

No. 65713-5-1

**IN THE COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON**

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JERRY WILLIAMS, individually,

Appellant,

vs.

BOSE CORPORATION, a Delaware corporation; DON CHRISTENSEN  
and "JANE DOE" CHRISTENSEN, and the Marital Community  
Composed thereof

Respondents.

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APPELLANT'S OPENING BRIEF

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A. **Introduction**

In this case, a trial court and a jury failed an African American employee who, on the job, was harangued with racial slurs from his manager, a Caucasian. The manager would often refer to the employee as *nigger* and *boy*. This occurred at least once or twice a week during the first six months of his 18 months of employment. It hurt so deeply that it cut to the quick. For the entire 18 months of his employment, he had to listen to his manager's *nigger* jokes and additionally to audio books and songs referencing *niggers*. He had to watch his manager's *Sambo* and *blackface* routines as well as his mimics of *Buckwheat*, a lamentable and shameful depiction of an African American. The employee was routinely accosted by his manager, who would never tire of lecturing him on why slavery was the fault of African-Americans. Yet, when the employee complained to his managers, virtually nothing was ever done. When the employee filed suit, the system failed him. Now, he appeals.

Jerry Williams ("Williams") went to work at Bose Corporation ("Bose") as a salesman under the direct supervision of Don Christensen ("Christensen"). RP 05052010 20:20-25-19. All Williams wanted was to be was a "great employee." *Id* at 22:13. He liked the Bose products. *Id*. 21:18-22:19. And he loved his job. *Id*. Soon, however, the atmosphere became poisoned with racial slurs and other repugnant sights and sounds

that attempted to make Williams appear subhuman.

In the Deep South, Mississippi, where Williams spent his formative years during the 1980s and 1990s, he heard this kind of offensive language. And more often than not, it was directed to him. *Id.* 9:24-16:9, 25:11-17. By dint of fate, Williams managed to escape the South, to escape Mississippi and he came to Seattle. In Seattle, he went to high school, where he excelled. *Id.*

Now, as he worked at Bose, under the hand of Don Christensen, Mississippi quickly came back to mind. Williams was subjected to the same kind of blatant, open, cutting racism that he thought he had left behind when he moved out of Mississippi.

No, this was not Mississippi. Nor was it the Deep South. And it was not the 1980s or the 1990s. But, the words were the same: jarring, cutting, insulting. This should not have happened in the State of Washington, which to the minds of many is culturally eons ahead of racially tinged Mississippi. It should not have happened in King County, named in honor of the first African American for whom we celebrate a national holiday. It should not have happened in the 21<sup>st</sup> Century. We are told we live in a “post-racial” society and in a post-racial era. But, do we? For Williams, while employed at Bose, the answer was a loud and resounding *No!*

**B. Assignments of Error**

**1. First Assignment of Error**

The trial court erred in not granting Williams' a motion for a new trial on the issue of harassment.

**2. Issues Pertaining to the First Assignment of Error**

Did the trial court err in not granting Williams' a motion for a new trial on the issue of harassment?

**3. Second Assignment of Error**

The trial court erred in granting Bose and Christensen's motion for summary judgment on the issues of racial discrimination-disparate treatment, unlawful retaliation, negligent supervision, negligent infliction of emotional distress and intentional infliction of emotional distress-outrage.

**4. Issues Pertaining to the Second Assignment of Error**

a. Did the trial court err in granting Bose and Christensen's motion for summary judgment on the issue of racial discrimination-disparate treatment?

b. Did the trial court err in granting Bose and Christensen's motion for summary judgment on the issue of unlawful retaliation?

c. Did the trial court err in granting Bose and

Christensen's motion for summary judgment on the issue of negligent supervision?

d. Did the trial court err in granting Bose and Christensen's motion for summary judgment on the issue of negligent infliction of emotional distress?

e. Did the trial court err in granting Bose and Christensen's motion for summary judgment on the issue of intentional infliction of emotional distress-outrage?

**5. Third Assignment of Error**

The trial court erred in excluding from evidence Williams' request to play for the jury a racist song frequently played by Christensen in the presence of Williams.

**6. Issues Pertaining to the Third Assignment of Error**

Did the trial court err in excluding from evidence Williams' request to play for the jury a racist song frequently played by Christensen in the presence of Williams?

**7. Fourth Assignment of Error**

The trial court erred in excluding the testimony of Dr. Albert Black.

**8. Issues Pertaining to the Fourth Assignment of Error**

Did the trial court err in excluding the testimony of Dr. Albert

Black?

**9. Fifth Assignment of Error**

The trial court erred in denying Williams motion to exclude evidence of Williams' employment at Study Island and Williams' employment hiring process at the Arlington, Texas Police Department.

**10. Issues Pertaining to the Fifth Assignment of Error**

a. Did the trial court err in denying Williams' motion to exclude evidence of Williams' employment at Study Island?

b. Did the trial court err in denying Williams motion to exclude evidence of Williams' employment hiring process at the Arlington, Texas Police Department?

**11. Sixth Assignment of Error**

The trial court erred in denying Williams motion to exclude defense witnesses: Ricky Eudy; Kelly Shoaf; and Brandy Miller.

**12. Issues Pertaining to the Sixth Assignment of Error**

a. Did the trial court err in denying Williams motion to exclude defense witness Ricky Eudy?

b. Did the trial court err in denying Williams motion to exclude defense witness Kelly Shoaf?

c. Did the trial court err in denying Williams motion to exclude defense witness Brandy Miller?

**C. Statement of the Case**

William was employed at Bose as a sales person in the Bose Bellevue store from November 2006 to June 2008, RP 05052010 47:3-12,121:4-8, where he was a sales associate. He did not work in any lead, managery, or management position. He was the lowest level employee at the Bose store. He started out as a temporary, part-time employee, but later became a permanent, full-time employee. RP 05052010 34:4-6, 95:9-19.

Christiansen, who is Caucasian, was the manager of the Bellevue Mall Bose store and was the person in the highest position at the store. RP 05042010 84:2-4. Later, Christensen, for reasons unrelated to this lawsuit, was demoted to assistant manager, which is the position he presently holds. *Id.* 105:2-6. Williams spent a lot of time with Christensen because they both opened the store most mornings. *Id.* 34:4-23.

Initially, Williams enjoyed his job and held those he worked with in a positive light. RP 05052010 20:20-25. But, then his job became very negative as a result of Christensen's constant harassment. Christensen discriminated so blatantly against Williams that the work environment became completely negative and hostile.

Christensen liked to use the word *nigger*, and he would often play songs that used the word *nigger*. He, Christensen, often referred to Williams as *boy*.

- Christensen frequently used the word *nigger* in Williams' presence. RP 05052010 56:8-25
- Christensen loved to tell and constantly told *nigger* jokes in Williams' presence. 05052010 23:16-28-25
- Christensen frequently used the curse words, "sweet chocolate Christ" or "sweet chocolate Jesus" in Williams' presence. RP 05052010 29:1-12
- More than once, Christensen referred to Williams as *boy*. RP 05052010 29:13-17
- Christensen constantly played a song in Williams' presence, which used the term "Nigger" multiple times in its lyrics. RP 05052010 35:20-36:24, 37:24-38:10, 54:5-13
- On several occasions, Christensen did a *Buckwheat* or *Sambo* routine in Williams' presence RP 05052010 39:14-41:7
- Christensen loved to argue, and often did argue that slavery was the fault of African Americans. RP 05052010 29:18-30:11

As Williams felt the thrust of it, Christensen's harassment was consistent, constant. RP 05052010 34:15-23. Finally, after turning the

other cheek many times, Williams complained to Robin Ramos, Bose Bellevue store's assistant manager. RP 05052010 40:5-41:7. Ramos did nothing. *Id.* Ramos responded to Williams' complaints, saying he should not "rock the boat." *Id.* 26:17-27-5.

In November 2007, Williams complained to Katherine Autry-Schffgens, known as "Kat". RP 05052010 141:7-143:7. Kat was a lead demonstration specialist at the Bose Bellevue store. 0506and102010 154:12-16. In turn, Kat reported Williams' complaints to Mike Krassner, to whom Christensen reported. RP 05052010 41:8-22, 142:10-149:20

Despite everything, the racism continued. RP 05052010 150:1-152:24

In February 2008, Williams complained about Christensen's behavior to Marissa Abrams and Jim Donnellan in Bose Human Resources Department. RP 05052010 155:3- 162:4. Donnellan spoke to Christensen.

Although Christensen stopped using the word *nigger* in front of Williams, his other racist conduct continued. 05062010 93:24-95:9

In addition to Williams testimony several other employees of the Bose Bellevue store witnessed Christensen's harassment.

Robin Ramos, the former Bose Assistant Manager, testified that he worked directly with Williams and Christensen, RP 05042010 11:4-18, and that Christensen routinely made racist jokes not only related to

African Americans, but with respect to several other minority groups as well. *Id.* 11:24-21:22. Ramos testified that Christensen would regularly debate the subject of slavery with employees and would tell employees he did not believe the enslavement of African Americans was wrong and slave masters took better care of African American slaves than the slaves' own families. *Id.* 23:15-26:14. Ramos testified that on one occasion, Christensen asked Ramos about whether his clothing was "East Coast Gear." Christensen then removed Ramos hat and jacket, put them on, and then began "jigging" while saying "Mammy" and doing a blackface routine. According to Ramos, Williams witnessed this incident and was not amused by it. *Id.* 18:24-21:4. According to Ramos testimony, employees, including Williams, complained to him regarding Christensen's racist behavior, yet Ramos literally failed to take any action to correct the situation. *Id.* 34:21-35:7, 50:3-51:22. Specifically, Ramos testified: "If I was a true leader I would have went the extra step and not cared about anything else. I should have protected my team. I didn't." *Id.* 50:16-21. "I failed at my job." *Id.* 51:14.

Dawn Crozier, who was the manager of the Rockport shoe store located near the Bose Bellevue store and is an individual familiar with Christensen. RP 05042010 61:5-62:23. Crozier testified she heard Christensen make jokes that were racist in nature and that his behavior

was not a rare occurrence. *Id.* 62:24-67:2. She also testified she once overheard Christensen comment he would not hire an African-American Bose applicant because the applicant was not just “black,” he was “ghetto black.” *Id.* 62:24-63:21.

Shawn Riibe, a former employee at the Bose Bellevue store who worked with Williams and Christensen, confirmed that Christensen engaged in racially discriminatory and harassing behavior. *Id.* 135:3-16. Riibe testified that Christensen made racial jokes regularly--making statements such as “towel heads” with respect to Hindus and Indians; making lesbian jokes; using the term “ghetto;” and referring to African Americans as “nigger” in front of Williams and other employees. Riibe told the Court that he had heard Christensen use the word *nigger* on approximately ten (10) occasions, and he knew Williams was offended by Christensen’s inappropriate conduct. *Id.* 135:25-146:8. According to Riibe, Christensen engaged in racial joking at least once a week, and perhaps more importantly, Riibe testified Williams complained to Bose management about Christensen’s behavior at least once every few weeks. According to Riibe’s testimony, even he complained to Bose management about Christensen’s discriminatory conduct. *Id.* Riibe testified that he assumed that Bose management would take action to correct Christensen’s conduct. *Id.* However the testimony of all of the witnesses, including

Riibe, bears out that Bose failed to take adequate corrective measures. *Id.*

Another former Bose employee, Collin Sarchin, also testified he worked at the Bose Bellevue store alongside Williams and Christensen. *Id.* 181:3-182:24. Sarchin testified he heard Christensen make racial jokes containing the word *nigger* and other racially inappropriate jokes. *Id.* 182:25-193-12. Sarchin overheard Christensen say the word *nigger* approximately five (5) times, as well make comments that women with large “booty’s” were favorable to black men. Sarchin testified that Christensen’s conduct occurred during work hours. *Id.*

Katherine Autrey-Schiffgens (referred to at trial as “Kat”), testified she was also a Bose manager and Williams had voiced complaints about Christensen’s racially offensive and discriminatory conduct to her. Notably, Kat testified that she too was offended by Christensen’s behavior and emailed Bose Manager, Mike Krassner, regarding it. RP 0506and10 153:17-155-1, 164:9-173:20, 181:16-191:20. Kat’s email to Krassner explicitly stated that both she and Krassner were aware that Christensen was prone to “cross the line” in his conduct at work. *Id.*

Mike Krassner, a Bose manager, supervised both Christensen and Williams. RP 05062010 178:-180:2. Krassner testified he was aware of Christensen’s racially inappropriate behavior. *Id.* 180:3-14. Krassner testified that even he was offended by some of Christensen’s less

offensive conduct such as calling Krassner a “Pussy.” RP 0506and102010 12:7-13:3. Krassner testified at trial that he received Kat’s email complaint regarding Christensen’s racially inappropriate conduct, including references to Christensen using terms such as *nigger* and *boy*, as well as making jokes about protected classes. RP 05062019 191:2-193:11, Ex 12.

Krassner’s response was to conduct a one day investigation in which he interviewed only the Bose employees who had made complaints. RP 0506and102010 5:8-9:12, Ex 31. His interviews, however, did include Williams, and according to Krassner, Williams told Krassner that he was offended by Christensen’s conduct. Ex 31. After conducting his cursory investigation, Krassner’s only response was to verbally counsel Christensen. RP 0506and102010 14:7-9.

Krassner’s subsequent testimony evidences that this approach was ineffective to remedy the racially hostile environment at Bose, because some four months later Krassner wrote a memo to Christensen noting that Christensen was not taking the verbal counseling seriously. *Id.* 13:15-14:20.

Williams’ reaction to all of this was the obvious. RP 05052010 50:5-17, 51:22-54:4. He was angry, *id* 36:14-37:23, and depressed, *id.* 34:24-35:19. Williams testified that when he heard Christensen use the

word *nigger* and make other racist comments, he began to re-experience the racial discrimination that he was subjected to as a child growing up in southern Mississippi. *Id.* 9:24-16:9, 25:11-17. Williams had testified that as a child, he would frequently be called a *nigger* and would hear Caucasians refer to African Americans as *nigger*. *Id.*

But, why did not Williams complain more often and at a higher pitch? Why did he not just quit? Williams answers these questions. His mom always told him: “If you see something that bothers you, just block it out and accomplish the goal that you need to accomplish and keep moving on.” RP 05052010 24:10-14, 27:6-28:L9, 32:4-33:17. She taught him not to quit. RP 05052010 41:23-42:12. Williams simply is a man who has learned to *turn the other cheek*.

When Williams resigned from Bose and took a job as a police officer with the Arlington, Texas Police Department, his resignation letter was intended not to burn bridges. It was a professional style letter of resignation 42:13-43:21, 183:14-188:4.

Upon resigning Williams decided that the status quo at Bose was not right. He filed a complaint to Washington Human Rights Commission RP 05062010 162:5-163:12. And, he filed this lawsuit against Bose and the individual who harassed him at Bose: Don Christensen.

This case was tried from May 5, 2010 through May 11, 2010.

Through motions *in limine* and at trial, the trial court excluded the testimony of Dr. Albert Black. Had Dr. Black been permitted to testify, his opinions would have aided the jury in understanding the highly offensive nature of the defendants' conduct and put that conduct in context as it relates to highly complex issues of race and culture.

The trial court admitted testimony of witnesses relating to Williams' employment at Arlington Police Department and Study Island. The jury should not have been permitted to hear or even consider the testimony of these witnesses. The testimony of Ricky Eudy, Brandy Miller, James Crouch, Michael Weaver, and Kelly Shoaf was devoid of probative value, highly prejudicial to Williams and had the effect of denying Williams a fair trial.

The jury in this case returned a defense verdict. There was insufficient evidence including reasonable inferences elicited at trial, which justified a defense verdict. Moreover, the defense verdict returned by the jury is both contrary to law, and did not do substantial justice.

Williams filed a timely notice of appeal.

**D. Argument**

- 1. First Assignment of Error - The trial court erred in not granting Williams' motion for a new trial on the issue of harassment**
  - a. Issue - Did the trial court err in not granting**

**Williams' motion for a new trial on the issue of harassment?**

Following a jury verdict for defendants, Williams moved for a new trial, on his claim for harassment, which the trial court denied. CP 3317-3318. Now, Williams appeals that ruling.

Denial of a motion for a new trial is within the sound discretion of the trial court and should be granted if, after viewing the evidence in the light most favorable to the nonmoving party, the court can say as a matter of law that there is no substantial evidence or reasonable inferences to sustain the verdict for the nonmoving party. *Kohfeld v. United Pac. Ins. Co.*, 85 Wn.App. 34, 41, 931 P.2d 911 (1997).

The Court of Appeals should reverse a trial court's denial of such a motion when it finds an abuse of the trial court's discretion. *Aluminum Co. of America v. Aetna Casualty & Surety Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). *State v. Copeland*, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996).

Appellate courts review a trial court's denial of a new trial more critically than they do the granting of one because a new trial places the parties where they were before, while denying a new trial concludes their rights. *State v. Taylor*, 60 Wn.2d 32, 41-42, 371 P.2d 617 (1962).

In order to establish a prima facie claim for harassment, a plaintiff

must show that he suffered harassment that was (1) unwelcome, (2) because he was a member of a protected class, (3) affected the terms and conditions of his employment, and (4) was imputable to the employer. *Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004) (citing *Glasgow v. Ga.-Pac. Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985)); see also *Clarke v. Office of Attorney Gen.*, 133 Wn.App. 767, 785, 138 P.3d 144 (2006), review denied, 160 Wn.2d 1006 (2007).

“RCW 49.60 requires a liberal construction in order to accomplish the broad purpose of the law”. *Brown v. Scott Paper Worldwide*, 143 Wn.2d 349, 357, 20 P.3d 921, 928 (2001). “Therefore, we ‘view with caution any construction that would narrow the coverage of the law.’” *Id.* (citing *Marquis v. City of Spokane*, 130 Wn.2d 97, 108, 922 P.2d 43 (1996)). Simple proof of individual prejudice by a decision-maker somewhere in the system is required. *State of Wash, Univ of Washington, v. ODA*, 111 Wn.App. at 99 fn 19.

#### 1. Harassment Was Unwelcome

Conduct is unwelcome if the plaintiff did not solicit or incite it. *Glasgow*, 103 Wn.2d at 406. *Davis v. West One Automotive Group*, 140 Wn.App 449, 457, 166 P.3d 807, 811 (2007).

Here, there is no issue. Williams did not solicit or incite the racial harassment he endured.

2. **Williams Was a Member of a Protected Class**

Williams is African American, a protected class.

3. **Harassment Affected Terms and Conditions of Williams' Employment**

“Because chapter 49.60 RCW substantially parallels Title VII, federal cases interpreting Title VII are ‘persuasive authority for the construction of RCW 49.60.’” *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn.App. 774, 793, 120 P.3d 579 (2005) (quoting *Oliver v. Pac. Nw. Bell Tel. Co.*, 106 Wn.2d 675, 678, 724 P.2d 1003 (1986)). But, the scope of Title VII is not as broad as RCW 49.60, as Title VII does not contain a direction for liberal interpretation as WLAD does. *Martini v. Boeing Co.*, 137 Wn.2d 357, 372-73, 971 P.2d 45 (1999).

Actionable conduct under Title VII is “so objectively offensive as to alter the conditions of the victim's employment.” *Oncale v. Sandowner Offshore Serv., Inc.*, 523 U.S. 75, 81, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview.” *Id.* (quoting *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (The objective severity of harassment should be judged from the perspective of a reasonable person in the

plaintiff's position, considering "all the circumstances". (Quoting *Harris v. Forklift Sys. Inc.*, 510 U.S. at 23)).

In the context of a summary judgment motion in a sexual harassment case, the Court of Appeals, Division I, recently had this to say regarding the third prong of the harassment/hostile work environment test:

To meet the third hostile work environment element, the employee must establish that the harassment was "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406, 693 P.2d 708 (1985). Courts consider the "frequency of the discriminatory conduct; its severity; whether it is physically threatening and humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Sangster [v. Albertson's, Inc.]*, 99 Wn. App. [156] at 163 [991 P.2d 674 (2000)] (quoting *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)). "The required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991). "Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms and conditions of employment to a sufficiently significant degree to violate the law." *Glasgow*, 103 Wn.2d at 406. "Although a single act can be enough, generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident." *King v. Bd. of Regents of Univ. of Wisconsin Sys.*, 898 F.2d 533, 537 (7th Cir. 1990) (citation omitted). Whether the harassment creates an abusive working environment is determined by examining the totality of the circumstances. *Sangster*, 99 Wn. App. at 163.

*Allen v. Global Advisory Group, Inc.*, \_\_\_\_\_ Wn.App. \_\_\_\_\_, \_\_\_\_\_ P.3d \_\_\_\_\_, No. 62338-9-I, p. 8-9, (Wash. App. 5/26/2009).

Here, the harassment was pervasive. It was constant. And, even after Christensen was verbally talked to about his conduct, the racial jokes, aimed at Williams and others, continued.

#### 4. Harassment Imputable to the Employer

“To establish the fourth element, [plaintiff] must show [the employer] knew or should have known of the comments and failed to take reasonable corrective action to end the harassment.” *Davis v. West One Automotive Group*, 140 Wn.App at 458 (citing *Francom v. Costco Wholesale Corp.*, 98 Wn.App. 845, 853-54, 991 P.2d 1182, *review denied*, 141 Wn.2d 1017 2000); *Campbell v. State*, 129 Wn.App. 10, 20, 118 P.3d 888 (2005), *review denied*, 157 Wn.2d 1002 (2006)).

Here, there is no issue. Christensen’s acts and the non-actions of Christensen’s superiors are imputed to Bose. Both Bose and Christensen are liable for Christensen’s constant harassment of Williams and for creating a very hostile work environment.

#### **2. Second Assignment of Error - The trial court erred in granting Bose and Christensen’s motion for summary judgment on the issues of racial discrimination-disparate treatment, unlawful retaliation, negligent supervision, negligent infliction of emotional distress and intentional infliction of emotional distress-outrage.**

A party who moves for summary judgment has the burden of proving there are no genuine issues of material fact, and all material

evidence and reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). Summary judgments shall be granted only if the pleadings, affidavits, depositions, or admissions on file show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Id.* CR 56(c). See also the Washington State Constitution, Article I, Amendment 21 (“[t]he right of trial by jury shall remain inviolate”).

Courts may not resolve questions of fact on summary judgment unless, considering all evidence and reasonable inferences in the light most favorable to the nonmoving party, reasonable minds could reach but one conclusion from the evidence presented. *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 47, 846 P.2d 522 (1993).

Summary judgment is unwarranted when, although evidentiary facts are not in dispute, different inferences may be drawn from them as to ultimate facts such as *intent*, knowledge, good faith, or negligence. *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960); *Sec. State Bank v. Burk*, 100 Wn.App. 94, 995 P.2d 1272 (2000) (summary judgment is not proper if reasonable minds could draw different conclusion from otherwise undisputed evidentiary facts).

Summary judgment is inappropriate where there is contradictory

evidence and an issue of credibility is present. *Balise v. Underwood*, 62 Wn.2d at 200. If there is an issue of credibility, the motion for summary judgment should be denied. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138, 95 A.L.R.3d 225 (1977). An issue of credibility is present if there is contradictory evidence or the movant's evidence is impeached. *Dunlap v. Wayne*, 105 Wn.2d 529, 536, 716 P.2d 842 (1986), *amended*, 89 Wn.2d at 129, 570 P.2d 138 (*citing Balise v. Underwood*, 62 Wn.2d 195).

“Summary judgment should rarely be granted in employment discrimination cases.” *Sangster v. Albertson's, Inc.*, 99 Wn.App. 156, 160, 991 P.2d 674 (2000). And, in employment cases, defeating a summary judgment motion requires only minimal evidence:

This Court has set a high standard for the granting of summary judgment in employment discrimination cases. Most recently, we explained that “[w]e require very little evidence to survive summary judgment' in a discrimination case, 'because the ultimate question is one that can only be resolved through a “searching inquiry” — one that is most appropriately conducted by the factfinder, upon a full record.” *Lam v. University of Hawaii*, 40 F.3d 1551, 1563 (9th Cir. 1994) (quoting *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991)).

“[W]hen a plaintiff has established a prima facie inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he will necessarily have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision.” . . . When [the] evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with

respect to any claim of a nondiscriminatory reason. The existence of this question of material fact will ordinarily preclude the granting of summary judgment. *Sischo-Nownejad*, 934 F.2d at 1111 (quoting *Lowe*, 775 F.2d at 1009).

*Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410-1411 (9th Cir. 1996).<sup>1</sup>

In the context of a summary judgment motion, an inference of discriminatory intent is all a plaintiff is required to show. And in defeating a summary judgment motion, plaintiff is only required to present evidence from which a finder of fact could, but not necessarily would, find discriminatory intent. And, that evidence is analyzed by the trial court under the “substantial factor” standard under Washington law, not under the “but for” standard. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 71, 821 P.2d 18 (1991).

The Ninth Circuit has had this to say about summary judgment motions in the context of racial discrimination in the workplace:

In evaluating motions for summary judgment in the context of employment discrimination, we have emphasized the importance of zealously guarding an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the evidence and an opportunity to evaluate the credibility of the witnesses. *See, e.g., Schnidrig*, 80 F.3d at 1410-11; *Lam [v. Univ. of Hawaii]*, 40 F.3d [1551] at 1563 [(9<sup>th</sup> Cir. 1994)]; *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991). As the Supreme Court has stated, "The real social impact of workplace behavior often depends on a constellation

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<sup>1</sup> This court has held that federal law is instructive with regard to our state discrimination laws. *Dedman v. Pers. Appeals Bd.*, 98 Wn. App. 471, 478, 989 P.2d 1214 (1999).

of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81-82, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). As a result, when a court too readily grants summary judgment, it runs the risk of providing a protective shield for discriminatory behavior that our society has determined must be extirpated.

*McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004).

“Summary judgment in favor of the employer in a discrimination case is often inappropriate because the evidence will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury.” *Davis v. West One Automotive Group*, 140 Wn.App 449, 456, 166 P.3d 807, 811 (2007) (Citing *Kuyper v. Dep't of Wildlife*, 79 Wn.App. 732, 739, 904 P.2d 793 (1995), *review denied*, 129 Wn.2d 1011 (1996)).

Additionally, RCW 46.90.020 informs us that all of the provisions of WLAD “shall be construed liberally for the accomplishment of the purposes thereof.” RCW 46.90.020.

On appeal, when reviewing a grant of summary judgment, appellate courts engage in the same inquiry as the trial court. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000). That review is *de novo*. *NW. Env'tl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1132 (9th Cir. 2006).

a. **Issue - Did the trial court err in granting Bose and**

**Christensen’s motion for summary judgment on the issues of racial discrimination-disparate treatment?**

RCW 49.60 *et seq.*, Washington’s Law Against Discrimination (“WLAD”) is a significant set of laws governing discrimination in the workplace and is a critical piece of the fabric of our diverse society. As our state’s highest court stated, the WLAD embodies a public policy of the “highest priority”. *Xieng v. Peoples Nat’l Bank*, 120 Wn.2d 512, 521, 844 P.2d 389 (1993) (quoting *Allison v. Housing Auth.*, 118 Wn.2d 79, 86, 821 P.2d 34 (1991)). The Washington Legislature has declared the purpose of our WLAD, as follows:

The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or physical disability . . . are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundations of a free democratic state.

RCW 49.60.010.

RCW 49.60.030 states in relevant part:

1. The right to be free from discrimination because of race . . . is recognized as and declared to be a civil right. This right shall include, but not be limited to:
  - (a) The right to obtain and hold employment without discrimination;
  - ....
  - (2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to

recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended . . . .

RCW 49.60.030.

The WLAD applies to companies who discriminate, as well as individual managers who discriminate. RCW 49.60.040(3). *Brown v. Scott Paper Worldwide*, 143 Wn.2d 349, 357-8, 20 P.3d 921, 928 (2001).

Disparate treatment is the most common type of discrimination brought before the courts. Disparate treatment is simply the different treatment of individuals based upon their membership in a protected class.

““Disparate treatment” . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or [other protected characteristic].” *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52, 124 S. Ct. 513, 157 L. Ed. 2d 357 (2003) (alterations in original) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)). Liability in a disparate-treatment case “depends on whether the protected trait . . . actually motivated the employer's decision.” *Id.* (alteration in original) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993)).

*Hegwine v. Longview Fibre Co.*, 78728-0, 14, fn 7, 172 P.3d 688 (Wash. 11-29-2007).

An employee can show disparate treatment by simply showing that the employment decision, hiring, firing, promoting, was based upon a illegally discriminatory act:

A plaintiff can also establish a prima facie case of disparate

treatment without satisfying the McDonnell Douglas test, if she provides evidence suggesting that the “employment decision was based on a discriminatory criterion illegal under the [Civil Rights] Act.” *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977). Cordova has offered direct evidence of such discriminatory animus: Raker's alleged comments that Maldonado was a "dumb Mexican" and that he was hired because he was a minority. Such derogatory comments can create an inference of discriminatory motive. See, e.g., *Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995) (fire chief's derogatory comments about Hispanics create inference of discriminatory motive); *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991) (manager's remarks indicating sexual stereotyping create inference of discriminatory motive).

*Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145,1148-9 (9th Cir. 1997).

As stated, there are two methods by which a plaintiff can establish a prima facie case of employment discrimination. *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 490-1, 859 P.2d 26, 865 P.2d 507 (1993). “The *McDonnell Douglas*<sup>2</sup> standard and the direct evidence method are merely alternative ways of establishing a prima facie case.” *Kastanis*, at 491. Where there is direct evidence of racial animus, a plaintiff need not make out the prima facie case. *Kastanis*, 122 Wn.2d at 491. Otherwise, a plaintiff must prove his or her case by applying the *McDonnell Douglas* burden-shifting method.

In the first alternative, a plaintiff may establish a prima facie case

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<sup>2</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973).

of discrimination by producing evidence from which a reasonable trier of fact could find that discriminatory intent was a substantial factor<sup>3</sup> leading to an adverse employment action. *Kastanis*, 122 Wn.2d at 491; *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 149, 94 P.3d 930 (2004); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003). If the plaintiff does this, the employer must show by a preponderance of the evidence that the same action would have been taken absent the discriminatory intent. Even if the employer provides this evidence, the case should go to the jury. *Kastanis v. Educ. Emp. Union*, 122 Wn.2d at 491.

The plaintiff's burden here "is a burden of production, not persuasion, and may be proved through direct or circumstantial evidence". *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 149.

The second alternative, which can be applied is the three-step *McDonnell Douglas* burden-shifting method. The plaintiff must first show that he or she (1) was in a protected group, (2) was qualified for the position in question, (3) was subjected to an adverse employment action, and (4) the circumstances support an inference of discrimination. If the plaintiff meets this first burden, then the employer has the burden of

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<sup>3</sup> The "but for" test has been abolished in employment discrimination cases. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 71, 821 P.2d 18 (1991).

showing a legitimate nondiscriminatory reason for the adverse employment action. If the employer meets this second burden, then the plaintiff has the burden of showing that the employer's given reason is a pretext for discrimination. If the plaintiff does not provide evidence of pretext, then the employer is entitled to dismissal. If the plaintiff does provide evidence of pretext, then the case should go to the jury. *Kastanis v. Educ. Emp. Union*, 122 Wn.2d at 490-91.

Where there is no direct evidence of discrimination, the court applies the *McDonnell Douglas* test. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 354, 172 P.3d 688 (2007); *Kastanis v. Educ. Emp. Union*, 122 Wn.2d at 490. Despite this, defendants spent literally the entire text of their motion for summary judgment discussing the application of the *McDonnell Douglas* test. CP 205-239.

As stated previously, “[s]ummary judgment should rarely be granted in employment discrimination cases.” *Sangster v. Albertson's, Inc.*, 99 Wn.App. 156, 160, 991 P.2d 674 (2000).

In establishing that discriminatory intent was a substantial factor leading to an adverse employment action, a plaintiff must present evidence from which a reasonable trier of fact could find the employer's (1) intentional discriminatory actions, (2) were a substantial factor, (3) leading to an adverse employment action. See *Kastanis v. Educ. Emp. Union*,

122 Wn.2d at 491 and *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d at 71.

**1. Boses and Christensen's Actions Were Intentional and Discriminatory**

Defendants have not argued, nor will they argue, that Christensen's use of these racially charged words, jokes, songs and arguments were anything but intentional and discriminatory. Here, Christen's words and acts were intentional and discriminatory.

**2. Boses and Christensen's Actions Were a Substantial Factor and Led to an Adverse Employment Action**

Adverse employment actions have been defined broadly to include, "discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand." *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999). Even lesser actions may also be considered adverse employment actions, such as "negative evaluation letters, express accusations of lying [and] assignment of [additional duties or less prestigious duties]." *Id.*

Washington courts have also recognized being treated less favorably in the terms and conditions of employment can be proven by showing an "adverse employment action" which, in turn, can be shown by evidence of, "a demotion or adverse transfer, *or a hostile work environment that amounts to an adverse employment action.*" *Kirby v.*

*City of Tacoma*, 124 Wn.App. 454, 465, 98 P.3d 827 (2004) (emphasis added) (citing *Robel v. Roundup Corp.*, 148 Wn.2d 35, 74 n. 24, 59 P.3d 611 (2002)). As enumerated above, Christensen subjected Williams to continuous racial comments creating a hostile environment and affecting the terms and conditions of William's employment with Bose. Caucasian employees were not subjected to such a hostile environment based upon their race.

Additionally, Bose management treated Williams differently from his Caucasian coworkers by not communicating as openly with him as they did with his coworkers. This is the type of behavior that makes performance of Williams' job more difficult.

**Q** And after you had contact with both -- both Ms. Abrams and Mr. Donnellan, did your job in any way become negative or did you have any negative experiences at Bose after talking to Ms. Abrams or Mr. Donnellan?

**A** Yes, it kind of got worse, like the atmosphere changed as far as being able to have open communication with management and just being able to really have good interaction with them. It kind of closed off. And it was more towards -- the interaction I was expecting to -- getting is what they were giving to the other employees and the interaction that was given to me was very limited.

CP 2214:17 – P. 2215:4.

“I felt like if I had to ask something or -- or if something was a -- was a problem, they would pull them off to the side, talk to them, tell them how to do it, and when they talked to me it was more of, You just need to

do this.” *Id.*, P. 1938:5-9. When management refuses to openly communicate with an African American employee while openly communicating with Caucasian employees it clearly makes the African American employee’s job more difficult. Bose management was hamstringing Williams compared to his Caucasian coworkers.

b. **Issue - Did the trial court err in granting Bose and Christensen’s motion for summary judgment on the issues of unlawful retaliation?**

“Washington recognizes a cause of action for retaliation under the law against discrimination, Ch. 49.60 RCW.” *Kahn v. Salerno*, 90 Wn.App. 110, 951 P.2d 321 (Div. I 1998).

The WLAD provides for a retaliation claim under RCW 49.60.210 as follows:

It is an unfair practice for any employer to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

To establish a prima facie case of retaliatory conduct, a plaintiff must show that (1) he or she engaged in statutorily protected activity, (2) the employer took some adverse employment action against him or her, and (3) retaliation was a substantial factor behind the adverse employment action. (Emphasis added). *Delahunty v. Cahoon*, 66 Wn.App. 829, 840-41, 832 P.2d 1378 (1992) (citing *Allison v. Housing Auth.*, 118 Wn.2d

79, 95, 821 P.2d 34 (1991)).

1. **Statutorily Protected Activity**

Reporting and complaining about race discrimination are statutorily protected activities. “It is an unfair practice for any employer . . . to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.” RCW 49.60.210. Defendants do not deny that Williams complained about Christensen’s discriminatory conduct in November 2007 and February 2008.

2. **Adverse Employment Action**

*Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the United States Supreme Court lowered the threshold for what constitutes an adverse employment action in the context of retaliation under Title VII. The same should apply under WLAD.

Here, under the broad or liberal interpretation of RCW Chapter 49.60 mandated by the Washington Legislature, plaintiff asserts that he was exposed to a hostile work environment such that it constituted an adverse employment action by defendants.

As explained above, Williams was subjected to adverse employment action both in the form of a hostile environment affecting the

terms and conditions of his employment and by being essentially black-balled by management who would not communicate openly with him following his complaints of discrimination. Williams also explained in his answers to interrogations that after he complained of the discrimination, Bose manager, Mike Krassner, continuously questioned him about when he was going to resign. CP 1770:4-22. This is an adverse employment action, one that ultimately led plaintiff to leave Bose. Williams testified at his deposition:

That's the whole thing, I didn't really want to leave during the time period I wrote the letter, but the way I was -- kept approached -- being approached by Mike, constantly telling me, Okay, when are you going to leave? Okay, when are you going to put in your two weeks' notice? So it was a constant bother to me. It got to the point where I was just like, Okay, I'll write this notice so you can leave me alone about it, and then that's when I wrote the notice.

CP 1770:4-22.

This was a constructive discharge brought about by a hostile work environment and retaliation. Bose was clearly seeking to drive plaintiff out of the company in retaliation for reporting discrimination.

### 3. **Retaliation Was a Substantial Factor**

See section above.

#### c. **Issue - Did the trial court err in granting Bose and**

**Christensen's motion for summary judgment on the issues of negligent supervision?**

Although Williams takes the position that Christensen was acting within the course and scope of his employment and therefore, Bose is liable under the theory of *respondeat superior*, if the court found that Christensen acted outside the scope and course of his employment, Bose would still be liable under a theory of negligent retention/supervision.

An employer may be liable for negligently supervising an employee. *Thompson v. Everett Clinic*, 71 Wn.App. 548, 555, 860 P.2d 1054 (1993), "The theory of negligent supervision creates a limited duty to control an employee for the protection of third parties, even where the employee is acting outside the scope of employment." *Niece v. Elmview Group Home*, 131 Wn.2d 39, 51, 929 P.2d 420(1997).

A negligent supervision claim requires showing: (1) an employee acted outside the scope of his or her employment; (2) the employee presented a risk of harm to other employees; (3) the employer knew, or should have known in the exercise of reasonable care that the employee posed a risk to others; and (4) that the employer's failure to supervise was the proximate cause of injuries to other employees.

*Briggs v. Nova Servs.*, 135 Wn.App 955, 966-7, 147 P.3d 616 (2006) (citing *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48-49, 51, 929 P.2d 420 (1997)).

This claim is only brought as an alternative to *respondeat superior* and Williams acknowledges that both *respondeat superior* and negligent supervision cannot co-exist. *Respondeat superior* exists when an

employee, including a store manager, acts within the course and scope of his or her employment, while negligent supervision exists when that employee is acting outside of his or her scope of employment. Although, negligent supervision was pleaded in the alternative to *respondeat superior*, the same factual arguments would apply.

d. **Issue - Did the trial court err in granting Bose and Christensen's motion for summary judgment on the issues of negligent infliction of emotional distress?**

A plaintiff alleging negligence, including negligent infliction of emotional distress, must establish duty, breach, proximate causation, and damage or injury. *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976).<sup>4</sup>

The threshold determination of whether a duty exists is not a

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<sup>4</sup> Under RCW 49.60, proof of discrimination results in a finding of liability. The plaintiff, once having proved discrimination, is only required to offer proof of actual anguish or emotional distress in order to have those damages included in recoverable costs pursuant to RCW 49.60. The damages result from the injury, the discrimination. *Dean v. Mun. of Metro. Seattle-Metro*, 104 Wn.2d 627, 640-1, 708 P.2d 393 (1985) *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 180, 116 P.3d 381 (2005).

*Ellingson v. Spokane Mortgage Co.*, 19 Wn.App. 48, 573 P.2d 389 (1978) had held that a person could recover damages for mental anguish under RCW 49.60. The decision noted that such recovery is distinguishable from common law recovery for emotional distress based on intentional discrimination or intentional tort because it is created by statute. *Spokane Mortgage*, at 57. The opinion recognized that the term "actual damages" included humiliation, mental anguish and suffering. *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981) affirmed emotional distress damages under RCW 49.60 in an action for age discrimination. There too the trial court refused an instruction requiring outrageous and extreme conduct. *Kelly*, 2d at 984 fn. 16.

question of fact, but a question of law. *Coleman v. Hoffman*, 115 Wn.App. 853, 858 (2003) (citing *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994)).

Whether a defendant owes a duty to a plaintiff “depends on mixed considerations of ‘logic, common sense, justice, policy, and precedent.’” *Caulfield v. Kitsap County*, 108 Wn.App. 242, 248, 29 P.3d 738 (2001) (quoting *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985)).

Whether the defendant owed the plaintiff a duty turns on the foreseeability of injury. *Rikstad v. Holmberg*, 76 Wn.2d 265, 268, 456 P.2d 355 (1969). “The hazard that brought about or assisted in bringing about the result must be among the hazards to be perceived reasonably and with respect to which defendant's conduct was negligent.” *Rikstad v. Holmberg*, 76 Wn.2d at 268.

The issue of breach is one for the trier of facts.

The issues of negligence and proximate cause are generally not susceptible to summary judgment. *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975); *see also Ferrin v. Donnellefeld*, 74 Wn.2d 283, 444 P.2d 701 (1968); *Wojcik v. Chrysler Corp.*, 50 Wn.App. 849, 751 P.2d 854 (1988). The question of proximate cause is a mixed question of law and fact. *Bell v. McMurray*, 5 Wn.App. 207, 213, 486 P.2d 1105 (1971). Proximate cause has two elements. The first, cause

in fact, requires some actual connection between the act and the injury. *Meneely v. S.R. Smith, Inc.*, 101 Wn.App. 845, 862-63, 5 P.3d 49 (2000). The second element of proximate cause involves legal causation, which is a policy consideration for the court, whether the ultimate result and the defendant's acts are substantially connected, and not too remote to impose liability. *Meneely v. S.R. Smith, Inc.*, 101 Wn.App. at 862-3. This is a legal question involving "logic, common sense, justice, policy, and precedent". *Id.*

The issue of comparative negligence is also a jury question. *Hough v. Ballard*, 108 Wn.App. 272, 279, 31 P.3d 6 (2001) (citing *Shook v. Bristow*, 41 Wn.2d 623, 626, 250 P.2d 946 (1952)). See *Young v. Caravan Corp.*, 99 Wn.2d 655, 661, 663 P.2d 834 (1983) (citing *Baughn v. Malone*, 33 Wn.App. 592, 598, 656 P.2d 1118 (1983)).

"The plaintiff, once having proved discrimination, is only required to offer proof of actual anguish or emotional distress in order to have those damages included in recoverable costs pursuant to RCW 49.60." *Dean v. Mun. of Metro. Seattle*, 104 Wn.2d 627, 641, 708 P.2d 393 (1985). The distress need not be severe. *Nord v. Shoreline Sav. Ass'n*, 116 Wn.2d 477, 485, 805 P.2d 800 (1991). The Court of Appeals has applied this standard in the context of employment discrimination. See *Herring v. Dep't of Soc. & Health Servs.*, 81 Wn.App. 1, 25, 914 P.2d 67 (1996).

Here, Williams set forth sufficient facts to create a jury question on the issues of duty, breach, proximate causation, and damage or injury.

- e. **Issue - Did the trial court err in granting Bose and Christensen's motion for summary judgment on the issues of intentional infliction of emotional distress-outrage?**

The elements of intentional infliction of emotional distress or outrage are: "(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress." *Birklid v. Boeing Co.*, 127 Wn.2d 853, 867, 904 P.2d 278 (1995).

1. **Extreme and Outrageous Conduct**

Whether conduct is sufficiently outrageous is ordinarily a jury question. *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989).

2. **Intentional or Reckless Infliction of Emotional Distress**

Here, the acts were intentional.

3. **Actual Result to the Plaintiff of Severe Emotional Distress**

See the testimony of Dr. Michael Kane. RP 0506and102010 87:20-111:19. In that testimony, Dr. Kane stated, "Basically I'm saying what I saw from Mr. Williams is that he had this mask that he wears. He looks good. It presents well. I call it substance versus imagery. The imagery, he looks well; but the substance is he is in deep emotional

distress.” *Id.* 111:15-19.

4. **Intentional Infliction of Emotional Distress – Conclusion**

In determining whether a case should go to a jury, a trial court considers: (a) the position the defendants occupied; (b) whether the plaintiff was peculiarly susceptible to emotional distress, and if the defendants knew this fact; (c) whether the defendants' conduct may have been privileged under the circumstances; (d) whether the degree of emotional distress the defendants caused was severe as opposed to merely annoying, inconvenient, or embarrassing to a degree normally occurring in a confrontation between these parties; and (e) whether the defendants were aware that there was a high probability that their conduct would cause severe emotional distress, and they consciously disregarded it. *Phillips v. Hardwick*, 29 Wn.App. 382, 388, 628 P.2d 506 (1981).

Again, keeping in mind (1) the trial court must view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party, (2) that summary judgments may be granted only if the pleadings, affidavits, depositions, or admissions on file show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law, (3) that courts may not resolve questions of fact on summary judgment unless, considering all evidence and

reasonable inferences in the light most favorable to the nonmoving party, reasonable minds could reach but one conclusion from the evidence presented, (4) that summary judgment is inappropriate, as here, where there exists contradictory evidence or where there is an issue of credibility, it is apparent that Williams has more than adequately responded to defendants' motion for summary judgment as to intentional infliction of emotional distress.

Whether conduct is sufficiently outrageous is ordinarily a jury question. *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989).

3. **Third Assignment of Error - The trial court erred in excluding from evidence Williams' request to play for the jury a racist song frequently played by Christensen in the presence of Williams.**
  - a. **Issue - Did the trial court err in excluding from evidence Williams' request to play for the jury a racist song frequently played by Christensen in the presence of Williams?**

A motion to exclude evidence is subject to the reasonable discretion of the trial court and the trial court's decision will be reversed upon a showing of abuse of discretion. *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976). An abuse of discretion occurs when the trial court's ruling is unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

During re-direct of Williams, Williams' attorney requested to play the song, referenced several times in Williams' testimony, which Christensen always liked to play when Christensen and Williams were opening the store. The song used the word *nigger* several times. Despite Williams' motion to play this song for the jury, the trial court only allowed a stipulation as to the contents of the song. RP 0505andd062010 80:23-92:5.

This ruling, by the trial court, unreasonably prejudiced Williams' case.

This evidence was relevant, ER 401, 402, and it was first hand evidence of the racial animus that existed at the Bose store. See RP 05052010 35:20-36:24, 37:24-38:10, 54:5-13. Normally, a trial court should admit an original document or recording with certain exceptions set out in ER 1002, 1004, 1006, 1007. None of those exceptions apply here.

Here, there was no legally sufficient reason to exclude the song that Williams complained of for virtually the entire period of his Bose employment, which song contained multiple uses of the word *nigger* and which Williams was forced to listen to on almost a daily basis. *Id.* The playing of the song was hostile and its exclusion was unreasonable.

**4. Fourth Assignment of Error - The trial court erred in excluding the testimony of Dr. Albert Black.**

**a. Issue - Did the trial court err in excluding the testimony of Dr. Albert Black?**

The exclusion of Dr. Black's testimony was highly prejudicial to Williams' case. See CP 680, 813, 998 (later is Court's Order).

Dr. Black is an eminent sociologist, retired from his teaching position at the University of Washington. If allowed, Dr. Black would have testified how Christensen's behavior could be highly offensive to African Americans and, generally, how that racial hostility affects African Americans.

Contrary to defendants' arguments, Dr. Black's testimony would not have replaced or even supplemented Williams' factual testimony regarding the racial hostility he faced or the medical testimony from Dr. Kane as to the mental and emotional toll of this racial hostility. Significantly what this testimony would have done is to create an important foundation or context for that other testimony.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702.

There is no question Dr. Black has the knowledge, skill,

experience, training, and education necessary to qualify as an expert witness.

Dr. Black has his Ph.D. in sociology and was a Principal Lecturer at the University of Washington, where he taught since 1972. Dr. Black is an expert in social interaction between Caucasian Americans and African Americans. See generally CP 768 – 957.

But, the issue here is not whether Dr. Black is an expert, the issue here is whether or not Dr. Black's testimony would "assist the trier of fact to understand the evidence or to determine a fact in issue."

It is important to point out initially that Dr. Black would not have provided a legal opinion on the ultimate legal issues in this case, but simply would have put Christensen's actions and the inactions of Bose management into the context of an African American rather than a Caucasian being on the receiving end of Christensen's verbal hand grenades. The crux of Dr. Black's proposed testimony is best stated by Dr. Black himself found, among other places, at CR 818, as follows:

A racially hostile environment is one in which a person is constantly confronted with racial slurs, epithets, jokes, insults, stereotypes.

And when I say "constantly confronted," I'm not talking about on a daily basis. I'm not sure you want to get into what we actually mean by "constant," but it is something that happens frequently over an extended period of time and that has a negative impact on the work environment, as well as on the people working in that

environment, and especially when it creates serious interpersonal conflicts within the individual, such that on the one hand the individual is offended by the comments, by the environment that he or she has to work in, but on the other hand is fearful that if they report the person who is responsible, especially if that person is that individual's manager, there might be consequences in terms of his or her continued employment and so on. Those are the kind of things that I think of when I talk about hostile racial environment.

CP 818:16-16.

All facts tending to establish a theory of a party, or to qualify or disprove the testimony of his adversary, are relevant. *Ladley v. Saint Paul Fire & Marine Ins. Co.*, 73 Wn.2d 928, 442 P.2d 983 (1968). See ER 401 and 402.

Dr. Black's testimony was relevant and would have "assist[ed] the trier of fact to understand the evidence or to determine a fact in issue."

**5. Fifth Assignment of Error - The trial court erred in denying Williams' motion to exclude evidence of Williams' employment at Study Island and Williams' employment hiring process at the Arlington, Texas Police Department.**

**a. Issue - Did the trial court err in denying Williams' motion to exclude evidence of Williams' employment at Study Island?**

See discussion regarding Study Island below in section 6b.

**b. Issue - Did the trial court err in denying Williams' motion to exclude evidence of Williams' employment hiring process at the**

### **Arlington, Texas Police Department?**

See discussion regarding Arlington, Texas Police Department below in section 6a.

**6. Sixth Assignment of Error - The trial court erred in denying Williams' motion to exclude defense witnesses: Ricky Eudy; Kelly Shoaf; and Brandy Miller.**

**a. Did the trial court err in denying Williams' motion to exclude defense witness Ricky Eudy?**

In this section, Williams will also discuss his motion to exclude evidence (Issue 5b) regarding the Arlington, Texas Police Department, as well as his motion to exclude the testimony of Ricky Eudy, an investigator with the Arlington, Texas Police Department, who performed a background check on Williams for the APD.

A motion to exclude evidence is subject to the reasonable discretion of the trial court and the trial court's decision will be reversed upon a showing of abuse of discretion. *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d at 91.

Williams moved to exclude the testimony of Ricky Eudy, citing several sections of Washington's Evidence Code. CP 1314. Over that motion to exclude, Eudy testified. RP 0510and112010 94:3-106:11.

The primary objection to both Eudy's testimony and evidence regarding Williams' application and employment with the APD was that it was irrelevant and highly prejudicial in violation of ER 401 and 402.

Additionally, Williams objected on the grounds of Eudy's lack of personal knowledge in violation of ER 602, on hearsay grounds, ER 801 and 802, and inadmissible character evidence, ER 404, 607 and 708.

“. . . [R]elevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” [Footnote omitted]. *Salas v. Erectors*, 168 Wn.2d 664, 230 P.3d 583, 586 (2010) (quoting ER 403). “When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.” *Id.* (Citing *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). “. . . [W]here there is a risk of prejudice and ‘no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.’” *Id.* at 587 (Citing *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983).

Here, there was a risk of prejudice.

**b. Did the trial court err in denying Williams motion to exclude defense witness Kelly Shoaf?**

In this section Williams will discuss his motion to exclude evidence regarding Study Island (Issue 5a), as well as his motion to exclude the testimony of Kelly Shoaf, Williams manager at Study Island.

A motion to exclude evidence is subject to the reasonable discretion of the trial court and the trial court's decision will be reversed

upon a showing of abuse of discretion. *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d at 91.

Williams moved to exclude the testimony of Kelly Shoaf, citing several sections of the Washington Evidence Code. CP 1118. The video of Shoaf's testimony was admitted and shown at TR 0509and102010 78:8-15 (Def's. Ex. 50).

The primary objection to both Ms Shoaf's testimony and evidence regarding Williams' application, employment and termination at Study Island is that is irrelevant and highly prejudicial in violation of ER 401 and 402. Additionally, Williams objected on the grounds of Shoaf's lack of personal knowledge in violation of ER 602, on hearsay grounds, ER 801 and 802, and inadmissible character evidence, ER 404, 607 and 708

“... [R]elevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” [Footnote omitted]. *Salas v. Erectors*, 168 Wn.2d 664, 230 P.3d 583, 586 (2010) (quoting ER 403). “When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.” *Id.* (Citing *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). “... [W]here there is a risk of prejudice and ‘no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.” *Id.* at 587 (Citing *Thomas v. French*, 99 Wn.2d 95,

105, 659 P.2d 1097 (1983).

Here, there was a risk of prejudice.

c. **Did the trial court err in denying Williams motion to exclude defense witness Brandy Miller?**

Dr. Miller's deposition was played for the jury at TR 05112010

93:20-24. The following testimony was taken by defense counsel:

Q. [Ms Moore] In your professional opinion, based on -- as a licensed psychologist, based on your years of experience, would you expect that the testing that you administer as part of the pre-hire psychological testing for the Arlington Police Department would be able to detect severe and permanent emotional distress in a candidate?

A. I would say generally yes, but not always. So there is a possibility that we would miss it, but I would say most of the time we would be able to identify it.

Q. And in what instances would you think that you might miss it?

A. If you've got someone who's a sociopath and is really good at lying and is smart enough to know what to put and to pull the validity scales and to charm and, you know, fool me, then that can happen.

Q. Okay.

A. Yeah.

Q. Other than a sociopath, would you expect the testing to be able to detect that?

A. Yeah.

Q. Okay. How about severe and permanent mental anguish? In your professional opinion as a licensed psychologist, would you expect that the psychological testing that you perform to be able to detect that --

A. Yes.

Q. severe and permanent

A. In general, yeah.

Q. Except -- except other than if somebody is a sociopath?

A. Right.

Q. And how about severe and permanent – permanent mental and emotional shock?

A. Well, I don't really know what that is, but, you know

Q. Okay. And I take it

A. -- something severe.

Q. I take it you would expect that those testings would pick up those conditions except for the situation where you had a true sociopath, someone who was able to really fool doctors about their condition; is that correct?

A. Right. I mean, sociopath or just someone who, yeah, was able to really fool doctors and the tests. And so *it* doesn't necessarily have to be a sociopath --

Q. Yeah.

CP 2484:5-2485:25.

This testimony should have been excluded as being highly prejudicial with no probative value.

“ . . . [W]here there is a risk of prejudice and ‘no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.’ ” *Salas v. Erectors*, 168 Wn.2d 664, 230 P.3d 583, 587 (2010) (citing *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)). In *Salas v. Erectors*, the court stated, “[w]e find the risk of prejudice inherent in admitting immigration status to be great, and we cannot say it had no effect on the jury. Consequently, we cannot hold that it was harmless to admit Salas' status, and we conclude that Salas is entitled to a new trial.”

*Id.*

The effect of this testimony, when looked at in the context of defense counsel's entire line of questioning, which line of questioning was

to attempt to show that Williams either lied to the Arlington Police Department about his mental and emotional distress or to the jury, was to infer, without any supporting evidence whatsoever, that Williams was a sociopath. And, if Williams was a sociopath, he was willing to lie to anybody and he could not and should not be believed by the jury.

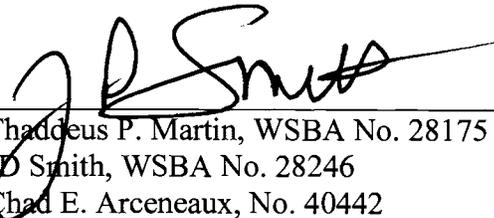
This is the height of unfair prejudice and this testimony should have been excluded.

**E. Conclusion**

For all of the reasons stated above, this matter should be reversed and remanded to the trial court for a new trial.

RESPECTFULLY SUBMITTED at Seattle, Washington this 26th day of January 2011.

By

  
Thaddeus P. Martin, WSBA No. 28175  
JD Smith, WSBA No. 28246  
Chad E. Arceneaux, No. 40442  
Attorneys for Appellant

No. 65713-5-1

**IN THE COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON**

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JERRY WILLIAMS, individually,

Appellant,

vs.

BOSE CORPORATION, a Delaware corporation; DON CHRISTENSEN  
and "JANE DOE" CHRISTENSEN, and the Marital Community  
Composed thereof

Respondents.

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**CERTIFICATE OF SERVICE**

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**LAW OFFICES OF THADDEUS P. MARTIN & ASSOCIATES**

Thaddeus P. Martin, WSBA # 28175

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2011 JAN 26 PM 3:59

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COURT OF APPEALS  
STATE OF WASHINGTON  


**CERTIFICATE OF SERVICE**

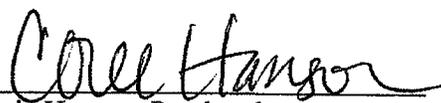
I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION AND THAT I PLACED FOR SERVICE OF APPELLANT'S OPENING BRIEF ON THE FOLLOWING PARTIES IN THE FOLLOWING MANNER(S):

Portia Moore Sheehan Sullivan-Weiss Roger Leishman 1201 3rd Ave Ste 2200 Seattle, WA
--

[XXX] by causing a full, true, and correct copy thereof to be E-MAILED to the party at their last known email address, per prior agreement of the parties, on the date set forth below followed by regular mail.

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

Executed at Tacoma, Washington on the 26<sup>th</sup> day of January, 2011.

  
Corie Hanson, Paralegal