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RECEIVED BY E-MAIL
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' REPLY BRIEF

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I. INTRODUCTION

The State of Washington asks this Court to judicially create an exception to the WLAD allowing it to classify its employees by race, rather than having to prove a “Bona Fide Occupational Qualification.” An employer cannot dodge the law simply by claiming “safety.” That is a BFOQ, and the State waived that affirmative defense.

A. The Hospital’s Continued Denial of an On-Going Policy that Authorizes Race-Based Staffing is Flatly Contradicted by the Evidence

Hospital CEO Ron Adler testified, repeatedly, as follows:

Q. You believe that Western State Hospital has a need to **take into account the race of its employees** when making staff decisions sometimes. Is that correct?

A. **Yes.** To ensure patient and staff safety.

* * * *

Q. And so Western State Hospital reserves the right to give a directive that **black employees not be assigned to work** with a particular patient. Is that right?

A. Under unusual circumstances, **yes.**

RP 31 (emphasis added).

Q. If a patient's acuity poses an imminent risk to staff based on their race, the hospital would then make a staffing decision, possibly to **preclude members of that race from working** with that patient. Is that right?

A. **Yes.**

RP 32 (emphasis added).

Q. Licensed staff at Western State Hospital do have the authority to **preclude an entire race from working** with a patient for a period of time, right?

A. If it were necessary for patient safety and staff safety, **yes**.

RP 34 (emphasis added).

Q. And each one of those decisions that you've just described is made by the individual nurse, RN2, 3 or 4, based on their clinical judgment. Is that right?

A. Yes. And based on inputs.

Q. And **that is consistent with Western State Hospital policy**. Is that correct?

A. **Yes**.

RP 35-36 (emphasis added).

Similarly, the Hospital's Nursing Administration Director Kimmi Munson-Walsh, who was its CR 30(b)(6) designee on its issuance of future racial staffing directives, admitted at trial that:

- "RN3s and RN4s are the titles of employees who will be authorized to issue future racial directives;"
- "the method of communication to hospital staff of future racial directives would typically be verbal in a shift report" and "not usually be in writing;" and
- "there would generally not be any documentation of such directives"

RP 607, 615-17.

Despite these admissions, and the testimony of several nurses demonstrating the implementation of this policy and practice, *see* Opening Br. at 6-8, the Hospital nevertheless argues that "None of the evidence at trial, therefore, established an 'ongoing policy' of 'race-based staffing,'" Resp. Br. at 7. This Court should not credit this double speak.¹ It makes no

¹ The trial court made no finding at all regarding this admitted Hospital policy and practice.

difference whether racial staffing is done for “safety,” or under “unusual circumstances.” The Hospital undeniably has an unwritten policy and a practice that allows and condones staffing assignments based on race. Indeed, when a patient makes a threat against members of a race, the Hospital treats race as *the* factor in deciding to preclude all members of that race from working with the patient.

The Hospital also tries to minimize the impact of the testimony of nurses about other instances of race-based staffing by dismissing them as “only a handful on incidents” of what the Hospital now labels “staff swaps,” Resp. Br. at 6-7, 13, a sterile term that has never been used to describe this policy and practice. But these nurses’ unrebutted testimony constitutes substantial evidence that the Hospital maintains a race-based staffing policy and practice. Nurses Sidibe, Hibbard, and Phelps each testified to multiple, specific incidents of racial staffing; and Nurse Cancio testified that she issued an instruction of constant racial staffing on her ward for a two-year period. Nurses Blacksmith and Rooks testified to other racial staffing incidents as well. The Hospital claims the record does not show Nurse Phelps testified she “*regularly* engages in racial staffing.” Resp. Br. at 44 (emphasis added). But in addition to three incidents of racial staffing she described in particular, Nurse Phelps testified as follows, when confronted with her deposition testimony:

Q. Were you asked the question, "Have you ever had patients who were of a racial minority who refused to

accept meds from a white staff member?"

[A. Yes.]

Q. Did you give this answer: "Yes. **That happens to me on a regular basis**"?

A. Uh-huh.

Q. Is that the answer you gave?

A. Yes.

Q. And then you mentioned, "African Americans, one I'm thinking of in particular, won't accept meds from me." Is that right?

A. Yes.

Q. And then were you asked -- well, the question is sort of cutoff, right, you were asked "and," and then you then say, "**And so I have my darker-skinned colleague -- colleagues.**" Was that your answer?

A. Yes.

RP 332 (emphasis added). Thus, on a regular basis, Nurse Phelps has a darker-skinned colleague give medications to a patient because the patient does not want to accept them from her—because she is white.

Thus, the State grossly understates the testimony as evidence of only "a handful" of racial staffing incidents. Moreover, none of the nurses testified that their recollections comprised all the racial staffing incidents they had experienced, witnessed, or of which they were aware. By arguing that its own employees did not identify even more incidents, the Hospital seeks to exploit its practice of not recording the incidents, its failure to secure responses in discovery from more than one-third of its nurses about whether they have engaged in or witnessed such incidents, *see* Resp. Br. at

6, and the likelihood that employees would not want to come forward to testify in court about their conduct. The only logical conclusion is that there are even more incidents than the many that Plaintiffs uncovered.

The Hospital also mischaracterizes Nurse Cancio's testimony as not supporting that she racially staffed Plaintiff Lopez without his knowledge, and that there was "no showing" that her staffing decision was "discriminatory." But here is what Nurse Cancio said:

Q. What race is [Patient L.B.]?

A. She's African American.

Q. Did an incident occur that caused you to accommodate her request regarding race?

A. Yes.

Q. Please describe it.

A. I have this female, black patient, who assaulted one of my PSAs really bad, to the point that we had to call 911, because she stated that she hates white men.

Q. And what color was this staff who she assaulted?

A. He's white.

* * * *

Q. And as a result of this incident, did you give an instruction to your staff on ward F6 regarding the staffing of patient L.B.?

A. Yes.

Q. Please explain your instruction.

A. I noticed that patient L.B. doesn't like white men. I will not put my staff in jeopardy for safety. If I assign white men, he's going to -- she's going to hurt them.

Q. Have you given your staff instruction never to assign white male staff to patient L.B.?

A. Yes.

Q. You gave this instruction more than two years ago. Is that right?

A. Yes.

Q. It lasted for approximately two years?

A. Yes.

RP 712-13 (emphasis added). She believes Plaintiff Lopez worked on her ward with the patient. RP 718. And Mr. Lopez confirmed he worked with L.B., but did not know he was placed with the patient because of his race (non-white) until Nurse Cancio told him shortly before trial. RP 732-33.

The State baldly declares there is “no evidence” of an “on-going practice or policy of ‘racial staffing’ at the Hospital” and “Employees point to no evidence in the record, let alone substantial evidence, that supports their assertion there is an ‘ongoing policy’ of ‘race-based staffing.’” Resp. Br. at 11, 46. But given the CEO’s and Nursing Administration Director’s testimony, and that of many, many other employees, it is difficult to understand how the Hospital can make this argument with a straight face.

B. Race was a “Substantial Factor”

The State acknowledges that under long-standing precedent, Plaintiffs needed to show only that their race was a “substantial factor” in its employment decisions. Resp. Br. at 30 (“[T]he plaintiff must show that his or her race was a substantial factor in the claimed adverse action.”)

The State also concedes that it banned African-American staff from working with patient MP for a period of time in 2011, claiming “safety concerns,” to select only employees who were not African-Americans to work with him during that period. And its CEO maintains an unwritten policy that nurses can—and do at times—assign staff based on their race, which multiple witnesses testified to a trial. Despite all of this, the trial court “concluded that race was not a substantial factor in the Hospital’s decision, but rather safety was. CP 2711-12.” Resp. Br. at 30-31.

The State defends this erroneous conclusion by stating that “the Hospital has always acknowledged that in this staffing decision, *race was believed to be a flashpoint for the safety threat that spurred the decision.*” Resp. Br. at 31-32 n. 15 (emphasis added). In other words, the patient’s racism threatened staff safety causing the Hospital to ban all black employees from working with him. The State has now conjured a balancing test, unknown to the WLAD,² in order to save the finding:

“The trial court appropriately balanced the safety-based nature of the staffing decision against the Hospital’s acknowledgement that M.P.’s race-based aggression prompted the decision, and properly concluded that safety—not race—was *the* substantial factor in the staffing decision.”

Resp. Br. at 31 (emphasis added).³ But the State’s description makes no

² Any “balancing” is done via the BFOQ affirmative defense, which the Hospital has expressly waived.

³ In an effort to show the court’s finding was reasonable, the State helpfully points out that the court did not rely on the State’s other legally indefensible argument: “the Hospital argued that *in the absence of an adverse action*, a challenge to a decision acknowledging race at the very least must include a showing of race-based animus. *See, e.g., CP 2909-10.*” Resp. Br. at 31 (emphasis in original). It is of no significance that the

sense. And referring to safety as “the” substantial factor misapprehends the whole point of the test: there can be more than one substantial factor, and liability attaches when race was just one of them. *See MacKay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310 (1995). It is troubling to see the State make up ill-considered tests to try to win, especially when it has a corresponding responsibility to enforce the WLAD.

C. The Unpublished Cursory Memorandum Decision in the Companion Federal Case is Unpersuasive

Plaintiffs brought a related action in federal court, which was dismissed on summary judgment. The State relies on an unpublished memorandum decision affirming that order purportedly to establish that federal law “does not undermine the state trial court’s verdict.” Resp. Br. at 18. But that decision is neither binding nor persuasive here.

First, the Ninth Circuit explicitly applied the Superior Court’s findings as collateral estoppel. Since Plaintiffs challenge those findings, it makes no sense to rely on a collateral unpublished decision that accepted the challenged findings wholesale. This is especially true because the Ninth Circuit declined to consider the plethora of unrebutted testimony at trial that the Hospital maintains a policy and practice of racial staffing, which the Superior Court failed to discuss at all. *See* Resp. Br., Att. A at n. 2. Its application of federal law accepting the underlying, erroneous verdict in this case at face value is of zero persuasive force here.

trial court failed to accept the State’s argument that a plaintiff must show animus because that notion is contrary to long-standing precedent. *See* Opening Br. at 38-41.

The Ninth Circuit’s unpublished decision did not apply or distinguish any of the specific cases cited by the Plaintiffs in their briefing to this Court or even the body of case law of facial discrimination that applies here. *See id.* Rather, the federal court applied qualified immunity analysis—which does not exist under Washington law. The unpublished decision simply serves no purpose for this Court.

D. Published Federal *Facial* Discrimination Precedent is Persuasive Authority

The State fundamentally misapprehends and misrepresents the Employees’ argument, by suggesting that the Plaintiffs contend “the *presence of race alone* constitutes an adverse action.” Resp. Br. at 17-18 (emphasis added). As an initial matter, the State’s injection of the term “presence”—which Plaintiffs have not used and which the State never explains—is simply confusing and illuminates nothing. Plaintiffs’ argument is straightforward: when an employer *explicitly classifies* its employees by their race, assigning tasks or duties to them “because of” race, the employer’s facial discrimination violates RCW 49.60. And this is true, regardless of whether the racial classification results in “no effect on salary, benefits, seniority, or job security.” Opening Br. at 33. Otherwise, the State could legally create segregated wards based on race.

The State tries to distinguish the line of federal precedent that has long established the legal principle articulated by the Plaintiffs:

In these cases, the presence of race alone did not constitute an adverse action—it was a job assignment based on the *false belief, following from repugnant stereotypes*, that the plaintiff’s race uniquely qualified him or her for the job.”

Resp. Br. at 19 (emphasis added). But the State fundamentally misstates the holdings of these cases, contending they depend on “repugnant” stereotypes or the falsity of the employer’s belief that the employee’s race uniquely qualified him or her for the job that offends the law. The holdings in these cases mean something quite different. They reject making employment decisions explicitly based on race, regardless of whether the stereotypes applied are perceived as “repugnant” (or positive) and regardless of whether the racial stereotype relied upon by the employer can be characterized as true or false. They recognize that the employer violates the law by making employment decisions because of racial stereotypes, period. That is what the law finds repugnant. And, the State fails to cite any aspect of the holdings that supports its contrary spin.

So, for example, the State tried to distinguish *Sims v. Montgomery County Commission*, 766 F. Supp. 1052 (M.D. Ala. 1990), where the police department “believed African American officers worked better with other African Americans.” Resp. Br. at 18. The court held that use of that stereotype was illegal, but never held the stereotype was “false” or that its legality depended on whether it was false. Similarly, the State tried to distinguish *Ferrill v. Parker Group, Inc.*, 168 F.3d 468 (11th Cir. 1999), where a company’s “get-out-the-vote” calls for political candidates assigning black employees to call black citizens using “black” scripts were held illegal because the employment decision was based on the employees’ race. The court never analyzed whether calls from black employees to black citizens were more effective at securing votes because

that simply didn't affect the legality of the employer's decisions. Even if the racial stereotypes were accurate, the law would prevent employment decisions based upon them.

Here, the State tries to distinguish its own behavior from this precedent, by contending it never engaged in racial stereotyping: "The Hospital voiced no perception that the employees' race impacted their qualifications for the job." Resp. Br. at 19. But this is self-evidently false. By endorsing and implementing an unwritten policy and practice that allows staffing by race, the Hospital accedes to the perceived racial stereotypes *of its psychotic patients*, just as the employer police department and employer get-out-the-vote campaigner acceded to perceived stereotypes of the public (black officers and black callers will be more effective dealing with black people) in *Sims* and *Ferrill*.

Somehow, the State reads these cases to mean that to be illegal an employer's racial stereotypes must be false. But these cases cannot be read to say that, and the argument is wholly illegitimate. Requiring falsity would necessarily require Washington courts to decide that racial stereotypes are accurate, and then to decide which ones are acceptable and which ones are "repugnant." Washington courts should not be endorsing use of racial stereotypes in the workplace, let alone pronouncing some of them legitimate. But that is what the State seeks here.

And, the State claims that "These cases do not stand for the proposition that simply because race is acknowledged in a staffing decision, a plaintiff has automatically proven an adverse employment

action.” Resp. Br. at 20-21. Again, the State is mistaken. These cases **do** stand for the proposition that facial racial discrimination—that is, classifying employees at work based on their race—is in and of itself illegal. The classification need not result in loss of pay or lesser work responsibilities—just assignments to work with different customers because of race. *See Sims, Ferrill, supra.*

The same is true with *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 130 (3d Cir. 1996). In *Healey*, “Southwood uses sex as an explicit factor in assigning its staff to the various shifts, and Healey was assigned to the night shift because of her sex.” *Id.* This, the Third Circuit explained, “involves a facially discriminatory employment policy....” *Id.* And although the State wants to focus on Ms. Healy’s dislike of her assignment to a less desirable shift, the Third Circuit articulated that she merely needed to show facial discrimination: “Healey has shown sex discrimination by establishing the existence of a facially discriminatory employment policy.” *Id.* at 132. At that point, the Third Circuit held that the employer could escape liability only by proving a BFOQ defense for sex discrimination. *Id.* Here, the State waived this defense.

These rulings do not require or even refer to an “adverse action” or imply that the legality of *facial* racial classifications depends on the length of time the employer implements them. This makes sense because the legal analysis of *facial* discrimination cases is distinct from those in which an employee must establish discrimination through pretext. *Id.* (“The disparate treatment theory can be further subdivided into two subtheories:

facial discrimination and pretextual discrimination.”). The “adverse action” component was judicially-crafted as part of a prima facie case in the context of proving pretext. *See, e.g. Leftwich v. U.S. Steel Corp.*, 470 F. Supp. 758, 764 (W.D. Pa. 1979) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801(1973)); *Pitre v. W. Elec. Co.*, No. 76-218-C2, 1985 WL 56638, at *11 (D. Kan. Apr. 23, 1985) *aff’d in part, rev’d in part*, 843 F.2d 1262 (10th Cir. 1988) (the “reasons for the adverse action taken towards plaintiff” “were merely a pretext for the discriminatory treatment of plaintiff.”).

When the employer denies that it is taking race into account, courts have required the employee to challenge a demonstrable harm labeled an “adverse action,” seemingly to justify judicial action. *See, e.g. Nance v. Librarian of Cong.*, 661 F. Supp. 794, 798 (D.D.C. 1987) (“Few discrimination cases brought by federal employees in federal court succeed. There is a pressing need to re-examine the process which is causing expenditure of so much time and expense litigating discrimination complaints without apparent benefit for most federal employees who resort to Title VII. The title is being misused in a futile attempt to resolve what are essentially problems attributable to insensitive personnel management, not to discrimination.”)

But this concept has no role in cases where the employer announces it is classifying its employees by their race, as race-based employment decisions cannot stand under federal law. Indeed, the State cites no case in which the employer admitted it was motivated by race but

the court dismissed the case anyway because that the type of harm alleged did not rise to the level of an adverse action. The complete absence of such cases is consistent with the strict admonition of the Supreme Court over forty years ago: “In the implementation of [employment] decisions, it is abundantly clear that Title VII *tolerates no racial discrimination*, subtle or otherwise.” *McDonnell Douglas Corp.*, 411 U.S. at 801 (emphasis added).

E. “Facial” Discrimination is Explicit Discrimination

The State tries to diminish the significance of the facial discrimination line of cases by pretending that “‘Facial discrimination’ is simply a successful disparate treatment claim.” Resp. Br. at 25. But this is an untenable reading of the facial discrimination precedent. “Facial” discrimination is not the name given to a “successful” discrimination lawsuit; it is treatment that explicitly (i.e., on its face) classifies a person by his or her legally protected characteristic. As the United States Supreme Court explained in *Johnson Controls*:

the absence of a malevolent motive does not convert a *facially discriminatory policy* into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate *treatment through explicit facial discrimination* does not depend on why the employer discriminates but rather on the *explicit terms of the discrimination*.

Int'l Union, United Auto., Aerospace & Agr. Impl. Workers of Am., UAW

v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) (emphasis added).⁴

A pretext case in which an employer denies that it is classifying its employees by race (or other protected characteristic) substantially differs from when an employer announces explicitly that it is taking the race of its employees into account when assigning work. In a pretext case, the employer rejects the relevance of race to its employment decisions—usually vociferously. In contrast, in a facial discrimination case, the employer acknowledges the use of race in making employment decisions—rendering judicial scrutiny not only appropriate but essential, as the use of race is so rarely justified.

Under the WLAD, is there any length of time and frequency that it would be legitimate to segregate employees by race, or to work with customers of only the same race, or to assign menial tasks to just a certain race, or to assign tasks stereotypically performed by members of that race? Employees typically spend very little time drinking at the water fountain, or entering the workplace. Is it permissible for an employer to tell its employees to use separate water fountains or entrances, based on race? Just for a weekend? Once a month? It is hard to conceive of a legitimate system of justice that would at this time in history approve of any periodic intentional, explicit use of race in the workplace in the absence of the employer showing a powerful and demonstrated need (*i.e.*, a BFOQ).

⁴ See also *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716 (1978) (finding illegal facial discrimination despite the employer's argument "that the absence of a discriminatory effect on women as a class justifies an employment practice which, on its face, discriminated against individual employees because of their sex.")

The Washington legislature was clear that an employee’s race may be used in the workplace only when an employer can establish a BFOQ—which is rare. Establishing a BFOQ affirmative defense requires the employer to prove that virtually no one of the excluded race can perform the job. Plaintiffs are aware of no Washington court decisions ever finding a race BFOQ, and there are no federal decisions. In this case, the State waived its BFOQ defense. Its liability follows.

And when the State itself uses race in the workplace, it surely violates the Legislature’s mandate that the WLAD eradicate race discrimination because it menaces the “institutions and foundations of a free democratic state.” RCW 49.60.010. Facial discrimination states a claim without showing an adverse action, or facial discrimination necessarily constitutes an adverse action.

The State seems encouraged by the fact that the trial court found no illegal discrimination “even having heard the plaintiffs’ testimony that the staffing decision was ‘deeply offensive and humiliating.’ Resp. Br. at 22 n. 10. But this just illustrates how deeply flawed the State’s and the trial court’s analyses are. Facial discrimination based on race is divisive, and harmful, no matter how brief. “[R]acial classifications ‘threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.’” *Johnson v. California*, 543 U.S. 499, 507 (2005). And such classifications are almost never justifiable. So, when use of race is explicitly endorsed by an employer—especially a government one in an established policy—it is shocking to employees. Judicial

intervention is necessary when the State simply shrugs in response.

F. RCW 49.60.180(4) Prohibits Racial Staffing

The State argues that RCW 49.60.180(4) must be read as limited to discrimination in pre-employment. Resp. Br. at 15. But the language of the provision is not limited to pre-employment. And the pair of court opinions that apply the provision, *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340 (2007) and *Fahn v. Cowlitz Cnty.*, 93 Wn.2d 368 (1980), do so to pre-employment circumstances because that was the context of the allegations; the opinions in no way restrict the provision to pre-employment. *See* Opening Br. at 31-32. Rather, by its plain language this provision targets explicit discriminatory inquiries and statements of preference, otherwise known as facial discrimination. It may be more likely to arise in the pre-employment context, but the provision is not limited to that context.

Consistent with federal facial discrimination doctrine, the provision makes it illegal for an employer to classify a person for employment purposes based on race. Indeed, limiting the provision to pre-employment would allow an employer to conduct the prohibited inquiries relating to an employee's race immediately after offering them a job. Since the legislature has established that an employer has no legitimate need of such information, the inquiries do not become legitimate once the person is hired—a harmful outcome the State apparently seeks in this case.

G. The State's Treatment Decisions are Subject to Scrutiny in this Case and the State Failed to Justify its use of Race as a Substantial Factor in Treating Patients

The State complains that “If the Hospital cannot acknowledge that

race may trigger safety concerns that in turn trigger staffing decisions even where no adverse action is present, the Hospital would be prohibited from making staff assignments in acute situations such as the following hypotheticals....” Resp. Br. at 23. In its hypotheticals, the State spins tales of a prisoner of war who will almost certainly suffer a heart attack if forced to work with health care providers of the ethnic group who had confined him, and of a Black person who fears whites as a result of beatings as a youth. As a result, the State dreams, “the doctor does not want staff of his captors’ ethnic origin to work with him” and “does not want white staff going in to serve this patient during such episodes.” *Id.*

As an initial matter, this whole discussion undermines the State’s claim that the staffing practices are not based on race (or ethnicity). But also, on the record before the Court such scenarios are nothing more than lawyer fantasy. The State employs an entire hospital of doctors and psychiatrists, yet points to no physician testimony that *medical* necessity ever warrants racial staffing. Why? Because the State did not put on *any* evidence of medical necessity justifying racial staffing under *any* circumstances, let alone its wild hypotheticals.

Indeed, the only evidence about *medical* necessity at trial was offered by Plaintiffs’ expert psychiatrist, Dr. Jeffery Geller,⁵ who is a Psychiatric Hospital Medical Director, long-time Professor at the University of Massachusetts Medical School, consultant with the Justice

⁵ See Opening Br. at 17-19. The trial court did not even mention that Dr. Geller testified.

Department, and previous consultant to the State of Washington itself. Dr. Geller testified that racial staffing is *never* medically necessary, is bad hospital policy, and is terrible treatment for patients.⁶

The Hospital's reinforcement of negative stereotypes about African-Americans simply, well, reinforces them. As explained by the U.S. Supreme Court in *Johnson* above, racially classifying people stigmatizes them and tends to "incite racial hostility." It likewise leads the patients to perpetuate stereotypes, harming not only their own treatment but increasing tension with other patients and undermining their view of staff of other races. *Cf. Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (noting that "mutually reinforcing stereotypes create [] a self-fulfilling cycle of discrimination"); *see* Opening Br. at 17-19.

Since it has no retort to Dr. Geller's lengthy and compelling testimony at trial, the State assiduously avoids discussing him. In its 50-page brief, the State had only this to say about him: "Dr. Geller's testimony attacked the Hospital on the basis of the professional judgment of its clinicians, but the efficacy or wisdom of the Hospital's treatment decisions were not on trial here, nor should they have been." Resp. Br. at 24 n. 11. That's all. Yet, the Hospital itself placed the judgment of its nurses on trial, as well as the judgment of its non-doctor CEO who ratifies

⁶ This likewise undermines the State's attempt to pit the Plaintiffs' right not to be discriminated against at work based on their race against patients' legitimate rights to ethical treatment by the State. Resp. Br. at 24. There simply is no such conflict. Other psychiatric hospitals, such as the one run by Dr. Geller, use other non-discriminatory tools to address patient racism, including demands for staffing. And the State itself has at its disposal those tools, but never explained why they do not apply in all circumstances.

and endorses his nurses staffing by race, by insisting that it *must* staff based on race. But Dr. Geller refuted their claimed need entirely, and the State never offered any *medical* evidence that it must staff by race, leaving Dr. Geller's opinion the only evidence of what is medically necessary and appropriate. The trial court ignored this un rebutted evidence entirely.

Moreover, it is telling that the State's hypotheticals focus exclusively on circumstances in which a "doctor" recommends racial staffing when none of its own doctors testified they would ever make such a recommendation and when the Hospital's unwritten policy is to allow nurses, not doctors, to make the decisions to staff by employee race.

H. Racial Staffing is Inherently Harmful and Unworkable

The State blames its employees for poorly implementing its unwritten ban on African-Americans in 2011. It implies that RN3 Yates is at fault because she asked Nurse Blackburn to assign the employee on her ward with the lightest skin. *See* Resp. Br. at 4-5. But it was the State that instructed her to discriminate on the basis of race. Uncertainty, if not confusion, over how to implement such an inflammatory instruction—unwritten and without criteria—was entirely predictable: Nurse Yates was confronted with the perplexing question of what it means to be "Black" or "African-American," especially in the eyes of a delusional, racist patient. Skin color? Facial features? Hair qualities? American society is increasingly populated by individuals of mixed race, whose race may not be obvious. For example, a "study, published recently in the journal *Perception*, found that surprisingly, skin tone contributes very little to

perceived race. Instead facial morphology—or the form and structure of the face—is the dominant cue in determining race.”⁷ is a citation needed here? It became Nurse Yate’s job to somehow divine who among available staff would in MP’s mind be “African-American” and choose other staff to work with him.

The State’s instruction that Nurse Yates stereotype employees based on her perception of race, not her attempt to do so, was to blame. The problems it generated illustrate one of the many reasons the Hospital’s policy is—and must be held—illegal.⁸

I. Hostile Work Environment

A policy or practice can in and of itself create a hostile work environment. *Hailey v. City of Camden*, 650 F. Supp. 2d 349, 356-57 (D.N.J. 2009) (“City may be held liable for this hostile work environment by proving during the retrial that the City through its policymaker caused [it] by way of a formal policy”); *Adams v. City of New York*, 837 F. Supp. 2d 108, 125-26 (E.D.N.Y. 2011) (holding in conjunction with other allegations “claims on the bathroom arrangements at Rikers... that extremely limited toilet access creates an environment that is hostile to women” stated a claim). Yet, the State dismisses Plaintiffs’ argument of a hostile work environment by trying to recast all of the evidence of a policy

⁷ <http://phys.org/news/2010-08-skin-tone-major-racial-identity.html#jCp>

⁸ When an employer classifies its employees explicitly by race at work, regardless of length of time, type of assignment, or precise manner in which the racial classification is implemented, the employer is “perpetuating the notion that race matters most.” *Johnson v. California*, 543 U.S. 499, 507 (2005).

and practice that was presented at trial as just harmless, infrequent “swaps” of duties between employees. *See* Resp. Br. at 36 n. 18. But as explained above, there have been many such assignments based on race made in accordance with the Hospital’s unwritten policy and practice, which the trial court neither discussed nor made any findings about.

Additionally, the State’s position disregards—as did the trial court—the un rebutted evidence at trial establishing severity: “the plaintiffs’ testimony that the staffing decision was ‘deeply offensive and humiliating.’” Resp. Br. at 22 n. 10. The State made no effort to challenge this testimony, or to undermine the severity of the State’s conduct.

Instead, the State seeks refuge in its continued racial staffing, even against one of the Plaintiffs (Joey Lopez), without the Plaintiffs’ knowledge. Resp. Br. at 36-37. But throughout their litigation and at trial, the Plaintiffs have asserted that they come to work every day worrying about when the Hospital will subject them to racial staffing, and they notified the Hospital of this fact in the summer of 2011 and thereafter. *See, e.g.*, RP 633-34, 531, and Pl’s Mot. for Preliminary Injunction, at CP 2107. When Plaintiffs deposed the CEO and learned the Hospital maintained an unwritten policy and practice endorsing and approving of racial staffing whenever nurses felt it appropriate, and then obtained an order compelling the State to conduct an inquiry to respond to discovery, the Plaintiffs learned that their fears had been realized. Since the Hospital and its managers are engaged in discriminating and creating a hostile work environment, it is no defense that they hid their misconduct.

The State also tries to spin its racial staffing of Joey Lopez as “mostly indicat[ing] gender, not race. RP 722.” This is nonsense. Apart from again admitting that race was a substantial factor in its staffing decision, the RN3 who staffed Mr. Lopez, Miner Cancio, testified that for a two-year period she banned *white* men from working with the patient. Plaintiff Lopez worked with that patient because of his race. And since he was not white, his gender was irrelevant; the State does not show otherwise. Moreover, even if it was a combination of Mr. Lopez’s race and his gender that led the Hospital to assign him this job, that is against the law. *Lam v. Univ. of Hawai’i*, 40 F.3d 1551, 1562 (9th Cir. 1994) (“when a plaintiff is claiming race and sex bias, it is necessary to determine whether the employer discriminates on the basis of that combination of factors, not just whether it discriminates against people of the same race or of the same sex.”) Discriminating against an employee using *two* unlawful classifications, rather than one, does not diminish an employer’s liability.

The State’s attempt to distinguish the long-standing law against customer preference cases is just as weak: “A civilly committed mental patient exhibiting dangerous and aggressive race-based delusions is no more a customer stating a preference than a drowning person is a customer of the coast guard stating a preference to be rescued.” Resp. Br. at 39 n. 19. Not so. The Coast Guard fulfills its mission when it saves a drowning person, but would shirk its duty if it delayed its rescue to abide by a demand for a rescuer of a different race. Similarly, Dr. Geller aptly

explained, when the Hospital accommodates patient racism, it fails its mission. Among other harmful effects, it provides poor treatment by reinforcing the patient's psychoses or allowing the patient to manipulate and choose his own staff creating a lack of needed boundaries for the patient; it undermines staff safety by diminishing respect for their authority just based on race; and it can increase racism on the ward and tension among other patients as well as future staffing problems because the patient and perhaps other patients will learn to demand staff changes.

The State again suggests that this Court must avoid considering the adverse medical consequences of its policy of race-based staffing—which the State maintains it must be able to engage in—calling this “dangerous territory.” Resp. Br. at 40. To make its case, the State suggests that the Plaintiffs are asking the Court to “wade into the judgements of the Hospital’s clinical staff in designing treatment modalities for its roughly 827 patients.” *Id.* This is simple fearmongering that asks the Court to defer to the *ad hoc* judgment of the Hospital’s lowest level nurses to implement an unwritten racial staffing policy without supervision, documentation, and review *over* the unrebutted medical opinion of psychiatrist Dr. Geller.

The Plaintiffs are not asking the Court to impact in any way providers’ decisions in designing treatment modalities for their patients. Plaintiffs’ request is far more limited, modest, and simple: remove from the State’s toolbox assigning employees based on their race. As has been established by Dr. Geller, the State has no medical need for this illegal tool, and the trial court did not find otherwise.

II. CONCLUSION

When an employer facially classifies its employees because of race (even for safety reasons) race is a substantial factor, which the employer can justify only by proving a BFOQ. There is no safety exception, and the State waived its BFOQ defense. Here, un rebutted evidence—ignored entirely by the trial court—established the Hospital maintains a policy and practice of allowing unmitigated staffing based on race to accommodate delusional or manipulative patient racism. The only physician and psychiatric testimony at trial on the topic—again ignored by the trial court—proved there is no medical necessity to staff by race, that it is bad medicine for mentally ill patients, and that it is poor hospital management. There are other widely accepted tools the Hospital can use instead without segregating its employees by race—but the Hospital has declared it will continue to staff by race absent an injunction from this Court.

DATED this 5th day of November, 2015

MacDONALD HOAGUE & BAYLESS

By: /s/Jesse Wing
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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 November 5th, 2015, I caused to be delivered via email a copy of APPELLANT'S REPLY BRIEF addressed to:

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

DATED this 5th day of November, 2015 at Seattle, King County, Washington.

/s/Esmeralda Valenzuela

Esmeralda Valenzuela, Legal Assistant