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SUPREME COURT OF THE STATE OF WASHINGTON

PATRICIA BLACKBURN, et al.,

Plaintiffs/Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND
HEALTH SERVICES AND WESTERN STATE HOSPITAL,

Defendants/Respondents.

RESPONDENT STATE OF WASHINGTON'S ANSWER TO
AMICI ACLU, WELA, AND WSAJ FOUNDATION

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I. INTRODUCTION

For over three decades, proving a disparate treatment employment discrimination claim under the Washington Law Against Discrimination (WLAD), RCW 49.60, has required (1) an adverse employment action that (2) was substantially motivated by the plaintiff's membership in a protected class. *Shannon v. Pay 'N Save Corp.*, 104 Wn.2d 722, 709 P.2d 799 (1985). This two-part test accords with the test for disparate treatment under 42 U.S.C. § 2000e-2(f) (Title VII), WLAD's federal analog. *International Bhd. Of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). But Amici, like the Appellant-Employees Patricia Blackburn et al. (Employees), urge this Court to abandon the settled WLAD test.

First, Amici argue that no adverse employment action is required where there is "facial discrimination" because an employer's decision that *on its face* acknowledges race is a *per se* violation of WLAD. The plain language of RCW 49.60.180 defeats this contention. Further, Amici's argument depends on the notion that the law governing constitutional equal protection claims of "facial discrimination" should be imported into WLAD. This is contrary to long-standing state and federal authority and would effectively subject private employers to equal protection claims

under WLAD, or if applied only to the Hospital in this case would violate sovereign immunity.

Second, Amici argue that in “facial discrimination” cases, the WLAD’s requirement for adverse employment action is satisfied *per se* by what Amici label “dignitary harm.” Amici rely again on constitutional equal protection law, which is just as inapposite to this argument as it is to their notion that facial discrimination completely eliminates the requirement for adverse employment action. Intangible, emotional harms, including “dignitary harm,” are cognizable under WLAD, in hostile work environment claims, where they are decided as questions of fact (not law). Here, the Employees put their evidence of dignitary harm before the trier of fact—the trial court—which found there was neither a hostile work environment nor an adverse employment action.

Third, Amici challenge the WLAD substantial factor element, which required the Employees to prove that race was a significant motivating factor in Respondent Western State Hospital’s (Hospital) decision. Amici argue that in a facial discrimination case the substantial factor element is inapplicable because motive is irrelevant. The Hospital agrees that the sentiment behind an employer’s decision, be it ill will or benign intent, is irrelevant to substantial factor. But the protected characteristic must still be a significant motivating factor in the decision—

in other words, here the employer's decision must be because of . . . race." RCW 49.60.180(3) (emphasis added). This requirement does not become irrelevant simply because a decision—on its face—acknowledges a protected characteristic. Of course, this Court need not wrestle with the substantial factor element, because the trier of fact concluded that the Employees failed to prove an adverse employment action and that alone is fatal to their WLAD claims. Clerk's Papers (CP) at 2709-12.

Finally, Amici argue that the Hospital is asking for a broad new exception to WLAD. But it is Amici (and the Employees) who ask this Court to depart from decades of WLAD and Title VII case law. Amici, echoing the Employees, urge this Court to hold that anytime an employer acknowledges that race as a social construct exists in America, there is *per se* disparate treatment employment discrimination in violation of WLAD. The repercussions of such a sweeping rule on the fabric of employment law cannot be overstated. By contrast, the Hospital simply asks this Court to affirm the trial verdict that applied the long-settled disparate treatment and hostile work environment tests.

II. COUNTERSTATEMENT OF FACTS

This matter is not on appeal from a summary judgment proceeding. After a multi-day bench trial in which over 20 witnesses were called on behalf of the Employees, the trial court rendered a verdict supported by

findings of fact. Unchallenged findings of fact are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). Challenged findings of fact are entitled to deferential review for substantial evidence, with the evidence viewed in the light most favorable to upholding the verdict. *State v. McNeal*, 145 Wn.2d 352, 359, 37 P.3d 280 (2002). This is the factual posture in which this matter comes before this Court.

The facts relevant to the Employees' appeal, primarily drawn from the trial court's findings and conclusions, are provided in the response briefing of the Hospital. *See* Brief of Respondent State of Washington (Resp't Br.) at 3-9; *see also* CP at 2709-12 (Amended Findings of Fact (FOF) and Conclusions of Law (COL)). But certain statements by Amicus American Civil Liberties Union of Washington (ACLU) demand response.

Contrary to the record, the ACLU asserts that "executive nursing staff decided that no Black employees would be staffed to M.P.'s ward." Amicus Curiae Brief of ACLU (ACLU Br.) at 3-4. But the trial court found the decision was just "that [patient] MP should not have access to African American staff to protect the staff over the weekend"—not to ban all African-American staff from Ward F-8. CP at 2710 (unchallenged FOF 7). The executive nursing staff was not involved in the subsequent statements by Nurse Barbara Yates that "a white staff person needed to go

to F-8” and that Nurse Patricia Blackburn should “send the person ‘with the lightest skin.’”¹ CP at 2710-11 (unchallenged FOF 9, 10).

Also suspect is the ACLU’s assertion that the decision not to send African American staff to Ward F-8 was “explicitly communicated to staff—for example, ‘NO BLACK STAFF TO F8’ was written on the nurse staffing white board of the unit.” ACLU Br. at 4. The trial court made no finding about such a communication, explicit or otherwise, nor did it make a finding about any directive written on a white board. The only witness who claimed to have seen these words on the white board was Nurse Yates, who the trial court “specifically” found “not credible”. CP at 2709 (unchallenged FOF 1); *see* Verbatim Report of Proceedings (RP) at 111-12 (testimony of Nurse Yates).²

III. ARGUMENT

A. **An Adverse Employment Action Is Required For WLAD Employment Discrimination, Whether or Not Race Is Acknowledged On the Face of the Employment Decision**

Amici Washington Employment Lawyers Association (WELA) and ACLU, echoing a conceptually flawed position taken by the Employees, argue that “facial discrimination” in employment is exempt from the long-

¹ The trial court “specifically” found Nurses Yates and Blackburn “not credible.” CP at 2709 (FOF 1).

² Nurse Lila Rooks, a member of the Executive Nursing Staff, never saw such a statement written on the white board and testified she was surprised to learn of claims it had been. RP at 203. The trial court specifically found Nurse Rooks, among other Hospital witnesses, to be credible. CP at 2709 (FOF 1).

settled requirements for proving WLAD disparate treatment claims—that to prevail a plaintiff must prove (1) protected-class status was a substantial factor in (2) the employer’s adverse employment decision. *MacKay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995). WELA and ACLU argue that “facial discrimination” is prohibited under the WLAD, RCW 49.60.180, and that “facial discrimination” just means treating an employee differently because of race, not necessarily disfavorably. Amicus Curiae Brief WELA (WELA Br.) at 8; ACLU Br. at 5-9. Thus, they contend, any employer’s decision that on its face acknowledges race is a *per se* violation of RCW 49.60.180—no adverse employment action is required.

Their contention ignores the plain language of RCW 49.60.180. Instead, Amici rely on selective case quotes that use the term “facial discrimination” but do not indicate whether they refer to discriminating between (making a distinction) or discriminating against (treating differently in disregard of individual merit). Amici also rely on cases decided under the Fourteenth Amendment’s Equal Protection Clause, implicitly arguing that the constitutional framework for “facial discrimination” should be imported into WLAD. WELA Br. at 6-12; ACLU Br. at 5-9. This argument is a radical departure from decisions interpreting WLAD and would subject private employers to vastly expanded liability, or if applied solely against

the Hospital in this case would violate sovereign immunity. This Court should not depart from the settled law that an adverse employment action is required for a WLAD employment discrimination claim, regardless of whether or not protected status is acknowledged on the face of the employment decision.

1. WLAD, like Title VII, requires employees be treated adversely, not just differently

The WLAD provision prohibiting discrimination in employment plainly requires adverse employment action for a successful claim. As the ACLU recognizes, RCW 49.60.180 “provides that it is unlawful for any employer to ‘discriminate against any person in compensation or in other terms or conditions of employment because of . . . race[.]’” ACLU Br. at 6 (quoting RCW 49.60.180(3)) (emphasis added). Certainly, the word “discriminate,” in isolation, can be ambiguous—one can discriminate among (distinguish) or discriminate against (treat less favorably on a class basis in disregard of individual merit). *See Webster’s Third New International Dictionary* (2002) at 648. By specifying “discriminate against,” the Legislature made explicit its intent regarding RCW 49.60.180(3). It is unlawful for employers to treat persons less favorably—to take adverse actions against them—because of race.

Title VII also requires an adverse employment action. As the ACLU recognizes, “Title VII makes it unlawful for an employer to ‘limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race.’” ACLU Br. at 8 (quoting 42 U.S.C. § 2000e-2(a)(2)) (emphasis added). As with the WLAD provision, in the Title VII provision the words “deprive” and “adversely affect” clearly convey that adverse action is required. Yet notwithstanding the plain language of both the WLAD and Title VII provisions, WELA and ACLU argue (as do Employees) that where “facial discrimination” is present, no adverse employment action is required to prove a violation.

The term “facial discrimination,” as Amici (and the Employees) use it, is ambiguous because discriminate can mean either discriminate among or discriminate against.³ Amici take advantage of this ambiguity to bolster their argument that “facial discrimination” eliminates the requirement to prove an adverse employment action. They make statements that are accurate under the first meaning (discriminate among),

³ The word “facial” is shorthand for “on its face” and describes a particular manner in which a statute, or rule, or conduct can draw a distinction. As discussed below in Section III.C, whether conduct considers a protected classification on its face may be relevant to (but not dispositive of) the “substantial factor” element of the WLAD test. But regardless, the adverse employment action element must still be met.

intending those statements to support the second meaning (discriminate against). For example, WELA argues “whether there exists an ‘adverse employment action’ is irrelevant to the question of whether a classification or practice is ‘facially discriminatory.’” WELA Br. at 7.⁴ This statement is accurate—if “facially discriminatory” means that a practice on its face discriminates among people. But if “facially discriminatory” means a practice on its face discriminates against people, the existence of an adverse employment action is not irrelevant at all, because for a practice to discriminate against people inherently requires adverse action. *See* Resp’t Br. at 26-28 (explaining that a plaintiff alleging “facial discrimination” must still prove both elements of a disparate treatment employment claim).

Leveraging this ambiguity, Amici rely on case quotes that condemn “facial discrimination” against people to support their contention that “the elements applicable to an ordinary disparate treatment claim do not apply to claims of ‘facial discrimination.’” WELA Br. at 8. But the cases Amici cite for their contention that “facial discrimination” is a *per se*

⁴ ACLU even uses the two meanings of “discriminate” in a single sentence, when it says “the essence of a facial discrimination claim is that a policy or practice on its face makes explicit distinctions between groups in what members can or cannot do; a facially discriminatory policy is one that applies unequally depending on a person's race, sex, or other characteristic.” ACLU Br. at 8. In the first clause, discriminate means distinguish among, in the second clause it means discriminate against. Obviously, confusion can arise when language intended to state the first meaning is misread as stating the second.

violation under WLAD and Title VII disparate treatment all involve adverse employment action.

In each case, Amici cherry-pick quotations regarding “facial discrimination” but ignore the proven “adverse employment action” at the core of the case. *See generally* WELA Br. (citing *Int’l Union v. Johnson Controls*, 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991) (describing as “facially discriminatory” a refusal to hire or promote on the basis of sex) (also cited by the ACLU); *City of Los Angeles Dep’t of Water and Power v. Manhart*, 435 U.S. 702, 716, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (1978) (disapproving under Title VII an employer’s policy that affected compensation by requiring female employees to make a larger pension contribution than male employees) (also cited by the ACLU); *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 356-57, 172 P.3d 688 (2007) (describing as “facially discriminatory” a refusal to hire on the basis of sex); *Fey v. State*, 174 Wn. App. 435, 443-45, 447, 300 P.3d 435 (2013) (describing as “facially discriminatory” a refusal to promote on the basis of disability); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 848, 853-55 (9th Cir. 2000) (describing as “facially discriminatory” a policy that imposed a more burdensome body weight standard on female flight attendants than male flight attendants resulting in female plaintiffs’ termination or discipline) (also cited by the ACLU); *Enlow v. Salem-*

Keizer Yellow Cab Co., Inc., 389 F.3d 802, 811, 813 (9th Cir. 2004) (reiterating that disparate treatment occurs when a plaintiff is treated less favorably than other employees and reversing summary judgment for employer where it was alleged that plaintiff was terminated because of his age); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 91 S. Ct. 496, 543, 27 L. Ed. 2d 613 (1971) (reversing summary judgment for the employer where employer had a policy of refusing to hire women with pre-school age children but not men with pre-school age children); *Healey v. Southwood Psychiatric Hospital*, 78 F.3d 128 (3d Cir. 1996) (holding that employer’s decision to staff female, but not male, employee to the less desirable night shift was “facially discriminatory.”).⁵

The settled law governing WLAD employment discrimination requires a plaintiff to *show* that there was an adverse employment action, and that the plaintiff’s membership in a protected class was a substantial factor in that adverse employment action. Amici (and the Employees) ask this Court to establish a sweeping new WLAD standard—that the requirement for an adverse employment action is met as a matter of law whenever an employment decision on its face acknowledges a protected

⁵ The ACLU cites to *Sommer v. Dep’t. of Social and Health Servs.*, 104 Wn. App. 160, 15 P.3d 664 (2001) in its “facial discrimination” discussion. ACLU Br. at 11. *Sommer* is not a disparate treatment case, it is a failure to accommodate case which is analyzed under a different test. *Sommer*, 104 Wn. App. at 169-70, 172-73. It is not instructive here.

classification. As discussed below in Section III.C, whether conduct acknowledges a protected classification on its face may be relevant to (but not dispositive of) the “substantial factor” element of the WLAD test, but regardless the adverse employment action element must still be met.

2. The analytical framework for constitutional equal protection claims should not be imported into WLAD employment discrimination law

ACLU and WELA also appear to argue that where there is “facial discrimination” no adverse employment action is required because constitutional equal protection law should govern WLAD employment discrimination claims. *See* ACLU Br. at 9-10 (citing the seminal case of *Brown v. Board of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) and a second equal protection case, *Johnson v. California*, 543 U.S. 499, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005)). This argument, premised as it is on equal protection analysis, is utterly inapposite.

When a plaintiff claims that constitutional equal protection guarantees have been violated by a government actor on the basis of race, that plaintiff need not show tangible adverse action. *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (explaining that as to racial classification, “whenever the government treats any person unequally because of his or her race, that

person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.”). The plaintiff may prevail by proving the government actor engaged in a prohibited classification, particularly where race is concerned. *Id.* This is the gravamen of a race-based equal protection claim: the government must not in the act of governing differentiate between citizens on the basis of race, unless it can meet strict scrutiny. *See e.g., Fischer v. Univ. of Tex.*, 133 S. Ct. 2411, 186 L. Ed. 2d 474 (2013); *Johnson*, 543 U.S. at 505; *Grutter*, 539 U.S. at 326-27. Accordingly, no showing of “adversity” is required; the “adversity” inheres in the act of race-based differentiation. *Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 272, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979); *Grutter*, 539 U.S. at 326-27.

But WELA and ACLU cite no case that imports the analytical framework of equal protection into the WLAD employment discrimination context. Nor could they. They merely cite equal protection cases, which are irrelevant to establishing their proposition. *See* WELA Br. at 7, 10 (citing *Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014), which challenged constitutionality of prohibition on same-sex marriage on equal protection grounds; and citing *Feeney*, 442 U.S. at 272, which answered no to “[t]he sole question for decision on this appeal”, whether the Massachusetts statute “in granting an absolute lifetime preference to veterans, has

discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment.”)); *see* ACLU Br. at 10 (citing *Brown v. Board of Education*, 347 U.S. 483, which held that racial segregation of children in public schools violated Equal Protection Clause of the Fourteenth Amendment; and citing *Johnson v. California*, 543 U.S. 499, which held that prison’s policy of placing new or transferred prisoners with cellmates of the same race must satisfy strict scrutiny in order to satisfy equal protection requirements).

The other non-equal protection cases cited by WELA and ACLU in their “facial discrimination” discussions are equally irrelevant to the proposition that equal protection standards should be imported into WLAD. In *Community House, Inc. v. City of Boise*, 468 F.3d 1118 (9th Cir. 2006), the Ninth Circuit borrowed from Title VII employment discrimination case law to conclude that a city contracting with a non-profit to manage a Boise homeless shelter was liable for a facially discriminatory policy under the Fair Housing Act when it allowed the non-profit to exclude residents based on gender and familial status. *Id.* at 1047-50. *Community House* is not instructive here—it involved a state actor, not standing in the shoes of an employer, and an entirely different statutory scheme than Title VII.

In the portion of *Lovell v. Chandler*, 303 F.3d 1039, 1057-58 (2002), cited by ACLU, the Ninth Circuit determined that disabled plaintiffs were entitled to compensatory damages under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), based on the State's "*facial discrimination*, in the form of a categorical exclusion of disabled persons" from its public health insurance program. This point is irrelevant to whether equal protection principles should be imported into WLAD.

In *Lewis v. Doll*, 53 Wn. App. 203, 765 P.2d 1341 (1989), a Washington appeals court held that a store owner was liable under a separate section of RCW 49.60 prohibiting race-based discrimination in places of public accommodation. As in *Community House*, the *Lewis* court borrowed from employment discrimination jurisprudence. But *Lewis* is not an employment case, contrary to the ACLU's parenthetical suggestion. ACLU Br. at 11. It has no application here.

ACLU argues that requiring an adverse employment action in WLAD "would permit state-sanctioned segregation under the WLAD; employers could enact practices or policies that separate employees by race, as long as they did not discharge or demote employees, or cut their wages." ACLU Br. at 10. This argument fails for at least two reasons: (1) under both WLAD and Title VII, plaintiffs may challenge any offensive

employment practice as a matter of fact, and (2) under the framework of constitutional equal protection, plaintiffs may challenge segregation by a state actor.

First, under WLAD and Title VII, an employer's practices or policies that allegedly separate, or "segregate," employees by race can be challenged as adversely affecting the terms and conditions of employment as a question of fact. While ACLU or WELA do not cite the cases that illustrate this point, Employees do in their similar "segregation" argument. *See* Appellants' Amended Opening Br. at 33-35; Reply Br. at 10-12. For example, in *Sims v. Montgomery County Commission*, 766 F. Supp. 1052 (M.D. Ala. 1990), the employer county sheriff department violated Title VII through its "polic[ies] of generally assigning officers to patrol cars and to neighborhoods" by race. *Sims*, 766 F. Supp. at 1094. In the context of the department's egregious history of race-based discrimination, still subject to a consent decree at the time of the case, these policies were "so overtly and clearly demeaning to blacks that they can only be characterized as racial harassment." *Sims*, 766 F. Supp. at 1094; *accord* *Bridgeport Guardians, Inc. v. Delmonte*, 553 F. Supp. 601 (1982); *Hunter v. Army Fleet Support*, 530 F. Supp. 2d 1291 (M.D. Ala. 2007). As under

Title VII, racial harassment that adversely affects the terms and conditions of employment can be actionable under WLAD.⁶

Second, state-sanctioned segregation, as in segregation by a state actor, can be challenged under an equal protection claim. Notably, the Employees availed themselves of that opportunity. In their parallel federal action, they challenged the Hospital's conduct in its capacity as a government actor under the rubric of equal protection. They lost. *See* Resp't Br., Attachment A.

The constitutional equal protection framework is not the law that underpins Title VII employment discrimination claims, and this Court should reject Amici's suggestion to make it the law underpinning employment discrimination under WLAD. A "facially discriminatory" employment decision under WLAD should continue to require a showing of an adverse action in which the plaintiff's membership in a protected class was a substantial factor. Resp't Br. at 17-24.

3. Importing the equal protection test into WLAD would subject private employers to constitutional standards applicable only to public actors

As ACLU observes, "[o]ur rule of law has long recognized the special nature of state action and the need for states to respect all of their citizens equally." ACLU Br. at 2. Accordingly, constitutional equal

⁶ Below the trial court rejected the Employees' claims that the Hospital's decision adversely affected the terms and conditions of their employment. CP at 2709-12.

protection guarantees hold state actors to a different—and higher—standard of conduct when they facially distinguish among people based on constitutionally protected characteristics. With that different standard comes a different analytical framework (strict scrutiny) and different defenses (qualified immunity) that are not available to private employers. Further, under that analytical framework, the Employees’ equal protection claim against the Hospital in its capacity as a state actor was dismissed in the federal courts. *See* Resp’t Br., Attachment A.

But under Amici’s approach to “facial discrimination,” private employers would be effectively subject to constitutional equal protection claims in WLAD employment discrimination cases. Conduct that “facially” acknowledged employees’ protected classification without any adverse employment consequences at all would be actionable under WLAD. Under Amici’s formulation, WLAD employment discrimination liability could flow from any employer acknowledgement or comment on difference, as innocuous as an isolated remark that the employer appreciates the diversity an employee brings to the workplace or an invitation to an employee to speak at a diversity awareness event. And such WLAD actions would proceed without the protections available to state defendants facing constitutional claims, the rigor of strict scrutiny and the safe harbor of qualified immunity.

The equal protection guarantees of the Fifth and Fourteenth Amendment do not apply to private employers. Nor should the WLAD hold private employers to the higher standards solely applicable under those constitutional provisions. The federal courts rejected the Employees' equal protection claims. This Court should reject the suggestion of WELA and ACLU to import into WLAD the equal protection approach to "facial discrimination."

4. Importing an equal protection standard into WLAD solely for state actors would violate sovereign immunity

The State of Washington has not waived its immunity from tort for employment claims that rely on its special status as a governmental actor.⁷ When the Legislature waived the State's sovereign immunity pursuant to the Washington Constitution, it did so with limitations. Const. art. II, § 26 ("The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state."). Namely, it made the State "liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." RCW 4.92.090. In other words, the State can be liable in tort for damages only where there

⁷ The Hospital had not contemplated until WELA and ACLU submitted its respective briefing that a potential sovereign immunity problem is posed by the extent to which Amici explicitly (and the Employees implicitly) rely on an equal protection analysis. But as a jurisdictional issue, sovereign immunity can be raised anytime. *State v. Lee*, 96 Wn. App. 336, 345, 979 P.2d 458, 463 (1999); *Tobar v. United States*, 639 F.3d 1191, 1195 (9th Cir. 2011). Moreover, the failure to state a claim upon which relief can be granted—the gravamen of the jurisdictional issue posed by a sovereign immunity problem—can be raised at any time, even on appeal. *See* RAP 2.5(a)(2).

is analogous, private sector liability. The requirement of a private sector analog under the State’s waiver of sovereign immunity is well established.⁸

To the extent that ACLU and WELA (and Employees) argue that the WLAD should incorporate an equal protection approach to “facial discrimination” only for the Hospital and other state actors, but not private employers, that argument violates sovereign immunity. The State has waived its sovereign immunity in tort to the same extent as if it were a private person. That necessarily means the State in its capacity as an employer faces a WLAD claim under the same employment discrimination disparate treatment test imposed on private employers under WLAD and Title VII.

B. Dignitary Harm Is Not Per Se Adverse Employment Action— While It May Be Adverse Action as a Question of Fact, The Employees Failed to Prove So Here

WELA, echoing Employees, uses the label “dignitary harm” to describe intangible damages that could flow from an employee’s emotional experience of discrimination in the workplace. WELA Br. at 16. WELA

⁸ See *Edgar v. State*, 92 Wn.2d 217, 226, 595 P.2d 534 (1979) (It is incumbent on a person asserting a claim against the State to show the conduct would be actionable if done by a private person in a private setting); *Morgan v. State*, 71 Wn.2d 826, 827, 430 P.2d 947(1967) (Judgment for the State based on RCW 4.92.090 affirmed because Morgan did not cite a case where a private individual would have liability for comparable conduct—failure to erect a fence to protect children from wandering onto highway); *Bergh v. State*, 21 Wn. App. 393, 400, 585 P.2d 805 (1978), quoting *Loger v. Washington Timber Products*, 8 Wn. App. 921, 928, 509 P.2d 1039 (1973) (RCW 4.92.090 “. . . contains limitations and that the State is liable only for tortious conduct that would render it liable if it were a private person or corporation.”).

argues that dignitary harm should in and of itself be *per se* adverse employment action under WLAD—that is, that a claim of dignitary harm satisfies the requirement for adverse employment action as a matter of law. WELA Br. at 14-19. WELA supports this erroneous argument by drawing on constitutional equal protection law, which is just as inapposite here as it was in support of WELA’s facial discrimination argument above. While no Washington appellate decision has used the term “dignitary harm,” under WLAD, like Title VII, a plaintiff’s emotional experience may be offered as evidence that discrimination altered the terms or conditions of their employment as a question of fact. However, here, the Employees put their evidence of “dignitary harm” before the trial court, which found there was neither a hostile work environment nor an adverse employment action.

1. Dignitary harm is not *per se* adverse employment action

WELA asks this Court to recognize dignitary harm to be *per se* adverse employment action under WLAD. WELA Br. at 14-20; *see also* ACLU Br. at 9-10. WELA asks for “[a] bright line prohibiting all discrimination based upon a protected classification [to] promote the liberal interpretation required by the WLAD.” WELA Br. at 17. This echoes the position of the Employees, who argue that “when an assignment is expressly based on race, that carries a dignitary harm that amounts to an

adverse employment action” without other evidence. Appellants’ Amended Opening Br. at 32. This is not, and should not be, the law.

WELA’s bright line rule would impose unlimited liability on employers for any dignitary affront subjectively experienced by employees that could be remotely linked to protected class, no matter how innocuous the comment, without regard for reasonableness or context. Such a rule would contradict the plain language of RCW 49.60.180 that requires a plaintiff to show at least “discrimin[ation] . . . in other terms or conditions of employment.” And it would run counter to this Court’s interpretation of that language, which holds that the trier of fact must consider “the totality of the circumstances” when determining “[w]hether the harassment at the work place is sufficiently severe and persistent to seriously affect the emotional or psychological well being of an employee.” *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985). Interpreting WLAD liberally cannot require ignoring the Legislature’s plain intent and this Court’s clear understanding that some cognizable adverse action is required to prevail in a WLAD employment discrimination claim.

Drawing again on inapposite equal protection law, WELA argues that if nominal damages may be presumed in a civil rights action even where no tangible economic damage is shown, so too “adverse

employment action should also be presumed.” WELA Br. at 16 n.8. As discussed *supra* in Section III.A, civil right actions and WLAD employment discrimination actions are distinct and the framework of equal protection should not be imported into WLAD employment discrimination. Nor do the equal protection cases WELA cites argue to the contrary. WELA Br. at 15 (citing *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) (discussing harm of racial stigmatization in the context of a Fourteenth Amendment claim); *Heckler v. Mathews*, 465 U.S. 728, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984) (discussing noneconomic injury caused by stigmatizing members of a protected class in the context of a Fifth Amendment equal protection challenge); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) (discussing the danger of stigmatic harm in the context of an equal protection challenge under the Fourteenth Amendment). The plaintiffs in these cases challenged racial classification on equal protection grounds. Equal protection analysis is no more applicable here than in support of WELA’s facial discrimination analysis.

2. What WELA (and Employees) label “dignitary harm” is cognizable in a hostile work environment claim

The WLAD, in addition to prohibiting tangible adverse employment actions such as termination, or lesser compensation and benefits, “prohibits

an employer from discriminating against an employee ‘in other terms or conditions of employment because of . . . race.’” *Davis v. W. One Auto. Grp.*, 140 Wn. App. 449, 456-57, 166 P.3d 807 (2007) (quoting RCW 49.60.180(3)). Pursuant to this language, employees may claim that humiliating, harassing, or otherwise offensive conduct was so severe or pervasive as to alter the terms or conditions of their employment and create a hostile work environment.⁹ A hostile work environment claim is likewise available under Title VII. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (holding under Title VII that intangible effects on the terms and conditions of employment can be “‘so severe or pervasive’ as to ‘alter the conditions of the victim’s employment and create an abusive working environment.’”) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)).

Accordingly, a hostile work environment claim by its very nature contemplates that employees may bring claims premised on their emotional experience in the work place. *See Gray v. Greyhound Lines*,

⁹ To prevail, they must show that they were (1) subjected to unwelcome hostile or abusive conduct (2) based on membership in a protected class, and that the conduct (3) was sufficiently severe or pervasive to alter the terms and conditions of employment and (4) is imputable to the employer. *See Glasgow*, 103 Wn.2d at 406; *Davis*, 140 Wn. App. at 456-57. In *Fisher v. Tacoma Sch. Dist. No. 10*, 53 Wn. App. 591, 595-96, 769 P.2d 318, *review denied*, 112 Wn.2d 1027 (1989), the court explained that the test for a hostile work environment based on sex set forth in *Glasgow* applies to a race-based hostile work environment claim as well.

East, 545 F.2d 169 (D.C. Cir. 1976) (holding African-American bus drivers had Title VII cause of action for claim that employer created atmosphere of discrimination causing psychological harm). A hostile work environment claim thus makes actionable what WELA (and Employees) label “dignitary harm” where, as a question of fact, such harm is sufficiently severe or pervasive. *See, e.g., Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 912-15 (7th Cir. 2010).

As WELA itself explains, “[i]n assessing whether there was dignitary harm, courts consider the perspective of the objectively reasonable plaintiff.” WELA Br. at 17 (string citing state and federal decisions). Thus, WELA’s briefing acknowledges that it is settled law that dignitary harm is actionable as a question of fact under a hostile work environment claim.

In Washington, a hostile work environment may constitute an adverse employment action for the purposes of meeting the adverse employment action element in a WLAD disparate treatment claim. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004).¹⁰ Whether

¹⁰ This Court should proceed with caution in relying on *Kirby* for this proposition, however. *Kirby* fails to make clear what type of discrimination claim the plaintiff brought—disparate treatment or hostile work environment. The tests for each of these causes of action are different. We do not know from the *Kirby* opinion which causes of action the court was evaluating, so *Kirby*’s analysis of “adverse employment action” is of little value.

Moreover, *Kirby* cites to the dissent from this court’s opinion in *Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 P.3d 611 (2002), for the proposition that

conduct is sufficiently severe or pervasive to alter the terms and conditions of employment is a question of fact examined in light of the totality of the circumstances. *Davis*, 140 Wn. App at 457-58. In this case, the trial court found the Employees' evidence of "dignitary harm" was insufficient to establish a hostile work environment claim. CP at 2712 (COL 7-12).

3. The Employees' testimony of their dignitary harm was before the trier of fact, who found neither a hostile work environment nor an adverse employment action

Whether the complained-of conduct is severe or pervasive enough to rise to the level of a hostile work environment is a question of fact. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). Here, the Employees proceeded below on both a disparate treatment employment discrimination claim and a claim of hostile work environment. They put before the trier of fact their evidence of dignitary harm, which they claimed was a result of the Hospital's staffing decision. CP at 2673-74. And in the context of their hostile work environment claim, the trial court determined that the facts presented at trial did not rise to the level of a hostile work environment. CP at 2712. Indeed, on both their disparate treatment and hostile work environment claims, the Employees lost *as a question of fact*. CP at 2709-12.

"discrimination requires 'an actual adverse employment action, such as a demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action.'" *Kirby*, 124 Wn. App. at 465 (citing *Robel*, 148 Wn.2d at 74 n.24 (Bridge, J., dissenting)) (N.B. the statement appears at footnote 14, not footnote 24, of the dissent).

The Employees now challenge this determination on the grounds that it is not supported by substantial evidence (Appellants' Amended Opening Br. at 41-44), which the Hospital has answered elsewhere. Resp't Br. at 32-40. But there can be no dispute that the trial court understood and applied the relevant law (CP at 2712 (COL 8, 9)) and considered the testimony of dignitary harm. WELA's attempt to claim that the trial court erred by not considering "dignitary harm" as a potential adverse action misapprehends the Employees' arguments below and the trial court's findings of fact and conclusions of law.

C. WLAD's Substantial Factor Element Requires Race To Be a Significant Motivating Factor in the Employer's Decision—The Trial Court Held Employees Did Not Prove That Here

"At trial, the WLAD plaintiff must ultimately prove that [the protected characteristic] was a 'substantial factor' in an employer's adverse employment action. A 'substantial factor' means that the protected characteristic was a significant motivating factor bringing about the employer's decision." *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014) (citing *MacKay*, 127 Wn.2d at 310-11). Amici argue that in the "substantial factor" element subjective motive, as in ill will or benign intent, is irrelevant. This point is not contested. WELA also argues that the protected characteristic need not motivate the employer's decision

at all, which is contrary to settled law, *id.*, and the law of the case (CP at 2711 (unchallenged COL 4)).

Applying the substantial factor test to the evidence presented, the trial court concluded that “[a]lthough [the Hospital’s staffing] communication indicated race, it was not a substantial factor in the ‘directive’—safety was the overriding factor.” CP at 2712 (COL 6). Substantial evidence supports this conclusion, because under the unique circumstances in which the decision was made, race actually played no part in motivating the Hospital’s decision.

First, although uncontested by the Hospital, Amicus Washington State Association for Justice Foundation (WSAJ Foundation) weighs in solely to argue that a plaintiff’s proof of WLAD discrimination does not require evidence of an employer’s “subjective intent manifesting ill will” nor may the employer “avoid liability when its subjective intent is benign.” Brief of Amicus Curiae WSAJ Foundation (WSAJ Foundation Br.) at 4; *see also* Appellants’ Amended Opening Br. at 39 (arguing that in “defin[ing] ‘substantial factor’ as ‘a significant *motivating* factor’” the trial court required Employees to prove the Hospital’s decision was “motivated by ‘race-based animus or hostility.’”); WELA Br. at 9-12; ACLU Br. at 10-11. This is a straw man, created to suggest error where there was none. With respect to substantial factor, the Hospital agrees that

“the relevant inquiry is whether the WLAD defendant acted knowingly and purposefully on the basis of the plaintiff’s protected characteristic and whether the protected characteristic was a substantial factor in bringing about the employer’s decision.” WSAJ Foundation Br. at 6 (citing *E-Z Loader Boat Trailers, Inc. v. Traveler’s Indem. Co.*, 106 Wn.2d 901, 910, 726 P.2d 439 (1986); *Scrivener*, 181 Wn.2d at 444-46; 6A WASH. PRAC., WPI 330.01 & Comment at 345-46 (2012) (disparate treatment pattern instruction)) (emphasis added).

Second, WELA erroneously argues that “[i]n a facial discrimination case the ‘substantial factor’ test is simply inapplicable because motive is irrelevant and causation is admitted.” WELA Br. at 11 (emphasis added). In the substantial factor test, motive as in ill will or benign intent is irrelevant: as WELA argues accurately elsewhere, “Plaintiffs need not show ‘discriminatory intent’ to prevail.” WELA Br. at 3. But likewise irrelevant in the substantial factor test is whether or not a protected characteristic is apparent on the face of the decision. The protected characteristic must still be “a significant motivating factor bringing about the employer’s decision.” *Scrivener*, 181 Wn.2d at 444 (emphasis added).

The Hospital admits to being perplexed as to the meaning of WELA’s statement that “[i]n facial discrimination cases . . . causation is

admitted by virtue of the facial classification itself.” WELA Br. at 3, 9. The term “facial classification” simply indicates that a distinction is apparent on the face the conduct being examined. The mere existence of a distinction does not establish that it caused anything, much less that it caused an adverse employment action as is required to satisfy the other element of the disparate treatment test. *See* Section III.A. And if by “facial discrimination cases” WELA means cases in which a distinction acknowledging protected class was made on the face of a decision, and because of the protected class distinction that decision resulted in an adverse employment action, then those cases simply satisfy both elements of the disparate treatment test: the plaintiff’s protected characteristic was a substantial factor in the defendant’s decision to take the adverse action. *Scrivener*, 181 Wn.2d at 444; CP at 2711 (COL 4). Such is the case in *Frank v. United Airlines*, which WELA relies on in support of its argument. WELA Br. at 11 (quoting *Frank*, 216 F.3d at 854, in which the airline imposed the adverse action of a more burdensome body weight standard on female flight attendants than male flight attendants, resulting in the female plaintiffs’ termination or discipline).

The relevant inquiry to the substantial factor element is whether the protected characteristic was a significant motivating factor in bringing about the employer's decision. *Scrivener*, 181 Wn.2d at 444. Just because

a characteristic happens to be a protected classification does not mean that the trier of fact necessarily has to find that the characteristic is a substantial factor in the employer's decision. To hold to the contrary would make any acknowledgment of race or any other protected characteristic in an employer's decision, a substantial factor as a matter of law.

Indeed here, under the unique circumstances in which the Hospital's decision was made, race actually played no part in motivating the Hospital's decision. Rather, race merely happened to be the characteristic which at that moment was escalating Patient M.P.'s aggressive behaviors. Patient M.P., a large "delusional" man, committed to the Hospital's custody as Not Guilty By Reason of Insanity, with a "history of assaulting patients and staff", had threatened violence against staff exhibiting a certain characteristic. CP at 2710. The characteristic could have been anything—glasses, hair style, or as it happened this time, skin color. The Hospital, motivated by safety concerns, decided to de-escalate the situation by not assigning staff to M.P. who exhibited the characteristic that was triggering him. What that triggering characteristic happened to be was irrelevant to—not a motivating factor in—the Hospital's decision. CP at 2710-12.

The trial court applied the correct “substantial factor” test and concluded that race “was not *a* substantial factor in the [Hospital’s staffing decision]—safety was the overriding factor.” CP at 2712 (emphasis added). Amici and the Employees find this conclusion incredible as a *factual* matter because the trial court said that race was indicated in the decision. Race exists as a social construct. But just because the Hospital acknowledged that race as a social construct exists—and that patient M.P. threatened violence based on race-based delusion—does not mean that race was a substantial factor in the Hospital’s staffing decision. As a factual matter, based on the evidence before it at trial, the trial court so held. That decision is supported by substantial evidence and should be affirmed.

D. Amici, Not the Hospital, Urge a New Exception to WLAD

ACLU argues that the Hospital advocates for a new exception to WLAD, one that would allow for employment discrimination “based on a patient’s racial preferences, demands, or threats.” ACLU Br. at 18. On the contrary, it is Amici and Employees who urge a sea-change in employment law under WLAD. They ask this Court to dispense with one or the other of the elements of a disparate treatment claim, to import equal protection standards into WLAD employment discrimination claims, and to ignore decades of well-settled law.

The ACLU claims that the Hospital fails to articulate any meaningful limit to its requested relief. *See* ACLU Br. at 17. On the contrary, the limit the Hospital advocates is the well-settled two-part disparate treatment claim test. If an employer makes a staffing decision that a trier of fact determines to be an adverse action in which race was a substantial factor, the employer will be appropriately liable. But here, the trier of fact determined that, as a matter of fact, race was not a substantial factor in a decision that was also not an adverse employment action. Affirming the trial court's verdict in no way invites employers to "racially classify" their employees with impunity. By affirming the trial court's verdict here, this Court will not usher in a new rule under WLAD. It will merely affirm a judgment based on substantial evidence and rendered in accordance with the law.

IV. CONCLUSION

The Hospital does not ask this Court to create an exception to WLAD. It simply asks this Court to recognize, as the trial court did, in accordance with every WLAD and Title VII case cited throughout this litigation, that plaintiffs claiming WLAD race-based disparate treatment must show an adverse employment action in which race was a substantial factor. As the trial court found, the Employees failed to prove either element here. The trial court's verdict should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of April, 2016.

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NO. 91494-0

SUPREME COURT OF THE STATE OF
WASHINGTON

PATRICIA BLACKBURN, et al.

Plaintiffs/Appellants,

v.

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES; and
WESTERN STATE HOSPITAL,

Defendants/Respondents.

DECLARATION
OF SERVICE

I, Lisa M. Savoia, declare that on the date indicated below, I sent a copy of the following documents by electronic mail:

1. Respondent State of Washington's Answer to Amici ACLU, WELA, and WSAJ Foundation; and
2. Respondents' Motion for Permission to File an Over-Length Brief in Answer to Amicus Briefs of ACLU, WELA, and WSAJ Foundation;
3. Declaration of Service;

to all parties or their counsel of record and Amici as follows:

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DATED this 14th day of April, 2016.

/s/ Lisa M. Savoia

Lisa M. Savoia, Legal Assistant

OFFICE RECEPTIONIST, CLERK

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Subject: Blackburn v. State of Washington; Supreme Court Cause No. 91494-0

Good afternoon,

Attached please find the following documents for filing:

1. Respondent State of Washington's Answer to Amici ACLU, WELA, and WSAJ Foundation; and
2. Respondents' Motion for Permission to File an Over-Length Brief in Answer to Amicus Briefs of ACLU, WELA, and WSAJ Foundation; and
3. Declaration of Service.

Thank you.

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