answer any question on the special verdict form, ten (10) jurors must agree
 6 upon the answer. It is not necessary that the jurors who agree upon the answer be the same
 7 jurors who agree on the answer to any other question so long as ten (10) jurors agree to each
 8 answer.
 9

10 When you finish answering the questions according to the directions on the special
 11 verdict form, the presiding juror must sign the form whether or not the presiding juror agrees
 12 with the verdict. The presiding juror will then tell the bailiff that the jury has reached a verdict
 13 and the bailiff will bring you back into court where your verdict will be announced.
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25 WPI 1.11

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

HELEN P. TUCKER-SLATER,

Plaintiff,

Vs.

CITY OF LAKEWOOD, a Municipal
corporation,

Defendant.

NO. 05-2-12912-9

SPECIAL VERDICT FORM

We the jury answer the questions submitted by the Court as follows:

QUESTION NO. 1: Did Defendant City of Lakewood retaliate against the Plaintiff Helen Tucker-Slater when it discharged the plaintiff from her employment?

ANSWER: _____ (Write "YES" or "NO")

If the answer to Question No. 1 is "NO", sign this verdict form. If you answered "YES" to Question No. 1, answer Question No. 2.

QUESTION NO. 2: What, if any, do you find to be the damages to Helen Tucker-Slater proximately caused by the defendant's wrongful conduct?

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DATED this ____ day of February 2007.

Presiding Juror