

FILED

MAR 16 2012

NO. 29912-1-III

---

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

---

STATE OF WASHINGTON, COMMUNITY COLLEGES OF  
SPOKANE,

Appellants/Cross-Respondents,

v.

MARK FEY,

Respondent/Cross-Appellant

---

**APPELLANTS/CROSS-RESPONDENTS' COMMUNITY  
COLLEGES OF SPOKANE REPLY/RESPONSE BRIEF**

---

ROBERT M. MCKENNA  
Attorney General

AMY C. CLEMMONS  
Assistant Attorney General  
WSBA# 22997  
Office of the Attorney General  
Torts Division  
1116 W. Riverside Ave  
Spokane, WA 99201  
(509) 458-3545

FILED

MAR 16 2012

NO. 29912-1-III

---

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

---

STATE OF WASHINGTON, COMMUNITY COLLEGES OF  
SPOKANE,

Appellants/Cross-Respondents,

v.

MARK FEY,

Respondent/Cross-Appellant

---

**APPELLANTS/CROSS-RESPONDENTS' COMMUNITY  
COLLEGES OF SPOKANE REPLY/RESPONSE BRIEF**

---

ROBERT M. MCKENNA  
Attorney General

AMY C. CLEMMONS  
Assistant Attorney General  
WSBA# 22997  
Office of the Attorney General  
Torts Division  
1116 W. Riverside Ave  
Spokane, WA 99201  
(509) 458-3545

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. REPLY STATEMENT OF THE CASE .....5

    A. Undisputed Facts.....5

    B. Response To Factual Disputes Raised By Mr. Fey.....8

    C. Procedural Background.....14

III. LAW/ARGUMENT .....15

    A. The Colleges Were Deprived Of A Dispositive  
    Affirmative Defense That A CDL Is A Legitimate Job  
    Qualification .....15

    B. Any Challenge That The CDL Qualification Was  
    Discrimination Must Be Evaluated Under A Disparate  
    Treatment Analysis, Not An Accommodation Theory .....20

    C. The Jury Instructions Given Were Contrary To Law And  
    Prejudicial .....25

        1. Contrary to the Instructions Given, The Law  
        Requires Mr. Fey To Qualify For the Promotion .....26

        2. The Timing Of Notice Was At Issue In This Case.....28

        3. The Jury Was Not Instructed That The Employer  
        Has The Right To Promote The Most Qualified  
        Applicant .....29

        4. Contrary To The Instructions Given, There Is No  
        Legal Duty To Promote An Employee As an  
        Accommodation .....30

        5. The Instructions Erroneously Stated The Employer  
        Has A Mandatory Duty To Negotiate Job  
        Qualifications .....33

6.	An Employer Is Not Required To Either Eliminate Qualification Standards or Reassign The CDL Duties To Other Employees As An Accommodation.....	34
7.	The Trial Court Failed To Provide Correct Instructions On What Constitutes An Essential Function.....	36
8.	It Was Prejudicial To Exclude Instructions On the Applicable Legal and Contractual Obligations As Suggested In The WPI's.....	40
9.	Significantly Altering The Undue Burden Standard Was Admittedly In Error.....	41
10.	Removing Proximate Cause From The Case Is Reversible Error.....	43
11.	The Special Verdict Form Was Misleading And Failed To Account For Any Defense.....	45
D.	The Evidentiary Rulings And Comments On The Evidence Were Prejudicial To The Colleges.....	46
E.	Mr. Fey Is Required To Mitigate The Claimed Lost Economic Damages.....	46
F.	The Trial Court Failed To Apply The Correct Standard Under The Law In Granting The Additur And Attorney's Fees.....	47
IV.	CONCLUSION.....	49

## TABLE OF AUTHORITIES

### Cases

<i>Albertson's Inc. v. Kirkingburg</i> , 527 U.S. 555, 119 S. Ct. 2162, 114 L.Ed. 2d 518 (1999)	16, 18, 20, 21, 22 23, 26, 35, 37, 38
<i>Barber v. Nabors Drilling U.S.A., Inc.</i> , 130 F.3d 702 (5th Cir. 1978)	35
<i>Bates v. United States Parcel Service, Inc.</i> , 511 F.3d 974 (9th Cir. 2007)	16, 18, 20, 21, 22, 36
<i>Bay v. Cassens Transp. Co.</i> , 212 F.3d 969 (7th Cir. 2000)	20
<i>Brady v. The Daily World</i> , 105 Wn.2d 770, 718 P.2d 785 (1986)	16
<i>Briggs v. Nova Services</i> , 166 Wn.2d 794, 213 P.3d 910 (2009)	38
<i>Clarke v. Shoreline School District No. 412</i> , 106 Wn.2d 102, 720 P.2d 793 (1986)	22, 23, 24
<i>Cravens v. Blue Cross and Blue Shield of Kansas City</i> , 214 F.3d 1011 (8th Cir. 2000)	31
<i>Dalton v. Subaru-Isuzu Automotive, Inc.</i> , 141 F.3d 667 (7th Cir. 1998)	32
<i>Dark v. Curry County</i> , 451 F.3d 1078 (9th Cir. 2006)	34
<i>Davis v. Microsoft Corp.</i> , 149 Wn.2d 521, 70 P.3d 126 (2003)	21, 24, 35
<i>Dean v. Municipality of Metropolitan Seattle</i> , 104 Wn.2d 627, 708 P.2d 393 (1985)	21, 29, 30, 31, 32

<i>Dedman v. Washington Personnel Appeals Board</i> , 98 Wn. App. 471, 989 P.2d 1214 (1999).....	26
<i>Doe v. Boeing</i> , 121 Wn.2d 8, 846 P.2d 531 (1993).....	24, 30, 32
<i>Fibreboard Paper Products. Corp. v. N.L.R.B.</i> , 379 U.S. 203, 85 S. Ct 398, 13 L.Ed.2d 233 (1964).....	38
<i>First National Maintenance Corp v. N.L.R.B.</i> , 452 U.S. 666, 101 S. Ct. 2573, 69 L.Ed.2d 318 (1981).....	38
<i>Ford Motor Co. v. National Labor Relations Board</i> , 441 U.S. 488, 99 S. Ct. 1842, 60 L.Ed.2d 420 (1979).....	38
<i>Franklin County Sheriff's Office v. Sellers</i> , 97 Wn.2d 317, P.2d 113 (1982).....	15
<i>Griffin v. UPS</i> , 661 F.3d 216 (5th Cir. 2011) .....	31, 32
<i>Havlina v. Washington State DOT</i> , 142 Wn. App. 510, 178 P.3d 354 (2007).....	26, 31
<i>Hegwine v. Longview Fibre Co.</i> , 162 Wn.2d 340, 172 P.3d 688 (2007).....	18
<i>Lloyd v. Swifty Transp. Inc.</i> , 552 F.3d 594 (7th Cir. 2009) .....	44
<i>Macsuga v. County of Spokane</i> , 97 Wn. App. 435, 983 P.2d 1167.....	34
<i>Mathews v. Trilogy Communications, Inc.</i> , 143 F.3d 1160 (8th Cir.1998) .....	16
<i>Matthews v. Commonwealth Edison Co.</i> , 128 F.3d 1194 (7th Cir. 1998) .....	16, 19, 21, 22, 24, 29
<i>McClarty v. Totem Elec.</i> , 157 Wn.2d 214, 137 P.3d 844 (2006).....	32

<i>Nyrop v. Independent School District No. 11</i> , 616 F.3d 728 (8th Cir. 2010) .....	31
<i>Ortiz v. Elgin Sweeping Services, Inc.</i> , No. 10C0936, 2011 WL 1930693 at *3 (N.D. Ill. May 17, 2011)17, 20, 21	
<i>Pulcino v. Federal Express Corp.</i> , 141 Wn.2d 629, 9 P.3d 787 (2000).....	32
<i>Raspa v. Office of the Sheriff of the County of Gloucester</i> , 191 N.J. 323, 924 A.2d 435 (2007) .....	31
<i>Rhodes v. URM Stores, Inc.</i> , 95 Wn. App. 794, 977 P.2d 651 (1999).....	16
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004).....	26
<i>Rose v. Hanna Mining Co.</i> , 94 Wn.2d 307, 616 P.2d 1229 (1990).....	15
<i>Scott v. City of Yuba City</i> , 2009 WL 4895549 (E.D.Cal., Dec. 11, 2009) .....	16, 18
<i>Snyder v. Medical Service Corp. of Eastern Washington</i> , 145 Wn.2d 233, 35 P.3d 1158 (2001).....	31
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	49
<i>State v. May</i> , 100 Wn. App. 478, 997 P.2d 956 (2000).....	17
<i>State v. Otis</i> , 151 Wn. App. 572, 213 P.3d 613 (2009).....	16
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	45
<i>State v. Vander Houwen</i> , 163 Wn.2d 25, 177 P.3d 93 (2008).....	45

<i>Tinjum v. Atlantic Richfield Co.</i> , 109 Wn. App. 203, 34 P.3d 855 (2001).....	16
--	----

<i>Trampler, Inc., v. N.L.R.B.</i> , 338 F.3d 747 (7th Cir. 2003).....	38
---	----

**Statutes**

5 U.S.C. 7103(a)(14).....	38
---------------------------	----

RCW 49.60.180(1).....	22
-----------------------	----

WAC 162-16-240.....	18
---------------------	----

**Other Authorities**

WPI 330.04 .....	15, 18
------------------	--------

WPI 330.33 .....	34
------------------	----

WPI 330.34 .....	27
------------------	----

WPI 330.35 .....	33
------------------	----

WPI 330.35 (5th) .....	33
------------------------	----

WPI 330.36 .....	40, 41
------------------	--------

WPI 330.83 .....	46
------------------	----

**Rules**

RAP 10.4(a)(4).....	46
---------------------	----

## I. INTRODUCTION

An employer can refuse to hire a person who cannot legally obtain a commercial drivers license (CDL) for a position designed to operate commercial vehicles. The Community Colleges of Spokane (the Colleges) operate two campuses, each with its own separate grounds staff. Mark Fey worked as a GNS3 at the Falls campus, a position assigned to drive a non-CDL vehicle. None of the grounds staff at the Falls campus were assigned to a CDL vehicle, but normal operations at the larger Spokane Community College (SCC) campus assigned two of the three grounds employees to operate CDL vehicles simultaneously.<sup>1</sup> The lead GNS4 position at SCC was assigned to drive a CDL vehicle and had to be able to train and fill in for all other grounds positions.

In 2007 SCC did not have any employees with a CDL, so the Colleges exercised their prerogative as an employer and made the possession of a CDL a requirement of the job.<sup>2</sup> Mark Fey applied for the GNS4 promotion at SCC after a CDL was made a qualification of the job.

---

<sup>1</sup> Jim Labish, a maintenance mechanic at the Falls, who had a CDL prior to getting the maintenance mechanic position, was assigned to drive the one CDL vehicle assigned to the Falls campus. However, with the need to have at least two grounds employees at SCC driving CDL equipment at the same time, management wanted at least three employees at SCC with CDL licenses, so that one would be available to fill in for the others during any absence.

<sup>2</sup> Future applicants for both the GNS3 and GSN4 were required to have a CDL or to obtain one during their probationary employment. As a GNS3, it is undisputed that Mark Fey was “grandfathered” into his position because he was hired prior to the CDL requirement.

Mr. Fey does not dispute that the CDL qualification for the GNS4 position was set solely for legitimate business reasons, nor does he dispute that there was no accommodation that could enable him to meet the licensing prerequisite for that position. Mr. Fey has vision over 20/40, so he could not meet the State requirements to drive CDL equipment, but all applicants were required to “possess a CDL.” The trial court did not apply the law on job qualifications to the undisputed facts of this case, the application of which warrants dismissal as a matter of law.

Instead of analyzing the application of a legitimate CDL employment qualification under the correct disparate treatment analysis, the trial court allowed Mr. Fey to present his case under an unrecognized accommodation theory--the employer has a duty to facilitate promoting a disabled employee into a better position, not just a duty to accommodate him in his current position. Additionally, under Fey’s theory, this alleged right to a promotion exists even though the other promotional applicants are admittedly more qualified than Mr. Fey. Fey’s theory that an employer has to alter legitimate job qualifications to “facilitate promotion” has never been recognized under the law and in fact runs counter to both Washington and Federal law on discrimination.

As a matter of law, an employer is not liable for excluding a disabled applicant from a job position when the disabled applicant cannot

meet a licensing qualification. The trial court erred by eliminating a required element of a prima facie case, specifically that Mr. Fey must be a “qualified applicant.” The trial court further erred by instructing the jury that as an accommodation, his employer was required to negotiate away the managerial right to set legitimate licensing qualifications. By law an employer is not required to negotiate hiring criteria set for legitimate reasons with employees.<sup>3</sup> In addition, the Colleges are not required as a matter of law to revamp their normal business operations to eliminate or reassign the use of CDL equipment and thereby operate less efficiently. Fey’s argument that a job qualification is not an essential function and that therefore the employer is required to modify it is not supported by any authority.<sup>4</sup> Mr. Fey admittedly could not meet the CDL qualification of the GNS4 promotional position, and he admits that he was reasonably accommodated by being grandfathered into his current GNS3 position. SCC had no duty to give him an advantage over other promotional applicants, all of whom were required to meet the CDL requirement.<sup>5</sup>

---

<sup>3</sup> WPI 330.04; *Franklin County Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 646 P.2d 113 (1982); *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 172 P.3d 688 (2007).

<sup>4</sup> Job qualifications are distinguished under the law from essential functions, because the employer has the entrepreneurial right to set qualifications. Fey’s theory is contrary to Civil Service laws which require equal application of qualifications.

<sup>5</sup> It is undisputed in this case that Fey was subject to the same written job description as all other applicants.

The trial court also instructed the jury that Mr. Fey was entitled to damages because the Colleges did not negotiate eliminating the CDL requirement as an accommodation. Not only did the trial court not require Mr. Fey to prove that he was reasonably likely to have received the promotion if interviewed, it precluded evidence that in fact, Mr. Fey was not likely to be selected as the lead, even with a CDL, due to his lack of leadership skills. Mr. Fey should not be entitled to lost promotional wages that he would never have received. SCC had the right to limit final interviews to qualified candidates that met the terms of the written job description. Mr. Fey concedes he was not the most qualified applicant and that someone with a CDL would be more qualified. The trial court mistakenly held that lost promotional damages could be assumed since he was not interviewed and that whether or not the Colleges were the proximate cause of any damage was irrelevant. Consequently, the trial court eliminated any fair consideration of damages or proximate cause in the instructions or evidence presented in this case.

The issue of whether an employer has a duty to alter promotional job qualifications presents a question of law for the court, not an issue of fact for the jury. It was error to allow this case to proceed to trial based upon the faulty premise that Mr. Fey could require his employer to redesign the job to fit his needs regardless of his inability to meet the job

qualifications. The correct application of the law required Mr. Fey to meet the employer's non-discriminatory CDL qualification. All the legal errors, instructional errors, and evidentiary errors in this case were preserved for appeal and specifically identified in the Colleges' Brief. The Colleges affirm each of those errors on reply. Cumulatively, those errors were so prejudicial that they prevented the Colleges' from presenting the pertinent defenses, and the law requires judgment in favor of the Colleges.

## **II. REPLY STATEMENT OF THE CASE**

### **A. Undisputed Facts**

The Colleges operate two separate community college campuses (The Falls and SCC), and in 2007 the Colleges employed an insufficient number of individuals who were legally licensed to operate the existing CDL equipment owned and used for maintenance operations. This created the specific business need to hire more employees able to legally drive CDL equipment.<sup>6</sup> RP 725, 732, 785, 819, 822, 825, 830-34, 847, 859-60. The Falls campus used one CDL vehicle, and it had one CDL licensed driver employed before September 2007.<sup>7</sup> RP 452-53, 456, 825-34, 845. All individuals familiar with both campuses testified that the SCC campus

---

<sup>6</sup> It was undisputed that the need for CDL drivers was greater at the SCC campus than the Falls campus due to the different configurations of the two campuses. RP 405, 407, 442-43, 452:12-19, 460-61, 463, 468-69, 490, 508, 542-543, 547, 551-52, 574, 578, 722-27, 730-32, 757-58, 785-88, 813, 815, 822-24, 829-34, 848, 860, 862-63; Ex. 172, 181, 182, 183.

<sup>7</sup> The Falls acquired a grounds employee with a CDL after September 2007, so it would have at least one employee available for backup.

had different terrain and larger parking lots and four off-site locations requiring the use of at least twice as many CDL vehicles as used on the Falls campus.<sup>8</sup> Normal grounds operations at SCC simultaneously used two CDL vehicles for standard winter operations, and business plans included a desire to purchase more CDL equipment due to the increased need for CDL plows at SCC. *Id.*; CP 23-34, 466-68; RP 723-27.<sup>9</sup>

In September of 2007, when the Colleges discovered that SCC's grounds operations were not in compliance with Washington state law, SCC needed at least two and preferably three grounds employees with a CDL in order to legally perform normal snow removal activities. RP 778-82. SCC did not have even one employee with a CDL in September 2007. RP 756-57, 750-56.<sup>10</sup> As admitted by Mr. Fey, someone with a CDL would be more qualified to fill the grounds position at SCC because the employer did use CDL equipment. RP 274, 284:17-22, 286, 293:17-19.

Mr. Fey, who was unable to ever obtain a CDL, was grandfathered into his GNS3 position at the Falls campus where he was assigned a non-CDL vehicle. The Falls campus had a sufficient number of CDL drivers to

---

<sup>8</sup> RP 286, 405, 407, 442-43, 452, 463, 469, 508, 542-43, 547, 574, 578, 722-27, 730-32, 755-56, 785-89, 813, 815, 822-24, 826-31, 833, 848, 860, 862-63; Ex. 181, 182.

<sup>9</sup> The trial court did not allow any evidence of the business plan to purchase more CDL vehicles at SCC into evidence, because new CDL vehicles had not yet been purchased. CP 449-51.

<sup>10</sup> As testified to by all individuals familiar with the grounds operations at SCC, SCC had a desperate need for more CDL drivers to legally carry out their normal grounds operations. RP 815, 574, 505, 532-33, 564, 467, 725, 732, 782, 785, 798-99, 785-89, 822, 825, 824, 785, 818-21, 830-34, 847.

cover the one CDL plow assigned to that campus. *Id.*, RP 258, 263, 296.

Mr. Fey testified this was a satisfactory accommodation.<sup>11</sup>

In September 2007, due to the shortage of CDL drivers, the GNS4 written job description was revised with the specific intent to require all applicants to “possess a CDL,” be able to operate a “variety” of maintenance equipment, and fill in for and train all other employees. Ex. 12, 13, RP 412:3-5, 526, 546, 552-53, 609, 790-91, 825, 857-58, 862. These written requirements were applied equally to all applicants consistent with Washington Civil Service Laws. RP 311, 811, 821-22.

It is undisputed that there was no accommodation that would enable Mr. Fey “to possess a CDL” as required by the written job description. Ex. 12, 13; RP 228: 8-10, 257, 271, 526, 553, 609, 674, 682, 790, 1009; CP 105-112.<sup>12</sup> Mr. Fey concedes that “he cannot meet the requirements to obtain a CDL.” Fey’s Br. at 4.

It is also undisputed that the Colleges did not negotiate their business plan to employ three CDL licensed drivers at SCC with Mr. Fey before it revised the job description. The CDL requirement for the

---

<sup>11</sup> At the Falls campus, there was a maintenance mechanic who had a CDL and was assigned the one CDL vehicle on that campus. RP 452-53, 456, 825-34, 845.

<sup>12</sup> Fey acknowledges “his eyesight impairment does not allow him to meet the CDL requirements.” Fey’s Br. at 4, citing RP 228. Mr. Fey argues he was never “considered” for the job, but his application was considered the same as any other applicant when it was screened by Human Resources for the written minimum job qualifications, including a CDL. RP 904.

grounds position was a business decision negotiated between management and the union. RP 310, 463, 488, 566-67, 569, 573-75, 577-78, 609, 813, 815, 822-24, 859-63, 866-67. Mr. Fey does not dispute the fact that the CDL was made a requirement for legitimate business reasons, and Mr. Fey concedes that the CDL requirement was a qualification standard and not a job duty.<sup>13</sup> CP 456-57; RP 86, 968:19-21.

**B. Response To Factual Disputes Raised By Mr. Fey**

Mr. Fey argues that his employer could have switched his assigned GNS3 duties at the Falls campus with the duties assigned to the GNS4 position at the SCC campus as an accommodation, ignoring the different needs of the two campuses.<sup>14</sup> RP 272. Each position is assigned a specific set of duties designed to meet the needs of the campus assigned.<sup>15</sup> RP 282, 821-22. Mr. Fey only worked at the Falls campus, and he had no idea what the CDL vehicles were used for at SCC. RP 241, 284-85, 782-83. Mr. Fey had no knowledge of the SCC campus's needs in order to know if switching the duties was even feasible. RP 284-85, 287.

---

<sup>13</sup> Fey's counsel argued to the court that: "You can't claim that a qualification standard is an essential function. In this case the CDL has been viewed as a qualification standard, condition of employment. And it's simply not an essential function." RP 968:19-21.

<sup>14</sup> Fey got to offer his lay opinion that the duties could be switched without any foundation about what the plowing needs were at SCC. He just speculates that he could do anything with his V-box sander (a 23,000 pound vehicle) that the heavier CDL International (a 39,000 pound vehicle) could do. However, he has never driven a heavier CDL vehicle to compare the two.

<sup>15</sup> The only duty of the grounds staff when there is snow is to drive the assigned vehicle. RP 282, 821-822.

Mr. Fey could perform the duties assigned to the GNS3 job at the smaller Falls campus since it used fewer CDL vehicles and had sufficient CDL drivers, but the SCC campus used more CDL equipment, and had an insufficient number of CDL drivers. Ex. 12, 32, RP 724-27, 732, 825-34, 451:9-13, 452:12-19, 460-61, 468-69, 490, 551-552, 757-58, 862. Although Mr. Fey argues the switch is easy without any facts to back it up, everyone who was familiar with both campuses testified that the non-CDL duties of the GNS3 at the Falls and CDL duties assigned to the GNS4 at SCC were not interchangeable. Ex. 26, 181, 182; CP 23-24, 52-88, 466-468; RP 403, 405, 407, 452, 459-60, 469, 547, 722-25, 732, 757-58, 785-788, 813, 815, 830-34, 847. Both the GNS3 and GNS4 at SCC were assigned CDL vehicles full time during winter operations, and switching the CDL vehicle (the International) assigned to SCC with a non-CDL vehicle (the V-box) assigned to the Falls would prevent the employer's ability to complete the required campus operations efficiently.<sup>16</sup> *Id.*

Mr. Fey does not address in his brief the undisputed fact that the International, the CDL vehicle assigned to the GNS4 position at SCC, was the only vehicle large enough to handle the sanding needs at SCC. RP 459-60, 469, 722-25, 757-58, 786-88, 813, 815, 830-34. He argues that it

---

<sup>16</sup> The employees and equipment are assigned to different campuses to meet needs of the particular campus, not the employee's personal desires. RP 412, 441, 725, 732, 785, 779, 822, 825, 830-34, 847, 859.

is mere speculation that a vehicle carrying 10 yards of sand is more efficient than one carrying 5 yards. Fey's Br. at 11. It is undisputed in the record that the physical demands at SCC require the use of more CDL equipment and the larger sander.<sup>17</sup>

The only individuals to testify that the V-box and the International could be switched between the two different campuses were Mr. Fey and his vocational expert, Fred Cutler. RP 284-85, 287, 688, 692, 702-15; CP 360-63. It is undisputed that neither of them had any factual information about the equipment needs at the SCC campus to support their opinions. *Id.*, RP 284. Despite this lack of foundation, both of their opinions were admitted into evidence over objection.<sup>18</sup> CP 360-64; RP 284-85, 292, 692. Mr. Fey also argues that the CDL grounds equipment could have been reassigned to the maintenance mechanics, none of whom had a CDL.<sup>19</sup> RP 838-39, 845, 865, 867, 878-79.

Mr. Fey argues that SCC did not operate CDL vehicles simultaneously. Fey's Br. at 10. The record is undisputed that normal operations required all snow removal equipment to plow assigned areas simultaneously. RP 282, 563 ll. 22-24; Ex. 181, 182. As recognized in the

---

<sup>17</sup> RP 459-60, 469, 722-25, 757-58, 785-88, 813, 815, 830-34, 412, 441, 732, 779, 822, 825, 847, 859.

<sup>18</sup> Mr. Fey had no idea how the CDL vehicles were used at SCC. RP 292: 18-21

<sup>19</sup> Maintenance mechanics are primarily responsible for buildings, not grounds work. *Id.*

references cited by Mr. Fey, the only time the assigned CDL vehicles were not operated simultaneously during winter operations was if one of them was broken down. *Id.* RP 521, 587, 605-06.

It is undisputed in the record that the GNS4 position was designed to drive the assigned International, a CDL vehicle. RP 854, 857-60, 862, 866, 876, 878, 879. There was no other employee available to drive the International, if the GNS4 was not able to drive it. RP 827-28. Since the International CDL vehicle assigned to the GNS4 was essential to the grounds operations at SCC, a replacement CDL vehicle had to be rented when it broke down. RP 827-29. Mr. Fey also argues that the GNS4 position at SCC was not required to operate the International plow because Cary Abbott was unable to drive it during the couple of winter months he was without a CDL during his probation as the GNS4.<sup>20</sup> Fey's Br. at 12. SCC had to hire a temporary employee to drive the International during Mr. Abbott's probation to perform the CDL work. RP 827-28. It was not feasible to hire a temporary worker to fill in for the CDL duties full time. *Id.* Mr. Abbott was demoted out of the GNS4 position when he did not obtain a CDL as required during his probation. RP 535, 883, Ex. 155. Because of the cost and burden of covering the CDL work during Mr. Abbott's probation, the probationary grace period was eliminated in

---

<sup>20</sup> In 2007 employees were allowed 6 months to obtain a CDL. Ex. 12.

2009. Ex. 13, RP 861. The employer should not be forced to continuously operate at a disadvantage such as when equipment is broken down or an employee is temporarily unqualified while on probation.

Mr. Fey argues that he could do Fred Hale's job at the Falls campus, but Mr. Hale's job was not open. RP 563 ll. 22-24. Mr. Fey claims the vehicles were commonly exchanged between campuses, but this is untrue. There is no evidence that the V-box was ever used at the SCC campus or that the International was ever used at the Falls campus.<sup>21</sup> Only the heavier CDL vehicles were assigned to plow the more problematic large parking lots at SCC. Ex. 181, 182; RP 782, 784-85.

Mr. Fey argues without any cite that the V-box was not used to plow in corn-rows. Fey's Br. at 11. The only testimony in the record is that the V-box as a lighter weight vehicle was solely used to plow in a constant "back-and-forth" fashion, synonymous to corn-rows, as testified to by Mr. Fey. RP 277; Ex. 182.

Mr. Fey argues in his response brief that the V-box was used for the "same work" as the CDL vehicles. Fey's Br. at 8, last ¶. However, none of the testimony cited by Mr. Fey actually supports this position.<sup>22</sup>

---

<sup>21</sup> The only vehicle shared between the two campuses was the water truck. RP 444.

<sup>22</sup> The testimony cited by Fey in support of this argument at RP 559 is comparing the weight and tires of two vehicles assigned to the Spokane Community College campus, the International (which held sand) and the Stakebed (which could not

There was no evidence that the V-box was ever assigned to plow a larger parking lot in a Zamboni style that required the weight of the CDL vehicles. Ex. 181, 182; RP 725, 785, 822, 825 725, 732, 830-34, 847.

Mr. Fey argues that there was no evidence of his performance problems prior to trial. This is not true. Mr. Fey's counsel moved to exclude evidence of his poor performance in pretrial motions in limine because he was well aware of his poor performance. CP 324-29. Mr. Fey testified in his deposition that he knew before 2007 that his supervisor would not support him in promoting to a lead position. RP 477; CP 35-51, 346. Mr. Fey received counseling sessions and written documentation relating to his performance, despite his claim that he was unaware of the performance problems. RP 294-97, 335, 474-75. The depositions and declarations prior to trial identified that performance issues would preclude Mr. Fey from ever being selected for a lead promotion. CP 16-22, 35-88, 268-71; RP 78-79, 170-71, 1057-58. Mr. Fey was considered by his coworkers to be dishonest, unreliable, lazy, a poor communicator

---

hold sand). This testimony did not address the V-box. The testimony at RP 473 is comparing the size (not function) of two vehicles assigned at the Falls campus, the V-box and the C6500 (a dump truck). It does not address the International. The testimony at RP 602 relates to a mechanic (who is not part of the snow removal crew) testifying that he preferred to drive the F600 because it was an automatic and easier to drive than the larger CDL vehicles which have manual transmissions. He does not discuss the weight difference or the plowing time difference that would result when a lighter vehicle is used, but solely indicates that he prefers the ease of driving an automatic transmission. RP 602. The testimony at RP 606 addresses that "the F600 and the rest of the trucks" assigned to SCC campus are used to fill in when one of the CDL vehicles breaks down. No testimony supports the assertion in Fey's brief.

and difficult to work with, all traits that would prevent promotion into a lead position.<sup>23</sup> Mr. Fey's performance issues went well beyond the written disciplinary notice in Ex. 150 and included the testimony of every single one of his coworkers and supervisors.<sup>24</sup> *Id.*

The trial court did not allow any evidence of the performance issues or his lack of leadership abilities based upon Mr. Fey's argument that it was irrelevant whether he was qualified for the promotion. RP 166-69, 416-17, 651, 617, 715-19, 921-23, 958, 983-85, 1059:8-10. Mr. Fey argued and the trial court agreed that he had no requirement to prove damages were proximately caused in a discrimination case. *Id.*

Mr. Fey could have mitigated his damages by improving his performance and seeking comparable pay in other jobs. RP 279-80, 383:5-8, 345-56, 376-77, 383. Instead he testified that he was happy and satisfied in the GNS3 position, so he did not look for other comparable jobs. RP 416-17.

### **C. Procedural Background**

Mr. Fey argues in his response brief that he did move to dismiss the bona fide occupational qualification defense as a matter of law. Fey's

---

<sup>23</sup> CP 16-22, 35-88, 268-71, 396-401, 466-68, 472-77; RP 78-85, 89, 159, 162-68, 172, 317-34, 339, 353, 344-45, 391, 413-17, 477, 479-80, 572, 578, 646-48, 651-55, 715-19, 738, 886-87, 921, 958, 983, 1051.

<sup>24</sup> Not one person testified that Mr. Fey was a good employee, other than Mr. Fey himself. *Id.*

Br. at 19. Fey moved to strike the Colleges' entire answer as untimely, but never submitted any motion or authority to dismiss the bona fide occupational qualification (BFOQ) defense. CP 402-06. In fact, Mr. Fey's counsel argued in response to the Colleges' motions to dismiss that the defendants should have the right to present the BFOQ defense to the jury. RP 212-13, 715-16, RP 951:17-20.<sup>25</sup>

RAP 10.4 (c) is satisfied when the instructions are included in an appendix to the brief or when errors are set out in the brief. The Colleges satisfied this requirement.

### III. LAW/ARGUMENT

#### A. **The Colleges Were Deprived Of A Dispositive Affirmative Defense That A CDL Is A Legitimate Job Qualification**

A bona fide occupational qualification (BFOQ) provides an absolute affirmative defense to a disability discrimination claim. *Rose v. Hanna Mining Co.*, 94 Wn.2d 307, 616 P.2d 1229 (1990); WPI 330.04, *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 646 P.2d 113 (1982). Mr. Fey's entire claim was premised upon the fact that a CDL qualification made him ineligible for the GNS4 promotion.

The law on discrimination does not prevent an employer from setting and enforcing a CDL license requirement for business reasons,

---

<sup>25</sup> Fey's counsel argued that the BFOQ is "an affirmative defense that afterwards the jury may consider." RP 951: 17-20; CP 212-13.

even though it “bears more heavily on the disabled than on the able-bodied.” *Mathews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1998); *see also Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555, 573, 119 S. Ct. 2162, 114 L.Ed. 2d 518 (1999). An employer is entitled to apply a CDL requirement in a written job description to all applicants, regardless of its impact on the disabled. *Bates v. United States Parcel Service, Inc.*, 511 F.3d 974, 995, n.10 (9th Cir. 2007), applied specifically to identical facts as this case in an unpublished opinion, *Scott v. City of Yuba City*, 2009 WL 4895549 (E.D.Cal., Dec. 11, 2009).<sup>26</sup> The correct law on the CDL qualification was never applied in this case. App. E: CP 613, 338, 344, 445, 623. The trial court erred as a matter of law by holding that a pilot’s license could be a BFOQ, but that a CDL could not. RP 959.

A trial court must give an instruction on a party’s theory of the case if the law and evidence support the instruction. *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009). In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the

---

<sup>26</sup> *See also Bay v. Cassens Transp. Co.*, 212 F.3d 969, 974 (7th Cir. 2000); *Mathews v. Trilogy Communications, Inc.*, 143 F.3d 1160, 1165 (8th Cir.1998); *Mathews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1998); *Dean v. Municipality of Metropolitan Seattle*, 104 Wn.2d 627, 637-638, 708 P.2d 393 (1985); *Tinjum v. Atlantic Richfield Co.*, 109 Wn. App. 203, 34 P.3d 855 (2001). RCW 49.60.180(1); *Rhodes v. URM Stores, Inc.*, 95 Wn. App. 794, 801, 977 P.2d 651 (1999); *Brady v. The Daily World*, 105 Wn.2d 770, 718 P.2d 785 (1986); *Ortiz v. Elgin Sweeping Services, Inc.*, No. 10 C 0936, 2011 WL 1930693 at \*3 (N.D. Ill. May 17, 2011).

court must interpret the evidence in favor of the defendant and must not weigh the proof. *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956 (2000). The court's failure to give an instruction on an affirmative defense is reviewed de novo and constitutes reversible error. *Otis*, 151 Wn. App. at 578.

Mr. Fey does not submit any legal authority that would support the trial court's self-initiated dismissal of the BFOQ defense. The only arguments submitted by Mr. Fey in response to the BFOQ defense are:

1. That if "an assistive device" could have been installed in the CDL equipment to enable Mr. Fey to drive it, then the BFOQ defense does not apply. Fey's Br. at 25. However, there is no evidence that any "assistive device" could enable Fey to drive CDL equipment. His own doctor testified that there was nothing that could be done as an accommodation that would enable Mr. Fey to legally drive a CDL vehicle. RP 682:11-13;

2. Mr. Fey also argues, without any authority, that a driver's license is a legitimate job qualification, but that a CDL is not.<sup>27</sup> The law does not support making a distinction between the type of license an employer's work needs may require; instead it requires the plaintiff to prove that he can meet the licensing requirements set by the employer for

---

<sup>27</sup> "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." Fey's Br. at 25

legitimate business reasons. *Albertson's Inc.*, 527 U.S. at 573; WAC 162-16-240; *Hegwine*, 162 Wn.2d at 355. The only questions to be asked for the BFOQ affirmative defense are (1) whether the license would facilitate the employer's ability to do the job in question and (2) whether the license qualification was applied to all applicants. WPI 330.04; *Hegwine*, 162 Wn.2d at 355. Both of those questions are answered in favor of the Colleges based upon the undisputed facts.

All of the evidence in this case indicates that CDL equipment was purchased and assigned to SCC to perform necessary grounds work. Mr. Fey argues, without any information about the SCC campus operations that the employer could chose to do the work without CDL equipment. However, Mr. Fey admits the employer prudently had to use the CDL vehicles it owned, and although he claims the CDL vehicle could be reassigned to another position, he fails to identify any employee with a CDL available to drive the International. This same factual claim was rejected and summary judgment was granted in favor of the employer, applying the correct legal standard to job qualifications as set out in *Bates*, 511 F.3d at 990, *see Scott v. City of Yuba City*, 2009 WL 4895549 (E.D.Cal., Dec. 11, 2009) (an unpublished opinion applying *Bates*).

A CDL was made a prerequisite for the GNS4 position specifically because SCC had a business need for more CDL operators. Ex.12; RP

811-13, 815, 821-31, 833-34, 848, 859-63, 866. Without requiring a CDL, SCC would not be able to legally perform its normal grounds operations. *Id.* Mr. Fey even admitted it was reasonable and prudent for SCC to require a CDL because the Colleges used CDL equipment. RP 88-89, 95:19-22, 101:21-23, 274, 284:17-22, 286, 293:17-19, 715-17, 904-05, 939-59; CP 105:22-25, 106, 112. Requiring the Colleges to replace the CDL vehicles was not reasonable.<sup>28</sup> RP 1016, 1018. Mr. Fey concedes: “Yes, there’s a business need to have some people [who] drive to have CDL’s. Absolutely. They have some CDL trucks. That’s undisputed.” RP 95:19-22, 101:21-23.

The law protects the employer’s right to set job qualifications without employee interference, so the employer gets to pick the positions that are assigned to drive CDL equipment, not Mr. Fey. *Matthews*, 128 F.3d at 1196. It is undisputed that the CDL requirement was set for legitimate business needs and applied to all applicants. Therefore, the CDL is a BFOQ, and Mr. Fey’s claim should be dismissed as a matter of law. In the alternative, a new trial allowing instructions on the BFOQ affirmative defense is necessary. *See App. E.*

---

<sup>28</sup> For budget reasons, the Colleges had to use the CDL vehicles they already owned. RP 470, 591, 822, 825, 848.

**B. Any Challenge That The CDL Qualification Was Discrimination Must Be Evaluated Under A Disparate Treatment Analysis, Not An Accommodation Theory**

Washington cases have not addressed a claim wherein an employee sought a waiver of a CDL license requirement as an accommodation. Federal authorities have addressed this issue and found there are two separate steps in a discrimination case to determine whether a disabled employee is “qualified” for the position as required by the law. *Bates*, 511 F.3d at 990. The first step is to determine whether the individual “satisfies the prerequisites for the position, such as possessing the appropriate licenses.” *Bay v. Cassens Transp. Co.*, 212 F.3d 969, 974 (7th Cir. 2000); *Albertson’s*, 527 U.S. at 573. Then “**only if** the individual satisfies the prerequisites do we consider whether he ‘can perform the essential functions of the position held or desired, with or without reasonable accommodation.’” *Ortiz v. Elgin Sweeping Services, Inc.*, No. 10 C 0936, 2011 WL 1930693 at \*3 (N.D. Ill. May 17, 2011), *citing Bay*, 212 F.3d at 974; *Bates*, 511 F.3d at 990. The law on discrimination does not allow plaintiff to convert a disparate treatment claim (challenging the legitimacy of a job prerequisite) into a reasonable accommodation claim by arguing that the employer could have eliminated or reassigned the job qualification. *Id.*, *Albertson’s*, 527 U.S. at 573; *Davis v. Microsoft Corp.*,

149 Wn.2d 521, 533, 70 P.3d 126 (2003) (Washington law distinguishes between job qualifications and essential functions).

A disabled applicant “who cannot do the job even with a reasonable accommodation has no claim under the Americans with Disabilities Act,” and “[i]t is irrelevant that the lack of qualification is due entirely to a disability.” *Matthews*, 128 F.3d at 1195; *Dean v. Municipality of Metropolitan Seattle*, 104 Wn.2d 627, 639, 708 P.2d 393 (1985). When the job prerequisites include a CDL, the employer has every right to exclude a disabled employee who is unable to get a CDL from consideration for that job. *Albertson’s, Inc.*, 527 U.S. at 573; *Ortiz*, 2011 WL 1930693 at \*4.

The U.S. Supreme Court’s decision in *Albertson’s* is directly on point in this case because it holds that the employer must set licensing standards to meet the legal requirements related to driving certain equipment. *Albertson’s Inc.*, 527 U.S. at 555. The Ninth Circuit recognizes the validity of an employer needing to require certain licenses to comply with the law under the business necessity or BFOQ defense as being a legitimate defense in a disparate treatment, disparate impact, and a failure to accommodate claim. *Bates*, 511 F.3d at 995, n.10. The plaintiff’s ultimate burden remains to be whether the qualification standard/business decision challenged was “because of” discrimination,”

and the employer is entitled to argue the business necessity defense. *Bates*, 511 F.3d at 994, 998.<sup>29</sup> The Ninth Circuit noted “that an employer is not required to justify its decision to require that employees meet an applicable government safety regulation” such as obtaining a commercial drivers license. *Bates*, 511 F.3d at 998, citing *Albertson’s*, 527 U.S. at 577.

In a case like Mr. Fey’s, where no accommodation enables the employee to meet the job qualifications or prerequisites then:

[t]he disabled individual’s **only recourse** ...is to prove that the employer has fixed a qualification that bears more heavily on disabled than on other workers and is not required by the necessities of the business or activity in question. This is the ‘disparate impact’ approach to proving discrimination.

*Matthews*, 128 F.3d at 1195-96. [emphasis ours]. A handicapped individual must be “otherwise qualified” to be considered for accommodation which means he is “able to meet all of a program’s requirements in spite of his handicap.” *Clarke v. Shoreline School District No. 412*, 106 Wn.2d 102, 118, 720 P.2d 793 (1986). Where the disability prevents an individual from meeting qualification standards, then the plaintiff must meet the shifting burden analysis proving that the job qualification at issue is a pretext for discrimination. *Matthews*, 128 F.3d at 1196; RCW 49.60.180; *Albertson’s Inc.*, 527 U.S. at 573; *Clarke*, 106

---

<sup>29</sup> The *Bates* case applied the disparate treatment analysis to a hearing restriction that was not part of any licensing requirement. The court noted that the DOT’s commercial licensing standards did not apply to the vehicles at issue in *Bates*’s job. *Bates*, 511 F.3d at 998.

Wn.2d at 117-119 (holding that an employer may discharge an employee with a disability who is unable to perform an essential job function without attempting to modify his position to accommodate the disability). This burden to prove he can meet the job qualifications rests with the plaintiff, and it should not be shifted to the defendant. *Id.* Under the correct shifting burden analysis, summary judgment dismissal is warranted when an employer requires a CDL, and the plaintiff is unable to physically qualify for one. *Albertson's*, 527 U.S. at 556.

An employer who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation [like obtaining a CDL] does not have to justify enforcing the regulation solely because its standard may be waived experimentally in an individual case.

*Albertson's*, 527 U.S. at 556. The U.S. Supreme Court noted that:

The Senate Labor and Human Resources Committee Report on the ADA stated that ‘a person with a disability applying for or currently holding a job subject to [DOT standards for drivers] must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under Title I of this legislation.

*Albertson's*, 527 U.S. at 573-574, *quoting*, S.Rep. No. 101-116, pp. 27-28 (1990).

Mr. Fey’s only complaint in this litigation is that he was unable to promote into a position that required a CDL because he could not meet state law safety standards to obtain a CDL. CP 102:8-11. There is no

requirement for employers “to make substantial modifications in their programs to allow disabled persons to participate” as claimed by Mr. Fey. *Clarke*, 106 Wn.2d at 118; *Davis*, 149 Wn.2d at 535-536, (an employer is not required to redesign a position); *Doe v. Boeing*, 121 Wn.2d 8, 20, 846 P.2d 531 (1993) (the employer has no duty “to create a job” to fit the needs of the disabled). An employer has a legitimate business purpose in “balancing the needs of its work force as a whole.” *Doe*, 121 Wn.2d at 19. A disabled applicant subject to the same qualification standards as all other applicants does not state a claim for disability discrimination as a matter of law. *Matthews*, 128 F.3d at 1195-1196.

This case is unquestionably about an employer requiring a CDL license for a job designed to drive CDL equipment. Mr. Fey admits the CDL qualification was not discriminatory on its face. It meets the BFOQ requirements under Washington law, and it is consistent with the U.S. Supreme Court’s decision in *Albertson’s Inc.* that entitles an employer to make a CDL a qualification of the job without threat of liability. In this case, Mr. Fey dismissed his disparate treatment claim for lack of support because the sight requirements were necessary to get a CDL. The Colleges had every right to make a CDL a qualification of a job that was designed and intended to drive CDL equipment.

Judgment in favor of the Colleges is warranted as a matter of law because Mr. Fey admittedly could not meet the CDL qualification that was applied equally to all applicants. Mr. Fey dismissed his disparate treatment claim for lack of evidence, and that claim was the only proper means of challenging the CDL qualification.

**C. The Jury Instructions Given Were Contrary To Law And Prejudicial**

Contrary to the law as set out above, Mr. Fey argued that he did not have to qualify for the promotion and instead that his employer was required to: “engage in a mandatory interactive process” to consider “altering the Grounds and Nursery 4 conditions of employment to accommodate plaintiff’s disability.” App. G: CP 578. This theory--to change the job to fit the employee’s desire to promote--is not supported by any Washington authority. Mr. Fey’s counsel argued to the jury based on inaccurate instructions that the “law demands” that you treat disabled individuals differently for promotion, and “if there’s a way to tweak their job” then “the employer is obligated to do so.” RP 1003 ll. 3-11. This theory confuses the duty to accommodate an employee in a current position with the employer’s right to apply the same promotional qualification standards to all applicants. The law on accommodation is not intended to facilitate promotion of an unqualified applicant or to force the

employer to negotiate changing qualification standards as asserted here. Allowing any instructions on accommodation in this case was error. (Colleges' Br. at 15-20); *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004); *Dedman v. Washington Personnel Appeals Board*, 98 Wn. App. 471, 485, 989 P.2d 1214 (1999) (as a matter of law, the employer does not have to eliminate job qualification standards as an accommodation). The trial court directed that exceptions and objections to instructions should be completed within five minutes. RP 954, 963, 979.

**1. Contrary to the Instructions Given, The Law Requires Mr. Fey To Qualify For the Promotion**

It is undisputed that the CDL qualification existed for legitimate non-discriminatory reasons. Therefore, as set out above, requiring all applicants to obtain a CDL to be qualified is not discrimination as a matter of law.<sup>30</sup> The law requires Mr. Fey to meet promotional qualifications, not for the employer to bargain them away as an accommodation. *Albertson's Inc.*, 527 U.S. at 573; *Havlina v. Washington State DOT*, 142 Wn. App. 510, 517, 178 P.3d 354 (2007). Despite the law entitling an employer to enforce a CDL qualification, Mr. Fey argued to the jury that the duty to accommodate included the requirement to make adjustments to the minimum job qualifications. RP 1014:5-1015. The trial court erroneously

---

<sup>30</sup> See Section A & B. An applicant for a promotion must be able to meet the job qualifications to have a reasonable accommodation claim. WPI 330.34; RP 950-51, 969; See also Colleges' Br. at 15-20.

held that although a disabled applicant has to be “qualified” for the job in a disparate treatment claim, the employee did not have to be qualified for a reasonable accommodation claim. RP 166. This confusion by the trial court between the two distinct claims of disparate treatment and reasonable accommodation resulted in errors throughout the instructions. A de novo review of those errors by this Court requires reversal of the jury’s verdict.

There is a huge difference between the recommended pattern instruction and the instruction given for reasonable accommodation. App. F; comparing WPI 330.34 to CP 587, 965. The WPI recommends the use of the term “qualified applicant” when the employee is seeking a new job, so the instruction should read: “An employer must provide a reasonable accommodation for a **qualified applicant**.” This keeps the burden of proving that the applicant meets the employer’s qualification standards where it belongs, on the plaintiff. The trial court eliminated the term “qualified applicant” from the instruction and used the term “employee,” which should be used when an employee is seeking accommodation in his or her current position (not a promotion or new position). By altering the WPI in this manner, the trial court eliminated the mandatory requirement that Mr. Fey meet the CDL qualification as required by law. (*See* sections A & B above). By giving the instruction

that the Colleges “must provide a reasonable accommodation for an employee” regardless of whether the employee qualified for the job, an essential element of the claim was eliminated. App. E.<sup>31</sup> The change in the WPI allowed Plaintiff’s counsel to incorrectly argue that (1) the law demands Mr. Fey be treated differently than other applicants for a promotion and (2) that he did not have to be qualified for the promotion. RP 1003, 1015, 1058-59. The correct instructions under the law were not given, and the Colleges were prevented from arguing that Mr. Fey had to be qualified for the promotion. App. E, F. The Colleges preserved the objection to all of the trial court’s modifications to the WPI’s. RP 941-45, 947-59, 965, 969, 976-77; *see* the correct WPI’s in comparison to the instructions given in this case. App. E, F, G, J, M, N, O.

## **2. The Timing Of Notice Was At Issue In This Case**

The timing of the notice of a disability and a request for accommodation was at issue because Mr. Fey’s doctor admits that there was no medical diagnosis in 2007 and that the only information Mr. Fey gave to his employer in 2007, Ex. 6, was not sufficient to identify a disability. RP 668, 670:14-15, 675-76, 679:17-19. *See* Colleges’ Br. at 25-26. Mr. Fey admits that he never requested any accommodation in 2007. CP 104; RP 271. In February 2010 Mr. Fey asked that the CDL

---

<sup>31</sup> The Colleges articulated their exception to the erroneous instruction, and that objection was properly preserved. RP 950-51, 969.

qualification be waived as an accommodation. Ex. 32. This issue was preserved on appeal. RP 973-75.

**3. The Jury Was Not Instructed That The Employer Has The Right To Promote The Most Qualified Applicant**

An employer has the right to hire the most qualified applicant, and the trial court refused to give any instruction on the correct law in this regard.<sup>32</sup> CP 354. Washington law recognizes that “[t]he employer has no duty to...hire [Fey] in preference to a more qualified employee,” in contrast to Mr. Fey’s claim that he should be subject to lower job qualification standards than the other applicants. *Dean*, 104 Wn.2d at 638. As admitted by Mr. Fey, a CDL would make someone more qualified for the job. “Requiring an employer to hire or retain a less qualified worker “would handicap the able-bodied” and result in “reverse discrimination” which is contrary to the purposes of the law on discrimination. *Matthews*, 128 F.3d at 1196. Mr. Fey conceded in this case that an applicant with a CDL would be more versatile, and nothing prevents the Colleges from hiring the most qualified applicant. RP 1059. By failing to instruct the jury on the law in this regard, Mr. Fey was allowed to argue under the instructions given that it is “irrelevant” whether he was the most qualified

---

<sup>32</sup> The trial court refused to instruct the jury that “An employer has the right to select the most qualified person for a position. A disabled individual does not have a right to a promotion over a more qualified candidate.” CP 354.

applicant for the promotion. RP 1003, 1015, 1058-59; RP 972, 975-81 (issue preserved for appeal).

The error in the instructions was exacerbated by allowing Fred Cutler to testify incorrectly as an expert on the law that the accommodation laws require an employer to “facilitate” or “assist” a disabled employee into a promotion over more qualified applicants. RP 693-94. Allowing Cutler’s opinions on the law in itself constitutes reversible error. *See* Colleges’ Br. at 32-35.

**4. Contrary To The Instructions Given, There Is No Legal Duty To Promote An Employee As an Accommodation**

The instructions erroneously advised the jury that the Community Colleges had a duty to promote Mr. Fey beyond his current GNS3 position, and into a promotional GNS4 position, as an accommodation. An employer does have a duty to assist with finding **equivalent work** that the employee is **qualified** to perform, **if** the employee cannot be accommodated in his current position, but nothing under the accommodation law requires the employer to facilitate promotion after accommodating the employee in his current position. *Dean*, 104 Wn.2d at 639; *Doe*, 121 Wn.2d at 8, 21 (an employer is not required to do anything beyond providing an accommodation that enables the employee to perform his current job); *Snyder v. Medical Service Corp. of Eastern*

*Washington*, 145 Wn.2d 233, 241, 35 P.3d 1158 (2001). Only when the employee cannot be accommodated in his current position, does the employer have a duty to look for “equivalent” alternative positions that the employee is “qualified” to perform. *Dean*, 104 Wn.2d at 639. There is no duty to look for promotions as an accommodation under Washington law. *Havlina*, 142 Wn. App. at 517 (the law requires that disabled employees must compete equally with other applicants for higher positions.).

Federal authority more frequently addresses accommodation requests under the ADA and clearly recognizes that “[a] disabled employee has no right to a promotion” or “to choose what job to which he will be assigned.” *Griffin v. UPS*, 661 F.3d 216, 224 (5th Cir. 2011); *Nyrop v. Independent School District No. 11*, 616 F.3d 728, 732, 737 (8th Cir. 2010); (“[the employer] was not required to promote her to accommodate her disability.”); *Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011, 1019 (8th Cir. 2000) (“promotion is not required.”); *see also Raspa v. Office of the Sheriff of the County of Gloucester*, 191 N.J. 323, 340, 924 A.2d 435 (2007) (applying a state law BFOQ defense similar to Washington’s and holding that accommodation is required only to an “equivalent level” not a promotion). The Colleges

could not find any Washington or Federal case that requires a disabled employee to be promoted as accommodation.<sup>33</sup>

When Mr. Fey was accommodated into his current GNS3 position, the employer's duty to accommodate was satisfied. *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 9 P.3d 787 (2000), overruled on other grounds by *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006); *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006), superseded by statute in part (regarding the definition of "disability.") (The ability to do the job assigned eliminates the need for accommodation); *Griffin*, 661 F.3d at 216; *Doe*, 121 Wn.2d at 18-19. The employer has no duty to alter promotional positions as a reasonable accommodation. *Id.*

The trial court refused to give a correct instruction under the law that (1) the employer's duty to accommodate is satisfied as a matter of law when steps are taken that enable the employee to perform his job, regardless of whether the employee desires steps beyond those required and (2) the employee has a "duty to accept reasonably compensatory work he could perform." *Dean*, 104 Wn.2d at 637-638. App. H: CP 339, 345.

---

<sup>33</sup> See also *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 679 (7th Cir. 1998). (Noting that: "[W]e have been unable to find a single ADA or Rehabilitation Act case in which an employer has been required to reassign a disabled employee to a position when such a transfer would violate a legitimate, nondiscriminatory policy of the employer,... and for good reason.")

The trial court refused to provide any correct instruction on the law to enable the Colleges to argue their theory of the case. The issue was preserved for appeal. RP 970-81.

**5. The Instructions Erroneously Stated The Employer Has A Mandatory Duty To Negotiate Job Qualifications**

The failure to engage in the interactive process over the CDL requirement was the basis for the jury's verdict. CP 637-41, 649-53. The instructions indicated that the Colleges had an "affirmative obligation" to engage in the interactive process to discuss reassigning the CDL equipment to other positions. CP 578, 585. The WPI's do not use the language used by the trial court in this case. No pattern instruction specifies that the employer has "an affirmative obligation" to engage in an interactive process regarding the BFOQ's for a promotional position. WPI 330.35 (5th), App. G. The trial court inserted the "affirmative obligation" language into an older version of WPI 330.35, even though WPI 330.35 was withdrawn in 2010. App. G; CP 585, WPI 330.35. This error was preserved for appeal. RP 947, 964, 966-67, 974-81. The duty to negotiate eliminating the CDL qualification does not exist under the law. App. G: CP 585, CP 578 in contrast to CP 433; *see also* App. E. It was error to instruct the jury that there was an "affirmative obligation" to engage in the interactive process for a promotional applicant who could not meet the

minimum qualifications. *Id.*; see Section B above. The employer has the prerogative to set legitimate job qualifications. If the law required an employer to negotiate away minimum licensing qualifications as a reasonable accommodation, it would nullify the employee's burden to prove he or she is "qualified" as part of a prima facie case and render the distinct elements of a disparate treatment/impact claim meaningless.

In addition, the trial court allowed the failure to engage in the interactive process to be presented as a violation of the law against discrimination. App. G, P: CP 578, 599-600. The trial court refused to provide a correct instruction on the law that: "the failure to engage in the interactive process is not a violation of the Washington Law Against Discrimination" in itself. CP 433; notes to WPI 330.33; *Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006).

**6. An Employer Is Not Required To Either Eliminate Qualification Standards or Reassign The CDL Duties To Other Employees As An Accommodation**

The instructions erroneously allowed Mr. Fey to argue that he could "qualify" for the GNS4 position if his employer restructured the GNS4 promotional position by reassigning the CDL equipment to another employee. The law is clear that an employer is not required to restructure or reassign necessary job functions or eliminate qualifications. *Macsuga v. County of Spokane*, 97 Wn. App. 435, 442, 983 P.2d 1167; *Davis*, 149

Wn.2d at 534; *Albertson's, Inc.*, 527 U.S. at 573; see CP 347, 348. See also *Colleges' Br.* at 18-20. An accommodation must enable the employee to perform the essential functions of the job, not reassign them. *Id.*; RP 968-69. Even if the disabled employee can perform most of the other functions, an employer is not required to reassign even one essential function. *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 709 (5th Cir. 1978); see also CP 433.

The only two accommodations proposed by Mr. Fey were for the Colleges to (1) switch the duties assigned to the GNS3 at the Falls campus with the duties assigned to the GNS4 at the SCC campus, thereby reassigning the CDL equipment to another employee at a different campus and preventing the employer from designating the efficient use of the equipment based upon business needs or (2) require the maintenance mechanics to get CDL's instead of grounds employees, infringing on entrepreneurial rights. RP 1017, 1020. Instead of Mr. Fey proving that he could qualify for the promotion to the GNS4 job, like all the other applicants, he was allowed to claim under the instructions given that the employer had a duty to rearrange the job to fit his needs. The trial court refused to provide any correct instructions under the law that the employer is not required to restructure its operation or reassign functions as an accommodation. App. I: CP 347, 348, 441. The trial court also refused to

instruct on the applicable Civil Service laws that required Mr. Fey to meet the minimum qualifications as a public employee. App. L: CP 614; RP 970-81.

**7. The Trial Court Failed To Provide Correct Instructions On What Constitutes An Essential Function**

Mr. Fey's only claim in this lawsuit was to argue that he could do the essential function of snow removal if the CDL equipment were switched or reassigned to another employee, thereby eliminating the CDL qualification. CP 106, Ex. 32. Fey argued that a job qualification is not an essential function, and therefore, it could be eliminated as a reasonable accommodation. The trial court failed to provide any instructions distinguishing between a qualification and an essential function.

The trial court incorrectly added a sentence to the instruction defining essential functions indicating that "essential functions are not qualification standards" thereby incorrectly allowing the jury to infer that the employer is required to modify job qualifications. App. I: CP 586. The law recognizes a distinction between essential functions and job qualifications, in that qualification standards cannot be modified.

Whereas "essential functions" are basic "duties," 29 C.F.R. § 1630.2(n)(1), "qualification standards" are "personal and professional attributes" that may include "physical, medical [and] safety" requirements. *Id.* § 1630.2(q). The difference is crucial.

*Bates*, 511 F.3d at 990.

An employer is not required to alter a CDL licensing requirement. *Id. Albertson's Inc.*, 527 U.S. at 573; CP 586. Although the Colleges' proposed instructions conformed to the law, the court did not give the jury any instructions on the law applicable to qualification standards. *See App. E: CP 613, 338.*

The standard WPI 330.34 instruction on accommodation references that an employer is required to make adjustments to "conditions of employment." That term is intended to refer to physical or environmental conditions, not licensing qualifications. However, Mr. Fey argued under the instructions given that the Colleges had an obligation to alter the CDL qualification because it was a physical "condition of employment" and not a job qualification. RP 957, 1003, 1010, 1014. WPI 330.34 lists "conditions of employment" referring to physical or environmental conditions that the employer can adjust. This instruction was not intended to require an employer to alter job qualifications. The Colleges pointed out the confusion that would occur by allowing the CDL qualification to be treated under the instructions the same as a physical condition of employment.<sup>34</sup> RP 934. The Federal courts recommend defining "conditions of employment" to avoid exactly the type of

---

<sup>34</sup> The confusion in this case was further compounded by the written job description using the heading "conditions of employment" to list the necessary licensing qualifications. Ex. 12.

confusion and equivocation that occurred in this case. 5 U.S.C. § 7103 (a)(14); CP 620.<sup>35</sup> The law recognizes that the term “conditions of employment” is not intended to include managerial decisions like CDL licensing requirements that are “at the core of entrepreneurial control.” *Id*; *Albertson’s Inc.*, 527 U.S. at 573. The trial court refused to define conditions of employment or provide any instruction to allow presentation of the Colleges’ theory that the employer is not required to alter job qualifications. App. E, K: CP 611, 613, 338, 344, 354, 620-21, 623.

The confusion in the correct application of the law was again multiplied by allowing Mr. Cutler to testify as an expert that the law required the employer to alter the CDL qualification. RP 688-89, 693-94, 697-98, 702-05. Contrary to the law, Mr. Fey’s counsel was permitted to argue at closing that the employer had an obligation to alter the CDL job qualification because it was a “condition of employment” and not an essential function. RP 1010, 14.

Pursuant to WPI 330.37, the jury should have been instructed to consider each of the following factors in determining whether a function is

---

<sup>35</sup> 5 U.S.C. 7103(a)(14); *Briggs v. Nova Services*, 166 Wn.2d 794, 803-4, 213 P.3d 910 (2009), citing *Ford Motor Co. v. National Labor Relations Board*, 441 U.S. 488, 498, 99 S. Ct. 1842, 60 L.Ed.2d 420 (1979), (quoting *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 223, 85 S. Ct 398, 13 L.Ed.2d 233 (1964) (Stewart, J., concurring)). Managerial decisions include the choice of one’s supervisor, *Trampller, Inc., v. N.L.R.B.*, 338 F.3d 747, 749, (7th Cir. 2003) and the wisdom of company practices, *CL First National Maintenance Corp v. N.L.R.B.*, 452 U.S. 666, 676, 101 S. Ct. 2573, 69 L.Ed.2d 318 (1981).

essential to the job: (1) “whether the reasons the position exists include performing that function.” (In this case, it was undisputed that the GNS4 position was designed specifically to operate CDL equipment. RP 859); (2) “the employer's judgment as to which functions are essential” (the employer and the union unanimously considered the operation of CDL equipment essential. RP 310, 463, 566-67, 569, 573-75, 577-78, 609, 813, 815, 822-24, 859-63, 866-67); (3) “the judgment of those who have experience working in and around the position in question” (All individuals filling the job were required to operate CDL equipment. *Id.*, RP 790-91, 825, 857-58, 862); (4) “any written job descriptions such as those used to advertise the position” (The written description required applicants to “possess a CDL” and be legally able to operate a variety of equipment), Ex. 12; and (5) “the amount of time spent on the job performing the particular function” (Operating the CDL equipment at SCC was the primary function for grounds positions in the winter. RP 310, 488, 573-75, 577, 822-24, 859). App. I: CP 586, compare to WPI 330.37 and CP 342. The trial court refused to give an accurate instruction consistent with the WPI’s defining an essential function, which compounded the instructional error of telling the jury that “essential functions are not qualification standards”.<sup>36</sup> App. J: WPI 330.37, CP 586. The net effect of

---

<sup>36</sup> The error was preserved. RP 950, 966-70, 977-81.

misstating that an essential function was not a qualification standard and the failure to correctly define an essential function by giving WPI 330.37 deprived the Colleges of the ability to present and argue their theory of the case to the jury. Indeed, in combination, these errors operated as a virtual directed verdict for Mr. Fey.

**8. It Was Prejudicial To Exclude Instructions On the Applicable Legal and Contractual Obligations As Suggested In The WPI's**

Under the employment contract, the Colleges had the right to (1) set “the skills and abilities necessary to perform the duties of the specific position” and (2) only consider internal applicants “who have the skills and abilities required for the position.” App. L: CP 621. Civil Service laws require the same written qualifications be applied to all applicants. App. L: CP 614. The law requires a CDL to legally operate any equipment over 26,001 pounds. App. L: CP 443, 445. The notes to the WPI's recommend including any applicable legal and contractual requirements in the instructions. App. L: WPI 330.36. (Compare CP 343 to CP 588, *see also* CP 614, 443, 445). The trial court noted that since he was striking the Colleges' Washington State Patrol expert on CDL requirements, he would instruct the jury on the CDL requirements. RP 53-53. However, the trial court then refused to give any instructions on the applicable laws as promised and did not allow any consideration of the

employment contract or applicable laws in the instructions as recommended by the WPI's. App. L: CP 343, 614, 445. This issue was preserved for appeal. RP 971-72, 975-81.

**9. Significantly Altering The Undue Burden Standard Was Admittedly In Error**

The court inaccurately instructed the jury on the standard for the undue burden defense by altering the WPI and incorrectly inserting language that the cost had to be “unreasonably high.” App. M: Compare CP 588 to CP 343, WPI 330.36. This issue was preserved for appeal. RP 970-71, 973-81. Mr. Fey concedes this change to the WPI is not supported by the law; however, he argues that the error was harmless because there was no evidence that switching CDL equipment with non-CDL equipment created an undue burden. Fey's Br. at 38. This argument ignores the undisputed facts of this case: that the International was the only sander big enough to cover SCC's sanding needs and that the SCC campus had a greater need for the heavier CDL equipment, which the lighter weight V-box with a sander half the size could not satisfy. RP 403, 405, 407, 451-52, 459-61, 468-69, 490, 547, 551-52, 722-25, 732, 757-58, 785-88, 813, 815, 829-34, 847. The record reflects that switching them would prevent normal, timely, and efficient snow removal operations. *Id.* There was no factual evidence that switching the two vehicles (The

International CDL for the non-CDL V-box) would allow the Colleges to timely complete the necessary grounds work.<sup>37</sup> *Id.* The only testimony in support of Mr. Fey's theory that the switch was reasonable were the unsupported conclusory opinions provided by Mr. Fey and his expert Fred Cutler, which were indisputably based upon the incorrect assumption that the two campuses had the exact same equipment needs. RP 284-85, 287, 692, 702-15. Neither Mr. Fey nor Mr. Cutler had any factual information about the SCC campus to support their opinions. The Colleges' case presented evidence that necessary snow removal activities could not be performed without more CDL drivers and that it was unduly expensive to hire temporary workers to drive the CDL equipment when the grounds employees were not licensed. *See* Colleges' Br. at 3-6, 8-9. If waiver of a legitimate job qualification is allowed to proceed under a reasonable accommodation theory, then the employer should be entitled to a correct instruction on the undue burden defense enabling the argument that waiving the job qualification created an undue burden. Providing an erroneous instruction on the standard for the undue burden defense was

---

<sup>37</sup> Fey argues the non-CDL equipment had an automatic transmission, so it was easier or preferable to drive and that more than one non-CDL vehicle could be used to fill in for the CDL vehicles, such as when the CDL vehicle broke down. Fey's Br. at 8-9, citing RP 253, 559, 473, 595, 563, 602, 606. None of the cited testimony reflects that a singular non-CDL vehicle could do the work of a CDL vehicle in the same time.

not harmless. In addition, the special verdict form did not allow the jury to answer any question on the undue burden. CP 599-600.

**10. Removing Proximate Cause From The Case Is Reversible Error**

Mr. Fey argues that removing the requirement for damages to be proximately caused by discrimination did not create prejudicial error. Mr. Fey argued that he should be entitled to economic damages as if he would have gotten the promotion (1) regardless of whether he lacked the leadership skills and performance record to get the job; (2) regardless of whether other applicants were more qualified than he was; (3) regardless of the fact that he likely never would have been selected for the promotion, even if he were interviewed; and (4) regardless of the fact that his supervisor would not give him the necessary recommendation to promote internally, which was required for the promotion. Mr. Fey argued that the fact that he would never have been hired for the promotion due to his poor performance was not at issue. RP 78. The longstanding law in Washington is that damages need to be reasonably certain and proximately caused. App. N; CP 350-51, 624, WPI 330.81, Comments to WPI 15.01. Proximate cause of damages is not eliminated in a discrimination case. *See* *Colleges' Br.* at 21-23. It was reversible error to exclude evidence and instructions on proximate cause. The trial court excluded the term

“proximate cause” from the WPI on damages, refused to define proximate cause, and excluded it from the special verdict form. *See* App. N, P. The error was preserved for appeal. RP 940-45, 973-81.

The trial court also excluded the admission of any evidence challenging proximate cause. The jury never got to hear the relevant evidence that Mr. Fey did not have the skills and abilities to be a lead, even if the CDL qualification was not applied to him. *See* Colleges’ Br. at 35-40; *Lloyd v. Swifty Transp. Inc.*, 552 F.3d 594 (7th Cir. 2009) (possessing the necessary leadership skills is a relevant qualification, in addition to the CDL requirement). The trial court allowed Mr. Fey to argue that he was an excellent, hard-working employee, who deserved a promotion; and in direct contrast to this, prohibited the Colleges from presenting the abundant evidence that (1) Mr. Fey lacked any leadership or communication skills necessary to be a lead; (2) he would never have been recommended by his supervisor for the promotion even if a CDL was not required due to his poor performance; and (3) Mr. Fey was not the excellent hard-working employee as self-described.<sup>38</sup> RP 983-84. It is

---

<sup>38</sup> It was undisputed that the predominate lead duties required good leadership skills, good relations with coworkers and supervisors, accountability, trustworthiness, and strong communication skills. RP 315-16, 414-17, 422, 449-50, 795, 797, 886; Ex. 12, 13. Mr. Fey was aware his supervisor would not support him in promoting to a lead position even before the CDL requirement went into effect. RP 477; CP 35-51, 346. All of Mr. Fey’s coworkers and supervisors would have testified, if permitted, that all the other promotional candidates had better leadership skills than Mr. Fey. CP 16-22, 35-51, 268-71, 472-77.

inconceivable that performance and qualifications should not be considered a factor in claiming lost economic damages in a promotional process.

Mr. Fey does not disagree that the trial court erred, but he argues that the errors were harmless. It is not harmless error when a party is prevented from arguing its case and the jury only hears one side of the evidence, which is what happened in this case. *See State v. Vander Houwen*, 163 Wn.2d 25, 28, 177 P.3d 93 (2008); *State v. Russell*, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). Mr. Fey was not qualified for the promotion, and consequently he could not establish that the Colleges were the proximate cause of any damage he experienced. An unqualified, problem employee had no reasonable expectation that he would be promoted.

**11. The Special Verdict Form Was Misleading And Failed To Account For Any Defense**

The special verdict form asked leading questions in favor of Plaintiff and prevented any consideration of the applicable defenses. App. P: CP 599-600, CP 625-26. The objection was preserved. RP 939-41, 940-45, 973-75. *See Colleges' Br.* at 31-32.

**D. The Evidentiary Rulings And Comments On The Evidence Were Prejudicial To The Colleges**

The trial court excluded relevant evidence, impairing the Colleges' ability to put on a defense. The errors were numerous and cumulative and the Colleges set out the evidentiary errors in the Appellants opening brief in section VIII meeting the requirements of RAP 10.4(a)(4). *See* Colleges' Br. at 32-43. There is no legitimate argument to support the trial court's evidentiary rulings that significantly limited the presentation of evidence in Mr. Fey's favor, and none is presented by him in his response brief. Mr. Fey fails to respond to the numerous evidentiary errors, the collective weight of which demonstrates a manifest abuse of discretion on the part of the trial judge which in itself necessitates reversal.

**E. Mr. Fey Is Required To Mitigate The Claimed Lost Economic Damages**

The law on mitigation requires that Mr. Fey make reasonable efforts to replace any claimed lost promotional wages by looking for comparable positions or openings "elsewhere." WPI 330.83; CP 589, RP 959-64.<sup>39</sup> Mr. Fey argued that because he was so happy with his GNS3 position, he should not have to look for any job with equivalent pay to the GNS4 promotion, but there is no legal authority to support his argument in

---

<sup>39</sup> Mitigation was the only instruction requested by the defense that was given, but the special verdict form failed to set out a question for the jury to assess mitigation. The Colleges preserved this error. CP 615, 599-600.

this regard. The law requires that he try to replace the promotional wages, and the facts demonstrated that Mr. Fey failed to look for comparable paying jobs elsewhere. RP 383, 279-80, 345-56, 376-77, 383.

**F. The Trial Court Failed To Apply The Correct Standard Under The Law In Granting The Additur And Attorney's Fees**

Mr. Fey testified that (1) he loved his GNS3 job; (2) he did not want to look for promotional pay elsewhere. RP 383:5-8, 279-80, 345-56, 376-77, 383; (3) he was not disappointed when he was turned down for other promotions. RP 336-37, 381, 620-24, 743; (4) he was satisfied with being grandfathered into his GNS3 position, understanding that it was reasonable for the employer to require certain positions to have a CDL. RP 279-80, 383:5-8, 345-56, 376-77, 383; and (5) he understood he would need a CDL to advance. RP 257. In addition, the jury found there were no lost future wages, confirming their decision that Mr. Fey was not forever frozen in pay as claimed. CP 599-600. It was conceded several times that there was no evidence Mr. Fey would have gotten the promotion if he had been interviewed. RP 78-79, 170-71, 1057-58. A claim for emotional distress in the amount of \$50,000 was premised on a theory that Mr. Fey was forever frozen in his job and prohibited from promoting with the Colleges. RP 1025-26. The evidence indicated that this claim was not true because the maintenance mechanic position was a promotion that was

higher paying than the GNS4 position, and it did not require a CDL. RP 336-37, 381, 620-24, 743. Mr. Fey testified that he was qualified for the maintenance mechanic position, but he was never interviewed for the maintenance mechanic position. RP 337, 381, 743. Mr. Fey's wife and the person who interviewed Mr. Fey testified that he was interviewed for the maintenance mechanic position. RP 337, 381, 743. The jury had reason to question Mr. Fey's credibility and veracity.<sup>40</sup> The jury may reasonably find that failing to interview Mr. Fey for a job that there was no evidence he would get did not cause him any emotional distress, especially since he claimed he did not have any distress about being turned down for other promotions. RP 599-600. Both Mr. Fey and his attorneys submitted that the sole basis for the claimed emotional distress was that the CDL requirement would "forever" prevent him from advancing or cause him to be "frozen" in his current position, but the jury did not find him to be frozen from advancement and denied all claimed future lost wages. RP 1025-26; CP 599-600. The jury's finding no emotional distress damages from the claim that Mr. Fey was frozen in his position was consistent with the evidence in the record and the denial of any lost future wages.<sup>41</sup>

---

<sup>40</sup> The trial court limited much evidence that demonstrated Mr. Fey's lack of credibility. RP 330.

<sup>41</sup> The jury verdict awarded \$7,549 to plaintiff based upon the premise that the Colleges did not engage in the mandatory interactive process. CP 637-41, 649-53, 599-600.

However, the trial court replaced the jury's judgment on emotional distress damages with its own judgment based solely on the premise that the trial court "believed" Mr. Fey looked distressed when he testified. CP 900-07. The evaluation of matters pertaining to the credibility of witnesses, conflicting testimony, and the persuasiveness of the evidence are the exclusive province of the jury. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The correct standard for an additur requires the trial court to evaluate whether the evidence on emotional distress was undisputed, not whether the trial court has a different view of the plaintiff's credibility than the jury. The trial court impermissibly substituted his own judgment and awarded the maximum amount of damages sought by Mr. Fey for emotional distress. RP 1025-26; CP 896-97, CP 900-07. The trial court also failed to engage in the required process of awarding fees and costs only for successful claims. *Colleges' Br.* at 45-47.

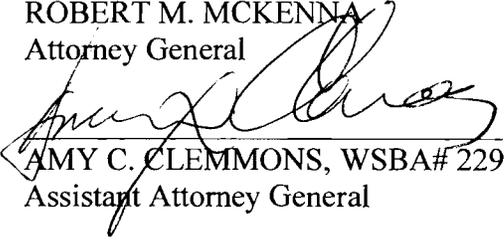
#### **IV. CONCLUSION**

The Colleges did what they are entitled to do under the law, setting reasonable job qualifications based upon legitimate business needs. Under the faulty legal theory presented to the jury in this case, all disabled individuals not who do not meet minimum qualifications would automatically be entitled to promotional wages if their employer only

interviewed more qualified candidates who met the qualifications. The Colleges respectfully request this Court reverse the legal and evidentiary rulings made by the trial court and grant judgment in favor of the Colleges as a matter of law.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of March, 2012.

ROBERT M. MCKENNA  
Attorney General

  
AMY C. CLEMMONS, WSBA# 22997  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

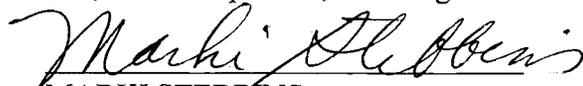
I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Appellants/Cross-Respondents' Reply Brief was hand delivered and filed at the following addresses:

Court of Appeals of Washington, Division III  
500 North Cedar Street  
Spokane, Washington 99201-2159

And one copy delivered to:

William Powell  
Powell, Kuznetz & Parker  
316 W. Boone, Rock Pointe Tower, Suite 380  
Spokane, WA 99201

DATED this 16 day of March, 2012 at Spokane, Washington.

  
MARKI STEBBINS

# **APPENDIX E**

## **Defendants' Proposed Instructions Re: Employer's Right To Set Job Qualifications – Declined by the Court**

**Fey v. CCS**

**Washington State Court Of Appeals, Division III 29912-1-III**

DEFENDANTS' INSTRUCTION REVISED NO. 2

Plaintiff Mark Fey is suing the Defendant, State of Washington, Community Colleges of Spokane, relating to his failure to be hired for the Grounds and Nursery Specialist 4 (GNS4) position at Spokane Community College. The plaintiff claims the defendant discriminated against him based upon a disability by failing to reasonably accommodate a disability. Plaintiff seeks monetary damages. The defendant claims that plaintiff could not meet the bona fide occupational qualifications of the job. Defendant further denies the alleged discrimination and claimed damages.

WPI 20.01 (5th ed.) (modified)

DEFENDANTS' INSTRUCTION NO. 7

A bona fide occupational qualification (BFOQ) exists when a particular quality will contribute to the accomplishment of the purposes of the particular job in question.

*Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 355, 172 P.3d 688 (2007)  
*Shannon v. Pay 'N Save Corp.*, 104 Wn.2d 722, 731, 709 P.2d 799 (1985)  
WAC 162-16-240

DEFENDANTS' INSTRUCTION NO. 13

The prohibition against discrimination because of a disability shall not apply if the particular disability prevents the proper performance of the particular worker involved.

RCW 49.60.180(1)(2010)

**DEFENDANTS' INSTRUCTION NO. 27**

**Driving a commercial motor vehicle without obtaining a commercial driver's license is a serious traffic violation.**

**RCW 46.25.010 (8) (18 (d))**

DEFENDANTS' INSTRUCTION REVISED NO. 6

It is unlawful for an employer to refuse to hire any person because of such person's disability. It is a defense to Mr. Fey's disability discrimination refusal-to-hire/promote claim if the requirement of obtaining a Commercial Drivers License (CDL) is a bona fide occupational qualification for the GNS4 position at Spokane Community College.

To establish that its requirement is a bona fide occupational qualification, Community Colleges of Spokane has the burden of proving each of the following propositions:

- (1) That Community Colleges of Spokane applies the requirement uniformly to all applicants or candidates for the job from September 12, 2007, and after, and
- (2) That all or substantially all individuals who fail to meet the requirement are unable to perform the job safely, efficiently, or lawfully.

If you find from your consideration of all of the evidence that the Community Colleges of Spokane has proved that its decision not to hire Mr. Fey as the GNS4 at Spokane Community College was based upon a bona fide occupational qualification, then you must find in favor of Community Colleges of Spokane. If, however, you find from your consideration of all the evidence that the Community Colleges of Spokane has failed to prove either proposition (1) or (2), then you must consider whether Mr. Fey meets his burden of proving that the Community Colleges of Spokane failed to reasonably accommodate a disability.

WPI 330.04 (5th ed.) (modified)

DEFENDANTS' INSTRUCTION NO. 37

A bona fide occupational qualification defense exists when all or substantially all persons in the class would be unable to efficiently perform the duties of the position and the essence of the operation would be undermined by hiring anyone in the excluded class.

WPI 330.04, *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 646 P.2d 113 (1982).  
In *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 172 P.3d 688 (2007) (current as of October 2010)

[Click here for easy edit version](#)



6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.04 (5th ed.)

Washington Practice Series TM  
Current Through the 2011 Update

Washington Pattern Jury Instructions--Civil  
Washington Supreme Court Committee On Jury Instructions

Part XVI. Employment  
Chapter 330. Employment Discrimination

**WPI 330.04 Employment Discrimination—Refusal to Hire—Bona Fide Occupational Qualification (BFOQ) Defense**

It is unlawful for an employer to refuse to hire any person because of such person's [age] [creed] [disability] [marital status] [national origin] [race] [religion] [gender] [sexual orientation] [honorably discharged veteran status] [military status]. It is a defense to \_\_\_\_\_ refusal-to-hire claim if the requirement of \_\_\_\_\_ is a bona fide occupational qualification.

To establish that [his] [her] [its] requirement is a bona fide occupational qualification, \_\_\_\_\_ has the burden of proving each of the following propositions:

- (1) That \_\_\_\_\_ applies the requirement uniformly to all applicants or candidates for the job; [and]
- (2) [That all or substantially all individuals who fail to meet the requirement are unable to perform the job safely and efficiently];[or] [and] [that excluding individuals was essential to the purposes of the position.]

If you find from your consideration of all of the evidence that \_\_\_\_\_ has proved that [his] [her] [its] decision not to hire \_\_\_\_\_ was based on a bona fide occupational qualification, then you should find in favor of \_\_\_\_\_ [on this claim]. If, however, you find from your consideration of all the evidence that \_\_\_\_\_ has failed to prove either proposition (1) or (2), then your verdict should be in favor of \_\_\_\_\_ [on this claim].

**NOTE ON USE**

Use this instruction as written when the defense of bona fide occupational qualification (BFOQ) is raised in a failure-to-hire case. If there are other claims or issues in the case, such as whether or not the plaintiff met non-discriminatory qualifications for the position, it may be necessary to modify this instruction or add other instructions.

For a discussion of honorably discharged veteran status and military status, see the Comment to WPI 330.01, Employment Discrimination—Disparate Treatment—Burden of Proof.

Select the appropriate bracketed words or phrases.

**COMMENT**

The instruction was revised in 2010 to incorporate statutory amendments that added protected status protection to sexual orientation, honorably discharged veteran status, and military status.

This instruction is written to apply in a failure-to-hire, failure-to-promote, or failure-to-transfer case in light of the specific language of RCW 49.60.180(1). See also RCW 49.60.180(4). It can be modified to apply to other adverse actions that involve the BFOQ defense. In addition to the BFOQ defense, other related special defenses are available in age discrimination cases involving termination of employment. See RCW 49.60.205; RCW 49.44.090.

To establish a valid BFOQ defense, an employer must show that excluding members of the particular protected status group is essential to the purposes of the job. WAC 162-16-240. The

employer must establish that all or substantially all persons in the class would be unable to efficiently perform the duties of the position and the essence of the operation would be undermined by hiring anyone in the excluded class. Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 646 P.2d 113 (1982). In Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 172 P.3d 688 (2007), the employer could not establish that excluding pregnant women was essential to the purposes of clerk/order checker or that all or substantially all pregnant women would be unable to efficiently perform the duties of the position.

*[Current as of October 2010.]*

Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

6A WAPRAC WPI 330.04

END OF DOCUMENT

DEFENDANTS' INSTRUCTION NO. 23

An employer has the right to select the most qualified person for a position. A disabled individual does not have a right to a promotion over a more qualified candidate.

*MacSuga v. Spokane*, 97 Wn.App. 435, 444, 983 P.2d 1167 (1999),  
review denied, 140 Wn.2d (2000)

42 U.S.C. § 12111(10)

*Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 121, 720 P.2d 793 (1986)

*Dean*, 104 Wn.2d at 638, 708 P.2d 393(1985)

*Kellogg v. Union Pacific R.R. Co.*, 233 F.3d 1083, 1089 (8th Cir.2000)

*Mason v. Frank*, 32 F.3d 315, 319 (8th Cir.1994)

(It must follow that an employer is not required to make accommodations that would subvert other, more qualified applicants for the job.)

# APPENDIX F

## WPI 330.34

- **Correct Pattern Instruction**
- **CP 587 – Altered Instruction – Given by the Court**

**Fey v. CCS**

**Washington State Court Of Appeals, Division III 29912-1-III**

[Click here for easy edit version](#)



6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.34 (5th ed.)

Washington Practice Series TM  
Current Through the 2011 Update

Washington Pattern Jury Instructions--Civil  
Washington Supreme Court Committee On Jury Instructions

Part XVI. Employment  
Chapter 330. Employment Discrimination

### **WPI 330.34 Disability Discrimination—Reasonable Accommodation—Definition**

Once an employer is on notice of an impairment, the employer has a duty to inquire about the nature and extent of the impairment. The [employee] [applicant] has a duty to cooperate with [his] [her] employer to explain the nature and extent of the [employee's] [applicant's] impairment and resulting limitations as well as [his] [her] qualifications.

An employer must provide a reasonable accommodation for [a qualified applicant] [an employee] with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. The obligation to reasonably accommodate applies to all aspects of employment, and an employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation.

[There may be more than one reasonable accommodation of a disability.]

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.

#### **NOTE ON USE**

Select the bracketed designation in the second sentence as appropriate to the facts of the case.

The bracketed sentence is to be used in an appropriate case when there is a disagreement as to which of several accommodations might be considered reasonable.

The list of accommodations in the instruction's final paragraph is not exclusive.

Use this instruction together with WPI 330.33 (Disability Discrimination—Reasonable Accommodation—Burden of Proof), and in appropriate cases with WPI 330.36 (Disability Discrimination—Undue Hardship) and WPI 330.37 (Essential Function—Definition).

#### **COMMENT**

The instruction was revised in 2010. The primary change was to add the instruction's first paragraph on the interactive process created by the employer's and employee's duties in exploring reasonable accommodations. See the Comment to WPI 330.33, Disability Discrimination—Reasonable Accommodation—Burden of Proof (also addressing other issues related to this instruction).

With regard to the bracketed sentence, see Doe v. Boeing Co., 121 Wn.2d 8, 846 P.2d 531 (1993), in which the court stated that "the Act does not require the employer to offer the precise accommodation which [the plaintiff] requests." 121 Wn.2d at 20.

If an employee becomes disabled and cannot be accommodated in his or her position, the employer must take affirmative steps to help the employee identify and apply for any vacant position for which the employee is qualified. Davis v. Microsoft Corp., 149 Wn.2d 521, 536-37, 70 P.3d 126 (2003); Clarke v. Shoreline School Dist. No. 412, 106 Wn.2d 102, 120, 720 P.2d 793 (1986); Dean v. Municipality of Metropolitan Seattle-Metro, 104 Wn.2d 627, 636, 708 P.2d 393 (1985); see also Havlina v. Washington State Dept. of Transp., 142 Wn.App. 510, 178 P.3d 354 (2007) (the individual

state agency is the employer, not the State of Washington). "The employee's reciprocal duties include informing the employer of his qualifications, 'applying for all jobs which might fit his abilities,' and 'accepting reasonably compensatory work he could perform.'" Davis v. Microsoft Corp., 149 Wn.2d at 537 (quoting *Dean*).

A requested accommodation to transfer to a different supervisor is considered unreasonable as a matter of law. See Snyder v. Medical Service Corp. of Eastern Washington, 145 Wn.2d 233, 35 P.3d 1158 (2000); see also RCW 49.60.040(7)(d), and the Comment to WPI 330.33, Disability Discrimination—Reasonable Accommodation—Burden of Proof.

For an additional discussion of reasonable accommodation issues, see Pulcino v. Federal Express Corp., 141 Wn.2d 629, 9 P.3d 787 (2000); Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 23 P.3d 440 (2001).

*[Current as of October 2010.]*

Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

6A WAPRAC WPI 330.34

END OF DOCUMENT

**INSTRUCTION NO. \_\_\_\_\_**

Under Washington law, the employer must provide a reasonable accommodation for an employee with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. The obligation to reasonably accommodate applies to all aspects of employment, and an employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation.

There may be more than one reasonable accommodation of a disability. A reasonable accommodation may include adjustments in job duties, 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.

# APPENDIX G

- **2010 WPI 330.35 - Withdrawn**
- **2004 Previous WPI 330.35**
- **CP 578 & 585 - Given by the Court**
- **CP 433 Defendants' Proposed – Declined by the Court**

**Fey v. CCS**

**Washington State Court Of Appeals, Division III 29912-1-III**

[Click here for easy edit version](#)

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.35 (5th ed.)



Washington Practice Series TM  
Current Through the 2011 Update

Washington Pattern Jury Instructions--Civil  
Washington Supreme Court Committee On Jury Instructions

Part XVI. Employment  
Chapter 330. Employment Discrimination

**WPI 330.35 Disability Discrimination—Reasonable Accommodation—Employer Notice and Employee's Duty to Cooperate**

(WITHDRAWN)

**COMMENT**

The instruction was withdrawn in 2010. This topic is now covered in other instructions in this chapter.

*[Current as of October 2010.]*

Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

6A WAPRAC WPI 330.35

END OF DOCUMENT

**WPI 330.35****DISABILITY DISCRIMINATION—REASONABLE  
ACCOMMODATION—EMPLOYER NOTICE AND  
EMPLOYEE’S DUTY TO COOPERATE**

If a disability is not known to the employer, the employee must give the employer notice of the disability. The employer then has a duty to inquire regarding the nature and extent of the disability, and the employee has a duty to cooperate with the employer’s efforts by explaining the employee’s disability and qualifications. The employer must then take positive steps to accommodate the employee’s limitations.

## NOTE ON USE

When applicable, use this instruction together with WPI 330.33, Disability Discrimination—Reasonable Accommodation—Burden of Proof.

## COMMENT

The duty of reasonable accommodation does not arise until the employer is “‘aware of respondent’s disability and physical limitations.’” *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408, 899 P.2d 1265 (1995), quoting *Holland v. Boeing Co.*, 90 Wn.2d 384, 391, 583 P.2d 621 (1978). If the disability is not otherwise known to the employer, the employee must give the employer notice of the disability; the employer then must take “‘positive steps’ to accommodate the employee’s limitations.” 127 Wn.2d at 408, 899 P.2d 1265. Once given notice, the employer has a “duty to inquire” regarding the nature and extent of the disability, while the employee has a duty to cooperate with the employer’s efforts by explaining the employee’s disability and qualifications. *Goodman*, 127 Wn.2d at 408–09, 899 P.2d 1265; *Hume v. American Disposal*, 124 Wn.2d 656, 880 P.2d 988 (1994); *Sommer v. Department of Soc. & Hlth. Svcs.*, 104 Wn.App. 160, 15 P.3d 664, review denied 144 Wn.2d 1007, 29 P.3d 719 (2001).

*[Current as of April 2004.]*

**INSTRUCTION NO. 5**

The plaintiff claims that the defendant discriminated against him in one or more of the following respects:

- By failing to engage in the mandatory interactive process required for reasonable accommodation of his disability.
- By failing to consider plaintiff for the Grounds and Nursery 4 position when he was able to perform the essential functions of the position.
- By failing to consider altering the Grounds and Nursery 4 conditions of employment to accommodate plaintiff's disability.

The defendant denies these claims. The defendant further denies that plaintiff was injured or sustained damage.

**INSTRUCTION NO. \_\_\_\_\_**

If a disability is not known to the employer, the employee must give the employer notice of the disability. The employer then has an affirmative obligation to engage in the interactive process. The employer has a duty to inquire regarding the nature and extent of the disability, and the employee has a duty to cooperate with the employer's efforts by explaining the employee's disability and qualifications. The employer must then take positive steps to accommodate the employee's limitations.

DEFENDANTS' PROPOSED INSTRUCTION NO. 25

The failure of an employer to engage in an interactive process is not a violation of the Washington Law Against Discrimination. Rather, the failure to engage in an interactive process must lead to the failure to identify a reasonable accommodation that enabled the employee to perform all the essential functions of the job.

*See* WPI 330.33

*See Dark v. Curry County*, 451 F.3d 1078, 1088 (9<sup>th</sup> Cir. 2006) (interpreting ADA)  
*See Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 752-753 (9<sup>th</sup> Cir. 1998), overruled on other grounds,  
535 U.S. 391 (2002) (interpreting ADA)  
*See Hennagir v. Utah DOC*, 587 F.3d 1255, 1256 (10<sup>th</sup> Cir. 2009) (interpreting ADA)

# **APPENDIX H**

## **Defendants' Proposed Instructions Declined**

- **CP 339 - Employee's Duty to Accept Work He Can Do**
- **CP 345 - Employer's Duty is Satisfied Even if Plaintiff Wants More**

**Fey v. CCS**

**Washington State Court Of Appeals, Division III 29912-1-III**

DEFENDANTS' INSTRUCTION NO. 8

A disabled worker has a duty to cooperate with his employer in efforts to reasonably accommodate his physical limitations and by accepting reasonable work the employee could perform.

*Dean v. Metro*, 104 Wn.2d 627, 637, 708 P.2d 393 (1985)  
*Molloy v. City of Bellevue*, 71 Wn. App. 382, 391, 859 P.2d 613 (1993)  
*Michelson v. Boeing Co.*, 63 Wn. App. 917, 922, 826 P.2d 214 (1991)  
*Simmerman v. U-Haul Co.*, 57 Wn. App. 682, 687, 789 P.2d 763 (1990)  
*Calhoun v. Liberty Northwest Ins. Co.*, 789 F. Supp. 1540, 1547 (W.D. Wash. 1992)  
29 C.F.R. §1630.9 and §1630.14(c)  
29 C.F.R. App. §1630.9 and §1630.14(c)

DEFENDANTS' INSTRUCTION NO. 14

An employer is required to provide accommodations which are medically necessary to perform the essential functions of the job.

An employer is not required to provide the specific accommodation requested by the employee. When an employer offers an accommodation that is reasonable, its legal obligation is satisfied.

*Doe v. Boeing*, 121 Wn.2d 8, 20, 846 P.2d 531 (1993)  
*Griffith v. Boise Cascade, Inc.*, 111 Wn.App. 436, 443, 45 P.3d 589 (2002)  
*Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 640, 9 F.3d 787 (2000)

# **APPENDIX I**

**Defendants' Proposed Instructions Declined Re:**

**The Law That an Employer is Not Required to  
Modify a Job**

**Fey v. CCS**

**Washington State Court Of Appeals, Division III 29912-1-III**

DEFENDANTS' INSTRUCTION NO. 16

The law does not require an employer to eliminate, remove, modify or reassign essential job functions to others in order to accommodate an employee with a disability.

An employer also is not required to change the nature of the employer's operation as an accommodation.

*Davis v. Microsoft Corp.*, 149 Wn.2d 521, 536, 70 P.3d 126 (2003)  
*MacSuga v. County of Spokane*, 97 Wn. App. 435, 444, 983 P.2d 1167, 1172 (1999)  
*Pulcino v. Federal Express*, 141 Wn.2d 629, at 644, 9 P.3d 787 (2000), overruled on other grounds by *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006) ("An employer, ... is not required ... to create a new position, to alter the fundamental nature of the job, or to eliminate or reassign essential job functions.")  
*Hill*, 144 Wn.2d at 193  
*Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006)  
*Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 45 P.3d 589 (2002),  
(An employer is not required to remove or modify essential functions of a position in order to accommodate an employee.)

DEFENDANTS' INSTRUCTION NO. 17

An employer may discharge a handicapped employee who is unable to perform an essential function of the job. It is not reasonable to require an employer to shift the essential job responsibility to other employees or perform the job in a less efficient manner.

DEFENDANTS' INSTRUCTION NO. 30

An employer is not required to reorganize its workforce or structure individual jobs.

*Davis*, 149 Wn.2d at 536, 70 P.3d 126

# **APPENDIX J**

## **WPI 330.37**

- **CP 586 – Given by the Court**
- **CP 342 – Declined by the Court**

**Fey v. CCS**

**Washington State Court Of Appeals, Division III 29912-1-III**

[Click here for easy edit version](#)



6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.37 (5th ed.)

Washington Practice Series TM  
Current Through the 2011 Update

Washington Pattern Jury Instructions--Civil  
Washington Supreme Court Committee On Jury Instructions

Part XVI. Employment  
Chapter 330. Employment Discrimination

**WPI 330.37 Essential Function—Definition**

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.]

6A WAPRAC WPI 330.37

END OF DOCUMENT

**INSTRUCTION NO. 13**

The term "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. An employer is not required to eliminate an essential function of a job to accommodate a disabled employee.

**Essential functions are not qualification standards.**

DEFENDANTS' INSTRUCTION NO. 11

The essential functions of a job are the position's fundamental duties. Essential functions do not include the marginal or incidental functions of the job. In determining whether a function is essential to a position, you should consider:

- (1) Whether the reason the position exists is to perform 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.

# **APPENDIX K**

**Defendants' Proposed Instructions Declined:**

**Clarifying the Correct Meaning of "Conditions of Employment"**

**Fey v. CCS**

**Washington State Court Of Appeals, Division III 29912-1-III**

DEFENDANTS' INSTRUCTION NO. 35

The Employer will determine when a position will be filled, the type of appointment to be used when filling the position, and the skills and abilities necessary to perform the duties of the specific position within a job classification. The Employer will consider internal promotional candidates prior to considering other candidates. Consideration will be limited to employees who have the skills and abilities required for the position.

DEFENDANTS' INSTRUCTION NO. 34

Conditions of employment are defined as things affecting working conditions. The phrase does not, however, include managerial decisions, which lie at the core of entrepreneurial control. The term is intended to address factors impacting employee benefits, physical conditions, or the environment in which the work is performed.

5 U.S.C. 7103(a)(14); *Briggs v. Nova Services*, 166 Wn.2d 794, 803-4, 213 P.3d 910 (2009), citing *Ford Motor Co. v. National Labor Relations Board*, 441 U.S. 488, 498, 99 S. Ct. 1842, 60 L.Ed.2d 420 (1979), (quoting *Fibreboard Paper Prods. Corp. v. National Labor Relations Board*, 379 U.S. 203, 223, 85 S. Ct. 398, 13 L.Ed.2d 233 (1964) (Stewart, J., concurring)). Managerial decisions include the choice of one's supervisor, *Trompler*, 338 F.3d at 749, and the wisdom of company practices, cf. *First National Maintenance Corp.*, 452 U.S. at 676, 101 S. Ct. 2573



**Effective: July 7, 2004**

United States Code Annotated Currentness  
 Title 5. Government Organization and Employees (Refs & Annos)  
 Part III. Employees (Refs & Annos)  
 Subpart F. Labor-Management and Employee Relations  
 ◻ Chapter 71. Labor-Management Relations (Refs & Annos)  
 ◻ Subchapter I. General Provisions  
 →→ § 7103. Definitions; application

(a) For the purpose of this chapter--

(1) "person" means an individual, labor organization, or agency;

(2) "employee" means an individual--

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include--

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the Agency for International Development, the Department of Agriculture, or the Department of Commerce; or

(13) "confidential employee" means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

(15) "professional employee" means--

(A) an employee engaged in the performance of work--

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

(16) "exclusive representative" means any labor organization which--

(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111

# **APPENDIX L**

**Defendants' Proposed Instructions Declined Re:  
Applicable Legal and Contractual Requirements**

**Fey v. CCS**

**Washington State Court Of Appeals, Division III 29912-1-III**

DEFENDANTS' INSTRUCTION NO. 24

Washington law provides that:

- 1) "Commercial driver's license" (CDL) means a license issued to an individual under chapter 46.20 RCW that has been endorsed in accordance with the requirements of this chapter to authorize the individual to drive a class of commercial motor vehicle.
- 2) Commercial motor vehicle" means a motor vehicle that:
  - (a) Has a gross vehicle weight rating of 11,794 kilograms or more (26,001 pounds or more) inclusive of a towed unit with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds or more); or
  - (b) Has a gross vehicle weight rating of 11,794 kilograms or more (26,001 pounds or more); If the GVWR of any unit cannot be determined, the actual gross weight will be used. If a vehicle with a GVWR of less than 11,794 kilograms (26,001 pounds or less) has been structurally modified to carry a heavier load, then the actual gross weight capacity of the modified vehicle.

RCW 46.25.010 (3), (6), (12)

**DEFENDANTS' INSTRUCTION NO. 27**

**Driving a commercial motor vehicle without obtaining a commercial driver's license is a serious traffic violation.**

**RCW 46.25.010 (8) (18 (d))**

**DEFENDANTS' INSTRUCTION REVISED NO. 18**

State civil service employees have transfer opportunities under the following regulations.

**WAC 357-19-180** – Permanent employees may request to transfer to another position in the same class or a different class with the same salary range maximum as long as the employee meets the competencies and other position requirements. The employer may require the employee to serve a trial service period following a transfer.

**WAC 357-19-180**

DEFENDANTS' INSTRUCTION NO. 35

The Employer will determine when a position will be filled, the type of appointment to be used when filling the position, and the skills and abilities necessary to perform the duties of the specific position within a job classification. The Employer will consider internal promotional candidates prior to considering other candidates. Consideration will be limited to employees who have the skills and abilities required for the position.

# **APPENDIX M**

## **WPI 330.36**

- **CP 588 - WPI 330.36 As Altered by the Trial Court**
- **CP 343 - Defendants' Proposed WPI 330.36 – Declined by the Court**

**Fey v. CCS**

**Washington State Court Of Appeals, Division III 29912-1-III**

[Click here for easy edit version](#)



6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.36 (5th ed.)

Washington Practice Series TM  
Current Through the 2011 Update

Washington Pattern Jury Instructions--Civil  
Washington Supreme Court Committee On Jury Instructions

Part XVI. Employment  
Chapter 330. Employment Discrimination

### **WPI 330.36 Disability Discrimination—Undue Hardship**

An employer is not required to accommodate an employee's disability if it would impose an undue hardship on the operation of the employer's business. \_\_\_\_\_ has the burden of proving that an accommodation would impose an undue hardship on \_\_\_\_\_.

An accommodation is an undue hardship if the cost or difficulty is unreasonable, considering:

- (1) The size of and the resources available to the employer;
- (2) Whether the cost can be included in planned remodeling or maintenance; and
- (3) The requirements of contracts.

#### **NOTE ON USE**

Under certain circumstances, non-cost factors also may support an undue hardship instruction. This instruction should be modified as necessary under such circumstances.

Use this instruction with WPI 330.34, Disability Discrimination—Reasonable Accommodation—Definition.

#### **COMMENT**

**Employer's burden.** This instruction is based on WAC 162-22-075, which provides as follows:

An employer, employment agency, labor union, or other person must provide reasonable accommodation unless it can prove that the accommodation would impose an undue hardship. An accommodation will be considered an undue hardship if the cost or difficulty is unreasonable in view of:

- (1) The size of and the resources available to the employer;
- (2) Whether the cost can be included in planned remodeling or maintenance; and
- (3) The requirements of other laws and contracts, and other appropriate considerations.

If the restrictions of "other laws" are a part of the employer's argument about undue hardship, the jury should be specifically instructed as to the requirements of the other laws at issue. The instruction likewise will need to be modified to address any "other appropriate considerations" that might apply to a given case.

Failure to give this instruction may be error if there is an issue of reasonableness of accommodation or undue hardship. Erwin v. Roundup Corp., 110 Wn.App. 308, 40 P.3d 675 (2002). Erwin implicitly approved the former version of this instruction.

Jurors may be confused if the court fails to inform them that the defendant must prove that a proposed accommodation would be an undue hardship. See Easley v. Sea-Land Service, Inc., 99

Wn.App. 459, 471-72, 994 P.2d 271 (2000). See Griffith v. Boise Cascade, Inc., 111 Wn.App 436, 442-43, 45 P.3d 589 (2002) (an accommodation may be an undue burden on the defendant and therefore unreasonable). See also Wheeler v. Catholic Archdiocese of Seattle, 65 Wn.App. 552, 829 P.2d 196 (1992), reversed on other grounds, 124 Wn.2d 634, 880 P.2d 29 (1994).  
*[Current as of October 2010.]*

Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

6A WAPRAC WPI 330.36

END OF DOCUMENT

Copyright (C) 1992 West Publishing Co.

DEFENDANTS' INSTRUCTION NO. 12

An employer is not required to accommodate an employee's disability if it would impose an undue hardship on the operation of the employer's business. Community Colleges of Spokane has the burden of proving that an accommodation would impose an undue hardship on their operations.

An accommodation is an undue hardship if the cost or difficulty is unreasonable, considering:

- (1) The size of and the resources available to the employer;
- (2) Requirements of law;
- (3) Safety and liability risks; and
- (4) The requirements of contracts.

# APPENDIX N

## WPI 330.81

- **WPI 330.81 As Altered by the Trial Court: CP 590 - (Eliminating Requirement for Damages to be Proximately Caused) – Given by the Court**
- **Defendants' Proposed Instructions Defining Proximate Cause and Damages: WPI 15.01, CP 624, 350, 351 – Declined by the Court**

**Fey v. CCS**

**Washington State Court Of Appeals, Division III 29912-1-III**

[Click here for easy edit version](#)



6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.81 (5th ed.)

Washington Practice Series TM  
Current Through the 2011 Update

Washington Pattern Jury Instructions--Civil  
Washington Supreme Court Committee On Jury Instructions

Part XVI. Employment  
Chapter 330. Employment Discrimination

### **WPI 330.81 Damages—Employment Discrimination—Economic and Non-Economic**

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

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

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

(here insert undisputed items and amounts)

In addition] you should consider the following elements:

(1) [The reasonable value of lost past earnings and fringe benefits, from the date of the wrongful conduct to the date of trial;]

(2) [The reasonable value of lost future earnings and fringe benefits;]

(3) [The physical harm to the plaintiff;] [and]

(4) [The emotional harm to the plaintiff caused by the [defendant's] [defendants'] wrongful conduct, including [emotional distress] [loss of enjoyment of life] [humiliation] [pain and suffering] [personal indignity, embarrassment, fear, anxiety, and/or anguish] experienced and with reasonable probability to be experienced by the plaintiff in the future.]

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

Any award of damages must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure [emotional distress] [loss of enjoyment of life] [humiliation] [pain and suffering] [personal indignity, embarrassment, fear, anxiety, and/or anguish]. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

#### **NOTE ON USE**

Use the first bracketed phrase when there are undisputed items of damages.

Use the bracketed paragraphs regarding elements of compensatory damages for which there is an evidentiary basis in the case. Do not use the numbers in the instruction; they are set out for discussion purposes. The numbered paragraphs include the most common elements of damages in employment discrimination cases. For guidance as to other damage issues, see WPI 30.05, Measure of Damages—Elements of Noneconomic Damages—Disability and Disfigurement, through WPI 30.09.02, Measure of Economic Damages—Elements of Future Damages—Domestic Services/Nonmedical Expenses.

If there is a claim for wage loss, use the instruction with WPI 331.83, Damages—Mitigation—Wage Loss. If there is an issue regarding the amount of damages for emotional distress attributable to the defendant, it may also be appropriate to give a version of WPI 30.17 (Aggravation of Pre-Existing Condition) or WPI 30.18 (Previous Infirm Condition), and/or WPI 33.02 (Avoidable Consequences—

Failure to Secure Treatment).

When there is a claim for future lost wages, using paragraph (2), use this instruction with WPI 330.82, Damages—Discrimination—Future Lost Earnings (Front Pay). Practitioners should note that there are offsets against economic damages, including earned income and failure to mitigate. See WPI 330.83 (Damages—Mitigation—Wage Loss), and/or WPI 33.03 (Avoidable Consequences—Property or Business), or WPI 303.06 (Contract—Mitigation of Damages) for instructions on mitigation.

For a definition of proximate cause, use WPI 15.01, Proximate Cause—Definition, or WPI 15.01.01, Proximate Cause—Definition—Alternative.

## COMMENT

This instruction is based upon RCW Chapter 49.60, WPI 30.01.01, and numerous cases more specifically analyzing damage issues.

As in a typical personal injury case, the burden of proving damages rests with the plaintiff. In employment discrimination cases, plaintiffs are entitled to recover for personal injuries for emotional distress, humiliation, and pain and suffering. See Ellingson v. Spokane Mortg. Co., 19 Wn.App. 48, 573 P.2d 389 (1978); Dean v. Municipality of Metropolitan Seattle-Metro, 104 Wn.2d 627, 708 P.2d 393 (1985). Cf. Cagle v. Burns and Roe, Inc., 106 Wn.2d 911, 726 P.2d 434 (1986) (wrongful termination). Plaintiffs must also prove economic damages.

A plaintiff may recover damages for emotional distress so long as he or she presents evidence sufficient to support a damages award. Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 116 P.3d 381 (2005). Plaintiff must produce "evidence of anguish and distress." 155 Wn.2d at 181. The plaintiff need only produce "sufficient evidence to convince an 'unprejudiced, thinking mind' of his anguish." 155 Wn.2d at 181. Such evidence can be provided by the plaintiff's own testimony; evidence from a health care professional is not required to prove emotional distress. 155 Wn.2d at 181. Corroboration is helpful, but the jury is the ultimate decision maker. 155 Wn.2d at 181.

In some cases a plaintiff may recover damages for injuries sustained outside the limitations period. Adopting the reasoning in National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), the court in Antonius v. King County held that in a hostile work claim, an employer may be liable for acts of harassment which occurred outside the three-year statute of limitations so long as one or more acts of harassment occurred within the limitations period. Antonius v. King County, 153 Wn.2d 256, 103 P.3d 729 (2005). It is the court's responsibility to determine whether acts "are part of the same actionable hostile work environment." 153 Wn.2d at 271.

Under RCW Chapter 49.60, damages might be taxable income to the plaintiff. A plaintiff may recover an offset for the federal income tax consequences of a damages award under RCW 49.60.030 (2). Blaney v. International Association of Machinists And Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 87 P.3d 757 (2004) (the offset is recoverable under RCW 49.60.030(2)'s "other appropriate remedy" language rather than as actual damages).

Disability benefits are not offset against wage loss if the disability benefits are a fringe benefit. Xieng v. Peoples Nat. Bank of Washington, 120 Wn.2d 512, 844 P.2d 389 (1993). Disability benefits may be an offset against past and future wage loss when used as an indemnification by the employer against future liability. 120 Wn.2d at 525-26. Xieng discusses how to analyze when disability may be considered indemnification. Unemployment compensation benefits are not an offset against an award of damages for economic loss, because they come from a collateral source. Hayes v. Trulock, 51 Wn.App. 795, 803-804, 755 P.2d 830 (1988); Johnson v. Weyerhaeuser Co., 134 Wn.2d 795, 799-800, 953 P.2d 800 (1998); see also Wheeler v. Catholic Archdiocese of Seattle, 65 Wn.App. 552, 568-69, 829 P.2d 196 (1992) (dictum), reversed on other grounds, 124 Wn.2d 634, 880 P.2d 29 (1994).

An employer's immunity under RCW Title 51, the workers compensation statutes, does not preclude a claim for damages under RCW Chapter 49.60 for physical injuries and emotional harm. Goodman v. Boeing Co., 127 Wn.2d 401, 899 P.2d 1265 (1995). It is important to note that there will often be offsets of or subrogation to workers compensation benefits. See Goodman v. Boeing Co., supra; Wheeler v. Catholic Archdiocese of Seattle, 124 Wn.2d 634, 880 P.2d 29 (1994); and Reese v. Sears Roebuck & Co., 107 Wn.2d 563, 731 P.2d 497 (1987), overruled on other grounds in Phillips v. City of Seattle, 111 Wn.2d 903, 766 P.2d 1099 (1989).

An employee who successfully proves a violation of RCW 49.60.180(3) has a claim for damages

under this statute. The employee is not required to prove a separate claim that he or she was discharged or constructively discharged in order to seek damages for front and back pay. Martini v. Boeing Co., 137 Wn.2d 357, 363-64, 367-69, 370-72, 971 P.2d 45 (1999); RCW 49.60.030(2).  
*[Current as of October 2010.]*

Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

6A WAPRAC WPI 330.81

END OF DOCUMENT

Copyright (C) 1992 West Publishing Co.

**INSTRUCTION NO. 17**

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

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

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

(1) The reasonable value of lost past earnings and fringe benefits, from the date of the wrongful conduct to the date of trial;

(2) The emotional harm to the plaintiff caused by the defendant's wrongful conduct, including emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish experienced and with reasonable probability to be experienced by the plaintiff in the future.

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

Your award must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

[Click here for easy edit version](#)



6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.01 (5th ed.)

Washington Practice Series TM  
Current Through the 2011 Update

Washington Pattern Jury Instructions--Civil  
Washington Supreme Court Committee On Jury Instructions

Part II. Negligence—Risk—Misconduct—Proximate Cause  
Chapter 15. Proximate Cause

### **WPI 15.01 Proximate Cause—Definition**

The term “proximate cause” means a cause which in a direct sequence [unbroken by any superseding cause,] produces the [injury] [event] complained of and without which such [injury] [event] would not have happened.

[There may be more than one proximate cause of an [injury] [event].]

#### **NOTE ON USE**

This instruction is the standard definition of proximate cause. For alternative wording, see WPI 15.01.01, Proximate Cause—Definition—Alternative.

When the substantial factor test of proximate causation applies, use WPI 15.02, Proximate Cause—Substantial Factor Test, instead of WPI 15.01 or WPI 15.01.01.

Use bracketed material as applicable. Use the bracketed phrase about a superseding cause when it is supported by the evidence. If this bracketed phrase is used, then WPI 15.05, Negligence—Superseding Cause, must also be used.

The last sentence in brackets should be given only when there is evidence of a concurring cause. If the last sentence is used, it may also be necessary to give WPI 15.04, Negligence of Defendant Concurring with Other Causes.

#### **COMMENT**

**Elements of proximate cause.** Proximate cause under Washington law recognizes two elements: cause in fact and legal causation. See Christen v. Lee, 113 Wn.2d 479, 507, 780 P.2d 1307 (1989); Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985), and cases cited therein. Cause in fact refers to the “but for” consequences of an act — the physical connection between an act and an injury. WPI 15.01 describes proximate cause in this factual sense. Hartley v. State, 103 Wn.2d at 778. The question of proximate cause in this context is ordinarily for the jury unless the facts are undisputed and do not admit reasonable differences of opinion, in which case cause in fact is a question of law for the court. Baughn v. Honda Motor Co., Ltd., 107 Wn.2d 127, 142, 727 P.2d 655 (1986); Estate of Bordon ex rel. Anderson v. State, Dept. of Corrections, 122 Wn.App. 227, 95 P.3d 764 (2004) (estate could not show that, but for negligent supervision, parolee would have been in jail and unable to kill plaintiff decedent); Estate of Jones v. State, 107 Wn.App. 510, 15 P.3d 180 (2000) (jury question whether had juvenile offender's score been non-negligently calculated, he would have been in prison and unable to murder plaintiff decedent).

Legal causation involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. It is a much more fluid concept, grounded in policy determinations as to how far the consequences of a defendant's acts should extend. Colbert v. Moomba Sports, Inc., 163 Wn.2d 43, 176 P.3d 497 (2008); Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 951 P.2d 749 (1998). The focus is on “whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose

liability." Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d at 478–79. This inquiry depends on "mixed considerations of logic, common sense, justice, policy, and precedent." See Hartley v. State, 103 Wn.2d at 779; Tyner v. State Dept. of Social and Health Services, Child Protective Services, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). The existence of a duty does not necessarily imply legal causation. Although duty and legal causation are intertwined issues (see Taggart v. State, 118 Wn.2d 195, 226, 822 P.2d 243, 258 (1992)), "[l]egal causation is, among other things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise. Thus, legal causation should not be assumed to exist every time a duty of care has been established." Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d at 479–80.

There have been many attempts to define "proximate cause." In Washington it has been defined both as a cause which is "natural and proximate," Lewis v. Scott, 54 Wn.2d 851, 341 P.2d 488 (1959), and as a cause which in a "natural and continuous sequence" produces the event, Cook v. Seidenverg, 36 Wn.2d 256, 217 P.2d 799 (1950). Some jurisdictions, in an effort to simplify the concept of proximate cause for jurors, have substituted the term "legal cause." See, e.g., Connecticut's civil jury instruction 3.1-1 and Restatement (Second) of Torts § 9 (1965). However, the "direct sequence" and "but for" definition adopted in this instruction is firmly entrenched in Washington law. See Alger v. City of Mukilteo, 107 Wn.2d 541, 730 P.2d 1333 (1987) ("direct sequence"); Tyner v. State Dept. of Social and Health Services, Child Protective Services, 141 Wn.2d at 82 ("but for").

**Superseding cause.** The pattern instruction includes the bracketed phrase "unbroken by any superseding cause." Prior to 2009, this phrase was worded as "unbroken by any new independent cause." The committee rewrote this phrase so that the instruction better integrates with the wording of WPI 15.05. No change in meaning is intended — the phrase "unbroken by any new independent cause" is an expression of the doctrine of superseding cause. See Humes v. Fritz Companies, Inc., 125 Wn.App. 477, 499, 105 P.3d 1000 (2005). The bracketed phrase should be used only when there is evidence of the doctrine's applicability. See Humes v. Fritz Companies, Inc., 125 Wn.App. at 499 n.5.

**Negligence concurring with other causes.** An instruction combining parts of WPI 15.01 and 15.04, Negligence of Defendant Concurring with Other Causes, was approved in Stevens v. Gordon, 118 Wn.App. 43, 74 P.3d 653 (2003) (WPI 15.04 was previously numbered as WPI 12.04).

**Substantial factor test.** Section 431 of the Restatement (Second) of Torts sets forth the substantial factor test of proximate cause, under which a defendant's conduct is a proximate cause of harm to another if that conduct is a substantial factor in bringing about the harm. In Blasick v. City of Yakima, 45 Wn.2d 309, 274 P.2d 122 (1954), the Supreme Court rejected this approach in favor of the "but for" definition contained in WPI 15.01 for general negligence actions. Courts continue to reject the substantial factor test except in limited circumstances. Fabrique v. Choice Hotels Intern., Inc., 144 Wn.App. 675, 183 P.3d 1118 (2008) (salmonella exposure); Gausvik v. Abbey, 126 Wn.App. 868, 107 P.3d 98 (2005) (negligent investigation of child abuse). For a more detailed discussion of the substantial factor test and the types of cases to which it applies, see WPI 15.02, Proximate Cause—Substantial Factor Test.

**Multiple proximate causes.** Using WPI 15.01 without the last paragraph is error if there is evidence of more than one proximate cause. Jonson v. Chicago, M., St. P. and P. R. Co., 24 Wn.App. 377, 601 P.2d 951 (1979).

An instruction setting forth the legal effect of multiple proximate causes is necessary when both sides raise complex theories of multiple causation. Goucher v. J.R. Simplot Co., 104 Wn.2d 662, 709 P.2d 774 (1985); Brashear v. Puget Sound Power & Light Co., Inc., 100 Wn.2d 204, 667 P.2d 78 (1983). Failure to give WPI 15.04, Negligence of Defendant Concurring with Other Causes, may be reversible error even though WPI 15.01 is given including the bracketed last paragraph. WPI 15.01 does not inform the jury that the act of another person does not excuse the defendant's negligence unless the other person's negligence was the sole proximate cause of the plaintiff's injuries. Brashear v. Puget Sound Power and Light Co., Inc., supra (failure to give WPI 15.04 was reversible error); Jones v. Robert E. Bayley Const. Co., Inc., 36 Wn.App. 357, 674 P.2d 679 (1984) (failure to give WPI 15.04 was error, but harmless given the jury's special verdict findings), overruled on other grounds in Brown v. Prime Const. Co., Inc., 102 Wn.2d 235, 684 P.2d 73 (1984). In Torno v. Hayek, 133 Wn.App. 244, 135 P.3d 536 (2006), it was not error to refuse WPI 15.04 where both defendants admitted liability (successive car accidents) but disagreed on which defendant caused particular medical expenses.

**Foreseeability.** It is error to add to WPI 15.01 the words "even if such injury is unusual or

unexpected." Blodgett v. Olympic Sav. and Loan Assoc'n, 32 Wn.App. 116, 646 P.2d 139 (1982). It is improper to inject the issues of foreseeability into the definition of proximate cause. State v. Giedd, 43 Wn.App. 787, 719 P.2d 946 (1986); Blodgett v. Olympic Sav. and Loan Association, supra.

**Whether to supplement the pattern instructions on proximate cause.** The preferred practice is to use the proximate cause language from the applicable pattern instruction or instructions. See Stevens v. Gordon, 118 Wn.App. at 53; Humes v. Fritz Companies, Inc., 125 Wn.App. at 498. Washington case law has occasionally approved instructions that supplement WPI 15.01 with more specific language as to what does, or does not, constitute proximate cause. See, e.g., Vanderhoff v. Fitzgerald, 72 Wn.2d 103, 107-08, 431 P.2d 969 (1967); Young v. Group Health Co-op. of Puget Sound, 85 Wn.2d 332, 340, 534 P.2d 1349 (1975); Richards v. Overlake Hosp. Medical Center, 59 Wn.App. 266, 277-78, 796 P.2d 737 (1990); Safeway, Inc. v. Martin, 76 Wn.App. 329, 885 P.2d 842 (1994).

Practitioners should use care in deciding whether to expand upon the standards in the pattern instructions. Such modifications are not always necessary, and they need to be written neutrally so as to avoid unduly emphasizing one party's theory of the case. See Ford v. Chaplin, 61 Wn.App. 896, 899-901, 812 P.2d 532 (1991).

[Current as of June 2009.]

Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

6 WAPRAC WPI 15.01

END OF DOCUMENT

DEFENDANTS' INSTRUCTION NO. 38

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

WPI 15.01

DEFENDANTS' INSTRUCTION NO. 19

Plaintiff is not entitled to recover damages for ordinary emotional distress any employee occasionally experiences in the workplace. Plaintiff is entitled to recover only that emotional distress, if any, that is proved to have been caused by unlawful discrimination.

DEFENDANTS' INSTRUCTION NO. 20

Damages for litigation-induced stress are not recoverable as emotional distress damages. Anxiety is an unavoidable consequence of the litigation process, and the plaintiff chose to pursue litigation cognizant of the emotional costs involved.

*Cicogna v. Cherry Hill Board of Education*, 143 N.J. 391, 671 A.2d 1035 (1996)  
*School District v. Nilsen*, 271 Or. 461, 534 P.2d 1135 (1975)  
*Buoy v. ERA Helicopters, Inc.*, 771 P.2d 439 (Alaska 1989)  
*Torres v. Automobile Club*, 41 Cal. App. 4<sup>th</sup> 468, 43 Cal. Rptr. 2d 147 (1995)  
*Clark v. United States*, 660 F. Supp. 1164 (W.D. Wash. 1987), aff'd, 856 Fed.2d 1433 (9th Cir. 1988)

# APPENDIX O

## WPI 330.31

- **CP 584 -Plaintiff's Proposed Instruction Altered to Remove the Word "May" From the Last Paragraph – Given by the Court**

## WPI 330.33

- **CP 583 - Trial Court's Modified Version of WPI 330.33 - Given by the Court**

**Fey v. CCS**

**Washington State Court Of Appeals, Division III 29912-1-III**

[Click here for easy edit version](#)



6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI **330.31** (5th ed.)

Washington Practice Series TM  
Current Through the 2011 Update

Washington Pattern Jury Instructions--Civil  
Washington Supreme Court Committee On Jury Instructions

Part XVI. Employment  
Chapter 330. Employment Discrimination

**WPI 330.31 Disability Discrimination—Definition of Disability—Disparate Treatment Cases**

A disability is a sensory, mental, or physical impairment that:

- 1 Is medically recognized or diagnosable; or
- 2 Exists as a record or history[; or]

[3 That [either] [exists] [or] [is perceived by the employer to exist, whether or not it exists in fact]].

[A disability may exist whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, whether or not it limits the ability to work generally or work at a particular job, or whether or not it limits any other activity.]

**NOTE ON USE**

Use this instruction with either WPI 330.32, Disability Discrimination—Treatment—Burden of Proof, or WPI 330.33, Disability Discrimination—Reasonable Accommodation—Burden of Proof. Use the bracketed final sentence if it will be helpful to the jury. See discussion in the Comment.

If the ADA (Americans with Disabilities Act) applies, use the definition of "disability" in the amendments to the ADA, signed into law on September 25, 2008, Public Law No. 110-325. These amendments significantly change the definition of disability under federal law.

**COMMENT**

RCW 49.60.040(7) (as amended in 2007).

The instruction was revised in 2010, primarily with regard to the bracketed final sentence. Previously, the sentence had addressed only the issue of temporary versus permanent conditions. The revised sentence is taken from RCW 49.60.040(7)(b) (as amended in 2007).

**Legislature's codified definition of disability and impairment.** In July 2006, the Washington Supreme Court adopted the definition of "disability" used in the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 as it was defined in 2006. McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006). Subsequently, in 2007 the Washington State Legislature enacted a new definition, which effectively overturned the *McClarty* decision. Laws of 2007, Chapter 317, § 2. The definitions of the terms "disability" and "impairment" are now codified in RCW 49.60.040(7). The definitions of disability and impairment apply to cases that arise after July 6, 2006. RCW 49.60.040; Hale v. Wellpinit School Dist., 165 Wn.2d 494, 198 P.3d 1021 (2009). The new definitions replace the circular definition from WAC 162-22-020, which was criticized in Pulcino v. Federal Express Corp., 141 Wn.2d 629, 9 P.3d 797 (2000).

**Disability discrimination.** RCW 49.60.180 provides that it is an unfair practice for an employer to discriminate in various employment decisions "because of ... the presence of any sensory, mental, or physical disability ..." RCW 49.60.180(1), (2), (3), and (4).

Liability in a disparate treatment case may be based upon the employer's perception that the plaintiff is disabled. Barnes v. Washington Natural Gas Co., 22 Wn.App. 576, 591 P.2d 461 (1979).

Conditions do not need to be permanent in order to qualify as disabilities. RCW 49.60.040(7)(b). See Pulcino v. Federal Express Corp., 141 Wn.2d at 643.

**Definition of disability.** Until *Pulcino*, the Washington Supreme Court used the definition of "disability" given in WAC 162-22-040, although it had noted the definition's "circularity." However, practitioners should now use the definition in RCW 49.60.040(7)(a)-(c) rather than the definition in the WAC.

For additional information about the statutory definition of "disability" and its application under Washington law, please refer to RCW 49.60.040(7) and the Washington State Human Rights Commission's website at [www.hum.wa.gov](http://www.hum.wa.gov).

Currently, the definitions of "disability" under state and federal law differ. Compare RCW 49.60.040(7)(a)-(c) with the ADA Amendments Act of 2008, Public Law No. 110-325 (2008).

**Pregnancy.** Claims of pregnancy discrimination are analyzed under a gender discrimination rather than a disability framework. Heqwine v. Longview Fibre Co., 162 Wn.2d 340, 350, 172 P.3d 688 (2007). As of this writing, the Human Rights Commission website ([www.hum.wa.gov](http://www.hum.wa.gov)) has a useful discussion of what may or may not constitute a disability under Washington law.

In the first edition of Volume 6A, this instruction was numbered as WPI 330.32.  
*[Current as of October 2010.]*

Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

6A WAPRAC WPI **330.31**

END OF DOCUMENT

**INSTRUCTION NO. 11**

Disability means the presence of a sensory, mental, or physical impairment that:

- (1) Is medically cognizable or diagnosable; or
- (2) Exists as a record or history;

A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity.

[Click here for easy edit version](#)



6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.33 (5th ed.)

Washington Practice Series TM  
Current Through the 2011 Update

Washington Pattern Jury Instructions--Civil  
Washington Supreme Court Committee On Jury Instructions

Part XVI. Employment  
Chapter 330. Employment Discrimination

**WPI 330.33 Disability Discrimination—Reasonable Accommodation—Burden of Proof**

Discrimination in employment on the basis of disability is prohibited. One form of unlawful discrimination is a failure to reasonably accommodate an employee's disability.

To establish [his] [her] claim of discrimination on the basis of failure to reasonably accommodate a disability, \_\_\_\_\_ has the burden of proving each of the following propositions:

- (1) That [he] [she] had an impairment that is medically recognizable or diagnosable or exists as a record or history; and
- (2) That either
  - (a) the employee gave the employer notice of the impairment; or
  - (b) no notice was required to be given because the employer knew about the employee's impairment; and
- (3) That either:
  - (a) the impairment [has] [had] a substantially limiting effect on
    - (i) [his] [her] ability to [perform his or her job] [apply for a job] [be considered for a job]; or
    - (ii) [his] [her] ability to access [equal benefits] [privileges] [terms] [or] [conditions] of employment; or
  - (b) the plaintiff has provided medical documentation to the employer establishing a reasonable likelihood that working without an accommodation would aggravate the impairment to the extent it would create a substantially limiting effect;
- (4) That [he] [she] would have been able to perform the essential functions of the job in question with reasonable accommodation; and
- (5) That the employer failed to reasonably accommodate the impairment.

In determining whether an impairment has a substantially limiting effect, a limitation is not substantial if it has only a trivial effect.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff [on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for the employer [on this claim].

**NOTE ON USE**

Use this instruction with WPI 330.31, Disability Discrimination—Definition of Disability—Disparate Treatment Cases. This instruction is designed to be used together with WPI 330.34 (Disability Discrimination—Reasonable Accommodation—Definition) and WPI 330.37 (Essential Function—Definition) or, alternatively, WPI 330.36 (Disability Discrimination—Undue Hardship).

When the plaintiff also makes a claim of disparate treatment based on disability, also use this instruction, rather than WPI 330.01, Employment Discrimination—Disparate Treatment—Burden of Proof.

An essential functions instruction may be appropriate depending on the facts and circumstances of the particular case. When there is a disagreement as to the essential functions of the position, use

WPI 330.37, Essential Function—Definition.

This instruction may need to be modified for cases involving medical necessity. See discussion in the Comment below.

#### COMMENT

In 2007, the Legislature adopted new definitions of disability and impairment in an accommodation analysis. RCW 49.60.040(7). See discussion in the Comment to WPI 330.01, Employment Discrimination—Disparate Treatment—Burden of Proof. The instruction was rewritten in 2010 to use the new statutory language.

For purposes of an accommodation analysis, "a limitation is not substantial if it has only a trivial effect." RCW 49.60.040(7)(e).

**When duty to accommodate arises.** Pursuant to RCW 49.60.040(7)(d), the duty to accommodate arises in two general circumstances: (1) when the impairment has a substantially limiting effect on the employee's ability to perform the duties of the position or affect other aspects of his/her employment opportunities; (2) when there is medical evidence that failure to accommodate a known impairment will aggravate the impairment, limiting the employee's ability to perform the job or affect other aspects of his/her employment opportunities.

In impairment cases, the Legislature clarified that the impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply for or be considered for a position, or the individual's access to equal benefits, privileges, or terms or conditions of employment, RCW 49.60.040(7)(d)(i). In the aggravation of impairment cases, the employee must notify the employer of the impairment, and provide medical documentation that establishes a reasonable likelihood that by engaging in the employee's job function without an accommodation "would aggravate the impairment to the extent, that it would create a substantially limiting effect." RCW 49.60.040(7)(d)(ii).

The duty of reasonable accommodation does not arise until the employer is "aware of respondent's disability and physical limitations." Goodman v. Boeing Co., 127 Wn.2d 401, 408, 899 P.2d 1265 (1995), quoting Holland v. Boeing Co., 90 Wn.2d 384, 391, 583 P.2d 621 (1978). If the disability is not otherwise known to the employer, the employee must give the employer notice of the disability; the employer then must take "positive steps" to accommodate the employee's limitations." Goodman v. Boeing Co., 127 Wn.2d at 408. Once notice is given, the employer has a duty to inquire regarding the nature and extent of the disability, while the employee has a duty to cooperate with the employer's efforts by explaining the employee's disability and qualifications. 127 Wn.2d at 408-09; Hume v. American Disposal Co., 124 Wn.2d 656, 880 P.2d 988 (1994).

If there is a factual question whether the parties cooperated in the reasonable accommodation process, Washington law is unclear how non-cooperation impacts the burden of proof. It may be appropriate to instruct the jury as follows: "You may consider whether a party cooperated in this process in good faith in evaluating the merit of that party's claim that a reasonable accommodation did or did not exist." This latter sentence is taken from a pattern jury instruction from the federal Third Circuit. See Third Circuit Model Civil Jury Instruction 9.1.3, Elements of an ADA Claim—Reasonable Accommodation (caveat: other aspects of the Third Circuit's instruction are based on federal law that may not be compatible with Washington law).  
[Current as of October 2010.]

Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

6A WAPRAC WPI 330.33

END OF DOCUMENT

**INSTRUCTION NO. 73**

Discrimination in employment on the basis of disability is prohibited.

To establish his claim of discrimination on the basis of failure to accommodate his disability, plaintiff has the burden of proving each of the following propositions:

- (1) That he had a disability;
- (2) That he either: gave notice of the disability to defendant; or no notice was required to be given because defendant was aware of the disability;
- (3) That the disability had a substantially limiting effect on the plaintiff's ability to apply or be considered for a job;
- (4) That he 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.

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

# **APPENDIX P**

## **Special Verdict Form**

- **CP 625-626 - Defendants' Proposed Revised Special Verdict Form – Declined by the Court**
- **CP 599-600 - Special Verdict Form – Given by the Court**

**Fey v. CCS**

**Washington State Court Of Appeals, Division III 29912-1-III**

STATE OF WASHINGTON  
SPOKANE COUNTY SUPERIOR COURT

MARK FEY,

Plaintiff,

vs.

STATE OF WASHINGTON, COMMUNITY  
COLLEGES OF SPOKANE,

Defendants.

NO. 09-2-05589-5

REVISED SPECIAL VERDICT FORM

WE, the Jury, make the following answers to the questions submitted by the Court:

(Answer "yes" or "no")

Question No. 1: Do you find that a commercial drivers' license is a bona fide occupational qualification for the Grounds and Nursery Specialist 4 position at Spokane Community College?

Answer: \_\_\_\_\_

If your answer is "yes", please go to the end of the verdict form and sign the verdict. If your answer is "no", please go to question No. 2.

Question No. 2: Do you find that plaintiff, Mark Fey, has a disability and that the Defendant had notice of the disability?

Answer: \_\_\_\_\_

If you answered "yes", go to question No. 3. If you answered "no", please go to the end of the verdict form and sign the verdict.

Question No. 3: Did the Defendants State of Washington, Community Colleges of Spokane fail to reasonably accommodate Mark Fey's disability?

Answer: \_\_\_\_\_

Go to question No. 4.

Question No. 4: Was the failure to accommodate Mark Fey's disability a proximate cause of injury or damage to Plaintiff, Mark Fey?

Answer: \_\_\_\_\_

If your answer to question 4 is "no", please go to the end of the verdict form and sign the verdict.  
If your answer to question 4 is "yes", go to question No. 5.

Question No. 5: What do you find to be Plaintiff's amount of damages proximately caused by discrimination?

Answer:

\$ \_\_\_\_\_ (Economic damages, if any)

\$ \_\_\_\_\_ (Emotional distress damages, if any).

Go to question No. 6.

Question No. 6: Do you find that plaintiff Mark Fey failed to mitigate his damages, if any. If so, please reduce the amount of damages based upon the amount Mr. Fey could reasonably have mitigated his damages?

Total damages after reduction for mitigation: \$ \_\_\_\_\_

Sign and return this verdict.

DATED this \_\_\_\_ day of March, 2011.

\_\_\_\_\_  
Presiding Juror

FILED  
MAR 29 2011  
THOMAS R FALLQUIST  
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, SPOKANE COUNTY

MARK FEY,

Plaintiff,

No. 09-2-05589-5

vs.

STATE OF WASHINGTON,  
COMMUNITY COLLEGES OF  
SPOKANE,

Defendants.

SPECIAL VERDICT FORM

NO SUMMARY  
NO JUDGMENT  
RCW 4.64.030

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

Question No. 1: Did plaintiff, Mark Fey, have a disability?

Answer: Yes X  
No \_\_\_\_\_

Question No. 2: Was defendant aware that plaintiff, Mark Fey, had a disability?

Answer: Yes X  
No \_\_\_\_\_

If your answer to **both** Question No. 1 and 2 is "yes", answer Question Nos. 3 **and** 4. If your answer to either Question No. 1 or 2 is "no", sign the verdict form.

Question No. 3: Did defendant engage in an interactive process to find a reasonable accommodation which would fit with plaintiff's disability?

Answer: Yes \_\_\_\_\_  
No X \_\_\_\_\_

Question No. 4: Did defendant reasonably accommodate plaintiff's disability?

Answer: Yes \_\_\_\_\_  
No X \_\_\_\_\_

If your answer to **either** Question No. 3 or 4 is "no", answer Question No. 5. If your answer to **both** Question No. 3 and 4 is "yes", sign the verdict form.

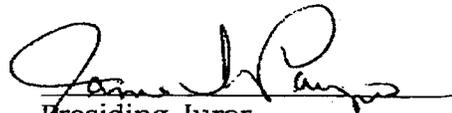
Question No. 5: What is the amount of plaintiff's damages?

Answer:

Lost Wages \$ 7,549.00

Emotional Distress \$ 0

Date: 3-28 - , 2011

  
Presiding Juror  
James L. Payne #3