

**IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III**

No. 29912-1-III

FILED 15 2012

MARK FEY

Respondent/ Cross-Appellant

vs.

**STATE OF WASHINGTON;
COMMUNITY COLLEGES OF SPOKANE**

Appellant/Cross-Respondent.

RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Respondent/Cross-Appellant, Mark Fey, a current ten-year employee with Community Colleges of Spokane (“CCS”), was excluded from a promotion because of his disability. CCS refused to consider Mr. Fey for the lead position of Grounds and Nursery Specialist 4 (“GNS4”) because he could not obtain a Commercial Driver’s License (“CDL”) due to his eye impairment in 2007. Mr. Fey had been “grandfathered” into his current position as a Grounds and Nursery Specialist 3 (“GNS3”) which also required a CDL. It is undisputed that Mr. Fey was not considered for the position solely because he could not get a CDL.

At trial, the jury found in favor of Mr. Fey on both claims: that CCS failed to engage in the mandatory interactive process, and that CCS failed to provide Mr. Fey with a reasonable accommodation. The trial court instructed the jury that Mr. Fey had a duty to mitigate even though he remains employed with CCS to this day. Mr. Fey was awarded \$7,549 in lost wages, and \$0 in emotional distress. Upon Mr. Fey’s motion for additur, the trial judge awarded him \$50,000 in emotional distress damages and also awarded attorney fees and costs. Mr. Fey respectfully requests this Court to uphold the verdict of the jury and award of additur and fees and costs by the trial court. In the alternative, if this Court orders a new trial, Mr. Fey requests that the jury not be instructed on mitigation.

**II. APPELLANT’S ASSIGNMENTS OF ERROR DID NOT
CONFORM WITH RAP 10.3(a)(4)**

RAP 10.3(a)(4) requires a “separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.” Proper assignment is critical because a reviewing court generally will not consider the merits of an issue that has a deficient assignment. *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995). Failure to properly assign error is the same as a party improperly shifting its responsibility to the court. *Orwick v. City of Seattle*, 103 Wn.2d 249, 256, 692 P.2d 793 (1984).

Assignments of error pertaining to jury instructions must have a separate assignment for each jury instruction that a party contends was either erroneously given or refused, including a reference to each number. RAP 10.3(g). When a party fails to abide by this requirement “[t]he issue will not be entertained on appeal.” *State v. Smith*, 104 Wn.2d 497, 511, 707 P.2d 1306 (1985).

Many of Appellant’s Assignments of Error do not comply with the rule requirements and should not be considered by this Court. In particular, Assignments of Error Nos. 5-6 make generalized statements about alleged errors without the required specificity. Appellant’s Assignments of Error also fail to include errors that are argued in its brief. The only issues properly before this Court on which argument should be considered is whether the trial court erred in excluding the BFOQ defense, undue burden and proximate cause (Assignments of Error Nos. 1 and 2).

III. RESPONDENT'S ASSIGNMENT OF ERROR

1. Whether the Trial Court Erred When It Instructed The Jury On An Employee's Duty To Mitigate His Damages Pursuant to WPI 330.83 As Set Forth In The Court's Instruction No. 16.

IV. STATEMENT OF THE CASE

Appellant's Opening Brief is replete with factual mischaracterizations, omissions, and fictions. The first sentence of the Introduction misstates the facts of this case: the GNS4 position "required operating equipment requiring a commercial driver's license". AP¹ 1. Operating CDL-rated equipment was not a requirement of the GNS4 job or necessary to perform the required duties. Ex. 12; RP 441-2.

A. Mr. Fey's Eye Disability

Mark Fey has had a visual impairment since he was a young child. RP 226-27. The genetic condition he is afflicted with is similar to macular degeneration but with a younger onset. RP 226; 669. Mr. Fey testified that he has had corrective lenses since he was a child and his eyesight has worsened over his adult years. RP 227. Reading is difficult for him as it causes headaches and he now uses a magnifying glass to read.

¹ For ease of reference, Appellant's Brief will be referred to as "AP". Appellant's brief does not conform to margin requirements of RAP 10.4(a)(1). It was the third brief presented by CCS. After the initial 118-page brief was rejected by the Clerk, a second 68-page brief was presented. It, too, was rejected. The third brief was the same brief with adjusted margins to fit the 50-page requirement. "The appellate court will ordinarily impose sanctions on a party or counsel for a party who files a brief that fails to comply with these rules." RAP 10.7.

RP 225-226; 227. While Mr. Fey is able to obtain a regular driver's license, his eyesight impairment does not allow him to meet the CDL requirements². RP 228.

Dr. Robert Hander testified at trial that Mr. Fey has a genetic eye impairment which more probably than not is Stargaardt's Disease³. RP 669-671. His vision in one eye is 20/50 and the other eye is 20/400. As a result of this impairment, Mr. Fey cannot meet the requirements to obtain a CDL since it requires vision correctable in each eye to 20/40. RP 674.

B. Grounds and Nursery Specialist Department

Both the Spokane Community College campus ("SCC") and Spokane Falls Community College campus ("SFCC") have three levels of GNS workers: 2, 3, and 4. The GNS4 is the lead supervisor. The majority of the year, the grounds department works to maintain and beautify the campuses. This includes pruning, mowing, planting, sprinkler maintenance, and removing debris. RP 232, 234-36, 441-42; Exs. 2, 3, 12, 13, 161. During snow days in winter, the grounds department removes snow and ice from the campuses. Other winter duties include pruning, winterizing and debris removal. RP 482.

In his capacity as GNS3, Mr. Fey operates large trucks, backhoes, lawnmowers, tractors, and a variety of hand tools to perform his duties. RP 233. Most of the year, Mr. Fey operates a two-wheel drive pickup truck which carries the sprinkler parts and

² When he was hired he informed his supervisor, Arden Crawford, that he was unable to obtain a CDL due to his eye condition. RP 232, 256.

³ Stargaardt's Disease is a type of juvenile retinal dystrophy. "Dystrophy" refers to a condition present at birth as opposed to "degeneration" which is a condition that is acquired over time. RP 669-70.

equipment he uses for sprinkler maintenance. RP 235. For snow removal, he drives a large snowplow with a sanding unit called the V-Box sander (“V-Box”). RP 235, 237, Ex. 34. This is a large truck that can weigh up to 23,000 pounds but does not require a CDL⁴. At times, he has operated heavy equipment, such as a backhoe, for snow removal as it does not require a CDL. RP 246. It is undisputed that Mr. Fey is able to perform all of the job duties of the GNS3 position without a CDL. RP 241, 259, 455⁵.

C. CDL was made a “Condition of Employment”

In 2007, when CCS realized it owned CDL-rated vehicles and did not have enough employees with CDLs, several job positions were amended to include a CDL as a “Condition of Employment”. Exs 3, 13, 166; RP 484. This included the GNS positions and Equipment Technician positions. RP 720, 824, 838. There was a discussion as to whether the Maintenance Mechanic position should also require a CDL, but ultimately it was excluded. Ex. 17; RP 720, 838.

It is undisputed that possession of a CDL is not a job duty in itself and is not listed as an “essential function”. RP 486, 869; Exs. 2, 3, 12, 13, Instead, “essential function” for the grounds positions include: 1) operate equipment such as trucks, and 2) remove debris including snow and ice. Exs. 2, 3, 12, 13, 161, 162.

⁴ A truck requires a driver to have a CDL when the gross vehicle weight rating (“GVWR”) is 26,001 pounds or more. RCW46.25.010(6).

⁵ Arden Crawford, Mr. Fey’s supervisor testified:

Q: Are there any job duties he’s unable to do as a Grounds and Nursery 3 without a CDL?

A: The only thing he couldn’t drive would be the CDL vehicles, the water truck or the C-6500 that’s on my campus.

Q: As a result of not being able to drive the water truck or the C-6500, are there any of his job duties that he does not do?

A: No.

D. Mr. Fey Was “Grandfathered” Into His GNS3 Position Because Of His Impairment.

In 2007, when Mr. Fey received notice that his GNS3 position would require a CDL, he reminded his supervisor, Arden Crawford, that his eye impairment would prevent him from obtaining a CDL. RP 257. Mr. Crawford told Mr. Fey to take the physical exam anyway. RP 446. Mr. Fey complied and took the exam, and failed. He gave the failed exam report to Mr. Crawford and told him that he failed the eye exam. RP 446-7, Ex. 6. Mr. Crawford testified “*I think what he told me was that he can’t pass the eye test.*” RP 446. Mr. Crawford chose not to look at the report but passed it on to Human Resources⁶. RP 250, 447-8.

As a result of failing the exam, Mr. Fey was “grandfathered” into his position since he could not get a CDL due to his medical condition. RP 249, 448. He was not informed that he could not promote into a position requiring a CDL as a condition of employment. RP 265. There was no indication that another job, which also required a CDL, would require Mr. Fey to meet the new set of Conditions of Employment. RP 309. Mr. Fey continued to perform his job duties as he did not need a CDL to complete the tasks. RP 228, 455, 908.

⁶ CCS claims that Mr. Fey “refused to respond to questions” but his employer did not ask questions or request information or medical records. AP 7;RP 447-8, 899. Mr. Fey chose not to discuss his medical condition with a co-worker. RP 418.

In the fall of 2007, CCS first had notice of Mr. Fey's eye disability when it acted on that disability by grandfathering Mr. Fey into his position because of the impairment. RP 448, 898-9.

E. Mr. Fey Was Not Considered for Promotion Because of His Disability.

CCS admitted that it did not consider Mr. Fey at all for the open GNS4 position when he applied in late 2007. RP 904⁷ Mr. Sievert informed Mr. Fey that “[g]iven that you are ineligible to receive a CDL, you did not meet the minimum requirements for the position, so you were not considered for the position.” Ex. 11. Other than that email notification, Mr. Fey was not contacted, interviewed or considered for the GNS4 position. RP 261, 904.

A GNS4 position became available again in 2010 and Mr. Fey again applied. RP 273. He specifically requested accommodation for his disability which prevented him from getting a CDL. RP 274, Ex. 32. Again, he was not interviewed or considered for the position but was deemed “ineligible”⁸. RP 274, 910.

F. The Essential Function is Snow Removal, Not Having a CDL.

An essential function of all GNS positions is to remove snow. Exs. 12, Exs. 2, 3, 12, 13, 161, 162. Snow removal is done by a crew of workers that includes the

⁷ Mr. Sievert testified:

Q: Do you recall anyone making contact with Mr. Fey to discuss the position with him?

A: Not that I am aware of.

Q: That's because he wasn't considered, correct?

A: Correct.

⁸ He received a form letter stating, “[a]lthough your application shows you possess experience and/or training related to this classification, you do not possess a commercial driver's license which this position requires. Therefore, your name is not being placed on the eligibility list.” Ex. 29.

grounds department, maintenance mechanics, custodians, and equipment technicians. RP 252, 400, 449, 509, 585, 600, 735, 838, 845; Exs. 163. Snow must be cleared from a variety of areas: numerous sidewalks, roads, parking lots, stairs, and ramps. RP 454. A main priority on a college campus is clearing sidewalks for the students walking to class. RP 454, Ex. 21.

Snow removal is completed with large trucks, four-by-four pickups, front end loaders⁹, backhoes, small utility vehicles, four-wheelers, and shovels. RP 244-45, 392-93, 453-54. The fleet of large snow removal trucks includes both CDL-rated and non CDL-rated trucks. RP 481. There are three CDL-rated snow removal trucks for both campuses: the C6500, the Kodiak and the International. Exs. 18, 172-74 (photos of vehicles). There are also two large, non-CDL trucks used for snow removal: the V-Box sander and an F600. Exs. 34, 175 (photos of vehicles). These two vehicles do not weigh enough to require a CDL, but are included in the category of “large trucks” used for removing snow from the large parking lots. RP 451, 481, 561-2.

The V-Box sander and F600 operate and complete the same work as the CDL-rated trucks. RP 559, 473, 602, 606. The current GNS4, Shawn Clifford, testified that the F600 could plow the same as the International in the same amount of time, but he just “*hates that truck*”. RP 559. Equipment technician Bryan Perkins, who works on

⁹ SCC also has front-end loaders and backhoes to remove snow which do not require a CDL. RP 523.

the trucks and drives them to plow snow, considers the V-Box and F-600 to be comparable to CDL vehicles. 602,¹⁰ 606¹¹.

Unlike smaller pickups with plows attached, the V-Box is similar to the CDL-rated vehicles because it is a heavy truck with comparable engines and plow sizes. RP 300, 581, 604, 731¹². The V-Box can push the same amount of snow and can plow the same areas as the CDL vehicles. RP 253, 595, 563. At one point, due to its size and weight the V-Box sander was believed to require a CDL. RP 841. When driving the V-Box, Mr. Fey is paid “premium-pay”¹³, the same as those driving CDL-rated vehicles. RP 481. Some CCS employees prefer the non-CDL trucks as they have automatic rather than manual transmissions and are easier to maneuver with the frequent direction changes when snowplowing. RP 277, 591, 602.

The snow removal crew on each campus consists of approximately seven employees¹⁴. RP 393. Each campus has at most two CDL-rated vehicles. Not everyone plowing snow can drive a CDL truck, even if they all had CDLs, as there are not enough vehicles. Snow removal also requires smaller vehicles and equipment to remove snow from sidewalks and other areas. Jill Nishimura, a GNS2 who has a

¹⁰ Q: How would you say the F600 compares to the CDL vehicles?

A: I tend to like it better. It’s an automatic. It’s easier to drive. I think it can – as far as how it performs, the same.

¹¹ Q: Do you consider that vehicle [V-Box] to be comparable to A CDL vehicle?

A: Yes.

¹² Greg Schauble, an equipment technician, testified that the F600 has a larger engine than the Kodiak. He also testified:

Q: Do you consider the V-Box sander comparable to the International or the Kodiak?

A: I do, yes.

¹³ Premium pay is \$3 per hour more than regular pay. RP 462, 481.

¹⁴ In addition to the grounds crew, maintenance mechanic job duties include snow removal. RP 252.

CDL, does not drive a CDL-rated vehicle but instead uses a lawnmower fitted with a plow to clear the sidewalks¹⁵. RP 244, 399, 401. Fred Hale, a GNS4, utilizes a small four-by-four to plow sidewalks. RP 245.

G. Appellant Made Erroneous Statements About Snow Removal.

Appellant makes several erroneous statements about snow removal to bolster the claim that Mr. Fey could not perform the GNS4 job. CCS falsely asserts that snow removal cannot be completed without “simultaneous full-time operation of the CDL plows”. AP 3. No one testified that simultaneous full-time operation of the CDL plows was necessary. One of the CDL trucks, the International, has broken down on several occasions. RP 549, 605, 776. At one point, both CDL-rated trucks on the SCC campus were being repaired so the F600 and smaller trucks were used. RP 521, 587, 605-06.

Throughout Appellant’s brief and during trial, it was argued that the “big trucks” necessary to complete snow removal exclude the V-Box. AP 8-9, 19-20; RP 460, 554, 727. It was implied that “big trucks” means CDL-rated trucks. “Big trucks” refers to trucks larger than pickup trucks. RP 404, 484, 731, 561. It is agreed that “big trucks” are necessary for efficient snow removal but that includes the V-Box as it is comparable to the CDL trucks. RP 483, 481, 588. Maintenance mechanic, Jim Labish, who has a CDL and plows with the CDL-rated C6500, and Mr. Fey both plow the

¹⁵ Instead of Ms. Nishimura driving the CDL truck it is driven by maintenance mechanic, Jim Labish, who has a higher hourly rate. RP 488.

large parking lots and streets on the SFCC campus. RP 242, 243, 722.¹⁶ The V-Box is the main sander for the SFCC campus. RP 451.

CCS falsely claims that the GNS4 position on the SCC campus is assigned to drive the International, a CDL-rated truck. AP 5. The evidence does not support this contention. The job description does not state that the GNS4 has to drive a certain vehicle, or even a CDL truck. RP 544¹⁷; Exs. 12, 13. Cary Abbott did not drive that vehicle when he was GNS4. RP 535. All equipment used on either campus is owned by CCS and can be shared between the campuses. RP 451, 802, 835-36.

CCS made unsupported allegations that the SCC campus is bigger than the SFCC campus because there are more parking lots. RP 834, 837. The campus manager of each campus only knows the needs of his own campus. RP 463, 784, 800. The SCC manager, Jeff Teal, who rarely plows snow, speculated that the V-Box would take longer to sand than the International. RP 787-8. CCS counsel also falsely claimed that the V-Box was “assigned to plow narrow areas in the cornrow fashion, not large areas in a Zamboni style like the International.”¹⁸ AP 9. The critical evidence is that those

¹⁶ The C6500, which has a slightly higher gross vehicle weight rating than the V-Box has the same size plow as the V-Box. RP 256, 731, 773.

¹⁷ The current GNS4, Shawn Clifford, testified:

Q: And does your job description list one of your duties to drive a CDL vehicle?

A: It lists snow removal.

Q: Does it list drive a CDL vehicle?

A: No. It lists that I have to have a CDL license, but it doesn't specifically say driving a CDL vehicle.

¹⁸ No one testified that the V-Box uses the cornrow style. That style of plowing is done by “smaller vehicles” not the V-Box. RP 555, 556, 724, 727, 730-1.

who operate the vehicles testified that the V-Box is comparable in ability to a CDL-rated truck. RP 300, 588, 595, 606.

H. Other GNS4 Employees Performed The Job Without A CDL.

The Appellant's brief ignores the critical fact that both campuses have had a GNS4 successfully perform the required job duties without a CDL. Fred Hale, who has been the GNS4 at SFCC for at least five years, has a medical condition that prevents him from obtaining a CDL. RP 394. He, too, was grandfathered into his position when the CDL became a required condition of employment. RP 395. Mr. Hale continues to complete the same GNS4 job duties. During the winter, he drives a small ATV piece of equipment to plow the sidewalks. RP 392. There is no job duty that Mr. Hale cannot complete because he does not have a CDL¹⁹. There was no hardship on the campus because Mr. Hale could not get a CDL even during the largest snowfall in Spokane history in 2008-09. RP 397, 456-7.

Cary Abbott also fulfilled the GNS4 duties without a CDL. He was hired on the SCC campus instead of Mr. Fey in 2008 and given six months to get a CDL. RP 511. During that time, he performed the GNS4 duties and removed snow from the

¹⁹ Q: Did anything in your daily job duties change after the CDL became a requirement of your job?

A: No.

Q: Is there any job duty that you can't do in your job because you don't have a CDL?

A: No.

sidewalks using a small 4x4. RP 505-6, 513. Mr. Abbott testified that there were not any duties that he could not perform as a GNS4 without a CDL²⁰. RP 513 515.

I. Other CCS Employees Have CDLs And Can Drive The CDL-Rated Trucks.

The Appellant's opening brief also ignores the fact that other CCS employees have a CDL, or the ability to get a CDL, who could drive the CDL snow removal trucks. RP 845. The maintenance mechanics are required to plow snow, but are not required to have a CDL. RP 720, 729, 738, 867; Ex 17. In addition to Mr. Labish, who has a CDL, Delman Kuhl and Matthew Bailey both testified that they drive small pickup trucks to plow but could get a CDL and drive the CDL-rated trucks. RP 739, 746.

In addition to the grounds workers and maintenance mechanics, equipment technicians who possess a CDL often plow snow. Greg Schauble, an equipment technician, has a CDL and has operated the CDL-rated plows on the SCC campus²¹. He operated the International truck during the large snowstorm of 2008-09. RP 585-86. He has also driven the Kodiak when the International was broken down. RP 587. Bryan Perkins, an Equipment Technician II, has a CDL and plowed snow on both campuses for several years. RP 600. He has driven both the Kodiak and International to plow snow, as well as smaller pickups and the F600. RP 601.

²⁰ After remaining in the position for over a year without a CDL, Mr. Abbott was demoted back to his GNS2 position when a disability prevented him from getting a CDL. RP 512-13.

²¹ He got a CDL as a GNS2 but did not plow with CDL trucks. Instead he drove a small 4x4. RP 584-5.

During the large 2008-09 snow storm independent contractors were hired to plow snow instead of using available CCS employees such as Mr. Perkins and Mr. Schauble²². Mr. Schauble and Mr. Perkins continue to plow at times using the CDL-rated trucks, and they were available to plow when needed. RP 589, 601, 605.

J. Mr. Fey Can Perform The Essential Functions Of The GNS4 Job.

The GNS4 job has the same job duties as the GNS3 and GNS2 of mowing, pruning, gardening, and maintenance²³. RP 390, 391, 390-92, 441-42, 449. The only additional duty for the GNS4 is a lead duty which involves delegating tasks to other grounds workers²⁴. RP 547, 874, 908. A CDL is irrelevant to performing these lead duties. RP 389. Mr. Fey has done all of the job duties of the GNS4 position as a GNS3. This includes the leadership duty when he supervised work study students in the past²⁵. RP 266-267, 270, 413.

As the lead, the GNS4, chooses which vehicle to operate and assigns vehicles to others. Mr. Hale does not even drive a truck for snow removal as he prefers to clear sidewalks. RP 405-6. The GNS4 position assigns vehicles for other grounds workers. RP 272. As the lead, Mr. Fey could have completed the duties of the GNS4 position using the V-Box or a smaller vehicle.

²² Mr. Schauble and Mr. Perkins and other employees successfully grieved this issue and were awarded the overtime pay that was lost. RP 589, 605.

²³ The job descriptions for the GNS positions are the same for both campuses. RP 449, 869.

²⁴ "Lead e.g. direct, assign, instruct, and evaluate other grounds personnel to facilitate grounds/irrigation work and complete preventive grounds maintenance programs." Exs. 12, 2, RP 391.

²⁵ Mr. Fey's job description includes "May direct or lead other employees and part time helpers as needed." Ex. 2.

A critical fact in this case is that snow removal is only one facet of the job. It is undisputed that Mr. Fey can do all other aspects of the GNS4 job. The only reason he was not considered for the promotion was because he could not get a CDL. A CDL is only necessary for snow removal which is done a few days a year²⁶. If there is no snow there are a variety of duties to perform that do not require a CDL: de-icing, pruning, debris removal. RP 482, 532.

K. Appellant's Counsel Repeatedly Violated the Trial Court's *In Limine* Order.

Since Mr. Fey was not considered for the promotion solely because of his disability, the issue of whether he was the most qualified candidate is irrelevant. Mr. Fey moved *in limine* to exclude alleged poor performance issues as irrelevant and prejudicial. RP 78-91; CP 324-29. The trial court originally denied the motion but on motion for reconsideration by Mr. Fey reversed the ruling. RP 91, 158-172, 317-34. The trial court found that there was no evidence of poor performance in the record, and CCS' attempt to portray Mr. Fey in such a negative light was inconsistent and contrary to the evidentiary record. RP 166, 326-7. The court's ruling also precluded Mr. Fey from presenting positive information about himself. To follow the court's ruling, Mr. Fey did not introduce evidence to demonstrate his positive performance. RP 80-1, 332-4.

²⁶ At trial, Mr. Fey testified that he plowed approximately 4 days during the 2010 and 2011 seasons. RP 282. Mr. Crawford testified that Mr. Fey plowed 17 days in the 2008 and 2009 seasons.

The only evidence in the record potentially evidence of poor performance is contained in one exhibit. Ex. 150²⁷. The exhibit details three incidents: an accident with a CCS vehicle, sprinklers accidentally going off, and Mr. Fey not getting his parking pass on time. RP 486-87. The court's ruling and subsequent order limited questions to the author of Ex. 150 and specifically excluded questioning relating to characterization of Mr. Fey as an employee. RP 334; CP 452-3. The court allowed CCS to question witnesses to contradict Mr. Fey's own statements if it was based on evidence in the record. RP 329-30.

Other than those minor instances, no other evidence or claim of poor performance was made at any time in the case. RP 80-81, 164-5, 319-21. CCS attempted to introduce at trial, for the first time, testimony that Mr. Fey was a problem employee and would not have gotten the promotion had he been considered. RP 162-163, 318-21. The evidence does not support this claim and it was properly excluded²⁸.

Despite this clear ruling and written order, Appellant's counsel violated the court's order on numerous occasions requiring multiple sustained objections and bench conferences. Frequently this involved counsel asking a question in an attempt

²⁷ Ex. 150 was excluded from evidence, but Mr. Crawford was permitted to testify as to any performance issues in the record. RP 170-3, 329-35, 486-7.

²⁸ Mr. Crawford testified in his deposition that he had never given Mr. Fey anything other than a satisfactory evaluation. RP 320.

to discredit Mr. Fey. RP 414-17, 477²⁹, 479³⁰, 480, 571, 571-2, 578, 738, 796,³¹ 1051³².

L. CCS Failed To Rebut Mr. Fey’s Emotional Distress Evidence.

After CCS refused to consider Mr. Fey for the promotion on two occasions for the GNS4 position, Mr. Fey was angry, frustrated, and depressed that he was not even interviewed. RP 261, 277. Mr. Fey broke down on the stand as he discussed having a “short fuse” with his children and arguing with his wife. RP 279. It was distressing since he knew he could do the job duties without a CDL. RP 277. He testified that he wanted to be treated as anybody else and rewarded for his hard work.³³ RP 278-279, 376. *“It seems that I’m being treated as lesser than because of a physical disability*

²⁹ Q: Do you consider Mr. Fey an excellent employee?

A: No.

Ms. Mann: Objection, Your Honor.

The Court: Sustained. Jury will disregard the answer.

³⁰ Q: Would you recommend Mr. Fey for a lead position?

Ms. Mann: Your Honor, I am going to object. I think –

The Court: Sustained.

Q: In determining which position would be a better fit for Mr. Fey, which position would be a better fit?

A: Maintenance –

Ms. Mann: Again objection.

The Court: Sustained.

Q: Does Mr. Fey work well with others?

Ms. Mann: Objection. Can we have a bench conference? The Court: Sustained, Counsel. No, it’s not necessary. Counsel, I recall the discussion we had earlier.

³¹ Counsel asked 2 questions (1 after an objection was sustained) about whether there were any applicants more qualified than Mr. Fey.

³² In closing, counsel began to argue that Mr. Fey would not have been promoted because his supervisor would not have given him a recommendation. An objection was sustained.

³³ *“I don’t think that ‘cause I was asked to get a license that I couldn’t get and that has no real bearing on whether the job I do can get done is going to block me forever for promoting within my classification at work.”* RP 355.

that I was born with. And I don't think that's right for me or for anybody else." RP 355.

Mrs. Fey testified that her husband was in "disbelief" that he was not even considered for the position. RP 377. She said that after he was told he was ineligible for the promotion he was frustrated, crabby, and "*feels powerless because he's now told that he will stay in his one job for the rest of his career there.*" RP 377. He was easily frustrated and had a short fuse. RP 377.

CCS failed to rebut the testimony of either Mr. Fey or his wife relating to emotional distress. Instead, CCS argued that Mr. Fey liked his job, and that he was not upset after not getting a maintenance mechanic position. AP 10. The issue was not whether or not he liked his job. The issue is whether he was prevented from consideration because of his disability.

M. Mr. Fey Was Not Required To Leave His Position And Seek Alternate Employment In Order To Claim Damages for Lost Wages.

Mr. Fey enjoys his job in the grounds department and wanted to promote to the highest level. He is proud of the work he does and enjoys working with his hands making things grow³⁴. RP 376. Mr. Fey did apply for a maintenance mechanic position at one time, but that is a very different position from grounds work. The maintenance mechanic position performs general maintenance and repair work inside the buildings. RP 478, 734-35, 741-42. Mr. Fey was not required to leave his position

³⁴ "*I'm arborist trained. I love working with trees... I like to be outside.*" RP 278.

or search for a higher paying one. His claim for lost wages is to compensate him for the discriminatory actions of CCS that prevented him from promoting.

V. PROCEDURAL CORRECTION

There were two claims before the jury in this case: 1) whether CCS failed to engage in the mandatory interactive process, and 2) whether CCS failed to provide Mr. Fey with a reasonable accommodation. CP 599-600. Before the start of trial Mr. Fey voluntarily dismissed his claim for disparate treatment due to his disability. This was done to prevent CCS from arguing or presenting evidence relating to Mr. Fey's alleged poor performance. RP 86. The prima facie elements of reasonable accommodation do not include analysis of the employee's performance³⁵. *Davis v. Microsoft*, 149 Wn.2d 521, 532, 70 P.3d 126 (2003). Mr. Fey prevailed on both claims before the jury.

Appellant claims that Mr. Fey never filed any authority or a motion requesting that the BFOQ affirmative defense be dismissed. AP 11, n.19. This is false. First, in Mr. Fey's response brief and oral argument in response to CCS' motion for summary judgment, this issue was extensively covered with case citations and applicable law. RP 28-29; CP 201-22 Second, Mr. Fey moved to strike CCS' Answer and affirmative defenses which was filed one week before trial and included, for the first time, the BFOQ defense. CP 694-7. Third, during exceptions to jury instructions Mr. Fey

³⁵ The trial court asked CCS' counsel to produce a case which stated that performance is relevant to a reasonable accommodation claim and she could not. The Appellant's brief fails to cite a reasonable accommodation case that stands for that proposition.

objected on several occasions to the inclusion of the BFOQ defense and asked that it be stricken³⁶. RP 937, 951-52, 956-57, 968. As a result, the BFOQ defense was stricken.

VI. ARGUMENT

A. A Reasonable Accommodation Claim Requires An Employee To Be Able To Perform The Essential Functions Of The Job.

The Washington Law Against Discrimination (WLAD) imposes an affirmative duty upon employers to provide reasonable accommodation to a disabled employee. *Holland v. Boeing*, 90 Wn.2d 384, 389, 583 P.2d 621 (1978); RCW 49.60.180(1). Unlike other types of discrimination, disability discrimination is premised on the recognition that disabled individuals must be treated differently³⁷. An employee does not need to formally request an accommodation. *Downey v. Crowley Marine Services*, 236 F.3d 1019, 1023 (9th Cir.2001). Notice of an employee's disability alone "triggers the employer's burden to take 'positive steps' to accommodate the employee's limitations." *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408, 899 P.2d 1265 (1995).

To establish a prima facie case of failure to accommodate, a plaintiff must show that he: 1) had a disability; 2) that the defendant was aware of the disability; 3) that the disability had a substantially limiting effect on his ability to do the job; 4) that he

³⁶ Mr. Fey's counsel cited *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 990 (9th Cir.2007) in support of this argument.

³⁷ "Identical treatment may be a source of discrimination in the case of the handicapped, whereas different treatment may eliminate discrimination against the handicapped and open the door to employment opportunities." *Holland*, 90 Wn.2d at 388.

was able to perform the essential functions of the job in question with reasonable accommodation; and 5) that defendant failed to reasonably accommodate plaintiff's disability. *Davis*, 149 Wn.2d at 532; WPI 330.33.

"Essential function" is defined as "a job duty that is fundamental, basic, necessary, and indispensable to filling a particular position, as opposed to a marginal duty divorced from the essence or substance of the job." *Id.*, at 532. Mr. Fey could perform all of the essential functions of the GNS4 position. The fact that he cannot obtain a CDL does not prevent him from performing the essential function of snow removal.

CCS argues on several occasions that the trial court erred by not using the magic word "qualified". As CCS' own brief points out, "qualified individual with a disability"³⁸ means an individual with a disability who, with or without accommodation, can perform the essential functions of the position. AP 16. The cases cited by Appellant to claim that Mr. Fey is unqualified are not analogous³⁹. The employees in those cases conceded that their disabilities prevented them from performing primary tasks, or essential functions. *MacSuga*, 97 Wn.App. at 439; *Clarke*, 106 Wn.2d at 121.

³⁸ The term "qualified" was meant to apply to "a person with a disability [who] applies for a job and meets all selection criteria *except one that he or she cannot meet because of a disability.*" *Bates*, 511 F.3d at 990, n.6 (quoting S.Rep. No. 101-116, at 37 (1989)(emphasis added).

³⁹ *MacSuga v. County of Spokane*, 97 Wn.App. 435, 983 P.2d 1167 (1999) and *Clarke v. Shoreline School Dist.*, No. 412, 106 Wn.2d 102, 720 P.2d 793 (1986).

Mr. Fey was “qualified” for the position as he could perform the essential functions with accommodation – allowing him to plow with the V-Box. It has not been asserted that the lack of a CDL prevented Mr. Fey from removing snow. CCS is unable to point to any essential function that Mr. Fey cannot perform.

Instead, Appellant attempted to argue that Mr. Fey, regardless of his disability, would not have received the GNS4 job anyway. RP 167-68. This was not the factual issue before the jury or the correct legal analysis. It is undisputed that CCS refused to consider or interview Mr. Fey solely because he could not get a CDL. Therefore, it is completely irrelevant whether or not he was the most qualified applicant or even if he would have received the promotion. His performance – good or bad – is irrelevant since his performance was not considered. The only consideration is whether CCS could legally exclude Mr. Fey from the applicant pool because of his disability. It cannot. *Matthews v. Commonwealth Edison, Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997) (“The employer could not refuse to consider him for the promotion because of his dyslexia...”)

B. Mr. Fey Did Not Request That CCS Eliminate Or Reassign Job Duties.

Contrary to CCS’ claim, Mr. Fey did not request that his employer eliminate or reassign essential job functions as an accommodation. AP 19. His only request was to allow him to do snow removal as a GNS4 position the same way he does it as a GNS3 – with a non-CDL truck. This does not involve eliminating or reassigning duties. It

would simply allow him to use certain equipment to perform his job – precisely the reason reasonable accommodation was created.

The duty to reasonably accommodate a disability extends to measures which will help an employee perform his job. See e.g. *Doe*, 121 Wn.2d 8, 18, 846 P.2d 531 (1993); *Clarke*, 106 Wn.2d at 119-121. Reasonable accommodation includes adjustments in job duties, work schedules or scope of work, as well as changes in the job setting or work conditions. WAC 162-22-065(2)(a-b).

There is nothing preventing Mr. Fey from using the V-Box to plow on the SCC campus. RP 451, 802-3, 804, 841, 844. Those who drive the large snowplows agreed that the V-Box can push the same amount of snow and do the same work as the CDL trucks. RP 300, 588, 595, 606. Vehicles go back and forth between the campuses as needed. RP 397-98, 451, 802-3, 841, 844. Mr. Fey could efficiently complete snow removal duties with the V-Box on the SCC campus. RP 452, 590-91.

CCS claims that the GNS4 position exists so that the employee can drive CDL-rated vehicles. The evidence does not support this conclusion. Fred Hale and Cary Abbott performed the GNS4 job without a CDL. Fred Hale does not even drive a truck, big or small, but uses a 4x4 to plow the sidewalks. Driving a CDL truck is not an essential duty.

C. A CDL is Not a Bona Fide Occupational Qualification. (Appellant Assignment of Error Nos. 1 and 2)

The employer bears the burden of justifying overtly discriminatory criteria – or that a bona fide occupational qualification (“BFOQ”) exists. *Blanchette v. Spokane County Fire Prot. Dist. No. 1*, 67 Wn.App. 499, 500, 836 P.2d 858 (1992). Because a BFOQ is an exception to the prohibition against discrimination, it is to be narrowly construed. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977); *Franklin County Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 326-28, 646 P.2d 113 (1982).

To succeed with a BFOQ defense, CCS must introduce sufficient evidence to establish that excluding disabled workers is “essential to ... the purposes of” the GNS4 position, or that “all or substantially all” disabled employees “would be unable to efficiently perform the duties” of the position, such that hiring them would undermine CCS operations. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 358, 172 P.3d 688 (2007); *Blanchette*, 67 Wn.App. at 500;⁴⁰ WAC 162-16-240⁴¹. CCS cannot prove that disabled workers are unable to perform the duties without a CDL.⁴² Exs. 12, 13. Since a CDL is not an essential function, the lack of one does not prevent proper performance. A CDL is listed as a “condition of employment” which is not an essential function. Exs. 12, 13.

⁴⁰ Holding that even documented medical standards developed as guidelines for determining fitness for fire fighter duty are insufficient to establish a valid BFOQ.

⁴¹ A BFOQ should only be “applied to jobs for which a particular quality of protected status will be essential to or will contribute to the accomplishment of the purposes of the job”.

⁴² A CDL is not included in the “Required Competencies”, “Preferred Competencies” or in the “Physical Requirements” of the GNS3 or GNS4 job descriptions.

The plain language in WAC 162-16-240(4) demonstrates that the defendant's attempt at a BFOQ fails.

A person with a disability applies for promotion to a position at a different site within the firm. The firm does not promote the person because doing so would compel the firm to install an assistive device on equipment at that site to enable the person to properly perform the job. This is **not** a valid BFOQ. (emphasis added)

CCS cannot demonstrate that Mr. Fey was incapable of performing the GNS4 job without a CDL. In fact, he has performed his GNS3 job without one for several years. Most importantly, by allowing other employees to perform the work of a GNS4 without a CDL, CCS acquiesced to the fact that the job can be performed without a CDL.

Appellant cites several cases for the proposition that an employer rule requiring certain minimum qualifications is valid even if it negatively impacts the disabled⁴³. AP 13-15. In those cases, the worker's disability prevented them from performing the job **with or without** accommodation. The question is whether the worker can do the job with accommodation, not whether certain minimum qualifications apply. *Matthews*, 128 F.3d at 1195; *See Bates*, 511 F.3d at 990. Here, Mr. Fey does not need a CDL to perform the job. Had he not been able to obtain a regular driver's license, then he would not be qualified to perform the work and a BFOQ would apply.

⁴³ *Matthews*, 128 F.3d 1194; *Tinjum v. Atlantic Richfield Co.*, 109 Wn.App. 203 (2001); *Rhodes v. URM Stores, Inc.*, 95 Wn.App. 794 (1999).

VII. JURY INSTRUCTIONS

Jury instructions are sufficient if, when read as a whole, allow the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the law to be applied. *Adcox v. Children's Orthopedic Hospital and Medical Center*, 123 Wn.2d 15, 36, 864 P.2d 921 (1993). A trial court has discretion in determining the wording of instructions. *Tyler v. Tyler*, 65 Wn.2d 102, 395 P.2d 1021 (1964).

A. The Trial Court Correctly Instructed the Jury on the Legal Standard for a Reasonable Accommodation Claim.

The jury is presumed to read the court's instructions as a whole, and all instructions should be read in light of all other instructions. *State v. Alford*, 25 Wn.App. 661, 670, 611 P.2d 1268 (1980), *aff'd*, *State v. Claborn*, 95 Wn.2d 629, 628. The trial court properly instructed the jury on all elements of Mr. Fey's reasonable accommodation claim.

The trial court appropriately relied on the reasonable accommodation pattern instruction to accurately lay out the required elements of the prima facie case, both parties' obligations in the interactive process, as well as the undue hardship exception. WPI 330.31, 330.33, 330.34, 330.36, 330.37⁴⁴. CP 583-588. The trial court made appropriate minor modifications to the pattern instructions to fit the facts of the case, which did not alter the plaintiff's required burden of proof.

⁴⁴ CCS incorrectly argues that the court refused an instruction defining "essential function" since WPI 330.37 does just that. AP 30-31, App. 1.

The Court's Instruction No. 10, nearly identical to WPI 330.33, laid out the required elements of Mr. Fey's prima facie case. Compare CP 583 and WPI 330.33. The changes that defendant now claims were error include, 1) utilizing the past tense rather than future tense to describe whether Mr. Fey could perform the essential functions of the job⁴⁵ (AP 29) and 2) that the court omitted a sentence at the end of the instruction⁴⁶ (AP 26). Neither of these modifications was objected to at the time of trial and should be considered waived. *State v. Thompson*, 47 Wn.App. 1, 6, 733 P.2d 584, *review denied*, 108 Wn.2d 1014 (1987). In fact, CCS requested that other instructions be given in the past tense. RP 973-74. Even if these minor alterations were error, it was harmless.

The trial court accurately instructed the jury on the primary issue: "an essential function is a job duty that is fundamental, basic, necessary and indispensable to filling a particular position, as opposed to a marginal duty divorced from the essence or substance of the job." Court's Instruction No. 13, CP 586; WPI 330.37⁴⁷ (attached in App. 1). The trial court aptly modified the instruction to include a statement that "essential functions are not qualifications standards". *Davis*, 149 Wn.2d at 533;

⁴⁵ "That he was able to perform the essential functions of the job" vs. "that he would have been able to perform the essential functions of the job."

⁴⁶ It was unnecessary to include "In determining whether an impairment has a substantially limiting effect" as it was undisputed that Mr. Fey's eye impairment prevented him from getting a CDL.

⁴⁷ WPI 330.37 includes additional factors that a jury can consider which the trial court did not include.

Bates, 511 F.3d at 990⁴⁸; 29 C.F.R. § 1630.2(q). The court also added the sentence, “An employer is not required to eliminate an essential function of a job to accommodate a disabled employee” which clearly favors the employer and was offered by CCS. CP 586, 347.

CCS argues it was error for the trial court to choose “employee” instead of “qualified applicant” in the reasonable accommodation definition. AP 23. Both terms are acceptable options in the pattern instruction. WPI 330.34. Since Mr. Fey is an employee, the term is preferable. It is still clear from the instruction that Mr. Fey had to be “qualified” or able to perform the essential functions. Court’s Instruction No. 14, CP 587. CCS was not prevented from arguing its theory of the case.

B. The Special Verdict Form Properly Included A Claim for Failure to Engage in the Interactive Process.

Participation in the interactive process is a mandatory rather than a permissive obligation on the part of employers. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114 (9th Cir.2000)(vacated on other grounds by 535 U.S. 391 (2002)); *Dean v. METRO*, 104 Wn.2d 627, 638-9, 708 P.2d 393 (1985). CCS mistakenly claims that failure to

⁴⁸ “Essential functions” are not to be confused with “qualification standards”, which an employer may establish for a certain position. Whereas “essential functions” are basic “duties”, “qualification standards” are “personal and professional attributes” that may include “physical, medical [and] safety” requirements.

engage in the interactive process is not a violation of the WLAD⁴⁹. AP 27. The employer has an affirmative duty to engage in the interactive process once on notice of an employee's disability. Employers face liability for the remedies imposed by statute for refusal to engage in the interactive process. *Dean*, 104 Wn.2d at 639, *Barnett*, 228 F.3d at 1116.

The trial court properly instructed the jury that violation of the mandatory interactive process is a violation of the WLAD. CCS' complete failure to engage in the interactive process violated the employer's duty under the WLAD. This resulted in CCS not providing a reasonable accommodation - allowing Mr. Fey to perform the GNS4 job without a CDL – which also violated the WLAD. These were issues determined by the jury in Mr. Fey's favor.

The Court's Instruction No. 5 properly summarized the claims in this case and the defendant's denial of the claims. Each party is entitled to have the trial court instruct on its theory of the case if there is evidence to support it. *Egede-Nissen v. Crystal Mountain Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). WPI 20.01 is used to set forth the issues or claims of the parties and applicable defenses. It is unclear how the removal of one sentence in the Court's Instruction No. 10 created any confusion as to

⁴⁹ Counsel's cites a direct quotation from *Dark v. Curry*, 451 F.3d at 1088 for the proposition that failure to engage in the interactive process is not a violation of the WLAD. *Dark* is not a Washington case, does not involve the WLAD (none of the cases cited by CCS counsel involved WLAD cases), and states the opposite from counsel's claim ("our cases make clear that the County bore an affirmative obligation to engage in an interactive process in order to identify, if possible, a reasonable accommodation that would permit Dark to retain his employment...Because the County did not engage in any such process, summary judgment is available only if a reasonable finder of fact *must* conclude that "there would in any event have been no reasonable accommodation available.")

the claims before the jury⁵⁰. If anything, removal of that sentence worked against Mr. Fey and not CCS. As a consequence, it was harmless error.

C. The Trial Court Properly Excluded CCS' Offered Jury Instructions Which Were Misleading, Superfluous, Or An Incorrect Statement Of The Law.

A trial court is under no obligation to give misleading instructions, or instructions that are not supported by authority. *Jaeger v. Cleaver Construction, Inc.*, 148 Wn.App. 698, 716, 201 P.3d 1028 (2009). When a party's theory of the case is covered adequately by other instructions, additional instructions are viewed as superfluous. *Herring v. Department of Social and Health Services*, 81 Wn.App. 1, 27, 914 P.2d 67, 82 (1996). Had the trial court given the instructions offered by CCS, such inconsistent, inadequate or contradictory instructions would have been prejudicial to Mr. Fey. *Galvan v. Prosser Packers, Inc.*, 83 Wn.2d 690, 521 P.2d 929 (1974).

An erroneous jury instruction is harmless if it is “not prejudicial to the substantial rights of the part [ies] ..., and in no way affected the final outcome of the case.” *Blaney v. International Association of Machinists and Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757, 761 (2004) citing *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947).

CCS argues that the trial court committed a litany of errors in refusing to give its offered instructions. AP 21-32. The instructions rejected by the trial court were either

⁵⁰ “One form of unlawful discrimination is a failure to reasonably accommodate an employee’s disability”. WPI 330.33.

a misstatement of the law or superfluous and properly excluded. If this Court determines that exclusion of any of these instructions was error, it was harmless.

1. The Trial Court Correctly Excluded the BFOQ Defense. (Appellant Assignments of Error No. 1 and 2)

A party is prejudiced by an instruction which permits the jury to act on a theory for which there is not proof in evidence. *Koker v. Armstrong Cork, Inc.* 60 Wn.App. 466, 804 P.2d 659 (1991). CCS failed to present sufficient evidence of a BFOQ to instruct the jury on that narrow exception to discrimination. No evidence was presented that excluding Mr. Fey, and other applicants who could not obtain a CDL was essential to the purposes of the job.

After the presentation of evidence, and upon exception by Mr. Fey, the trial court excluded the BFOQ defense. RP 956-59. The court noted a BFOQ is a narrowly applied exception only relevant when necessary for the performance of the job. RP 959. The trial court correctly refused to instruct the jury on this affirmative defense. To have instructed the jury otherwise would have constituted error.

2. The Trial Court Properly Excluded a Jury Instruction on Proximate Cause. (Appellant Assignment of Error No. 2)

The court need not include specific language, so long as the instructions as a whole correctly state the law. *Capers v. Bon Marche*, 91 Wn.App. 138, 143, 955 P.2d 822 (1998). A separate jury instruction on proximate cause was not necessary as it is admitted that the only reason that Mr. Fey was not considered for the position was his

disability and inability to get a CDL. No other evidence was presented as a basis for his wage loss and emotional distress.

The plain statutory language of RCW 49.60 makes it clear that a person who suffers from any violation of the statute shall have a claim for damages⁵¹. A successful plaintiff in a discrimination case is entitled to recover all of the wages and benefits that would have been earned but for the discrimination. *Burnside v. Simpson Paper Co.*, 66 Wn.App. 510, 531, 832 P.2d 537 (1992). Once discrimination is proven, a plaintiff need only show that some distress occurred as a result of the wrongful act in order to recover emotional distress damages. *Nord v. Shoreline Sav. Ass'n*, 116 Wn.2d 477, 484, 805 P.2d 800 (1991).

CCS argues that not including a proximate cause instruction was error as there was dispute as to whether Mr. Fey would have received the promotion. AP 22-23. This was not the issue for the jury to decide in this case. CCS' decision to not consider Mr. Fey for the promotion because of his disability was the discriminatory act. The jury was instructed to award Mr. Fey "for such damages as you find were caused by the acts of the defendants." CP 590.

WPI 330.81 does not require a court to give a separate proximate cause instruction. See comments to WPI 330.81, App D to AP. As Appellant points out, a

⁵¹ "Any person deeming himself or herself injured by *any* act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the *actual damages* sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964...." RCW 49.60.030(2) (emphasis added).

proximate cause instruction is necessary when there is potentially more than one proximate cause. AP 22; *Goucher v. J.R. Simplot*, 104 Wn.2d 662, 676, 709 P.2d 774 (1985). There was only one cause of Mr. Fey's injury in this case – CCS' refusal to interact and consider him for the promotion. The jury found that the actions of CCS caused the resulting damages awarded. The trial court did not err by failing to include a separate instruction on proximate cause. If it was error failing to instruct on proximate cause, it was harmless. There was no prejudice to CCS as it was able to argue its theory of the case.

3. Instructing The Jury That CCS Could Hire The Most Qualified Would Be Misleading.

Whether or not Mr. Fey was the most qualified for the GNS4 position, or even if he would have received the promotion, is irrelevant to this case. The jury did not get to that determination as the discriminatory action was refusal to consider Mr. Fey for the job because of his disability. Since CCS refused to consider or interview Mr. Fey, there is no way to determine whether he was the most qualified or not. The trial court properly refused Defendant's proposed Instruction No. 23 as the jury was not tasked with determining whether the defendant was entitled to hire the most qualified applicant. CP 354.

4. It Was Unnecessary To Add A Specific Time Frame To The Notice Instruction.

To initiate the accommodation process, the employer must be put on some "notice of the disability" although the employer need not know "the full nature and extent of

the disability.” *Goodman*, 127 Wn.2d at 408. It is undisputed that in the fall of 2007 Mr. Crawford knew that Mr. Fey had a medical condition that caused him to fail the CDL physical exam. Not only was CCS aware of the eye impairment, it acted on that disability by grandfathering Mr. Fey into his current GNS3 position because of the impairment. When Mr. Fey applied for the GNS4 position in late 2007, Mr. Sievert responded that Mr. Fey was not considered for the position since he “*could not obtain a CDL for medical reasons*”. Ex. 11.

The Court’s Instruction No. 10 correctly instructed the jury that Mr. Fey was required to prove that he “*gave notice of the disability to defendant*”. WPI 330.33, CP 583. No objection was made to add a specific timeframe to this instruction. RP 965. The trial court did modify the special verdict form to read “did plaintiff have a disability” rather than “does plaintiff have a disability”. RP 985. CCS objected to the special verdict form arguing that the clause “at the time of the promotional opportunity” should be added to modify when CCS had notice of Mr. Fey’s disability. RP 973-4. This was redundant and not required under the law.

5. Mr. Fey Did Not Claim That The Employer Had A Duty To Investigate.

CCS confuses an employer’s duty to engage in the interactive process with a duty to investigate a disability. As stated in the Court’s Instruction No. 12, which is taken from WPI 330.34, “[t]he employer has a duty to inquire regarding the nature and extent of the disability...” CP 585; *Goodman*, 127 Wn.2d at 408. Although asserted

by CCS, Mr. Fey did not claim that the employer has “an investigatory duty to find out of if an employee is disabled.” AP 26. Once CCS was on notice of Mr. Fey’s eye impairment, no steps were taken to determine his limitations or determine what tasks he could or could not complete. CCS’ offered Instruction No. 29 was superfluous and not required under the law. CP 439. It was not argued that CCS should have investigated an employee “suspected of a disability”. AP 26. Mr. Fey’s disability was already known as he was grandfathered as a GNS3 because of it.

6. The Trial Court Properly Instructed the Jury on Mr. Fey’s Obligation In the Interactive Process.

The trial court correctly instructed the jury that Mr. Fey had a duty to give notice of his disability, and to cooperate with the employer’s efforts by explaining his limitations. Court’s Instruction No. 12⁵², CP 585. CCS’ proposed instructions Nos. 8 and 14 were duplicative of the court’s instruction. CP 339, 345. Mr. Fey did cooperate. It was CCS that took no action (other than grandfathering Mr. Fey into his position) to determine the nature and extent of his disability.

CCS’ proposed instructions 4, 8, 13, 14, 15, 25, 29 and 31 are duplicative and unnecessary instructions that are not required elements of the legal standard. CP 335, 339, 344, 345, 346, 433, 439, 617. None of the defendant’s offered instructions are pattern instructions. The court properly relied on WPI 330.34 and 330.36 to craft the duties of both employee and employer in the interactive process. CP 585, 587, 588.

⁵² CCS argues that this instruction expanded the employer’s duty beyond WPI 330.34 but gives no indication how it was expanded. AP 26.

7. The Trial Court was Not Required to Define “Conditions of Employment”.

WPI 330.34 states:

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

CCS argues that “condition of employment” in WPI 330.34 has a different meaning than the CDL “condition of employment” in this case. AP 29⁵³. If a condition or qualification standard is irrelevant to the employee’s performance of the essential functions of the job, an employer can alter such a standard. *See Davis*, 149 Wn.2d at 533, *Bates*, 511 F.3d at 990. It was not necessary to provide further definition of “conditions of employment” since it is undisputed that the CDL was a condition of employment.

8. Mr. Fey Did Not Request Reassignment of Duties.

CCS also claims that the trial court erred by failing to instruct the jury that an employer is not required to reassign or reorganize its work force as an accommodation. AP 30. The court did instruct the jury that an employer is not required to eliminate an essential function. CP 586. Mr. Fey did not request that a job duty be reassigned. He did not ask CCS to reorganize its workforce. He simply

⁵³ CCS argues that the trial court erred in relying on WPI 330.34 and should not have included “condition of employment” in the list of possible accommodations. There is no reason this language should have been removed from WPI 330.34. CCS’ proposed instruction No. 34 is irrelevant to the facts and to include it would have been error. CP 620.

wanted to do snow removal with the same vehicle he had used for many years. This is precisely what reasonable accommodation envisions. CCS' proposed instructions were superfluous and not required to allow CCS to argue its theory of the case. CP 338-9, 342-48, 354, 441, 613, 620-21.

9. The Trial Court Properly Excluded Superfluous Instructions on Irrelevant Laws.

CCS argues that the trial court should have instructed the jury on other irrelevant laws that were peripherally related to this case. AP 30. It is undisputed that a CDL is required to drive CDL-rated vehicles. It was unnecessary to include an instruction on the physical qualifications for a CDL as it was undisputed that Mr. Fey could not obtain one. CP 353. It was unnecessary to include an instruction on the law requiring drivers to have a CDL when operating CDL-rated equipment. It was undisputed that CDLs were required for those vehicles. CP 436, 445, 616. It was also irrelevant to instruct the jury on civil service laws or union contract issues as these were not related to the jury's determination of whether CCS failed to provide a reasonable accommodation. CP 614, 621.

10. The Trial Court Was Not Required to Instruct on the Undue Hardship Defense. (Appellant Assignment of Error No. 2)

The trial court utilized WPI 330.36 to instruct the jury on the undue hardship defense even though CCS did not plead, or argue in its Motion for Summary Judgment that accommodation would impose an undue hardship. CP 120-36. Mr. Fey identified a reasonable accommodation which would allow him to perform the GNS4

position. No evidence was presented that accommodating Mr. Fey by allowing him to drive the V-Box sander when plowing, or any other potential accommodation, would impose an undue hardship on CCS.

11. The Special Verdict Form Allowed CCS To Argue Its Theory.

CCS failed to present any evidence, let alone sufficient evidence, of any defense to allow an applicable instruction or question on the special verdict form. As argued earlier, the BFOQ was not applicable to this case, there was no claim or evidence of undue hardship, and even though the court instructed the jury on mitigation there was no evidence presented. The jury could have found that Mr. Fey needed a CDL to perform the GNS4, but it did not. That is not an error of law.

VIII. EVIDENTIARY ISSUES

The admission of evidence is within the trial court's discretion and will not be overturned absent an abuse of discretion. *Burnside*, 123 Wn.2d at 107, 864 P.2d 937. Discretion is abused when it is based on untenable grounds or in a manifestly unreasonable manner. *Herring*, 81 Wn.App. at 21.

A. The Trial Court Properly Allowed Mr. Cutler to Testify as To Available Accommodations for the GNS4 position.

The admissibility of expert testimony is at the discretion of the trial court. *Roberts v. ARCO*, 88 Wn.2d 887, 898, 568 P.2d 764 (1977). Expert testimony is admissible if specialized knowledge will “assist the trier of fact to understand the evidence or to determine a fact in issue”. ER 702. Such testimony is deemed to be helpful to the jury

if it concerns matters beyond the common knowledge of the average layperson and is not misleading. *Moses v. Payne*, 555 F.3d 742, 756 (9th Cir.2009). A qualified expert is competent to express an opinion on the ultimate fact facing the jury. *State v. Kirkman*, 159 Wn.2d 918, 929, 155 P.3d 125 (2007).

Mr. Fey offered vocational expert, Fred Cutler, who testified that a condition of employment, such as a CDL, is not an essential function. He also analyzed the GNS3 and GNS4 job descriptions and determined they involve the same job duties relating to a CDL. RP 689.

CCS claims that Mr. Cutler's testimony was not proper under ER 702 because it lacked foundation or technical expertise and he offered incorrect opinions on the law. AP 34. Other than listing a number of opinions Mr. Cutler offered, counsel failed to identify how Mr. Cutler was unqualified or how his testimony was unreliable. Mr. Cutler has extensive expertise in the area of vocational rehabilitation. This includes analyzing job descriptions and functions. He has specialized knowledge to assist the jury in understanding how to assess a disabled worker's ability to work and how to accommodate a disability. CR 684. He is also well-qualified to testify regarding an employer's obligation as part of the interactive process. CR 694. The average layperson is unaware of how an employer makes reasonable accommodation, what an employer is required to as part of the interactive process, and what are reasonable accommodations that are available to an employer.

The issue for the jury to decide was whether CCS failed to provide a reasonable accommodation to allow Mr. Fey to perform the GNS4 job. Mr. Cutler did not testify as to whether an available accommodation was reasonable as that is the purview of the jury⁵⁴. Instead he testified as to possible accommodations that were available. CR 697. Ultimately, the jury decided that CCS could have provided Mr. Fey with a reasonable accommodation. It was not an abuse of discretion to allow Mr. Cutler to assist the jury in understanding reasonable accommodation.

B. The Trial Court Properly Excluded Irrelevant and Speculative Evidence.

CCS claims that excluding evidence about the employer’s “business plan” was prejudicial. AP 35. There was no business plan. CCS wanted to argue that the “plan” was to buy more CDL-rated trucks. But this did not occur. CCS claimed that this plan started in 2007. Between 2007 and 2010, no CDL rated trucks were purchased⁵⁵. CCS attempted to argue that it intends to purchase larger, CDL-rated trucks as soon as the budget allows. RP 103. The court properly excluded this evidence as speculative and irrelevant to what actually occurred in 2007 or 2010⁵⁶. “[A] verdict cannot be founded on mere theory or speculation.” *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn.App. 372, 379 972 P.2d 475 (1999).

⁵⁴ The court prevented Mr. Cutler from testifying regarding whether CCS was justified in not promoting Mr. Fey as that was the factual determination facing the jury. RP 696.

⁵⁵ A new front-end loader was purchased and used for plowing, but it does not require a CDL. RP 807.

⁵⁶ The court clarified that if CCS could present evidence that the plan was in effect in 2007 and concrete steps were taken then the issue would be revisited. RP 104.

C. The Trial Court Properly Excluded Prejudicial or Irrelevant Testimony Regarding Mr. Fey's Performance.

CCS' argument that Mr. Fey's alleged poor performance was improperly excluded from trial is flawed both legally and factually. AP 35-9. Mr. Fey met his burden by demonstrating that he was able to perform the essential functions of the GNS4 job with or without accommodation. The analysis does not include whether Mr. Fey would have been awarded the position. CCS discriminated against him when he was not considered. CCS wanted to include alleged poor performance to demonstrate that Mr. Fey was not "qualified" and would not have gotten the job anyway. RP 162-3. This was properly excluded as irrelevant and prejudicial.

Irrespective of the legal analysis, the facts simply do not support CCS' contention that Mr. Fey had "performance problems". As argued to the trial court, at no other time in this case was some other reason offered as to why Mr. Fey was not considered for the GNS4 position, other than his inability to get a CDL. RP 78-80, 159, 165. The record is clear that he was deemed ineligible by CCS solely because of his eye impairment. Ex. 11; RP 904.

CCS did not offer any evidence to demonstrate that he had "performance problems". The record identifies only three insignificant or accidental issues relating to Mr. Fey's performance. Ex. 150, RP 473-4, 486-7. CCS asserted at trial that Mr. Fey would not have gotten the job, and employees would testify as to his performance or leadership problems. RP 162-3. Such evidence was not only irrelevant to Mr. Fey's

burden of proof, but contradictory to the evidence in this case. The trial court properly prevented such prejudicial and inconsistent evidence. RP 166.

CCS relies on a Seventh Circuit case for the proposition that the discrimination law does not eliminate the disabled employee's need to perform well in order to receive a promotion. AP 36 citing *Lloyd v. Swifty Transp. Inc.*, 552 F.3d 594 (7th Cir.2009). This case is distinguishable on several grounds. Most importantly, *Lloyd* is not a reasonable accommodation claim and therefore has different prima facie elements⁵⁷. In *Lloyd*, it was only *after interviewing the worker* that the employer found other applicants more qualified. *Id.* at 598.

We will never know whether Mr. Fey would have received the GNS4 job. That is because he was not considered, interviewed, or even allowed a chance. RP 904. The supervisor who hired for this position, Jeff Teal, did not speak with Mr. Fey or even know him. CP 12-22, 268-71; RP 260. He could not have determined that Mr. Fey was less qualified than any other applicant as he knew nothing about him.

CCS argues that Mr. Fey "opened the door" to character evidence by testifying that he was a good employee and then CCS was prevented from challenging that claim. The court allowed factual testimony relating to incidents that occurred, but aptly excluded opinion testimony about Mr. Fey's character. RP 329-30. CCS repeatedly violated the court's ruling in an attempt to inject opinion evidence to disparage Mr. Fey as an employee. In Mr. Fey's case-in-chief, no questions were

⁵⁷ Even if *Lloyd* is relevant, it is not binding as it is a 7th Circuit case with an ADA claim.

asked regarding his performance or if he was a good worker or not⁵⁸. No testimony was offered, including that by Mr. Fey's experts, that Mr. Fey believed he was the most qualified applicant for the GNS4 position⁵⁹. Mr. Fey respected the court's ruling and did not present evidence of Mr. Fey's positive performance. However, CCS intentionally violated the trial court's ruling in an effort to poison the jury against Mr. Fey. *See Supra Section III(K)*.

The evidence presented demonstrated that Mr. Fey could do the essential functions of the job. Even if Mr. Fey had poor performance, the only reason given for not considering him was his inability to get a CDL.

D. Mr. Fey's Qualification for Maintenance Mechanic Position Is Irrelevant.

The fact that Mr. Fey applied for other positions is irrelevant to his claim for discrimination.

E. Other Excluded Testimony

CCS lists, without applicable argument or basis, nine other portions of testimony that were excluded, but not properly listed in the Assignments of Error. AP 40-2. This Court should not consider those issues. If the issues are considered, each has been

⁵⁸ Testimony related to his performance was elicited by CCS's counsel. RP 316, 346, 337 (Q: "Why were you turned down for a promotion that didn't require a CDL if you were so overly qualified and excellent?" A: "...you're saying so overly qualified and excellent...").

⁵⁹ Mr. Fey's experts did not testify that he was qualified for the promotion. Mr. West testified that it was "possible" Mr. Fey could have received the Maintenance Mechanic position. This did not relate to the GNS4 promotion. RP 621-22. Mr. Cutler's testimony was that Mr. Fey's current job description is "virtually" the same as the description of the GNS4 position. RP 692.

argued and responded to in other parts of this brief. If any of the listed excluded testimony was error, it did not constitute an abuse of discretion by the trial court.

F. The Trial Court Did Not Comment on the Evidence.

It is unclear how the trial court informing the jury that juror disabilities would be accommodated is an unconstitutional comment on the evidence. AP 43. CCS provides no basis or evidence for how the trial court acted improperly, emphasized certain instructions, or inserted a personal view.

IX. POST TRIAL ISSUES

A. The Trial Court Correctly Granted Plaintiff's Motion For Additur⁶⁰.

At the trial court's discretion, a damage award can be increased if it is found to have been the result of "passion or prejudice."⁶¹ RCW 4.76.030. Additur may be granted when the award would "shock the sense of justice and sound judgment" of the court as it was "unjustified in light of the evidence". *Baltzelle v. Doces Sixth Ave., Inc.*, 5 Wn. App. 771, 779, 490 P.2d 1331 (1971) (quoting *Malstrom v. Kalland*, 62 Wn.2d 732, 738, 384 P.2d 613 (1963)).

A plaintiff who "substantiates [their] pain and suffering with evidence is entitled to general damages...the adequacy of a verdict, therefore, turns on the evidence."

⁶⁰ Appellant failed to include this issue as an Assignment of Error pursuant to RAP 10.3 and it should not be considered by this Court. *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995).

⁶¹ "The increase or reduction of a verdict as an alternative to a new trial is a procedure designed to achieve a just result and to avoid multiple trials. It is a procedure which, disciplined by the exercise of sound discretion by the trial judge, should be encouraged by appellate courts." *Benjamin v. Randell*, 2 Wn.App. 50, 54, 467 P.2d 196, 199 (1970).

*Palmer v. Jensen*⁶², 132 Wn.2d 193, 197, 937 P.2d 597(1997)(quoting *Hills v. King*, 66 Wn.2d 738, 404 P.2d 997 (1965)); See also *Ide v. Stoltenow*, 47 Wn.2d 847, 850, 289 P.2d 1007 (1955) (grant of less than \$500 in general damages went against the weight of the evidence and “shocked the conscience” of the court).

The WLAD provides for liberal remedies resulting from unlawful employment discrimination This includes the “actual damages sustained by the person”. RCW 49.60.030(2). Once a plaintiff has established discrimination, in addition to economic damages, he need only offer proof of emotional distress in order to recover emotional distress damages. *Dean*, 104 Wn.2d at 640-642. Not only did Mr. Fey and his wife testify to his emotional distress, but the defendant offered no evidence to rebut the emotional distress testimony presented by plaintiff.

The jury’s failure to award anything, even one dollar, to compensate Mr. Fey for his emotional distress “shocked the conscience” of the court. It is irreconcilable for the jury to make a finding of liability of the defendant and not award any emotional distress damages. Under RCW 49.60, proof of discrimination results in a finding of liability. *Martini v. Boeing Co.* 137 Wn.2d 357, 371, 971 P.2d 45, 52 (1999). “*The damages result from the injury, the discrimination*”. *Dean*, 104 Wn.2d at 641, 708 P.2d 393 (emphasis added).

⁶² CCS cites *Palmer* in an attempt to show that a non-economic damage award of zero dollars is justifiable. In *Palmer*, no evidence was presented of pain and suffering for the child. The child’s father, however, was granted a new trial because the jury awarded no general damages despite the fact that he did present adequate evidence of pain and suffering. 132 Wn.2d at 197.

Judge Sypolt did not award additur based on his personal view as claimed by CCS. AP 45. The court noted that the jury's verdict was a clear finding of discrimination. CP 901. The court, in recalling the testimony presented, stated "there was significant evidence of emotional distress suffered by the plaintiff" and "there really wasn't any evidence to counter the testimony and evidence on the emotional distress suffered by the plaintiff here." CP 901-2.

A court reviews a jury award to evaluate whether substantial evidence supports the verdict. *Herriman v. May*, 142 Wn.App. 226, 232, 174 P.3d 156 (2007). There was no evidence to support the jury's finding that emotional distress was nonexistent. The jury's original award was "unjustified in light of the evidence" and the grant of additur was not an abuse of discretion.

B. The Trial Court Correctly Awarded Reasonable Attorney Fees.⁶³

Prevailing discrimination plaintiffs are entitled to reasonable attorneys' fees and costs. RCW 49.60.030(2); *Steele v. Lundgren*, 96 Wn.App. 773, 982 P.2d 619 (1999). In determining what constitutes a reasonable award for litigation expenses and attorneys' fees, the Court should be mindful that the fee shifting remedy provision is "to be construed in order to encourage enforcement of the Law Against Discrimination." *Blair v. Wn. State Univ.*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987); see also RCW 49.60.020. A fee amount does not depend upon the amount of

⁶³ Appellant failed to include this issue as an Assignment of Error pursuant to RAP 10.3 and it should not be considered by this Court. *Olson*, 126 Wn.2d at 323.

damages awarded, and may far exceed the damages awarded. *Perry v. Costco*, 123 Wn.App. 783, 809 (2004); *Quesada v. Thompson*, 850 F.2d 537, 540 (9th Cir.1988).⁶⁴

The trial court properly exercised its discretion to award all fees and costs in this matter. CCS did not challenge the hourly rate, but disputed the award of fees for more than one attorney. AP 46. Where two attorneys participated in the trial, fees for both are presumed reasonable and not duplicative. *Wheeler v. Catholic Archdiocese of Seattle*, 65 Wn.App. 552, 557, 829 P.2d 196 (1992) overruled on other grounds 124 Wn.2d 634, 880 P.2d 29 (1994); see also *McGrath v. County of Nevada*, 67 F.3d 248, 255 (9th Cir.1995). Litigation of this case on a contingent basis carried high risks. The firm advanced all but several hundred dollars in costs. CP 800-16. While Ms. Mann has limited trial experience, William Powell, who has practiced law for 54 years, was co-counsel. *Id.* As more than one attorney participated in this case, fees for both Mr. Powell and Ms. Mann was reasonable.

While courts, where possible, may segregate fees incurred for unsuccessful claims, there should be no segregation if “the evidence presented and attorney fees incurred for the successful and unsuccessful claims were inseparable.” *Blair*, 108 Wn. at 572. Plaintiff is entitled to recover for all of the time expended where the successful and unsuccessful claims are based on a “common core of facts and ... no reasonable segregation could be made.” See *Pannell v. Food Services of America*, 61

⁶⁴ “It is inappropriate for a district court to reduce a fee award below the lodestar simply because the damages obtained are small. Permitting such reductions would create an incentive to bring only those civil rights cases that would produce large damage awards.”

Wn.App. 418, 446-447, 810 P.2d 952 (1991); *Johnston v. Harris Cty. Flood Control Dist.*, 869 F.2d 1565 (5th Cir.1989) cert den., 493 U.S. 1019 (1990).

Mr. Fey voluntarily dismissed the disparate treatment claim the day before trial. RP 93-4. Both the disparate treatment and failure to accommodate claims were based on the same core set of facts. All discovery, depositions and trial preparation were the same as both claims arose out of the same common core of facts.

The trial court weighed the factors necessary to exercise discretion and make an award of fees. RP 903-6. There was no abuse of discretion in awarding full fees and costs to Mr. Fey as the prevailing party. RCW 49.60.030(2).

X. THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY ON MITIGATION (RESPONDENT'S ASSIGNMENT OF ERROR NO. 1)

A party is prejudiced by an instruction which permits the jury to act on a theory for which there is no proof in evidence. *Koker v. Armstrong Cork, Inc.* 60 Wn.App. 466, 804 P.2d 659 (1991). The trial court erred in instructing the jury on mitigation as there was no evidence that mitigation was possible or relevant. Court's Instruction No. 16, CP 589, WPI 330.83 is attached as App. 1. A plaintiff has a duty to avoid or minimize damages. *Young v. Whidbey Island Bd. Of Realtors*, 96 Wn.2d 729, 732, 638 P.2d 1235 (1982). Mitigation prevents an injured party from recovering damages that could have been avoided through reasonable efforts. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 840, 100 P.3d 791 (2004). Mitigation is the duty to attempt to earn wages at another occupation. *Sutton v. Shufelberger*, 31 Wn.App. 579, 581, 643

P.2d 920 (1982). There were no reasonable efforts Mr. Fey could have undertaken to reduce his damages. He had no duty to quit his job to search for a higher paying one.

It is well settled that the wrongdoer has the burden of proving mitigation of damages. *McCurdy v. Union Pacific Railroad Co.*, 68 Wn.2d 457, 466, 413 P.2d 617 (1966). Proof is based on availability of suitable alternative employment, and failure of Plaintiff to make reasonable efforts to find it. *Burnside*, 66 Wn.App at 529; accord *Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 301, 890 P.2d 480 (1995). CCS cannot fulfill its burden here.

It was error to instruct the jury to consider reducing any lost wages because of a failure to mitigate. The jury was misled into reducing Mr. Fey's award due to the mitigation instruction. CCS's counsel argued or hinted that Mr. Fey could work for his father, or that he could have had other positions with his employer. RP 1029,⁶⁵ 1038. 1050-52. He did not get those jobs. There was no evidence presented about what those jobs entailed or whether Mr. Fey was even considered for those positions. Defendant offered no expert to opine about the job market or available positions. Instead, the jury was left to speculate about whether Mr. Fey could have obtained a better paying position elsewhere. Mr. Fey was prejudiced by this instruction as the jury believed Mr. Fey had a duty to reduce his wage loss. Mitigation should not have been offered as a limiting defense to the jury as it was not supported by substantial

⁶⁵ Counsel also misstated facts by arguing that "Mr. Fey had six promotional opportunities that didn't require a CDL." There is no evidence to support this falsehood.

evidence. *Bernsen v. Big Bend Elec. Co-op., Inc.*, 68 Wn.App. 427, 434-435, 842 P.2d 1047, 1052 (1993).

Should this Court find that a new trial is required, the jury should not be instructed on mitigation. The jury found that the defendant discriminated against Mr. Fey based on his disability. Now, he is stuck in his current position with no possibility of being promoted in the grounds department. Allowing a mitigation instruction forced the jury to believe Mr. Fey had a duty to mitigate, likely resulting in a jury verdict that reduced his damages.

XI. ATTORNEY FEES AND COSTS ON APPEAL

Pursuant to RAP 18.1(a), Mr. Fey respectfully requests this Court award reasonable attorney fees and costs necessary to respond to this appeal should he prevail. The WLAD entitles a plaintiff to request reasonable attorney fees and costs when successful on appeal. RCW 49.60.030(2); *See Collins v. Clark County Fire Dist. No. 5*, 155 Wn.App. 48, 231 P.3d 1211 (2010), corrected on denial of reconsideration.

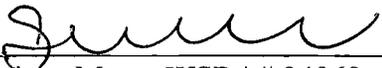
XII. CONCLUSION

Based on the facts and argument as set forth above, Respondent request that this Court uphold the jury verdict and the trial court's award of additur and attorney fees and costs. In the alternative, if a new trial is granted Respondent requests that the jury instruction on mitigation not be given.

DATED: February 15, 2012

Respectfully submitted:

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APPENDIX 1

WPI 330.37

ESSENTIAL FUNCTION—DEFINITION [New]

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

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

- (1) whether the reasons the position exists include performing that function;
- (2) the employer's judgment as to which functions are essential;
- (3) the judgment of those who have experience working in and around the position in question;
- (4) any written job descriptions such as those used to advertise the position; and
- (5) the amount of time spent on the job performing the particular function.

NOTE ON USE

This definition should be used whenever there is an issue as to whether a function of the position is essential. This issue is most likely to arise in accommodation cases. This instruction is designed to be used together with WPI 330.34, Disability Discrimination—Reasonable Accommodation—Definition. In appropriate cases, also use WPI 330.36, Disability Discrimination—Undue Hardship.

COMMENT

The instruction was added in 2010.

The two seminal cases discussing the definition of “essential function” are *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 533, 70 P.3d 126 (2003), and *Easley v. Sea-Land Service, Inc.*, 99 Wn.App. 459, 472, 994 P.2d 271 (2000). The pattern instruction uses language from *Davis* (149 Wn.2d at 533) and the trial court’s instruction in *Easley* (99 Wn.App. at 465 n.3). The Court of Appeals in *Easley* approved the instruction. 99 Wn.App. at 465 n.4. “The term essential functions means the *fundamental job duties* of the employment position the individual with a disability holds or desires. The term ‘essential functions’ does not include the *marginal* functions of the position.” *Davis v. Microsoft Corp.*, 149 Wn.2d at 533 (quoting 29 C.F.R. § 630.2(n)(1) (2002)) (emphasis in original). Job presence or attendance may be an essential job function. *Davis v. Microsoft Corp.*, 149 Wn.2d at 534.

Easley and *Davis* cited federal law for the definition of essential functions. However, there have been substantial amendments to the Americans with Disabilities Act, 42 U.S.C. § 12101, effective January 1, 2009, so practitioners should not necessarily rely on earlier federal law to broaden or expand the definition of an essential function under Washington law for purposes of this instruction.

[Current as of October 2010.]

is, may be a factor in computing Bank of Washington, 120 Wn.2d

WPI 330.83

DAMAGES—MITIGATION—WAGE LOSS

or a reasonably certain period of any duration of the terminated Automotive Corp., 75 Wn.App. 589, on other grounds in Mackay v. Wn.2d 302, 898 P.2d 284 (1995). In the employer provides evidence to consider that an illegally-discharged employee is entitled to wages for the employer until he or she is reemployed. See *Lords v. N. Auto. Corp.*, 100 Wn.2d 100, 683 P.2d 100 (1984), cert. denied, 476 U.S. 1139 (1986). The determination of future lost earnings, is generally left to the jury to consider evidence from which a reasonable amount can be projected. See 75 Wn.App. at 590 (1995) (7 years after termination). See also *Wn. App. of Machinists And Aerospace Workers v. Boeing Co.*, 133 Wn.2d 33, 87 P.3d 757 (2004) (citing *Lords v. N. Auto. Corp.*, supra).

juries had included subrogating the employees' compensation benefits.

The plaintiff, (name of plaintiff), has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

To establish a failure to mitigate, defendant, (name of defendant), has the burden of proving:

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

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

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

NOTE ON USE

This instruction is to be used when the plaintiff challenges as discriminatory a discrete employment decision, such as a termination or a failure to hire. When mitigation of damages other than for wage loss is at issue, see WPI 33.02, Avoidable Consequences—Failure to Secure Treatment.

Whether a mitigation instruction is used will typically depend on whether the employer has pleaded and offered proof on the defense.

APPENDIX 2

WAC 162-16-240

Bona fide occupational qualification.

Under the law against discrimination, there is an exception to the rule that an employer, employment agency, labor union, or other person may not discriminate on the basis of protected status; that is if a bona fide occupational qualification (BFOQ) applies. The commission believes that the BFOQ exception should be applied narrowly to jobs for which a particular quality of protected status will be essential to or will contribute to the accomplishment of the purposes of the job. The following examples illustrate how the commission applies BFOQs:

(1) Where it is necessary for the purpose of authenticity or genuineness (e.g., model, actor, actress) or maintaining conventional standards of sexual privacy (e.g., locker room attendant, intimate apparel fitter) the commission will consider protected status to be a BFOQ.

(2) A 911 emergency response service needs operators who are bilingual in English and Spanish. The job qualification should be spoken language competency, not national origin.

(3) An employer refuses to consider a person with a disability for a receptionist position on the basis that the person's disability "would make customers and other coworkers uncomfortable." This is **not** a valid BFOQ.

(4) A person with a disability applies for promotion to a position at a different site within the firm. The firm does not promote the person because doing so would compel the firm to install an assistive device on equipment at that site to enable the person to properly perform the job. This is **not** a valid BFOQ.

[Statutory Authority: RCW 49.60.120(3), 99-15-025, § 162-16-240, filed 7/12/99, effective 8/12/99.]

WAC 162-22-065

Reasonable accommodation.

(1) Reasonable accommodation means measures that:

- (a) Enable equal opportunity in the application process;
- (b) Enable the proper performance of the particular job held or desired;
- (c) Enable the enjoyment of equal benefits, privileges, or terms and conditions of employment.

(2) Possible examples of reasonable accommodation may include, but are not limited to:

- (a) Adjustments in job duties, work schedules, or scope of work;
- (b) Changes in the job setting or conditions of work;

(c) Informing the employee of vacant positions and considering the employee for those positions for which the employee is qualified.

[Statutory Authority: RCW 49.60.120(3). 99-15-025, § 162-22-065, filed 7/12/99, effective 8/12/99.]