

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 36968-1-II

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

CLARK COUNTY FIRE DISTRICT NO. 5, CITY OF VANCOUVER,
COUNTY OF CLARK, and MARTY JAMES,

Appellants,

v.

SUE COLLINS, HELEN HAYDEN,
VALERIE LARWICK and KRISTY MASON,

Respondents and Cross-Appellants.

BRIEF OF RESPONDENTS AND CROSS-APPELLANTS

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I. INTRODUCTION

This is a gender-based hostile work environment case arising from claims for violation of the Washington Law Against Discrimination, RCW 49.060 (“WLAD”) brought by, Sue Collins (“Collins”), Helen Hayden (“Hayden”), Valerie Larwick (“Larwick”), and Kristy Mason (“Mason”) (collectively, “the four women”), against Clark County Fire District No. 5 (“CCFD#5”) and its administrator/district secretary/gatekeeper to CCFD#5’s District Board, Marty James (“James”) (collectively “CCFD#5/James”) alleging crude and disparaging sexual statements, angry gender-based outbursts, and other gender-based psychological mistreatment over a period of years by James. Collins had a separate action against the City of Vancouver (“the City”) for negligence, which resulted in a verdict for Collins that was paid in full by the City.

During a five week trial, the jury listened to 70 witnesses and received hundreds of exhibits, received instruction, heard argument, spent almost two days deliberating and returned its verdicts for the four women.

CCFD#5/James received a fair trial and lost. CCFD#5/James, however, are attacking that process and result through a brief that contains *ad hominem* attacks on the four women’s counsel, uses straw-man arguments such as its reference to counsel’s use of a Golden Rule argument in closing (despite the Golden Rule’s complete absence from

the case), and is unsustainable in fact or law. Moreover, because CCFD#5/James assigned no error to any evidentiary ruling and no error to any jury instruction, they are appealing from the verdict of a jury that received proper evidence and was properly instructed in the law.

The system and the process worked in this textbook illustration of what WLAD was enacted to remedy. The jury's verdict should stand, and CCFD#5/James' effort to retry the case in this forum should be denied. However, the trial court's post-verdict actions reducing Larwick's jury award and the four women's award of attorney fees abused its discretion.

II. COUNTERSTATEMENT OF ISSUES PERTAINING TO CCFD#5/JAMES ASSIGNMENTS OF ERROR

The four women acknowledge CCFD#5/James' assignments of error, but believe the questions before the Court are better framed as follows:

1. Did the trial court abuse its discretion in denying CCFD#5's motions for a new trial and post-verdict relief as to Collins' economic damages?
2. Did the trial court abuse its discretion in denying CCFD#5/James' motions for a new trial and post-verdict relief based on allegations of misconduct by the four women's counsel?

III. CROSS-ASSIGNMENTS OF ERROR

1. The trial court erred in issuing its October 9, 2007, Memorandum of Decision in which it reduced Larwick's jury awarded economic damages from \$626,000 to \$150,000 and non-economic damages from \$875,000 to \$250,000.

2. The trial court erred in issuing its October 9, 2007, Memorandum of Decision in its determination of the four women's attorney fees.

IV. ISSUES PERTAINING TO CROSS-ASSIGNMENTS OF ERROR

1. Did the trial court improperly reduce the jury's award to Valerie Larwick of economic damages from \$626,000 to \$150,000 and non-economic damages from \$875,000 to \$250,000. (Cross-assignment of Error #1.)

2. Did the trial court err when it awarded the four women attorney fees at a rate below their attorney's customary hourly fee for currently paying clients; reduced their attorney disbursements award for what the court described as general overhead; and failed to grant a lodestar multiplier in what the court recognized was a high risk trial with little prospect for counsel to recover costs if the jury ruled for CCFD#5/James? (Cross-assignment of Error #2.)

V. COUNTERSTATEMENT OF CASE

The four women take exception to CCFD#5/James' misrepresentations of the record and insertion of argument in violation of RAP 10.3(a)(5).

Employees and others who were regularly at the Training Center knew that it was a "boys' club." RP 912, 2214, 2966. One male supervisor testified that a breakfast group of male supervisors met almost every day and discussed business, RP 3123, but that Collins was never invited. RP 3124. Her exclusion from the male manager's activities visibly distressed Collins. RP 2966. Mason recalled one instance when the male supervisors left for a meeting and Collins grabbed her materials and ran after them, which Mason saw as pitiful. RP 2486-87.

The four women frequently heard gender-based comments and vitriol from James in his "boy's club". When James cooked sausage in the morning, he would say "want a little wiener", with sexual innuendo. RP 914, 1800-01, 2468. With a front office full of women, James would say "we need some more testosterone around here", often grabbing his crotch and jiggling when he said so. RP 644-45, 748-49, 914-15, 972, 1197, 1731-32, 2469. He complained there were too many uteruses present. RP 620. He complained that women were "too sensitive" (RP 970), and opined that women were "worthless" (RP 970), or "damn worthless." RP

1725. When a woman was upset, she was “PMS-ing” (RP 971, 2472), “on the rag” (RP 971, 1812), or being “bitchy” that day. RP 2471, 2472.

Women were “stupid women”, “fucking worthless women” or “dumb women”. RP 2471. He would disparage a woman who made a suggestion, “That’s all we need is another woman’s opinion around here.” RP 2472.

James used the word “bitches” or “fucking bitches” in the Training Center (RP 643) harshly enough that one person who officed there, but was not employed at the Training Center, stopped to listen. RP 408.

James used the term “cunt” in the Training Center. RP 643.

James regularly made comments about women’s bodies. RP 915. He commented on women’s “racks”(RP 291,641, 963, 1805, 2473), and their breast size. RP 2588. When female employees entered his office, he often asked whether it was cold in there or they were glad to see him. RP 964-65, 1215, 1780, 1803, 2469. He would say of Mason that she couldn’t “strap down those big ‘ol taters anymore.” RP 1769. When younger women walked by, James would say, “That’s how I like them, young and tight.” RP 1805-06. On another occasion when CCFD#5 Commissioner Robert Torrens (“Torrens”) and James were walking behind Mason and a Training Center student, Mason heard James say, “High and tight, that’s the way I like them” before beginning to laugh. RP 2479-80. Torrens went along with it, “smiling and yukking it up”, (RP

2480), and this was after Mason had gone to Torrens for help in dealing with James. RP 2480. James also described a Fire Commissioner's daughter as having a hard body. RP 1806, 2478-79. When a female employee would bend over to get something, James would comment that "it looks good from here". RP 2473. James referred to unattractive women as being a "double-bagger" or "triple-bagger". RP 1803, 2473. He referred to people he did not like as "douche bags or fucking douche bags". RP 1804. He referred to lesbians as carpet munchers or dikes. RP 1804, 2473. He would opine, "I can't believe they let retards have babies." RP 1806-07, 1202. He spoke of another woman, saying "he didn't know how her husband could fuck such a big ass." RP 1204.

When Collins or Mason wore a dress to work, James would ask whether it was a no panties day, and explain that his wife liked to go without panties when she wore a dress so she could catch a cool breeze. RP 2475-76.

At a business gathering at Billigans restaurant, James shook a bowl of peanuts, saying "want some penis". RP 2476-77. James kept a can of macadamia nuts on his desk, which he would shake and ask whether the person in his office wanted some "cum nuts". RP 1813. It got to where Collins and a female consultant to the Training Center made a pact that if they were going to be present for an extended time with James and another

male member, they would try to go in together rather than by themselves. RP 2588. On another occasion as Collins and a state trooper who taught at the Training Center were leaving a meeting, James approached, looked at the state trooper who had recently lost some weight, and said, “You must be able to see your wiener now.” RP 714. James then said, “something to the line of: Do you know the difference in a paycheck and a blow job? That it’s easy to get your wife blow your paycheck.” RP 715, 1801-02. The trooper was embarrassed for both Collins and himself. RP 715. Because he was on duty in his WSP uniform and he had “understanding that there had been things going on there at the Training Center and he ‘was afraid’ that it would result in court testimony one day, he reported what he had observed to his superior officers.” RP 716.

On yet another occasion, when Collins wore a new pearl necklace to work that her husband had just given her for Christmas, James told her that he could have given her one for free, RP 966-67, 1795, resulting in Collins never again wearing the Christmas pearl necklace. RP 1796.

When James was falsely accusing Mason of having an affair with a Clark County co-worker, James would talk to Collins about Mason “over there fucking” the employee, RP 1767, or tell Collins that Mason was “just using her fucking tits to get her way”. RP 1769; *see also*, 1206.

James made so many statements that Mason found it hard to remember all of them. RP 2472. One male employee even described James as an old dog. RP 2594. When the CCFD#5 Commissioners were asked about the many comments attributed to James, they described them as unacceptable in the workplace, RP1608-13, 2355-57, or as being in a zero tolerance category of comments that can't be spoken in the workplace. RP 1613. The identified statements were acknowledged as being all the more offensive because they were spoken by a male to a female, RP 1617, and even more offensive because they were spoken by a male supervisor to a female subordinate. RP1617. Commissioner Torrens described the identified comments as being "beyond morally repugnant". RP 2356. He conceded that hearing them day to day could break someone down. RP 2358. Still, at the end of his testimony, Torrens testified that James was "unequivocally" the image he would want to set forth as the face of CCFD#5. RP 2398-99.

With regard to Valerie Larwick's termination, CCFD#5/James stated she was terminated because CCFD#5 "finally had decided to hire a full-time program director" and "the Training Center's budget did not allow for Larwick's position." App. Br. at 4. A "fair statement of the facts" would have included reference to other relevant facts. CCFD#5 Fire Commissioner Conrad Geiger asked James during a Fire Board meeting

less than a month before Larwick's termination and was told that Larwick was being retained. RP 1544; Ex. 93, p. 3. Outside persons associated with the Training Center understood that Larwick would continue on staff. RP 425, 804. Personnel within the Training Center understood that Larwick would be continuing. RP 922, 1263-64, 1739. Several employees testified that James plan was to tell Larwick she would be retained in a lower paying, and relatively demeaning position that he was sure she would reject, but was surprised when she accepted. RP 1263, 1739, 2482-83. (The trial court also noted these facts when addressing Larwick's termination in its ruling on CCFD#5/James' motions for post-trial relief. CP 892-93.

CCFD#5/James description of the financial motivation for Larwick's termination also omits significant facts. App. Br.,p. 4. The person hired to take the paramedic instructor position at CCFD#5 was paid \$60,000 to leave a position paying \$39,000 (RP 327). Within months after firing Larwick for "financial" reasons, James hired a long-time friend of his, Dave Sauerbrey, for an \$80,000 salary to be CCFD#5's Fire Inspector, despite Sauerbrey not being qualified to perform fire inspections at CCFD#5. RP 3122-23. James hired Dave Vial as business manager a few months after that for a salary in excess of \$80,000 to fulfill functions previously performed by James, while James continued to draw

a salary in excess of \$100,000. RP 3906, 3942; Ex. 63. County Medical Officer Lyn Wittwer testified that Larwick's termination did not make sense from a financial perspective. RP 2269.

CCFD#5/James' description of Larwick's post-termination life ignores the testimony of several witnesses. App. Br. at 4-5. Larwick's emotional distress increased further after her termination. RP 784-85. Larwick disappeared and cut herself off from close friends. RP 832. After her termination, Larwick's son from time to time found her asleep in front of the fireplace, with an empty bottle of wine beside her, which was completely out of character for her. RP 1143. Larwick continued to have nightmares and sleep disturbances about the Training Center years after she left. RP 989.¹

CCFD#5/James' description of Collins' post-Training Center life omits her treating physician's testimony. App. Br., p. 6. Dr. Cyril Dodge, Collins' internist, felt it would have been damaging to Collins' health to go back to the work setting, Dodge Tr. 8; that Collins was dramatically different than he had seen her over his many year history of treating her, Dodge Tr. 21; that Collins was showing symptoms of worsening depression, Dodge Tr. 23; that he was prescribing Collins the maximum

¹ Substantial additional evidence regarding Larwick appears in the discussion of her remittitur at pps. 14-15, 63-64.

dose of medications that he felt comfortable prescribing, Dodge Tr. 23; that even continuing into December 2003 he was medicating Collins towards the higher end that he felt comfortable describing to a patient, Dodge Tr. 20; that he considered Collins to be towards the higher end of stress among the patients that he treated, Dodge Tr. 20; that he began seeing Collins far more frequently than he would his normal patients, Dodge Tr. 9-10; that he continued to see Collins into 2004, including on May 10, 2004, when Collins was worse emotionally because she had run into former co-workers, which triggered memories, at which time Dr. Dodge concluded that it would have been medically “very risky” for her to try to go back into the workplace, Dodge Tr. 30-2; and that by June 15, 2004, he was noting such continuing anxiety and depression in Collins that concluded she remained unable to return to work in late June 2004. Dodge Tr. 37. CCFD#5/James also omit the fact that as late as October 4, 2005, Collins “was still having difficulty with focus, her productivity wasn’t good, she had insomnia, and she was irritable”. Dodge Tr. 46-7. CCFD#5/James omits that through May 3, 2007, Collins continued under Dr. Dodge’s care and that he has not seen her come even close to returning to the condition she was in 2000-01, such that he has continuing concerns about her longtime psychological and physical health. Dodge Tr. 51.

CCFD#5/James' description of Collins' post-termination efforts omits significant facts from the testimony of Laura Caldwell, Collins' psychotherapist and the person from whose notes the "kibosh" phrase used by CCFD#5/James was quoted. App. Br., p. 6. CCFD#5/James fail to note that Caldwell testified that because the phrase with the word "kibosh" in it has no quotation marks around it in her session notes, they may have been her own "interpretation" rather than Collins' words. RP 2005-06. CCFD#5/James omit that Collins testified that while the four women's attorney incorporated a business on Collins' behalf, she never did anything with it because she couldn't concentrate. RP 2140, 1893-94.

CCFD#5/James also omit that Caldwell saw Collins for a total of five visits between February 18 and June 18, 2004, RP 2004-05, the same period of time when her long-time internist Dr. Dodge was treating her for severe distress (see above).

In CCFD#5/James' discussion of the "estimate" of damages by Lierman, Appellants Br. at 7, they omit that the basic document from which Lierman was working (Ex. 63) was prepared by CCFD#5 and the City of Vancouver regarding what the four women would have earned had they remained at the Training Center through trial; that the jury heard from both Richard Ross, the four women's vocational evaluator and consultant (RP 2512-2534), and Hank Lageman, (RP 3682-3725), CCFD#5/James's

vocational rehabilitation expert regarding their post-termination earning capacities; and omitted that Lierman explained in detail how he calculated (not estimated) damages, which he reduced to five exhibits (Exs. 318-322), which were received without objection. RP 2722-23.

The four women object to CCFD#5/James' presentation of pure argument that "after a lengthy trial, Boothe ended his closing argument with a series of improper arguments" including injecting "insurance" and an invitation to "send a message". Appellants Br. at 7. CCFD#5/James' omit that the word "insurance" was ever spoken during the four women's closing (RP 4197-4247; 4342-4364), and that the trial court found that "comment was fair and that the Fire District encompasses a large taxing area. It has an interlocutory agreement with the City of Vancouver for services paid by millage levied by the district." CP 888-89.

CCFD#5/James omit that CCFD#5's financial condition was inferentially established by the over \$8 million in revenues that the Fire District receives (RP 329) for a district without fire suppression equipment (RP 236), fire-fighting personnel (RP 236), or paramedics (RP 236); by James' hiring a long-time friend for a position he could not perform at a salary of approximately \$80,000 within months of terminating Larwick (Ex. 63; RP 3055, 3065); by James hiring another former co-worker a few months later to do many of James' tasks (RP 3906) for a salary approaching

\$100,000; and by James continuing to draw a salary of around \$100,000 (Ex. 63).

As to the assertion that the jury was “invited to send a message” (Appellants Br. at 7), CCFD#5/James omit that those words were never spoken in the four women’s closing (RP 4197-4247, 4342-64) and that the trial court found that the “argument was one very small portion that was not addressed in such a manner as to incite the jury on beyond reasonable awards” and that it was “indirect . . . and did not attempt to set forth monetary issues other than that which would directly compensate plaintiff for the damage they suffered.” (CP 889).

The four women also object to CCFD#5/James closing statement that “at the time, neither defense counsel nor the court could have anticipated the effectiveness of Boothe’s comments.” App. Br., p. 7. Besides violating the stricture of RAP 10.3, it misrepresents the Memorandum of Decision issued four months after the jury rendered its verdict as the trial court found that the line of argument was ‘indirect’, “one very small portion”, and “and was not addressed in such a manner as to incite the jury”. CP 889. The four women object to CCFD#5/James assertion that “it quickly became clear the jury’s verdict was contrary to the evidence and based on passion and prejudice.” App. Br., p.7. The trial court did grant remittitur as to Larwick, which is the subject of a cross-

appeal, but the court denied the requested post-verdict relief as to Collins. RP 894. The four women also object to CCFD#5/James further argument that “based on the trial court’s denial of a fair trial” (App Br., p.7) and failure to address the “procedure relevant to the issues presented for review”. RAP 10.3.²

Collins, Hayden, Larwick and Mason filed the present action in Clark County Superior Court on February 18, 2005. CP 1-6. CCFD#5/James answered, asserting affirmative defenses. CP 7-14. Clark County filed motions for and obtained summary judgments as to the four women’s claims. CP 1009-20. The City of Vancouver filed motions for and obtained summary judgment as to the claims of Hayden, Larwick and Mason. CP 1021-23. The case proceeded to trial by the four women as against CCFD#5/James and by Collins as against the City of Vancouver.

² The four women also object to CCFD#5/James closing statement that “at the time, neither defense counsel nor the court could have anticipated the effectiveness of Boothe’s comments.” App. Br., p. 7. Besides violating the stricture of RAP 10.3, it misrepresents the Memorandum of Decision issued four months after the jury rendered its verdict as the trial court found that the line of argument was ‘indirect’, “one very small portion”, and “and was not addressed in such a manner as to incite the jury”. CP 889. The four women object to CCFD#5/James assertion that “it quickly became clear the jury’s verdict was contrary to the evidence and based on passion and prejudice.” App. Br., p.7. The trial court did grant remittitur as to Larwick, which is the subject of a cross-appeal, but the court denied the requested post-verdict relief as to Collins. RP 894. The four women also object CCFD#5/James further argument that “based on the trial court’s denial of a fair trial” (App Br., p.7) and failure to address the “procedure relevant to the issues presented for review”. RAP 10.3.

The case was assigned to the Honorable Robert L. Harris for trial. CP 1024-27. Trial began on May 2, 2007, and the jury heard evidence over 20 days, (RP 11–4380), from 70 different witnesses, including six health or mental care providers and five retained experts. At the close of evidence, CCFD#5/James’ counsel moved unsuccessfully for a directed verdict. RP 4134. The jury submitted questions, including a request for an electronic calculator. CP 1028. The jury returned its verdict, awarding to Collins \$540,000 economic damages and \$75,000 non-economic damages, subject to division and reduction (CP 248-49; RP 4374); to Larwick, \$626,000 economic damages and \$875,000 non-economic damages (CP 250; RP 4375–76); to Mason \$215,000 in economic damages and \$250,000 in non-economic damages (CP 251; RP 12-21); and to Hayden \$350,000 in economic damages and \$600,000 in non-economic damages (CP 252; RP 4378-79).

CCFD#5/James filed post-trial motions which the court granted in part and denied in part by its Memorandum of Decision dated October 9, 2007. CP 888-99.

CCFD#5/James subsequently paid in full the jury’s awards in full as to Hayden and Mason. CP 1068-1071.

VI. SUMMARY OF ARGUMENT

CCFD#5/James do not raise any issue as to liability, jury instructions, or the admission of any evidence. They therefore concede liability and that the jury was properly informed about the facts and properly instructed about the law. This appeal is thus essentially a complaint about damages awarded by a well-informed, properly-instructed jury and the trial court's post verdict rulings.

The jury had substantial evidence supporting its award of economic damages to Collins based on numerous witnesses to the harm she suffered, expert testimony as to her devastated mental state, extensive medical records as to her substantially declined physical condition, and her longtime internist's opinion that she was unable to return to the work place as late as 2005 and had not by the time of trial recovered to her pre-CCFD#5 condition. Lay testimony supported the same. The jury also had evidence of her economic loss based on wage loss charts prepared by CCFD#5/James and entered without objection, as well as expert testimony from a vocational expert, who testified to market values, and from a well-qualified economist, who based his calculations on the collective information and presented to the jury not merely a conclusion but also complete spreadsheets so that the jury could see his work, and such that the second jury question was for an electronic calculator.

The misconduct that CCFD#5/James asserts is a continuation of the *ad hominem* attacks on the four women's counsel CCFD#5/James made throughout trial and an effort to create out of whole cloth what they cannot find in the record. The words "insurance" and "send a message" were never uttered throughout the challenged argument. Despite CCFD#5/James' efforts to suggest that there was some violation of "the Golden Rule", there was no mention of "the Golden Rule" at trial based on the complete absence from the record of any mention of it.

The trial court did abuse its discretion when it awarded attorney fees less than the four women's counsel's ordinary hourly rate, denied bona fide trial preparation and presentation expenses, and did not award any lodestar multiplier despite acknowledging that the case was high risk for the four women's counsel and that he had advanced more than \$160,000 in expenses with no prospect for recovering them in the event of an adverse judgment. The high risk profile is accentuated where CCFD#5/James thought so little of the case that they never made a pretrial settlement offer and made only a mid-trial offer to Hayden, and then in an amount substantially less than what the jury awarded.

The trial court abused its discretion when it reduced Larwick's economic damages from \$626,000 to \$150,000, and Larwick's noneconomic damages from \$875,000 to \$250,000, despite leaving

undisturbed the jury's awards to Hayden (whose awards were \$350,000 in economic damages and \$600,000 in noneconomic damages which CCFD#5/James paid in full) and to Mason (whose awards of \$215,000 in economic damages and \$250,000 in noneconomic damages CCFD#5/James also paid in full), and despite the substantial evidence that Larwick was the primary target of James' hostility. The trial court further abused its discretion in so ruling despite testimony from multiple witnesses as to the lasting effect the Training Center and her termination had on Larwick, the fact that the award of economic damages was within the amounts calculated by Lierman and submitted without objection to the jury as Exhibits 221 and 222, and that there was expert psychiatric testimony from Oregon Health Sciences University ("OHSU") psychiatrist James Boehnlein, M.D. regarding Larwick's continuing emotional damage. Finally, in the trial court's Memorandum of Decision, the trial court made value based fact judgments as to Larwick, thereby invading the province of the jury and misstating facts in support of its decision. These multiple manifest errors demonstrate that the trial court abused its discretion.

VII. ARGUMENT IN RESPONSE TO CCFD#5/JAMES

CCFD#5/James ask this Court to grant remittitur as to Collins' economic damages, grant a new trial because of alleged misconduct by the four women's attorney, and reduce or strike the amount of attorney fees granted by the trial court³.

A. Collins economic damages were well supported by substantial evidence

1. Standard of review

The standard of review is abuse of discretion, *Bunch v. King County Dep't of Youth Services*, 155 Wn.2d 165, 176, 116 P.3d 381 (2005); however, the standard as applied appears to be something higher once remittitur is declined: the jury verdict is thus strengthened and the appellate courts should "strongly presume the jury's verdict is correct." *Id.* at 179.

2. Back and front pay were properly awarded to Collins

WLAD includes among its remedies the award of actual damages. RCW 49.060.030(2). Actual damages include recovery without temporal limitation of back damages and recovery of front pay as part of the law's liberal intent to make the employee who suffered the discrimination

³ Argument regarding the trial court's award of attorney fees is included under the four women's discussion of their Cross Appeal at pp. 68 *infra*.

whole. *Martini v. Boeing Co.*, 137 Wn. 2d 357, 364-72, 971 P. 2d 45 (1999).

(a) Back Pay

When reviewing the issue of the denial of Collins remittitur, the Court must also accept the truth of the nonmoving party's evidence and must draw all inferences favorable to the nonmoving party that may reasonably be drawn there from. *Levy v. North Am. Co. for Life and Health Ins.*, 90 Wn. 2d 846, 851, 586 P.2d 845 (1978). Further, by not raising the substantive issue on appeal, CCFD#5/James implicitly admit liability, which means they admit their violation of WLAD. Once a violation of WLAD has been established, any doubts regarding back pay are to be resolved against the employer. *Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 531, 832 P.2d 537 (1992), *aff'd* 123 Wn. 2d 93, 864 P.2d 937 (1993).

Back pay is calculated from the day Collins stopped working at the Training Center to the day of the verdict. *Martini*, 137 Wn. 2d at 362, 375-76. It is the calculation of what the WLAD plaintiff would have received in pay and benefits had they stayed at their position with the defendant employer, less whatever earned income they received. The emotional toil of CCFD#5/James' unconscionable conduct toward Collins at the Training Center as outlined in the Counterstatement of the Case makes clear that

Collins was subjected to emotional scarring that affected her ability to return to the workforce and affected what she could do when she was able to return.

(b) Front Pay

The actual damages awardable under WLAD also include front pay, which is to replace the employee's lost earnings "for a reasonably certain period of time that does not exceed the likely duration of the terminated employment." *Blaney v. Int'l Ass'n of Machinists*, 151 Wn. 2d 203, 210, 83 P.3d 757 (2004).

In Washington, there are three permissible approaches to front pay: (1) the court determines the parameters and the jury resolves the amount within those guidelines; (2) the jury determines the entire issue, as in non-discrimination actions; or (3) the court determines the entire front pay issue. *Blaney v. Int'l Ass'n of Machinists*, 114 Wn. 2d 80, 87, 55 p. 3d 1208 (2002). However, "the determination of future lost earnings, including the number of years, is generally left to the jury to determine, once an employee produces evidence from which a reasonable future employment period may be projected." *Id.* at 89. How far into the future front pay will be awarded is discretionary with the trier of fact based on some evidence of job availability and marketability of the employee. *Xieng v. People's Nat'l. Bank*, 120 Wn. 2d 512, 844 P.2d 389 (1993).

For Collins, the emotional scarring continues to affect her and her her capacity to earn into the future.

The trial court appropriately placed no limits on the jury's determination of front pay. In its decision on CCFD#5/James post-trial motions, the trial court noted the discrepancy between the jury's award of economic damages and its reduced award of noneconomic damages to Collins, which the trial court attributed to the jury "taking her own actions into consideration". CP 894. However, the trial court also concluded that "the hostile environment did contribute to her emotional well-being being in disarray as testimony of neutral parties clearly portrays a person subject to emotional issues brought on by the activities taking place at her place of employment." CP 894-95. The trial court's conclusion was well based in the substantial evidence presented at trial. The emotional disarray of which the trial court wrote is essentially that same disarray and stressors that support Collins' claim for noneconomic damages.

The jury also heard from Ross and Lierman in their determinations of Collins present earning capacity compared to what she was making at the Training Center. See Section VII.A.4., *infra*.

3. Substantial Evidence supported both the jury's verdict and the trial court's analysis of Collins economic damages.

The trial court's conclusion regarding the impact of James' unconscionable actions earlier described substantially affected Collins as she wore down from 2002 into 2003 (RP 2294), as she was appearing very upset (RP 1710), disorganized and forgetful (RP 1709, 2415-16), losing focus (RP 2173), and completely different that she had been earlier in 2003. RP 1710, 2161-62. Mason found Collins in her office crying, explaining "it's just – it's just so bad here. I can't handle it." RP 2560. Mason testified that if this situation continued for another six months to a year, it would kill her. RP 2560-61. Collins was a wreck, nervous, stressed. RP 2301, 2299-2300. The stress manifested itself in lack of sleep and hair falling out. RP 2162, 2302-03; RP 2414. She was displaying more than common, everyday stress. RP 2162. She suffered from nightmares that awoke her (RP 2414), and she began locking house doors when she had not done so before. RP 2415. She got to the point that her husband described it as displaying "paranoia". RP 2415.

When Collins reported her great distress to a female Vancouver Police officer who worked at the Training Center (which ultimately led to James' behavior finally being investigated), Collins was visibly stressed (RP 3965-66), crying (RP 1877, 3966), and shaking. RP 3966. The officer

saw Collins' tearfulness and heard her tone of voice and pace of speech as consistent with somebody who was really very upset and highly stressed. RP 3966. She found them consistent with the report Collins was giving to her about the events Collins had experienced during the preceding years. RP 3966-67.

Collins described her October 2003 as "living hell". RP 1876. Collins condition became so bad that her husband called Dr. Dodge to make an appointment (RP 2418-19), picked her up from the Training Center on October 31, 2003 (1880), and took her to see Dr. Dodge, all without giving her any prior notice. RP 1880-81, 2419-20. By late 2003 into 2004, Collins was upset and not following through with phone calls or canceling appointments. CP 1709. She was different. *Id.*

After Collins left the Training Center, she continued to be different than she had been before, less organized and more withdrawn. RP 2308 09. She became worse, she withdrew, she quit calling friends, quit talking, and quit being "the old Sue". RP 2243. She has never returned to what she was like in 2001 to early 2002. RP 2312, 2427. She hid out in her house (1889-90). With Collins losing her job, her family had to refinance their home. RP 2424.

For Collins, the anxiety attacks, panic attacks, sleep troubles, and nightmares continued through trial. RP 1895.

4. Expert Witnesses Calculated Collins' Economic Damages

Richard Ross, a vocational evaluator and consultant (RP 2512) testified that he met with Collins and reviewed her medical documents, (RP 2525), collected her work history after leaving the Training Center, (RP 2525-26), and concluded that her employment at the time of trial represented her “residual earning capacity that is certainly commensurate with her skills, aptitudes and abilities.” RP 2526. Ross thought that she was earning a fair wage, if only a little bit higher than what he would have projected. (*Id.*)

Walt Lierman, Ph. D. , an economic consultant and forensic economist, (RP 2725), testified that for the back pay calculation he reviewed (Ex. 63) prepared by CCFD#5/James, which provided the numbers that Lierman used in determining what Collins' income had been and was projected to be if she had stayed at the Fire District. RP 2729. Exhibit 63 is a significant document because the base for calculating economic damages was not based on supposition from Lierman, but was instead a combination of CCFD#5/James own report of what Collins would have earned, plus a vocational expert's determination of what her earning capacity was. Lierman described the numbers that he worked with as very conservative. RP 2731. He calculated Collins' economic losses,

with those losses substantially reduced when Collins found full-time employment, (*Id.*). He also calculated her pension loss. RP 2735-36

From that combination of the economic information provided in Ex. 63 and Collins' earnings, Lierman calculated Collins' lost future income three years in the future to be \$519,000, five years into the future to be \$571,000, and ten years into the future to be \$683,365. RP 2738.

Lierman compiled the historic information and his calculations regarding Collins' back and front pay into a chart, Ex. 318. Lierman was vigorously cross-examined. RP 2749-74.

Dr. James Boehnlein, an OHSU professor of psychiatry who worked at OHSU and the veterans hospitals as a clinician, as an educator and researcher, (RP 2780), and as the director of the medical student education program, (RP 2780), testified about the ongoing impact of what Collins had experienced at the Training Center. RP 2783. Collins was frustrated with herself for putting up with what happened there. RP 2793. "It was still very emotionally fresh to her." RP 2794. Collins didn't embellish or exaggerate. RP 2794. Dr. Boehnlein explained that Collins continued to report nightmares. RP 2804. While the four women's nightmares were different from each other in content, the theme common to all was a feeling of being trapped, of being closed in, of fear of humiliation. RP 2804. The four were consistent throughout their

depositions, the medical records, his interviews with them, and all of the information that he received along the way, as well as how they presented themselves with the congruence of words, body language, and emotional expression, which Dr. Boehnlein found to be consistent with veracity and truthfulness. RP 2859.

5. A new trial or remittitur would be unreasonable

CCFD#5/James' brief is full of contradictions, and its argument is as significant for what it admits and omits as it is for what it asserts. First, CCFD#5/James admit that there is evidentiary support for Collins' economic damages (Appellants Br. at 11) ("Collins' economic damages were *largely* unsupported")(emphasis added). The phrase "largely unsupported" logically means that CCFD#5/James is acknowledging that there was some evidential support. Where CCFD#5/James are admitting that there was some evidence, they are admitting that the case belonged properly in the province of the jury. *McGowan v. Northwestern Siberian Co.*, 41 Wn. 675, 677, 84 P. 614 (1906); *Arnold v. Sanstol*, 43 Wn.2d 94, 98, 260 P.2d 327 (1953). Further, CCFD#5/James *paid in full* the jury's award of economic damages to both Hayden and Mason, despite Mason being awarded a higher percentage of her prayer for economic damages (approximately 100% of economic damages prayer; RP 4226; Ex. 320; CP 251) than Collins recovered (approximately 79% of economic damages

prayer; RP 4226; Ex. 318; CP 248-49). CP 1046-47. Still more remarkably, CCFD#5/James would have this court believe that somehow the same jury that asked for an electronic calculator to use in the jury room (CP 1040) and awarded differing percentages to each of the four women as to both their economic and non-economic damages, (*Compare* CP 248-49, RP 4374 to CP 250, RP 4375-76 to CP 251, RP 4376-77 to CP 253, RP 4378-7) lost its head as to Collins, the same person to whom it awarded only 7.5% of her requested noneconomic damages. CP 248-49, RP 4374. CCFD#5/James argument does not make sense.

Further, because CCFD#5/James have not assigned error to any instruction given to the jury, the instructions are, in their entirety, the law of the case. *Schneider v. Noel*, 23 Wn. 2d 388, 401, 160 P.2d 1002 (1945). The well instructed jury made its factual decision.

CCFD#5/James' denied motions for a directed verdict, for judgment as a matter of law, and for judgment notwithstanding the jury's verdict are the same thing: a motion for judgment as a matter of law. *Litho Color, Inc. v. Pacific Employer's Ins. Co.*, 98 Wn. App. 286, 298, fn.1, 991 P.2d 638 (1999). The threshold is high for granting a motion for judgment as a matter of law and removing the case from the jury or ruling despite the jury's verdict, and an appellate court reviewing the trial court's

denial of such a motion applies the same standard as the trial court. *Mega v. Whitworth College*, 138 Wn. App. at 668.

To prevail on any of its motions for judgment as a matter of law, CCFD#5/James must prove that there is “no legally sufficient evidentiary basis for a reasonable jury to find or have found for [the four women] with respect to that issue.” CR 50(a)(1); *Bunch*, 155 Wn.2d at 176; *Industrial Indemnity Co. of the Northwest Inc. v. Kallevig*, 114 Wn.2d 907, 916, 792 P.2d 520 (1990). Framed another way, CCFD#5/James can prevail on their appeal from the denial of remittitur as to Collins *only* if Collins had offered *no* substantial evidence to support the jury’s verdict. *Mega*, 138 Wn. App. at 668. To be “substantial”, evidence must be of a kind which “would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *Arnold*, 43 Wn. 2d at 98; *Industrial Indemnity*, 114 Wn. 2d at 916; *Hojem v. Kelly*, 93 Wn. 2d 143, 145, 606 P.2d 275 (1980). However, that is not the case: there were 70 witnesses, numerous exhibits, and James’ implied admission of there being some evidence in support, which together dwarf the minimal burden necessary to let the jury decide the matter. That evidentiary burden would have been satisfied by circumstantial evidence, plus an expert’s opinion. *Lockwood v. AC&S, Inc.*, 109 Wn. 2d 235, 248-49, 744 P.2d 605 (1987). The burden

to protect the jury's verdict from remittitur is the same. *Bunch*, 155 Wn. 2d at 176.

In reviewing Collins' evidence for sufficiency, the Court must also accept the truth of the nonmoving party's evidence and must draw all inferences favorable to the nonmoving party that may reasonably be drawn there from. *Levy*, 90 Wn. 2d at 851.

CCFD#5/James' first two assignments of error and the four women's first cross-assignment of error, therefore, must be read as presenting the limited questions as to whether the jury was presented with evidence sufficient to sustain the jury's verdict. *Bishop of Victoria Corporation Sole v. Corporate Business Park, LLC*, 138 Wn. App. 443, 454, 158 P.3d 1183, (2007), *rev. denied*, 163 Wn. 2d 1013, 180 P.3d 1290 (2008). Because it is the sole province of the jury to determine credibility, and the jury's determination is not reviewable, *State v. Camarillo*, 115 Wn. 2d 60, 71, 794 P.2d 850 (1990), "the reviewing court will not reverse if there is substantial evidence to support the jury's findings." *State v. Kane*, 72 Wn. 2d 235, 239, 432 P.2d 660 (1967). Therefore, the inquiry is not whether Collins' evidence was perfect, but is instead whether there was *any* substantial evidence sufficient to support the jury's verdict. *Davis v. Microsoft Corp.*, 149 Wn. 2d 521, 531, 70 P.3d 126 (2003); *Sing v. John L. Scott, Inc.*, 134 Wn. 2d 24, 29, 948 P.2d 816 (1997). As

demonstrated by the unconscionable conduct of CCFD#5/James and as supported by the multitude of lay and expert witnesses, Collins has readily carried her burden. In short, there is no reported or unreported appellate decision construing WLAD where there was the body of evidence presented in this case in which a new trial or remittitur was even considered. The evidence presented to the jury was not just “substantial”, it was overwhelming. James' offenses were so many and so severe that Penny Harrington, a national expert in sexual harassment, testified that the “environment” at CCFD#5 “was one of the more toxic settings I have encountered in my years of working.” Harrington Tr., 56.

B. There was no misconduct by the four women’s counsel, let alone conduct sufficient to warrant post-verdict relief

CFD#5/James quote an extended passage from the four women’s closing argument:

But I’ll leave you with the request that we are gonna [sic] make for an award of \$1,000,000 in non-economic damages for each of the four plaintiffs.

The amount that’s being sought will not in any way reduce fire services, hurt the department, it’s not going to do anything that will hurt services in any way or raise taxes, do any of the bogies that might be mentioned, it will not happen. We know that.

What you need to do, please, is put a value on their suffering that other department will look up and say, “We can’t do that.” Put a value on what they have experienced and compensate them to a level that says, “If you do this, serious consequences flow, and we compensate people as

they are injured.” And in doing, help let the commissioners know the answer to the question they felt had to go to you all to be decided. *And in so doing, also let HR departments know that there’s a better structure, there’s a better way to do this.*

HR departments don’t exist for protection of the city. HR departments don’t exist for the protection of the company. *Let them know that they have to be up there with a viable means for somebody who’s experiencing harassment to step forward and bring it forth in a safe way.* And an award of \$1,000,000, compensation of \$1,000,000 to Valerie Larwick, to Kristy Mason, to Sue Collins and to Helen Hayden is the best way you can do that. That, and their economic damages. Thank you. RP (May 30, 2007) at 4246-47 (emphasis added).

Ap. Br. 22-23.

Nowhere in the challenged passage is there the statement to send a message, the word insurance or any invocation of the concept of insurance. The trial court heard the argument, and found no part of it to have constituted misconduct.

1. Standard of Review

The standard of review for the denial of a new trial for misconduct of counsel is abuse of discretion. *Aluminum Co. of America v. Aetna Cas. Sur. Co.*, 140 Wn. 2d 517, 537-38, 998 P. 2d 856 (2000).

2. There was no mention of insurance

Despite CCFD#5/James’s allegation of attorney misconduct by the four women’s counsel arising from the quoted section of the four

women's closing argument, which they contend injected an impermissible concept into the trial and inflamed the jury (App.Brief, pp. 22-23), insurance was never raised, let alone the word having been spoken. The argument was that there would not be any adverse effect based in testimony from CCFD#5/James' witnesses. James testified that the District has no fire suppression equipment, (RP 236), no firefighting personnel (RP 236), no active paramedics (RP 236), and is guided by him, a man who "wears a chief's badge but is not a chief". RP 290. That suggests that there would not be any reduction in services to the residents. James testified that CCFD#5 collects over \$8,000,000 in revenue. RP 340. David Sauerbrey, the man who was hired as a Fire Inspector but was not qualified to do that job (RP 2345-46), testified that he was hired a few months after Larwick's termination for about \$80,000 and was, at the time of trial, making approximately \$90,000 a year. RP 3122-23. At trial, one of the CCFD#5 Fire Commissioners testified that he still did not know whether Sauerbrey was even then doing or overseeing any fire inspections, four years after he was hired. RP 1628. James was making more than \$105,000 annually. Ex. 63. David Vial, the director of administration at the Training Center (RP 3905), testified that he was making more than \$100,000 to do what had been tasks previously performed by James. RP 3941-42. The trial court heard the same, finding that the four women's

attorney's argument "was fair in that the Fire District encompasses a large taxing area. It has an interlocutory [sic.] agreement with the City of Vancouver for fire services paid millage levied by the District." CP 884-85.

CCFD#5/James argue, nonetheless, that the four women's attorney's supposed reference to insurance rises to the level that it commands a new trial, citing *King v. Starr*, 43 Wn.2d 115, 260 P.2d 351 (1953). In *King*, however, the challenged statement was as direct as it could have been: "the defendants have no insurance here". *Id.* at 117. It just does not apply.

CCFD#5/James also argue that their failure to object or even request a correcting instruction from the court does not waive their motion for relief through a new trial where the "misconduct is so flagrant that no instruction could cure it", citing *Warren v. Hart*, 71 Wn. 2d 512, 518, 429 P.2d 873 (1967). However, *Warren* cautions that a court be slow to find reversible error and to accord "reasonable latitude to the interpretation of statements made in the heat of trial". 71 Wn. 2d at 515. Moreover, *Warren* is a criminal case that does not even involve insurance; it was a personal injury case and the misconduct was repeated reference to police determinations of liability. *Id.*

No one heard an insurance argument in the courtroom, no one raised it at the time, and even four months later after a chance to consider the issue in hindsight, the trial court found the argument without merit. CP 889.

3. There was no statement “to send a message”

In the quoted portion of the four women’s closing argument upon which CCFD#5/James ask this court to overturn the five week trial, the four women’s attorney asked the jury to respect the harm incurred by the four women. RP 4246-47. The words “send a message” were never spoken. The argument drew no comment or objection from CCFD#5/James at the time. RP 4310. However, during the break after CCFD#5/James’ closing argument, while the jury was outside of the courtroom, the Court *sua sponte* cautioned the four women’s counsel not to repeat the “send a message argument”. RP 4310. The four women’s counsel respected the caution and made no comment contrary to it during rebuttal. *See* RP 4341-66.

CCFD#5/James, however, now present a statement from a post-trial briefing as proof that the four women’s counsel *intended* to make a “send a message argument”. CP 330-31. In so arguing, they fail to tell the rest of the story. At oral argument on the issue, the four women’s counsel explained the context of the statement and how it came to be in the closing

argument. Counsel explained, “that there were at least four witnesses who testified that if there was a problem, they would never go to the HR department.” August 27, 2007, RP 54. Moreover, the four women’s counsel explained that the court “saw me work without a script. This wasn’t a planned, planted message. This wasn’t something that had been planned out in advance. But it came out in the context of argument. I didn’t disavow it in the response to the pleadings [*sic.*] because I said it.” *Id.* It was said in the heat of argument at the end of a five week trial, and it does not rise to the level of error. *Warren*, 71 Wn. 2d at 515.

While the phrase “send a message” has been the subject of frequent criticism in Washington criminal cases, it is addressed in only one reported Washington civil decision. *Joyce v. State Dep’t of Corrections*, 155 Wn. 2d 306, 326, 119 P.3d 825 (2005). In *Joyce*, “a number of statements made during . . . closing argument were improperly made to ‘send a message’ to Olympia” 155 Wn. 2d at 326. (emphasis added). The Department of Corrections’ attorney did not object when the comments were made. The Washington Supreme Court determined that, as a general principle, “[r]emarks of counsel in argument claimed to be so prejudicial as to warrant a reversal . . . must be brought to the trial court’s attention and a curative admonition or instruction requested.” *Id.* (quoting *Kain v. Logan*, 79 Wn. 2d 524, 528, 487 P.2d 1292 (1971)). CFD#5/James

failed to do so. The trial court analyzed it as “indirect ... and did not attempt to set forth monetary damages other than that which would directly compensate plaintiffs for the damage they suffered.” CP 885.

In their effort to create further support, CCFD#5/James have tried to create a base for argument where there is none by dragging in reference to the “golden rule” argument, App. Br. 28-29 The “golden rule” is not now and never has been a factor in this case.

VIII. ARGUMENT IN SUPPORT OF CROSS-APPEAL

- A. The trial court erred when it calculated the lodestar for the four women’s attorney fees to a rate below their attorney’s customary hourly fee for currently paying clients; reduced their award for attorney disbursements as being what the court described as general overhead; and failed to grant a lodestar multiplier in what the court recognized was a high risk trial with little prospect for counsel to recover of costs if the jury ruled for CCFD#5/James. (Cross-assignment of Error #2.)**

At the end of trial, the four women moved for attorney fees at their attorney’s customary rate of \$300 per hour (CP 391, 769-770), plus award of related expenses, and a lodestar multiplier, including hundreds of pages of billings and invoices in support. CP 390-639. The trial court instead determined the lodestar at \$280, declined to award several of the requested expense reimbursements and declined to award a lodestar multiplier. CP 896-898.

1. Standard of Review

The standard for review of attorney fees is abuse of discretion. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 97-978 (9th Cir. 2008).

2. The lodestar rate was unreasonably low

Prevailing discrimination plaintiffs are entitled to reasonable attorneys' fees and costs. RCW 49.60.030(2). The purpose of awarding attorneys fees in civil rights cases is to encourage attorneys to act as private attorneys generals and enforce fundamental civil and constitutional rights. *Blair v. Washington State University*, 108 Wn. 2d 558, 573, 740 P.2d 1379 (1987). Attorney fees under RCW 49.60.030 "are more generous generally than for other fee statutes." Talmadge & Jordan, *Attorney Fees in Washington*, Lodestar Publishing (2007), p. 783. The starting point is to determine "a 'lodestar' fee by multiplying a reasonable hourly rate by the number of hours reasonably expended". *Pham v. City of Seattle*, 159 Wn. 2d 527, 545, 151 P.3d 976 (2007). After the trial court has multiplied "a *reasonable* hourly rate by the number of hours *reasonably* expended on the matter", the trial court adjusts the award "either upward or downward to reflect factors not already taken into consideration." *Broyles v. Thurston County*, -- Wn. App. ---, 195 P.3d 985, 1007 (2008).

In establishing the four women's attorney fees, the four women's attorney fully satisfied the Lodestar methodology. *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998), by documenting in detail the number of hours worked, the type of work performed, and information regarding the attorney who performed the work.

(a) Determining the hourly rate

In contrast to CCFD#5/James reliance on the declaration from a local general civil litigator who occasionally practiced employment law, CP 666-84, the four women offered testimony from regional employment law experts as well as an attorney fees expert. *Broyles*, 195 P.3d at 1007. The award of fees for successful prosecution of WLAD cases serve a vital civic function by encouraging active enforcement of the statute. RCW 49.060.030; *Blair*, 108 Wn. 2d at 740.

“Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate.” *Bowers v. Transamerica Title Co.*, 100 Wn. 2d 581, 597, 675 P.2d 193 (1983). For the four women's attorney, that rate was \$300 per hour. CP 392; *see also* CP 394-639.

The four women presented declarations from employment specialists who testified to the reasonable hourly rate: Greg Ferguson from Vancouver (CP 1042-1045), Mary Ruth Mann from Seattle (CP 742-

60), Craig Crispin from Portland (CP 1046-1058) and Dana Sullivan from Portland (CP 761-67), as well as the leading local attorney's fee expert, David Markowitz (CP 1059-1067).

Employment law is regional, not local community driven. *Broyles*, 195 P.3d at 1007. The City of Vancouver reached into Portland to hire its defense attorneys (CP 981-82, 983-86). CCFD#5/James went to trial with a Vancouver law firm but, apparently disappointed with the experience, hired a Seattle attorney for the post-trial motions, related matters and appeal. CP 1041. Because employment law is a specialty for attorneys between Seattle and Portland, the rates should be established on a regional norm.

(b) The rate charged by counsel is evidence of the appropriate fee

The four women offered testimony both their attorney's petition and billing records, as well as a declaration from one of his hourly clients regarding their counsel's actual billing rate of \$300 per hour for clients who pay their billings on a current basis. CP 392; 394-639, 804-08.

3. Miscellaneous costs should be compensated

The trial court impermissibly denied the four women recovery for "clerk's time; copying costs; Kinko costs, other than response to discovery: and word processing as all of those costs are inherent with the

reasonable attorney fees hourly charge”. CP 898. The court reduced the award by \$21,068.10 for those costs. *Id.* The court also reduced the requested expenses by \$32,000 from a requested \$37,000 fee paid to a trial consultant, whom the court acknowledged “continued to be present during the bulk of trial and was observed in the court daily.” *Id.* Instead the court “allowed” \$5,000 for his assistance during the voir dire process” (*Id.*), which lasted less than two days compared to all of the days in trial.

In addition to receiving the attorney’s “historic rate”, the plaintiff may recover litigation expenses such as travel, copying, telephone expenses, deposition costs, and expert fees, beyond the traditional costs set forth in RCW 4.84.010. *Blaney v. Internat’l Ass’n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 208, 87 P.3d 757 (2007); *Blair v. Wa. St. Univ.*, 108 Wn.2d 558, 740 P.2d 1379 (1987). It is therefore reasonable that costs the counsel ordinarily bills to his client are a legitimate part of an attorney fees claim under the fee shifting statutes. *Henry v. Webermeier*, 738 F.2d 188, 192 (7th Cir. 1984); *Jane L. v. Bangerter*, 61 F.3d 1505, 1517-18 (10th Cir. 1995) (expenses not customarily absorbed as part of law firm’s overhead but which are normally billed to a private client which are reasonable in amount or compensable under § 1988); *Sussman v. Patterson*, 108 F.3d 1206, 1213

(10th Cir. 1997) (award for photocopying, mileage, meals and postage was appropriate).

Where, as here, the attorney component bills his clients for word-processing, copies, postage, clerk time and the like (CP 392, 776-78), the Oregon practice should be adopted whereby there is reimbursement for “expenses specially billed to the client in the attorney fees award when they are properly documented and are reasonable. We conclude that the charges to which defendant objected [charges for secretarial and legal assistant time, consultants, photocopying charges, long distance telephone charges and postage] are proper in addition to the amounts attributable to individual attorney’s hourly charges”. *Willamette Production Credit Ass’n v. Borg-Warner Acceptance Corp.*, 75 Or. App. 154, 158-59, 706 P. 2d 577 (1985), *review denied*, 300 Or. 477, 713 P. 2d 1058 (1986); *Fred Meyer, Inc v. Tischer*, 1993 WL 430542 *2 (D. Or. 1993). In document intense employment cases such as this in which there were tens of thousands of copies made, where extraordinary time was required by staff and other expenses were incurred, those amounts should be reimbursed to the WLAD plaintiff who is responsible to pay them as a separate cost item in their attorney’s billing. CP 770. Moreover, where a lone counsel is representing multiple WLAD plaintiffs against a phalanx of defense

attorneys, the presence of a trial consultant who was in court daily is a reasonable expense.

4. A lodestar multiplier is appropriate in this risky case

“While we presume that the lodestar represents a reasonable fee, occasionally a risk multiplier will be warranted because the lodestar figure does not adequately account for the high risk nature of a case.” *Pham. v. City of Seattle*, 159 Wn. 2d 527, 542, 151 P. 3d 976 (2007). “The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk.” *Bowers*, 100 Wn. 2d at 598.

This case is the textbook illustration of the reason why risk multipliers are applied. The four women’s attorney took the case from clients who had no means of paying for his expenses, let alone his fees if they lost. CP 392. When the first two plaintiffs (Collins and Mason) presented, the risk was manifest because Collins had been integrally involved in bantering with James RP 1734), sending off color emails to James (1809, 1917-18, 1923-24; Ex. 101, 103- 126, 137-38, 175-76, 214-247) , acting out toward a co-worker (co-plaintiff Larwick) (RP 1736-37), and co-plaintiffs Larwick and Collins had unresolved issues such that Collins apologized to Larwick from the stand. RP 1736. This was a

difficult setting, and challenging to counsel to keep the co-plaintiffs together and cooperating. With lead named plaintiff being a co-harasser there was real risk that she would drag down the other three women's claims. The risk of loss was real. It appears that CCFD#5 assessed the case the same way. CCFD#5/James thought so little of the four women's case that CCFD#5/James made no offer to any of the four women despite them arranging an all-day mediation with Susan Hammer, a Portland professional mediator. CP 391. They never made an offer to Collins, Larwick or Mason (CP 392) and only a minimal one of less than 30% of what they paid Hayden after the verdict. CP 392, 1068-71. Against those dire circumstances, the four women's counsel risked more than 2,500 hours of his time and invested over \$160,000 out-of-pocket for the four women for amounts advanced through trial. CP 392. The costs were advanced to the four women who were so destitute after CCFD#5/James's actions that Hayden lost her house (RP 1282), the Collins' had to refinance their house (RP 2424) , and Larwick had to sell her investment property, her house, and her car (392) as well as other possessions. CP 757. Further, Larwick had not worked outside of the house since her termination at the Training Center (RP 1136), and the Masons were still reeling under the stresses of her having to start anew and her husband having been laid off. RP 2717-18. There were no viable means by which

the four women could have afforded to bring this case on their own without an attorney who would front their costs and risk his time. In a case that began in October 2003, was not resolved by the jury until June of 2007, and is still before this Court without payment of the four women's attorney fees or costs, the award should reflect, at least for time spent through trial, the high risk nature of the case. These risks are clearly not reflected in an award of less than the four women's attorney's standard hourly rate that is billed to clients who pay their fees on a monthly basis, covering costs at the same time. CP 390-639.

The four women's inability to advance or later pay the costs necessary to take this case to trial warrants a lodestar multiplier. *Steele v. Lundgren*, 96 Wn. App. 773, 780, 982 P.2d 619 (1999), *rev denied* 139 Wn. 2d 1026 (2000). The four women suggest that where nearly 60 depositions were taken, multiple motions were filed and battled, and trial raged for five weeks' time, the case qualifies as heated high-risk litigation. The Court may award a multiplier on the basis of risk alone. *Bowers*, 100 Wn. 2d at 599.

Mary Ruth Mann, a Washington employment law expert, recommended a lodestar multiplier of 2-3 times attorney's fees (CP 756) based on her experience working with Mr. Boothe and knowledge of his work personally. CP 743-53. Mann explained in her declaration: "It is my

personal and professional opinion that in today's market, to make this work as desirable as that of a general business or personal injury attorney practice, warrants a multiplier of 2-3 times fees." CP 757. Mann also testified:

"His work on paper and in court shows an excellent knowledge of employment discrimination law and precedent. His development and presentation of evidence was effective against strong adversaries and against significant evidentiary challenges. His trial skill in cross examination of witnesses and presentation of direct testimony were at a high level. Mr. Boothe was the sole attorney for the 4 plaintiffs and that is a remarkable undertaking requiring a high degree of skill and organization and a command of the facts, exhibits, witnesses and case file that is far above normal for a case this long and complex."

CP 747.

The four women requested a lodestar multiplier of 1.5 (CP 779), which is the generally-accepted multiplier in Washington. Talmadge & Jordan, *Attorney Fees in Washington, op cit.* at 149. In support, Talmadge cites *Banuelos v. TSA Washington, Inc.*, 134 Wn. App. 607, 141 P.3d 652 (2006) (multiplier of 1.5); *Washington State Physician's Ins. Exchange & Ass'n. v. Fisons Corp.*, 122 Wn.2d 335 (affirming 1.5 multiplier "where partial contingency fee case was both *exceptionally* risky when it was accepted and *exceptionally* litigated") (emphasis original); *Bowers*, 100 Wn.2d 599 (affirming a multiplier of 1.5); *Somsak v. Criton*

Technologies/Heath Tecna, 113 Wn. App. 84, 98-99, 52 P.3d 43 (2002)
(multiplier of 1.5 allowed).

In an employment case such as brought by the four women, where there is such a strong state social policy at issue, where CCFD#5/James was unwilling to offer anything by way of pretrial resolution, and where there were substantial expense and hours at risk with no prospect of compensation if the case failed, the court's refusal to grant a multiplier was an abuse of discretion.

As an additional consideration for the quality work and result, the Court should note of what the four women accomplished as they proceeded throughout the entire case with a single attorney. CP 390-393. During trial, there were multiple opposing attorneys present in the courtroom. Opposing the four women, CCFD#5/James utilized a local law firm, from which a single attorney appeared at trial, but from which other attorneys participated in taking perpetuation depositions during the course of trial, and outside counsel brought in from Ohio. CP 1034-39 In addition, the City Attorney's office had outside counsel and an Assistant City Attorney at the counsel table, as well as associate counsel behind the bar providing assistance. Against that mountain of time, the four women's counsel stood as solo. A lodestar multiplier is appropriate.

B. The trial court erred in reducing Larwick’s economic damages from \$626,000 to \$150,000 and non-economic damages from \$875,000 to \$250,000

The court misapprehended the evidence as to Larwick in every particular it identified as its bases for reducing Larwick’s jury award. CP 889-890. The trial court concluded that Larwick’s term of employment was materially shorter than the others, that Larwick “stabilized her life after a great deal of unpleasantness prior to her marriage”, and that the jury did not consider that she voluntarily removed herself “from the labor market of comparable earnings”. CP 889. It was mistaken on all three counts, as discussed *infra*.

1. Standard of Review

The statutory standard of review (de novo) applies when the trial court actually remits an award. RCW 4.76.030; *see also Ma v. Russell*, 71 Wn. 2d 657, 658, 430 P.2d 518 (1967) (applying the statute’s de novo standard.); *Bunch v. King County*, 155 Wn. 2d at 176.

2. Larwick’s Economic Damages Were Supported by Substantial Evidence.

CCFD#5/James admit there is evidentiary support for Larwick’s economic damages (App. Br., p. 20) (“Larwick’s economic damages also were largely unsupported”). “A trial court has no discretion to disturb a verdict within the range of evidence. *Bunch*, 155 Wn. 2d at 177-78.”

Herriman v. May, 142 Wn. 2d 226, 232, 174 P. 2d 156 (2007). In fact, “If there is any justiciable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury.” *Id.*

The situation at the Training Center is material to Larwick’s emotional condition and her ability to enter the marketplace. The Trial Court noted with regard to Collins that the situation at the training center contributed to her emotional disarray, which reduced her ability to obtain later employment. CP 890-91. The same would certainly be true for Larwick.

While all four women experienced James unconscionable behavior as described in the Counterstatement of the Case, Larwick was James’ special target, which all three of the other women made clear at trial. Mason recalled that James unleashed a “barrage of comments towards [Larwick]” so extreme that Mason “was just so taken aback by these things that were said.” RP 2465-66. Collins saw the same when Collins arrived at the Training Center, “Valerie was being verbally attacked in many ways....And he said he was going to get rid of her.” RP 2481. Hayden described it as “just an out and out vendetta against [Larwick].” RP 1243.

Larwick testified that working at the Training Center was stressful, emotionally draining, and belittling. RP 872-73. When Larwick went into

James' office, he would get in her face and say, "you hate Sue Collins. Just face it, you hate her." RP 958. On another occasion, James got furious when Larwick tried to solve the problems with Collins through a memorandum of understanding. RP 961. Sitting in an office supply building in Portland, as women walked by James would comment about their legs or say "she's got a nice rack." RP 963. In James' office, one could see out in daylight hours, but no one could see him, and James would make sexual comments about women who walked by the window. RP 964. James would comment to Larwick, "is it cold in here, or are you happy to see me", but Larwick didn't find it funny. (*Id*) James referred to women as being too sensitive or being worthless all the time. RP 970. For Larwick, it combined to make her "feel completely powerless. Like someone coming in, ripping the rug out from under you. You get back up on your feet and here comes another slam at you. And it was daily." RP 971. For Larwick, the toughest words to hear were "stupid woman" and "stupid bitch". RP 973. Larwick continued to have nightmares about them more than fifty-four months after her last day at the training center. (*Id.*)

Larwick was aware that comments were made about her supposedly not wearing panties under her white pants. (RP 986). Also, when Larwick wore her white pants, James said he wished she would get

“her f’ing period, and whether or not she was wearing underwear.” RP 2466.

Larwick brought in a mental health counselor as a consultant to address the many problems in the Training Center, explaining that James was hurtful, damaging, and was so offensive that it reached the level of sexual harassment. RP 497. “She was experiencing it as a very sexually-harassing environment, and it was understandably upsetting to her. (*Id.*) Larwick talked about James' inappropriate comments, and how she hated Monday mornings because she felt she was going to be badgered and it was going to be a hostile environment. RP 529. Her mental health was suffering from having to think about all those things. *Id.*

Often when Larwick was in James' office, James would get in Larwick's face and say, “[Y]ou hate Sue Collins. Just face it, you hate her' it was his anger, rage and trying to force me to not like her." RP 958. When Larwick prepared a memorandum to clear up responsibilities between her and Collins, James “got extremely mad” (RP 1729), “outraged mad” (RP 1729), "so angry", "yelling" in Larwick's "face, screaming." RP 961.

James referred to Larwick as “that fucking bitch running a business out of her kitchen.” RP 1730. He referred to her as “a stupid bitch” (*Id.*), a

“lying bitch” (RP 1731), and a “fucking cunt” (*Id.*). “[H]e would often say that he could not stand her.” (*Id.*).

Larwick talked about James’ inappropriate language regarding women, her body parts and other crude words he spoke on a regular basis, and she sought assistance from other stakeholders in the Training Center. RP 410-11, 413, 2265. Larwick expressed concerns about James making gender-specific and sexual comments, which were very troubling to her. RP 773. Larwick talked about how James would stare at her body parts when he was talking to her. RP 815. The comments that Ms. Larwick shared were graphic and offensive. (*Id.*). Larwick complained about James commenting about her “dropping a couple of double Ds in”. RP 779. Once, after James told Collins that he could give her a “pearl necklace”, (RP 966-67), Larwick mentioned it to her son, who explained to her what it meant, to which Larwick's reaction was, "shock, absolutely. Pure shock." RP 967-68.

When Mason talked to Commissioner Torrens, she told him how Larwick was being treated. RP 2537. When Larwick reached out for help to Torrens and requested confidentiality, Torrens did not tell the other commissioners (RP 2327-29); instead, he told James. RP 2322. Larwick felt helpless. RP 2819.

Larwick described her treatment at the Training Center as “so draining, so stressful and caused so much anxiety”. RP 988-89. Around Christmas 2000, Larwick remembered being “so stressed out and so upset and my stomach hurt severely. I shut my door, locked it, laid on the floor, and held my stomach because my stomach cramps were so bad.” RP 990-91. She would go for nights without sleep, suffering such nightmares, frequent headaches, and severe neck pain that she went to a therapist during her last year at the Training Center. RP 989.

In September to October of 2001, Larwick learned of her then husband’s improper actions toward their daughter. RP 1027-28. Larwick immediately kicked him out of house and worked to get on with her life, but that Christmas 2001, James walked into her office and put a wind-up penis on Larwick's desk, laughing. RP 1028-29. Larwick was shaken up by it. RP 1216. Mason couldn’t understand why James was so cruel to Larwick, “how somebody could be so cruel to somebody who had just went through such a bad situation.” RP 2464.

Friends and co-workers from outside of the Training Center saw the stress in Larwick. RP 465, 775, 784-85. Another saw changes in Larwick’s emotional setting, her demeanor, and her personality while Larwick was at the Training Center. RP 826. Larwick’s son testified to the erosion he saw in his mother and the substantial changes she

underwent, including never returning to what she was like before she was at the Training Center. RP 1142-45. She began calling him more often, and some nights when he visited, he would find her asleep by the fire place after drinking a full bottle, which was completely out of her character, such that he would “wake her and take her upstairs”. RP 1143.

When James found a replacement for Larwick, he said that “he could finally get rid of the bitch”. RP 1738. James formulated a plan to offer her a low paying job that would embarrass her, one “that he knew she would not accept; and he would be done with her.” RP 1739.

Larwick’s termination was intended by James to cause Larwick pain.

James told Mason that he was going to offer Larwick a lesser paying job similar to the one Mason had, but knew she would not accept it because her ego could not handle it and he would be rid of her. RP 2484. When she did accept, he walked into her office and fired her in person. RP 952-53.

After she was gone, Collins was unable to remove Larwick’s nameplate from the bracket on the wall, so James reached around Collins, “grabbed it, and it literally busted in half, and said, there, Good riddance”. RP 1740-41.

When Larwick was terminated, she was devastated and pulled away and insulated herself for “quite a number of years.” RP 655-56. She displayed signs of shock and grief after her termination. (RP 786) Her son

explained that Larwick would not call or have any contact with her closest friends. RP 1143. One close friend from whom she withdrew for many years testified that Larwick is still not back to the way she was before June or July of 2000. RP 656. “She’s much more guarded than she was in the past.” (*Id.*) Other former friends and acquaintances reported the same thing at trial: they had not seen Larwick from when she was fired until either their deposition or trial. RP 737-38. One woman who was so close that Larwick kept a photo of the friend and her baby on Larwick’s desk, RP 1059. She did not see Larwick from her termination until she appeared to testify at trial. RP 832.

The impact on Larwick continued. She remained “withdrawn” (RP 1148). She lost the income from sales of her book and teaching first aid classes (RP 1149). She had continuing difficulty sleeping, and she was experiencing chest and neck pain, and dreams that interrupted her sleep. RP 1151. Larwick’s husband explained how Larwick’s experience at the Training Center has “affected every day of our lives” and that he’s “never really known her without the tension and stress of what she went through.” RP 1151.

(a) The measure of Larwick’s Economic Damages

A WLAD plaintiff is entitled to all wages and benefits that would have been earned but for the discrimination suffered. *Ablemarle Paper Co.*, 422 US 405, 423-24, 95 S.Ct. 2362, 2374-75 (1975).

(1) Back Pay

By the nature of their appeal, CCFD#5/James implicitly admit liability, which means they admit WLAD was violated. Once a violation of WLAD has been established, any doubts regarding back pay are to be resolved against the employer. *Burnside.*, 66 Wn. App. at 531.

Back pay is an historic calculation. It is the calculation of what the WLAD plaintiff would have received in pay and benefits had they stayed at their position with the defendant employer, less whatever earned income they received, or would have received if they had mitigated their damages.⁴

(2) Front pay

The trial court erred in remitting Larwick’s front pay. “Juries have considerable latitude in assessing damages, and a jury verdict will not be lightly overturned.” *Herriman v. May*, 142 Wn. 2d at 232. In Washington,

⁴ Discussion of the legal authority for back pay is more fully addressed at pp 21 *supra*.

there are three permissible approaches to front pay: (1) the court determines the parameters and the jury resolves the amount within those guidelines; (2) the jury determines the entire issue, as in non-discrimination actions; or (3) the court determines the entire front pay issue. *Blaney v. International Ass'n of Machinists*, 114 Wn. 2d 80, 87, 55 p. 3d 1208 (2002). However, “the determination of future lost earnings, including the number of years, is generally left to the jury to determine, once an employee produces evidence from which a reasonable future employment period may be projected.” *Blaney v. International Ass'n of Machinists*, 114 Wn. 2d at 89.

In support of the trial court’s remittitur, CCFD#5/James rely upon, but can find no support in, *Bingaman v. Grays Harbor Com'ty Hosp.*, 103 Wn. 2d 831, 835, 699 P.2d 1230 (1985), in which the Supreme Court reaffirmed its policy of extreme reluctance to disturb an award of damages made by a jury. *Id.* at 835. *Bingamon* also cautions that “before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable.” *Id.* at 836. In *Bingamon*, the Washington Supreme Court analyzed whether the damages awarded were “flagrantly outrageous and extravagant”, noting that they pertained to the decedent’s pain and suffering, which were sufficiently impressive that the award did not shock the conscience its conscience. *Id.* at 837.

Richard Ross, the four women's vocational expert, testified about his evaluation of Val Larwick. RP 2517. He noted that Ms. Larwick had “withdrawn from the competitive labor force”, was living “up on the mountains” and was “attempting to assist her husband” in his timber venture. RP 2518. Ross looked at the “emotional issue” and how the events at the Training Center affected her personality. (*Id.*) As a result of his “transferable skills analysis” (*Id.*), Ross concluded she could work in customer service/administrative assistant position, which would pay \$25,260 to \$31,600. RP 2519-20. Ross explained he had ruled out emergency related positions because of psychological effects on Larwick. RP 2521. As a result, there were two scenarios: one in which Larwick is considered effectively out of the workforce due to the psychological toll and one in which her income is set at an administrative assistant level. Those became the conceptual foundation for exhibits 320 and 321 respectively. RP 2744.

James and CCFD#5'S expert, Hank Lageman, a vocational rehabilitation specialist (RP 3682), testified to a different conclusion regarding Larwick. RP 3695-701. In cross-examination, Lageman admitted to forming opinions on things he hadn't read and didn't know how many sales of Larwick's books had occurred. RP 3715. Lageman also admitted that his employability analysis was based on “general

experience rather than specific knowledge of what positions each of these women could have taken” after termination from the Training Center.

(Id.)

Walter Lierman calculated Larwick’s post wage loss at \$206,000 (RP 2742), and post pension loss at \$5,352. He also calculated her lost future pension loss at \$243,000. *(Id.)* Lierman made two sets of calculations to reflect Ross’s two track analysis. Under the assumption that Larwick did not return to the workforce, Lierman calculated Larwick’s loss of future income at three years as \$173,000, at five years as \$265,000, and at ten years as \$474,000. RP 2742-43. Her total economic losses under this construct were \$628,676 at three years, \$720,000 at five years, and \$1,929,000 at ten years. Ex. 320. Lierman also calculated Larwick’s lost future wages under Ross’ second construct based on Larwick earning administrative assistant wages, with past damages remaining the same. RP 2743. Lierman calculated Larwick’s adjusted future wage loss at three years as \$66,000, at five years as \$99,000, and at ten years as \$171,000. RP 2743-44. Under the second construct, Lierman calculated that her total losses with three years’ future wage loss would be \$521,000, with five years’ future wage loss would be \$554,000, and with ten years’ future wage loss would be \$626,000. Significantly, that calculation did not include the \$25-30,000 per year that Larwick had been

making from the sale of her first aid books that she walked away from when she was fired from the Training Center. RP 881, 1058-59.

The jury thus had evidence of Larwick's complete withdrawal, including testimony about her emotional distress and personality changes. The jury also heard from conflicting expert witnesses. Its responsible approach to this was to issue its first jury request, for an electronic calculator. CP 1040. Even with the calculator, the jury unanimously awarded Larwick economic damages of \$626,000, which can be viewed as 100 percent of her ten-year future loss if she was assigned administrative assistant wages, or about 67.4 percent of the amount she requested in closing based on no earned income. However the jury arrived at the award, it did so based on substantial evidence.

3. Non-economic damages were supported by substantial evidence

In attacking Larwick's noneconomic damages, James and CCFD#5 rely on two defamation cases. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), and *Rasor v. Retail Credit Co.*, 87 Wn. 2d 516, 530, 554 P.2d 1041 (1976), for the principle that jury awards must be supported by competent evidence supporting the verdict. That standard was satisfied by the testimony of the many witnesses to

Larwick's devastation, James' devastating crudeness, and the commissioners' complicity or cluelessness.

In making their argument, James and CCFD#5 re-display their blindness to the severity of what Larwick suffered through James' perverted and outrageous behavior at the Training Center, suffering made worse by Commissioner Torrens complicity. RP 1738, 2322, 991-93. Moreover, James and CCFD#5 are asking that the Court impermissibly weigh the evidence rather than inquire into whether there was substantial evidence. There was substantial evidence.

As to Larwick's noneconomic damages, Dr. James Boehlein testified that Larwick was closed in with regard to her emotional expression. RP 2809. Significantly, all four of the women reported continuing nightmares, which "were totally different from each other in the content", but had a striking commonality of "feeling trapped, of being closed in, of fear, or humiliation". RP 2804. For Larwick, those recurring nightmares involved James forcing her "onto an elevator. And he was angry and yelling at her and forcing her into a closed space." *Id.* Dr. Boehlein explained that Larwick had grown up with the idea that one had to excel or be successful in order to have value as a person. RP 2812. This would explain why not only her termination, but the way it was done and how it took her book sales and training business from her would be so

much more devastating. *Id.* Dr. Boehlein also addressed the impact of James putting the wind-up penis on Larwick's desk shortly after she had kicked her husband out for sexually abusing their daughter, such that :the stressor at home could affect the degree to which the incidents at the center were affecting her." RP 2813. "It would make her more sensitive because of the symbolic and real nature of that object. And the connection emotionally and psychologically to sexual abuse." RP 2814. Dr. Boehlein described how James' "actions conveyed a sense of threat; of psychological or emotional threat of really playing on people's weaknesses. Either female physiology of female anatomy." RP 2818.

Boehnlein also found significant the violent image of James response to Larwick going outside for help when he said "You're trying to cut my sack." *Id.* Where the reports are being ignored as they were with Larwick, "that can lead to a long-term sort of hopelessness, helplessness. And where sometimes people just give up. They feel like there's no hope. *** it can lead to feeling demoralized. And demoralization is one of the things that most closely associated with depression." RP 2819. Dr. Boehlein explained that after Larwick left the training center, it became difficult "because the stress contributed to her feeling very fearful. And so she isolated herself from other people." RP

2825. Dr. Boehnlein explained that he would treat for PTSD symptoms.
RP 2856.

From that mountain of evidence, the jury had more evidence to support Larwick's verdict than in any reported case in which remittitur was ordered. The court however, granted remittitur, but it did so based on a misapprehension of the facts.

4. The court's stated reasons for reducing Larwick's damages were contrary to the evidence

(a) Length of Service

The trial court in part based its remittitur on the idea that "Larwick's employment was approximately two-thirds of the length of time of the other plaintiffs, so it is difficult to justify an award for emotional damages in excess of any other plaintiff as the sexual harassment climate was equal to all and continuous in time." The trial court is incorrect about Larwick's relative length of service. Larwick began employment when the Training Center opened, on June 12, 2000 (Ex. 63). However, she had begun working on the project and volunteering with CCFD#5 months before that RP 884-85. She was terminated in October 2002, (RP 1108), such that she was under James for more than 28 months, and likely closer to 35-36. Mason was hired on December 17, 2001, and left on October 31, 2003, for a total of less than

23 months. Collins started at the Training Center in May of 2001 (RP 1716-17) and left on October 31, 2003, for a total of about 30 months. Hayden, whom Larwick hired, began work on July 3, 2000, and left in November of 2003 (RP 1279-80), for a total of about 40 months. She was the only one of the other three women who worked longer than Larwick, and she had not been James target.

(b) Relative Severity

The trial court's statement that the "sexual harassment climate was equal to all and continuous in time" (CP 889) ignores the direct attacks on Larwick described by her co-workers as being so severe.⁵ More significantly, the other three women in the suit acknowledge that Larwick was James particular target. Larwick was the singular target, not just one of the women, and the jury saw that and appropriately took it into consideration. In short, no other employee received comparable treatment which was that extended, that orchestrated, that cruel or that evil.

(c) Larwick's Post-Termination Circumstance

The court concluded with regards to Larwick that:

Her subsequent actions would also indicate that she stabilized her life after a great deal of unpleasantness prior to her remarriage and total change of career. She began assisting in the tree farming operation of her new husband,

⁵ See Brief pp 50 *supra*.

and she had continued to do so prior to the jury's determination of the ultimate award. CP 889.

The trial court's insertion of its analysis impermissibly supplanted the jury and it ignored the substantial testimony that far from retreating to a productive, effective life, Larwick essentially withdrew from society and her previous life.⁶ Ross looked at Larwick under two potential constructs of transferable skills, and drew expert conclusions about Larwick's potential prevailing wages for her considering the economic market, her earning capacity, and opportunities. RP 2519-21. This was relatively consistent with the testimony of CCFD#5/James' expert, Hank Lageman, who also testified that Larwick had skills. RP3696. This information was taken into consideration by Lierman and is why two different sets of calculations were prepared for Larwick, one making the assumption that she was effectively removed from the workforce and without offsetting income and the other based on the presumption that Larwick should be assigned transferable skills Compare Ex.320 and Ex 321.

With regards to the court's perception that Larwick voluntarily removed herself from the workplace, the jury heard from Dr. Boehnlein that Larwick continued to experience substantial psychological disturbance.

⁶ See discussion at pp 55 *supra*.

(d) Passion and prejudice

The trial court also erroneously believed that the jury was acting with passion or prejudice as to Larwick. The jury was obviously paying close attention to the evidence that, as Collins, Mason and Hayden testified, Larwick was James chosen target. RP 1243, 2465-66, 2481. Alleged passion or prejudice on the part of the jury is not grounds for granting a new trial under CR 59(a)(5) unless the record indicates that the verdict is not within the range of proven damages. *James v. Robeck*, 79 Wn. 2d 864, 870-71, 490 P. 2d 878 (1971). When a jury award is within the range of evidence, it is error to rule that juror passion or prejudice motivated the award. *Woolridge v Woolett*, 96 Wn. 2d 659, 668, 638 P. 2d 566 (1981).

This was not a jury that was guided by passion or prejudice. This was a jury that asked for and used an electronic calculator as it parsed the evidence and made individual assessments of the four women's individual claims. CP 248-49, 250, 251, 252. Given the voluminous record of the wrongs done to Larwick, the harms she suffered, and the continuing emotional withdrawal and losses she continues to experience, the jury awarded damages are within the range proven.

5. CCFD#5/James ratified the jury's verdict

CCFD#5/James ratified the jury's verdict. They paid in full the jury's awards to Hayden and Mason. CP 1068-1071. Hayden received approximately 54 percent of her requested economic damages and 60 percent of her noneconomic damages. CP 252, RP 1046-49, 4226, 4247. Mason received approximately 100 percent of her economic damages, but only 25 percent of her requested noneconomic damages. Compare RP 4226, 4247 and CP 251. It strains logic to accept the argument that this careful jury was rational as to Hayden and Mason, rational as to Collins noneconomic damages but irrational as to Collins economic damages and Larwick's economic and noneconomic damages. Collins got shafted by a jury that awarded her only \$75,000 despite the horrendous physical and emotional toll that CCFD#5/James inflicted on her, largely because they targeted her for their attack and, in part, because she had chosen to go along to get along. Collins did not move for addittur because while she was wounded by the result, she knew going in that it was a risk. The perpetrators, CCFD#5/James should be held to no less of a standard.

IX. THE FOUR WOMEN SHOULD BE GRANTED FEES ON APPEAL

The four women are entitled to their fees on appeal. RAP 18.1; RCW 49.060.030. *Martini v. Boeing Co.*, 137 Wn.2d 357, 377, 971 P.2d 45, *aff'd*, 137 Wn.2d 357, 971 P.2d 45 (1999).

X. CONCLUSION

CCFD#5/James motion for remittitur or a new trial should be denied with regard to Collins' economic damages which were supported by substantial evidence and within the province of the jury to decide.

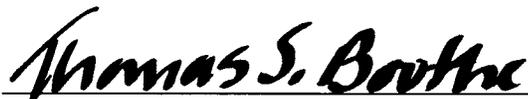
CCFD#5/James motion for a new trial on the basis of the four women's attorney's alleged misconduct in closing argument is not as CCFD#5/James represent it to be and certainly does not rise to the level warranting the requested relief.

The trial court's award of attorney fees abused its discretion by awarding less than the four women's attorney's customary hourly rate, set the lodestar below the level identified by four expert employment attorneys, excluded costs advanced on behalf of the four women which they will be obligated to pay, and did not include a multiplier despite the very high risk to their counsel who expended more than \$160,000 in personal funds and invested more than 2500 hours of time with no prospect of recovery if the jury had ruled for CCFD#5/James. The case

was risky, and we can reasonably infer that CCFD#5/James analyzed it as likely a defense verdict, based on their decision not to make any pretrial offer of settlement at any level despite participating in a private professional mediation.

The remittitur by which the trial court reduced Larwick's economic damages from \$626,000 to \$150,000 and her noneconomic damages from \$875,000 to \$250,000 abused the trial court's discretion, was based on multiple misapprehensions of the testimony and impermissibly interposed the trial court's factual interpretations and values over the jury's interpretations and values. The jury had substantial evidence to support its verdict, and that verdict should be respected.

DATED this 18th day of December, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing

BRIEF OF RESPONDENTS AND CROSS-APPELLANTS on the following named person(s) on the date and time indicated below by:

- mailing with postage prepaid
- hand delivery
- facsimile transmission
- overnight delivery
- e-mail transmittal to

COURT OF APPEALS
 DIVISION I
 00 DEC 23 AM 10:24
 STATE OF OREGON
 BY [Signature]
 DEPUTY

on October 9, 2008 to said person(s) a true copy thereof, addressed to said person(s) at their last-known address(es) indicated below.

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