

No. 36097-7-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION TWO

HELEN TUCKER-SLATER,

Appellant,

vs.

CITY OF LAKEWOOD,

Respondent.

BRIEF OF RESPONDENT

James E. Baker, WSBA No. 9459
Jerry Moberg & Associates
Attorneys for respondent
451 Diamond Drive
Ephrata, WA 98823
(509) 754-2356

TABLE OF CONTENTS

I. RESPONDENT’S COUNTER-SUMMARY OF THE APPEAL.....1

II. RESPONDENT’S COUNTER-STATEMENT OF THE CASE.....5

III. RESPONSE TO APPELLANT’S ARGUMENT.....20

 A. Standard of Review.....20

 B. Summary Judgment of Retaliatory Hostile
 Work Environment Claim.....21

 C. Jury Instructions.....30

 D. Objections to Challenged Jury Instructions.....41

 E. Failure to Properly Object to Jury Instructions.....41

 F. Use of Aug. 2002 Incident to Prove Retaliation.....42

 G. Alleged Racial Bias of Members of the Jury.....42

 H. CR 59(a) Argument for a New Trial.....45

 I. Request for Reasonable Fees and Costs.....46

IV. CONCLUSION.....47

V. APPENDIX

 1. Ex. 126 Michael Fuller Police Report

 2. Ex. 113 9/25/02 Letter Heid to Booker-Hay

 3. Ex. 128 Mack Foster Police Report

 4. Ex. 124 8/29/02 Rainbow Thomas Memo

5. Ex. 61 8/28/02 Memo Tucker-Slater to Booker-Hay and Horst
6. Ex. 1 8/29/02 Memo Booker-Hay to Horst

TABLE OF AUTHORITIES

Table of Cases

<u>Allison v. Dep't of Labor & Industries,</u> 66 Wn.2d 263, 401 P.2d 982 (1965).....	43
<u>American Civil Liberties Union of Ky. v. Mercer County,</u> 432 F.3d 624 (6 th Cir. 2005), <u>denying rehearing en banc</u> 446 F.3d 651 (6 th Cir. 2006).....	37
<u>Anderson v. Stauffer Chemical Co.,</u> 965 F.2d 297 (7 th Cir. 1992).....	41
<u>Bishop v. Nat'l R.R. Passenger Corp.,</u> 66 F.Supp.2d 650 (E.D. Pa. 1999).....	37
<u>Bozman v. Per-Se Technologies, Inc.,</u> 456 F.Supp.2d 1282 (N.E. Ga. 2006).....	28
<u>Brady v. Fibreboard Corp.,</u> 71 Wn.App. 280, 857 P.2d 1094 (1993), <u>rev. denied</u> 123 Wn.2d 1018, 871 P.2d 599 (1994).....	43
<u>Bryant v. Brownlee,</u> 265 F.Supp.2d 52 (D.D.C. 2003).....	29
<u>Burlington Northern & Santa Fe R.R. Co. v. White,</u> __ U.S. __, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006).....	22, 23, 26, 36
<u>Burnside v. Simpson Paper Co.,</u> 123 Wn.2d 93, 864 P.2d 937 (1994).....	20
<u>Campbell v. State,</u> 129 Wn.App.10, 118 P.3d 888 (2005), <u>rev. denied</u> 157 Wn.2d 1002, 136 P.3d 758 (2006).....	21
<u>Canron, Inc. v. Fed. Ins. Co.,</u> 82 Wn.App. 480, 918 P.2d 937 (1996), <u>rev. denied</u> 131 Wn.2d 1002, 932 P.2d 643 (1997).....	20

<u>Che v. Mass. Bay Transp. Auth.,</u> 342 F.3d 31 (1 st Cir. 2003).....	25
<u>Clark County Sch. Dist. v. Breeden,</u> 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001).....	36
<u>Clarke v. State Attorney General’s Office,</u> 133 Wn.App. 767, 138 P.3d 144 (2006), <u>rev. denied</u> 160 Wn.2d 1006, 158 P.3d 614 (2007).....	21, 22
<u>Cox v. Charles Wright Academy, Inc.,</u> 70 Wn.2d 173, 179, 422 P.2d 515 (1967).....	44
<u>Dammen v. UniMed Medical Center,</u> 236 F.3d 978 (8 th Cir. 2001).....	41
<u>Edwards v. U.S. Environmental Protection Agency,</u> 456 F.Supp.2d 72 (D.D.C. 2006).....	29
<u>E.E.O.C. v. Crown Zellerbach Corp.,</u> 720 F.2d 1008 (9 th Cir.1983).....	36
<u>Evers v. Alliant Techsystems, Inc.,</u> 241 F.3d 948 (8 th Cir. 2001).....	41
<u>Gardner v. Malone,</u> 60 Wn.2d 836, 376 P.2d 651 (1962).....	44
<u>Gordon v. Deer Park School Dist. No. 414,</u> 71 Wn.2d 119, 426 P.2d 824 (1967).....	43
<u>Gregory v. Widnall,</u> 153 F.3d 1071 (9 th Cir. 1998).....	27, 29
<u>Gunnell v. Utah Valley State College,</u> 152 F.3d 1253 (10 th Cir. 1998).....	24
<u>Hale v. Hawaii Publications, Inc.,</u> 468 F.Supp.2d 1210 (D. Hawaii 2006).....	27, 28

<u>Harley v. McCoach,</u> 928 F.Supp. 533 (E.D. Pa. 1996).....	37
<u>Harris v. Forklift Sys., Inc.,</u> 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).....	24, 27
<u>Hazen Paper Co. v. Biggins,</u> 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993).....	41
<u>Hill v. BCTI Income Fund-1,</u> 144 Wn.2d 172, 23 P.3d 440 (2001).....	39, 40
<u>Hinman v. Yakima Sch. Dist. No. 7,</u> 69 Wn.App. 445, 850 P.2d 536 (1993), <u>rev. denied</u> 125 Wn.2d 1010, 889 P.2d 498 (1994).....	46
<u>Hussain v. Nicholson,</u> 435 F.3d 359 (D.C. Cir. 2006), <u>cert. denied</u> __ U.S. __, 127 S.Ct. 494, 166 L.Ed.2d 365 (2006).....	24, 27
<u>Hutson v. McDonnell Douglas Corp.,</u> 63 F.3d 771 (8 th Cir. 1995).....	41
<u>Jensen v. Potter,</u> 435 F.3d 444 (3d Cir. 2005).....	26
<u>Keeley v. Small,</u> 391 F.Supp.2d. 30 (D.D.C. 2005).....	29
<u>Kent v. Smith,</u> 11 Wn.App. 439, 523 P.2d 446 (1974), <u>rev. denied</u> 84 Wn.2d 1007 (1974).....	43
<u>Knox v. State of Indiana,</u> 93 F.3d 1327 (7 th Cir.1996).....	26
<u>Koschoff v. Henderson,</u> 109 F.Supp.2d 332 (E.D. Pa. 2000), <u>aff'd</u> 35 Fed. Appx. 357 (3d Cir. 2002).....	37

<u>Kruger v. Principi,</u> 420 F.Supp.2d 896 (N.D. Ill. 2006).....	28
<u>Learned v. City of Bellevue,</u> 860 F.2d 928 (9 th Cir. 1988), <u>cert. denied</u> 489 U.S. 1079, 109 S.Ct. 1530, 103 L.Ed.2d 835 (1989).....	35
<u>Manning v. Metropolitan Life Ins. Co.,</u> 127 F.3d 686 (8 th Cir. 1997), <u>abrogated by Burlington Northern & Santa Fe R.R. Co. v. White, ___ U.S. ___, 126 S.Ct. 2405,</u> 165 L.Ed.2d 345 (2006).....	22
<u>Martin v. Merck & Co., Inc.,</u> 446 F.Supp.2d 615 (W.D. Va. 2006).....	24, 28
<u>Mattern v. Eastman Kodak Co.,</u> 104 F.3d 702 (5 th Cir. 1997), <u>cert. denied</u> 522 U.S. 932, 118 S.Ct. 336, 139 L.Ed.2d 260 (1997), <u>abrogated by Burlington Northern & Santa Fe R.R. Co. v. White, ___ U.S. ___, 126 S.Ct. 2405,</u> 165 L.Ed.2d 345 (2006).....	22
<u>Meritor Sav. Bank v. Vinson,</u> 477 U.S. 57, 106 S.Ct.2399, 91 L.Ed.2d 49 (1986).....	24
<u>More v. Snow,</u> 480 F.Supp.2d 257 (D.D.C. 2007).....	28
<u>Morris v. Oldham County Fiscal Court,</u> 201 F.3d 784 (6 th Cir. 2000).....	26
<u>Mountain Park Homeowner’s Ass’n v. Tydings,</u> 25 Wn.2d 337, 883 P.2d 1383 (1994).....	20
<u>Moyo v. Gomez,</u> 40 F.3d 982 (9 th Cir. 1994), <u>cert. denied</u> 513 U.S. 1081, 115 S.Ct. 732, 130 L.Ed.2d 635 (1995).....	36
<u>Newell v. Celadon Security Services, Inc.,</u> 417 F.Supp.2d 85 (D. Mass. 2006).....	29

<u>Noviello v. City of Boston,</u> 398 F.3d 76 (1 st Cir. 2005).....	26, 27, 29
<u>Oxley v. Dep’t of Military Affairs,</u> 597 N.W.2d 89 (Mich. 1999).....	27
<u>Pannell v. Food Services of America,</u> 61 Wn.App. 418, 810 P.2d 952 (1991), <u>rev. denied</u> 118 Wn.2d 1008, 824 P.2d 490 (1992).....	40
<u>Ray v. Henderson,</u> 217 F.3d 1234 (9 th Cir. 2000).....	27, 29
<u>Richard v. United States Postal Service,</u> 219 F.Supp.2d 172 (D.N.H. 2002).....	29
<u>Richardson v. N.Y. State Dep’t of Corr. Serv.,</u> 180 F.3d 426 (2d Cir.1999).....	26
<u>Riehl v. Foodmaker, Inc.,</u> 152 Wn.2d 138, 94 P.3d 930 (2004).....	47
<u>Robinson v. Safeway Stores,</u> 113 Wn.2d 154, 776 P.2d 676 (1989).....	43
<u>Rochon v. Gonzales,</u> 438 F.3d 1211 (D.C. Cir. 2005), <u>re hearing en banc denied</u> (2006)..	23
<u>Rowley v. Group Health Co-op of Puget Sound,</u> 16 Wn.App. 373, 556 P.2d 250 (1976).....	21, 44
<u>Runkle v. Gonzales,</u> 391 F.Supp.2d 210 (D.D.C. 2005).....	29
<u>Schwapp v. Town of Avon,</u> 118 F.3d 106 (2d Cir.1997).....	22
<u>Seattle v. Jackson,</u> 70 Wn.2d 733, 425 P.2d 385 (1967).....	43

<u>Smith v. King,</u> 106 Wn.2d 443, 722 P.2d 796 (1986).....	40, 42
<u>State v. Dennison,</u> 115 Wn.2d 609, 801 P.2d 193 (1990).....	40, 42
<u>State v. Jackson,</u> 75 Wn.App. 537, 879 P.2d 307 (1994), <u>rev. denied</u> 126 Wn.2d 1003, 891 P.2d 37 (1995).....	43
<u>State v. Scott,</u> 110 Wn.2d 682, 757 P.2d 492 (1988).....	33
<u>Stiley v. Block,</u> 130 Wn.2d 486, 925 P.3d 194 (1996), <u>reconsideration denied</u> (1997).....	32
<u>St. Mary’s Honor Center v. Hicks,</u> 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).....	39
<u>Tennant v. Roys,</u> 44 Wn.App. 305, 722 P.2d 848 (1986).....	21
<u>Terry v. Memphis Housing Authority,</u> 422 F.Supp.2d 917 (W.D. Tenn. 2006).....	28
<u>Texas Dep’t of Cmty. Affairs v. Burdine,</u> 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).....	39
<u>Thola v. Henschell,</u> 140 Wn.App. 70, 164 P.3d 524 (2007).....	20, 32
<u>Thomas v. iStar Financial, Inc.,</u> 438 F.Supp.2d 348 (S.D. N.Y. 2006), <u>reconsideration denied</u> 448 F.Supp.2d 532 (S.D.N.Y. 2006).....	28, 30
<u>Von Gunten v. Maryland,</u> 243 F.3d 858 (4 th Cir. 2001), <u>abrogated by Burlington Northern &</u> <u>Santa Fe R.R. Co. v. White,</u> ___ U.S. ___, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006).....	26

<u>Walker v. AT & T Technologies,</u> 995 F.2d 846 (8 th Cir. 1993).....	41
<u>Washington v. Illinois Dept. of Revenue,</u> 420 F.3d 658 (7 th Cir. 2005).....	23
<u>Wideman v. Wal-Mart Stores,</u> 141 F.3d 1453 (11 th Cir. 1998).....	27

Statutes

RCW 49.60.030.....	46
RCW 49.60.180.....	3
RCW 49.60.210.....	3
42 U.S.C. Sec. 2003-3(a).....	35

Regulations and Rules

CR 59(a)(7).....	45, 46
CR 59(a)(8).....	45
CR 59(a)(9).....	45, 46
RAP 2.5.....	33

Other Authorities

L. P. Hembree, <u>Noviello v. City of Boston: Hostile Work Environments and Retaliatory Adverse Actions Under Title VII,</u> 29 Am. J. Trial Advoc. 231 (Summer 2005).....	26
WPI 330.05 (5 th ed. 2005).....	31

I. RESPONSE TO APPELLANT'S SUMMARY OF APPEAL

Appellant Helen Tucker-Slater (hereafter "plaintiff"), who is an African American woman, contends that she was fired by respondent City of Lakewood (hereafter "defendant city") as retaliation for complaining against "the N word" being spoken by another employee of defendant city.

Plaintiff was not a permanent, full-time employee of defendant city at the time she was fired. She was still in her probationary period. Defendant city considers the probationary period to be a continuation of the job interview. RP 762.

Due to concerns about plaintiff's job performance, defendant city did not grant permanent status to plaintiff at the end of her probation period. Instead, defendant city extended plaintiff's probation.

Due to further concerns about plaintiff's job performance, defendant city did not grant permanent status to plaintiff at the end of her second probation period. Instead, defendant city extended plaintiff's probation.

During the second extension of probation, defendant city fired plaintiff. Plaintiff was fired immediately after a threatening e-mail from plaintiff to defendant city. The e-mail, which a reasonable employer would consider to be malicious, wrongly accused defendant city of multiple

transgressions including “unconscionable behavior” that was “condoned and tolerated.” Ex. 61.

The phrase “the N word” was spoken to plaintiff on one occasion during fall 2001 (as alleged by plaintiff) or spring 2001 (as claimed by defendant city), when city attorney Daniel Heid and assistant city attorney Anneke Berry were discussing a pending legal case with plaintiff, which involved court testimony where defendant Michael Fuller used “the N word.” The word “nigger” was spoken to plaintiff on Aug. 23, 2002, when co-worker Rainbow Thomas discussed a pending legal case with plaintiff, which involved an incident where a domestic violence victim (T.F.) enraged her husband (defendant Mack Foster) by calling him by “the N word.” “The N word” was not used as a racial slur by any employee of defendant city although throughout trial plaintiff referred to the two incidents as racial slurs.¹

Plaintiff’s theory of liability (i.e., her discharge from employment was “retaliation” for complaining about “the N word” being uttered in the

¹ Former city attorney Heid testified that the actual word “nigger” was not spoken in connection with the Michael Fuller incident. Mr. Heid confirmed his written statement, Ex. 113, which stated: “[D]uring our conversation with Helen, no one, neither Anneke nor me, used the “n” word. (The only reference in the conversation to the “n” word was as “the n word.”)” RP 692-693. As to the Mack Foster case, plaintiff testified that Ms. Thomas stated: “She said she called him a nigger.” CP 192. The “she” referred to by Ms. Thomas was an Asian domestic violence victim, T.S., who used “the N word” during an argument with her African American husband. Plaintiff quoted Ms. Thomas as stating: “She called him a Nigger.” Brief of Appellant at p. 13.

workplace) was a race-based claim. It was not based upon any of the other suspect class (i.e., age, creed, disability, marital status, national origin or sex).

In plaintiff's summary of the appeal, she complains that "the defense turned this retaliation trial into a race discrimination trial before the all white jury." Brief of Appellant at p. 2. To be sure, the issue of race discrimination was part of the case. To support a retaliation claim, plaintiff was required to be a member of a suspect class (i.e., race). To establish a claim of unlawful retaliation, plaintiff was required to prove that she was opposing what she reasonably believed to be discrimination on the basis of race.

Plaintiff claims that she was unfairly prevented from proving her retaliatory termination claim.² However, in the discussion that follows, it will be shown that plaintiff was given a fair opportunity to prove her retaliation claim. Plaintiff simply does not agree with the finding of fact by the jury, which answered "no" to the question on the special verdict form which asked: "Did the City retaliate against the plaintiff?" **All 12 of the jurors found that there was no retaliation.**

² Plaintiff brought her claim pursuant to RCW 49.60.180(3)(2), which prohibits the discharge of a person from employment because of race, and RCW 49.60.210(1), which prohibits the discharge of an employee "because he or she has opposed any practices forbidden by this chapter." The statutes are part of the Washington Law Against Discrimination (WLAD).

Plaintiff further claims that summary judgment should not have been entered in connection with a claim known as “retaliation based hostile work environment.” (RBHWE) Plaintiff’s RBHWE claim was subsumed by plaintiff’s retaliation termination claim. No case cited by plaintiff demonstrates that a fired employee can maintain a lawsuit for both retaliatory termination and for RBHWE. Moreover, plaintiff was unable to prove that the alleged harassment was severe and pervasive.

Plaintiff further claims that she was prevented from having a fair trial due to racial prejudice of the jury. Plaintiff presented one signed and one unsigned declaration from a single juror to support this contention. Defendant city presented declarations from seven jurors to show that there was not racism on the part of the jury. In a post trial motion for a new trial, the court found that plaintiff did not demonstrate that the jury was racially prejudiced.

A unanimous defense verdict was returned on Feb. 15, 2007. CP 432-433.³

³ Plaintiff’s complaint had five causes of action: (1) race discrimination, (2) hostile work environment due to race, (3) retaliation due to complaints of unlawful employment practices, (4) age discrimination, and (5) an untitled disability discrimination claim that discussed disability due to sleep apnea. CP 1-7. Defendant city brought a motion for summary judgment of plaintiff’s five claims. CP 15-35. In plaintiff’s brief in opposition, she did not challenge the race discrimination claim, the age discrimination claim and the disability claim. CP 128-158. In Plaintiff’s brief in opposition, she raised two new claims: (1) retaliation-based hostile work environment and (2) disability-related retaliation. CP 238-268. Six of plaintiff’s seven claims were dismissed on summary

II. RESPONDENT'S COUNTER-STATEMENT OF THE CASE

Plaintiff's Contract Position

During November 2000, plaintiff was hired as a "community advocate interviewer" by defendant city on a contract basis in a grant funded position. Ex. 1 at 1, RP 119-120, 218, 295, 300-301, 623, 733. She primarily worked at a work station at the Pierce County Sheriff's Office, where she was "absolutely happy." Ex. 1 at 1, RP 203, 218, 225-226, 299-300, 313, 623, 733, 735. She liked working with the police officers, who she said were "wonderful." Ex. 1 at 1, RP 318. She also maintained a desk at defendant city's legal department. RP 299, 322, 341. Plaintiff's position was limited to assisting female victims of domestic violence over the age of 18. Ex. 1 at 1, RP 292, 623, 734. Plaintiff primarily worked from 10 a.m. to 6:30 p.m. RP 302. Plaintiff was given a great deal of autonomy as to when to put in her required hours. RP 303, 735. Officials of defendant city were satisfied with the work that plaintiff performed on the limited, grant position. Ex. 1 at 3, RP 350-351, 630, 735.

The Michael Fuller Case

judgment. CP 275-277, CP 337-339. The court stated: "The only claim that will be tried is plaintiff's retaliatory termination claim." RP 338.

In early to mid 2001, when plaintiff was still working on her grant position, the first of the two “N word” incidents occurred. This incident is known as “the Michael Fuller case.”⁴ Ex. 1 at 1.

There is a substantial difference between plaintiff’s version of the Michael Fuller case and defendant city’s version of the case.⁵ Documentation of the case is set forth in Ex. 113 and Ex. 126.⁶

Defendant city’s version was explained by former city attorney Daniel Heid:

This report [Ex. 126] was indirectly related [to plaintiff’s being upset by the use of “the N word.”]. I was not the prosecutor prosecuting this case. . . . Michael Fuller happens to be a defendant who the City of Lakewood prosecuted repeatedly because he was just one of the people that you run into repeatedly. He was not always on his best behavior.

. . .

During that trial, Anneke [Berry] shared with me – I was not in trial. I was not in court. But she shared with me, after she got back from court on the day that this occurred, where she was flabbergasted . . . at the terminology that this African-American defendant was using. He was using the “N” word in his testimony.

⁴ Plaintiff claimed that the incident took place during fall 2001. Plaintiff’s version of the incident is set forth at pp. 6-7 of the Brief of Appellant.

⁵ Plaintiff testified that city attorney Heid and assistant city attorney Berry both used the actual word “nigger” in a “racist manner” and for the purpose of making her “uncomfortable.” RP 582-583. Plaintiff testified that both Mr. Heid and Ms. Berry “used the ‘N’ word numerous times around [her] in a willy-nilly fashion and for the purpose of making [her] upset.” RP 613.

⁶ Plaintiff’s assignment of error No. 10 is for “hearsay testimony” that she identifies at p. 20 of the Brief of Appellant as Ex. 126 and Ex. 113. Plaintiff presented no argument and provided no authority on this claim of error.

That was surprising to her and she actually brought it to my attention because she was offended by it. She was absolutely bewildered that somebody would be using that terminology, especially an African-American.

RP 692-693. Mr. Heid stated that he believed that his discussion with Ms. Berry took place during spring 2001. RP 708. Mr. Heid added:

Anneke brought to my attention her upset or confusion as to how he could go into court, an African American, go into court and use the “N” word as frequently as he did. She told me that this is part of the police report, and he testified that he didn’t nullify or modify his use of those terms when he was testifying.

Her questions to me were really – they weren’t directly to me, but how could anybody do that? And maybe it was even more surprising that it was an African-American using those words that Anneke indicated was so upsetting to her. I agreed with her.

I said, “That is totally foreign. That is not the type of language that I would use” or Anneke said that she would use. And for it to be coming from an African-American defendant was upsetting to her and it was confusing to the both of us. It was more of a question of, how could he do that?

...

I asked – Helen was in my office, and she and I had a number of very good conversations over the years about the process and what’s going on in different cases. I got along very well with her. I asked her – her office was not too far from where I was. At least she was convenient.

I asked her, when Anneke was in my office, and she was explaining her confusion at this trial, this language. Well, I asked Helen, Helen – actually I even asked ahead of time, I asked her, “Can I ask you a question?” I did that because even using the “N” word, not even the actual language, was something that I did not want to do lightly or do carelessly.

But I asked Helen, is there any – this is very confusing to the two of us. And I gave Helen a description of what occurred in this case: not only a police report but the testimony itself. He didn't back off from using those words that we found offensive.

Helen's response was, "No. There is absolutely no justification for this. This is totally wrong." That was the answer to the question that I asked, but I asked it.

I'll tell you this sincerely as I can, I never used the actual language, but I actually did it and asked it because Anneke and I were both as surprised and offended by his, Mr. Fuller's, use of this language. That was my description of it was probably as long as the conversation occurred as well.

RP 708-711. Mr. Heid stated:

I actually would have thought that Helen would have been offended by what Michael Fuller had done, not what Anita and I had done in terms of our conversation. We did not use the actual language. And any suggestion to the contrary, I will strongly deny as emphatically as I can.

RP 715-716. Mr. Heid also set forth his version of the incident in a letter dated September 25, 2002 to Ms. Booker-Hay.

See Ex. 113, which is attached in the appendix.

Plaintiff Hired as a Full Time Employee with a Six-Month Probationary Period

During 2001, defendant city's full time victim advocate, Karen Burgess, accepted a newly created part time advocate position. Ex. 1 at 3. Plaintiff applied for Ms. Burgess' full time victim advocate position. Ex. 1 at 3, RP 323. During August 2001, city attorney Dan Heid wrote a letter of

recommendation for plaintiff. RP 346.⁷ In November 2001, defendant city hired plaintiff for the position with the proviso that she would only perform her grant duties until the grant ran out on March 31, 2002. Ex. 1 at 3, RP 219-223, 324, 359, 474, 624, 736-737, 743-744, 753. Plaintiff's supervisor was assistant city attorney Anita Booker-Hay. RP 183, 766. It was explained to plaintiff that when the grant expired, plaintiff would be required to perform all duties required of a victim advocate and pass defendant city's six-month probation period like any other new city employee. Ex. 1 at 3, RP 182, 322, 326, 474, 624, 625. Moreover, the duties of a full time victim advocate were substantially more rigorous than plaintiff's duties while performing the work required under the grant. RP 471, 625.⁸

Plaintiff demonstrated frustration when she began performing the more challenging position. Ex. 1 at 3. She told her supervisor, Ms. Booker-Hay, that her salary should be increased because she had a Master's Degree. Ex. 1 at 3. No salary increase was given because the position did not require a Master's Degree. Ex. 1 at 4. She applied for a new city position that was

⁷ Plaintiff's contention that Mr. Heid used "the N word" as a racial slur to intentionally discriminate against her at the time of the Michael Fuller case is particularly unlikely given the fact that Mr. Heid later wrote a letter of recommendation for her.

⁸ Plaintiff testified that her workload "quadrupled" when she changed from doing contract work (i.e., only domestic violence victims over age 18) to doing all work required of victim advocates in the legal department. RP 625.

created called Ombudsman and was unhappy when she was not offered the position.⁹ Ex. 1 at 3-4, RP 434.

Changes Made Within the Victim Advocate Program

During January 2002, some changes were made in the victim advocates program. Ex. 1 at 4-5, RP 358, 745, 842. Plaintiff was assigned to make telephone contact with crime victims whose cases appeared on the Monday afternoon calendar and the Tuesday, Wednesday and Friday morning calendars. Ex. 1 at 5. For the Monday afternoon calendar, plaintiff had until noon Monday to make her contacts. Ex. 1 at 5. For the Tuesday, Wednesday and Friday calendars, plaintiff had to make her contacts by 9 a.m. of each court day. Ex. 1 at 5.

On January 25, 2002, Ms. Booker-Hay explained the new duties to the victim advocates. Ex. 1 at 5. Ms. Booker-Hay noticed that plaintiff displayed a negative attitude once the new duties were set. Ex. 1 at 5.

Plaintiff Speaks to the Interim City Attorney and Obtains a Change in Her Work Hours

Before January 25, 2002, plaintiff came to work about 10 a.m. and stayed after the regular closing time of 5 p.m. Ex. 1 at 5-6, RP 334. Under the reorganization of victim advocate duties, plaintiff was required to maintain an 8:30 a.m. to 5:00 p.m. schedule. Ex. 1 at 5, RP 334, RP 336,

⁹ Defendant city offered the position to another person, who accepted the position and then decided not to accept the job. Defendant city then decided not to fill the

738, 742, 746.¹⁰ Plaintiff told Ms. Booker-Hay that reporting to work at 8:30 a.m. would cause stress. Ex. 1 at 5, RP 337, 738, 739. Plaintiff did not tell Ms. Booker-Hay about any medication problems that would be caused by reporting to work by 8:30 a.m. Ex. 1 at 5, RP 745.

On January 30, 2002, plaintiff told Ms. Booker-Hay that she had a “medical condition” that would make it difficult for her to report to work at 8:30 a.m. Ex. 1 at 5, 621. Plaintiff stated that it had to do with her medication schedule.¹¹ Ex. 1 at 5. Plaintiff advised Ms. Booker-Hay that she had already cleared a delayed starting time with acting city attorney Mike McKenzie. Ex. 1 at 5, RP 352, 742.

On January 30, 2002, Ms. Booker-Hay spoke to Mr. McKenzie, who verified that he spoke to plaintiff and authorized a 10 a.m. to 6:30 p.m. work schedule. Ex. 1 at 6, RP 354. The delayed start time meant that plaintiff would not be available to cover the Wednesday morning or the Friday morning arraignment calendars and that she would not be able to attend

position. Ex. 1 at 3.

¹⁰ Plaintiff testified: “I thought the new plan would be burdensome for me.” RP 635. She thought the new plan would cause her to be “overworked.” Id.

¹¹ Plaintiff’s physician, Phyllis D. Hursey, M.D., stated that she did not recall telling plaintiff that medically she needed to start her work day at 10 a.m. and it was inappropriate for her to start work at 8:30 a.m. RP 545. This contradicts a statement in plaintiff’s brief that plaintiff “worked the different schedule because of her disability.” Brief of Appellant at p. 7. When plaintiff applied for jobs after she was fired, she did not advise her potential employers that she had a disability that required her to start work at 10 a.m. instead of 8:30 a.m. RP 596-597, 620.

customary office meetings that began at 9 a.m. each Monday. Ex. 1 at 6, 739, 740, 742, 743.

On January 30, 2002, when Ms. Booker-Hay advised plaintiff of the problems caused by her 10:30 a.m. starting time, plaintiff volunteered to come in at 9:00 a.m. on Mondays to attend office meetings. Ex. 1 at 6, RP 634. Plaintiff stated that coming in at 9:00 a.m. one day per week would not be a problem for her medication schedule. Ex. 1 at 6.¹²

Plaintiff's Attitude Toward the Job Deteriorates

From February 28 to March 25, 2002, plaintiff was off full time for a surgery.¹³ Ex. 1 at 6, RP 377, 379. Plaintiff worked part time from March

¹² Ms. Booker-Hay testified that, contrary to plaintiff's contention, she did not tell plaintiff that "you're probably not going to pass probation anyway" after plaintiff arranged for a mid-morning start time. RP 742.

¹³ In plaintiff's accusatory e-mail of August 28, 2002, plaintiff referred to her tonsil/adenoid surgery as "emergency surgery." Ex. 61. Plaintiff's physician, Dr. Hursey, testified that she knew of nothing that would indicate that plaintiff's surgery was an emergency surgery. RP 545. Plaintiff also made other comments that could lead a jury to question plaintiff's recollection. Examples include how she explained her previous job at a meat company, her non-filing of B & O tax returns when she was self-employed and her application for an ombudsman position. Plaintiff was laid off from a job that she had at West Coast Grocery. RP 272-273. Plaintiff told the jury that she understood her employer's decision and she didn't expect her job to be held forever. RP 274. "They've got a company to run. They have customers to supply needs. So it wasn't involved around me," plaintiff told the jury. Id. However, plaintiff actually attempted to make a legal claim against the grocery company for not holding her job open. RP 614. As to taxes, plaintiff confirmed her interrogatory responses stating that she did not file B & O tax returns "because she either was not required to or her income was below the annual level." RP 648. However, the testimony of her economist, Robert Moss, was that her consulting work at \$50 per hour was something that he "would expect" to be subject to B & O taxes. RP 409. In plaintiff's accusatory e-mail, she complained that she applied for the ombudsman position and was given favorable recommendations by three city employees but when she reapplied for the job "Chief Saunders informed me . . . that he could not recommend me for the position

25, 2002 to May 15, 2002. Ex. 1 at 6, RP 379-381. When plaintiff returned, Ms. Booker-Hay noticed that plaintiff's attitude further deteriorated. Ex. 1 at 6. For example, when staff members asked questions of plaintiff, she responded with short, pointed answers. Ex. 1 at 6. Plaintiff's poor attitude was to the point that Ms. Booker-Hay felt it necessary to have a meeting with plaintiff and city attorney Heidi Horst (now Wachter). Ex. 1 at 7. Ms. Booker-Hay explained that she observed plaintiff to be visibly unhappy and making other staff members uncomfortable. Ex. 1 at 7. She explained that plaintiff would need to make a choice between her job at the legal department or finding a job where she would be happier. Ex. 1 at 7. Plaintiff explained that the transition from grant employee to regular, full time employee was like becoming "a caged bird with clipped wings." Ex. 1 at 7, RP 747.

In April 2002, staff attorney Anneke Berry reported that plaintiff did not properly complete contacts for the April 22, 2002 jail calendar. Ex. 1 at 7, RP 844. Later, Ms. Berry reported that plaintiff did not properly complete contacts for the May 1, 2002 calendar. Ex. 1 at 7.

On May 3, 2002, Ms. Booker-Hay discussed Ms. Berry's concerns with plaintiff. Ex. 1 at 7-8. Plaintiff advised that she left early on the April

and had been called by Human Resources and told not to." Ex. 61. During trial, plaintiff stated that she was making no claim in connection with the ombudsman

date but only two cases were incomplete. Ex. 1 at 7. Plaintiff contended that Ms. Berry was in error about incomplete contacts on the May date. Ex. 1 at 7-8.

Plaintiff's Probation is Extended

On May 13, 2002, Ms. Booker-Hay provided a written, six-month probationary report for plaintiff to review. Ex. 1 at 8. Ms. Booker-Hay and plaintiff discussed the report on May 23, 2002. Ex. 1 at 8-9, RP 754, 755. "I indicated that she had a pretty rocky start since relocation to the legal department," Ms. Booker-Hay stated. RP 751.¹⁴ Due to work related concerns, Ms. Booker-Hay recommended that plaintiff's probation be extended another three months. Ex. 1 at 9, RP 465, 754. The options at that time were "[t]ermination or extension." RP 871. Plaintiff was angry about the evaluation and submitted a six-page critique of the evaluation. Ex. 1 at 9, RP 453-455, 465.

During June 2002, plaintiff complained that she had too much work to do. Ex. 1 at 9. Therefore, Ms. Booker-Hay assigned some of plaintiff's work to the advocate assistant, Rainbow Thomas. Ex. 1 at 9, RP 842.

position. RP 435-436. However, in her interrogatory responses, one of the claims she made in the lawsuit was for not getting the ombudsman position. RP 645.

¹⁴ Ms. Booker-Hay also testified: "I indicated she had not yet learned how to rely upon staff members to pull their load and to assist her and indicated that there were several indications where staff members felt uncomfortable around her and felt the need to stay clear." RP 751. She added: "[S]he couldn't keep up with the work. She was overwhelmed by the volume of cases and the fact that the attorneys actually had to leave at a certain time." RP 752.

According to Ms. Booker-Hay, plaintiff continued to demonstrate a poor attitude about her job. Ex. 1 at 10. Plaintiff complained that she was not given sufficient resources to perform her job. Ex. 1 at 10. RP 384. Ms. Booker-Hay disagreed with plaintiff's contention. Ex. 1 at 10.¹⁵

On July 1, 2002, plaintiff and Ms. Booker-Hay met with city attorney Wachter about plaintiff's evaluation.¹⁶ Ex. 1 at 10, RP 867. Plaintiff claimed that she was being harassed by attorney Berry and Ms. Burgess. Ex. 1 at 10-11. When asked for details, plaintiff could only recount instances that occurred two months before. Ex. 1 at 11.¹⁷ Plaintiff also claimed that she was doing "the lion's share of the work load" of the victim advocates. RP 203. Ex. 1 at 11, RP 758, 867.¹⁸

City attorney Wachter asked Ms. Booker-Hay to investigate the claims of harassment of performing more work than other victim advocates. Ex. 1 at 11, RP 758, 759, 868. Ms. Booker-Hay prepared a memo dated July

¹⁵ Plaintiff complained that she did not get as much help from assistants as other victim advocates including Karen Burgess. RP 641. Plaintiff admitted that Ms. Burgess had multiple sclerosis, was in a wheelchair and had to have assistance from the parking lot to her cubicle. Id.

¹⁶ Plaintiff claimed that she did not recall the meeting of July 2, 2002. RP 484. She does recall telling Ms. Wachter and Ms. Booker-Hay that she was "doing the lion's share of the work . . ." RP 647.

¹⁷ Jurors had ample reason to conclude that plaintiff tended to exaggerate. For example, plaintiff testified that she did "first-responder training" for "new officers" and "training with the judiciary." RP 315. When pressed upon this point during cross examination, she explained that "I don't know that I would train them" [judges] but that on one day one judge "happened to sit in on" her training session. RP 629.

¹⁸ "And she wasn't carrying, the lion share are all," Ms. Booker-Hay testified. "She was carrying the kitten share of the load." RP 760.

10, 2002, which documented that plaintiff was not carrying the largest work load. Ex. 1 at 11. In fact, the memo documented that plaintiff was carrying a work load similar to the part time advocate and much lighter than that of the other full time advocates. Ex. 1 at 11, RP 759, 844, 869. Ms. Booker-Hay also interviewed employees of the legal department about whether plaintiff was being harassed and was unable to verify any harassment. Ex. 1 at 11, RP 841.¹⁹

Plaintiff's Probation is Extended a Second Time

On July 29, 2002, as plaintiff's extended probationary period was ending, Ms. Booker-Hay met with plaintiff. Ex. 1 at 11-12, RP 761, 762. Ms. Booker-Hay explained that they needed to extend plaintiff's probation an additional three months because it appeared that plaintiff was not right for the position but they wanted to give her an opportunity to prove herself. Ex. 1 at 11, RP 482, 487, RP 843. Ms. Booker-Hay explained that the work load was quantified and, according to the analysis, plaintiff was not carrying the largest work load. Ex. 1 at 11-12.²⁰ Ms. Booker-Hay explained that the

¹⁹ In regard to plaintiff's disagreement with attorney Berry's criticisms, Ms. Booker-Hay stated: "I didn't conclude that the attorney was wrong and the advocate was right." RP 756. Ms. Booker-Hay stated that when plaintiff disagreed with the decision of another employee, plaintiff's "normal reaction was to kind of freeze people out" and "become silent." RP 757.

²⁰ Ms. Booker-Hay testified that at the time of the second extension of probation, "I had concerns about her being able to accomplish the work in a timely manner, which was related to speed. I had concerns about her being able to handle the volume of work since other advocates had taken part of her duties." RP 761.

probationary period is considered to be a continuation of the job interview. Ex. 1 at 12, RP 220, 762, 842, 843, 870.

On July 30, 2002, Ms. Booker-Hay again discussed a second extension of her probation and plaintiff agreed to the extension. Ex. 1 at 12. RP 488, 468. During plaintiff's extension, she was not keeping up with the volume of work. RP 764.

The Mack Foster Case

On August 23, 2002, plaintiff advised city attorney Wachter that advocate assistant Rainbow Thomas used "the N word" in her presence. Ex. 1 at 13, RP 588. Plaintiff then left the office for the day with a complaint of a migraine headache. Ex. 1 at 13, RP 591.

On August 26, 2002, during a legal department staff meeting, city attorney Wachter reminded employees to be sensitive about repeating information contained in police reports because some staff member could be offended by the comments. Ex. 1 at 13. Plaintiff did not attend the meeting because she stayed home due to a headache. Ex. 1 at 13, RP 592. However, she was well enough to contact her lawyer, Beverly Johnson Grant, to discuss employment law matters. RP 561, 592.

On August 26, 2002, Ms. Booker-Hay spoke to Ms. Thomas about "the N word" incident. Ex. 1 at 13. Ms. Thomas explained that she simply quoted from a police report and asked plaintiff why she thought that the

deputy sheriff involved repeated the specific quote to the crime victim. Ex. 1 at 13. City attorney Wachter had Ms. Thomas prepare a written statement. Ex. 1 at 13, RP 874. Ms. Thomas' statement is attached in the appendix as Ex. 124. The statement said in part:

[T]he victim had mentioned to me that the defendant had talked to her after the detective interviewed him. The defendant told her that the detective made a statement to the defendant in regards to her having called her husband a "nigger." I told her not to worry about it, that the detective was probably trying to get her husband to open up to him. . . . After this phone call, I talked to Helen about the conversation I had with the victim. As she had been the one trying to call the victim previously. Then I mentioned to her that the defendant told the victim that the detective asked the defendant "what kind of women calls her man a 'nigger'." (The statement was something to that effect, may not be the exact quote.) And asked her if she thought it was Detective Bunton's way of trying to get the defendant to open up.

Ex. 124²¹

The Accusatory E-Mail

After the staff meeting, Ms. Booker-Hay contacted plaintiff and advised her that city attorney Wachter instructed all legal staff members to

²¹ City attorney Wachter testified that she reviewed the Mack Foster police report, Ex. 128, when she interviewed Ms. Thomas about the incident. RP 872. "I wanted to know the context." *Id.* The police report stated in part: "Their argument rose to the point where Mack called [the DV victim] a 'bitch' and a 'whore.' [The DV victim] said she called him a 'niger' [sic] several times in return. [The DV victim] said that when she called Mack a 'niger,' [sic] that it really upset him to be called that. Mack became angrier and threatened to kill [the DV victim] by hitting her with a hammer if she didn't stop calling him that. Mack then again threatened [the DV victim] by saying, 'I'll call somebody to finish you, and I won't have to.'"

be sensitive when they mentioned information contained in police reports. Ex. 1 at 13, RP 876.

On August 28, 2002, plaintiff did not go to work because she contended that she had another headache. Ex. 1 at 13.²² Later that day, plaintiff sent an e-mail to Ms. Booker-Hay and city attorney Wachter. Ex. 61. The e-mail showed a cc to her lawyer. Ex. 61.

City attorney Wachter and Ms. Booker-Hay each testified that the allegations set forth in the e-mail were untrue. Ex. 1 at 13-14, RP 766-770, 772-733, 874-877.²³ Since the allegations were untrue, the e-mail could only be considered to be malicious with the added threat of a lawsuit.

Plaintiff's Termination on August 29, 2002

On August 29, 2002, after consultation between city attorney Wachter, Ms. Booker-Hay and Debra Young, human resources director for defendant city, it was decided to terminate plaintiff's employment. RP 222, 773, 774. Plaintiff was fired that day. RP 561, 562.²⁴

²² It may have actually been August 28, 2002, when plaintiff consulted with attorney Grant. Plaintiff wrote in a declaration: "I did not report to work on Monday, August 26th because I was still feeling ill from the most recent migraine which lasted several days. I consulted with then attorney, Beverly Grant, on that day." RP 593.

²³ City attorney Wachter testified about her reaction after reviewing plaintiff's e mail: "My thoughts were that these issues never end with Helen. . . ." RP 875. "Again, it is not over because with Helen, it's never really over," city attorney Wachter testified. "That was the flavor of what it was like for those months before the email came in, and the e-mail really solidified that for me." RP 876.

²⁴ Ms. Booker-Hay testified that the motivating factor for her to fire plaintiff "was the fact that she wasn't able to move with the speed that you needed to accomplish the job, and she wasn't able to carry her workload." RP 774. City

III. RESPONSE TO APPELLANT'S ARGUMENT

A. Standard of Review

There are several standards of review in the case at bar.

Whether the verdict is supported by the evidence

Factual findings of a jury are reviewed under the substantial evidence standard: "The record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question." Canron, Inc. v. Fed. Ins. Co., 82 Wn.App. 480, 486, 918 P.2d 937 (1996), rev. denied 131 Wn.2d 1002, 932 P.2d 643 (1997). An appellate court may overturn a jury's verdict only if the verdict is "clearly unsupported by substantial evidence." Burnside v. Simpson Paper Co., 123 Wn.2d 93, 108, 864 P.2d 937 (1994). The court may not substitute its judgment for that of the jury when there is evidence that, if believed, would support the verdict rendered. Id.

Whether the jury instructions were proper

Questions of law are reviewed de novo. Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994)("all questions of law are reviewed de novo."); Thola v. Henschell,

attorney Wachter testified that she relied upon Ms. Booker-Hay's opinions and evaluations of support staff. RP 864. She testified that Ms. Booker-Hay made her aware of "concerns [about plaintiff's] ability to keep up with the volume and a lack of appreciation for the change in gears between the previous job [grant position at the police department] and this job." RP 866.

140 Wn.App. 70, 84, 164 P.3d 524, 531 (2007)(“We review jury instructions and statutory interpretation de novo.”) The trial court’s decision to give or not give a jury instruction is reviewed for an abuse of discretion. Tennant v. Roys, 44 Wn.App. 305, 308, 722 P.2d 848 (1986).

Whether the jury was racially prejudiced

The test for granting a new trial is “whether the irregularity described establishes a reasonable doubt that the plaintiff received a fair trial.” Rowley v. Group Health Co-op of Puget Sound, 16 Wn.App. 373, 377, 556 P.2d 250, 253 (1976).

B. Summary Judgment of the Retaliatory Based Hostile Work Environment (RBHWE) Claim

The claims of hostile work environment (HWE) based on sex and hostile work environment based on race are established causes of action in the state of Washington. See, e.g., Campbell v. State, 129 Wn.App. 10, 19, 118 P.3d 888, 891-92 (2005)(plaintiff claimed HWE based on sex), rev. denied 157 Wn.2d 1002, 136 P.3d 758 (2006); Clarke v. State Attorney General’s Office, 133 Wn.App. 767, 785, 138 P.3d 144 (2006)(plaintiff claimed HWE due to race, ethnicity and national origin), rev. denied 160 Wn.2d 1006, 158 P.3d 614 (2007).²⁵

²⁵ Plaintiff brought a claim for HWE based on race. The claim was dismissed on summary judgment. CP 337-339. Defendant city opposed plaintiff’s claim for HWE based upon race on the ground that plaintiff did not prove that the alleged harassment was “sufficiently pervasive so as to alter her employment conditions.”

At pp. 21-30 of the Brief of Appellant, it is argued that the court erred in dismissing a claim known as “retaliation based hostile work environment” (RBHWE), which is also known as “retaliatory hostile work environment.” (RHWE)

Jurisdictions which allow RBHWE claims hold that a cause of action may lie (in some instances) when the employee is subjected to material adverse treatment that is less than discharge, demotion or reduction in pay (i.e. “ultimate employment decisions”). Jurisdictions which did not allow RBHWE claims held that a retaliation cause of action would only lie for “ultimate employment decisions.”²⁶

In the case at bar, it was not necessary for plaintiff to bring a RBHWE claim because she was fired, which is the strictest type of “adverse employment action.” There was never an issue as to whether plaintiff was

Clarke v. State Attorney General's Office, 133 Wn.App. 767, 785, 138 P.3d 144 (2006), rev. denied 160 Wn.2d 1006, 158 P.3d 614 (2007). The court quoted with approval from Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997) (“For racist comments, slurs, and jokes to constitute a hostile work environment, there must be ‘more than a few isolated incidents of racial enmity,’ [citations omitted], meaning that ‘[i]nstead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments”). RP 31 (Sept. 22, 2006).

²⁶ The 5th Circuit and the 8th Circuit held that employment discrimination claims under 42 U.S.C. Sec. 20003-3(a) apply only to “ultimate employment decisions” (i.e., dismissal, demotion, reduction in pay) and not to harassment. Mattern v. Eastman Kodak Co., 105 F.3d 702, 707 (5th Cir.1997), cert. denied 522 U.S. 932, 118 S.Ct. 336, 139 L.Ed.2d 260 (1997); Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997). The Mattern and Manning cases were specifically abrogated to the extent that they held that Title VII retaliation provisions are limited to an employer’s employment-related or workplace actions. Burlington Northern & Santa Fe R.R. Co. v. White, ___ U.S. ___, 126 S.Ct. 2405, 2410-11, 165 L.Ed.2d 345 (2006).

subjected to an “adverse employment action.” There is no need to allow a claim for RBHWE where plaintiff is fired and sues for alleged wrongful discharge.

Plaintiff cited no case recognizing RBHWE where a party was allowed to bring a claim for both retaliatory discharge/constructive discharge and a claim for RBHWE. Thus, if plaintiff potentially had a claim for RBHWE, her claim was subsumed by her retaliatory discharge claim. This was the basis of the trial court’s decision to dismiss plaintiff’s claim for RBHWE on summary judgment.²⁷

The purpose of a RBHWE claim is to provide a cause of action for an employee who suffers a material “adverse employment action” which is less severe than an “ultimate employment decision” but is nevertheless material because it might have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” Burlington Northern & Santa Fe Railway Co. v. White, __ U.S. __, 126 S.Ct. 2405, 2415, 165 L.Ed.2d 345 (2006)(agreeing with Washington v. Illinois Dept. of Revenue, 420 F.3d 658, 662 (7th Cir. 2005) and Rochon v. Gonzales, 438 F.3d 1211, 1217-1218 (D.C. Cir. 2006), rehearing en banc denied (2006)).

²⁷ “I am going to reconsider my denial of retaliation-based hostile work environment ruling and I am going to grant summary judgment on that, because I believe based on what’s been presented to this Court that claim has been subsumed by the retaliatory termination claim.” RP 12 (Oct. 20, 2006).

To support plaintiff's RBHWE claim, she cited eight federal cases from the 1st – 4th, 6th, 7th and 9th – 11th circuits. **In each of the cases** except the Gunnell case from the 10th Circuit, **plaintiff was not fired.** Plaintiff in each case (except the Gunnell case) would not have had a remedy unless the court allowed a RBHWE claim. Significantly, the Gunnell case was not a RBHWE case.²⁸

In the cases allowing a claim for RBHWE, plaintiff must still prove that the employer subjected the employee to discriminatory intimidation, ridicule and insult that was so severe and pervasive that it altered the terms and conditions of employment and created an abusive working environment. Hussain v. Nicholson, 435 F.3d 359, 366 (D.C. Cir. 2006), cert. denied ___ U.S. ___, 127 S.Ct. 494, 166 L.Ed.2d 365 (2006)(less than ideal working conditions for employee were not so severe or pervasive to have created an objectively hostile or abusive work environment), citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) and Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). See also Martin v. Merck & Co., Inc., 446 F.Supp.2d 615, 640

²⁸ In Gunnell v. Utah Valley State College, 152 F.3d 1253 (10th Cir. 1998), plaintiff brought claims for sexual harassment (hostile work environment), violation of the Family Medical Leave Act (FMLA) and retaliation which resulted in her resignation (i.e. constructive discharge). The sexual harassment and FMLA claims were dismissed on summary judgment. The retaliation claim was tried and resulted in a defense verdict. The court affirmed the summary judgment on the FMLA claim and the jury verdict on the retaliation claim. The court reversed the summary judgment on plaintiff's sexual harassment (hostile work environment) claim.

(W.D.Va. 2006)(“To succeed on this claim [RHWE], the alleged hostility must be ‘sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.’”); and Che v. Mass. Bay. Transp. Auth., 342 F.3d 31, 40 (1st Cir. 2003)(plaintiff claiming RHWE must prove that the “alleged harassment was severe or pervasive.”) **The trial court already found as a matter of law that plaintiff was not subject to severe or pervasive harassment in connection with the summary dismissal of plaintiff’s race based hostile work environment claim,** which dismissal was not appealed.

The reason for the requirement that an employee prove a material adverse job effect was explained by the United States Supreme Court:

We speak of material adversity because we believe it is important to separate significant from trivial harms. Title VII . . . does not set forth “a general civility code for the American workplace.” [Citations omitted.] . . . An employee’s decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. [Citations omitted.] The anti-retaliation provision seeks to prevent employer interference with “unfettered access” to Title VII’s remedial mechanisms. [Citation omitted.] It does so by prohibiting employer actions that are likely “to deter victims of discrimination from complaining to the EEOC,” the courts, and their employers. [Citation omitted.] And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. [Citation omitted.]

Burlington Northern & Santa Fe R.R. Co. v. White, __ U.S. __, 126 S.Ct. 2405, 2415, 165 L.Ed.2d 345 (2006).

The cases cited by plaintiff other than the Gunnell case will be discussed in order:

Noviello v. City of Boston, 398 F.3d 76 (1st Cir. 2005)(plaintiff parking enforcement officer was **not fired** but due to harassment lost weight, experienced nightmares and panic attacks, became anxious at work and was forced to seek medical care).²⁹

Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426 (2d Cir. 1999)(plaintiff prison employee was **not fired** but claimed that she took a medical leave that she had “no alternative” but to take due to harassment).

Jensen v. Potter, 435 F.3d 444 (3d Cir. 2005)(plaintiff postal service employee was **not fired** but due to harassment suffered panic attacks, used sick time and required emergency room visits for asthma attacks).

Von Gunten v. Maryland, 243 F.3d 858 (4th Cir. 2001)(plaintiff environmental health aid was **not fired** but offered a different position, which she rejected), abrogated by Burlington Northern & Santa Fe R.R. Co. v. White, __ U.S. __, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006).

Morris v. Oldham County Fiscal Court, 201 F.3d 784 (6th Cir. 2000)(plaintiff secretary was **not fired** but claimed retaliatory harassment by a supervisor for complaining about the supervisor's sexual harassment).

Knox v. State of Indiana, 93 F.3d 1327 (7th Cir. 1996)(plaintiff correctional officer was **not fired** after complaining about sexual harassment by co-worker but was subjected to harassment by co-workers which was allegedly acquiesced in by employer).

²⁹ The Noviello case has a thorough discussion on the claim of RHWE. The case is also discussed at L. P. Hembree, Noviello v. City of Boston: Hostile Work Environments and Retaliatory Actions Under Title VII, 29 Am. J. Trial Advoc. 231 (Summer 2005).

Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000)(plaintiff postal service employee was **not fired** but due to harassment required stress leave from work due to harassment).³⁰

Wideman v. Wal-Mart Stores, 141 F.3d 1453 (11th Cir. 1998)(plaintiff store employee, who was **not fired**, filed an EEOC complaint after not being hired to craft instructor position on alleged racial grounds and was later subjected to harassment, which employee claimed resulted in constructive discharge).

No published state court cases was found alleging a claim of “retaliatory hostile work environment.” One published state court case referred in passing to the claim of “retaliation-based hostile work environment.” The case is Oxley v. Dep’t of Military Affairs, 597 N.W.2d 89 (Mich. 1999). At p. 547, fn 8, the Oxley court stated:

We note that the Gregory court [Gregory v. Widnall, 153 F.3d 1071 (9th Cir. 1998)(plaintiff National Guard technician was **not fired**)] assumed, without deciding, that a technician’s retaliation-based hostile work environment claim was justiciable under title VII However, it concluded that the plaintiff failed to raise a genuine issue of material fact regarding retaliation. 153 F.3d at 1075.

One published federal circuit court cases was found alleging a claim of “retaliatory hostile work environment” since the Noviello case was decided in 2005. The case is Hussain v. Nicholson, 435 F.3d 359 (D.C. Cir. 2006)(affirming summary judgment of plaintiff’s claim because he did not

³⁰ The Ray court stated that to support a claim for RBHWE the harassment must be “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” 217 F.3d at 1245, citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). See also Hale v. Hawaii Publications, Inc., 468 F.Supp.2d 1210 (D. Hawaii 2006).

prove that the harassment was severe or pervasive; plaintiff VA hospital physician was **not fired**), cert. denied ___ U.S. ___, 127 S.Ct. 494, 166 L.Ed.2d 365 (2006).

The ten most recent published federal district court cases considering “retaliatory hostile work environment” are More v. Snow, 480 F.Supp.2d 257 (D.D.C. 2007)(action filed by seven plaintiffs who were current and former employees of the police force at the Bureau of Engraving and Printing; plaintiffs were **not fired**); Hale v. Hawaii Publications, Inc., 468 F.Supp.2d 1210 (D. Hawaii 2006)(plaintiff sales associate was **not fired**); Bozman v. Per-Se Technologies, Inc., 456 F.Supp.2d 1282 (N.D. Ga. 2006)(plaintiff human resources director was **not fired**; the court did not consider a claim for RHWE because “[i]t is unclear as to whether Plaintiff actually asserts a retaliatory hostile work environment claim or a traditional retaliation claim” 456 F.Supp.2d at 1344, fn 149); Martin v. Merck & Co., Inc., 446 F.Supp.2d 615 (W.D. Va. 2006)(action filed by three pharmaceutical manufacturing employees; plaintiffs were **not fired**); Thomas v. iStar Financial, Inc., 438 F.Supp.2d 348 (S.D. N.Y. 2006)(plaintiff accounts payable employee **was fired**), reconsideration denied 448 F.Supp.2d 532 (2006); Terry v. Memphis Housing Authority, 422 F.Supp.2d 917 (W.D. Tenn. 2006)(plaintiff field commander; plaintiff was **not fired**); Kruger v. Principi, 420 F.Supp.2d 896 (N.D. Ill.

2006)(plaintiff consulting psychologist was **not fired**); Newell v. Celadon Security Services, Inc., 417 F.Supp.2d 85 (D. Mass. 2006)(plaintiff security guard was **not fired**); Runkle v. Gonzales, 391 F.Supp. 210 (D.D.C. 2005)(plaintiff FBI agent was **not fired**); and Keeley v. Small, 391 F.Supp.2d 30 (D.D.C. 2005)(plaintiff museum shop financial manager was **not fired**).

Other than the 1st Circuit's Noviello case and the 9th Circuit's Ray case, already discussed, the only published federal circuit court case that was found alleging a claim of "retaliation-based hostile work environment" is Gregory v. Widnall, 153 F.3d 1071 (9th Cir. 1998)(plaintiff was **not fired**), which is also mentioned above.

Four published federal district court cases considering "retaliation-based hostile work environment" were found, which are Edwards v. U.S. Environmental Protection Agency, 456 F.Supp.2d 72 (D.D.C. 2006)(plaintiff program analyst was **not fired**); Keeley v. Small, 391 F.Supp.2d 30 (D.D.C. 2005)(plaintiff museum shop financial manager was **not fired**); Bryant v. Brownlee, 265 F.Supp.2d 52 (D.D.C. 2003)(plaintiff Army Corps of Engineers attorney was **not fired**); and Richard v. United States Postal Service, 219 F.Supp.2d 172 (D.N.H. 2002)(plaintiff letter carrier was **not fired**).

As is apparent, **the only case alleging RHWE involving an employee who was fired** is Thomas v. iStar Financial, Inc., 438 F.Supp.2d 348 (S.D. N.Y. 2006), reconsideration denied 448 F.Supp.2d 532 (2006). In Thomas, plaintiff brought actions for retaliatory termination, HWE due to race and RHWE. Only plaintiff's retaliatory termination claim survived summary judgment. 438 F.Supp. at 366. Plaintiff's claim for HWE due to race was dismissed because (like in the case at bar) "with nothing more than . . . isolated events, a reasonable trier of fact could not conclude that a hostile work environment existed" because plaintiff's complaints "were not sufficiently pervasive, severe or threatening to violate Title VII." 438 F.Supp. at p. 363. The court noted that if plaintiff could not prove a claim of HWE due to race, then plaintiff also could not prove a claim of RHWE. The court stated at 365 (emphasis added):

A retaliatory hostile work environment has been considered actionable when incidents of harassment following complaints were sufficiently continuous and concerted to have altered conditions of an employee's employment. [Citation omitted.] A hostile work environment could also constitute a materially adverse change that might dissuade a reasonable worker from reporting activity prohibited by Title VII. As discussed above, the incidents [plaintiff] complained of were insufficient to constitute a hostile work environment.

. . .

C. Jury Instructions

Plaintiff contends that the court erred by giving Instruction ## 11, 13, 15, 18, 19, 20, 21 and 22. Each instruction will be discussed separately.

Instruction No. 11: Instruction No. 11 sets forth the elements of a retaliation claim (i.e., proof that plaintiff was opposing what she reasonably believed was discrimination and proof that her opposition to discrimination was a substantial factor in the decision to terminate her employment). The instruction given by the court was modeled after WPI 330.05 (5th ed. 2005).

The instruction given by the court omitted the first paragraph of the pattern instruction, which simply stated that “[i]t is unlawful for an employer to retaliate against a person for opposing what the person reasonably believed to be discrimination on the basis of [fill in the suspect class] or for providing information to or participating in a proceeding to determine whether discrimination or retaliation occurred.”

The remainder of the instruction given by the court followed the pattern instruction except that under (1) it did not include the words: “or was providing information to a proceeding to determine whether discrimination or retaliation had occurred.”

Plaintiff did not object to the giving of instruction No. 11. Moreover, plaintiff’s proposed instruction No. 11 did not suggest the

language about “providing information to or participating in a proceeding . .

. . .”³¹

The instruction as given by the court was an accurate statement of the law. Moreover, plaintiff did not object to the court’s failure to set forth the language about “providing information to or participating in a proceeding”

The general rules in connection with the law of jury instructions were concisely set forth in Thola v. Henschell, 140 Wn.App. 70, 84, 164 P.3d 524, 531 (2007):

Parties are entitled to jury instructions that accurately state the law. Eagle Group, Inc. v. Pullen, 114 Wash.App. 409, 420, 58 P.3d 292 (2002), review denied, 149 Wash.2d 1034, 75 P.3d 968 (2003). We review jury instructions and statutory interpretation de novo. Cox v. Spangler, 141 Wash.2d 431, 442, 5 P.3d 1265 (2000); Rucker II, 137 Wash.2d at 436-37, 971 P.2d 936. Jury instructions are sufficient when they allow counsel to argue their case theories, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied. Blaney v. Int’l Ass’n of Machinists, 151 Wash.2d 203, 210, 87 P.3d 757 (2004). Instructions that are merely misleading are not grounds for reversal unless they cause prejudice. Keller v. City of Spokane, 164 Wash.2d 237, 249, 44 P.3d 845 (2002). A clear misstatement of the law is presumed prejudicial. Thompson v. King Feed & Nutrition Serv., Inc., 153 Wash.2d 447, 453, 105 P.3d 378 (2005).

A party is entitled to a jury instruction only if it has offered substantial evidence to support the instruction. Stiley v. Block, 130 Wn.2d

³¹ Exceptions to jury instructions are set forth at RP 897-950.

486, 498, 925 P.3d 194 (1996), reconsideration denied (1997). The trial court's decision whether to give or not give a jury instruction is reviewed for an abuse of discretion. Id. Generally, the failure to object to the giving or not giving a jury instruction precludes appellate review. RAP 2.5(a)(stating the rule of the requirement to object but noting that a "manifest error affecting a constitutional right" may be raised for the first time in the appellate court); State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988)(stating the general rule of the requirement to object and setting forth examples of "manifest" constitutional errors in jury instructions).

Instruction No. 13: Instruction No. 13 stated that the jury was to consider the alleged "N word" incident of August 23, 2002 as the discrimination that plaintiff was opposing and plaintiff's termination of employment on August 29, 2002 as that retaliatory act to be considered.³²

In the August 28 e-mail, plaintiff made these false accusations: (1) racial slurs were made by Daniel Heid and Anneke Berry, (2) Ms. Berry was wrong (and plaintiff was right) about in-custody calendar problems, (3) retaliation was the reason that she could not pass probation, (4) emergency surgery on her throat was the reason that she could not pass probation, (5) the extension of plaintiff's probation was unfair, (6) racial slurs were made

³² Plaintiff's exception to the instruction was that all "the issues that were presented in the August 28th e-mail" should be considered by the jury and the instruction was a comment on the evidence. RP 901-902.

by Rainbow Thomas, (7) defendant legal department was a hostile work place, (8) there were retaliations and reprisals against her, and (9) defendant city is guilty of unconscionable behavior that is condoned and tolerated. Ex. 61.

Thus, plaintiff wanted the jury to find defendant city liable if its motivation for firing plaintiff had to do with employment decisions other than her opposing discrimination in the work place. However, in argument to the court, counsel for plaintiff stated that the primary evidence supporting the retaliatory termination claim was “the N word” incident of August 23, 2002.³³

Instruction No. 15: Instruction No. 15 stated that if no reasonable person could have considered Rainbow Thomas’ use of “the N word” to be

³³ Counsel for plaintiff argued: “And the really strong evidence in this case, particularly with respect to not only the hostile work environment retaliatory claim, but particularly the termination – The incident with the coworker using the N word occurs on Friday, August 23rd. Ms. Slater immediately complains to the city attorney on that date. . . . On Wednesday, she sends an e-mail, putting in writing the complaint about the incident of the 23rd and the earlier incident that went unaddressed in the fall of 2001. The very next day, without any further complaints or issues regarding her work performance . . . she is abruptly terminated by the city attorney So the unlawful termination and the proximity in time between the complaint [the August 28, 2006 e-mail] and the termination, the fact that there was no discussion, no further work complaints obviously allows the case to go to the jury with respect to whether or not there was a retaliatory motive for the termination of my client.” RP 27 (Sept. 22, 2006). Counsel for plaintiff noted that retaliatory termination and RBHWE are “independent, viable claims based on different fact patterns.” RP 7 (Oct. 20, 2006)(emphasis added). She stated that “The retaliation [termination] is a very discrete action that occurred. On August 28th she is in compliance. On August 29th, the next day, she is terminated. It [retaliatory termination] is not connected with the prior harassment” RP 8 (Oct. 20, 2006).

race discrimination, then a retaliation claim could not be proven.³⁴ The instruction was based on the case that that a retaliatory termination claim may not be maintained if the conduct that was being opposed was something that no reasonable person could view as discrimination. See also the discussion on “reasonable person” and “reasonable belief” below.

Instruction No. 18: Instruction No. 18 instructed the jury that “a reasonable person is not a hyper-sensitive or overly-sensitive person.”³⁵

To make a prima facie case for retaliation, plaintiff was required to prove that she suffered a material adverse action for opposing an act of discrimination based on race. This is similar to the “opposition clause” (i.e. protection for opposing violations of Title VII) set forth in 42 U.S.C. Sec. 20003-3(a). The federal “opposition clause” protects an employee from retaliation for opposing “what they reasonably perceive as discrimination under the Act.” Learned v. City of Bellevue, 860 F.2d 928, 932 (9th Cir. 1988)(emphasis omitted), cert. denied 489 U.S. 1079, 109 S.Ct. 1530, 103 L.Ed.2d 835 (1989). The employment practice opposed by the employee must not actually be unlawful; instead, opposition clause protection applies “whenever the opposition is based on a ‘reasonable belief’ that the employer

³⁴ Plaintiff’s objections were “improper comment on the evidence,” improperly “infusing the standard for a harassment case into the standard for a retaliation case,” and failure to provide “an accurate standard for a reasonable person.” RP 907-909.

has engaged in an unlawful employment practice.” EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1013 (9th Cir. 1983). The Ninth Circuit described the “reasonable belief” requirement in Moyo v. Gomez, 40 F.3d 982 (9th Cir. 1994), cert. denied 513 U.S. 1081, 115 S.Ct. 732, 130 L.Ed.2d 635 (1995), when it stated at 985:

[Plaintiff] would be able to state a retaliation claim if he could show that his belief that an unlawful employment practice occurred was “reasonable. . . . The reasonableness of [plaintiff’s] belief that an unlawful employment practice occurred must be assessed according to an objective standard – one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims. . . .

Applying this standard, the United States Supreme Court held that “opposing perceived discrimination or harassment” is not sufficient to invoke the anti-retaliation protections of Title VII when “no one could reasonably believe” that the conduct complained of violated Title VII. Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001)(reversing the Ninth Circuit’s holding that plaintiff could have reasonably believed that her co-workers’ comments constituted a violation of Title VII). See also Burlington Northern & Santa Fe R.R. Co. v. White, ___ U.S. ___, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)(Title VII action alleging sex discrimination and retaliation; “We refer to reactions of a

³⁵ Plaintiff’s objection to the instruction was that it improperly substituted “reasonable person” for “reasonable belief.” RP 923-924.

reasonable employee because we believe that the provision's standard for judging harm must be objective. . . . It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings.”)(emphasis in original).

Thus, **plaintiff was not allowed to invoke the protections of the WLAD if no reasonable person could have believed that the conduct she complained about violated the WLAD.** It was therefore proper for the court to instruct the jury that a reasonable person is not a hyper-sensitive or overly-sensitive person. See, e.g., American Civil Liberties Union of Ky. v. Mercer County, 432 F.3d 624, 639 (6th Cir. 2005), denying rehearing en banc 446 F.3d 651 (6th Cir. 2006)(in a federal civil rights case challenging the constitutionality of the display of the Ten Commandments in the county courthouse, “the reasonable person is not a hyper-sensitive plaintiff.”); Harley v. McCoach, 928 F.Supp. 533, 539 (E.D. Pa. 1996)(anti-discrimination statute is not “designed to protect the overly sensitive plaintiff.”); Koschoff v. Henderson, 109 F.Supp.2d 332, 338 (E.D. Pa. 2000), aff'd 35 Fed. Appx. 357 (3d Cir. 2002)(the objective standard of the anti-discrimination statute “puts a check on the overly sensitive plaintiff who is unreasonably affected by acts of discrimination.”); Bishop v. National Railroad Passenger Corp., 66 F.Supp.2d 650, 664 (E.D. Pa.

1999)(anti-discrimination statute is not “designed to protect the overly sensitive plaintiff.”).

The court noted that one of the reasons that the court was going to give the “unduly sensitive instruction” was plaintiff’s acknowledgement that she could read “the N word” but could not listen to “the N word.” RP 927.³⁶

Instruction No. 19: Instruction No. 19 instructed the jury that plaintiff’s opposition to perceived racial discrimination “must have been about something that a reasonable person would believe to be racial discrimination.”³⁷

The instruction was proper under the analysis set forth above, which explains that the “opposition clause” requires a “reasonable” perception that the conduct being opposed is discrimination.

Instruction No. 20: Instruction No. 20 instructed the jury about legitimate, non-discriminatory reasons for discharging an employee and that it was plaintiff’s burden to prove that defendant city intentionally

³⁶ Plaintiff testified that she read “the N word” in the course of her work at the legal department “once or twice a month” and it did not upset her. RP 588. Plaintiff testified that hearing “the N word” caused her to be “inflamed.” Id.

³⁷ Plaintiff’s objections were based on the use of a “reasonable person” standard rather than a “reasonably believed” standard. RP 923-994. At p. 37 of the Brief of Appellant, plaintiff argues that the instruction was also objectionable because “Slater’s complaints were broader than complaints about what she reasonably believed to be a racially hostile work environment.” This objection was not made to the trial court.

discriminated against her.³⁸ The instruction was based on law set forth in Hill v. BCTI Income Fund-1, 144 Wn.2d 172, 181, 23 P.3d 440, 446 (2001)(once plaintiff establishes a prima facie case of unlawful discrimination, defendant must produce “evidence of a legitimate, nondiscriminatory explanation for the adverse employment action”); Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981)(“The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”); and St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 507, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993)(once plaintiff establishes a prima facie case, “defendant must clearly set forth . . . reasons for its actions which . . . would support a finding that unlawful employment discrimination was not the cause of employment action.”).

Each sentence of the instruction as given is an accurate statement of law.

Instruction No. 21: Instruction No. 21 instructed the jury that the employer has discretion in choosing employees, the employer is not subject to liability simply for misjudging an employee’s qualifications and it is not

³⁸ Plaintiff contended that “retaliation” should be added to the phrase “unrelated to an employee’s age, sex, marital status, race, creed, color, national origin or physical disability.” RP 945. Plaintiff provides no legal authority for her argument. An argument not supported by legal authority will not be considered

unlawful to discharge an employee due to a perception that the employee misbehaved. The instruction was based on law set forth in Pannell v. Food Services of America, 61 Wn.App. 418, 436, 810 P.2d 952, 963 (1991), rev. denied 118 Wn.2d 1008, 824 P.2d 490 (1992) and Hill v. BCTI Income Fund-1, 144 Wn.2d 172, 190 n. 14, 23 P.3d 440, 451 n. 14 (2001).

The instruction as given is an accurate statement of law.

Plaintiff provided no legal authority for her suggestion that Instruction No. 21 was a comment on the evidence. An argument not supported by legal authority will not be considered by the appellate court. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); Smith v. King, 106 Wn.2d 443, 722 P.2d 796 (1986).

Instruction No. 22: Instruction No. 22 instructed that the jury is not allowed to substitute its judgment for the judgment of defendant city about plaintiff's abilities and that defendant city is not liable for erroneous evaluation of plaintiff so long as the decision was not based on plaintiff's race, national origin, gender, age or disability.³⁹ The instruction was based

by the appellate court. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); Smith v. King, 106 Wn.2d 443, 722 P.2d 796 (1986).

³⁹ Plaintiff's objected by stating that the second sentence of the instruction should have included the word "retaliation" and thus read: "The law only requires that the employer not make its employment decision based on race, national origin, gender, age, disability or retaliation." (Emphasis added.) Plaintiff provided no legal authority for including "retaliation" to the list of protected categories. An argument not supported by legal authority will not be considered by the appellate court. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); Smith v. King, 106 Wn.2d 443, 452, 722 P.2d 796, 801 (1986).

on law set forth in Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 780 (8th Cir. 1995); Dammen v. UniMed Medical Center, 236 F.2d 978, 982 (8th Cir. 2001); Evers v. Alliant Techsystems, Inc., 241 F.3d 948, 959 (8th Cir. 2001); Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993); Anderson v. Stauffer Chemical Co., 965 F.2d 397, 403 (7th Cir. 1992); Walker v. AT & T Technologies, 995 F.2d 846, 848 (8th Cir. 1993).

The instruction as given is an accurate statement of law.

D. Objections to Challenged Jury Instructions

Plaintiff contends that she properly made objections to the eight jury instructions that are being challenged.

Plaintiff made no objection to Instruction No. 11. The passage cited at p. 42 of the Brief of Appellant does not qualify as an objection.

Plaintiff took exception to Instruction ## 13, 15, 18, 19, 20, 21 and 22. However, there was no merit in plaintiff's objections.

E. Failure to Properly Object to Jury Instructions

Plaintiff argues that if her objections to the jury instructions were not properly made, the court should still reverse due to the jury instructions. The failure to properly object to a jury instruction precludes appellate review unless the error was of constitutional magnitude, which is not

claimed by plaintiff. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); Smith v. King, 106 Wn.2d 443,452, 722 P.2d 796, 801 (1986).

F. Use of the August 23, 2002 Incident to Prove Retaliation

The reason why it was proper for the court to give 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. . . .”) was discussed above. Plaintiff argued that she should have been allowed to prove “through a series of separate acts, which might not, standing alone, violate Title VII.” Brief of Appellant at p. 45. Plaintiff’s argument is simply a repackaging of her argument that the court should have accepted her alleged claim of retaliation based hostile work environment.

G. Alleged Racial Bias of Members of the Jury

Plaintiff contends that alleged statements made by three jurors were racially biased against her. This argument was made as a post-trial motion to the trial court. Plaintiff filed a signed declaration by juror Steven R. Depuydt stating that he detected some degree of racial prejudice in the three jurors. Defendant city filed signed declarations by seven jurors⁴⁰ which refuted any suggestion of racial bias during the jury deliberations. Plaintiff

⁴⁰ The juror declarations were from Norman L. Budrow, Kenneth H. Adams, James C. Nichols, Caren C. Smithlin, Michael J. Morgan, Julie A. Sampson and Rodney J. Kessler. CP 480-507.

also filed an unsigned supplemental declaration by Mr. Depuydt that the court considered even though it was not signed.

Before the trial court, plaintiff cited five cases to support her argument: Seattle v. Jackson, 70 Wn.2d 733, 425 P.2d 385 (1967), Allison v. Dep't of Labor & Industries, 66 Wn.2d 263, 401 P.2d 982 (1965), Gordon v. Deer Park School District No. 414, 71 Wn.2d 119, 426 P.2d 824 (1967), State v. Jackson, 75 Wn.App. 537, 879 P.2d 307 (1994), review denied 126 Wn.2d 1003, 891 P.2d 37 (1995), and Brady v. Fibreboard Corp., 71 Wn.App. 280, 857 P.2d 1094 (1993), rev. denied 123 Wn.2d 1018, 871 P.2d 599 (1994). The cases were distinguished in defendant city's memo in opposition to plaintiff's memo for new trial. RP 443-459.⁴¹ In the Brief of Appellant, plaintiff also cited Robinson v. Safeway Stores, 113 Wn.2d 154, 776 P.2d 676 (1989)(a juror's statements during deliberations that Californians were sue happy and would sue anybody warranted a new trial where the juror stated in voir dire that he would not be prejudiced against a plaintiff from California) and Kent v. Smith, 11 Wn.App. 439, 523 P.2d 446 (1974)(a juror's disclosure during deliberations that he was experienced as a truck driver warranted a new trial where the juror stated in voir dire that he was not experienced in operating trucks), rev. denied 84 Wn.2d 1007 (1974).

Plaintiff further argues that “the Court should have held an evidentiary hearing to determine juror bias.” Brief of Appellant at p. 51. Plaintiff did not request an evidentiary hearing.⁴²

Courts are mindful of the sanctity of jury deliberations and the need for the courts to refrain from intruding into the province of the jury. Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 179, 422 P.2d 515 (1967). When a jury verdict is challenged due to alleged bias of jurors, the court’s inquiry into bias focuses on whether the derogatory comments are evidence of bias sufficient to create a reasonable doubt that a party received a fair hearing. Rowley v. Group Health Co-op of Puget Sound, 16 Wn.App. 373, 377, 556 P.2d 250, 253 (1976)(the test is “whether the irregularity described establishes a reasonable doubt that the plaintiff received a fair trial.”). A jury verdict may not be set aside for jury misconduct which inheres in the verdict. Gardner v. Malone, 60 Wn.2d 836, 843, 376 P.2d 651, 654 (1962). The Gardner court stated at 841 (emphasis added):

[I]t is today universally agreed that on a motion to set aside verdict and grant a new trial the verdict cannot be affected,

⁴¹ Defendant city’s memo is incorporated by reference. CP 443-459

⁴² At the conclusion of argument on alleged juror bias, the court stated: “I will also decline to conduct a hearing in the matter. And I note an exception, obviously, to the plaintiff, on both the denial of the motion and denial of the suggestion of conducting a hearing.” RP 25 (March 16, 2007). Counsel for defendant city objected to wording on the Order re Plaintiff’s Motion for a New Trial, CP 473-474 (“The Court also declines to hold an evidentiary hearing on this matter.”) “because there’s never been a motion for evidentiary hearing by Counsel” RP 25 (March 16, 2007). While the court declined to hold an evidentiary hearing, it was not over the objection of plaintiff.

either favorably or unfavorably . . . by an improper remark of a fellow juror.

The trial court properly applied the legal standard when it found that plaintiff did not raise a reasonable doubt about whether she received a fair trial. In concluding that it was a fair trial (as opposed to “a perfect trial”), the court stated that plaintiff’s evidence was not “sufficient to overcome the clear statement of the foreman of the jury” who stated in his declaration:

I can state with complete confidence that the jury’s verdict in this case was made after a careful review of the evidence and the Court’s instructions and that the jury’s verdict was not based upon racial discrimination or racial prejudice of any kind.

RP 24-25 (March 16, 2007).⁴³

H. CR 59(a) Argument for a New Trial

Plaintiff contends that she is entitled to a new trial under CR 59(a)(7)(“no evidence or reasonable inference from the evidence to justify the verdict . . . or that it is contrary to law”), under CR 59(a)(8)(“Error in law occurring at the trial and objected to at the time”), and CR 59(a)(9)(“substantial justice has not been done”).

Plaintiff’s CR 59(a)(7) argument fails because there was substantial evidence to support the jury verdict.

Plaintiff's CR 59(a)(8) argument fails because the jury was properly instructed on the law and the evidence does not support that plaintiff's case was rejected due to racial prejudice of the jury.

Plaintiff's CR 59(a)(9) argument suggests that trial with "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." Brief of Appellant at p. 52. This argument also fails because the jury was properly instructed, it was not an abuse of discretion for the court to allow evidence on the Michael Fuller case and the record does not support a finding of racial prejudice of the jury.

I. Request for Reasonable Attorney Fees and Costs

If plaintiff is successful in obtaining a remand, plaintiff seeks an award of reasonable attorney fees and costs pursuant to RCW 49.60.030(2). Obtaining a remand on a discrimination case is not the same as proving a meritorious discrimination case. An employee bringing a claim under the WLAD must first prove that her case is meritorious before being awarded reasonable attorney fees because "[e]ntitlement to attorney fees cannot be determined until after trial on the merits." Hinman v. Yakima Sch. Dist. No. 7, 69 Wn.App. 445, 453, 850 P.2d 536 (1993), review denied 125 Wn.2d

⁴³ The court also stated: "Booker-Hay [plaintiff's supervisor] and [plaintiff] Slater, are both African Americans and that should be a part of the record. RP 24 (March 16, 2007).

1010, 889 P.2d 498 (1994). “Where a party has succeeded on appeal but has not yet prevailed on the merits, the court should defer to the trial court to award attorney fees.” Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 153, 94 P.3d 930 (2004).

IV. CONCLUSION

Plaintiff had a full and fair opportunity to present evidence to the jury that she was wrongfully fired. The jury verdict came down to a finding of fact whether statutorily protected activity was a substantial factor in defendant city’s firing of plaintiff. The jury made a finding of fact that statutorily protected activity on the part of plaintiff employee was not a substantial factor in her discharge. There is substantial evidence to support the jury’s finding. Moreover, plaintiff did not make a compelling case whether a racially prejudiced jury had anything to do with plaintiff’s firing.

The court should affirm the judgment entered upon the jury’s verdict.

RESPECTFULLY SUBMITTED this 11th day of December, 2007.

JERRY MOBERG & ASSOCIATES



JAMES E. BAKER, WSBA No. 9459
Attorney for defendant city

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Resubmitted Brief of
Respondent to be mailed by U.S. mail, postage prepaid, to:

Curman Sebree
Law Offices of Curman Sebree
Eighteenth Floor
1191 Second Avenue
Seattle, Washington 98101-2939

DATED December 11, 2007 in Ephrata, Washington.



LINDA SPERLINE, Paralegal