Supreme Court No. 1037490
Court of Appeals No. 57052-1-II

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

REYNOLDO VERDUZCO,

Plaintiff/Petitioner,

vs.

KING COUNTY,

Respondent.

WASHINGTON EMPLOYMENT LAWYERS AMICUS CURIAE MEMORANDUM UNDER RAP 13.4(h) IN SUPPORT OF PETITION FOR REVIEW

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I. IDENTITY AND INTEREST OF MOVING PARTY

This motion is filed on behalf of Washington Employment Lawyers Association ("WELA"), through undersigned counsel. WELA is a chapter of the National Employment Lawyers Association. WELA comprises approximately 230 attorneys admitted to practice law in Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life.

II. INTRODUCTION

This Court should grant the petition for discretionary review. This case presents an issue of substantial public interest regarding the meaning of the term "adverse action" in employment cases under the Washington Law Against Discrimination ("WLAD") that should be determined by the Supreme Court. The jury instruction at issue combined the pattern instruction definition of "adverse action" for retaliation cases with the pattern instruction definition of "adverse action" for discrimination cases. Verduzco prevailed on his retaliation claim, but not his

discrimination claims. The court of appeals reversed the retaliation verdict because it could not be certain whether the jury applied the retaliation or the discrimination definition of "adverse action" in finding in Verduzco's favor. *Verduzco v. King County*, 31 Wn. App. 2d 1080, 2024 WL 3580830, at *13-14 (July 20, 2024) (unpublished).

The court of appeals failed to recognize that as a matter of law the scope of a "materially adverse employment action" in retaliation cases is *broader* than in discrimination cases because retaliation claims are not limited to material adverse changes in the "terms, conditions, or privileges of employment." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S., 53, 64 (2006). By defining an "adverse action" for discrimination cases as "one that materially affects the terms, conditions, or privileges of employment," the pattern jury instruction for discrimination cases imposes on the plaintiff a *more stringent* test than the pattern instruction defining "adverse action" for retaliation cases does. If the jury did apply the discrimination definition of adverse action

to Verduzco's retaliation claim, then the jury found in favor of Verduzco on that claim after holding him to a higher burden of proof than the law requires. There was no basis for the court of appeals to reverse the jury's verdict.

III. STATEMENT OF THE CASE

Verduzco filed claims for race discrimination, disability discrimination, and retaliation in violation of the WLAD. *Verduzco*, 2024 WL 3580830, at *7. At trial, the parties disagreed over the wording of the jury instructions with respect to defining "adverse action" under the WLAD. Verduzco's counsel proposed an instruction that "combined Washington Pattern Jury Instruction (WPI) 330.06, which defines 'adverse' in retaliation claims, and WPI 330.01.02, which defines 'adverse' in the context of discrimination claims." *Verduzco*, 2024 WL 3580830, at * 7. King County objected and proposed separate instructions. *Id.* Verduzco's counsel responded by noting that WPI 330.06 "states to combine the instructions when both disparate treatment and retaliation claims are involved." *Id*. (citing 6A

WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 330.06, at 343 (7th ed. 2018)).

The trial court agreed with Verduzco's counsel reasoning: "It is a correct statement of the law. I don't think it causes confusion." *Verduzco*, 2024 WL 3580830, at * 7. The disputed instruction became Instruction 8. *Id.* at * 12. The jury found in favor of Verduzco on his retaliation claim but in favor of King County on his discrimination claims. *Id.* at *8. The jury awarded him approximately $70,000 in economic damages and $2,000,000 in emotional distress damages. *Id.* at *8.

King County appealed and argued the jury instructions "created the possibility for the jury to apply the 'more generalized' discrimination definition of 'adverse' applicable to disparate treatment claims—an action the affects the terms, conditions, or privileges of employment—to Verduzco's retaliation claim." *Id.* at *13. Verduzco argued "the lack of differentiation in the instruction placed an additional burden on him to prove his case…." *Id.*

The court of appeals sided with King County: "Contrary to Verduzco's assertion, the note on use for WPI 330.06 does not instruct users to simply combine WPI 330.06 with WPI 330.01.02, but states that users should 'combine the instruction with WPI 330.01.02…to *differentiate* adverse employment action in disparate treatment claims from adverse employment action in retaliation claims.'" *Id.* at *13 (citing WPI 330.06 note on use at 343) (emphasis in court of appeals decision). The tribunal then ruled: "Given the lack of differentiation, the jury could well have applied the incorrect legal standard when it considered adverse actions in Verduzco's retaliation claim." *Id.*

The court of appeals summarized its holding thus:

> Because Instruction 8 failed to distinguish between the different definitions of "adverse" applicable in retaliation and discrimination claims, it was misleading and did not properly inform the jury of the applicable law. Therefore, we hold that the trial court erred when it gave Instruction 8 to the jury, and we reverse and remand for a new trial on the issue of retaliation.

Id. at * 14 (internal citation omitted).

IV. ARGUMENT

The court of appeals correctly recognized the direction "to differentiate between discrimination based on disparate treatment and retaliation claims arises from the United States Supreme Court decision in *Burlington Northern & Santa Fe Railway Co. v. White*, which distinguished between adverse employment actions in the context of retaliation claims and adverse employment actions in the context of discrimination claims." *Verduzco*, 2024 WL 3580830, at * 10 (citing 548 U.S. at 67-68); *see also* Pet. Opp. at 12. However, the court of appeals misinterpreted *White*. *White* holds that potentially actionable employer conduct in retaliation cases is *broader* than in discrimination claims because the latter, and not the former, are limited to adverse actions with respect to "the terms, conditions or privileges of employment." *White* therefore establishes *as a matter of law* that if the jury did apply the disparate treatment definition of "adverse action" set forth in Instruction 8 to Verduzco's retaliation claim, then the jury found in his favor using a stricter standard

than the retaliation-claim definition of "adverse action" also set forth in Instruction 8. Had the court of appeals properly understood and applied *White*, the panel would not have reversed the jury's verdict in favor of Verduzco on his retaliation claim.

White analyzed in detail the significant distinctions between the legal prohibitions on discrimination and retaliation: "[T]he two provisions differ not only in language but in purpose as well." 548 U.S. at 63.[1] "The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Id.* "To secure the first objective, Congress did not need to prohibit anything other than employment-related discrimination." *Id.* "But one cannot secure the second objective by focusing only upon

[1] *White*, of course, concerned Title VII of the Civil Rights Act of 1964 and this case arises under the WLAD. Although the language of the discrimination and retaliation provisions under Title VII, 42 U.S.C. § 2000e-2 & § 2000e-3, and under the WLAD, RCW 49.60.180 & 210, are not identical, the legal analysis set forth in *White* is equally applicable to the WLAD.

employer actions and harm that concern employment and the workplace." *Id.*

"Thus, purpose reinforces what language already indicates, namely, that the antiretaliation provision, unlike the substantive provision, *is not limited to* discriminatory actions that affect the terms and conditions of employment." *Id.* at 64 (emphasis added). "The scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm." *Id.* at 67.

Precisely because the scope of the prohibition on retaliation is inherently broader than the disparate treatment prohibition, *White* limited claims of actionable retaliation to "materially adverse" employer actions. *Id.* at 67-68. The Justices went on the define "materially adverse" in the retaliation context to mean an action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68. "We speak of *material* adversity because we believe it is important to separate significant from trivial harms." *Id.*

In this case, the first three sentences of Instruction 8 came from WPI 330.06.

> The term "adverse" means unfavorable or disadvantageous. An employment action is adverse if it is harmful to the point that it would dissuade a reasonable employee from making a complaint of discrimination. Whether a particular action is adverse is judged from the perspective of a reasonable person.

Verduzco, 2024 WL 3580830, at *12. Although the court of appeals asserted that WPI 330.06 "define[s] adverse employment actions in the retaliation context," *id.*, the court failed to understand that as a matter of law WPI 330.06 defines a "*materially* adverse action" in the retaliation context. *White*, 548 U.S. at 68.

The final sentence of Instruction 8 came from WPI 330.01.02, "which defines adverse action in a discrimination context": "An adverse employment action is one that materially affects the terms, conditions, or privileges of employment." *Verduzco*, 2024 WL 3580830, at *12. In other words, the first three sentence of Instruction 8 required Verduzco to prove a "materially adverse employment action" to prevail on his retaliation

claim. The final sentence of Instruction 8 required him to prove a "materially adverse employment action" to prevail on his discrimination claims.

Because the court of appeals misunderstood *White*, the panel failed to recognize that "a materially adverse employment action" in the retaliation context is by definition a *broader* concept than "a materially adverse employment action" in the discrimination context because the latter are limited to the "terms, conditions, or privileges of employment." If indeed, the jury erroneously applied the final sentence of Instruction 8 to Verduzco's retaliation claim, rather than the first three sentences, then as a matter of law, the jury applied a stricter definition of "materially adverse employment action" than Verduzco was required to prove to prevail on his retaliation claim.

The court of appeals asserted that "[i]n his brief Verduzco failed to make any argument as to why the instruction was not prejudicial to the County." *Verduzco*, 2024 WL 3580830, at *13. However, a few paragraphs earlier in its opinion, the court

recognized Verduzco had argued that to the extent that Instruction 8 improperly failed to inform the jury of the difference between retaliation and disparate claims, "the instruction placed an additional burden on him to prove his case anyway." *Id.* The court then stated that "in his brief, Verduzco did not elaborate as to what his additional burden was…." *Id*.

Although it is true that appellate courts will not consider "an issue raised for the first time during oral argument" or "new arguments in a case at the final hour," *State v. Kirwan*, 137 Wn. App. 387, 394, 153 P.3d 883 (2007), those principles do not apply here. As the Petition for Review notes, Verduzco's brief in the court of appeals explicitly argued that Instruction 8 was not "prejudicial to the County" because the instruction's failure to differentiate between retaliation and disparate claims placed "an additional burden on the Plaintiff…." Pet. at 22 n.5 (quoting Resp. Br at 29-30). To be sure, Verduzco's briefs could have been more explicit in identifying the additional burden the disparate treatment definition of "adverse action" imposed on him

above and beyond the retaliation definition of "adverse action." But Verduzco's lack of specificity does not change the fact that he raised and therefore did not forfeit the argument that Instruction 8's failure to differentiate between retaliation and discrimination treatment claims was not prejudicial to the County because the discrimination definition of adverse action imposed an additional burden on him over the retaliation definition.

In any event, Verduzco's lack of specificity regarding the additional burden he faced under Instruction 8 does not alter the court of appeals' failure to understand that *White* holds that a plaintiff in a discrimination case as a matter of law faces an additional burden over a plaintiff in a retaliation case regarding proof of an adverse employment action: A discrimination plaintiff must prove that the adverse employment action at issue affected the "terms, conditions, or privileges of employment" and a retaliation plaintiff need not. 548 U.S. at 64. Although Instruction 8 should have differentiated between the parts of the instruction that applied to Verduzco's retaliation claim and the part that

applied to his discrimination claims, the instruction correctly stated the law applicable to his retaliation claim. The inclusion of the final sentence in Instruction 8 made it harder, not easier, for Verduzco to prevail on his retaliation claim than the first three sentences alone did . He prevailed on his retaliation claim but not his discrimination claims. Accordingly, there was no legal basis for the court of appeals to reverse the jury's verdict on the retaliation claim.

The court of appeals' opinion in this case significantly misinterprets the United States Supreme Court's decision in *White* regarding the differences between retaliation and substantive discrimination claims. Division II's decision will inevitably create confusion in the trial courts and among legal practitioners regarding what constitutes an adverse employment action under the WLAD. This Court should grant review to clarify this important issue of employment discrimination law.

V. CONCLUSION

The Court should grant the Petition for Review.

RESPECTFULLY SUBMITTED this 3rd day of March 2025.

I hereby certify that this memorandum contains 2,182 words in accordance with RAP 18.17(c)(9).

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