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THE SUPREME COURT
OF THE STATE OF WASHINGTON

PATRICIA BLACKBURN, et al.,

Plaintiffs/Appellants,

v.

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

Defendants/Respondents.

APPELLANTS' AMENDED OPENING BRIEF

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR AND RELATED ISSUES	1
A. Assignments of Error	1
B. Issues Pertaining to Assignments of Error	2
III. STATEMENT OF THE CASE.....	3
A. Procedural History and Parties.....	3
B. The Hospital Maintains and Implements a Policy and Practice of Allowing Nurses Discretion to Staff Patients According to Employee Race	4
C. The Employees Discover That They Are Being Subjected to The Hospital’s Racial Staffing Policy.....	8
D. The Only Medical Expert Testimony Was That Racial Staffing Is Bad Medicine and Dangerous, and Cannot Support a BFOQ	14
IV. ARGUMENT	20
A. Discussion of Issues Pertaining to Assignments of Error	20
1. The trial court erred when it failed to find that the Hospital has an ongoing policy and practice of racial staffing.....	20
2. The trial court erred when it did not require the State to prove that race is a bona fide occupational qualification.....	24
3. The trial court erred when it held that a facially discriminatory staffing assignment is not an “adverse employment action”	30

4.	The trial court erred when it held that race was not a substantial factor in the Hospital’s decision to exclude black staff members from working with a particular patient because the decision was motivated by safety and not racial hostility.	38
5.	The trial court erred when it held that race-based staffing at Western State Hospital was not sufficiently severe or pervasive to affect the terms and conditions of plaintiffs’ employment.....	41
6.	The trial court erred when it found that the race-based staffing directive ended on April 4, 2011; when it found that since April 2011, none of the plaintiffs have been on a shift in which a similar staffing assignment was made; and when it held that plaintiffs’ fears of future racial staffing were speculative.....	44
B.	Plaintiffs Request Judgment Be Entered By This Court, and If The Case is Remanded, a New Judge.	49
C.	Request for Fees and Costs.....	50

TABLE OF AUTHORITIES

Federal Cases	Page
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975).....	49
<i>Billings v. Madison Metropolitan School District</i> , 259 F.3d 807 (7th Cir. 2001)	36
<i>Bridgeport Guardians, Inc. v. Delmonte</i> , 553 F. Supp. 601	33
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954).....	48
<i>Burlington N. R.R. Co. v. Dep't of Revenue</i> , 934 F.2d 1064 (9th Cir. 1991)	49
<i>Community House, Inc. v. City of Boise</i> , 490 F.3d 1041	41
<i>Ferrill v. Parker Group, Inc.</i> , 168, F.3d 468 (11th Cir. 1999)	26, 34, 35, 41
<i>Gerdom v. Cont'l Airlines, Inc.</i> , 692 F.2d 602 (9th Cir. 1982)	43
<i>Goodman v. Lukens Steel Co.</i> , 482 U.S. 656 (1987).....	40
<i>Healey v. Southwood Psychiatric Hosp.</i> , 78 F.3d 128 (3d Cir. 1996).....	26, 27
<i>Hunter v. Army Fleet Support</i> , 530 F. Supp.2d 1291 (M.D. Ala. 2007)	35, 36
<i>Knight v. Nassau City Civil Service Commission</i> , 649 F.2d 157 (2d Cir. 1981).....	26, 34, 41
<i>Lam v. Univ. of Hawai'i</i> , 40 F.3d 1551 (9th Cir. 1994)	43
<i>Latta v. Otter</i> , 771 F.3d 456	41
<i>Los Angeles Department of Water & Power v. Manhart</i> , 435 U.S. 702 (1978).....	25
<i>Lovell v. Chandler</i> , 303 F.3d 1039 (9th Cir. 2002)	25
<i>Monterey Mech. Co. v. Wilson</i> , 125 F.3d 702 (9th Cir. 1997)	36, 48
<i>Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.</i> , 462 U.S. 669 (1983).....	25
<i>Olsen v. Marriott Intern. Inc.</i> , 75 F. Supp.2d 1052 (D. Ariz. 1999)	43
<i>Sims v. Montgomery County Commission</i> , 766 F. Supp. 1052	33

<i>UAW v. Johnson Controls, Inc.</i> , 499 U.S. 187 (1991).....	40
<i>Woods v. Graphic Commc'ns</i> , 925 F.2d 1195 (9th Cir. 1991)	41

State Cases

<i>Browning v. Slenderella Sys. of Seattle</i> , 54 Wn.2d 440, 341 P.2d 859 (1959).....	36
<i>Davis v. West One Auto. Grp.</i> , 140 Wn. App. 449, 166 P.3d 807 (2007)	37
<i>Dawson v. Troxel</i> , 17 Wn. App. 129, 561 P.2d 694 (1977)	30
<i>Fahn v. Cowlitz Cnty.</i> , 93 Wn.2d 368, 610 P.2d 857 (1980).....	31
<i>Fey v. State</i> , 174 Wn. App. 435, 300 P.3d 435 (2013)	26
<i>Franklin County Sheriff's Office v. Sellers</i> , 97 Wn.2d 317, 646 P.2d 113 (1982).....	25, 28, 39, 40
<i>Hegwine v. Longview Fibre Co.</i> , 162 Wn.2d 340, 172 P.3d 688 (2007).....	25, 26, 28, 31
<i>Heikkinen v. Hansen</i> , 57 Wn.2d 840, 360 P.2d 147 (1961).....	20, 21
<i>In re Welfare of A.B.</i> , 168 Wn.2d 908, 232 P.3d 1104 (2010).....	22
<i>King v. Riveland</i> , 125 Wash.2d 500, 886 P.2d 160 (1994).....	47
<i>Lewis v. Doll</i> , 53 Wn. App. 203 (1989)	36, 40
<i>MacLean v. First Nw. Indus. of Am., Inc.</i> , 96 Wn.2d 338, 635 P.2d 683 (1981).....	48
<i>Sommer v. Dep't of Soc. & Health Servs.</i> , 104 Wn. App. 160, 15 P.3d 664 (2001)	25
<i>State v. Homan</i> , 181 Wn.2d 102, 330 P.3d 182 (2014).....	20
<i>State v. Mewes</i> , 84 Wn. App. 620, 929 P.2d 505 (1997)	21
<i>State v. Reader's Digest Assoc.</i> , 81 Wn.2d 259, 501 P.2d 290 (1972).....	20
<i>Wold v. Wold</i> , 7 Wn. App. 872, 503 P.2d 118 (1972)	21
<i>Xieng v. Peoples Nat. Bank of Wash.</i> , 120 Wn.2d 512, 844 P.2d 389 (1993).....	20, 30

Statutes

42 U.S.C. § 1981..... 33, 34, 35
42 U.S.C. §1983..... 33, 34
42 U.S.C. § 2000e-5(g)..... 49
RCW 49.60 3, 40, 47
RCW 49.60.010 20, 30
RCW 49.60.020 20, 30
RCW 49.60.030(2)..... 49
RCW 49.60.180 31
RCW 49.60.180(4)..... 31, 32

I. INTRODUCTION

Western State Hospital maintains an ongoing and facially discriminatory policy and practice that provides for Hospital nurses at the lowest level to assign employees to job posts explicitly because of their race. This policy came to light when the Hospital in April 2011 banned all black employees and other racial minorities from working with a particular patient due to the patient's racist threats and remarks. According to the undisputed testimony of its CEO and several managers, the Hospital's policy and practice is ongoing. The only medical expert testimony presented at trial unequivocally established that racial staffing is counter-therapeutic to patients, destructive to staff morale, and dangerous to everyone. The Hospital implemented this policy as recently as two months before trial, and has no intention of halting it.

II. ASSIGNMENTS OF ERROR AND RELATED ISSUES

A. Assignments of Error

1. The trial court erred when it failed to make a finding that Western State Hospital has an ongoing policy allowing race-based staffing and that the policy continues to be implemented.
2. The trial court erred when it did not require the State to prove that race is a bona fide occupational qualification for staffing assignments at Western State Hospital.
3. The trial court erred when it held that a facially discriminatory race-based staffing assignment is not an "adverse employment action." (Conclusion of Law No. 5.)
4. The trial court erred when it held that race was not a substantial factor in the Hospital's decision to exclude black staff members from working with a particular patient because the decision was motivated by safety and not racial hostility. (Conclusion of Law No. 6.)

5. The trial court erred when it held that race-based staffing at Western State Hospital was not sufficiently severe or pervasive to affect the terms and conditions of plaintiffs' employment. (Conclusions of Law Nos. 9, 10.)
6. The trial court erred when it found that the race-based staffing directive ended on Monday, April 4, 2011 (Finding of Fact No. 12; Conclusions of Law No. 5, 9).
7. The trial court erred when it found that since April 2011, none of the plaintiffs have been on a shift in which a similar race-based staffing assignment was made (Finding of Fact No. 14; Conclusion of Law No. 10).
8. The trial court erred when it held that plaintiffs' fears that they would be subject to racial staffing again in the future were speculative (Conclusion of Law No. 11).

B. Issues Pertaining to Assignments of Error

1. Washington law prohibits employers from discriminating against any person in the terms or conditions of employment because of race and to make any statement that expresses any limitation, specification, or discrimination as to race. Western State Hospital has an ongoing policy and practice allowing low-level supervisors to exclude all employees of a certain race from working with psychiatric patients who voice racial preferences, demands, threats, or delusions. Does such a policy violate Washington law? (Assignments of Error Nos. 1, 2, 3, 4, and 5.)
2. Western State Hospital has an ongoing policy allowing low-level supervisors to exclude all employees of a certain race from working with psychiatric patients who voice racial preferences, demands, threats, or delusions. In a facial discrimination case, does the adoption of such a policy by a state employer shift the burden to the State to prove that race is a bona fide occupational qualification for certain staffing assignments? (Assignment of Error No. 2.)
3. Washington law prohibits employers from discriminating against any person in the terms or conditions of employment because of race and to make any statement that expresses any limitation, specification, or discrimination as to race. In a facial discrimination case, when an employer explicitly forbids employees of a certain race from performing certain assignments or tasks, has the employer taken an "adverse employment action" against the employee? (Assignment of Error No. 3.)

4. Under Washington law, an employer discriminates when race is a “substantial factor” in the action taken by the employer against the employee. Can race be a substantial factor when the employer is motivated by concerns for employee safety and not racial hostility or animus? (Assignment of Error No. 4.)
5. To prove a hostile work environment claim under Washington law, an employee must show that the unwanted racial conduct was severe or pervasive such that it affected the terms and conditions of employment. Is an ongoing policy allowing low-level supervisors to exclude all employees of a certain race from particular assignments severe or pervasive such that it affects the terms and conditions of employment? (Assignment of Error No. 5.)
6. During the bench trial in this case, unrebutted testimony from the CEO of Western State Hospital established that the Hospital “reserves the right to give a directive that black employees not be assigned to work with a particular patient.” In light of that testimony, and the unrebutted testimony of nursing supervisors and employees documenting repeated uses of race when making staff assignments at the Hospital, was it error for the trial court to fail to make a finding that Western State Hospital has an ongoing policy allowing racial staffing and that the policy continues to be implemented; to find that the race-based staffing directive ended on April 4, 2011; to find that since April 2011 none of the plaintiffs have been on a shift in which a similar staffing assignment was made; and to hold that plaintiffs’ fear that they will be subject to racial staffing in the future is speculative? (Assignment of Error Nos. 1, 5, 6, 7.)

III. STATEMENT OF THE CASE

A. Procedural History and Parties

Plaintiffs initially filed their action in the U.S. District Court for the Western District in 2011. The State asserted sovereign immunity over the Plaintiffs’ claims under RCW 49.60, so the parties stipulated to voluntary dismissal of them after which Plaintiffs filed them in Pierce County Superior Court. On February 11, 2015, after a six-day bench trial, the court entered findings of fact and conclusions of law dismissing the Plaintiffs’ claims. On March 27, 2015, Plaintiffs timely filed a notice of

appeal. On April 13, 2015, Plaintiffs filed a motion for direct review asking the Supreme Court to hear the matter directly because of its public import and because the Hospital is maintaining an ongoing facially discriminatory policy based on the race of its employees.

Western State Hospital (WSH) is a State-run psychiatric hospital that provides evaluation and inpatient treatment for individuals with serious mental illness. RP 24-26, Finding of Fact #2. WSH is a division of the Department of Social and Health Services (DSHS). *See* RP 24. The nine Plaintiffs (“Employees”) have been employed by the Hospital on the same ward (Ward F-5) of the Center for Forensic Services (CFS). *See, e.g.*, RP 416, 524; and Finding of Fact #3. Plaintiff Patricia “Polly” Blackburn is a Registered Nurse, classified as an “RN2,”¹ and was the Ward F-5 charge nurse. RP 415-16; Finding of Fact #3. The other eight Plaintiffs are Psychiatric Security Attendants (PSAs) who assist in the care of mentally ill patients. Finding of Fact #3. Nurse Blackburn is white; the Plaintiff PSAs, who work as a team with her, are various races: African-American, Black African, Filipino, and Caucasian. Finding of Fact #3. Seven of the nine plaintiff employees remain employed by the Hospital. *See* RP 524, 579, 597, 586, 623, 651, 725.

B. The Hospital Maintains and Implements a Policy and Practice of Allowing Nurses Discretion to Staff Patients According to Employee Race

It is undisputed that the Hospital maintains an ongoing unwritten

¹ Position descriptions are located in the admitted exhibits. Ex. 1 (RN3); Ex. 5,6, 7 (RN4); Ex. 32 (RN2); Ex. 38 (PSA).

policy and practice that authorizes race-based staffing when a nurse deems it appropriate, regardless of available alternatives. The Hospital's CEO Ronald Adler testified at trial his Hospital² needs to "take into account the race of its employees when making staffing decisions," RP 31, and the Hospital "reserves the right" to give "a directive that black employees not be assigned to work to a particular patient" again in the future, RP 31. Under hospital policy, any level of nursing staff can determine that all members of a race, such as black people, are prohibited from working with a particular patient. RP 31-32.

Mr. Adler testified there is no limit on the amount of time all members of a particular race could be barred from working with a patient. RP 43. Staffing decisions that take into account employees' race do not need to be documented. RP 39. Nor does the Hospital have any written policy or protocol that guides a nurse's decision to take an employee's race into account. RP 39. When patients make racial slurs, Mr. Adler testified that "on occasion," the Hospital removes all persons of color from a patient's line of sight rather than secluding or restraining him. RP 54-55. And, the Hospital automatically removes all staff of a particular race before determining a threat is credible. RP 56-57.

Indeed, when an employee is at imminent risk of harm from a patient based on their race, Mr. Adler condones prohibiting members of that race from working with the patient rather than involuntarily

² The Hospital is full of mentally ill patients, many who are at times delusional, and patient violence is always a risk. Patient racism is a regular problem, widespread in the Hospital, including use of racial slurs such as the word "nigger." RP 40.

medicating the patient. RP 54. Unless a court tells them not to, Mr. Adler and the Hospital will continue to consider employee in staffing. RP 62.

Nursing Director Kimmi Munson-Walsh, who oversees all nursing managers (RN4) including those involved in this case, RP 607-08, testified at trial explaining the mechanics of how the Hospital implements this policy and practice. She confirmed that when an employee is assigned based on the employee's race, such racial directives are not conveyed in writing, just verbally. RP 617; *see also* RP 615-17. Race-based staff assignments are not put in progress notes. RP 611.

This unwritten policy is implemented widely. Nursing Manager Lila Rooks, one of the decision-makers in this case, has previously staffed using race. When a patient complained about working with African-American staff members, Ms. Rooks decided to no longer assign African-American staff to that patient. RP 174-76. Nursing supervisors and ward nurses who oversee four of the nine wards at the Center for Forensic Services (Wards F1, F4, F6, and F8) confirmed they use racial staffing frequently, and sometimes for extended periods.

For example, at trial, RN3 Miner Cancio testified that she implemented a racial staffing policy on Ward F6 in which she directed that “no white males” could work with a specific patient. RP 712-14. She discussed this with her boss, Nurse Manager Kelly Saatchi, RN4, who approved of this practice. RP 714. Nurse Cancio testified that her directive continued *for a period of two years*, ending only because the patient was transferred. RP 713. She instructed multiple RN2s to carry

the policy out on a daily basis. RP 715-16. RN3 Cancio testified that without his knowledge, she subjected plaintiff, Jose Lopez, to this policy, to work with this patient because he is not white. RP 717-18; 732-33.

Similarly, Stephanie Hibbard, RN3, who oversees two wards—F1 and F4—testified that on a regular basis, she assigns her staff based on their race to accommodate racism expressed by the patients. RP 669-70; Ex. 43. For example, when a patient did not want to take medication from a Black medicine nurse, the patient asked for a white medicine nurse, and Nurse Hibbard accommodated that request. RP 671. Unless there is a policy change, Nurse Hibbard testified she would continue to replace staff of different races in response to patient requests. RP 674.

RN2 Nancy Phelps, ward charge nurse for Ward F-8, testified that regularly engages in racial staffing, including upon patient request. RP 326-28, *et seq.* She does this even when the staff member has not requested the change. RP 326-27. She does not document her racial staffing because it is “not worth of charting.” RP 325.

Additionally, Licensed Practical Nurse Aboubacar Sidibe, who has been employed at WSH since 2007, RP 554, testified racial staffing has permeated employment at WSH. His supervising nurses on Ward F-8 and Ward E-2 reassigned him when patients objected to working with him explicitly because he is Black. His white RN supervisor on Ward E-2 involuntarily replaced him from helping a racist patient with his soiled linens, RP 556, and a different non-Black RN supervisor on Ward F-8 took over to give medication to a patient who did not want to get

medication “from black people.” RP 559-60. He testified this happened on other occasions on Ward F-8 as well. RP 560. Patients have also refused his assistance because he is from Africa” (Ivory Coast). RP 560-61. Mr. Sidibe testified that on his behalf other Black medication nurses complained about this racial staffing to the RN3. RP 562-63. He explained, at RP 563:

one of the things we said is...the patients are here for treatment and we are getting them ready to go out in the community. And when they go to Wal-Mart, they are not going to have a choice to have a black or a white cashier. So instead of fitting into some of their requirements, we should, of course, talk to them and bring them down to reason and say, we only have one med nurse, this is the med nurse and you're going to take your medication for [sic] him; there's nothing wrong with it.

All told, the evidence at trial specifically identified nearly 50 people (staff, administrators, patients) involved or affected by racial staffing, CP 2663-68, not including other known and unknown instances in which patients and staff were not identified.

C. The Employees Discover That They Are Being Subjected to The Hospital's Racial Staffing Policy

The Plaintiffs learned of the Hospital's policy and practice of staffing them by race when they were overtly subjected to it in 2011.

In March 2011, a patient with the initials M.P.³ refused to take his anti-psychotic medications. RP 363-64 (at 3/13/11). When patient M.P. refuses his medications, he “decompensates,” and becomes racially

³ M.P. is a mentally ill patient who has resided at Western State since 2004, until recently on Ward F-8. He regularly suffers delusions, and has often refused his anti-psychotic medication. RP 164. According to Nurse Manager Rooks—a decision-maker in this case—the patient “had a very difficult time being compliant with his medication.” RP 164.

focused and violent. RP 164. And, he began making threats and assaulting his staff monitors by throwing coffee on them on March 25. RP 321-22 (at 3/24/11). Though hospital management recognizes that obtaining a court order to medicate him was possible, there was no discussion of doing. RP 193:2-196-20.

Instead, on March 24, Ward Nurse Nancy Phelps immediately implemented the racial staffing policy, offering to M.P. to substitute other staff for his current African-American staff, as reflected in her chart notes:

I asked if other staff would be safe monitoring him, explaining that I was obliged to assign two staff to monitor him. He said that would be a good idea. For the safety of the assigned two-to-one staff and the ward, I swapped staff.

Ex. 22 (at 3/24/11); RP 321-22, 325. M.P. approved the swap, saying he was “OK with the Chinese nigger and the alien.” RP 321-22; Ex. 22.

Hospital managers testified that a week later, on Friday, April 1, 2011, as they were leaving for the weekend, they worried that M.P. might harm Black staff. On Friday, April 1, 2011, one of M.P.’s regular caregivers, Andy Prisco, came to Ms. Rooks and told her that M.P. didn’t want to work with black people, and that he would “fuck up any niggers” who worked with him. RP 165. Ms. Rooks and her counterpart, Kelly Saatchi (RN4),⁴ then met with Marylouise Jones, Ph.D. RP 378.

Dr. Jones informed them that M.P. was fixated on African-Americans and

⁴ Nurse Managers Rooks and Saatchi split responsibility over day shift nursing staff (Monday through Friday). RP 165. On the weekends, a single Hospital Manager RN4 is in charge of the entire Hospital. RP 491.

she asked them to keep staff safe. RP 378-79. Ms. Rooks then raised the issue with hospital management, including Saatchi, who testified that she, and Nurse Executive JoAnn Blacksmith, and they collectively made the decision to exclude all African-American staff from working with him. RP 166-69. There was no evidence at trial that Hospital management considered less restrictive options, such as increasing supervision over the weekend. Nor, if he was an imminent threat, did they consider placing M.P. in seclusion (or restraints),⁵ or involuntarily medicating him to counter his delusions.

Consistent with the unwritten racial staffing policy and routine practice, Ms. Saatchi emailed RN4 Nurse Manager Jay Sandhu that M.P. is “triggered by staff of african or mixed african descent,” and requested that Sandhu replace his monitors, (Marley Mann and Eddie Griffin), who were African-American with other staff. Ex. 26;⁶ RP 380-84. Before leaving for the weekend, Rooks walked down the hall to the RN3 office and instructed the RN3s not to assign *any* African-American PSAs to Ward F-8 to work with M.P. RP 169-70; *see also* Ex. 13. Yates confirmed that Rooks instructed that no Blacks be assigned to M.P, RP 102-03. Later that day, the nurse staffing white board stated in large, capital letters: “NO BLACK STAFF TO F8.” RP 105; Ex. 4.

The next day, Saturday, Ward Nurse for F5 Plaintiff

⁵ The Hospital can place patients in seclusion and restraints when faced with risk of imminent harm. But this policy does not mention anything about using race based staffing to achieve safety. Ex. 57.

⁶ In preparing this brief, Plaintiff noticed that the clerk’s description of Exhibit 26 is incorrect. The actual exhibit is an April 1, 2011 email from Ms. Saatchi to Mr. Sandhu.

Polly Blackburn received a hand-written note stating, “No Blacks No Joey to F8;” that note was seen by many of the plaintiffs. RP 598-99 (Peterson); RP 625 (Fant); RP 525-26; 534-35 (Imo); RP 543 (Dau); RP 416-17 (Blackburn). RN3 Yates then instructed Blackburn to pull a non-Black PSA from Ward F5 to send to Ward F8; again, this phone exchange was witnessed by many. RP 418 (Blackburn); RP 103-04(Yates); RP 626 (Fant); RP 527 (Imo); RP 599,544 (Dau). Shocked, Blackburn objected, saying the next three PSAs on the Pull List were persons of color. RP 418-19. Nellie Imo is Black African; Dennis Fant is African-American; and Bonni Fornillos is Filipino. RP 524, 623, 651.

Nurse Blackburn refused to ignore the Pull List and assign staff based on race, so RN3 Yates asked: “Which one is the lightest?” RP 418-420. As Ms. Yates put it, she was trying to find the staff person who would be the “least conspicuous.” RP 105-106. Overhearing, Ms. Imo, Mr. Fant, and Mr. Fornillos held up their arms comparing skin tones. RP 599-600 (Peterson); RP 545 (Dau); RP 527-28 (Imo); RP 627-28 (Fant).

When Ms. Blackburn continued to protest, Ms. Yates then contacted RN4 Weekend Hospital Manager Kara Himmelsbach—the highest ranking official at the Hospital on the weekend. RP 104 (Yates); RP 486 (Himmelsbach). Himmelsbach spoke with both Ms. Yates and RN3 Candace Wight about Rook’s racial staffing directive. RP 488-89. Ms. Himmelsbach’s testimony and contemporaneous notes from Saturday, April 2, 2011 reflect she was told at 3 pm: “only Caucasian,” “from mgmt.,” “cannot say ‘no;’” at 7:29 pm: “lila directive – white male” and at

8:10 pm “only male white staff.” Ex. 37; RP 484-90. Ms. Himmelsbach thought it was “very strange that a patient was going to dictate that only white males would watch him.” RP 489. Yates then called back Blackburn and told her that “per Western State administration and Lila Rooks” she was to send Bonni Fornillos to F8 because he had the lightest skin color. RP 421. RN3 Yates and RN3 Beth Baltz gave Blackburn the Staffing Coordinator’s sheet for that day, which states, “F-5 (white male)” to Ward F8 and “Bonni.” Ex. 3; RP 422; RP 106-09.

RN4 Himmelsbach recommended that RN3 Wight send an email requesting written instruction about the racial staffing. RP 488. Wight did so, asking Nurse Managers Rooks and Saatchi whether “we are to reassign the non-Caucasian, namely African American employees who were hired as one to ones for [M.P.] and replace the staff with non-African American staff.” Ex. 27; RP 388. Unless it was “an agreed-to staffing measure,” she wrote, “I believe it violates the Equal Opportunity Act and will not be able to enforce this staffing plan for F8.” Ex. 27; RP 388.

The following day (Sunday, April 3rd), Clinical Operations Director Jones and Nurse Manager Saatchi discussed the race-based staffing, and Saatchi responded to RN3 Wight’s email: “It is under discussion. Dr. Jones and I have talked.” Ex. 27; RP 388-89. She wrote that M.P.’s “trigger apparently is African American individuals so if we can provide someone who does not trigger him I think we are ok.” Ex.

27.⁷ That evening, RN3 Barbara Kaye emailed Managers Rooks and Saatchi: “there is a lot of anger and requesting Caucasian/white staff only for [M.P.] is creating a very controversial, possibly discriminating situation.” Ex. 9. Though Nurse Manager Rooks recognized that Nurse Kaye was talking about racial discrimination, and that it was “a very unusual staffing decision” to use race as a factor, she did not view this email as a complaint of race discrimination. RP 197-99.

The following morning (Monday, April 4th), Nurse Manager Saatchi responded to Nurse Kaye: “Until you hear further from me they should continue with their assignment.” Ex. 9. In response to Blacksmith who had asked about the racial staffing changes, RN4 Saatchi emailed: “some RN3’s on some shifts have and some haven’t been making changes. Since nothing has been placed in writing everyone is pretty much doing their own thing.” Ex. 28. RN4 Saatchi then pointedly asked Jones and Blacksmith: “And your direction is???????” Ex. 28. There is no evidence that Dr. Jones or Ms. Blacksmith ever responded. And while there is some dispute as to how long the directive was in place, it is undisputed that the Hospital never rescinded it in writing.

Ms. Blackburn filed an Administrative Report of Incident (AROI), asserting that the racial staffing instructions were racially discriminatory and asking for an investigation. Exs. 30, 31. That AROI made its way to

⁷ Like many of the State’s witnesses, Ms. Saatchi was utterly impeached with her prior testimony. She initially denied that she wanted to replace African-American staff with non-African-American staff, but was forced to admit the opposite when confronted with her deposition testimony. RP 381-83. This happened more than once with her, so it is difficult to understand how the trial court found Ms. Saatchi credible.

the Nursing Executive, JoAnn Blacksmith. RP 451.

The State's response was swift, and hostile. The day after Blackburn filed her AROI, Saatchi - who was not Blackburn's supervisor—told Blackburn she should not have filed it. RP 404:16-405:6. Ms. Saatchi, who was visibly angry, said she “didn't have the facts,” and accused her of being “defiant.” RP 410-411. She also said “there is not going to be an investigation.” RP 410-11, 426-428.

Once again, Ms. Saatchi was caught in a misrepresentation at trial: at first, she denied telling Ms. Blackburn that this incident would “look bad in your personnel record,” claiming it was the shop steward who had said it. RP 411-12. When crossed with her deposition testimony, she was forced to admit that she did in fact tell Ms. Blackburn during the meeting that it would “look bad in her record.” RP 411-12.

The court found that the “directive ended” on Monday April 4, 2011, but this was contrary to the un rebutted testimony of Plaintiff Joey Lopez, that he was pulled off Ward F-8 working with MP on Thursday April 7, 2011, because of his race but when the RN3 saw him and said that she was “shocked” that he was there, that he was “not the right PSA” for the job, and sent him back to Ward F-5. RP 729-31.

D. The Only Medical Expert Testimony Was That Racial Staffing Is Bad Medicine and Dangerous, and Cannot Support a BFOQ

The State has defended this case with technicalities, arguing that racial staffing is not an “adverse employment action,” and what happened to the Plaintiffs was not sufficiently “severe or pervasive,” ignoring

completely its policy and practice allowing racial classifications in staffing at any moment, for unlimited periods of time. As a theme, the State has justified its express use of race as “safety-based.” As set forth below, that argument required a “BFOQ” defense which the State waived. And the trial court erred by ignoring entirely the only medical expert testimony, that given by Dr. Jeffrey Geller.⁸ Dr. Geller explained at some length how and why racial staffing is not only unnecessary, but also actually counter-therapeutic and dangerous. In its findings of fact and conclusions of law, the trial court does not even mention Dr. Geller. The State did not offer *any* medical testimony in support of racial staffing.

Dr. Geller became familiar with Western and Eastern State Hospitals when DSHS Director Richard Kellogg asked him to evaluate them to avoid attention from the Justice Department. RP 230.

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.

⁸ Dr. Jeffrey Geller is a “physician specializing in psychiatry,” who is a Professor of Psychiatry at the University of Massachusetts Medical School where he has taught for the past 30 years (since 1986). RP 228-29. He is the medical director of a state psychiatric hospital, supervises residents, treats patients at a community mental health center, and conducts research and has written many peer-reviewed publications. RP 229-32; Ex 10. He began working at such hospitals in 1979. RP 229. Dr. Geller spent “six to eight years as an expert for the U.S. Department of Justice in their civil rights division evaluating state hospitals across the country, “became a consultant to states who were involved in these same suits, now from the State’s perspective” for about fifteen years. RP 229-30. He has “evaluated or consulted to state hospitals in half of the states” in the U.S. RP 230.

For example, if a patient says, 'I'm King George III and when I walk into the room, everyone stand up. I you don't stand up, I'm going to beat you all up. He walks into the room and everybody stands up. Now we have just agreed with the patient that he's King George III. And if he's King George III, he has a myriad of other powers and authorities that he will then execute. We've done nothing to assist him to understand, in fact, that he's not King George III and when he says he's King George III, we're not going to respond[] as if he is.

Dr. Geller continued: "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. It causes other problems as well. Seeing that threats of violence work, other patients act on their racist (and other) fears and wants, making demands for (or against) staff of certain races or sexes or other attributes. RP 264. This harms employee morale and undermines a consistent workforce with knowledge of the ward's patients. RP 263-64.

According to Dr. Geller, the Hospital has a "very good" written protocol to handle "Aggression, Assaultive Behavior" explaining 85% of violence is from fear, but Dr. Geller could "find no evidence in the medical record that Western State Hospital follows its own nursing protocol." RP 236-37. The result was patient "M.P.'s violence." RP 237-38.

Regarding the racial staffing of M.P., Dr. Geller discussed that when "M.P. makes an outrageous demand" to get "rid of the []'nigger staff,' " "the hospital accedes to his outrageous demands." RP 241. Dr. Geller described how this played out with the offer by the Ward Nurse,

Nancy Phelps, to “swap” M.P.’s black staff for “a Chinese nigger and the alien” fed, rather than alleviated, the patient’s stated fears: patients “like M.P. generally become fearful when no one is in control” and “In this situation, there are no external controls. So from M.P.’s perspective, there are no controls...and that’s frightening.” RP 239-41. As a result, “he is less safe” and “His aggression, aggressive activities, following this are greater and more severe than for the time period preceding this” yet “No staff on his treatment team addresses this issue at all.” RP 241.

Having reviewed M.P.’s medical file, Dr. Geller testified that the Hospital did not treat patient M.P.’s racism, despite being aware of it when he entered seven years earlier (in 2004) and noting it in his annual assessments. RP 242. “Medications are one of the major ways that a hospital would try to treat a patient like M.P.” RP 244. But “Mr. M.P., throughout his stay in the hospital, up to and inclusive of the spring of 2011, is permitted to quite willy-nilly take prescribed medications or not take prescribed medications. That is he can accept the medications that are written on a schedule or he can refuse them, and very often he refuses them.” RP 246. At the same time, the Hospital frequently gives him—at his request—a medication that “has a reasonable probability of disinhibiting him,” which is the last thing that Western State Hospital wants to do because it will make his aggression worse.” RP 246.

As Dr. Geller explained, the Hospital could have (and should have) handled this differently, and without using race: “There were many interventions that could have happened and should have happened long

before there was any consideration of staffing M.P. by race, and we have covered many of the failures to treat.” RP 250. In other words, aside from racial staffing, the Hospital had “many tools.” RP 252. For example, “The nursing supervisor could have called the on-call psychiatrist to do an assessment;” “The on-call psychiatrist could have offered the patient stacked doses of medication;” and “The treating psychiatrist could have medicated the patient, even over his objection.” RP 252.

The Hospital simply did “not avail itself of the opportunities that they have in the State of Washington to medicate M.P., even if he’s objecting...and it’s very difficult to understand...why....” RP 246. In an emergency, the Hospital can medicate for up to 24 hours over a patient’s objection. RP 247. And, “Second, and more importantly, Washington...has a judicial process that allows for medication over objection.” RP 248. This “is a fundamental way to address their safety concerns, of which they do not avail themselves and there’s no explanation for that that makes any sense to me.” RP 248. With hundreds of such experiences under his belt, Dr. Geller explains there is every reason to file a request in court and zero reasons for refraining—as this Hospital did. RP 248-50.

Finally, Dr. Geller testified that racial staffing simply doesn’t achieve the stated goal—safety—and didn’t work here: “Throughout the hospital record, there’s many, many, many examples of his 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 no risk-free.

The Caucasian staff is at high risk. So you haven't accomplished anything.” RP 255 (emphasis added). Staffing by race also increases danger to the staff of color: “In the long run I think, yes, *you have increased the danger for them* because you have already agreed with M.P. that they are dangerous.” RP 256 (emphasis added). “And unless you are going to treat M.P.’s delusions...differently than you have for the past seven years...*those staff are at higher risk when they return to work than they were before.*” RP 255-56 (emphasis added). “[T]here’s no indication that they changed how they treated M.P. So the staff is at increased risk.” RP 256.

The State had no medical evidence to rebut this unequivocal indictment of the racial staffing policy. The only Hospital doctor who testified was staff psychiatrist Dr. Charles Harris, who treated M.P. He testified that no one ever asked him whether keeping black staff away from patient M.P. would be medically necessary or therapeutic. RP 953-54. Dr. Harris did not even know M.P. had been racially staffed until after the lawsuit was filed. RP 954. Dr. Harris agrees with Dr. Geller that reinforcing a patient’s delusions is counter-therapeutic. RP 955. Dr. Harris is not aware of any medical literature supporting racial staffing of delusional patients. RP 956. As patient M.P.’s treating psychiatrist, Dr. Harris was required to sign off on the patient’s treatment plan, and nowhere does it say that racial staffing is recommended. RP 957.

IV. ARGUMENT

The WLAD “embodies a public policy of the highest priority. *Xieng v. Peoples Nat. Bank of Wash.*, 120 Wn.2d 512, 521, 844 P.2d 389 (1993) (quotations omitted). The statute itself contains a “sweeping policy statement” declaring that workplace discrimination is “a matter of state concern . . . [that] threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.” RCW 49.60.010. WLAD provisions shall be construed liberally for the accomplishment of the purposes thereof. RCW 49.60.020.” *Xieng*, 120 Wn.2d at 521 (quotations omitted).

When a trial court makes findings of fact and conclusions of law under Civil Rule 52, “the trial court is required to make findings of fact on all material issues.” *Heikkinen v. Hansen*, 57 Wn.2d 840, 844, 360 P.2d 147 (1961). The appellate court reviews the findings of fact for substantial evidence and the conclusions of law de novo. *State v. Homan*, 181 Wn.2d 102, 105–06, 330 P.3d 182 (2014). “Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise.” *Id.* at 106. Findings of fact that are actually conclusions of law will be treated as conclusions of law. *State v. Reader’s Digest Assoc.*, 81 Wn.2d 259, 266, 501 P.2d 290 (1972).

A. Discussion of Issues Pertaining to Assignments of Error

1. The trial court erred when it failed to find that the Hospital has an ongoing policy and practice of racial staffing.

A major focus of the trial was whether the Hospital maintains an

ongoing unwritten policy authorizing low-level supervisors to exclude all employees of a particular race from working with patients when those patients voice racial preferences, demands, or threats. Despite the employees' request for declaratory and injunctive relief and testimony from numerous witnesses affirming the repeated implementation of this policy, including testimony from the Hospital's policymaker himself, the trial court did not make a finding as to whether the policy exists and whether it continues to be implemented. Instead, the trial court's findings focused solely on the discrete instances of racial staffing in 2011, without the context of the admitted ongoing policy that allowed those assignments to occur both before the events of April 2011, and as recently as two months before trial

It was error for the trial court not to make such a finding. After a bench trial, "the trial court is required to make findings of fact on all material issues." *Heikkinen*, 57 Wn.2d at 844; *see also State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997) (trial court's findings must "address all ultimate facts and material issues"). "A material fact is one which a reasonable [person] would attach importance to in determining [a] course of action." *Wold v. Wold*, 7 Wn. App. 872, 875, 503 P.2d 118 (1972). "Ultimate facts are the essential and determining facts upon which the conclusion rests and without which the judgment would lack support in an essential particular." *Id.*

The existence of the Hospital's ongoing policy allowing racial staffing was both a material and ultimate fact. It is also undisputed.

Whether racial staffing continues to be authorized and whether it has continued to occur since April 2011 were essential to plaintiffs' request for declaratory and injunctive relief and to the trial court's conclusion that plaintiffs' fears they would be racially staffed again were speculative.

For purposes of appellate review, "lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof." *In re Welfare of A.B.*, 168 Wn.2d 908, 927, 232 P.3d 1104 (2010). This Court should therefore presume that the trial court's failure to make a finding on whether the Hospital has an ongoing policy allowing racial staffing is the equivalent of a finding that such a policy does not exist.

This implicit finding is not supported by substantial evidence. To the contrary, the undisputed evidence from the Hospital's own employees—including policymaker Ron Adler, the CEO of the Hospital—established that the Hospital "reserves the right" to give "a directive that black employees not be assigned to work to a particular patient" again in the future. RP 31. Under hospital policy, any level of nursing staff can determine that all members of a race, such as black people, are prohibited from working with a particular patient. RP 31-32. Adler testified that there is no limit on the amount of time that all members of a particular race could be barred from working with a patient. RP 43. Staffing decisions that take employee race into account do not need to be documented anywhere. RP 39. Nor does the hospital have any written policy or protocol that guides a nurse's decision to take an employee's race into account when staffing. RP 39. When patients are making racial

slurs, Adler testified that the hospital can remove all persons of color from a patient's line of sight rather than secluding or restraining the patient. RP 54.

The undisputed trial testimony of several nurses from the Hospital also established that the Hospital continues to use racial staffing. Nurse Manager Lila Rooks, one of the decision-makers in this case, has previously staffed using race as a factor. When a patient complained about working with African American staff members, Ms. Rooks decided to no longer assign any more African American staff to work with that patient. RP 174-176.

Nursing supervisors and ward nurses who oversee four of the nine wards confirmed that they use racial staffing policy frequently, and regarding some patients for extended periods. As described above, RN3 Miner Cancio testified at trial that she implemented a racial staffing policy for a patient on Ward F6 in which she directed that "no white males" could work with that patient *for a period of two years*, carried out through daily directives to staff. RP 712-714 et seq. Showing the hidden nature of this unwritten policy and directive, Cancio also testified that she racially staffed Plaintiff Lopez, without his knowledge, to work with this patient because he is not white. RP 717-718; 732-733.

Similarly, Stephanie Hibbard, RN3, testified that on a regular basis, she assigns her staff based on their race to accommodate racism expressed by the patients on these wards. RP 669-670; Ex. 43. Unless there is a policy change, she testified that she would continue to staff by

race in response to patient requests. RP 674:6-21. RN2 Nancy Phelps testified that she regularly engages in racial staffing. RP 326-328, *et seq.* Additionally, Nurse Sidibe testified that racial staffing has permeated employment at WSH, and that his supervising nurses on Ward F-8 and Ward E-2 have reassigned him from working with patients who objected to working with him explicitly because he is Black.

The implicit negative finding that there is no policy or practice of racial staffing should be reversed as unsupported by substantial evidence.

2. The trial court erred when it did not require the State to prove that race is a bona fide occupational qualification.

The trial court's findings of fact and conclusions of law recognize that, at least with respect to the April 2011 incident, the Hospital expressly assigned staff members to different tasks because of their race. The trial court found that on Friday, April 1, 2011, RN4 Rooks and others decided "that MP should not have access to African American staff to protect the staff over the weekend" (FOF 7); that on April 2, when assigning staff to other wards, RN3 Yates told Ms. Blackburn "that a white staff person needed to go to F-8," (FOF 9); and that if a white staff person was not available, that "she send the person 'with the lightest skin'" (FOF 10).

As argued elsewhere in this brief, plaintiffs contend that racial staffing has continued to occur at the Hospital since 2011 pursuant to an ongoing policy allowing race-based assignments, and that the trial court's implicit findings to the contrary are not supported by substantial evidence. The State even admitted in its Trial Brief (*see* Appendix to Plaintiffs'

Request for Review, at App. 33) that “race was involved in the Hospital’s decision.” But even when limited to the trial court’s findings, the Hospital’s actions are a textbook example of a facially discriminatory classification. When it perceives a risk to safety, the Hospital can decide to treat its employees’ race as a job qualification for working with patients.

“[B]y its very terms, facial discrimination is ‘intentional.’” *Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002); *Sommer v. Dep’t of Soc. & Health Servs.*, 104 Wn. App. 160, 172, 15 P.3d 664, 670 (2001) (The “discrimination” element “is met if the employee demonstrates that the employer took action against the employee because of his or her condition....”). An employer engages in illegal discrimination when it treats “a person in a manner which but for that person’s [protected characteristic] would be different.” *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978). If an employment practice fails this “simple test,” it is discrimination *per se*. *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 683 (1983).

For more than three decades, the Washington Supreme Court has held that an employer may defend facially discriminatory classifications only by proving, as an affirmative defense, that the otherwise protected characteristic is a bona fide occupational qualification. *See Franklin County Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 328–29, 646 P.2d 113 (1982); *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 357–58, 172 P.3d 688 (2007). In *Hegwine*, the Court clarified that to succeed with a

BFOQ defense, the employer must prove that the protected characteristic is “essential to the purposes” of the job, and that “all or substantially all” members of the protected class “would be unable to efficiently perform the duties” of the position. 162 Wn.2d at 358. “In disparate treatment cases alleging facial discrimination, the employer’s defense—that the facially-discriminatory qualification it applies is a ‘bona fide occupational qualification’ (BFOQ)—has been narrowly construed.” *Fey v. State*, 174 Wn. App. 435, 447, 300 P.3d 435, 442 (2013). This is because “[t]he law is most wary of an employer’s facial discrimination against a protected class.” *Id.*⁹

Under Title VII, at least one federal appeals court has applied the BFOQ requirement to shift assignments in a psychiatric hospital. In *Healey v. Southwood Psychiatric Hospital*, although the employer had a policy of scheduling both males and females to all shifts, it considered their sex in making assignments. 78 F.3d 128, 130 (3d Cir. 1996). Healey objected that she was assigned to the night shift because her employer wanted a female child care specialist on that shift. *Id.* The employer argued “that its gender-based policy is necessary to meet the therapeutic needs and privacy concerns of its mixed-sex patient population.” *Id.*

The Third Circuit explained that disparate treatment cases can be divided into “two subtheories: facial discrimination and pretextual discrimination.” *Id.* at 131 (citations omitted). Because “Southwood uses

⁹ Under Title VII, there is no BFOQ for race discrimination as a matter of law. *E.g.*, *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 473 (11th Cir. 1999); *Knight v. Nassau County Civil Serv. Comm’n*, 649 F.2d 157, 162 (2d Cir. 1981).

sex as an explicit factor in assigning its staff to the various shifts . . .

Southwood's staffing policy is facially discriminatory." *Id.* at 131.

Healey has shown sex discrimination by establishing the existence of a facially discriminatory employment policy... When open and explicit use of gender is employed, as is the case here, 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.

Id. at 132. "[T]he defendant's affirmative defense is that its policy, practice, or action is based on a" BFOQ. *Id.* at 131.

Here, as in *Healey*, plaintiffs have established the existence of facially discriminatory staffing (as recognized by the trial court), and an ongoing facially discriminatory employment policy and practice. In Washington, as under Title VII, a facially discriminatory employment action may be upheld only if the employer proves a BFOQ.

And yet, despite admitting in writing (as noted above) that "race was involved in the Hospital's decision" to assign plaintiffs to work on certain wards, the State made zero effort to satisfy the BFOQ standard: to the contrary, *it expressly waived its BFOQ defense*. CP 2641 ("[T]he plaintiffs argue that this evidence is relevant to the Hospital's bona fide occupational qualification (BFOQ) defense. The Hospital is waiving this defense."). Once the State made that waiver, Plaintiffs should have prevailed as a matter of law. Instead, the trial court ignored decades of Washington law and analogous federal cases, and upheld the State's facially discriminatory actions without requiring the State to prove a

BFOQ. This was error, and the Court should reverse the trial court and enter judgment for plaintiffs on their disparate treatment claims.

Even if the State had not waived its BFOQ defense, it was nowhere close to meeting the demanding standard. First, the State's own managers testified that it has no need to assign staff based on race. *See* RP 401 (Saatchi). RN4 Himmelsbach described it as "strange" and "crazy." RP 488-490; *see also* Ex. 34 ("I explained that it is a very poor and dangerous idea to allow him to dictate who and who he will not accept as his 1:1 staff (for, now, it is based on race of the staff)"). The Hospital cannot prove it lacks other tools to address the danger posed by other patients or by M.P., who had a history of assaults toward all races.

Merely asserting general safety concerns fails to establish a BFOQ. In *Franklin Cnty. Sheriff's Office v. Sellers*, 97 Wn. 2d 317, 32629, 646 P.2d 113, 117 (1982), the Supreme Court adopted the very narrow federal interpretation of Title VII's BFOQ and applied it to the WLAD.¹⁰

The Hospital has not identified a single alternative it considered, let alone tried. And, it has not explained why less extreme alternatives would not have been successful. For example, before imposing race-based

¹⁰ In its subsequent opinion, *Hegwine*, this Court cited with approval federal precedent that likewise condemns the State's position here: "United States Supreme Court precedent confirms that even alleged health or safety concerns of the employer, as to Hegwine or her fetus, are insufficient to rebut this proof of discriminatory animus. *See Johnson Controls*, 499 U.S. 187, 111 S.Ct. 1196." 162 Wn.2d at 361 (emphasis added). The Court held: "Fibre introduced no objective, medical evidence on this point. The only plausibly relevant testimony came from Dr. Ostrander, who indicated that general safety concerns motivate Fibre's medical examinations." And as is the case here, the Court in *Hegwine* found that "This is insufficient evidence to establish a valid BFOQ." *Id.* (Emphasis added). The same is true here.

staffing, the State did not increase supervision, administer short-term involuntary medication, request a judicial medication override, place M.P. in seclusion or restraints temporarily if he was truly such a threat. The *only* medical expert opinion in the record reveals several viable alternatives. RP 252. There are well-recognized methods of treating patients like M.P. that are more effective than segregating his caregivers by race, which in fact “*increased the danger for them.*” RP 256:3-6 (emphasis added). *See also* RP 255-256.

Dr. Geller also 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 263:6-12. Racial staffing causes other problems as well. Seeing that threats of violence produce results, other patients will act on their racist (and other) fears and wants, making demands for (or against) staff of certain race or sex or other attributes. RP 264. The practice harms employee morale and undermines the value of a consistent workforce with knowledge of the patients on the Ward, when staff are substituted whenever patients demand it. RP 263.

Finally, the trial testimony reveals that Hospital management racially segregated in a haphazard fashion undermining any assertion that it was “necessary.” Nurse Managers casually implemented the ban on black PSAs by verbally banning African-Americans from F-8. RP 182-183. Meanwhile Nurse Manager Saatchi sent an email asking if non-Black replacements could be found. Ex. 26. *See also* Exs. 27, 28, 29.

She never received a response and did not bother to check the outcome. RP 385-386. Despite emails from staff over the weekend clamoring for clarification and reporting anger, frustration, and concern, Hospital management did not give written instructions or clarification, Exs. 27, 28, 29, leading to inconsistent implementation of the racial directive.

Washington courts have never held that acceding to patient racism in a state-run hospital is anything other than a violation of the WLAD, whether for purported medical purposes or otherwise. This Court should not do so now. The Court should reverse the failure to require proof of a BFOQ as an error of law, and should reverse any implicit finding that a BFOQ was satisfied for failure to be supported by substantial evidence.

3. The trial court erred when it held that a facially discriminatory staffing assignment is not an “adverse employment action”

“Because workplace discrimination is ‘a matter of state concern ... [that] threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state,’ RCW 49.60.010, the Legislature has mandated that WLAD provisions ‘shall be construed liberally for the accomplishment of the purposes thereof.’ RCW 49.60.020.” *Xieng v. Peoples Nat’l Bank*, 120 Wn.2d 512, 521, 844 P.2d 389 (1993). So, “courts must carefully consider all allegations of unlawful discrimination, since the WLAD “embodies a public policy of ‘the highest priority.’” *Id.*

Long ago, our courts recognized that “Racial segregation is an evil,” *Dawson v. Troxel*, 17 Wn. App. 129, 133, 561 P.2d 694, 696 (1977),

so it is impossible to reconcile the Legislature’s declaration of freedom from racial discrimination a civil right, with the license to divide employees according to their race. RCW 49.60.180 provides, “It is an unfair practice for any employer... (3) To discriminate against any person in compensation or in other terms or conditions of employment *because of ... race....*” (Emphasis added). That statutory subsection likewise makes it a discriminatory practice “To print, or circulate, or cause to be printed or circulated *any statement... which expresses any limitation, specification, or discrimination as to . . . race....*” RCW 49.60.180(4) (emphasis added).

The trial court’s application of the adverse action requirement here rendered the statutory language prohibiting facially discriminatory limitations and specifications “because...of race” meaningless. The other subsections of RCW 49.60.180 specifically prohibit discrimination in: (1) hiring, (2) discharge from employment; and (3) “in other terms and conditions.” The plain language of subsection 4 prohibits conducting discriminatory inquiries and making discriminatory statements that it prefers some races over others, or limits or specifies what work members of some races can or cannot do, without showing a BFOQ.

This Court has interpreted subsection 4 to prohibit the behavior specified outright, with no mention of an “adverse action” standard. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 359, 172 P.3d 688, 698 (2007) (“inquiring as to a prospective employee's pregnancy status constitutes unlawful sex discrimination”; *Fahn v. Cowlitz Cnty.*, 93 Wn.2d 368, 374, 610 P.2d 857, 861 (1980) *amended sub nom. Fahn v. Civil Serv.*

Comm'n of Cowlitz Cty., 621 P.2d 1293 (1981) (recognizing RCW 49.60.180(4) “expressly prohibits... preemployment inquiries relating to race ...” and holding that employer can only defend such facial discrimination by proving business necessity). To hold otherwise would eviscerate the legislative prohibition of these acts. Otherwise, an employer would be free to facially discriminate so long as it did not deny pay or a job. This would allow racially segregated workplaces, such as a black ward and a white ward in the Hospital.

But instead of requiring the State to meet its burden of proving a BFOQ, the trial court evaluated the State’s facial discrimination under a disparate treatment pretext analysis, requiring plaintiffs to prove that: “a) The defendant imposed a tangible adverse employment action on the plaintiffs;” (COL 4.), then rejected plaintiffs’ claim: “Plaintiffs have failed to demonstrate any adverse employment action.” (COL 5.)

This conclusion was erroneous for two reasons: first, as explained elsewhere, the trial court’s factual finding that racial staffing lasted for only one weekend is not supported by substantial evidence, and the existence of an ongoing policy providing for racial staffing is an inherently adverse employment action, akin to the “separate but equal” policies that pervaded schools, workplaces, and places of public accommodation decades ago. Second, even if plaintiffs did suffer only a “temporary alteration in assignment” over a weekend, when an assignment is expressly based on race, that carries a dignitary harm that amounts to an adverse employment action even in the absence of “evidence of

termination, demotion, loss of pay, or significant reassignment.”¹¹

Under the analogous federal protections of Title VII and 42 U.S.C. § 1981, numerous courts have recognized that assigning an employee to a task based on race violates those statutes, even if it has no effect on salary, benefits, seniority, or job security. In *Sims v. Montgomery County Commission*, the defendant Sheriff’s Department assigned “black officers to serve as car partners with only black officers, and white officers to serve as car partners with white officers” and “black officers to work in the predominantly black west side of the City of Montgomery and white officers to the predominantly white east side.” 766 F. Supp. 1052, 1085–86 (M.D. Ala. 1990). Supervisors explained that they were assigned to the west side because “y’all could talk to them better than we can” and “y’all can get anything out of them on that side.” *Id.* at 1086. The court concluded that by restricting the black officers to mainly dealing with black people, their employer deprived the black officers of being treated as “full-fledged law enforcement officers for *all* the people of the county, both black and white.” *Id.* Without requiring a distinct adverse employment action separate from the segregation, the court held that the defendant’s conduct was “clearly violative of Title VII.” *Id.*; *see also Bridgeport Guardians, Inc. v. Delmonte*, 553 F. Supp. 601, 612–13 (D. Conn. 1982) (holding that pairing black police officers predominantly with other black or Hispanic officers violated Title VI, Title VII, and 42 U.S.C.

¹¹ If the Court determines that plaintiffs were entitled to judgment as a matter of once the Hospital waived its BFOQ defense, the Court need not reach this assignment of error.

§§ 1981 and 1983, without any discussion of pay, benefits, or seniority).

In *Knight v. Nassau City Civ. Serv. Comm'n*, the Second Circuit found a violation of Title VII where Knight, a black man was assigned to “minority recruitment” because he “would develop a better rapport than would a white person with the members of minority groups...” 649 F.2d 157, 162 (2d Cir. 1981). “[A]lthough *his salary and benefits remained unchanged*, Knight claims that the assignment was racist and demeaning.” *Id.* (Emphasis added). In finding it illegal, the court explained:

[I]t was based on a racial stereotype that blacks work better with blacks and on the premise that Knight's race was directly related to his ability to do the job. No matter how laudable the Commission's intention might be in trying to attract more minority applicants to the Civil Service the fact remains that Knight was assigned a particular job (against his wishes) because his race was believed to specially qualify him for the work.

Id. That is precisely what happened to the plaintiffs—they were excluded from performing tasks because their race was deemed to be a qualification.

In *Ferrill v. Parker Group, Inc.*, the employer was making “get-out-the-vote” calls for political candidates. 168 F.3d 468, 471 (11th Cir. 1999). When requested by a candidate, some calls were “race-matched,” with black employees who called black voters using the “black” script, while white employees called white voters using the “white” script based on a belief that voters “would respond” better to callers of the same race. *Id.* at 471, 474. Black and white callers were assigned to make their calls from separate rooms. *Id.* Without any discussion of compensation or benefits, the court upheld summary judgment in favor of the employee

plaintiff under §1981, explaining that the employee was “humiliated” by the employer’s “physical separation of employees on the basis of race” and by the “allocation of work and scripts according to race. Humiliation and insult are recognized, recoverable harms.” *Id.* at 476-77.¹²

And, in *Hunter v. Army Fleet Support*, the court rejected the employer’s claim (similar to the State’s argument and the court’s holding here) that even if it had created segregated work crews, “Title VII and § 1981 would not prohibit this conduct as long as the defendants otherwise did not racially discriminate against the plaintiffs in hiring, termination, and pay and in other tangible ways.” 530 F. Supp.2d 1291, 1295 (M.D. Ala. 2007). The court “strongly disagree[d] with the defendants’ essentially ‘separate but equal is acceptable in the workplace’ argument:”

An employer’s intentional creation and maintenance of racially segregated crews is just as invidious and offensive to the notions of equality at the heart of Title VII and § 1981 as would be segregated water fountains, one labeled for whites and the other labeled for blacks, or segregated rest rooms, one labeled for whites and one labeled for blacks. Such intentional racial segregation in the workplace, even without loss of tangible benefits, is invidious and offensive because it is inherently demeaning.

Id. Relying on the “adverse action” language applicable to the WLAD, the court held racial segregation of job assignments “discriminate with respect to conditions of employment” and “segregate in a way which would adversely affect status as an employee” because “such segregation would be inherently and greatly demeaning to the plaintiffs; indeed, with

¹² The Eleventh Circuit also held that because “the BFOQ defense does not apply to racial discrimination”, the employer could not avail itself of that defense. *Id.* at 473–74.

such conduct, the defendants would relegate the plaintiffs to second-class status in the workplace merely because of their race.” *Id.* at 1296 (alterations omitted).

Nothing about these cases turned on the length or frequency of the discrimination. Further, plaintiffs have shown that the trial court’s finding that racial staffing at the Hospital lasted only for a weekend is not supported by substantial evidence—there is an ongoing policy and practice. But even if plaintiffs’ race-based assignments were “temporary,” that is not a meaningful legal distinction. There is no “de minimis” exception for facial race discrimination. *C.f.*, *Lewis v. Doll*, 53 Wn. App. 203, 210 (1989) (instructing directed verdict for plaintiff under WLAD where store refused to serve blacks); *Browning v. Slenderella Sys. of Seattle*, 54 Wn.2d 440, 442-43, 341 P.2d 859, 861 (1959) (affirming liability of salon for discouraging customer based on race; *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 712 (9th Cir. 1997) (“[T]here is no de minimis exception to the Equal Protection Clause. Race discrimination is never a “trifle.”); *Billings v. Madison Metropolitan School District*, 259 F.3d 807, 814 (7th Cir. 2001) (no de minimis defense for racial seating of elementary school students for short duration). Would it be permissible if, for one weekend a year, an employer assigned all black employees to take out the trash? Serve only black customers? Eat in a different cafeteria? Change in a different locker room? There is no rational reason for holding that a “temporary alteration in assignment” is not actionable. Washington courts generally recognize an broader definition of “adverse action” than

do the federal courts. *See Davis v. West One Auto. Grp.*, 140 Wn. App. 449, 459, 166 P.3d 807, 812 (2007) (Stephens, J., holding employee showed disparate treatment where employer failed to put employee's picture "in the paper when he was salesman of the month," refused to allow him "to drive any car he wanted as salesman of the month," and held him to different standards).

The Plaintiffs testified that the racial directives were deeply offensive and humiliating, and this testimony went unchallenged and un rebutted. For example, Nele Imo, Black African, testified:

I was in shock. I couldn't believe my eyes, that this was happening. . . . Can this be true that we are checking our skin to do our job? And some of us are not qualified due to our skin color to do our job. You can see that - - you can see that there is anger in everyone's face.

* * *

. . . the story or the belief is that the United States is a place of freedom, equality. A place where people can be what they want to be. A place where you can do whatever you want to do if you're qualified. Not a place - - I never believed I would experience a rejection in America due to the skin of my color (sic).

RP 529-530. When she heard CEO Adler affirm the racial staffing policy during trial, and that she could be staffed by race, she testified, at RP 531:

I felt so nauseous. I felt angry. . . . It hurts to the bone of my being. It makes me feel nervous. I makes me feel anxious, because this is still going on. I don't feel secure in my job. All this is because of my skin color. I can't change who I am. This is the way God made me.

Joey Lopez, Filipino, testified at RP 731 that being racially staffed:

That day I was -- I remember I feel humiliated. I feel my skin rip off from my body at the time, and I was questioning myself. I was rendering my job right with

M.P., and all of sudden they are telling me I'm not the right person because I am Filipino.

Illustrating the divisive and inherently unequal and destructive nature of racial segregation, Bonni Fornillos—who is Filipino—was at first pleased the Hospital chose him to work with M.P. because the Hospital had considered him “white.” RP 653-654. But he then felt:

I was -- I felt bad because I was scared, and at the same time I was -- I felt bad for the rest of my -- of my -- of the staff, my co-workers, because we were, like, discriminated. They were actually discriminated because they were blacks and then they were sending me as I was a white person.

RN4 Himmelsbach understood how devastatingly humiliating this experience was. To Nurse Executive Blacksmith, Himmelsbach wrote:

“My heart went out to the staff who were pulled from their positions because of the color of their skin - - how humiliating.” Ex. 36 at 1.

Plaintiff Peterson also complained in writing, stating “I found this unbelievable, that in 2011, people were still judging people by skin color in America.” Ex. 40. The State never addressed these written complaints.

The Court should reverse this finding and conclusion and an error of law. No “adverse action” is required in facial discrimination cases, and even if one is required, such a requirement was met here.

4. The trial court erred when it held that race was not a substantial factor in the Hospital’s decision to exclude black staff members from working with a particular patient because the decision was motivated by safety and not racial hostility.

The trial court also rejected plaintiffs’ disparate treatment claim on the alternative basis that, although the Hospital issued “a directive not to have any person of color attend to MP,” and “[a]lthough this

communication indicated race,” race “was not a substantial factor in the ‘directive’—safety was the overriding factor.” (COL 6.) The trial court defined “substantial factor” as “a significant *motivating* factor in bringing about the employer’s decision.” (COL 4 (emphasis added).) In reaching this conclusion, the trial court seemed to accept the State’s argument that race could not be a “substantial factor” unless the use of race was motivated by “race-based animus or hostility,” even though the State admitted in writing that “race was involved in the Hospital’s decision.” (see Appendix to Plaintiffs’ Request for Review , at App. 33).

This holding contradicts decades of Washington and analogous federal law. First, no Washington case holds that facially discriminatory classifications are tolerable so long as the employer is not motivated by animus toward the protected characteristic. To the contrary, in *Franklin County*, the Washington Supreme Court required an employer to meet the BFOQ standard despite evidence that the County’s use of sex in hiring was not motivated by animus. See 97 Wn.2d at 321–328. The County had decided that the two counselor positions for its work release program would be allocated to one male and one female. *Id.* at 321. The policy was not based on any animus—there were an equal number of spots for men and women—but the Court held that the “decision to achieve a sexual balance by providing a male counselor and female counselor resulted in the County” hiring based on sex. *Id.* at 328. “As such, the action was prohibited by the [WLAD] unless it was based upon a bona fide occupational qualification.” *Id.* The Court further held that the

appropriate measure of a BFOQ was whether “all or substantially all” counseling teams composed of the same gender would be unable to perform their required function or whether “the essential function of the program would be undermined” if teams of the same gender were utilized. *Id.* at 329 (citing federal cases applying Title VII BFOQ standard). The Court held that “a BFOQ did not exist,” so “the County’s actions in attempting to sexually balance its staff violates RCW 49.60.” *Id.* at 329 & n.2; *see also Lewis v. Doll*, 53 Wn. App. 203, 210 (1989) (“Nor is the fact that Ms. Doll did not intend a discriminatory effect relevant.”).

Numerous federal cases also establish that a showing of animus is not required in cases of facial discrimination. The seminal case on this topic is *UAW v. Johnson Controls, Inc.*, in which the U.S. Supreme Court held that “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy.” 499 U.S. 187, 199 (1991). The Court held that an employer’s policy prohibiting women of childbearing age from working in jobs that exposed them to lead violated Title VII, even though the policy was motivated not by animus toward women, but by a desire to protect an employee’s fetus from exposure to lead if she becomes pregnant. *Id.* at 198. “The beneficence of an employer’s purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination.” *Id.* at 199. *See also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668-69 (1987) (affirming unions’ liability for not processing grievances of race discrimination in order to maintain good relations with management; that “there was no suggestion

below that the Unions held any racial animus against or denigrated blacks generally” was irrelevant) *See also Woods v. Graphic Commc'ns*, 925 F.2d 1195, 1200 (9th Cir. 1991) (explaining *Goodman*).

Similarly, in *Ferrill v. Parker Group*, discussed above, the employer tried to argue that it had not discriminated because it was not motivated by animus. 168 F.3d at 473. The Eleventh Circuit flatly rejected that argument: “The crucial issue then is whether a defendant who acts with no racial animus but makes job assignments on the basis of race can be held liable for intentional discrimination Clearly, the answer is yes.” *Id.*; *see also id.* at 473 n. 7 (“In other words, ill will, enmity, or hostility are not prerequisites of intentional discrimination.”).¹³

The Court should reverse this finding and conclusion as unsupported by law or evidence. The State has admitted in open court that race was a factor. And it was undeniably a substantial factor.

5. The trial court erred when it held that race-based staffing at Western State Hospital was not sufficiently severe or pervasive to affect the terms and conditions of plaintiffs’ employment.

The trial court rejected plaintiffs’ hostile work environment claim on the basis that a race-based staffing assignment that lasts “only” for one weekend is not sufficiently severe or pervasive to affect the terms and conditions of employment. COL 9, 10. Elsewhere in this appeal,

¹³ In *Knight v. Nassau Cty Civil Serv. Comm’n*, also discussed above, the court found that assigning a black employee to minority recruitment based on his race was discriminating “no matter how laudable the Commission’s intention might be.” 649 F.2d at 162. Countless other federal cases establish the same principle. *See, e.g., Latta v. Otter*, 771 F.3d 456, 467–68 (9th Cir. 2014) (“Whether facial discrimination exists does not depend on why a policy discriminates, but rather on the explicit terms of the discrimination.”); *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1048–49 (9th Cir. 2006).

plaintiffs have challenged the trial court's factual finding that racial staffing at the Hospital lasted only for a weekend, and that in any event they are subject to an ongoing policy and practice—which makes it pervasive and humiliating, and severe. But even if the racial staffing was only temporary, the dignitary harm caused by acceding to racist threats, demands, and preferences of psychiatric patients is sufficiently severe to affect the terms and conditions of employment.

Accommodating the demands of racist patients creates an inherently hostile work environment. In *Chaney v. Plainfield Healthcare Center*, a nursing home resident asked not to be assisted by black nursing assistants; the employer complied by writing in her chart, “prefers no black CNAs.” 612 F.3d 908, 910 (7th Cir. 2010). Reversing summary judgment in favor of the employer, the Seventh Circuit held that the employer had “acted to foster and engender a racially charged environment through its assignment sheet that unambiguously, and daily, reminded Chaney and her coworkers that certain residents preferred no black CNAs. Unlike white aides, Chaney was restricted in the rooms she could enter, the care that she could provide, and the patients she could assist.” *Id.* at 912. So, too, the Hospital has explicitly and publically limited which patients the Plaintiffs may work with (no blacks or only whites to work with patient M.P.) and where they can work (“NO BLACKS TO F8”) based on their race, and the Hospital’s ongoing policy sends the unmistakable message that it supports staffing decisions that accommodate patients’ racist attitudes.

Like the holding in *Chaney*, courts in the Ninth Circuit have repeatedly declared that an employer cannot defend intentional discrimination on the ground that it is merely accommodating customer (or patient) preferences. See *Olsen v. Marriott Intern. Inc.*, 75 F. Supp.2d 1052, 1065 (D. Ariz. 1999) (“Ninth Circuit consistently rejected BFOQ based on customer preference for one sex”); *Lam v. Univ. of Hawai’i*, 40 F.3d 1551 (9th Cir. 1994) (same); *Gerdom v. Cont’l Airlines, Inc.*, 692 F.2d 602, 603 (9th Cir. 1982) (same).

Racial segregation job assignments, without a doubt, creates a hostile work environment, and it is surprising that this is even being discussed in 2015. It announces to the Plaintiffs, and to supervisors, co-workers, and patients alike that race is “what matters most” in the workplace. The directive necessitated a mid-level manager (RN 3) asking Ward Nurse Blackburn “who has the lightest skin” and several of the Plaintiffs comparing their skin tones to see who could work with M.P.

This would be hostile in any workplace, but it is especially so in a psychiatric hospital because it tends to foster irrational bias and bigotry in the minds of the mentally ill patients, many of whom have shown not only a propensity for but a practice of committing violence against staff and for trying to “split” staff, meaning attempting to create division between staff to get what they want. RP 49-50. As set forth above, Plaintiffs’ un rebutted expert testimony from Dr. Geller establishes that the State’s race-based actions actually increase the danger of physical harm to staff and amount to bad medicine for the patients. RP 255:24-256:11

The State undermined the authority of the Plaintiffs in this dangerous workplace by acceding to the wishes of a psychotic and delusional patient, and by announcing that their race is the determining feature of their qualification to work with a patient, and that the perceived racial preference of a patient will be accommodated when the patient threatens to commit violence based on race. As explained above, the undisputed testimony of the Plaintiffs showed that they were humiliated by the Hospital's racial segregation of them and its ongoing policy and practice. This finding and conclusion should be reversed as unsupported by substantial evidence. The substantial evidence is that there is a current and ongoing policy and practice of racial staffing by the Hospital that was, and remains, deeply upsetting to the plaintiffs.

6. The trial court erred when it found that the race-based staffing directive ended on April 4, 2011; when it found that since April 2011, none of the plaintiffs have been on a shift in which a similar staffing assignment was made; and when it held that plaintiffs' fears of future racial staffing were speculative.

At several places in its written findings of fact and conclusions of law, the trial court found that the Hospital's race-based staffing directive ended on Monday, April 4, 2011, and that none of the plaintiffs had been subject to a similar racial staffing assignment. *See* FOF 12, 14; COL 5, 9, 10. Based on these findings, the trial court concluded as a matter of law that plaintiffs' fear they will be subject to racial staffing again in the future is speculative. COL 11. These findings and conclusions are not supported.

As noted above, the trial court did not make any findings about the existence of the Hospital's policy or practice or racial staffing let alone

that it is ongoing. All the undisputed evidence at trial established the opposite, and that race-based staffing is widespread and continues to this day, and that the Plaintiffs are subject to that policy if the Hospital chooses to use it, so substantial evidence does not support the court's finding.

As for the specific directive banning employees of color from working with patient M.P, that too lasted longer than the trial court found. To begin with, Nurse Phelps began racially staffing M.P. on March 24. Ex. 22 (at 3/24/11); RP 321. Nurse Barbara Kaye complained that the racial directive had been in place as of March 29, 2011. Ex. 9. Plaintiff Matt Staley testified that in the week leading up to the April 2-3 weekend, the racial staffing directive was being discussed at a safety meeting, but that COO Dale Thompson simply shrugged his shoulders about it. RP 581-91. After the weekend, on (Monday, April 4th), Nurse Manager Saatchi responded to Nurse Kaye's weekend email asking for clarification about racial staffing, by writing: "*Until you hear further from me they should continue* with their assignment." Ex. 9 (emphasis added). It is undisputed that the Hospital never rescinded its policy in writing. Then, Plaintiff Joey Lopez testified that later that week, on Thursday, Ward F8 supervisor turned him away stating that he was not the right person for the job. RP 729-731. The State offered no testimony to the contrary. The overwhelming weight of the evidence presented was that this particular racial staffing event lasted much longer than two days, and that racial staffing more generally was widespread and common.

Similarly, the court found that none of the Plaintiffs have been on

shifts since April 2011 in which they were staffed according to race. For this finding, the court relied on the Plaintiffs' testimony that they did not know whether the Hospital had staffed them by race. And, in doing so, the trial court ignored entirely the unchallenged testimony of RN3 Cancio, who testified that without Plaintiff Lopez's knowledge, she assigned him to work with a patient because of his race as recently as December 2014—a mere two months before trial. RP 717-718; 732-733. And Nurse Cancio testified that her racial staffing directive was in place for the past two years. Plainly, the court's finding that no Plaintiff had been racially staffed since 2011 was unsupported by substantial evidence. Furthermore, the unwritten nature of both the policy and the practice, both of which are admitted by the State, necessarily mean that others have done this, and had this done to them, without disclosing it.

The trial court found that it was mere speculation by the Plaintiffs that they would be racially staffed at the Hospital again. But the opposite is true. Nurse Cancio racially staffed Mr. Lopez in 2014. Nurse Hibbard testified that she racial staffs on both wards that she oversees, as does Nurse Phelps. That's four of the nine CFS wards. Nurse Sidibe testified that he had been racially staffed repeatedly, and on more than one ward. Further, RN4 Rooks and now retired Nurse Executive Blacksmith both testified to instances in which they or others had staffed by race as well. CEO Adler testified, unequivocally, that the Hospital endorses racial staffing through a policy and practice implemented at the discretion of every nurse in the Hospital for as long as he or she concludes is necessary.

Finally, Nursing Administrator (and corporate representative at trial), Kimmi Munson-Walsh testified that such racial staffing decisions are typically not be documented—which is likewise illustrated by the fact that the Hospital produced no records of the many instances of racial staffing testified to by Ms. Cancio, Ms. Hibbard, Ms. Phelps, Mr. Sidibe, Ms. Rooks, and Ms. Blacksmith, rendering them very difficult to discover except anecdotally. As a result of all this undisputed and unchallenged testimony, the trial court’s finding that it is speculative whether the Plaintiffs will be racially staffed again was wholly unsupported.

Plaintiffs sought declaratory and injunctive relief—including in motions for preliminary injunction and affirmative summary judgment that the trial court denied. In correcting the trial court’s findings of fact and erroneous conclusions of law, this Court should declare that the Hospital’s policy and practice of racial staffing violates RCW 49.60 and permanently enjoin the State against using employees’ race to define what tasks they are allowed to perform and for which patients or members of the public.

To obtain an injunction, Plaintiffs must show: (1) they have “a clear legal or equitable right”; (2) a “well-grounded fear of immediate invasion of that right;” and (3) “that the acts complained of are either resulting in or will result in actual and substantial injury” to them. *King v. Riveland*, 125 Wash.2d 500, 515, 886 P.2d 160 (1994).

Plaintiffs have established their clear legal right. Every day, they show up at work facing ongoing danger that in response to racism by M.P. or one of the many other delusional or seriously mental ill patients they

serve that the Hospital will implement its unwritten policy authorizing race-based staffing. And, as shown above, the Hospital maintains an unwritten policy and practice endorsed unfettered, undocumented, and unreviewed staffing decisions based on employee race at the discretion of any nurse, which has occurred repeated, on many wards, and in one case at least lasted at two years—ending only two months before trial.

The detrimental effect of race discrimination is magnified when it is not only sanctioned but sponsored by the State: “The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the [minority] group.” *Brown v. Board of Education*, 347 U.S. 483, 494 (1954); *MacLean v. First Nw. Indus. of Am., Inc.*, 96 Wn.2d 338, 344, 635 P.2d 683 (1981) (“It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service.”). It is well-established that such violations constitute great harm that cannot be repaired. *See Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), explains that “it is not apparent to us how” discrimination by the State could be remedied by money damages.¹⁴

¹⁴ Federal precedent provides further guidance: “The standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief.” *Burlington N. R.R. Co. v. Dep’t of Revenue*, 934 F.2d 1064, 1074 (9th Cir. 1991) (internal quotation marks and citation omitted). This applies to Title VII, which provides: “[i]f the court finds that the

This concept applies with force to WLAD, which explicitly provides for injunctive relief and incorporates Title VII remedies. RCW 49.60.030(2). Each day that the State subjects Plaintiffs to a policy of racial segregation in their public employment, the State deprives them of their rights. And the State has asserted its intent to segregate employees by race whenever it deems appropriate. That harm is not adequately compensable at law, and should be enjoined without delay.

B. Plaintiffs Request Judgment Be Entered By This Court, and If The Case is Remanded, a New Judge.

The Plaintiffs filed a motion for partial summary judgment, CP 354-390, because this case turns on questions of law for this Court: can the State segregate its Hospital by the race of its employees? The answer to that question is binary. It should result in a remand only to decide damages because the core facts in this case are not disputed between the parties.¹⁵ Indeed, they flow from the mouths and keyboards of the

respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate....” 42 U.S.C. § 2000e-5(g). Under Title VII, the Supreme Court has emphasized the need for injunctive relief: “Where racial discrimination is concerned, ‘the (district) court has *not merely the power but the duty to render a decree* which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.’” *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (citation omitted) (emphasis added).

¹⁵ Plaintiffs respectfully request reassignment to a different judge on remand. The trial judge did not just erroneously disagree with the Plaintiffs on the law such as can occur on dismissing a case on summary judgment. Rather, the judge was the fact-finder at trial. In this capacity, to reach the findings of act and conclusions of law entered in this case, the judge ignored (1) all evidence of the Hospital’s policy and practice of racial staffing, including the testimony of Hospital CEO Adler, Nurse Director Munson-Walsh, RN3 Cancio, RN3 Hibbard, RN2 Phelps, and Medication Nurse Sidibe; and (2) the only medical evidence offered at trial on whether racial staffing is medically necessary or

Hospital's own CEO and its managers: The Hospital (1) maintains an unwritten policy and practice of providing discretion to its nurses to assign staff based on their race, including entire races; (2) has implemented its policy and practice many times with many patients and staff on many wards of CFS, lasting in one case two years; (3) has no set criteria for its policy, no approval or review of implementing decisions, no documentation of race-based staffing, and no limit on the length of time that races are banned from working with a patient; (4) implemented racial staffing on the Plaintiffs regarding patient MP in March and April 2011 and on Plaintiff Joey Lopez as recently as December 2014 regarding a different patient; and (5) intends to continue maintaining and implementing its race-based staffing policy and practices as described.

C. Request for Fees and Costs

Under RAP 18.1, Plaintiffs request award of their fees and costs to prevailing plaintiffs, as provided by the applicable law, RCW 49.60.030(2).

DATED August 19, 2015.

MACDONALD HOAGUE & BAYLESS

BY: /s/Jesse Wing

Jesse Wing, WSBA #27751

Joseph R. Shaeffer, WSBA #33273

Tiffany Cartwright, WSBA #43564

appropriate—the unchallenged testimony of Jeffrey Geller, MD, MPH. The trial judge also made inexplicable credibility findings in favor of RN4 Saatchi—who was repeatedly and effectively impeached with her deposition testimony—and against Plaintiff Blackburn, who was not crossed by the State at all. Under the circumstances, it would be difficult for the trial judge to view this case through a fresh lens on remand.

DECLARATION OF SERVICE

Esmeralda Valenzuela states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by MacDonald Hoague & Bayless, and I make this declaration based on my personal knowledge and belief.
2. On August 19, 2015, I caused to be delivered via email a copy of APPELLANTS' AMENDED OPENING BRIEF addressed to:

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Email: torolyEF@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 19TH day of August, 2015 at Seattle, King County, Washington.

/s/ Esmeralda Valenzuela
Esmeralda Valenzuela, Legal Assistant