

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 21, 2016, 11:31 am
BY RONALD R. CARPENTER
CLERK

NO. 91494-0

RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

PATRICIA BLACKBURN, et al.,

Petitioners,

v.

STATE OF WASHINGTON DEPT. OF SOCIAL & HEALTH
SERVICES, et al.,

Respondents.

AMICUS CURIAE BRIEF
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

Jeffrey L. Needle, WSBA #6346
Law Offices of Jeffrey Needle
119 1st Ave. South - Suite #200
Seattle, WA 98104
Telephone: (206) 447-1560
jneedle@wolfenet.com

Elizabeth Hanley, WSBA #38233
The Hanley Law Firm, PLLC
520 Pike St Ste 2500
Seattle, WA 98101-4083
Telephone: (206) 466-2334
ehanley@thehanleylawfirm.com

FILED *ES*
APR - 6 2016
WASHINGTON STATE
SUPREME COURT *byh*



ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION AND AMICUS INTEREST	1
II. SUMMARY OF ARGUMENT	2
III. STATEMENT OF FACTS	5
IV. ARGUMENT	6
A. The Hospital's Staffing Decision Was Facially Discriminatory.	6
B. Different Elements Apply to Facially Discriminatory Claims.	9
1. The "substantial factor" standard is inapplicable. Motive and intent are irrelevant and causation is admitted.	9
2. The BFOQ is an affirmative defense which has been waived.	12
C. An Adverse Employment Action Can Result from Dignitary Harm Even in the Absence of Tangible Economic Harm.	14
V. CONCLUSION	20

TABLE OF AUTHORITIES

STATE OF WASHINGTON CASES

<i>Alonso v. Qwest Commc 'ns Co., LLC</i> , 178 Wash.App. 734, 746, 315 P.3d 610 (2013).....	14, 18
<i>Boyd v. State</i> , 187 Wn.App. 1, 13, 349 P.3d 864 (2015).....	15, 18
<i>Brown v. Scott Paper Worldwide Co.</i> , 143 Wn.2d 349, 360, 20 P.3d 921 (2001).....	17
<i>Fey v. State</i> , 174 Wn.App. 435, 447, 300 P.3d 435 (2013) review denied, 179 Wn.2d 1029, 320 P.3d 720 (2014).....	7, 12, 13
<i>Hegwine v. Longview Fibre Co., Inc.</i> , 162 Wn.2d 340, 353-54, 357, 172 P.3d 688 (2007).....	3, 12, 13
<i>Kalmas v. Wagner</i> , 133 Wn.2d 210, 943 P.2d 1369, 1371 (1997).....	16
<i>Kirby v. City of Tacoma</i> , 124 Wash.App. 454, 465, 98 P.3d 827 (2004).....	14
<i>Minger v. Reinhard Distributing Co.</i> , 87 Wn.App. 941, 943, 946 P.2d 400, 403 (1997).....	16
<i>Robel v. Roundup Corp.</i> , 148 Wash.2d 35, 74 n.24, 59 P.3d 611 (2002).....	14
<i>Scrivener v. Clark College</i> , 181 Wn.2d at 446-447 (2014).....	11
<i>Tyner v. State</i> , 137 Wash.App. 545, 565, 154 P.3d 920 (2007).....	15, 18

FEDERAL CASES

<i>Allen v. Wright</i> , 468 U.S. 737, 755 (1984).....	15, 16
<i>Bates v. UPS</i> , 522 F.3d 973, 987 (9th Cir. 2007).....	11

<i>Brooks v. City of San Mateo</i> , 229 F.3d 917, 924 (9th Cir. 2000).....	17
<i>Burlington N. & Santa Fe Ry., Co.</i> , 548 U.S. 53, 71, 126 S.Ct 2405 (2006)	15
<i>Community House, Inc. v. City of Boise</i> , 468 F.3d 1118, 1124 (9 th Cir. 2006).....	7, 12
<i>Enlow v. Salem-Keizer Yellow Cab Co, Inc.</i> , 389 F.3d 802,811, 817 (9th Cir.2004).....	7, 10
<i>Frank v. United Airlines, Inc.</i> , 216 F. 3d 845, 853, 854 (9th Cir. 2000).....	7,10, 11
<i>Harris v. Forklift Systems, Inc.</i> , 510 U.S. 17, 23 (1993).....	19
<i>Harriss v. Pan American WorldAirways, Inc.</i> , 649 F.2d 670, 674 (9 th Cir. 1980).....	13
<i>Hazen Paper Co. v. Biggins</i> , 507 U.S. 604, 609 (1993).....	7
<i>Heckler v. Mathews</i> , 465 US 728, 737, 755 (1984).....	15
<i>Healey v. Southwood Psychiatric Hosp.</i> , 78 F.3d 128 (3d Cir. 1996).....	11
<i>Latta v. Otter</i> , 771 F. 3d 456, 468 (9th Cir. 2014).....	7
<i>Little v. Windermere Relocation, Inc.</i> , 301 F. 3d 958, 967 (9th Cir. 2002).....	19
<i>Los Angeles Dept. of Water and Power v. Manhart</i> , 435 US 702, 707 (1978).....	8, 16
<i>McGinest v. GTE Service Corp.</i> , 360 F.3d 1103, 1116 (9th Cir. 2004).....	18
<i>Meritor Savings Bank, FSB v. Vinson</i> , 477 US 57, 64 (1986).....	15
<i>Morton v. United Parcel Service, Inc.</i> , 272 F.3d 1249, 1260 (9th Cir. 2001).....	13

<i>Personnel Adm'r of Massachusetts v. Feeney</i> , 442 U.S. 256, 277-78 (1979).....	10
<i>Phillips v. Martin Marietta Corp.</i> , 400 U.S. 542, 544 (1971).....	8
<i>Piercy v. Maketa</i> , 480 F. 3d 1192, 1204 (10th Cir. 2007).....	11
<i>Pottenger v. Potlatch Corp.</i> , 329 F.3d 740, 749 (9th Cir.2003).....	7
<i>Reidt v. County of Trempealeau</i> , 975 F. 2d 1336, 341 (7th Cir. 1992).....	11
<i>Richmond v. JA Croson Co.</i> , 488, US 469, 493 (1989).....	15
<i>United Auto Workers v. Johnson Controls, Inc.</i> , 499 U.S. 187 (1991).....	2, 9, 12, 13
<i>University of California Regents v. Bakke</i> , 438 US 265, 298 (1978).....	18

WASHINGTON STATUTES

RCW 49.60.020.....	17
WAC 162-16-240.....	3, 12

FEDERAL STATUTES

42 U.S.C. § 2000e-2(e).....	13
-----------------------------	----

I. INTRODUCTION AND AMICUS INTEREST

Plaintiffs are health care workers at Western Washington State Hospital ("Hospital"). They claim racial discrimination and a hostile work environment in violation of the WLAD, RCW 49.60 *et seq.* They allege that management at the hospital made a facially racial classification in staffing for at least one particular patient, and that assignment reflects a broader unwritten policy and a pattern and practice of making racial staffing assignments. The Hospital denies that race played a "substantial factor" in their staffing decision, and insists that it was motivated by staff safety. It denies the existence of a policy or pattern and practice, and argues that the staffing incident in question occurred during one weekend, was then rescinded, and never repeated. It argues that an "adverse employment action" is an essential element of all discrimination claims and is absent from this case. The trial court entered Findings of Fact and Conclusions of Law consistent with the Hospital's arguments and entered a judgment in its favor. This Court granted direct review.

The Washington Employment Lawyers Association (WELA) is a chapter of the National Employment Lawyers Association. WELA is comprised of more than 160 attorneys who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the

quality of life.¹

II. SUMMARY OF ARGUMENT

Facial discriminatory classifications are inherently suspect. A facially discriminatory classification exists where an employer explicitly singles out a protected group for different treatment. Unless otherwise justified, facially discriminatory classifications are exactly the type of discriminatory treatment the law was meant to prevent. The burden to sustain facially discriminatory classifications falls heavily upon those seeking to justify them.

In this case, the Hospital's staffing decision singled out African Americans for different treatment and was therefore facially discriminatory. Whether the Hospital was motivated by race or staff safety is irrelevant to the question of whether the staffing decision was facially discriminatory. *See United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) ("[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination"). Whether the staffing decision resulted in an "adverse employment practice" is likewise irrelevant to the designation of "facial discrimination."

¹ Plaintiffs' attorneys, Joseph Shaeffer and Jesse Wing, are members of WELA's Amicus Committee. They have been recused from all of the WELA Amicus Committee's deliberations and decisions involving this case.

The “substantial factor” standard applies to disparate treatment cases where discriminatory intent and causation are contested. In facial discrimination cases, however, Plaintiffs need not show “discriminatory intent” to prevail, and causation is admitted by virtue of the facial classification itself. The “substantial factor” standard therefore does not apply. The trial court concluded that “[a]lthough this communication indicated race, it was not a substantial factor in the ‘directive’ - safety was the overriding factor.” CL ¶6. But a benign motive does not justify a facially discriminatory classification and the trial court applied an incorrect standard of proof for deciding this case.

A facially discriminatory classification can be justified as a bona fide occupational qualification (“BFOQ”), and is therefore an exception to the rule that discrimination on the basis of a protected status is prohibited. *See* WAC 162-16-240. The exception “should be applied narrowly to jobs for which a particular quality of protected status will be essential to or will contribute to the accomplishment of the purposes of the job.” *Id.* The BFOQ is an affirmative defense. *Hegwine v. Longview Fibre*, 162 Wn.2d 340, 357, 172 P.3d 688 (2007). In this case, the Hospital insists that the BFOQ affirmative defense does not apply; it has been waived, and was therefore not addressed by the trial court. Even in the absence of that waiver, Plaintiffs’ expert testimony demonstrates that racial staffing in the name of staff safety is not an accepted medical practice. This unrebutted expert testimony is sufficient

to defeat the BFOQ affirmative defense.

An “adverse employment action” can result from some tangible economic harm or a material adverse change in working conditions. An “adverse employment action” can also result from “dignitary harm” which carries a badge of inferiority. Employment actions which result in segregation in the workplace or reflect negative stereotypes are examples of dignitary harms sufficient to constitute an “adverse employment action” even in the absence of more tangible economic harm; separate is inherently unequal and negative stereotypes carry a badge of inferiority. Whether there exists dignitary harm is viewed from the perspective of the objectively reasonable Plaintiff.

The trial court found that Plaintiffs failed to prove an “adverse employment action.” Specifically, the Court found that the Plaintiffs suffered no economic harm; loss of “salary, pay, or benefits.” FF ¶13. The Court concluded that Plaintiffs failed to demonstrate any adverse employment action because “[t]here is no evidence of termination, demotion, loss of pay, or significant reassignment. A temporary alteration in assignment is not severe enough to rise to the level of an adverse employment action.” CL ¶5. Even a temporary alteration in a job assignment (without any loss of wages or benefits) based upon a facial racial classification may result in dignitary harm sufficient to create an “adverse employment action.” The trial court failed, however, to consider whether Plaintiffs suffered a dignitary harm

resulting in an “adverse employment action.”

This Court should reverse and remand with instructions to follow the standard of liability applicable for facial discrimination cases, and to determine whether there existed a dignitary harm resulting in an “adverse employment action.”

III. STATEMENT OF FACTS

Patient M.P. is a mentally-ill patient who was housed on Ward F-8 of CFS in April 2011. He was admitted to the Hospital after he was found not guilty by reason of insanity. FF ¶4. M.P. carries several psychiatric diagnoses and is a difficult patient to manage, noncompliant with taking his psychotropic medications and delusional. *Id.* He is 6’4” tall and weighs 230 pounds, and can be intimidating to staff. *Id.* He has a history of assaulting other patients and staff. *Id.* See also Hospital Brief at 3. On or about April 1, 2011, it was reported that M.P. threatened that he was going to “f*** up any [n word] working with him. FF ¶6. Based upon this threat “executive nursing staff decided that M.P. should not have access to African American staff over the weekend in order to maintain safety on the ward.” Hospital Brief at 3. See also FF ¶6. In response to this directive, Plaintiff Blackburn and three others were told that they were to work on other wards. Plaintiff Blackburn was told that a White staff person needed to go M.P.’s ward. Hospital Brief at 4.

The duration of the reassignment, whether others were affected, or

whether there existed an unwritten policy of making racial staffing decisions is contested by the parties. The trial court concluded that the incident occurred at the very most from April 2, to April 3, 2011; that the directive was not communicated or followed by other shifts on Ward F-S; it was rescinded by April 4, 2011; and that this kind of directive had never happened before or after April 2, 2011. CL ¶9-10. WELA takes no position about whether substantial evidence supports these findings and conclusions. It appears uncontested that none of the Plaintiffs lost salary, pay or benefits as a result of the reassignment.

Although the Hospital denies an “ongoing policy” of “race-based staffing,” it concedes that it has maintained a consistent position throughout the litigation “that while staff swaps acknowledging racial aggression are not common-place, the Hospital must maintain the ability of its clinicians to exercise professional judgment in managing the safety and welfare of the wards.” Hospital Brief at 7. This concession reflects that at least some future staffing decisions will be made with the race of staff used as a criteria. *See also* Testimony of CEO Ronald Adler at RP 31 (the Hospital needs to “take into account the race of its employees when making staffing decisions”).

IV. ARGUMENT

A. The Hospital’s Staffing Decision Was Facially Discriminatory.

The Hospital argues that the staffing reassignment lasted only for a weekend. The Plaintiffs argue that it is ongoing and part of an unwritten

policy and practice of making racial staffing decisions. But the length of the assignment, whether others are subjected to racial staffing, and whether there exists an unwritten policy is irrelevant to the question of whether the staffing decisions were “facially discriminatory.” Likewise, whether there exists an “adverse employment action” is irrelevant to the question of whether a classification or practice is “facially discriminatory.”

“The law is most wary of an employer’s facial discrimination against a protected class.” *Fey v. State*, 174 Wn.App. 435, 447, 300 P. 3d 435 (2013) review denied, 179 Wn.2d 1029, 320 P.3d 720 (2014).² A classification or employment practice is facially discriminatory where it explicitly singles out a protected group for different treatment. *See Latta v. Otter*, 771 F. 3d 456, 468 (9th Cir. 2014) (“Whether facial discrimination exists ‘does not depend on why’ a policy discriminates, ‘but rather on the explicit terms of the discrimination’”); *Frank v. United Airlines, Inc.*, 216 F. 3d 845, 853 (9th Cir. 2000) (“An employer’s policy amounts to disparate treatment if it treats men

² A plaintiff in an employment discrimination case can proceed under two theories of employment discrimination: “disparate treatment and disparate impact.” *Enlow v. Salem-Keizer Yellow Cab Co., Inc.*, 389 F.3d 802, 811 (9th Cir.2004), citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993). “Disparate treatment is demonstrated when the employer simply treats some people less favorably than others because of [a protected characteristic].” *Id.* (internal marks and quotation marks omitted). “Disparate impact” is demonstrated when “employment practices that are facially neutral in their treatment of different groups ... fall more harshly on one group than another and cannot be justified by business necessity.” *Pottenger v. Potlatch Corp.*, 329 F.3d 740, 749 (9th Cir.2003) (internal quotation marks omitted). This case alleges disparate treatment.

and women differently on its face”); *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1048 (9th Cir.2007)(“A facially discriminatory policy is one which on its face applies less favorably to a protected group”); *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702,714-18 (1978) (holding that it is prima facie sex discrimination to require that female employees contribute more money to pension fund than male employees); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (holding that, absent exception for bona fide occupational qualification, it is prima facie sex discrimination for employer to have one hiring policy for women . . . and another for men . . .).

The Hospital argues that facial discrimination is proved only when a Plaintiff shows both elements of a disparate treatment claim; “adverse employment action” and that race was a “substantial factor” in the decision. Hospital Brief at 26. This argument is conceptually flawed because it is clear that the elements applicable to an ordinary disparate treatment claim do not apply to claims of “facial discrimination.” The existence of a facial classification or practice is determined by whether individuals in a protected class are singled out for different treatment, and not by whether the elements of an ordinary disparate treatment claim can be proved.

Here, it is uncontested that the supervising nurse instructed that African Americans not be allowed access to a particular patient because of his racial threats. While the parties contest the reassignment’s motivation

and whether it resulted in an “adverse employment action,” it is clear that African Americans were explicitly singled out for different treatment; they were prevented explicitly by race from access to patient M.P. The reassignment was therefore facially discriminatory.

B. Different Elements Apply to Facially Discrimination Claims.

1. The “substantial factor” standard is inapplicable. Motive and intent are irrelevant and causation is admitted.

In facial discrimination cases, motive and intent are not relevant, causation is admitted, and the “substantial factor” standard is inapplicable. In *United Auto Workers v. Johnson Controls*, 499 U.S. 187 (1991), the defendant adopted a policy which barred fertile women, but not fertile men, from jobs entailing high levels of lead exposure. Its benign purpose was to protect the health of an unborn fetus carried by a female employee. *Id.* at 190-92. Plaintiffs filed a class action challenging the policy as sex discrimination in violation of Title VII of the 1964 Civil Rights Act. *Id.* at 192. Applying the “business necessity” test, the District Court granted summary judgment, and the Seventh Circuit affirmed. *Id.* at 193-96. The United States Supreme Court reversed.

The Supreme Court first acknowledged that this was not a neutral practice with a disparate impact, and that the “business necessity” defense therefore did not apply. *Id.* at 197-98. The Court rejected the lower court’s assumption that “because the asserted reason for the sex-based exclusion

(protecting women's unconceived offspring) was ostensibly benign, the policy was not sex-based discrimination.” *Id.* at 198.

In this case, even though the Hospital had the benign reason of protecting staff, its reassignment was still race-based discrimination. “The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) and thus may be defended only as a BFOQ.” *Id.* at 200. “Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.” *Id.* at 199. *See also Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 277-78 (1979) (“Thus, plaintiffs challenging policies that facially discriminate on the basis of race need not separately show either ‘intent’ or ‘purpose’ to discriminate”); *Enlow v. Salem-Keizer Yellow Cab Co., Inc.*, 389 F. 3d 802, 817 (9th Cir. 2004) (“But precedent is clear that in a case of facial discrimination, the explicit use of a protected trait as a criterion for the employer's action establishes discriminatory intent, regardless of the employer's subjective motivations”); *Frank v. United Airlines, Inc.*, 216 F. 3d at 854 (“[w]here a claim of discriminatory treatment is based upon a policy which on its face applies less favorably to one gender . . . a plaintiff need not otherwise establish the presence of discriminatory intent”).

The “substantial factor” test combines the issue of motive and causation.³ In a facial discrimination case the “substantial factor” test is simply inapplicable because motive is irrelevant and causation is admitted. *See Frank v. United Airlines, Inc.*, 216 F.3d at 854 (“When open and explicit use of gender is employed . . . the systematic discrimination is in effect ‘admitted’ by the employer, and the case will turn on whether such overt disparate treatment is for some reason justified under Title VII”) quoting *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128 (3d Cir. 1996).⁴

³ The “substantial factor” standard allows the Plaintiffs to prevail even though the Defendants were also motivated by a legitimate reason. “An employee may satisfy the pretext prong by offering sufficient evidence to create a genuine issue of material fact *either* (1) that the defendant’s reason is pretextual *or* (2) that although the employer’s stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer. *Scrivener v. Clark College*, 181 Wn.2d at 446-47(emphasis added). “An employee does not *need* to disprove each of the employer’s articulated reasons to satisfy the pretext burden of production. Our case law clearly establishes that it is the plaintiff’s burden at trial to prove that discrimination was a substantial factor in an adverse employment action, not the only motivating factor.” *Id.* (emphasis original).

⁴ The *McDonnell Douglas* shifting evidentiary framework is designed to assist the Court in determining the existence of an illegal motive. But the *McDonnell Douglas* shifting burden framework does not apply to facial discrimination cases because motive in those cases is irrelevant. *See Bates v. UPS*, 522 F.3d 973, 987 (9th Cir. 2007)(“A burden-shifting protocol is, however, unnecessary in this circumstance. The fact to be uncovered by such a protocol - whether the employer made an employment decision on a proscribed basis . . . - is not in dispute”); *Reidt v. County of Trempealeau*, 975 F. 2d 1336, 1341 (7th Cir. 1992) (“The *McDonnell Douglas* procedure is inapt in a situation involving a facially discriminatory policy,”); *Piercy v. Maketa*, 480 F. 3d 1192, 1204 (10th Cir. 2007) (“where an employer’s policy is discriminatory on its face, we need not worry about eliminating nondiscriminatory reasons for an employer’s action. In cases of facial discrimination, ‘[t]here is no need to probe for a potentially discriminatory motive circumstantially, or to apply the burden-shifting approach outlined in

The Hospital argues that it was not motivated by race, but by considerations of staff safety. The trial court agreed and specifically found that race was not a substantial factor: “[T]he concern and decision to reassign [Plaintiff] to protect him from MP had nothing to do with [Plaintiffs’] race . . . Although the directive indicated race, it was not a substantial factor in the ‘directive’ - safety was the overriding factor.” CL ¶6. This Conclusion of Law applied the incorrect legal standard.

2. The BFOQ is an affirmative defense which has been waived.

The BFOQ defense does not assist the court in determining whether the employer acted discriminatorily. Rather, it provides a justification for practices that *are* discriminatory. The only defense to a facially discriminatory practice is a BFOQ, *See Fey v. State*, 174 Wn.App, 435, 300 P. 3d 435 (2013)(applying federal law); *United Auto Workers v. Johnson*

McDonnell Douglas Corp. v. Green”); *Community House, Inc. v. City of Boise*, 468 F. 3d 1118, 1124 (9th Cir. 2006)(“We hold . . . that the plaintiffs’ gender and familial discrimination claims are properly characterized as claims of facial discrimination and should be analyzed in that framework. The *McDonnell Douglas* test is inapplicable . . .”). *But see Hegwine v. Longview Fibre Co., Inc.*, 162 Wn. 2d 340, 353-54, 172 P. 3d 688 (2007)(applying *McDonnell Douglas* where pregnancy is admitted causation).

The BFOQ defense not only serves a different purpose from the *McDonnell Douglas* test but also arises at a different point in time. The BFOQ, as an affirmative defense to otherwise discriminatory conduct, comes into play only after the factual issue posed by the *McDonnell Douglas* test has been answered affirmatively. If the employer fails to overcome the burden of showing that its policy is not facially discriminatory, the plaintiff’s disparate treatment claim prevails unless the employer establishes a BFOQ defense.

Controls, 499 U.S. at 200.⁵ WAC 162-16-240 addresses the application of a BFOQ which applies to all protected classifications including race.⁶

In this case, *the BFOQ affirmative defense is waived*. Even if it had not been waived Plaintiffs' expert witness testified explicitly that indulging mental patients' irrational preferences simply empowers them and is not an accepted medical practice.⁷ This expert testimony was not rebutted.

⁵ The BFOQ affirmative defense is distinguished from the "business necessity" defense. The former is applicable to facially discriminatory classifications. The latter is applicable in disparate impact cases. *See Fey v. State; Harriss v. Pan American World Airways, Inc.*, 649 F. 2d 670, 674 (9th Cir. 1980)("The BFOQ defense is applicable to employment practices that purposefully discriminate on the basis of sex while the Business Necessity defense is appropriately raised where facially neutral employment practices run afoul of Title VII only because of their disparate impact"); *United Auto Workers v. Johnson Controls*, 499 U.S. at 200. *But see Hegwine v. Longview Fibre Co., Inc.*, 162 Wn. 2d 340, 172 P. 3d 688 (2007)(applying the "business necessity" defense in the absence of disparate impact).

⁶ Under Title VII, while the BFOQ affirmative defense applies to protected classifications other than race, *race was deliberately omitted from its application*. *See* 42 U.S.C. §2000e-2(e) ("it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, . . ."); *Morton v. United Parcel Service, Inc.*, 272 F. 3d 1249, 1260 fn11 (9th Cir. 2001)("Under Title VII, the bfoq defense is not available at all where discrimination is based on race or color").

⁷ Dr. Geller testified it is never medically necessary to assign staff members to patients based on their race. RP 250, 253. He explained that "staffing by race will decrease safety." RP 253. First, lack of external controls increases a patient's fears. Second, it tends to reinforce "patients' delusional thinking." RP 253. Dr. Geller testified: "It is not accepted medical practice at psychiatric facilities to assign staff members to a patient based on the staff member's race when there is an imminent threat of violence associated with the staff member's race." RP 263. Dr. Geller

The Hospital argues convincingly that hypothetical examples demonstrate why a racial classification might be justified. Hospital Brief at 23. But these arguments do not apply to the facts of this case, and the Hospital offers only argument to justify a hypothetical facially discriminatory practice. When and if those hypothetical facts become actual fact the Hospital will have an opportunity to argue that the facial discriminatory classification is justified by a BFOQ. But the BFOQ affirmative defense will be the only analytical framework available to justify a facial discriminatory practice, and the presence or absence of discriminatory intent will be irrelevant.

C. An Adverse Employment Action Can Result from Dignitary Harm Even in the Absence of Tangible Economic Harm.

Generally, in order to prove a disparate treatment claim Plaintiff must prove the existence of an “adverse employment action.”

An adverse employment action involves a change in employment that is more than an inconvenience or alteration of one's job responsibilities. *Alonso v. Qwest Commc'ns Co., LLC*, 178 Wash.App. 734, 746, 315 P.3d 610 (2013). It includes a demotion or adverse transfer, or a hostile work environment. *Kirby v. City of Tacoma*, 124 Wash.App. 454, 465, 98 P.3d 827 (2004) (quoting *Robel v. Roundup Corp.*, 148 Wash.2d 35, 74 n. 24, 59 P.3d 611 (2002)). . . . “*Whether a particular reassignment is materially adverse depends upon*

testified that racial staffing simply doesn't achieve the stated goal of safety: “Throughout the hospital record, there's many, many, many examples of [M.P.'s] attacking others, independent of what color their skin was” so “there's no evidence” “that if you remove staff of color, that the Caucasian staff is not risk-free. The Caucasian staff is at high risk. So you haven't accomplished anything.” RP 255.

the circumstances of the particular case, and 'should be judged from the perspective of a reasonable person in the plaintiff's position.'" *Tyner v. State*, 137 Wash.App. 545, 565, 154 P.3d 920 (2007) (quoting *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 71, 126 S.Ct. 2405).

Boyd v. State, 187 Wn. App. 1, 13, 349 P. 3d 864 (2015)(emphasis added).

An "adverse employment action" can result from *either* tangible economic harm or dignitary harm. See *Allen v. Wright*, 468 U.S. 737, 755 (1984) ("There can be no doubt that [stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action"); *Heckler v. Mathews*, 465 US 728, 739-40 (1984) ("we have repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group"); *Richmond v. JA Croson Co.*, 488 US 469, 493 (1989)("Classification based on race carry a danger of stigmatic harm"); *Meritor Savings Bank, FSB v. Vinson*, 477 US 57, 64 (1986)("the language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment"). Contrary to Hospital's assertion, the

Court is not being asked to create new category of adverse action. Hospital Brief at 22.

Dignitary harm without any tangible economic harm can result in an “adverse employment action” just like a dignitary harm without tangible economic harm can result in at least nominal damages.⁸ Dignitary harm standing alone can also be sufficient to support standing.⁹ Indeed, the dignitary harm created by a discriminatory act can be far greater and last far longer than mere economic harm. Segregation in the workplace on the basis of race may not result in a loss of wages, demotion, or loss of professional opportunity, and the physical working conditions may be equal. But a racially segregated workplace carries a badge of inferiority; separate is inherently unequal. Likewise, a job assignment based upon a negative stereotype may result in no tangible loss of benefits, but create a dignitary

⁸ “[N]ominal damages are awarded to compensate a plaintiff for hurt feelings, embarrassment and humiliation which naturally flow from any discriminatory act.” *Minger v. Reinhard Distributing Co.*, 87 Wn.App. 941, 946, 943 P.2d 400, 403 (1997). “[N]ominal damages are presumed in a civil rights action even if no damage is shown.” *Id.* See also *Kalmas v. Wagner*, 133 Wn.2d 210, 943 P.2d 1369, 1371 (1997) (“A plaintiff who proves these [42 U.S.C. §1983] elements is entitled to at least nominal damages”). Dignitary harm resulting in an adverse employment action is indistinguishable from the type of harm for which at least nominal damages are awarded. If nominal damages are presumed in a civil rights case, adverse employment action should also be presumed.

⁹ See *Allen v. Wright*, 469 U.S. at 755 (holding that the stigma caused by racial discrimination without economic harm “accords a basis for standing only to ‘those persons who are personally denied equal treatment’ by the challenged discriminatory conduct”).

harm resulting in an adverse employment action. Employment decisions cannot be predicated on mere “stereotyped” impressions. *Los Angeles Dept. of Water and Power v. Manhart*, 435 US at 707. “Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.” *Id.* at 708.

Moreover, allowing employers to engage in disparate treatment, so long as it is not sufficiently “adverse,” tolerates discriminatory treatment. Toleration of discriminatory treatment fosters resentment among workers who are in a protected class. *See Los Angeles Dept. of Water and Power v. Manhart*, 435 US 702, 709 (1978)(“Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals”). The purpose of WLAD, however, is not to tolerate but to *eradicate* discrimination from the workplace. *E.g., Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 360, 20 P.3d 921 (2001)(“The overarching purpose of the law is ‘to deter and to eradicate discrimination in Washington’”). A bright line prohibiting all discrimination based upon a protected classification would promote the liberal interpretation required by the WLAD. *See RCW 49.60.020.*

In assessing whether there was dignitary harm, courts consider the perspective of the objectively reasonable plaintiff. *See Brooks v. City of San Mateo*, 229 F. 3d 917, 924 (9th Cir. 2000)(“When assessing the objective portion of a plaintiff’s claim, we assume the perspective of the reasonable

victim”); *McGinest v. GTE Service Corp.*, 360 F. 3d 1103, 1116 (9th Cir. 2004)(“we consider the objective hostility of the workplace from the perspective of the plaintiff”); *Boyd v. State*, 187 Wn. App. 1, 349 P. 3d 864 (2015)(“Federal law provides that context matters in analyzing the significance of any given act of retaliation because ‘[a]n act that would be immaterial in some situations is material in others”); *Tyner v. State*, 137 Wn. App. 545, 565, 154 P.3d 920 (2007) (“Whether an action ‘is materially adverse depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff’s position”); *Alonso v. Qwest Commc’ns Co., LLC*, 178 Wn.App. 734, 746, 315 P.3d 610 (2013) (loss of driving van and cellular phone benefits, as well as the preference in employer-supplied workstations, computers, and desk telephones could be an adverse employment actions”).

In this case, the quoted testimony of the Plaintiffs reflects that they were subjectively humiliated, and deeply resented the racial staffing decision. More specifically, the testimony revealed that they considered the staffing decision an adverse reflection on their ability to do their job based only upon their race. *See* Plaintiffs’ Brief at 37-38. Plaintiffs in this case insist that they needed no protection. *Id. See University of California Regents v. Bakke*, 438 U. S., 265, 298 (1978)(“[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth”).

The trial court's findings don't reflect that Plaintiffs' testimony was considered. It should have carried substantial weight in making the determination of whether there existed a dignitary harm resulting in an "adverse employment action."

The Hospital argues that the presence of race alone does not make the staffing decision inherently an "adverse employment action." Hospital Brief at 17. It also relies upon the limited duration of the racially based reassignment. But even a single racial facially discriminatory practice standing alone or one of short duration may constitute a dignitary harm resulting in an "adverse employment action." "A single 'incident' of harassment . . . can support a claim of hostile work environment because the 'frequency of the discriminatory conduct' is only one factor in the analysis." *Little v. Windermere Relocation, Inc.*, 301 F. 3d 958, 967 (9th Cir. 2002)(collecting cases from other circuits), citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993). "Conduct is actionable if it is either 'sufficiently severe or pervasive.'" *Little*, 301 F.3d at 967.

In this case, the Hospital explicitly singled out African American employees to prevent them from treating patient M.P. The duration of the reassignment is relevant to the amount of damages Plaintiffs suffered but is not dispositive to the existence of an "adverse employment action." If the totality of facts and circumstances demonstrate that Plaintiffs suffered a dignitary harm, that is sufficient to establish an "adverse employment action."

Here, the trial court never considered whether there existed a dignitary harm resulting in an "adverse employment action."

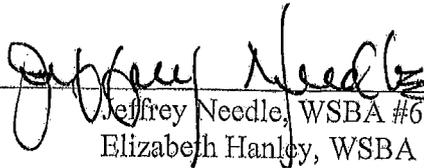
V. CONCLUSION

The Court should reverse the trial court and remand with instructions to follow the proper legal standard applicable to facial discrimination cases, and to consider whether Plaintiffs suffered a dignitary harm resulting in an adverse employment action.

Dated this 21st day of March, 2016.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By



Jeffrey Needle, WSBA #6346
Elizabeth Hanley, WSBA #38233

DECLARATION OF SERVICE

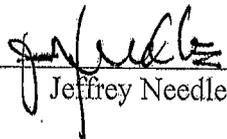
I, Jeffrey Needle, hereby declare that on the 21st day of March, 2016, I caused to be sent and filed via email a copy of the foregoing WELA Amicus Curiae Brief to the Clerk of the State Supreme Court and to be delivered via email a true and accurate copy of the attached document to the following:

Jesse Wing, WSBA #27751
JesseW@mhb.com
Joe Shaeffer, WSBA #33273
JosephS@mhb.com
MacDonald Hoague & Bayless
Hoge Building, Suite 1500
705 Second Avenue
Seattle, WA 98104
(206) 622-1604

Joseph M. Diaz
Grace C.S. O'Connor
Assistant Attorney General
ATTORNEY GENERAL OF WASHINGTON
Torts Division
7141 Cleanwater Drive SW
PO Box 40126
Olympia, WA 98504-0126
Email: josephD@atg.wa.gov; graces@atg.wa.gov

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 21st day of March, 2016.



Jeffrey Needle

OFFICE RECEPTIONIST, CLERK

To: Jeffrey Needle
Cc: 'Jesse Wing'; Josephs@mhb.com; josephD@atg.wa.gov; graces@atg.wa.gov
Subject: RE: Blackburn v. State of Washington - No. 91490-0

Received 3-21-16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jeffrey Needle [mailto:jneedlel@wolfenet.com]
Sent: Monday, March 21, 2016 11:25 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: 'Jesse Wing' <JesseW@mhb.com>; Josephs@mhb.com; josephD@atg.wa.gov; graces@atg.wa.gov
Subject: Blackburn v. State of Washington - No. 91490-0

Dear Clerk:

Attached hereto for filing please find a copy of the Amicus Curiae Brief and Declaration of Service on behalf of the Washington Employment Lawyers Association. Counsel for the parties are copied on this email. Please acknowledge receipt. Thanks.

Law Offices of Jeffrey Needle
Jeffrey Needle
119 1st Ave. South - Suite #200
Seattle, Washington 98104
206.447.1560