

70801-5

70801-5

FILED

Aug 12, 2013

Court of Appeals

Division III

State of Washington

70801-5

NO. 311848-III

---

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

---

DALLAS BARNES,

Appellant,

v.

STATE OF WASHINGTON, through  
WASHINGTON STATE UNIVERSITY

Respondent.

---

**BRIEF OF RESPONDENT**

---

ROBERT W. FERGUSON  
Attorney General

PAUL J. TRIESCH  
Assistant Attorney General  
WSBA #17445  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188  
(206) 464-7352  
Counsel for Respondent

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	1
III.	COUNTERSTATEMENT OF THE CASE.....	3
	A. Nature Of The Case .....	3
	B. Facts .....	3
	1. Employment At The Pullman Campus.....	3
	2. Employment At The Tri-Cities Campus.....	4
	3. The 2005 Human Rights Commission Investigation.....	5
	4. The 2008 OEO Investigation And The <i>Curtiss</i> Lawsuit .....	6
	C. Procedural Summary.....	7
IV.	SUMMARY OF THE ARGUMENT.....	8
V.	ARGUMENT .....	8
	A. Standard On Review .....	8
	B. The Trial Court Properly Exercised Its Discretion In Excluding Brenman’s Opinions And The 2005 HRC Report.....	10
	C. The University’s Opening Statement Did Not “Open The Door” To Inadmissible Evidence.....	14
	D. The Trial Court Properly Exercised Its Discretion In Excluding Racial Comments By Jaime Contreras Regarding Others Employees Made Outside Dr. Barnes’ Presence .....	20

E.	The Trial Court Properly Exercised Its Discretion In Excluding The Monetary Sum Of The Prior Settlement Agreement Between Dr. Barnes And The University .....	26
F.	The Trial Court Properly Exercised Its Discretion In Precluding Dr. Barnes From Testifying That An Assistant Attorney General Told Him To Stop Advising Students To Sue The University.....	26
G.	The Trial Court Properly Rejected Dr. Barnes' Proposed Special Verdict Form And The Court Was Fair .....	26
H.	The Jury's Verdict Should Be Affirmed Because Dr. Barnes Failed To Establish That Any Of The Trial Court's Evidentiary Rulings Prejudiced The Outcome Of The Case?.....	27
VI.	ATTORNEY FEES ON APPEAL .....	28
VII.	CONCLUSION .....	28

## TABLE OF AUTHORITIES

### Cases

<i>Barfield v. Orange Cnty.</i> , 911 F.2d 644 (11th Cir. 1990) .....	12
<i>Beachy v. Boise Cascade Corp.</i> , 191 F.3d 1010 (9th Cir. 1999) .....	23
<i>Burnside v. Simpson Paper Co.</i> , 66 Wn. App. 510, 832 P.2d 537 (1992) .....	23, 24
<i>Cooper v. Com.</i> , 31 Va. App. 643, 525 S.E.2d 72 (2000) .....	14
<i>Cooter &amp; Gell v. Hartmarx Corp.</i> , 496 U.S. 384, 110 S. Ct. 2447, 2459 L. Ed. 2d 359 (1990) .....	9
<i>Cox v. Spangler</i> , 141 Wn.2d 431, 5 P.3d 1265 (2000) .....	9
<i>Curtis v. Oklahoma City Public Schools Bd. of Educ.</i> , 147 F.3d 1200, 1218 (10th Cir. 1998) .....	10, 12
<i>Davidson v. Mun. of Metro. Seattle</i> , 43 Wn. App. 569, 719 P.2d 569 (1986) .....	13
<i>Davis v. Combustion Eng'g, Inc.</i> , 742 F.2d 916 (6th Cir. 1984) .....	11
<i>DeGroot v. Berkley Const. Inc.</i> , 83 Wn. App. 125, 920 P.2d 619 (1996) .....	9
<i>Doe v. Puget Sound Blood Ctr.</i> , 117 Wn.2d 772, 819 P.2d 370 (1991) .....	8
<i>Heyne v. Caruso</i> , 69 F.3d 1475 (9th Cir. 1995) .....	22

<i>Kotla v. Regents of the Univ. of California</i> , 115 Cal. App. 4th 283, 8 Cal. Rptr. 3d 898 (2004).....	11, 12
<i>Lords v. Northern Automotive Corp.</i> , 75 Wn. App. 589, 881 P.2 256 (1994).....	22, 24
<i>Mackay v. Acorn Custom Cabinetry, Inc.</i> , 127 Wn.2d 302, 898 P.2 284 (1995).....	22, 23
<i>Maehren v. City of Seattle</i> , 92 Wn.2d 480, 599 P.2d 1255 (1979), <i>cert. denied</i> , 452 U.S. 938 (1981).....	9
<i>Miller v. Likins</i> , 109 Wn. App. 140, 34 P.3d 835 (2001).....	10
<i>Obrey v. Johnson</i> , 400 F.3d 691 (9th Cir. 2005) .....	25
<i>Perry v. Ethan Allen, Inc.</i> , 115 F.3d 143 (1997).....	21
<i>Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha</i> , 126 Wn.2d 50, 882 P.2d 703 (1994).....	13
<i>Roberts v. Atlantic Richfield Co.</i> , 88 Wn.2d 887, 568 P.2d 764 (1977).....	23, 24
<i>Safeco Ins. Co. v. McGrath</i> , 63 Wn. App. 170, 817 P.2d 861 (1991).....	13
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 230 P.3d 583 (2010).....	9
<i>Shaw v. Lobe</i> , 58 Wash. 219, 108 P. 450 (1910) .....	27
<i>Sintra, Inc. v. City of Seattle</i> , 131 Wn.2d 640, 935 P.2d 555 (1997).....	9

<i>Sprint/United Mgmt Co. v. Mendelsohn</i> , 552 U.S. 379, 128 S. Ct. 1140, 170 L. Ed. 2d 1 (2008).....	21
<i>State v. Anastasia</i> , 356 N.J. Super. 534, 813 A.2d 601 (2003) .....	14, 15
<i>State v. Carter</i> , 23 Wn. App. 297, 596 P.2d 1354, review denied, 92 Wn.2d 1035 (1979).....	14
<i>State v. Hamlet</i> , 133 Wn.2d 314, 944 P.2d 1026 (1997).....	27
<i>State v. Mark</i> , 94 Wn.2d 520, 618 P.2d 73 (1980).....	27
<i>State v. Porter</i> , 150 Wn.2d 732, 82 P.3d 234 (2004).....	26
<i>State v. Price</i> , 126 Wn. App. 617, 109 P.3d (2005).....	28
<i>State v. Richards</i> , 190 W. Va. 299, 438 S.E.2d 331 (1993).....	14
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	15
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	9
<i>State v. Trotter</i> , 632 N.W.2d 325 (2001) .....	14
<i>State v. Whelchel</i> , 115 Wn.2d 708, 801 P.2d 948 (1990).....	14
<i>Tyrell v. Leege</i> , 105 Wash. 438, 178 P. 467 (1919) .....	27

<i>U.S. v. French</i> , 12 F.3d 114, 116 (8th Cir. 1993) .....	10
<i>WA State Physicians Ins. Exch. &amp; Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	9
<i>Ward v. Westland Plastics, Inc.</i> , 651 F.2d 1266 (9th Cir. 1980) .....	12
<i>Winfred D. v. Michelin N. Am., Inc.</i> , 165 Cal. App. 4th 1011 (2008) .....	15

**Statutes**

RCW 4.36.240 .....	27
--------------------	----

**Other Authorities**

3 Witkin, <i>Cal. Evidence</i> , Presentation at Trial § 352 (4th ed. 2000) .....	14
5D Karl B. Tegland, <i>Washington Practice</i> , Evidence § 103 (2003) .....	14

**Rules**

ER 404(b).....	22, 25
RAP 18.1 .....	28

## I. INTRODUCTION

Dallas Barnes appeals from a jury verdict rejecting his race discrimination and retaliation claims against Washington State University. He claims the trial court erred in evidentiary rulings and failed to act impartially, because it refused his special verdict form detailing eight sub-categories of general damages. Dr. Barnes asks this Court to substitute its judgment on those evidentiary rulings for that of the trial court.

The trial court has broad discretion in ruling on the admission of evidence. Its rulings were based on sound reasoning grounded in the facts and the law. The trial court's rejection of Dr. Barnes' special verdict form was proper as a matter of law, but if the court erred, that error was harmless. The jury returned a verdict for the University on both claims.

## II. COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the trial court abuse its discretion by excluding the opinion of Dr. Barnes' expert, stating that the University retaliated against Dr. Barnes because he advocated for "students and faculty and administrators of color"? (Assignment of Error A).

B. Did the trial court abuse its discretion in excluding the opinion of Dr. Barnes' expert, stating that institutional racism exists at the University based on a 2005 Human Rights Commission report regarding a complaint

of racial harassment on the Pullman campus? (Assignments of Error A, L and M).

C. Did the trial court abuse its discretion in refusing to admit two letters about Dr. Barnes' positive qualities which were previously excluded by the trial court and were reoffered by Dr. Barnes based on the University's opening statement? (Assignments of Error B, C, D and E).

D. Did the trial court abuse its discretion in excluding racial comments about Dr. Barnes and others made by one of Dr. Barnes' supervisors outside his presence, where Dr. Barnes neither experienced a racially hostile work environment nor alleged a hostile work environment claim? (Assignments of Error D, F, G and H).

E. Did the trial court abuse its discretion by redacting the monetary sum of a settlement agreement between Dr. Barnes and the University, which resolved his 1994 race discrimination lawsuit, where the agreement was admitted into evidence to explain Dr. Barnes' transfer from the Pullman campus to the Tri-Cities campus? (Assignments of Error I and J).

F. Did the trial court abuse its discretion in precluding Dr. Barnes from testifying that an Assistant Attorney General told him to stop advising students to sue the University? (Assignment of Error K).

G. Should the jury's verdict be affirmed where Dr. Barnes failed to establish that any of the trial court's evidentiary rulings prejudiced the outcome of the case?

### **III. COUNTERSTATEMENT OF THE CASE**

#### **A. Nature Of The Case**

Dr. Barnes alleges race discrimination and retaliation. CP at 641-43. He claims the University discriminated against him because in 2005, it evaluated him as an administrative/professional and not as a faculty member and, in 2007, failed to appoint him as the Director of Student Affairs. CP at 528-39, 854. Dr. Barnes also claims the University retaliated against him because of his 1994 race-discrimination lawsuit against the University and because he has assisted people on the Tri-Cities campus "in clarifying any claims that they may have in the areas of discrimination, gender, race, whatever it may be . . . ." CP at 457, 854-56.

The jury returned a verdict for the University. CP at 13-14.

#### **B. Facts**

##### **1. Employment At The Pullman Campus**

Dr. Barnes began his employment with the University in 1969, at the Pullman campus. RP at 139. In 1982, he became the coordinator of the Academic Development Program (ADP), the purpose of which was to respond to the special needs of students who were admitted to the University

on a provisional basis or as a non-traditional student. CP at 670-71. In 1986, the ADP merged with the Curriculum Advisory Program and Disabled Student Services to create the Student Advising and Learning Center (SALC). CP at 670-71. Tom Brigham, Ph.D., became the interim director. CP at 670-71.

Thereafter, Dr. Barnes complained that nearly every decision made within the SALC was discriminatory toward him. CP at 671. He filed numerous complaints with various internal and external agencies. CP at 671. On September 15, 1994, he filed a lawsuit against the University alleging race discrimination and retaliation. CP at 923-28. On December 5, 1996, he settled that lawsuit. Ex. 101 (Appendix); RP at 435-39. As part of the settlement agreement, Dr. Barnes became the Assistant Branch Campus Director of Student Services at the University's Tri-Cities campus. Ex. 101 (Appendix); RP at 435-39.

## **2. Employment At The Tri-Cities Campus**

In 1997, Dr. Barnes began working at the Tri-Cities campus in the Office of Student Affairs. RP at 173, 190. He performed adequately until 2006. Exs. 103, 104, 106, 107, 108. In 2006, his performance became and remained poor. Exs. 109, 111, 114, 117, 123, 124; RP at 653-710. Eight supervisors expressed concerns about his performance. RP at 710. Pat Wright, an African American female, completed the majority of his

evaluations, including his 2006 evaluation. Exs. 104, 106, 107, 108, and 109; RP at 231.

On October 6, 2000, the Campus Executive Officer and Dean, Larry James, removed Dr. Barnes' responsibility for Disability Support Services. Ex. 105. Dr. Barnes failed to address the accommodation needs of a sight-impaired student, Wade Ricard, thereby exposing the University to civil liability. Ex. 105; RP at 220-22, 1012, 1025-26, 1034-36, 1046-50.

In 2007, the Tri-Cities campus became a four-year institution and admitted its first freshman class. RP at 512, 519-23. This caused the campus to formalize counseling services. Exs. 110, 112; CP at 473-76, 520-23, 548-50, 561-62, 591-605, 621-26, 1101. The University instructed Dr. Barnes to discontinue counseling students and staff. Exs. 110, 112; CP at 473-76, 520-23, 548-50, 561-62, 591-605, 621-26, 1101.

Since Dr. Barnes has been at the Tri-cities campus, he has not applied for advancement, published scholarly articles, performed scholarly research, supervised another employee or been responsible for a budget. RP at 174, 445-47; 536-40, 710, 718-23; 794-803, 854-59. He has taught only two classes: Teaching and Learning and Diversity in Schools. RP at 177.

### **3. The 2005 Human Rights Commission Investigation**

In 2005, an Asian female student at the Pullman campus alleged racial harassment by four players with the men's basketball team. CP at

586-96; RP at 244. The University investigated and concluded the players engaged in adolescent behavior involving no racial gestures or epithets, which was misconstrued as racially-oriented. CP at 586-96. The allegation and investigation received media attention, however, prompting the Human Rights Commission (HRC) to offer assistance in a “cooperative, outreach capacity, rather than its investigatory, enforcement capacity.” CP at 581.

The University accepted the HRC’s offer and Marc Brenman, the HRC director, organized a task force to provide the University with recommendations. CP at 574-634 (Appendix). On July 11, 2005, the HRC issued a report reflecting those recommendations. CP at 574-634. Neither the investigation nor the HRC report concerned or referenced Dr. Barnes. CP at 574-634 (Appendix).

#### **4. The 2008 OEO Investigation And The *Curtiss* Lawsuit**

On December 14, 2008, an employee in the Office of Student Affairs, Anna Mitson, verbally complained to the University’s Office for Equal Opportunity (OEO) that her supervisor, Jaime Contreras, made racial and ethnic references toward her, spread a rumor that she was having an affair with a subordinate and retaliated against her for failing to assist his daughter in a student conduct matter. CP at 541-51 (Appendix). On March 7, 2011, the OEO concluded that Contreras had violated University policy by using derogatory racial and ethnic references

regarding himself and others and by stating that Mitson was having an extra-marital affair with a subordinate. CP at 541-51 (Appendix).

On September 30, 2011, Mitson and two other Office of Student Affairs employees, Christina Stevenson and Johan Curtiss, commenced a lawsuit against the University alleging that Contreras made racial, sexual and religious comments in their presence about himself and others, creating a hostile work environment. CP at 997-1004 (Appendix: *Curtiss et al. v. State of Washington*, Benton Cnty. Cause No. 11-2-02187-1): The plaintiffs alleged that some of Contreras' racial comments referenced Dr. Barnes, but were made without his knowledge. RP at 298, 649; CP at 962-63. Dr. Barnes was unaware of racial comments referencing him. RP at 394. He learned of them from the OEO report. RP at 394.

### **C. Procedural Summary**

Dr. Barnes commenced this race discrimination and retaliation lawsuit on June 14, 2010. CP at 676-80. He identified the specific factual bases for his two claims, most of which were time-barred. CP at 854-56; 693-95, 906-07; RP at 12-17, 442-787. At trial, the University moved to exclude (1) the opinions of Dr. Barnes' "civil rights" expert, Marc Brenman, (2) Contreras' racial comments about anyone but Dr. Barnes and himself, and (3) the monetary sum of Dr. Barnes' 1997 settlement agreement. CP at 361-71, 420-30, 503-05, 517-25; RP at 9-16,

29-33. The trial court granted those motions. CP at 361-71,420-30, 503-505, 517-25; RP at 9-16, 29-33. Dr. Barnes appeals those rulings.

#### **IV. SUMMARY OF THE ARGUMENT**

The opinions of Dr. Barnes' expert invaded the province of the jury and were unnecessary to the jury's understanding of the evidence. The trial court did not abuse its discretion by excluding those opinions. The trial court also properly excluded Contreras' racial comments about persons other than Dr. Barnes and himself, and defense counsel's comments on opening statement did not open the door to those comments.

The trial court's special verdict form and damages instructions properly stated the law, were not misleading and allowed Dr. Barnes to argue his theory of damages. The failure to give Dr. Barnes' special verdict form with eight sub-categories of general damages was not prejudicial to him, because the jury returned a verdict for the University on both of his claims. If the trial court erred, it did not affect the verdict.

#### **V. ARGUMENT**

##### **A. Standard On Review**

It is the function of the trial court to exercise its discretion in the control of litigation before it. *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991). A trial court's decision to admit or exclude evidence and the court's balancing of probative value against

prejudicial effect are entitled to a great deal of deference. *DeGroot v. Berkley Const. Inc.*, 83 Wn. App. 125, 920 P.2d 619 (1996).

A trial court has broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000) (quoting *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997)). Even the admission or refusal of relevant evidence lies within the discretion of the trial court. *Maehren v. City of Seattle*, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979), *cert. denied*, 452 U.S. 938 (1981).

A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010) (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). The abuse of discretion standard recognizes that deference is owed to the trial court, because it is better positioned than the appellate court to decide the issue in question. *WA State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403, 110 S. Ct. 2447, 2459 L. Ed. 2d 359 (1990), superseded by rule on other grounds.). The law does not allow Dr. Barnes to re-try the facts of this case before the appellate courts.

**B. The Trial Court Properly Exercised Its Discretion In Excluding Brenman's Opinions And The 2005 HRC Report**

**Brenman Opinions.** The admissibility of expert testimony is among the evidentiary matters within a trial court's broad discretion. *Miller v. Likins*, 109 Wn. App. 140, 147, 34 P.3d 835 (2001). Dr. Barnes offered opinion testimony from the former HRC director, Marc Brenman, with whom he worked for several years. RP at 14-15, 31-33, 50-52, 237. Brenman opined that Dr. Barnes was unable to advance at the Tri-Cities campus because of retaliation, that it was fruitless for him to apply for advancement, and that his title of Associate Director for Special Projects was a "code word" for a marginalized employee. RP at 247-48; *see also* RP at 48-52. He also opined that Academia is "rule-bound" and "inward looking," that hiring decisions are subjective and lack diversity, and that employees who allege discrimination in Academia will experience retaliation. RP at 242-43. The trial court excluded this testimony and Dr. Barnes made an offer of proof. CP at 356-57; RP at 237-50.

The trial court did not abuse its discretion. Expert testimony is only appropriate "when it relates to issues that are beyond the ken of people of ordinary intelligence". *Curtis v. Oklahoma City Public Schools Bd. of Educ.*, 147 F.3d 1200, 1218 (10th Cir. 1998), citing *U.S. v. French*, 12 F.3d 114, 116 (8th Cir. 1993). Brenman did not present any scientific,

technical, or specialized knowledge that would have assisted the jury to understand the evidence or to determine a fact in issue. He simply opined that the University retaliated against Dr. Barnes and rationalized Dr. Barnes' failure to apply for the positions he claimed the University wrongfully failed to bestow upon him. The trial court's decision was sound.

The primary case upon which Dr. Barnes relies, *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916 (6th Cir. 1984), is inconsistent with the decisions of the many courts that have considered whether an expert should be allowed to testify that the particular facts in a case constitute discrimination or retaliation. For example, the court in *Kotla v. Regents of the Univ. of California*, 115 Cal. App. 4th 283, 292, 8 Cal. Rptr. 3d 898, 904 (2004), recognized that numerous federal courts have discussed the admissibility of testimony like that proffered by Brenman and "most have rejected it". The *Kotla* court found *Davis*, in particular, unpersuasive.

In *Davis*, the trial court held that it "was not clearly erroneous, given the broad [federal] standard," to allow a "personnel management expert" to testify that the plaintiff's discharge was the result of discrimination. The *Kotla* court observed that though "the jury in *Davis* had been instructed that it could 'totally disregard' the expert's opinions if it found them unsound for any reason," it was nevertheless improper for

the trial court to allow such testimony. *Kotla*, 115 Cal. App. 4th at 291. An instruction allowing a jury to reject an expert's opinion on the very question they are to decide is of little consolation. *Id.*

Other federal courts have reached the same conclusion. In *Ward v. Westland Plastics, Inc.*, 651 F.2d 1266, 1271 (9th Cir. 1980), the court found that "[t]he question of whether gender was the basis of differential treatment is not so technical as to require the aid of an expert to enlighten the jury or the court." The *Ward* court held that the trial court properly deemed the plaintiff's expert "incompetent" to voice an opinion on whether alleged conduct constituted sex discrimination.

Similarly, in *Curtis*, 147 F.3d at 1219, the tenth circuit upheld exclusion of such expert testimony, stating that the jury "could determine for itself whether the recruitment plan in this case was ineffective and whether it was evidence of retaliation". And in *Barfield v. Orange Cnty.*, 911 F.2d 644, 651 n.8 (11th Cir. 1990), the eleventh circuit upheld the exclusion of expert testimony regarding whether the plaintiff was a victim of race discrimination, because it would not assist the trier-of-fact.

The trial court's exclusion of Brenman's opinions was sound because those opinions were based on generalities and speculation. Any probative value was far outweighed by the potential for undue prejudice to the University. It is well established that conclusory or speculative expert

opinions lacking an adequate foundation should not be admitted. *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991). When such opinion testimony is presented to a lay jury with the imprimatur of “expertise,” it is a near certainty that the jury will give such testimony undue weight. Hence, “[w]here there is no basis for [an] expert opinion other than theoretical speculation, the expert testimony should be excluded”. *Queen City Farms, Inc. v. Cent. Nat’l Ins. Co. of Omaha*, 126 Wn.2d 50, 103, 882 P.2d 703 (1994). And “when ruling on somewhat speculative [expert] testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert.” *Davidson v. Mun. of Metro. Seattle*, 43 Wn. App. 569, 572, 719 P.2d 569 (1986).

**2005 HRC Report.** Dr. Barnes offered the July 11, 2005 HRC report as evidence of a systemic and pervasive environment of racial hostility within the University, but the report itself states there was no fact-finding investigation and no legal findings. CP at 580-81 (Appendix). The report also states the HRC drew no conclusions whatsoever and that the report may contain factual errors. CP at 580-81. More importantly, neither the report nor the University’s investigation referenced or had anything to do with Dr. Barnes’ claims. It was properly excluded.

**C. The University's Opening Statement Did Not "Open The Door" To Inadmissible Evidence**

Dr. Barnes claims the University's opening statement "opened the door" to previously-excluded evidence. RP at 125-29, 748-62; *see e.g.*, RP at 105-18. But evidence only becomes admissible by the introduction of evidence, not by a lawyer's comments on opening statement. *State v. Whelchel*, 115 Wn.2d 708, 801 P.2d 948 (1990); *State v. Carter*, 23 Wn. App. 297, 596 P.2d 1354, *review denied*, 92 Wn.2d 1035 (1979); 5D Karl B. Tegland, *Washington Practice*, Evidence § 103 (2003).

Several state courts have held that because an opening statement is mere argument and has no evidentiary value, it does not open the door to otherwise inadmissible evidence. *See, e.g., State v. Trotter*, 632 N.W.2d 325, 335-36 (2001); *State v. Richards*, 190 W. Va. 299, 438 S.E.2d 331 (1993); *State v. Anastasia*, 356 N.J. Super. 534, 813 A.2d 601 (2003); *Cooper v. Com.*, 31 Va. App. 643, 525 S.E.2d 72 (2000). The courts reason that "[i]f improper remarks are made by counsel, the remedy lies in a curative instruction to the jury or, if absolutely necessary, a mistrial." *Anastasia*, 813 A.2d at 606; *see also* 3 Witkin, *Cal. Evidence*, Presentation at Trial § 352, at 439-440 (4th ed. 2000), ["open the door" argument is a "popular fallacy" and turns on whether *evidence* has been admitted by adversary that is prejudicial and not curable by objection or motion to

strike (emphasis original)); *Winfred D. v. Michelin N. Am., Inc.*, 165 Cal. App. 4th 1011, 1027 (2008) (quoting *Anastasia*, 356 N.J. Super. at 534 (same)); see also *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (“[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury”).

The University’s opening statement merely answered Dr. Barnes’ opening statement and outlined the evidence that would be admitted at trial. RP at 90-95. Prior to opening statements, the trial court instructed the jury that counsel’s statements were not evidence, and Dr. Barnes presented evidence supporting the comments of which he now complains. RP at 37, 132, 181-85. Moreover, Dr. Barnes did not object or request a limiting instruction. RP at 105-19, 761. The trial court properly rejected his argument.

**The University is a Marketplace of Ideas and Diversity.**

WSU is Washington’s original land grant university. It was founded in 1890, in Pullman, and serves about 26,000 students. It’s got graduates (sic), undergraduates (sic), and professional students. Like all major universities, it’s a marketplace of ideas. It’s a marketplace of diversity. It is a marketplace of inquisitiveness. It is the base of one of the nation’s top research institutions. That’s important. Its president since 2007 has been Elson Floyd. He is African American. If you talk about WSU and Pullman, you’re

talking about an African American CEO—Chief Executive Officer—President.

RP at 110-11. These comments respond to Dr. Barnes' opening statement and introduce the University. Dr. Barnes himself testified to the University's commitment to diversity and the significant African-American leadership within the University. RP at 132, 181-85, 429-33.

**The Monetary Amount of the 1997 Settlement Agreement.**

But that lawsuit went on for a couple of years, and the University decided to resolve it with Dr. Barnes and brought him back to Pasco to WSU Tri-Cities, where he is from. And you'll see the agreement that they reached. It specifies the job he will have. It specified what he will do. And he agreed to it. And, of course, those things changed over time and the evidence is going to show why they changed . . . . We will present you the settlement agreement and the acceptance letter detailing Dr. Barnes new position and his agreement to it.

RP at 109, 114. These comments respond to Dr. Barnes' opening statement and provide context for his transfer from the Pullman campus to the Tri-Cities campus. RP 57, 90-94. The entire settlement agreement, except the monetary sum, was admitted into evidence. RP 55-58, 434-39.

**Appointment of Pat Wright as Director of Student Affairs.**

WSU Tri-Cities was a small campus. This case is going to have a lot of information about growing a university. It's a tough business. It's a tough thing to do. And early on, people had to wear a lot of hats. By that I mean you've got one job now, you've got another job here, you've got another job here—one person. That's how it was. Flexibility was paramount. If you were inflexible and

entrenched, you can't be asked to do other things. If you won't do them, someone else will. That's how it has to be. So as I said, when Dr. James first came in, he will tell you about this. Dan Capraun was head of the student services department. There were problems with student services. It did not meet with Dr. James's satisfaction. He removed Mr. Capraun and installed Pat Wright. Why? He will tell you why. Because Pat Wright, an African American female, was an out front person. Someone who interacted well with people and had the background to do the job. That was his assessment.

RP at 112-13. These comments respond to Dr. Barnes' opening statement, which compared his qualifications with those of Pat Wright. RP at 93-95. They did not open the door to admission of "character evidence" in the form of two letters expressing gratitude from in Dr. Barnes' personnel file. RP at 145-52, 212-15. Moreover, Dr. Barnes did not make an offer of proof regarding the two excluded letters and he testified that Pat Wright was, in fact, an "out front" person. RP at 212, 1008-14.

The exclusion of the letters was not prejudicial to Dr. Barnes, because the trial court allowed him to testify that he received positive commendation letters. RP at 150-52, 212-16. The trial court observed that the inferences the jury could draw from Dr. Barnes' testimony was more favorable than the excluded letters. RP at 150-52, 212-16.

Ultimately, however, whether or not Dr. Barnes believes his qualifications to be superior to those of Pat Wright is irrelevant. Her

appointment occurred well outside the statute of limitations and was not an issue before the jury. CP at 15-35, 732-34.

**Contreras Did an Excellent Job as Director of Student Affairs.**

So a nationwide search was opened. Jaime Contreras and others applied. They went through a committee. He was hired. Hispanic male. Dallas Barnes never applied and Mr. Contreras became Dr. Barnes supervisor. And the freshman class came in. And by all accounts, Contreras did an excellent job. And we have a robust freshman and sophomore class at WSU Tri-Cities. And a growing and robust university. The evidence is going to show that the 2007 transition required considerable review and substantial evaluation of curriculum, staffing, employee performance, and procedures and practices to enhance the existing level of institutional performance consistent with a four-year institution. It's a big deal. It's not small potatoes. It needs to be done right and these changes affect everyone.

RP at 116-17. These comments referenced the growth of the Office of Student Affairs under Contreras' leadership. *See e.g.*, RP at 522-23. They make no reference to, and do not open the door to evidence of, Contreras' racial comments regarding other employees. *See* section V. D., below.

**Contreras Referred to Himself in Racial Terms.**

The evidence is going to show that his last supervisor before Carol Wilkerson, Jaime Contreras, is a Hispanic man. As Ms. Clare said, he was Mr. Barnes' supervisor for three years. He engaged in racial banter about Dr. Barnes several times over the three years. I think he used the terms Kunte Kinte and Thurgood Marshall. What the evidence is also going to show is that, as inappropriate as it is, is that Mr. Contreras referred to himself often as bean burrito, Mr. Beaner, taco boy, burrito man. He used those terms.

He used those terms about himself. Inappropriate. But that's being used by Dallas Barnes to propel a claim that it doesn't propel. The evidence is going to show that Jaime Contreras was the supervisor at the far end of Dallas Barnes' long litany of complaints and that the entire series of supervisors, all these people who will populate the list of discriminators, doesn't really include Jaime Contreras because he made few, if any, decisions that Dr. Barnes takes issue with. What we dispute is that discrimination occurred. What we dispute is that retaliation occurred.

RP at 110. Over the University's objection, the trial court allowed Dr. Barnes to present evidence that Contreras made several racial references to him outside Dr. Barnes' presence. RP at 49-55, 252-58. Johan Curtiss testified that during the three years Contreras supervised her, he referred to Dr. Barnes as Thurgood Marshall a "couple of times" and as Kunte Kinte once. RP at 280-82, 286. She also testified that Dr. Barnes was never present for these comments, she never told Dr. Barnes about the comments, and that during the same time period, Contreras referred to himself as taco boy or burrito man six or seven times. RP at 283, 286.

Anna Mitson testified that during the three years Contreras supervised her, he referred to Dr. Barnes as Kunte Kinte in both a joking manner and in an angry manner. RP at 298. Dr. Barnes never overheard Contreras' comments and Mitson never told Dr. Barnes about them. RP at

298. Mitson also testified that during the same time period, Contreras frequently referred to himself as bean burrito. RP at 302, 360.

Christina Stevenson testified that during the three years Contreras supervised her, he referred to Dr. Barnes as Kunte Kinte and Thurgood Marshall “a handful of times”. RP at 649-50. Stevenson laughed at these comments. RP at 639. Stevenson also testified that Dr. Barnes never heard these comments and she never disclosed them. RP at 649. She testified that Contreras referred to himself as bean burrito, beaner, and brown beret approximately a dozen times. RP at 648.

Former student Affairs employee, Karla Short, too, was allowed to testify that Contreras referred to Dr. Barnes as the black man a half a dozen times. RP at 360, 365-67. Contreras referred to himself as the token Mexican more times than she could count. RP at 360, 365-67.

Dr. Barnes admitted that Contreras never referred to him in racial terms. RP at 713-18. He only learned of Contreras references by reading the OEO report (which also does not reference him). RP at 394, 717-18.

**D. The Trial Court Properly Exercised Its Discretion In Excluding Racial Comments By Jaime Contreras Regarding Others Employees Made Outside Dr. Barnes' Presence**

Dr. Barnes never claimed or presented evidence that Contreras made racially improper comments to him or in his presence. Rather, he alleged Contreras told students not to speak with him, removed the duty of

reinstating students (though he continued to do so), and failed to introduce him to new employees. RP at 716-17. Even if these acts were adverse employment actions as defined by the law, none of them have any connection to the claims asserted by Curtiss, Mitson and Stevenson.

Dr. Barnes confuses the legal standards governing hostile work environment claims and disparate impact discrimination claims, as distinguished from disparate treatment claims. While “evidence of a general work atmosphere” (*Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (1997)), might be relevant in a hostile work environment claim, it is not relevant in a case regarding disparate treatment based upon specific acts of discrimination or retaliation. Allowing evidence of other employees’ claims creates a mini-trial within the trial, causing undue delay and confusion of the issues. Given the lack of probative value of the evidence regarding the claims of Curtiss, Mitson and Stevenson as related to Dr. Barnes’ allegations, the trial court did not abuse its discretion in excluding that evidence.

Evidence of other discriminatory acts by a supervisor is neither per se admissible nor per se inadmissible. *See Sprint/United Mgmt Co. v. Mendelsohn*, 552 U.S. 379, 128 S. Ct. 1140, 170 L. Ed. 2d 1 (2008). However, such evidence should be excluded if is not sufficiently closely related to the plaintiff’s circumstances and facts of the case. When

evidence is proffered regarding alleged discrimination against another employee who is not in a position similar to the plaintiff in employment or in protected status, and where the evidence is likely to confuse or mislead a jury, a court should exclude the evidence. See *Lords v. Northern Automotive Corp.*, 75 Wn. App. 589, 881 P.2 256 (1994), abrogated on other grounds by *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 306, 898 P.2 284 (1995).

To support his argument, Dr. Barnes relies on *Heyne v. Caruso*, 69 F.3d 1475, 1480 (9th Cir. 1995). However, *Heyne* is distinguishable.

*Heyne* involved a claim of wrongful discharge by a female restaurant employee based on *quid pro quo* sex discrimination. The *Heyne* court permitted evidence of *quid pro quo* sex discrimination against other female employees to prove the employer's stated reason for her dismissal—that the plaintiff was late opening the restaurant on two consecutive days—was a pretext. *Heyne*, 69 F.3d at 1479; see ER 404(b). Here, there is no allegation that Contreras terminated Dr. Barnes, who has at all times been employed by the University, or that Contreras discriminated against him based upon his race.

Rather, Dr. Barnes claims that Contreras retaliated against him in the three particulars stated above for filing a race discrimination claim

and/or for counseling others about their civil rights. There is no arguable connection between Dr. Barnes' claims and the *Curtiss* claims.

Moreover, four years after *Heyne*, the Ninth Circuit clarified the limited scope of that case, holding that an argument based on *Heyne* "might be persuasive if the evidence in question indicated that [the employer] was hostile toward a well-defined and protected group such as persons of a particular race, persons of a particular gender, or persons who are disabled". *Beachy v. Boise Cascade Corp.*, 191 F.3d 1010, 1014 (9th Cir. 1999). No such evidence exists in this case. Again, Dr. Barnes has never alleged such a claim or identified evidence to support such a claim.

Dr. Barnes also relies upon *Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 832 P.2d 537 (1992), abrogated on other grounds by *Mackay*, 127 Wn.2d at 310. *Burnside*, too, is distinguishable.

In *Burnside*, Division 1 affirmed the trial court's admission of testimony by other terminated employees who allegedly experienced age discrimination because they had been through sufficiently similar circumstances to the plaintiff's termination. *Burnside*, 66 Wn. App at 522. The *Burnside* court distinguished *Roberts v. Atlantic Richfield Co.*, 88 Wn.2d 887, 568 P.2d 764 (1977), observing that the evidence offered there was "too remote and irrelevant to be admissible . . . those employees were older than the plaintiff, and there was no showing that their jobs,

working conditions or the way in which they were discharged were similar to Roberts". *Burnside*, 66 Wn. App at 522, n.10 (citing *Roberts*, 88 Wn.2d at 887).

In *Lords*, 75 Wn. App. at 589, an age discrimination case decided two years after *Burnside*, the court excluded testimony of a witness who shared characteristics with the plaintiff (over 40, had a heart condition, and was terminated without an offer of demotion), but who did not hold the same position and who did not have the same direct supervisor. *Id.* at 610. The court determined that the facts were not sufficiently similar and that the trial court did not abuse its discretion in determining that the evidence "would be confusing or misleading" to the jury. *Id.*

Here, Dr. Barnes' allegations are not related to those in the *Curtiss* lawsuit. Those plaintiffs allege Contreras made comments to and in the presence of Anna Mitson, who is Asian-American employee, following a conflict between Contreras' daughter, a WSU student, and another student named Lynn Collins. The only shared factor is that both Mitson and Dr. Barnes were supervised by Contreras. This does not warrant allowing testimony regarding Mitson's hostile work environment allegations as support for Dr. Barnes' claim of retaliation for filing a lawsuit and/or counseling others about their civil rights.

In addition, the court must distinguish the cases cited by Dr. Barnes involving disparate impact discrimination. In *Obrey v. Johnson*, 400 F.3d 691 (9th Cir. 2005), the court observed that while anecdotal evidence of other alleged discrimination “might prove inadmissible in the typical case of individual discrimination, in a case involving a claim of discriminatory pattern or practice,” such evidence may be admissible. *Id.* at 698. This is not a disparate impact case and there is no evidence of “pattern and practice”.

Dr. Barnes offered evidence of Contreras’ other alleged acts to prove that “Contreras views people in light of their ethnicity . . . [and] . . . treats employees derogatorily based upon the [sic] racial stereotypes.” CP at 410-11. He also argued that evidence related to Mitson’s hostile work environment claim is relevant because “[w]hen (Mitson and Collins) stood up to Contreras, he retaliated with force against each”, and that Contreras’ alleged removal of duties from Dr. Barnes was similar to the alleged removal of Mitson’s duties. CP at 411. Thus, by his own admission, Dr. Barnes offered this evidence to prove that Contreras is generally “the kind of person” who treats people differently because of race and/or who retaliates against people when he does not like something. This is exactly the type of proof that ER 404(b) excludes.

**E. The Trial Court Properly Exercised Its Discretion In Excluding The Monetary Sum Of The Prior Settlement Agreement Between Dr. Barnes And The University**

Dr. Barnes provided no authority, facts or argument that would allow this court to conclude that the trial court abused its discretion in excluding the sum of his settlement agreement with the University.

**F. The Trial Court Properly Exercised Its Discretion In Precluding Dr. Barnes From Testifying That An Assistant Attorney General Told Him To Stop Advising Students To Sue The University.**

The University moved to exclude Dr. Barnes' hearsay testimony that an Assistant Attorney General instructed him to refrain from counseling students to sue the University. CP at 517. Though the trial court granted the motion, Dr. Barnes' counsel nevertheless made that inquiry at trial. RP at 396-97. The trial court sustained the University's objection. RP at 396-97. Again, Dr. Barnes provides no authority, facts or argument that would allow this Court to conclude that the trial court abused its discretion in excluding that testimony.

**G. The Trial Court Properly Rejected Dr. Barnes' Proposed Special Verdict Form And The Court Was Fair**

Alleged errors of law in a trial court's instructions are legal questions that the appellate court reviews *de novo*. *State v. Porter*, 150 Wn.2d 732, 735, 82 P.3d 234 (2004). Jury instructions are proper if they correctly state the applicable law, do not mislead the jury and permit the

parties to argue their case theories. *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980).

Here, Dr. Barnes proposed a Special Verdict Form in which the general damages question included eight sub-categories. CP at 137-38; RP at 1168-93; *cf.* CP at 13-14. The trial court rejected this proposed special verdict form and submitted a special verdict form that was consistent with the Washington Pattern Instructions. CP at 13-14. The court also instructed the jury by a separate instruction regarding the breadth of the general damages available to Dr. Barnes. CP at 29-34.

Even if the trial court's decision was error, it did not prejudice Dr. Barnes. He testified at length about his general damages. RP at 418-27, 1177-82. Moreover, the jury returned a verdict for the University. There is no reasonable probability that the trial court's refusal of Dr. Barnes' special verdict form affected the verdict. *State v. Hamlet*, 133 Wn.2d 314, 327, 944 P.2d 1026 (1997). Any error was harmless and thus not cause for reversal. RCW 4.36.240; *Tyrell v. Leege*, 105 Wash. 438, 178 P. 467 (1919); *Shaw v. Lobe*, 58 Wash. 219, 108 P. 450 (1910).

**H. The Jury's Verdict Should Be Affirmed Because Dr. Barnes Failed To Establish That Any Of The Trial Court's Evidentiary Rulings Prejudiced The Outcome Of The Case?**

Dr. Barnes fails to show how the trial court's evidentiary rulings prejudiced him and improperly affected the jury's verdict. Where an error

violates an evidentiary rule rather than a constitutional mandate, the error is not prejudicial unless it is reasonably likely that the outcome of the trial would have been materially affected had the error not occurred. *State v. Price*, 126 Wn. App. 617, 109 P.3d (2005). Here, the jury's verdict was supported by substantial evidence. The University denied that it discriminated and retaliated against Dr. Barnes and the jury returned a verdict based on that evidence.

#### **VI. ATTORNEY FEES ON APPEAL**

The University requests an award of attorney fees and costs on appeal, pursuant to RAP 18.1.

#### **VII. CONCLUSION**

Based on the foregoing arguments and authorities, the University respectfully requests that this court affirm the judgment on the August 13, 2012 jury verdict, and award the University its attorney fees and costs.

RESPECTFULLY SUBMITTED this 12th day of August, 2013.

ROBERT W. FERGUSON  
Attorney General



PAUL J. TRIESCH, WSBA #17445  
Assistant Attorney General  
Attorneys for Respondent  
State of Washington,  
Washington State University

**CERTIFICATE OF SERVICE**

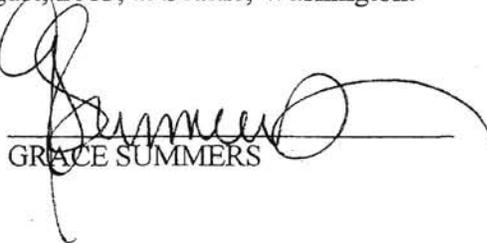
I certify under penalty of perjury in accordance with the laws of the State of Washington that the preceding Brief of Respondent, were electronically filed at the Electronic Filing-Party Web Portal:

COURT OF APPEALS OF WASHINGTON, DIVISION III  
500 N. CEDAR ST.  
SPOKANE, WA 99201

That a copy of the preceding Brief of Respondent was served by Federal Express on counsel for appellant at the address below:

ANDREA J. CLARE  
LEAVY SCHULTZ DAVIS, CLARE & RUFF, P.S.  
2415 WEST FALLS AVENUE  
KENNEWICK, WA 99336-3068

DATED this 12<sup>th</sup> day of August, 2013, at Seattle, Washington.

  
GRACE SUMMERS

## **APPENDIX**

## Appendix

Full and Final Release .....	Ex 101
HRC Task Force Report .....	CP 574-634
Investigation Final Report .....	CP 541-551
<i>Curtiss</i> , et al., Amended Complaint .....	CP 997-1004

FULL AND FINAL RELEASE

THIS IS COMPLETE RELEASE. READ IT BEFORE SIGNING.

I hereby and for my heirs, executors and administrators, successors and assigns, release and forever discharge the State of Washington, Washington State University, and their respective officers, agencies, agents, indemnitees, employees, representatives, departments, servants, heirs, executors and administrators, successors, assigns, and any other person or entity for whom the State of Washington could be held liable under any theory of recovery, from any claims for injuries or damages which have resulted or may result from any occurrence which took place during plaintiff's employment at Washington State University between 1988 and the present date, and any subsequent medical care, including those injuries or damages stated in any claim for damages previously filed by the claimant herein with the Risk Management office at the State of Washington or which have been or could be raised in United States District Court Case No. CS94-0328WFN.

In further consideration of the payment of the monies stated above, Dallas Barnes hereby agrees to accept a position as Assistant Branch Campus Director of Student Services, WSU - Tri Cities, as outlined in Exhibit A hereto. Dallas Barnes will be paid at the same rate he is currently earning as an employee at WSU. Said appointment will begin at a time convenient to all parties herein.

It is understood and agreed that this Release is intended to cover all actions, causes of action, claims and demands for, upon, or by reason of any personal bodily injuries, sickness, disease, and damage to or destruction of property which may be traced either directly or indirectly to the claim and lawsuit referenced above, as now appearing or as may appear at any time in the future, regardless of how remotely they may be related to the claim and lawsuit referenced above.

It is further understood and agreed that this settlement is the compromise of a disputed claim and that payment is not to be construed as an admission of liability on the part of the parties hereby released and that this Release and settlement shall not be used by the undersigned or anyone on his behalf against the parties hereby released or his agents or representatives as a defense in any action which is now pending or which may be brought hereafter, whether such action be asserted in a complaint or by way of cross-action, counterclaim, or set-off. This Release is being given by Dallas Barnes voluntarily and is not based on any representations or statements of any kind by the Payers or their representative as to the merits, legal liability, or value of my claim or any other matter relating thereto. I agree and understand that this settlement is a complete compromise of matters involving disputed issues of law and fact, and I assume the risk that the facts or laws may be different than we believe.

I further acknowledge and agree that all financial obligations related to medical, hospital, nursing, or related services, or any loss, damage and expense of any kind, which may have been or may be incurred in connection with the injuries and damages I allege were sustained because of the claims set out above, including any bills due any person, federal or state entity, corporation or partnership, or liens or subrogated claims under the statutes of the State of Washington, federal statutes, or contract, are my sole and separate obligation and the parties hereby released are discharged or otherwise held harmless of any and all liability thereof.

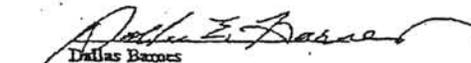
This Release contains the entire agreement between the parties with regard to the matters set forth herein, and shall be binding upon, and enure to, the benefit of the executors, administrators, heirs, successors and assigns of each.

This Release and agreement shall be construed and interpreted according to the laws of the State of Washington.

I DECLARE THAT THE TERMS OF THIS SETTLEMENT HAVE BEEN COMPLETELY READ AND FULLY UNDERSTOOD AND VOLUNTARILY ACCEPTED FOR THE PURPOSE OF MAKING A FULL AND FINAL COMPROMISE AND SETTLEMENT OF ALL CLAIMS, DISPUTED OR OTHERWISE, ON ACCOUNT OF THE DAMAGE OR LOSS ABOVE-MENTIONED FOR THE EXPRESS PURPOSE OF TERMINATING AND PRECLUDING FOREVER ANY ADDITIONAL CLAIMS ARISING OUT OF, OR IN ANY WAY CONNECTED WITH, THE EVENTS REFERENCED IN THIS RELEASE.

I SPECIFICALLY RELEASE ALL CLAIMS FOR KNOWN INJURIES, UNKNOWN CONSEQUENCES OF KNOWN INJURIES, AND UNKNOWN INJURIES RELATED TO THE CLAIM AND LAWSUIT REFERENCED ABOVE. I RECOGNIZE THAT THE FULL EXTENT AND FUTURE COURSE OF PRESENT INJURIES OR OTHER DAMAGES CANNOT BE DETERMINED OR PREDICTED WITH CERTAINTY AND EXPRESSLY WAIVE ANY CLAIM THAT THIS RELEASE IS NOT FAIRLY AND KNOWINGLY MADE.

IN WITNESS WHEREOF, the undersigned hereunto sets his hand this 5 day of Dec. 1976 and agrees that this Release contains the entire agreement between the parties hereto and that the terms hereof are contractual and not a mere recital.

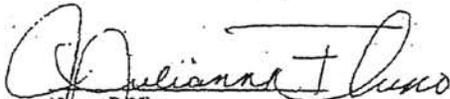
  
Dallas Barnes  
Claimant/Plaintiff

STATE OF WASHINGTON )

COUNTY OF Spokane )<sup>ss</sup>

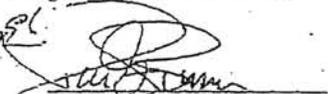
On the 5 day of Dec. 1976, before Julianne Hurv appeared the individuals described in and who executed the foregoing Release and (he) (she) (they) acknowledged to me that (he) (she) (they) voluntarily executed the same.

My term expires 2/19 1997

  
Notary Public

As the legal counsel for the party executing this document, and by reason of being joint payee regarding this settlement agreement, I enter into this agreement as to the content and provisions of paragraph IV and agree to see that any and all expenses, bills, or liens, medical or otherwise, will be paid or satisfied to the end that the parties hereby released are held harmless and indemnified against any and all such claims.

Dated this 5 day of December 1976

  
Paul J. Buras, WSB#13320

**POSITION DESCRIPTION**

**Official Title/Title Code:** Assistant Branch Campus Director of Student Services

**Position Number:**

**Appointment Status:** Administrative and Professional; Permanent; Full-Time

**Organization and Location:** Student Services Office at Washington State University at Tri-Cities

**Basic Function:** Development and implementation of academic development and retention initiatives and programs for students at the WSU Tri-Cities campus. Strong interaction is expected between this position, the Office of Multicultural Services, and the minority recruiting function in the Office of Admissions.

**Reports to:** Branch Campus Director of Student Services

**Supervisory Responsibilities:** To be determined

**Duties and Responsibilities:**

**Academic Development/Retention:**

- Develop and implement tutorial, advising, guidance, and supplemental instruction programs including the use of telecommunications and computer technologies to facilitate learning.
- Assist in the development of short- and long-range planning as it pertains to these areas.
- Actively participate in recruitment, evaluation, and retention of students, particularly students of color.

**Instruction/Mentoring:**

- Teach upper division undergraduate and/or graduate courses in specialty areas, as appropriate.
- Mentor undergraduate and/or graduate students, as appropriate.

Exhibit A

Minimum Qualifications:Required Qualifications

- Master's Degree from an accredited college or university.
- Minimum of five year's experience in administration and management, preferably in higher education, with at least three years of supervisory experience.
- Excellent interpersonal, organizational, and communication skills, both oral and written.
- Demonstrated experience working with older and other nontraditional students.
- Experience with distance learning and computer-aided instruction.
- Demonstrated commitment to cultural diversity, equal access, and opportunity programs.

Preferred Qualifications

- Ph.D. from an accredited college or university.
- Teaching experience and related research skills
- Eligibility for an adjunct academic appointment in the Social Sciences.
- Administrative experience in higher education.
- Ability to function effectively in an evolutionary and growth-oriented environment.
- Experience with budget and program planning.
- Familiarity with local industries and the Columbia Basin service area.



**WASHINGTON STATE HUMAN  
RIGHTS COMMISSION**

---

**TASK FORCE REPORT**

**Race and Ethnic Relations at  
Washington State University**

July 11, 2005

ACKNOWLEDGEMENTS.....	5
INTERVIEWS.....	5
Individual in-person interviews:.....	5
Group interview with WSU Student Leaders.....	5
Group interview with the Office of Student Conduct.....	5
Group interview with the Multicultural faculty and staff.....	6
Group Interview with three members of the WSU Commission on Race and Ethnicity:.....	6
Group Meeting with Senior Administrators:.....	6
Subsequent telephone interviews include:.....	6
MEMBERS OF THE TASK FORCE AND ADVISORS.....	7
Advisory members:.....	7
I. EXECUTIVE SUMMARY.....	7
A. Washington State Human Rights Commission (WSHRC).....	7
B. Introduction to the Project.....	8
C. Objectives of the Report.....	8
D. Methodology.....	9
II. BACKGROUND ON RACE RELATIONS AT WSU.....	10
A. Brief History of Washington State University.....	10
B. Changing Demographics at WSU.....	11
C. Meeting the Challenge of Diversity, Inclusion and Civility.....	11
D. A Responsibility to Serve.....	12
E. Continuing Challenges of Ethnic Diversity and Inclusion.....	12
III. THE CORE INCIDENT.....	13
A. TIMELINE.....	13
IV. ADMINISTERING THE STUDENT CONDUCT CODE.....	23
A. Perceptions of the Student Conduct Process.....	23
B. Structure and Goals of Student Conduct Process.....	25
C. Appropriate Disclosure under Family Educational Rights and Privacy Act (FERPA).....	26
1. Introduction – What is FERPA?.....	26
2. Implementation in the Core Incident.....	26
3. Implementation in Broader Context.....	27
4. Legal versus Educational Issues.....	28
V. THE RESPONSE OF THE ADMINISTRATION.....	28
A. Expectations of the Administration.....	28
B. Reactive Response by the Administration to Issues of Diversity.....	28
VI. PROBLEMATIC STRUCTURAL ISSUES.....	29
A. Nature of University Structure and Resources.....	29
C. Some Structures are Not Held in Respect by Activist Students and Faculty.....	30
D. Views of the AAPI Community.....	30
VII. RECOMMENDATIONS.....	31
A. University Administration 101.....	31
B. Student Conduct Process.....	31
1. Prior to Engaging in the Conduct Process - Options for Dispute Resolution.....	32
2. Inform Student Reporting the Incident of the Minimum Standard of Due Process.....	32

3. Administrative Hearing v. Council Hearing Determination .....	32
4. Investigations of All Harassment and Discrimination Incidents .....	32
5. Discrimination and Harassment Policy and Procedure .....	33
6. Mandatory Harassment and Discrimination Training .....	33
7. Inform WSU Community of Policies and Procedures .....	33
8. Establish and Support Alternative Dispute Resolution (ADR) Programs .....	34
C. Establish a Bias Response Incident Protocol .....	35
D. Establish a Diversity Education Program .....	35
1. Diversity Education Program .....	35
2. Diversity Training for Freshman Orientation .....	36
3. Promote Cultural Competency/Sensitivity Training .....	36
4. Continuous and Integrated Diversity Training .....	36
5. Encourage, Normalize, and Promote Dialogue on Sensitive Issues .....	37
E. Role of the Center for Human Rights .....	37
F. Responsibilities of Law Enforcement .....	37
H. Addressing Campus Climate .....	38
1. Campus Climate Survey .....	39
2. Perform Exit Interviews of Minority Students, Faculty, Staff and Administrators .....	39
3. University-wide Diversity Initiative .....	39
4. Focus on Transparency in Recruitment in Administrative Positions .....	39
5. Assessment and Evaluation of Diversity Goal Attainment .....	40
6. Campus Participation in Diversity Initiatives .....	40
7. Community Input on Diversity Initiatives .....	40
8. Accountability to the Diversity Strategic Plan .....	41
9. Application of FERPA .....	41
I. Communication .....	42
1. Campus Dialog .....	42
2. Inter-departmental Communication .....	42
3. Active Participation and Involvement in the Multicultural Community .....	42
4. Partnership Programs between Student Affairs and Multicultural Student Services .....	43
5. Representative Participation on Diversity Committees .....	43
6. Foster Relationships and Understanding among Students .....	43
7. Update Posters and Materials on Hate Bias .....	44
J. Curricular Issues .....	44
1. Review the General Education Diversity Requirement [D] .....	44
2. Utilization of Existing Academic Resources .....	44
K. Ownership .....	45
L. Remembering and Sustaining Best Practices .....	45
1. Hate, Bias and Discrimination Report .....	45
2. Preserving Institutional Memory .....	45
VIII. TASK FORCE DOES NOT RECOMMEND .....	46
A. Zero Tolerance Policy .....	46
B. Hate Speech Policy .....	46
IX. FOLLOW-UP AND COMMIT RESOURCES .....	46
1. Follow-up by Administration .....	46

2. Financial Commitment.....	46
3. Dissemination.....	47
4. Accountability.....	47
5. Monitoring.....	47
6. Further Research.....	47
7. Impact of budget cuts.....	47
8. Commitment of the Task Force to Remain Involved and Monitor.....	47
X. CONCLUDING STATEMENT.....	47
XI. RESOURCES.....	47
Appendix 1: The Preliminary Report.....	48
Appendix 2: Written Statement by Ms. A.....	50
Appendix 3: Statement by President Rawlins.....	51
Appendix 4: Flowchart of Student Conduct Process.....	52
Appendix 5: Statement by accused students Mr. D and Mr. E.....	53
Appendix 6: List of allegedly unaddressed racial incidents.....	54
Appendix 7: Portions of Conduct Board Manual.....	62
Appendix 8: Sanctions and Incident Summaries from Conduct Office.....	70
Appendix 9: WSU Compilation of Diversity Accomplishments.....	76

## ACKNOWLEDGEMENTS

Human Rights Commission Task Force members Marc Brenman, Reiko Callner and Thi Huynh conducted two full days of interviews on the campus of WSU on May 1 and May 2, 2005. Mr. Brenman stayed on campus for additional interviews on May 3, and additional members of the team, including Michael Chin, Phyllis Lane, and Joan Menzies have conducted supplemental interviews.

The full list of people interviewed includes the following (identified with their standing at the time of core incident under consideration):

## INTERVIEWS

### Individual in-person interviews:

Mike Tate, Vice President for Equity and Diversity  
Felicia Gaskins, Associate Vice President for Equity and Diversity  
Ms. B, Undergraduate Student, student employee at Multicultural Student Services (MSS)  
(invited but not present)  
Ms. C, Graduate Student, supervisor at Multicultural Student Services (MSS) for  
undergraduate student Ms. A  
Ms. A, Asian/Pacific American Undergraduate Student (junior)  
Mr. D, Caucasian Undergraduate student, freshman on the basketball team  
Mr. E, Caucasian Undergraduate student, freshman on the basketball team  
Ron Sanchez, Assistant coach, basketball team (Coordinator of Basketball Operations)  
Tony Bennett, Associate Head Coach  
Mr. F, Caucasian Senior undergraduate student, friend of Ms. A. and active with Students for  
Equity and Diversity

### Group interview with WSU Student Leaders

Council of Multicultural Student Presidents  
Incoming and Outgoing Associated Students of WSU  
Robert Easterly, ASWSU Director Multicultural affairs (current)  
Chris Rutt, ASWSU Director Multicultural affairs (incoming)  
Ike Wells, ASWSU President Elect  
Mike King, ASWSU Vice President Elect  
Brea Thompson, ASWSU President (current)

### Group interview with the Office of Student Conduct

Jerry Marczynski, Student Affairs Associate Vice President  
Elaine Voss, Student Conduct Director  
Chris Wuthrich, Student Conduct Associate Director

**Group interview with the Multicultural faculty and staff**

Manuel Acevedo, Multicultural Student Services Director  
Steve Bischoff, Asian Pacific Islander Counselor in Multicultural Student Services  
Yolanda Flores-Niemann, Chair, Comparative Ethnic Studies Department  
Raul Sanchez, Director, Center for Human Rights  
Dana Patterson, PhD Student in College of Education and Assistant in Office of Equity and Diversity. Graduate Student Member of Student Conduct Board

**Group Interview with three members of the WSU Commission on Race and Ethnicity:**

Carmen Lugo-Lugo, Assistant Prof., Dept of Comparative Ethnic Studies  
J. J. Oliver, Program Coordinator, Admissions  
Mary Meares, Assistant Professor, ER Murrow School of Communication

**Group Meeting with Senior Administrators:**

V. Lane Rawlins, WSU President  
Robert Bates, Provost and Academic Vice President  
Felicia Gaskins, Associate Vice President for Equity and Diversity  
Antoinette "Toni" Ursich, Senior Assistant Attorney General  
Charlene Jaeger, Vice President for Student Affairs  
Sally Savage, Vice President for University Relations  
Mike Tate, Vice President for Equity and Diversity.

**Subsequent telephone interviews include:**

Robert Bates, Provost  
Da Vina Hoyt, President, Graduate and Professional Student Association  
Felicia Gaskins, Associate Vice President for Equity and Diversity  
V. Lane Rawlins, WSU President  
John Streamas, Faculty, Dept. Of Comparative Ethnic Studies  
David Leonard, Faculty, Dept. Of Comparative Ethnic Studies  
Kenneth Struckmeyer, WSU Ombudsperson, Prof. of Landscape Design, incoming President of Faculty Senate  
Charlene Jaeger, Vice President for Student Affairs  
Tom Brigham, Special Assistant to the President.  
Michael Brown, WSU Graduate, Ph.D, current faculty in WSU distance learning program  
Dan Brittenham, Dept. Of Education FERPA resource person  
Alice Coil, Director, Women's Resource Center  
John (Juan) Ramirez, Counseling Services  
Antoinette (Toni) Ursich, Senior Asst. Attorney General, WSU Division Chief  
Sally Savage, Vice President for University Relations  
Elaine Voss, Student Conduct Director  
Noel Sturgeon, Chair, Women's Studies Department

## MEMBERS OF THE TASK FORCE AND ADVISORS

Reiko Callner, Chair, Washington State Human Rights Commission (WSHRC)  
Thi Huynh, Commissioner, Washington State Commission on Asian and Pacific American  
Affairs (CAPAA)  
Marc Brenman, Coordinator, Executive Director, Washington State Human Rights  
Commission

### *Advisory members:*

Phyllis Lane, Dean of Students, The Evergreen State College  
Joan Menzies, Director of Student Services, WSU Spokane  
Michael Chin, intern, Washington State Human Rights Commission

Advisory members did not participate in on-site visits and interviews, but contributed very significantly to the work of the Task Force.

## I. EXECUTIVE SUMMARY

### A. Washington State Human Rights Commission (WSHRC)

The WSHRC is a state agency charged with enforcing the Washington Law Against Discrimination (WLAD, RCW 49.60), which prohibits discrimination on the basis of race, color, national origin, sex, disability, age, and family status in a wide range of life experiences in the State of Washington. Its primary method is to investigate complaints of discrimination, but the WLAD also empowers the WSHRC to provide educational, preventive, outreach, and partnership efforts. It is under this latter responsibility that the WSHRC has undertaken this effort with Washington State University.

This review is not an investigation, and no finding under the WLAD or any other law is being made. The WSHRC is providing expert consultative services of its executive director and chair, the services of Commission on Asian Pacific American Affairs Commissioner Thi Huynh, and advisory task force members, operating objectively and neutrally. No payment has been offered or received to anyone participating in the Task Force. Because no official investigative finding is being made, WSU is not obligated to follow the recommendations made in this report. We expect that the WSU Board of Regents, the President, and the Executive Cabinet will review the recommendations and discuss any questions they have with the Task Force before reconfiguring the recommendations to be couched in language appropriate to the inner workings of the University. We expect WSU to implement those recommendations which are possible and appropriate, do not impose an undue hardship on the University, and would not cause the University to change any of its essential functions. The views expressed in this Report are those of the Task Force members, and not those of all the Commissioners of the WSHRC, or those of the advisory members.

## B. Introduction to the Project

In the spring of 2005, employees, members, and affiliates of the WSHRC became aware of a controversial situation at the Pullman campus of Washington State University (WSU), surrounding a series of incidents of alleged racial harassment. After the incident was handled internally by WSU personnel, many students, faculty, and community members remained dissatisfied with the result, believing that justice had not been served. The broader civil rights community in the State, including private groups, individuals, advocacy groups, and government entities, expressed urgent concern and a desire to help address the situation.

WSHRC Executive Director Marc Brenman contacted Vice President for Equity and Diversity Dr. Mike Tate, offering the agency's assistance in addressing the situation as a neutral, objective government civil rights agency. While the primary mandate of the WSHRC is to address specific allegations of violations of the state law against discrimination (RCW 49.60), the Executive Director proposed that the WSHRC might be able to play a role pursuant to its ability to further mutual goals with public and private agencies and individuals toward eliminating discrimination. It is in this cooperative, outreach capacity, rather than its investigatory, enforcement capacity, that the WSHRC is addressing the situation.

Accordingly, WSU invited WSHRC to lead a task force to take a fresh look at the situation and make recommendations. On behalf of the WSHRC, Mr. Brenman formed a task force, consisting of WSHRC Chair Reiko Callner; Thi Huynh, Commissioner on the State Commission on Asian Pacific American Affairs (CAPAA); advisory member Phyllis Lane, Evergreen State College; advisory member Joan Menzies, WSU Spokane campus; advisory member Michael Chin, Intern, WSHRC; and Mr. Brenman, as coordinator. The task force has proceeded in close contact with the Office of the Governor, including CAPAA, which exists under the Office of the Governor, and with others who have expressed concern for the situation. (This is the first of such projects, at least in recent history, for the WSHRC, and the full Commission will review the protocols and efficacy of such future undertakings. While Executive Director Marc Brenman and Chair Reiko Callner actively participated in this project, the other appointed commissioners did not, and the observations and recommendations of the full complement of appointed commissioners should not be presumed.)

## C. Objectives of the Report

The members of the Task Force are aware of the expectation, on the part of many interested parties and observers, that this Report constitutes a definitive fact-finding conclusion as to who did what and with what motivation. That is not the goal of this review.

The objectives of this Report are to review the responses of institutions and individuals to the core incident, and to make positive, practical recommendations for the future. Throughout this Report, we refer to the "core incident" as the experiences of perceived discrimination by the Asian/Pacific Island female undergraduate (referenced herein as "Ms. A") in the Multicultural Students Services Center (MSS). As discussed in more detail below, there is a trend of miscommunication and polarization among the parties. If it is possible at all to reverse this trend, all the parties concerned need to shift their focus from fixing the blame to fixing the problems.

Common concerns stated by those viewing the situation include the following:

- The perception that the administration and those staffing the conduct process were unresponsive or slow to respond to the aggrieved party's allegations, thus allegedly indicating a lack of concern for the seriousness of the matters addressed;
- The perception that there was a lack of concern for the aggrieved parties, thus allegedly demonstrating the authorities' indifference to their well-being, as opposed to concern for the well-being of the accused;
- The perception that, despite admissions of engaging in the behavior described by the two named students accused, the student conduct process derived the unsupportable conclusion that no harassment had occurred;
- The perception that there is a lack of transparency of the process for the people in the larger community who were concerned with the incident and its aftermath;
- The further perception that the lack of transparency is symptomatic of an administration which is allegedly historically callous to issues of discrimination and bigotry on campus;
- The perception that the University values the athletic program over other aspects of the University;
- The further perception that the lack of transparency is symptomatic of an administration historically callous to issues of discrimination and bigotry on campus;
- The perception that the University's various statements and the existence of a variety of programs to address issues of social justice and diversity are allegedly cosmetic and ineffective, and fail to engage the people most affected by them.

#### D. Methodology

Several members of the Task Force visited the WSU Pullman campus on May 1 and 2, 2005, to conduct interviews and site visits with a variety of students and staff. Marc Brenman remained on campus on May 3 to conduct additional interviews and site visits. Task Force members also visited with and interviewed a wide variety of members of the Asian-America/Pacific Islander (AAPI) community in Washington State, and AAPI organizations. Additional interviews were conducted by telephone, especially with WSU administrators, faculty, and staff. A large volume of documents were requested from and provided by WSU. Other parties also provided documents.

The recommendations are primarily in regard to the Pullman campus, though some themes probably carry through the entire University. WSU was completely cooperative in the course of the review, and the Task Force wishes to thank WSU for its hospitality and cooperative spirit. All other parties were similarly cooperative, and the Task Force is gratified by the good faith efforts of all parties to take a thoughtful and sincere look at the core incident and the climate of welcomeness for people of color at WSU. It is entirely possible that there may be errors in the Task Force's report, due to the complexity of the University and the circumstances, the size of the University, and the short time in which the review occurred. The Task Force hopes that the Report will be construed in the spirit in which it was written, with a charitable eye toward enhancing the relationship between the parties.

The Task Force has offered to maintain a continuing relationship with WSU, to explain the recommendations, to help provide additional expert advice, to meet with the parties as necessary, and to help monitor progress in fulfilling the recommendations.

The Task Force issued a Preliminary Report on May 4, 2005. That Report is included by reference in this Report as Appendix I. The Preliminary Report is a public document, and has been widely distributed. The University desired quick action by the Task Force, as have all those involved. There has been media coverage of the Task Force's work, unsought by the Task Force. All documents and testimony provided to the Task Force were done so voluntarily. No documents or testimony were compelled. Other sources of information were examined, such as publicly available information on the University, its website, law review articles on student conduct codes, and a legal compendium of the Family Educational Rights and Privacy Act (FERPA). Because the Task Force is not making a legal finding, no standard of proof need be discussed. The Task Force used a common sense standard in examining documents and listening to testimony, and has tried to clearly differentiate perceptions from fact from process. The Task Force has brought to bear its collective experience in best practices in matters concerning university students, student conduct, discrimination, and perceptions and experience of prejudice in the United States. These matters are always controversial and sensitive, and often hinge on the perceptions of those involved. They often do not admit of easy answers, and first impressions are sometimes wrong.

## II. BACKGROUND ON RACE RELATIONS AT WSU

### A. Brief History of Washington State University

Washington State University was founded in 1890 as a land-grant college and from its humble roots has become one of the top public research universities in the United States. "Under the terms of the Morrill Act, adopted by Congress in 1862, the federal government encouraged states to create colleges 'to teach such branches of learning as are related to agriculture and the mechanic arts ... in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.'" An Enabling Act passed in the state Legislature, creating the Agricultural College, and made the state eligible for a grant of 190,000 acres of federal land on which WSU sits today.<sup>1</sup>

The City of Pullman won the bid to house the University by boasting good train service to Spokane and to Portland, Oregon and argued that because of the rail system, it had commercial and cultural connections to the larger world.<sup>2</sup> Pullman is the home to WSU's main campus and is located in the southeastern corner of Washington State. Perhaps these original boosters were correct, for Pullman has succeeded in attracting students from around the country and world.

<sup>1</sup> Cassandra Tate, *Washington State University -- Snapshot History*, (2004). Historylink.com. [http://www.historylink.org/essays/output.cfm?file\\_id=5701](http://www.historylink.org/essays/output.cfm?file_id=5701). Accessed 7/6/05

<sup>2</sup> *Id.*

## B. Changing Demographics at WSU

In the past 50 years, WSU has quadrupled in size. What is even more striking is the change in demographics that has accompanied this growth as WSU has transitioned from a local agricultural college to world-class university. In the 1950's, the typical student was white, middle class, 18 to 22 years old, and from a small town in Washington. Today, nearly 14 percent of WSU's students on the Pullman campus are racial minorities, with more than one third who are 23 years old or older. In addition, nearly 15 percent come from outside the state, including 3 percent from foreign nations.<sup>3</sup> The new demographic reflects the changing face of the nation and the State.<sup>4</sup>

## C. Meeting the Challenge of Diversity, Inclusion and Civility

Having begun its endeavor to recruit more minorities beginning in 1968, WSU has made significant inroads in diversifying its student body, faculty, and administration. In addition to the diversified student body, faculty for all of WSU are approximately 15 percent people of color for all those who reported any type of race or ethnicity. Administrative/Professional/Classified staff reported themselves as 9% people of color.<sup>5</sup>

With the increased exposure to a multicultural world, the University has had to confront issues of race and diversity in a predominantly white community. According to HistoryLink.com, an online encyclopedia of state and local history in Washington State, the perception of inhospitality to racial minorities may have begun when WSU initiated its recruitment of minorities.

One factor in the increasing politicization of the campus was the hostile reception given a group of 54 African American students from Seattle's Garfield High School, who arrived for a campus visit on the evening of May 9, 1968. The visit was part of a nascent effort to recruit minorities to WSU. Due to an oversight, dormitory officials were not on hand to welcome the students and assign them to rooms. The students were forced to wait for hours while efforts were made to find other accommodations. The tense situation worsened when a few WSU students began taunting the visitors with racial insults. At 2:30 a.m. the next morning, the Garfield students boarded a bus to return to Seattle. President Terrell promptly issued a public apology, but the school's image suffered a blow.<sup>6</sup>

It is apparent that WSU has the desire to be inclusive and to diversify its campus. It is also must be noted that while numeric gains in diversity are striking on paper, Pullman is still a predominantly Caucasian town in a rural area that is geographically close to overtly racist groups. It is understandable that students of color from other parts of Washington may feel isolated in an unfamiliar environment. There are Asian/Pacific Islanders (API's) who come to

<sup>3</sup> Id.

<sup>4</sup> There is a significant influx of Asian immigrants in Washington. In the 1970s the population of Asian Americans in the Seattle area soared, as immigrants and refugees from Southeast Asia arrived. The trend has continued, especially in King County, where between 1990 and 1996 the population of people of Asian and Pacific Island descent increased 48%. The Asian-American population in Spokane County, where WSU has a campus, jumped 28% during the 1990s, well outpacing the 16% overall population growth there. . . [The Journal of Business, Spokane, September 2, 2004]

<sup>5</sup> News release, 2004, WSU

<sup>6</sup> See Historylink.com

WSU from communities that are much more diverse; their expectations are different from, for example, an API who has grown up in a rural area surrounded by Caucasians all his/her life. Given the geographical and demographic limitations of the Pullman campus, the problems and challenges in addressing issues of race are issues the University must face directly as the student population becomes even more diversified.

#### D. A Responsibility to Serve

WSU has a goal of diversity and equity and strives to be a powerhouse regional university. In fact, U.S. News and World Report ranked it as one of the top 50 public research universities in the nation in 2004. While having developed into a full-fledged university with 73 locations throughout the state, WSU still acknowledges its agricultural roots and maintains a strong commitment in that area. For example, WSU is the only institution in the state, and one of the few in the United States that offers a program in veterinary medicine.

It is precisely because WSU is an institution with national and global reach that it must redouble its commitment of inclusiveness and diversity. Proclaiming itself as a world-class institution, the expectations of Asian/Pacific Islander students are high with regard to how the University deals with issues of race. In the last few decades, APIs have been attending and graduating from college in dramatic numbers, well above their overall proportion in the total U.S. population.<sup>7</sup>

WSU recognizes its obligations to the students in providing not only access to higher education, but a safe, welcoming environment which promotes diversity and participation by all. It would appear that not all API students feel WSU is inhospitable towards minorities; in 2000, the now defunct "A. Magazine" conducted a survey of its readers and research into which colleges and universities are the "best" for Asian Americans. WSU ranked 23 on this list of top universities.<sup>8</sup>

In the 1960's students demanded that curriculum be made more "relevant" and include courses on subjects such as race relations and women's history.<sup>9</sup> Today, WSU offers majors in Comparative Ethnic Studies and Women's Studies. The University's commitment to diversity is manifest, at least, in the significant and steady increase of racial and ethnic diversity on the campus over the past fifteen years. Change is being made, and change inevitably generates discomfort, particularly in an environment with a robust and dynamic multiplicity of views such as an institution of higher learning.

#### E. Continuing Challenges of Ethnic Diversity and Inclusion

To a large extent, the energies demanded by the crisis atmosphere surrounding the present controversy have distracted and diverted resources from core tasks for the Office of Equity and Diversity such as maximizing recruitment and retention projects.

<sup>7</sup> The latest statistics from the Census show that almost 45% of all Asian-Americans at least 25 years of age have a college degree or higher. Although many of these degrees were obtained in their Asian country of origin before immigrant Asians came to the U.S., a large number represent degrees by foreign Asian students and U.S.-born Asian-Americans. <http://www.asian-nation.org/best-colleges.shtml>. Visited 6/6/2005

<sup>8</sup> Id.

<sup>9</sup> See Historylink.com

There have been significant controversies at the campus over hiring and retention of faculty and administrators of color, and prior incidents where allegations of racial bias in discipline and of inadequate official response to bias incidents.

The Task Force found that while there are issues of race and ethnic relations on the Pullman campus that need work, in the greater context of social justice and race and ethnic relations in the nation and the region, disproportionate emphasis may have been placed on these issues because of the natural tendency on a college campus to be self-focused (which can limit one's sense of perspective). It could be an interesting and useful social experiment if activist students—both multicultural and mainstream students, and faculty and staff—could use their considerable awareness and energy to address issues broader and more significant social justice import in the "real world." Part of a new relationship between students of color on campus and administrators could be the willing acceptance by students of the good faith implementation of the recommendations contained in this Report, in return for which the students would address their skills, energy, consciousness, and freedom toward some of the many pressing social needs beyond the campus.

Students of color, faculty and administrators have come to an important fork in the road, where legitimacy of needs should not be confused with recriminations. The Task Force is not in any way recommending that the past be put behind and forgotten; rather, we are encouraging the parties to ask themselves what would it take for the campus community to come together and work to develop sustainable solutions that address campus climate, particularly in the areas as related to students of color and issues of race.

### III. THE CORE INCIDENT

(Note - this information has been derived from interviews with the persons listed above and examination of documents. The members of the Task Force have no direct information and as such, are not "witnesses" to the events discussed herein. This chronology focuses on the time sequence of the conduct staff, and not on community meetings, and input with other state offices and officials.)

#### A. TIMELINE

##### Fall 2004

At an undetermined date during the first semester of 2004, a group of white male students pass by the workplace of Ms. A, where she works as a student assistant in the evening shift for the Multicultural Student Center (MSS). In later reports Ms. A states they "made some animal noises, danced around a little bit, and made some 'minstrel' type movements at me. I felt like an animal in the zoo and that the guys were mimicking me as if I was a monkey doing something odd or funny." This is not reported to anyone at the time. Ms. A's friend, Mr. F., introduced to her the description "minstrel," having learned about minstrel shows from the late 1700s in classes.

January 25, 2005

Ms. C, a graduate student who supervised Ms. A and other undergraduates at the MSS, returns from a trip and asks Ms. A how things were going at the MSS. For the first time, Ms. A discloses that a group of white male students have been irritating her as they passed by. Ms. C is concerned, and learns from Ms. A that there were at least five incidents where she was annoyed by the group, including at least one occasion where Ms. A described that "one guy...points to his eyes and makes a motion to indicate that I have 'chinky eyes.'" Ms. C tells Ms. A that she would report it to the MSS staff the next day. Undergraduate assistant Ms. B is also present during some of these incidents and reports witnessing similar things.

January 26, 2005

Ms. C reports Ms. A's concerns to the MSS staff, including MSS Director Manuel Acevedo. At this time they do not know the identity of the students in question, and meet with John Cory, the facilities director of the building housing the MSS (known as the CUB). He immediately proposes sending some CUB employees by in the evening to make sure Ms. A is ok while working there. During that week they did not know the identities of the people suspected of harassment. Ms. C observes some people she thought might include one of the suspects, but not the others, outside the MSS. Ms. C goes into the hallway and pretends to be looking at the vending machine. While she is looking at the machine, she hears someone, never identified, say "those Asians, taking away the jobs." She does not hear the rest of the conversation.

Upon inquiry by the Task Force, Ms. C stated she was not aware of mediation or alternate dispute resolution options at the campus.

Around this time, MSS Director Manuel Acevedo advises Vice President for Equity and Diversity Mike Tate of the allegations, and they brainstorm ways to identify the suspects and to increase the safety and security of Ms. A and the other students at the MSS. Mr. Tate's suggestions include placement of police interns at the MSS and installation of surveillance cameras there. (The latter measure was discontinued when people at MSS expressed discomfort with being under surveillance, themselves.)

February 3, 2005

Manuel Acevedo leaves a voice mail for Elaine Voss, Director of Student Conduct, that there is a problem at the MSS and he will come speak with her shortly about it.

February 4, 2005

Manuel Acevedo and Ms. C bring Ms. A's written account (*See Appendix 2*) of her allegations to Student Conduct Director Elaine Voss to discuss a course of action. The identities of the suspected harassers are not known, so Elaine Voss calls campus police, does not reach them, and provides telephone numbers for the campus police to Manuel Acevedo so that he can engage their assistance in locating and identifying the suspects. He does so and police respond that day to interview Ms. A and Ms. C. Police interns are stationed in the MSS to both guard against further incidents and to assist in identifying suspects.

February 7, 2005

Undergraduate assistant Ms. B reports to a police intern present at MSS that a group of young men walking by are those who have been giving them problems. The intern contacts another police officer who joins him as he observes the group get into a car. The license plate is registered to a freshman, Mr. D, and they are able to ascertain the residence hall in which he lives. Police contact Mr. D within a half hour and ask him about the incidents at the MSS.<sup>10</sup> According to the police report, Mr. D states he and some of the freshmen members of the WSU basketball team eat dinner at the CUB (a student center building where the MSS is also located) and usually walk past the MSS, which is on their normal route. He identifies another player, Mr. E, as one who passes by with the group. Mr. E is also questioned. Both students state that any gestures or clowning by anyone in their group was in friendly jest, and express surprise that anyone had been upset. They state no one had said they were upset and one girl had laughed. According to the report, "They both expressed that they were sorry about the incidents, and they also were told not to make any further contact with anybody from the Multicultural Center."

February 8, 2005

Elaine Voss inquires with the WSU police about the status of their investigation. She requests a copy of the police report in order to determine whether any violations of the conduct code had occurred. The police report concludes: "Spoke with Sgt....about this incident and that all investigation was complete. [Sgt]...was sure that the students would not continue their behavior as they were very apologetic and did not mean to alarm anyone by their actions."<sup>11</sup> The people at the MSS, however, are not specifically informed that the suspects denied the racial behavior, nor that they had apologized, nor that they had agreed to stay away from the MSS. [Note - the Task Force identifies this failure to reassure the people at MSS as a serious problem in the approach of the Conduct Office in this situation.]

Manuel Acevedo informs Elaine Voss of the Conduct Office and other concerned people on campus by email that the students have been identified as basketball players. Charlene Jaeger, Vice President for Student Affairs (to whom Student Conduct division reports); Sally Savage, Vice President for University Relations; and Mike Tate, Vice President for Equity and Diversity had been apprised earlier and had helped to brainstorm ways to identify suspects, including placement of cameras at the MSS; President V. Lane Rawlins had been notified of the issue

<sup>10</sup> Mr. D self-identifies as a very actively religious person, and was engaged in a bible study group at the time the police came to question him.

<sup>11</sup> There is some confusion about the role of the police with regard to bias/hate issues that do not constitute crimes as defined by Washington State law. Some people interviewed expressed the belief that the police should continue an investigation even after their initial investigation establishes that the incident does not constitute a crime. Termination of police involvement at that point does not constitute an endorsement by them of alleged discriminatory activity. The authority of the police and their obligation and right to insert themselves into the lives of the people in and around the campus does not extend beyond enforcement of the law. Enforcement of student conduct code violations that are not crimes is the province of the conduct board. (There was also criticism that not all potential witnesses to the incidents at the MSS were contacted by the police. It is not unusual that some potential witnesses are not initially contacted by patrol officers, in any police investigation. It is often the case that additional witnesses are identified at a later time either by the detectives in a department, if the criminal allegations in the case warrant such use of resources, or by the prosecuting authority completing an investigation in order to prove a case.)

while traveling on the east coast and inquires about the status, hearing then that the police and student conduct are involved.

Student Affairs Associate Vice President Jerry Marczynski, who supervises Student Conduct, informs WSU Athletic Director Jim Sterk and Basketball Assistant Coach Ron Sanchez of the incident, that the police have conducted an investigation, and the nature of the allegations. That day all the freshmen members of the basketball team are interviewed intensively and individually by the basketball staff. Both the basketball staff and the students report to the Task Force members later that in these interviews the coaches focused on impressing upon the students the seriousness of the allegations and insisting that they tell the truth.

Ms. A writes an email at 7:41 pm to President Rawlins, Vice President Charlene Jaeger and two other administrators, stating she wished to meet "DIRECTLY" with Pres. Rawlins and VP Jaeger, and that they should "PLEASE respond back if you care about your students. This email and others will flood your mail box as well as phonecalls [sic] if you do not reply."

At 8:00 pm Ms. A writes a mass email to multiple students and several Asian American/Pacific Islander (AAPI) list-serves thanking them for support expressed in a recent meeting, and summarizing plans for action, including a video project, contacts with major media, and "Petition to hold these guys accountable (kicked out of school)."

#### February 9, 2005

Upon receipt in the morning of the email Ms. A sent the night before (2/8/05) at 7:41pm, VP Charlene Jaeger walks directly to the MSS and, seeing Ms. A there, offers to meet with her immediately. VP Jaeger states Ms. A said she was too busy. VP Jaeger notes that Ms. A's email seemed to indicate urgency and asks if they could meet later that week. They agree to do so and then exchanged two more emails over the next two hours, finally arranging a meeting time for Friday the 11th. VP Jaeger notes for Ms. A's information that Pres. Rawlins is out of town, and that VP Jaeger is advising his assistant that she and Ms. A would be meeting that Friday.

Conduct Office Director Elaine Voss and Supervisor Jerry Marczynski, hearing that there are calls for the immediate expulsion of the accused students, go to the MSS to explain to the students and staff to present to them how the Student Conduct Process works. Ms. A is present at the beginning of the meeting. Voss and Marczynski describe the information gathering process, options for sanctions, and its basically educational goals as mandated by the Washington Administrative Code. Demands for the expulsion of the suspected students are made and Ms. A leaves the meeting part-way through, appearing upset to Ms. Voss. Some of the students and staff present describe a pattern of racial incidents they have heard of on the campus dating back for about fifteen years.<sup>12</sup>

At 9:49am, Ms. A transmits an email to multiple recipients, including Asian/Pacific Island (API) list-serves, titled "AGAIN AND AGAIN! READ!" The email is a statement critical of the lack of response of the administration and dissatisfaction with the conduct code goal of reaching "educational", "appropriate" sanctions within a two-week time frame. The email calls for recipients to "bombard" Pres. Rawlins and VP Charlene Jaeger with calls and emails.

<sup>12</sup> The list of racial incidents allegedly unaddressed by WSU appears to be the same that circulated widely on campus, was presented to the Task Force, and has been referenced in mass emails to the broader AAPI community across the state. A version of the list is attached to this report.

In the afternoon, the two named suspects are called in to the Student Conduct Office, with the cooperation of the Athletic Department. The meeting requires the Department's assistance, as the team is departing for a game out of state. The bus is delayed and students required to get off in order to allow the meeting to occur. The students are advised by Chris Wuthrich (Associate Director of Student Conduct) that they will be undergoing the conduct investigation process, that the matter is extremely serious, will be broadly observed, and that they will be required to comply with the interview process.

#### February 11, 2005

With the assistance of MSS Director Manuel Acevedo, Conduct Director Elaine Voss has a scheduled meeting with Ms. A. The purpose of the meeting, from Voss' perspective, and typical of the conduct process protocol, is to fill in details of the allegations that Ms. A made in her written statement submitted earlier through Manuel Acevedo, gain further details, and make sure the allegations were clearly understood. (See Ms. A's written statement, attached.) A great deal of the narrative subjectively describes Ms. A's impressions, and Ms. Voss seeks to fill in specific details to the extent possible. For example, Ms. Voss hoped Ms. A would be able to describe which person or persons made the "chinky eyes" gesture. A graduate student is present to take notes for the Conduct Office. Ms. A arrives with Comparative Ethnic Studies Associate Professor Dr. David Leonard and another student. On Ms. A's behalf, Dr. Leonard demands the names of the accused students. Elaine Voss declines to provide their names at that time. She explained to Task Force members later she declined to identify the accused students because there were third parties present, the investigation was not yet conducted and she was operating from the understanding that the information her office gathered was confidential under the provisions of the Family Educational Records Privacy Act (FERPA). Ms. A and the people accompanying her take the position the accused students need to be expelled. Elaine Voss states she told them the University has a process, they need to follow it, and she can't predict the outcome. She is not able to accomplish her goal of collecting information at that meeting, as most of the discussion is conducted by the people accompanying Ms. A and is about campus climate issues and historical issues of racism on campus. After reiterating demands to know the names of the students accused, Ms. A ends the meeting stating she has to go to class.

At this meeting, Ms. A provides copies of two letters to Ms. Voss. One is dated February 8, 2005, and is addressed to Charlene Jaeger, Michael Tate, and President Rawlins. That letter, in its words, "is mainly being written to help you, as the upper administration, to stop ignoring the blatant discrimination that occurs on a daily basis here on the campus of WSU...While most of you may go home earlier in the daytime, most of the 'colored' students on this campus stay possibly until after two am just to make sure that we can get home 'safely' with the fear of getting targeted because of our skin color, sexuality, or any other marker that deems us as different....As a woman and student of color on the Washington State University campus, I urge you, as a 'victim' of racist and sexist crime that you do expel the 'boys' that have taken my right to feeling 'safe' on this campus."

The other letter, addressed "To you boys," includes the following: "It is only fair that you listen and read this letter with an open mind which has been something you have not allotted for me. I have been on this university campus for three years now and people like you, racist and sexist, are the reasons this university cannot go forward its "diversity" goal.....As a woman of

color on this campus, I have gone through many racist and sexist events that would make many people want to give up on life. As a strong woman of color I am prepared to make sure that you understand fully the extent of the pain that you have caused me and the multicultural community. You're [sic] every action that you decided to act upon every night that you saw me made me hate you from the darkest part of my heart. Your blatant ignorance of my feelings and my rights made me feel like a slave that had been beaten to the ground. Your harassment that you found so particularly funny only caused someone else's day to be broken down.....The only reason I have to love you is because God gives me that...If I had no compassion in my life I would hate you with all of my heart, mind, body, and soul because you, are the image of a person who would lynch me."

Ms. Voss did not deliver the letter to the suspected students, explaining to the Task Force that it was simply accusatory, it did not describe who did what, and described only Ms. A's feelings. The matter had not yet been adjudicated and the letter was conclusory in that regard. Ms. Voss stated she had concerns about further escalating an already tense situation.

#### February 14, 2005

Elaine Voss learns from the coaching staff that two additional players came forward, identifying themselves as members of the group that walked by the MSS with Mr. D and Mr. E. All four students went through the Student Conduct process, though only the participation and identities of Mr. D and Mr. E are widely known. Ms. Voss told members of the Task Force that, although the Student Conduct staff was prepared to issue the letters that would formally initiate the process at that time, there were many administrators, lawyers advising the University on how to proceed at this point because of the high profile of the situation and the attention drawn to it both on campus and external media, etc., and they were directed not to begin the process at that time. There is, instead, an informal meeting with the coaching staff and conduct staff, at which time the students are told that the matter is serious, that all four students need to tell what they know, and that any player involved should not be walking on that floor of the CUB at all. The students all agreed, but this, too, was not communicated later to Ms. A or to the others at the MSS. *[It is the observation of the Task Force members that fears of the students and staff at the MSS might have been lessened had they been advised that the accused students were not going to pass by their office at this point. The Task Force understands that the Conduct Officers believed they were legally restricted from giving this information by FERPA.]*

Ms. Voss states the students were very apologetic from the outset, and stated they were shocked that anything they'd done had "caused this much grief" to anyone. They stated to her they didn't know, as nobody told them they were out of line, and they had thought they were getting a positive response from their clowning behavior. Ms. Voss further states that none of the athletes said they had observed or had engaged in making "chinky eyes" as a gesture. Several of them stated if it had, they would have stopped it, and would have reported it, as it would be very offensive. There is no written account nor any person interviewed in this Review process indicating that any of the athletes said this particular behavior had taken place. The team is very ethnically diverse, and one of the student athletes in the group passing by the MSS is himself an Asian/Pacific Islander. They explained the behavior they admitted to as being "goofy," friendly and outgoing. The dance that one of the group engaged in, according to the basketball players, was his rendition of a dance performed by one of the leads in the movie

"Dumb and Dumber."<sup>13</sup> Mr. D indicated that he believed he was probably mistaken by Ms. A for another very tall team member in the group. He agreed he had been present when the clowning behavior took place, but stated he had not engaged in it, himself.

#### February 15, 2005

Elaine Voss contacts Manuel Acevedo questioning whether he is aware of any additional witnesses to the incidents in question. Mr. Acevedo identifies three potential witnesses: Ms. B, mentioned above, Mr. F, also mentioned above, and a third student. Ms. Voss attempts to contact them all that day, and is able to interview Mr. F and the third student. Ms. Voss also emails Ms. A, requesting further opportunity to meet.

#### February 16, 2005

Elaine Voss has not heard from either Ms. A or Ms. B, and asks Manuel Acevedo for assistance in contacting them, explaining it is vital that she be able to interview them in aid of the investigation. She told a Task Force member she recalls noting to him that it was wrong that they make such serious allegations and then walk away from the process. He indicates he will try, that he understands neither of the students trusted the administration, including him.

Ms. A responds to Ms. Voss' email, asks what part of the statement she needed clarified and states she was "OVERLOADED" with other obligations, perhaps they could speak on the phone while she was working at the MSS. Ms. Voss ascertains from Manuel Acevedo that it would be acceptable to him if Ms. Voss interviewed Ms. A at work at the MSS, and then sends a confirming email to Ms. A to that effect, asking to come down to see her that Thursday (the 17th) at 7 pm, to which Ms. A agreed.

#### February 17, 2005

Elaine Voss arrives for the appointment with Ms. A at the MSS at 7 pm, accompanied by Conduct Officer Chris Wuthrich. In aid of the investigation, the Conduct Officers prepared a photo montage so that Ms. A could identify which person made the "chinky-eyed" gesture at her. Police interns are still present in the MSS. Though Ms. A initially greets Ms. Voss with a smile, she then turns to Manuel Acevedo and engages in about a five-minute private conversation. Mr. Acevedo excuses himself and Ms. A and they retire to another part of the office while the conduct staff wait. The police interns advise the conduct staff that earlier in the evening, someone had knocked on the hallway window at the MSS and that had upset Ms. A. He is not the same individual as those under investigation. Ms. A believes it was a student from her communications class, and concludes it was some ally of Mr. D's and Mr. E's, attempting to intimidate her. The conduct staff identified all the students in Ms. A's communication section, and none of them are on the basketball team. There has not been any corroborative evidence that this incident was related to the prior incidents, nor that Mr. E, Mr. D, or the other accused students were aware it had taken place. Manuel returns after speaking with Ms. A for about 20

---

<sup>13</sup> One of the conduct staffers and one of the Task Force Review team members viewed the film to see if such a dance sequence takes place in the film. There is a brief sequence wherein a lead character engages in the sort of jig that the various witnesses described.

minutes and advises the conduct staff she is too upset to engage in the meeting with them. Ms. C is also present.

Elaine Voss is able to reach Ms. B after several attempts on her cell phone, and they schedule a meeting on February 22nd.

#### February 18, 2005

Ms. C contacts Elaine Voss, provides an additional statement about the glass-tapping incident and clarifies a date on her earlier written statement.

#### February 22, 2005

Elaine Voss goes to meet Ms. B for their scheduled meeting but Ms. B does not attend.

#### February 23, 2005

Elaine Voss emails Manuel Acevedo requesting help meeting with Ms. A and Ms. B. She emails Ms. A and leaves her a voice mail to the same effect. Ms. Voss has indicated to Task Force members this is very unusual in her experience with complainants, who are usually anxious that the investigators have full information about their complaints.

About 200 students stage a march on the administration building about campus climate and racial issues. They enter the Office of the President and demand an immediate meeting. Staff advise he is not present at the moment and a meeting can be scheduled later that day. Mike Tate meets with and talks with some of the demonstrators. Vice President Sally Savage offers to meet and to talk with some of the demonstrators but is rebuffed.

The conduct staff discuss the matter and conclude tensions related to the need to resolution have arisen to the point they can no longer delay the process in hopes that Ms. A and Ms. B will provide further information. Preliminary conference letters are hand-delivered to the suspected athletes, advising them of the process and scheduling a preliminary conference for February 28, 2005.

#### February 24, 2005

Elaine Voss sends an email to Ms. B again requesting the opportunity to interview her.

Estimated hundreds of 8" x 11" flyers with the photos of Mr. E and Mr. D were posted throughout the center of campus. Both flyers are topped with the word "Warning!" in bold letters. The text under one photo read: "These are one of the individuals who have been identified as one of the guys that are involved in the Multicultural Student Center racial harassment events." The text under the other photo read: "Makes monkey noises and gestures at students of color so watch out!" Once noticed in the morning, the flyers were removed by campus security, some athletes, and Athletic Department staff.

Although Ms. Voss advised a Task Force member she would consider the latter incident a violation of the conduct code, it was not pursued, after consultation with members of the Athletic Department, because (1) there were no suspects and (2) the situation already appeared to be dangerously volatile.

A group of protesters appears at the WSU basketball game, which was televised, bearing posters, some of which accuse Mr. E and Mr. D of being "bigots." Head Coach Dick Bennett, reacting to the posting of the flyers and the presence of accusatory posters and demonstrators at the game, speaks to the press, stating the players "had absolutely no desire or intent to do anything untoward racially. That is just not them." The coach is also quoted in the media as saying "Mr. D and Mr. E weren't even the ones who did it. They even got the wrong kids. There were a bunch of them. Mr. D and Mr. E did nothing. They never said anything," and "They were flabbergasted when this came out. They didn't know and we were all confused about what happened. The irony is they are some of our best kids. They're top students and strong Christians."<sup>14</sup> Though the coach is also quoted as saying he would have taken "appropriate actions" had the students been guilty as accused, the earlier statements were more the focus of response in the community.

#### February 25, 2005

Ron Sanchez and John David Wicker of the Athletic Department call Elaine Voss to discuss what had occurred at the game. After conversation they decide not to pursue the matter as a complaint, even though participants in the protest, at least, could be identified. They decided against doing anything that would further escalate the situation.

#### February 28, 2005

President Rawlins releases a statement (attached) to the community highlighting his desire to work with students on the issues and reminding people of the right to due process. This adds to about 30 written and spoken apologies and expressions of regret delivered by the President in regard to this incident.

Preliminary conferences were held by the Student Conduct Staff (see outline of process, attached). Ms. A was not specifically informed of this step in the process. In answer to questions from the Task Force, Ms. Voss explained that her prior attempts to contact Ms. A and Ms. B for follow up had led her to believe it would be useless to attempt to contact them further. Ms. Voss further notes that in their normal process, matters are concluded more quickly. She explained it took as long as it did because of the time spent attempting to obtain Ms. A and Ms. B's participation in follow-up. Chris Wuthrich conducted the conferences with Mr. E and Mr. D, Elaine Voss with the other two students. Though the process anticipates a seven day written notice of hearing, either administrative or by a Conduct Board, the students all waived their right to such notice and the staff elected to conduct administrative hearings then and there. Again, in response to inquiry by the Task Force members, Ms. Voss, Mr. Wuthrich and Mr. Marczynski agreed there was considerable pressure at that point from all quarters to move the process along as fast as possible. Ms. Voss further explained, in response to the question of why this did not go to a full Conduct Board, that they did not believe, based on their experiences to date, that they could procure Ms. A's presence. To have a Conduct Board proceeding, Ms. A would have had to

---

<sup>14</sup> The latter quotation has been highly inflammatory. It appeared to be contradicted by (inaccurate) media accounts that the named students had admitted to racially-harassing behavior, and to inject an irrelevant observation about the students' religious affiliations. The coach likely intended to convey that he knew his students to be fair, kind, and non-aggressive, but that statement did not achieve its intended effect.

appear at the Board - the accused people have the right to question their accusers. Further, in the estimation of the conduct staff, even if true the accusation didn't arise to the level of seriousness over which conduct boards are commonly convened. The practice is generally reserved for situations involving multiple or very serious offenses when the staff is considering a serious sanction. In this instance, they had an uncorroborated complaint to present and believed they didn't have enough to present to a board. Their goal is to deal with things at the least formal process possible. They're "looking for an educational moment." This is consistent with student conduct code processes and practices at other institutions.

[The Task Force's position is that, despite apparent non-cooperation from the aggrieved students, they should have been advised that the matter was reaching the point of adjudication, and offered the opportunity to participate. Further, it is the Task Force's position that the high profile of the incident and the impact of alleged racial harassment was such that it would have been appropriate to conduct a full Conduct Board, with participation by students, faculty, and people with particularized training in bias issues.]

#### March 1, 2005

Results of the administrative determination are relayed to the four accused students. The conclusion is that there is not evidence that the accused students engaged in harassing behavior as alleged. The conclusion was also that adolescent behavior (that did *not* include racial gestures or epithets) was misconstrued as racially-oriented. A press release was prepared by multiple parties involved in WSU administration. [It is the observation of the Task Force that the press release, carefully composed as it was, was not clear in relaying what had occurred and why, for example, the matter had not gone to a full Conduct Board hearing. Further, while it is apparent, in hindsight, that Ms. A was not notified at the same time as Mr. D and Mr. E of the outcome because the administrators were attempting to coordinate support for her at the time of notification, the timing of notification of the various students makes it appear as though Mr. D and E were being favored.]

#### March 2, 2005

Immediately prior to issuance of the press release, Elaine Voss is tasked with bringing the written announcement to Ms. A. Vice President for Equity and Diversity Mike Tate and others in the administration relay to Ms. Voss the results will be upsetting to Ms. A, and that she should have support when she hears. They enlist the aid of Alice Coil in the Women's Resource Center to be present with Ms. A to meet with Ms. Voss. Ms. Coil is not apprised before the fact that the information being relayed was the outcome of the adjudication. Ms. B is upset at the result,<sup>15</sup> and Ms. Coil inquires whether there was an appeal option for a complainant if an allegation was dismissed, and was told that there is not. [Note - it is typical of this type of adjudicative process and most others that a dismissal of allegations of wrongdoing are not appealable by the aggrieved party.]

<sup>15</sup> Members of the Comparative Ethnic Studies Dept., Women's Resource Center, Multicultural Student Services Center, and Office of Equity and Diversity all stated that throughout the time described in this timeline, counseling and other support options were offered to Ms. A, who articulated she was receiving sufficient support from friends and faculty. Some offers of help were declined by Ms. A because of her lack of trust in anything associated with the WSU administration.

Mr. D and Mr. E issue a public statement (*See Appendix 5*) regarding the issues and their resolution, wherein they state, "At no time did we make gestures, comments or noises directed at anyone that were racially motivated. We have a racially diverse team and group of friends, both back home and in Pullman. We are upset by the accusations of racism, the damage to our reputations and the hurtful way our names and pictures have been associated with these events. We recognize a student in the Multicultural Center was offended and for that we are apologetic. However, again we maintain our actions were not racially offensive or harassing in nature and we were only attempting to be friendly with a group of people."

March 4, 2005

The WSU Board of Regents requests an appropriate review of the student conduct process during its March meeting.

#### IV. ADMINISTERING THE STUDENT CONDUCT CODE

##### A. Perceptions of the Student Conduct Process

In General. During interviews conducted at WSU campus by the Task Force, everyone expressed dissatisfaction with the course of events. There was also little knowledge outside the conduct staff about how the conduct process actually functions. Highly placed faculty, MSS staff, student leaders on campus, including officers of the Associated Students of WSU Officers, and others were not familiar with the conduct board process. This information is disseminated in Student Handbooks to incoming students and is accessible on the WSU web site, but people are not actually familiar with the process.<sup>16</sup>

The conduct staff feels that they were personally attacked; "abused"—in the words of one employee—by members of the Comparative Ethnic Studies faculty and some of the MSS staff and students, who wished to see the process fail in order to further political agendas of their own. Though the University administrators directed the conduct staff to stick to their process, the level of scrutiny was such that they were not able to follow their regular protocols. In addition, they are aware that many people perceive their process as being a failure, although they believe the structure is sound and that they fulfilled their duties in good faith and professionally. It appears they were excoriated for attempting to conduct their duties fairly to all sides and for observing the confidentiality requirements as they understand them.

The administrators, including the President and his top cabinet members, expressed sadness and frustration that the process was so disruptive and polarizing, and that their efforts to address the concerns and feelings of the affected people were generally rejected. They also described the experience as consuming enormous quantities of time and resources which detracted from their core duties, particularly in the areas of promoting diversity, because of the need to constantly be in crisis response mode.

---

<sup>16</sup> The lack of retention of knowledge regarding the process is not necessarily inexplicable, in that there is a lot of information to absorb for a newcomer to campus life, and no particular reason to familiarize oneself with the conduct process unless one is affected personally by it.

Steven Bischoff, staffer at MSS, stated he lost faith in the process from the first meeting with Ms. Voss and Mr. Marczynski on February 9, 2005, upon hearing from them that the conduct process is an educational one. He felt the results should be more punitive, as did Ms. A, in meetings and emails transmitted widely on and beyond the campus community, and, to a lesser extent, in interviews with the Task Force members. It appears to have been the position of many of those students and some of their staff and faculty supporters that the conduct process, which averages up to two weeks to complete an investigation and has a range of potential sanctions, reserving expulsion for only the most serious offenses, was itself unacceptable. The process is, however, as described above and is defined as chiefly an educational one. The process, and its goals and values, were rejected by many at very high volume and in multiple arenas. (See, for example, the events of February 9, 2005, in above chronology.) It is impossible, therefore, that even the most scrupulous and exacting application of the code could satisfy its critics who fundamentally disagreed with it. Though no one was actually able to articulate clearly what the oft-demanded "zero-tolerance" is composed of, it appears to be a demand to accept allegations of racial bias or discrimination at face value and to summarily expel anyone so accused, without any examination of the truth of the allegations, the motivations of the actors, or the magnitude of the offense.

Everyone outside the conduct staff expressed confusion and at least retroactive regret that the matter was not heard before a Conduct Board. Multiple faculty members and students expressed the importance that such a Conduct Board include student participation, and that the adjudicators have publicized expertise in areas of racial sensitivity and awareness. (In the latter regard, however, all three of the student conduct staffers relayed they do have specific training and personal experience in such areas, but this is not known to the larger community.)

Ms. A stated that from her first arrival on campus, her mentors explained that she could not trust the administration, and she has a high level of suspicion regarding any statement or action by the University. This perception of Ms. A's perspective was reflected by Manuel Acevedo, and described as relatively widespread by a number of faculty and University staff. Though she noted to members of the Task Force that she was difficult to contact, Ms. A felt excluded from the student conduct process and also felt the outcome was incorrect factually and unfair. She has also stated she felt very exposed to media and other interests, although, paradoxically, she vigorously initiated media attention, at least via email.

Ms. A also has expressed the unrealistic belief that the administration and the President in particular can and should be able to prevent all acts of racial antagonism by other people on campus.

Mr. D and Mr. E felt they had participated and cooperated in every way possible with the process, and yet the people accusing them were unfairly allowed to avoid the process, to resort to the media and public pressure. Consequently, Mr. D and Mr. E feel they are still commonly perceived as being guilty of the allegations, even though they were cleared by each process, police and University, that was conducted. They also felt the process took too long, and wish that the University stood by its process and results more unequivocally.

Manuel Acevedo and Ms. C stated that, in retrospect, at the time of the core incident, they should have simply walked out to the hallway and told the students their actions were unwelcome. Their recommendations to the Task Force included the proposal that relationships between all parties be strengthened to heighten the possibility of actual dialogue to resolve

differences. Virtually everyone interviewed, including the President of the University and members of the conduct staff, expressed regret that a more direct, personal resolution was not possible earlier in the course of events.

An unattributed "History" of alleged instances of bigotry and violence on campus, described as rampant and largely unaddressed by the campus authorities, has been broadly disseminated both on campus and beyond (a version is attached). Many people have operated on the unquestioned assumption that this account is factually accurate. The Student Conduct staff has records reflecting responses and investigations that were made of many of these incidents that could hopefully lower the level of outrage over the accounts, but has not done so because of a belief that they are entirely prevented from doing so by the constraints of privacy law (FERPA). The Task Force's understanding of the law is that there is a great deal of latitude to permit more information, without violating individual privacy rights, and that it is essential that the ability to share this information be re-examined in light of the community's legitimate concerns.

The alleged lack of action by the administration to address incidents of hate/bias has caused some students to resort to self-help remedies instead of relying on conduct proceedings. The Task Force perceives that the public humiliation inflicted upon Mr. D and Mr. E by the posting of accusatory fliers and accusations of bigotry at the basketball game were serious transgressions of civility and, quite possibly, of WSU's Conduct Code. This was virtually unaddressed, apparently because the University authorities were effectively intimidated by the radicalism of those protesting issues stemming from the core incident. It is unfortunate that such an apparently unjust result would pertain.

Some of the faculty appear not to have assisted the University or the students in exercising rights and process under the student conduct procedure. Boycotting or politicizing a process is not participating in it. If the process is inherently not equitable, or designed to arrive at predetermined results, one can imagine not participating in it. This review did not find support for that conclusion, however. Before a process is criticized or rejected, it should be, at a minimum, understood. If the process is essentially sound and provides basic due process, it should be participated in. Increased transparency in the process would assist, as well as a willingness on the part of critics to view the system fairly and openly before concluding that it is broken.

## B. Structure and Goals of Student Conduct Process

WSU's Standards of Conduct for Students are established under the Washington Administrative Code (WACs), at WAC Title 504.24 and following. WAC 504-25-200 provides "The university's disciplinary process is educational, but students can be suspended or dismissed for serious violations of the standards of conduct."<sup>17</sup> Accused students' rights are set forth under WAC 504-25-201, and largely dictate the process that the Student Conduct staff must follow. The Conduct Code-- termed "Conduct Regulations" in the WACs-- is set forth under WAC 504-25-001 and following. The section starts with definitions, addresses academic dishonesty, and then goes on to define violations under the titles of "Discrimination" (WAC 504-250-020),

<sup>17</sup> The insistence in the WAC that the Conduct process is "educational" rather than punitive might bear re-examination for intellectual honesty, if nothing else. While the primary purpose of an institution of higher education is, of course, education, it can appear disingenuous to disavow any punitive intent or impact upon a process that includes penalties that, as a matter of fact, amount to punishment.

"Harassment" (WAC 504-25-040), and "Malicious Harassment" (WAC 504-25-041). Note: Some students expressed the opinion that academic violations are emphasized whereas bias incidents are not. WSU is an academic institution, focusing primarily on its identity as such. The primary focus, even structurally in the WACs, is necessarily on educational issues. As an example, arson would be highly disruptive to campus life, and would be a violation of the Code of Conduct, but arson is not highlighted in WSU's discipline structure. It does not follow that the administration does not take arson seriously.

The functions, jurisdiction, purpose, and philosophy of the Student Conduct Board are set forth in its training manuals (example attached). Flyers outlining these core directives are provided to students, parents, and the community. Training is conducted and it appears that the conduct staff is dedicated to faithfully fulfilling the directives set forth for them. How, then, could it be that the process in this instance was such a uniformly disappointing experience?

### C. Appropriate Disclosure under Family Educational Rights and Privacy Act (FERPA)

#### 1. Introduction - What is FERPA?

FERPA is an acronym for the Family Educational Rights and Privacy Act, codified in 20 U.S.C. §1232g. The purpose of this federal Act in a university context is to protect a student's privacy interest in his or her "education records." This term is broadly defined as records, files, documents, and other materials, which contain information directly related to a student; and are maintained by an education agency or institution or by a person acting for such agency or institution. A university is prohibited from disclosing any "education records" or "personally identifiable information" from such records unless prior written consent of the eligible student is obtained. There are only a limited number of specified circumstances when an education institution can release information without prior written consent.

Section 99.3 of the regulations defines "personally identifiable information" as information that includes, but is not limited to: the student's name; the name of the student's parent or other family member; the address of the student or the student's family; a personal identifier, i.e. social security number; a list of personal characteristics that would make the student's identity easily traceable; or other information that would make the student's identity easily traceable.

Many in the legal profession feel that this law, while serving an important function by protecting the privacy of students, is limiting in other respects. For instance, because student disciplinary proceedings are considered a part of the student's education record, information from the record cannot be disclosed. Congress has not determined that an exception for disciplinary proceedings should be exempt from FERPA, so apart from the narrow exemptions, a waiver by the eligible student is required before any information can be released.

#### 2. Implementation in the Core Incident

In this instance, waivers were not signed by the students until findings were made by the conduct officer. In the entire period prior to that, the only source of information available to

the public was the police report, which is exempt from FERPA and is a public document. The statements made by the accuser in the police report became the basis of information that was disseminated widely in the campus and off-campus media. All too often, what is alleged in a police report becomes engrained as fact in the minds of observers. The administrative hearings decision did not publish findings of the incident, and it is unclear how the three-member board (made up of staff from the Student Conduct office) made their decision or grounds for their decision. Also, the activist measures of disseminating the allegations as fact led to their acceptance as fact, even in the broader community beyond the campus. Some of the demands for change stated to the University are grounded in the assumption that the allegations were entirely true and supported by evidence.

The limitations placed on WSU by FERPA severely inhibit its ability to share any information that could shed light on what the facts of the case are. Though this incident should have gone onto a full Conduct Board hearing, the record of such a hearing and any investigation done on its behalf could not have been disclosed.

There were several events in which an overly strict adherence to FERPA may have been detrimental. For example, the widow-tapping incident at the MSS (see timeline) could have been explained in a way to put students' minds at ease. Here, if the conduct offices had redacted the personally identifiable information related to that student, they could have disclosed the fact to Ms. A that the incident was not backlash or related to the athletes.

### 3. Implementation in Broader Context

While FERPA does place severe limitations on the information that the University can disclose, it does not prevent the University from stating that it is taking action or investigating a certain incident. Many in the community respect the fact that the University must obey the law. However, it is the perception of inaction and bias that contributes to much of the misunderstanding. Because there at least one University official (the head coach) spoke out on behalf of the players, there was a perception of unequal favorable treatment towards the basketball players by the University. The perception became: Why, in the dearth of information, was a University official making statements when no comment had been issued by the Office of Student Conduct? In part, this perception is based on a lack of understanding of how power is decentralized in a large university.

Free and open speech is highly valued, and speech limitations are frowned upon. As custodians of facts following an investigation, student conduct staff are in a position to substitute facts for rumor and supposition. Their duty to the larger university community, and indeed in preventing future perceptions of bias, would point toward more dissemination of basic, non-personally identifiable facts, and away from a cloaked process which is detrimental to their and the system's own credibility.

There has been a litany of events (referenced previously in this Report) which have occurred in the past and allegedly illustrate WSU's non-action. WSU, through its Student Conduct Office, has investigated many of these alleged incidents and acted upon them. However, because of FERPA, none of the findings were made public. Calls for action

appear, therefore, to remain unanswered, which perpetuates the perception that the University is indifferent about incidents of racial harassment.

#### 4. Legal versus Educational Issues

The campus judicial process should be an educational tool for the student which may carry with it consequences, corrective actions or amends. Though a particular act may not be a crime, the University can still view the violation as egregious, against the core values of the community, and disruptive to the educational process for students. These principles of conduct should include bias-related incidents, which should be seen by the campus community as breaches of standards of civility and equity. This view should not be in conflict with the need for due process. The threshold determination is whether the conduct occurred as alleged. If it did occur, such conduct is taken seriously.<sup>18</sup> Even in cases where there are not publicized findings, the process should illustrate how the values of a community are jeopardized or comprised by acts of race or racism. At this point, determination of a sanction in the case of violations of the conduct code is often up to the individual judicial officer or the hearing board. Such consequences should always account for the impact on the larger community.

### V. THE RESPONSE OF THE ADMINISTRATION

#### A. Expectations of the Administration and the Administration's Reactions to Those Perceptions

Members of the Task Force perceived a widespread lack of understanding of the actual, functional dynamics of how the WSU administration operates. Some students, staff, faculty, and off-campus observers evinced the belief that the University President operates, "Wizard of Oz-like," as the "man behind the curtain" who is able to control all aspects of the campus. Consequently, virtually every aspect of campus life that is unsatisfactory has been attributed by some to the President's inaction, indifference, or worse, alleged malicious design.

#### B. Reactive Response by the Administration to Issues of Diversity

Multiple programs, commissions, committees, and initiatives have been set in place in reaction to stated concerns about diversity issues. Some committee members addressing the Task Force articulated confusion over their own roles and the manner in which they should interact with like-minded components of the campus community. The Offices setting these groups in place have articulated the desire to allow them to operate independently. Diversity proposals are sometimes discussed but are "shelved" by the administration without consistent implementation, monitoring, and evaluation. There appears to be a lack of assessment and goal

<sup>18</sup> To the extent the concept "zero tolerance" was meaningfully articulated to the Task Force, it means, as Ms. A stated, the establishment of a campus climate where the dignity of all students, regardless of race, is highly valued. No bias incident should be considered so insignificant as to be unworthy of response. The concept of zero tolerance is discussed in more detail below.

attainment. (There is a perception, for example, that studies have been done and not necessarily followed up, such as the Council On Campus Climate Plan Of Action, April 24, 2001.)

Members of groups charged with such tasks should take the initiative to coordinate with each other and to consult centrally with the Office of the Vice President for Equity and Diversity for assistance in continuity and effectiveness. The reactivity of the University results in part in student and faculty perceptions that the administration responds with damage control and the stance of "we know what is best." There is a perception of a "top-down" approach to handling issues of diversity with little to no feedback from the University community. The University has, however, long-term employees with a wealth of institutional history and experience in addressing these issues. A sincere and thorough-going use of channels of communication is required to change that tendency. On the part of disaffected students and faculty, the willingness to allow the University to "do the right thing" must be extended for any possibility of success of their stated desire to be included and not "marginalized."

## VI. PROBLEMATIC STRUCTURAL ISSUES

### Some Structures Which Could be Useful Lack a Clear Path or are Disengaged from Racial Issues

#### A. Nature of University Structure and Resources

There may be a lack of persistence and adequate funding for programs and structures created to address some of the issues that make them less than successful. The structure of most colleges and universities is unlike many other organizations, as they are "loosely coupled". This means that as an organization, though there appears to be a hierarchal structure (i.e. president, vice presidents, deans etc.), there are essentially various groups (i.e. students, faculty and administrators) who are engaged in making decisions and developing different solutions and taking action. The core incident and what followed is a prime example. The "nature of the organization" therefore has limits.

The Task Force has observed that:

1. Various entities often do not communicate directly (and in some cases do not share the same language) or talk across the groups.
2. These groups take action and make decisions without consideration of the impact that action has on others.
3. The assumption is nurtured that an issue or problem belongs to another group or that another entity has the capabilities or resources to address adequately the issue or problem.
4. A volatile issue can become an orphan and left until one group can recognize negligence by another group or the institution as a whole.

When the recent budget crisis hit higher education in the State of Washington, institutions were faced with deep cuts. Often valued programs were cut completely, reassigned or reprioritized as administrators were faced with protecting the core of the institution, which is instruction and research. Discovery that the accused people in the core incident were athletes,

concern was heightened because of the perception that the athletic department has been favored in funding over other aspects of the University. This perception probably colored assumptions about the culpability of those accused, quite apart from who they are as individuals.

#### **B. Relative Lack of Provost, Ombudsperson, Deans Role in Promoting and Supporting Diversity**

The entities appear to be relatively uninvolved in solving the problems identified, although they are nominally charged with an important role. The Provost is the chief academic officer, and could play a more important role in the diversity course issue. The Ombudsperson has the premiere alternative dispute resolution role at the University, and could help resolve issues before they go into formal processes. The Deans lead their colleges and departments.

#### **C. Some Structures are Not Held in Respect by Activist Students and Faculty**

There is a perception among some students and faculty that position of the Vice President in the Office of Equity and Diversity and the Vice President's position at the University are "cosmetic." The Vice President for Equity and Diversity is harshly criticized for not being the product of a national search. Because they feel they were not included in this process, some students of color respond by criticizing all initiatives the Office engages in, instead of assisting in its goal of promoting diversity, which is a self-destructive pattern. The University has the discretion to appoint positions without a search and has done so in a number of units. It is not fair if only the "ethnic" appointments are scrutinized and criticized for this, and this unbalanced criticism reflects the general need for a better understanding of the overall functioning of the University system (referenced below).

#### **D. Views of the AAPI Community**

There are many groups that constitute "the Asian American/Pacific Islander" (AAPI) community in the state (and nation). Even within existing community groups there are subsets and individuals with divergent views. As a historically discriminated against group, especially on the West Coast of the United States, it is understandable that AAPI's should have heightened sensitivity to perceived discrimination and anti-Asian bias and acts. A traditional route to success in America is education. WSU, as a long-standing venue for realizing such opportunity and the fear of the cutting off such a path to success can understandably lead to heightened concerns and anger in the API community.

There have been many expressions of concern by API groups about the core incident and its aftermath, which positively reflect the high level of vigilance that the community maintains regarding the well-being of API college students. The information made available to the broader community and in particular that which was disseminated narrowly to the API community, however, tended to be one sided and incomplete. The highest volume of information disseminated to the API community, chiefly through emails, offered as conclusive reality that alleged racist incidents occurred and that the administration failed to respond or responded improperly. One of these emails included the police report, which became the basis of factual conclusions, and a letter from students listing past acts of harassment. The tone of these

communications was purposefully incendiary and inciting; a student letter even referred to the athletes several times as "terrorists."

In addition, due in part to the limitations placed by FERPA and the one-sided information disseminated, full information was unavailable from the beginning. Even CAPAA's report to the Governor, ~~which was~~ in part to be a fact-finding mission, focused only on the MSS students and administration and was not a full-blown investigation, yet that report became viewed as a source of authority that racial harassment had in fact occurred.<sup>19</sup> The combination of the issuance of the poorly-worded conclusions about the Student Conduct Office adjudication, the purposefully incendiary emails, subsequent statements by the head coach, selective statements taken from the police report, and the un-rebutted allegations by student groups, contributed in presenting a one-sided picture which was difficult to refute.

In this atmosphere of incomplete information and distrust of the administration, it was difficult for community groups to calibrate an accurate response. The typical communication to the administration from community groups consisted of demands for change and action, after having concluded that racial harassment had taken place and that nothing was done about it. A regularized means of communication with the University, such as access to the Diversity Update as noted above, and the cultivation of productive, honest, and constructive personal relationships will help greatly.

## VII. RECOMMENDATIONS

### A. University Administration 101.

A resource and dissemination plan should be developed and implemented to explain the institutional functioning of the administration in its policy, planning, and operations. A roadmap illustrating how the University operates would be useful, showing the various venues for redress of grievances as well as lines of authority for decision-making to be positively assisted or petitioned.

### B. Student Conduct Process

According to interviews with the Conduct Code staff and in consideration of the documentation provided (see attached Sanctions and Incident Summaries), the great majority of issues addressed by the Student Conduct process are concerned with academic violations, alcohol violations, and petty interpersonal disputes, none of which generally significantly concern the larger community on and off-campus. In the majority of situations, it appears that the Conduct Code process functions well in satisfying its stated purposes and policy. The Code is organized along a nationally-recognized model, and is acknowledged for its proficiency in achieving its stated goals. For the most, those goals are best achieved when the Conduct Board staff is permitted to operate with autonomy, according to the provisions of the WACs and without "political" interference.

---

<sup>19</sup> CAPAA's early intervention served the more primary purpose of providing support for the API students who were indicating distress.

In other types of disputes that implicate violations of the code, however, more integrated attention needs to be made, on a regular basis, by key members of the administration and those executing the code. In circumstances that are likely to implicate broader sections of the campus community, a broader set of concerns should be taken into account.

**1. Prior to Engaging in the Conduct Process - Options for Dispute Resolution**

All members of the WSU campus, but particularly the administration, faculty, staff, and graduate student assistants, should have a clear understanding of the options on campus for dispute resolution and, in any crisis situation, be ready to present these options to those in need. This is not possible without coordination of programs and the development of relationships and lines of communication among all levels of the campus population, vertically and horizontally, and over time.

**2. Inform Student Reporting the Incident of the Minimum Standard of Due Process**

In any instance where the Code is specifically enforced, the student conduct staff should clearly educate and inform students of the minimum standards associated with the student conduct hearings process (i.e. discovery, adjudication, and remedial measures and consequences). This information is included in the Student Handbook. Transparency of the student conduct process should be a high priority for the Office of Student Conduct. Students and others who avail themselves of this service should commit to listening to and understanding this information or the process cannot properly function.

**3. Administrative Hearing v. Council Hearing Determination**

The student conduct process should clearly explain when and under what circumstances an allegation will go to the administrative hearing process or to the general council process for adjudication. The present case involving a student's allegation of harassment and discrimination by another student at WSU should probably have gone to the Student Conduct Board process for adjudication by their peers, and members of the faculty and administration. The reasons for not so doing should have been discussed among the affected units, which may have changed the forum, and the decision should have been explained publicly whether or not the decision was changed.

**4. Investigations of All Harassment and Discrimination Incidents**

All occurrences and allegations of harassment and discrimination on campus based on race, national origin, gender, religion, sexual orientation, disabilities, etc., should be addressed independently by the Center for Human Rights (CHR). The WSU Police Department and the Office of Student Affairs should immediately report incidents to the Center for Human Rights to investigate the occurrence or allegation. The CHR should actively participate in the process by which such incidents are adjudicated.

The Office of the Vice President for Equity and Diversity, the Office for the Vice President for Student Affairs, and those directly engaged in these cases need to play close attention to some concerns in the creation of this special arena for one particular category of conduct code violations. Is there a compromise of the appearance of fairness if CHR both

investigates and adjudicates case? Can the CHR assist in training the Conduct Office? If the student conduct office is to do its job with integrity, it must closely coordinate with CHR. Fairness does not allow an investigative and adjudicatory body to unquestioningly accept the investigation and recommendations done by a separate entity, unless there has been an agreement that the first body is responsible for the investigation. Obviously, this is a developing area of cooperation, and close collaboration between the units is essential. And, very importantly, as CHR is given this higher level and quantity of responsibility, its resource allocation should be commensurate with that level and quantity for it to carry out these new obligations.

#### **5. Discrimination and Harassment Policy and Procedure**

Similar to the alcohol and drug policy established in the Student Conduct Handbook, there should be a clear policy on how allegations of discrimination and harassment should be handled and guidelines enunciated according to the degree of severity. Currently, there are no policies that address incidents of discrimination and harassment in a clear and systematic manner. The policy should allow for flexibility to do justice in individual situations, yet have sanctions clearly based on the severity of the incident. The Student Conduct Handbook should make it clear that harsher penalties such as suspension and expulsion from school may be used in severe incidents of discrimination and harassment. Typical standards for judging discrimination incidents include frequency, egregiousness, pervasiveness, and creation of a hostile learning and living environment.

#### **6. Mandatory Harassment and Discrimination Training for Conduct Officer and Student Conduct Board Members**

Specific and well-publicized training should be the norm for conduct officers and student conduct board members who handle issues of hate/bias, discrimination and harassment. Proper training should include handling issues of hate/bias crimes, malicious harassment, FERPA, sexual assault, etc. The minority student population, appropriate divisions and individuals within the University, and community groups should be included as resources to give the process legitimacy and credibility. While supplemental training might well be appropriate, the conduct officers do have training in areas of cultural competence. These strengths should be stressed and spelled out, and supplemented and further legitimized with input from community and student groups.

#### **7. Inform WSU Community of Policies and Procedures regarding Discrimination and Harassment**

The policies and procedures of the Student Conduct Board should become more transparent and unambiguous to the public on handling incidents of harassment and discrimination and its rationale and decisions.

## 8. Establish and Support Alternative Dispute Resolution (ADR) Programs

Alternative dispute resolution is any procedure that is used to resolve issues in controversy, including but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombuds, or any combination thereof. All these techniques have the goal of emphasizing the relationship between the parties, respect for the individuals involved, and permitting those involved in a controversy to have a voice in creating their solutions. These techniques involve a neutral third party, a person who assists others in designing and conducting a process for reaching agreement, if possible. The neutral third party has no stake in the substantive outcome of the process. Depending on the circumstances of a particular dispute, neutral third parties may be employees or may come from outside the organization. Typically, all aspects of ADR are voluntary, including the decision to participate, the type of process used, and the content of any final agreement. In some cases, some ADR techniques (such as facilitation, mediation, and fact-finding) are used to facilitate public involvement in decision-making by creating ownership for conflict prevention, management, and resolution at various levels, including use of a protocol everyone understands.

The precise forms of ADR that work best for the WSU community will be best recognized and developed by those living and working there. Some disputes between students can be more constructively resolved by training students to mediate and resolve issues among themselves. This program would empower students to participate in handling issues of conflict in a healthy and non-adversarial manner. It would be useful to institute an ADR system prior to a formal student conduct process. It would create ownership for conflict prevention, management, and resolution at various levels, including use of a protocol everyone understands. Some theories and examples follow.

- a) Transformative mediation [Transformational mediation] is a model of conflict resolution that values both personal strength and compassion for others as well as viewing conflict as an opportunity for growth and mutual gain. The transformative mediator works to help the parties gain a greater sense of their own capacity to effectively deal with their conflict and an increased understanding of the other parties' perspective on the conflict. The concept is that, in addition to the goal of agreement, it is appropriate and desirable for mediators and mediating parties to have additional goals, such as empowerment and mutual recognition.

Transformational mediation is especially suited for highly emotional issues such as employee-management relations and has been highly successfully used by the US Postal Service and adopted by many other major employers. It is a distinctive approach that concentrates less on settlement than on transforming the disputants' views of themselves and their dispute. 'Transformation' of the conflict is measured by the disputants' capacity to assert their own points of view while recognizing that other parties may entertain different ones.

- b) Restorative justice is a philosophy for the delivery of justice that seeks to address the harms to victims, the community, and offenders arising from crime (in contrast to traditional "retributive justice," which focuses simply upon adjudicating and punishing offenders). It refers to bringing together victims, offenders, families, community members, law enforcement people and others into a voluntary process that can help

both victims and offenders. Participants talk about the harm an offender has done and what amends would help. Offenders may realize how they have hurt individuals, families and communities. Restorative justice processes have various forms and names: victim offender mediation, restitution, community service, group conferencing, sentencing, or peacemaking circles.

- c) Conflict Resolution Program. In the past, the Conflict Resolution Program mainly handled interpersonal conflicts in the workplace, classrooms, and living environment. Currently, this program is in transition but should be considered an important option to resolve conflict. Currently, there are two staff members in the Office of Equity and Diversity who are certified in mediation; however, there is no specific conflict resolution/mediation program. There should be a cadre of individuals across the campus trained in mediation. The campus-wide training will serve to provide more comprehensive and focused efforts on resolving conflict at its lowest level.
- d) Conflict Resolution Training. The administration is currently developing a Prejudice Reduction with Conflict Resolution training program. The Task Force would like to see this training involve students, faculty and staff and have on-campus trainers who can promote and educate the campus community in conflict resolution.

#### C. Establish a Bias Response Incident Protocol

The University should consider developing and implementing a Bias Related Incident Protocol and Team, which would supplement the work of the Center for Human Rights and provide a defined communication forum. This team could be comprised of members of the University community, including students, staff, and faculty, who are called in when there is an alleged incident of bias. This group would be able to articulate to the community what happened and assure the community that the incident is being addressed. Also, the team would be able to work more directly with those communities impacted by the incident as well as encourage dialog and direct educational forums. This could offset some of the more incendiary and emotional impacts of an unfettered media, without muzzling that media. A protocol would allow for more coordinated efforts between University offices regarding their policies and practices and facilitate stronger communication. In the stress of the immediate aftermath of an incident, the resources available to those affected should be clear.

#### D. Establish a Diversity Education Program

In Appendix 7, the University has listed a wide variety of programs oriented toward diversity and inclusion. The Task Force's drawing attention to the programs listed below is not intended to disparage any programs that are successful. We recommend, however, that these programs be considered critical to the University's mission, and that they be monitored and evaluated for success.

##### 1. Diversity Education Program

While WSU holds programs and activities that embrace diversity, it could do more to educate students on these matters through discussing subjects of discrimination, harassment, intercultural communication, behavior, and relations (i.e. intersections of race, nationality,

gender, sexual orientation and disabilities). The program should also address issues of harassment, discrimination, and institutionalized "-isms" that face the WSU community. The Dialogue Program (a peer-to-peer diversity education program established in 1994 at WSU which no longer exists) would be a possible model to consider for a program to encourage students to address campus climate issues. The Diversity Education Program could also be responsible for providing programming for the new student orientation and for the residence halls and Greek system. It was reported to the Task Force that in the fall, the Office of Equity and Diversity will be implementing a new program created by the National Coalition Building Institute. This program teaches a model for campuses and communities on (1) prejudice reduction and (2) the controversial issues process. It also has a leadership development program which provides advanced training in conflict resolution skills. The Task Force is encouraged that the University has taken the initiative to develop a training program in this area of diversity.

## **2. Diversity Training for Freshman Orientation**

Proficiency in intercultural communications and cultural competency is an important component of a university education. The Task Force recognizes that most learning occurs from interactions and experiences outside of the classroom. WSU has a number of successful freshman orientation programs such as Alive! and University 100 which would be viable means to facilitate various discussions and understanding of diversity.

## **3. Promote Cultural Competency/Sensitivity Training**

Cultural competency and sensitivity training should be required for all administrators, faculty, staff, and law enforcement officers, especially for individuals who work with students on a daily basis. Training should include how individuals should respond appropriately to incidents of alleged discrimination and harassment and how to foster intercultural relationships in a learning environment. University employees who work with students in a living, classroom, or employment setting should attend mandatory harassment and discrimination training periodically, so that new ideas and learning can be explored. Such trainings should be included in the new employee orientation and training. Specific training should be designed for faculty to be used in classroom settings, highlighting strategies for facilitating difficult conversations, interventions when students may exhibit discriminatory behaviors, and ways to ensure that classrooms are fair and equitable. Each of these entities should receive training in FERPA as well as the conduct code. Student leaders, particularly those representing groups likely to be affected, should have the opportunity to be consulted and involved in the formulation of this training.

## **4. Continuous and Integrated Diversity Training**

Diversity training should not be viewed as an isolated subject but rather is more effective when integrated throughout the academic and extra-curricular experience at WSU. Diversity should be developmental and ongoing throughout the student's experience at WSU.

#### **5. Encourage, Normalize, and Promote Dialogue on Sensitive Issues**

Discussion of these topics should not be reserved for times of stress and antagonism. Models of community dialogue such as Study Circles that existed and functioned successfully on campus previously should be reinvigorated. If successful, they can serve the function of creating the relationships and vocabulary that the entire community needs to successfully confront the challenges that a changing demographic inevitably brings.

#### **E. Role of the Center for Human Rights**

The Center for Human Rights (CHR) should be included in the review and processing of all harassment and discrimination investigations at WSU. It currently has a limited role and responsibility in conjunction with the student conduct process. Because of concerns outlined above in regard to this new role for the CHR, it is essential that this process be developed carefully and collaboratively, so that the conduct process as defined in the WACs is not contradicted or undermined, and those implementing the various programs understand how their actions affect each others' duties. All specific recommendations below are made in light of this proviso, and are not to be considered binding on the formulation of a working partnership.

1. **Enhance the Investigatory Process.** The CHR should create specific objectives and goals of the investigatory process for all alleged harassment and discrimination occurrences and allegations on campus. This will add a perspective and focus that will enhance and inform the general conduct process in dealing with issues of bias and discrimination.
2. **Comprehensive Report on all Allegations and Occurrences of Discrimination and Harassment.** To provide a more verifiable barometer of the actual occurrence of bias and discrimination incidents on campus, the CHR should submit a report of all allegations and occurrences of discrimination and harassment to the President's Council and the Board of Regents. This report should include all pertinent statistical data available, as well as specific occurrences of discrimination and harassment. This report should be distributed to the WSU community and all interested parties.
3. **Handling of all Discrimination and Harassment Incidents.** The Center for Human Rights should be the primary office to handle hate/bias incidents, having at a minimum a consulting role in any incident, even those viewed as plainly criminal.
4. **Encourage Reporting of All Discrimination and Harassment Incidents.** The Center for Human Rights and the entire administration, faculty and staff should commit to educating students, faculty and staff of their responsibilities to report all incidents of alleged harassment and discrimination that occurs on campus to the CHR. The Task Force has found a number of instances where students were unaware of CHR's role to investigate discrimination and harassment on campus.

#### **F. Responsibilities of Law Enforcement**

1. **The Hate/Bias Hotline** should be answered independently from the Police Department.

2. **Protocol Training.** There appears to be a need for a training protocol for campus police and other law enforcement officers in handling such incidents. While an incident may not constitute a crime as defined by Washington State law, it may well constitute a hate/bias incident that violates WSU's Conduct Code. The protocol for sharing reports of such incidents with the Conduct Board and the Center for Human Rights should be clear and consistently followed.
3. **Bias Awareness Training.** Law enforcement officials should have knowledge, training and awareness of laws about discrimination and harassment.

#### H. Addressing Campus Climate

There is no easy means of assessing and promoting a healthy learning environment that encourages positive interactions among students. It is the responsibility of all students, faculty, staff, and administrators to foster with good faith dialogue and participation on campus that values and embraces diversity. Regularized channels of communication, even on sensitive topics, must be nurtured.

In connection with the core incident, some students and apparently some of their mentors protesting or reacting to perceived inaction by the University authorities acted in fairly extreme fashion, sometimes with a significant failure of civility. Such incidents as the posting on campus of flyers bearing the faces of the two accused students with inflammatory accusations and the demonstration at the offices of administrators who expressed readiness to dialogue with the students may reflect an undergraduate penchant for revolutionary drama more than anything else. The alarm of supportive groups and individuals beyond the campus may have been heightened more by the volume and heat of the rhetoric employed than by the merits of the substantive wrongs articulated.

WSU's situation is not necessarily unique. For example, in 1998, the Washington State Board for Community and Technical Colleges, Education Division surveyed students about the supportive climate on campuses. Students were asked five questions related to the campus climate. Three of these questions related to how many instructors, support staff and other students were supportive, approachable and helpful. While the majority of all students, regardless of race and ethnic background, reported that most staff, students and faculty were supportive, more than 500 students reported that few or none of the other students, faculty or staff were supportive. Students of color were most likely to report that few or none were supportive, with Asians reporting this lack of supportive response at the highest rate. Some 15 to 16 percent of the Asian Americans who responded to the questionnaire reported that few or none of the staff were helpful or supportive. While the percentages who reported few or none of the others at the college as supportive is small, the race differences suggest that students of color feel less supported than do whites.

Virtually every witness on campus interviewed by the Task Force was asked whether he or she personally experienced or witnessed racist or discriminatory behavior at WSU. The most severe incident relayed in response to this query was the experience of one student who suffered the noxious experience of being subjected to racial epithets by unidentified, apparently drunken partygoers. The other incidents reported as actually experienced by the individuals can fairly be described as relatively minor, though still problematic. (For example, one person stated that an

unknown person misspelled "Asians Go Back" on a poster at the MSS. On a DVD of "student testimonies" prepared during the time considered in this review, an AAPI student complained of being the only minority student in a particular class.) CHR's centralized collection of bias-related information, a more careful application of FERPA, and the composite of improved communication and dispute-resolution channels can all contribute to a more constructive and accurate reflection of hate and bias issues.

After interviewing several students, faculty, staff and administrators at WSU, the Task Force has drawn up the following recommendations on how better to encourage a healthy learning environment at WSU. These recommendations, however, are not a comprehensive list. Members of the WSU community will undoubtedly suggest other solutions, which may be more suitable for the WSU community.

#### **1. Campus Climate Survey**

WSU should consider administering an all-campus climate survey to identify the specific issues of hate, bias, and harassment based on race and national origin. The University conducted a Climate Survey which addressed the general climate on campus, but which lacked credibility with some students and faculty because it reflected the opinions of the majority, the bulk of who are non-minority. There is some feeling that minority perspectives were lost in the methodology of the survey. As in most surveys, the methodology and limitations on interpretation need to be carefully explained. A new survey can be useful in determining whether WSU has met its diversity goals and plans outlined in the Strategic Plan for Diversity at WSU and in creating future initiatives on campus.

#### **2. Perform Exit Interviews of Minority Students, Faculty, Staff and Administrators**

It would be useful for WSU to conduct exit interviews for members of the student, faculty, staff, and administrators regarding their "WSU experience," which should include topics of diversity. Exit interviews may provide WSU with insight about the campus climate and relations on campus. Data drawn from the exit interviews could be included in the Vice President's report to the Regents annually.

#### **3. University-wide Diversity Initiative**

Diversity goals and strategies are the responsibility of all colleges and departments in changing the campus climate. Each college and department should review the University's Strategic Plan for Diversity and incorporate those areas of focus into its own specific diversity action plan.

#### **4. Focus on Transparency in Recruitment in Administrative Positions**

The Task Force recognized an overall lack of trust inside and outside the University, particularly regarding the recruitment of faculty and administrators for positions which address diversity on campus. A repeated theme articulated in this respect from some observers on and off the campus is that direct appointment to key administrative positions without a national search and without articulation of why the decisions were made or consultation on such issues by those affected, diminishes the legitimacy and effectiveness of

those appointed. Another perspective on this issue is that some critics of the administration have an imperfect understanding of how a university actually functions. This criticism could apply to direct appointments to many positions at the University, not just those concerning diversity. It is not evident that those levying this criticism are themselves familiar with the normal processes of appointment and structuring in the University as a whole. They may, consequently, over-inflate the significance of the appointment process in the units under scrutiny. Nonetheless, in highly sensitive positions, such as the Office of Equity and Diversity, it is inevitable that a great deal of interest will be focused on how those duties, and it is incumbent on the administration to lend support and credence to those appointed to such positions by being as open and explanatory as possible about the validity of decisions made.

There have also been concerns stated by some students that individuals appointed by WSU to handle diversity in recruitment may not have the necessary qualifications. Some students and staff interviewed assumed a lack of qualification without any basis that they could articulate, when requested by Task Force members. Increased dialogue on how these decisions are made and good faith in addressing these concerns are required on all sides. The flip side of this need for transparency is the need for students, faculty, and others seeking diversity to do what they can to constructively support those engaged in attaining those goals. Criticism and rejection of those charged with attaining and sustaining diversity, without more, is destructive of those goals.

#### **5. Assessment and Evaluation of Diversity Goal Attainment**

WSU is to be commended on its efforts to create comprehensive diversity goals for its community. However, WSU should focus on monitoring, assessing, and evaluating whether it has attained the goals in its strategic plan for diversity. The University needs to examine what has worked in the past, what is working now, and what does not work. Some of those with long experience at WSU believe that the University was more successful in the past at full integration of people of color throughout the University at all levels of responsibility, not just in units focused on diversity. This issue resonates with the "lack of institutional memory" problem. WSU should also create specific strategies for each goal, to be implemented with individual colleges and departments throughout the University.

#### **6. Campus Participation in Diversity Initiatives**

An integral part of diversity planning and initiatives is to elicit participation from the entire University community including students, faculty, staff and administration. An important goal of inclusion should be to foster involvement among a wider range of constituents to discuss and take part in the University's commitment to diversity. Diversity is not just the interest of students of color, but critically depends on the involvement on non-minority students and staff, and the readiness of all concerned to communicate openly and to explore avenues to reach common goals.

#### **7. Community Input on Diversity Initiatives**

Since the harassment allegation in spring 2005, various community organizations and state officials have been concerned with how the University addresses issues of harassment and discrimination on its campus. The concern and dedication of those groups is manifest.

We recommend the University would do well to establish or emphasize its means of communicating its diversity goals and initiatives to the public, and receiving feedback on these issues. Such means could include public forums and discussion groups to discuss issues of diversity. The "Diversity Update" publication from the Office of Equity and Diversity could be made broadly available to interested community organizations.

Various AAPI organizations have shown interest in providing input from AAPI communities who understand the politics of identity and the dynamics of identity politics to assist the University on its diversity initiatives and recruitment of students and faculty to WSU. The University should request feedback and assistance from the community for support in its diversity initiatives. These communication initiatives, moreover, must effectively communicate with the intended recipients. Both parties to any communication must extend effort for that communication to be successful. Where the WSU administration holds out a hand, there must be some willingness to accept that effort - the administration must be allowed to try to "do the right thing" in order to have any chance to succeed.

As noted elsewhere in this report, the students and the administration have been using different means of communicating, and missing each other. To be successful, communication must be a mutual process, and disaffected parties need to be willing to listen and to be heard. (The University's Department of Communication could probably assist in developing a communications strategy that would meet the needs of the targeted groups.)

#### **8. Accountability to the Diversity Strategic Plan**

WSU has adopted a Diversity Strategic Plan which addresses issues of recruitment and retention of faculty, staff and students. The administration has a responsibility to ensure that the strategic plan is implemented in all areas of the University and assess its effectiveness by using benchmarks and targets to show measurable progress in the areas outlined in the strategic plan. Targets could include putting money and resources towards support system for students, implementing the strategic plan and raising money for minority scholarships. Accountability should also include holding deans and department chairs accountable for attaining benchmarks. As noted elsewhere in this report, all members of the Executive Cabinet have responsibilities for the critical mission of diversity.

#### **9. Application of FERPA**

The University should create a plan on how FERPA should be applied in cases of harassment and discrimination. FERPA is discussed in more detail elsewhere in this report. There needs to be a balance between student privacy and public safety. The widely-disseminated "History" of accounts of unaddressed bigotry on campus should be compared against actual records of the Student Conduct Department and, with the assistance of the Attorney General, accounts of whether incidents were investigated, whether suspects were apprehended, and other information regarding the resolution of these incidents should be as widely shared.

## I. Communication

### 1. Campus Dialog Should Occur on Separateness Versus Integration/Assimilation Solutions and Approaches.

The MSS system as currently set up encourages ethnic and racial separateness as a vehicle for support, delivery of services, and creation of a safe place for racial and ethnic minority students. But that very separateness can help create the atmosphere of hypersensitivity discussed elsewhere in this report. For students and faculty of color to have the influence throughout the University that they desire, they must of necessity integrate themselves into the University's power structure. Integration is often considered on a par with inclusion. It is the bringing of people of different racial or ethnic groups into unrestricted and equal association. In U.S. history, it has been the goal of the civil rights movement to break down the barriers of discrimination and segregation separating African-Americans and other traditionally discriminated-against groups from the rest of American society. Higher education integration has been a hallmark of the civil rights movement, with U.S. Supreme Court victories won well before *Brown v. Board of Education*.

*The faculty, administrators, and students of color whom the Task Force interviewed want barriers to opportunity and power removed. At the same time, another stream of intellectual and action-oriented thought has seen the vitality of maintaining separateness for purposes of cultural self-identification, esteem, and enrichment. We do not know the answer to such a fundamental question; nor would we recommend one right answer. But we do call the attention of all parties to this question, and believe it should be discussed openly and in good faith.*

### 2. Inter-departmental Communication

The Task Force observed that communications and interaction between the Office of Student Affairs and the Office of Equity and Diversity could be improved, as could communication and interaction between the Center for Human Rights, Ombudsman Office, Student Conduct Office, and Multicultural Student Services.

### 3. Active Participation and Involvement in the Multicultural Community

The Task Force observed that some multicultural students feel "marginalized," which expression was repeated in a number of contexts. The meaning of this characterization appears to be the perception that the University is also not involving students in participating and providing valuable feedback on student matters. Unfortunately, in the heated rhetoric surrounding the core incident at the University, this term may have suffered inappropriate use. Marginalization usually refers in general to the overt or subvert acts and trends within societies whereby those perceived as lacking function or desirable traits are killed or otherwise excluded from existing systems of social and economic protection, thereby limiting their means for survival. In the instant case, the students of color may mean "moved to the edges," "disregarded," and "disrespected." There is a danger that the sometimes-desired separateness of students of color can bring about re-marginalization, which would be desired by no one. The term "marginalization" has been so ill-used in America today that it has even

been appropriated by affirmative action opponents to describe the alleged plight of European-Americans and reverse discrimination. A major theme of this report is the need for all parties, especially the students and faculty of color, to be cautious with language.

The University should encourage and actively seek participation and feedback from students regarding student issues and policy. For this to be effective and meaningful, students must be prepared to engage in such a dialogue in good faith, and to listen to others equally as much as they demand to be heard themselves. There is a further paradox that should be honestly faced. The existence of the Multicultural Student Services program presents a potential for self-marginalization. It answers the needs of students from more diverse communities to have personalized support as they operate in a mostly-mainstream institution. The physical segregation of the MSS facility, split into different ethnic and other groups within itself, inhibits integration and can exacerbate an emotional sense of "otherness." The Office of Equity and Diversity should examine, with the student body and with community organizations, possibilities for exploring projects and issues of common concern for the full campus, so that diversity issues are not only framed in an "us-them" paradigm taking place only within the confines of the campus.

#### **4. Partnership Programs between Student Affairs and Multicultural Student Services**

The Office of Student Affairs and the Multicultural Student Services should consider establishing a joint partnership in admissions, (such as Alive! and Week of Welcome programs) and student services (career services, educational programming, academic counseling, student leadership etc.). To facilitate this partnership, funding for student positions and full time equivalent personnel slots (FTEs) could be allocated and shared by both the Office of Student Affairs and the Office of Equity and Diversity to fund positions which are mutually beneficial for both offices. Another example of where positions could be shared between two offices is in recruitment of minority students. Recruiters who work in the Office of Admissions could be responsible for recruiting minority students and work closely with the recruitment efforts of the Multicultural Student Services. Community organizations and their resources should be called in as partners and resources in maximizing effective hiring of diversity recruiters and implementation of their goals. This approach would hopefully help alleviate some of the AAPI community's concerns surrounding the core incident and its ramifications.

#### **5. Representative Participation on Diversity Committees**

There should be more student involvement and senior leadership participation on the committee, to increase confidence in the work of the committees. Committees include the Commission of the Status of Minorities, etc. Also, more senior faculty and administrators should be appointed to these committees to assist in institutional changes.

#### **6. Foster Relationships and Understanding among Students**

Students and staff need to make their own statements and actions coherent, rational, and fair. Some of the groups and individuals have operated with hyperbolic rhetoric, posturing, and the rapid-fire statement of irrational and extremist demands, with no regard for issues of

basic fairness. Failure to immediately comply with these demands has led to immediate and extreme condemnation and widespread, dramatic declarations of oppression and injustice. Even some of the administration's attempts to comply with urgently-stated demands have met with the same result. If the activist students and their mentors were accused of bad behavior, they would expect the opportunity to defend themselves and to have a consequence rationally related to their level of culpability. The same standard should apply to anyone. Unreasonable insistence on special status has the potential to denigrate respect and concern for legitimate issues of racial injustice, or to create skepticism toward people articulating such concerns.

#### **7. Update Posters and Materials on Hate Bias**

The posters and materials on hate/bias and discrimination should be updated with new contact information and procedures regarding reporting a discrimination and harassment incident. Materials should be distributed to all student services departments, student organizations, and academic departments. In the past, the materials have been confusing to students. WSU should focus on developing clear and specific policy and guidelines on how it handles discrimination and harassment.

### **J. Curricular Issues**

#### **1. Review the General Education Diversity Requirement [D].**

Review the General Education Diversity [D] requirement and its effectiveness in its intent to address issues of diversity. Review all courses that have been designated to fulfill that requirement.

#### **2. Scholarship v. Activism in the Comparative Ethnic Studies Department: Role Conflict**

Currently, several faculty in the CES Department view their role as a mixture of scholarship and activism. The Chief Academic Officer of the University sees all faculty as having the role of scholarship and academic excellence. The University stakes its reputation on its academics and not its activism. An activist role, therefore, can put practicing faculty into conflict with the goals of the University. Members of the Task Force do not claim to be experts in the issue of activism in cultural studies departments in American universities. Under ideal circumstances, the CES Department would play a key role in evaluating the efficacy of the Diversity Courses and in proposed new and revised ones. It would use the scholarship of its members to inform the open discussions we propose for the University and to warn the parties away from over-heated and mal-used rhetoric. To help achieve a high-functioning CES Department, we recommend that a board of visitors be appointed by the President to obtain the best thinking from the most successful cultural and ethnic studies departments in universities around the country.

#### **2. Utilization of Existing Academic Resources**

Existing University resources should serve the identified needs. For example, the Department of Communications could contribute to enhanced interpersonal and inter-group communication. The new PhD program being implemented, in Intercultural

Communications, in this Department, could also be used to help address issues under discussion.

#### **K. Ownership**

1. More Involvement by Deans in creating and monitoring Diversity Action Plans (noted above)
2. Faculty Involvement on Diversity Initiatives (noted above)
3. Faculty Senate Address Quality and Numerosity Issues Surrounding Diversity Courses.

The Provost should consider charging the curriculum review group to review the current designation of diversity courses. Each college and department should review the University's Strategic Plan for Diversity and incorporate those areas of focus into its own specific diversity action plan. The Provost might consider offering incentives to departments which develop courses that are closer to reflecting current issues which affect students of color. There is also an ideal opportunity for the Ombudsperson and Faculty Chair (who will be the same person) to focus on these issues during the 2005-2006 academic year.

#### **L. Remembering and Sustaining Best Practices**

In regard to issues pertaining to diversity, WSU is a campus that has historically been perceived as extremely white, middle-class, and not easily integrated. A number of initiatives have attempted to address that reputation and reality over the University's history; some acknowledged being more successful than others. As with many human endeavors, the individuals involved in executing the particular programs are often the vital ingredient to their success or lack of success. Some of the individuals involved with these programs over time, such as Ms. Felicia Gaskins in the Office of the Vice President for Equity and Diversity, are still present and available to help the institution promote the most successful approaches. The human resources existing on the campus should be consulted and given a significant amount of input in composing, retaining, and resurrecting successful initiatives.

##### **1. Hate, Bias and Discrimination Report**

This ongoing report on campus climate and relations recommended for the Center for Human Rights should contain all incidents of hate, bias, and discrimination based on race, nationality, gender, sexual orientation, disabilities, etc. The information should contain a brief summary of facts, investigation, findings, and remedies. Pursuant to FERPA, this document should be maintained and monitored by the Center for Human Rights and reviewed periodically by the administration and the Board of Regents. This report should be made public.

##### **2. Preserving Institutional Memory**

To address the loss of institutional memory due to students regularly leaving, the President should appoint an advisory board with former students that would meet

periodically with the Vice President for Equity and Diversity to refresh the University's memory of the student experience, what has worked in the past and what has not worked.

## VIII. TASK FORCE DOES NOT RECOMMEND

### A. Zero Tolerance Policy

There is misunderstanding about what a zero tolerance policy is. Most of the people interviewed by the task force were not able to define it - even those demanding it be implemented. Zero tolerance policies have firm and defined punishments for infractions, sometimes even minor ones, without consideration of the totality of the circumstances, extenuating circumstances, previous infractions, degree of harm, etc. Many zero tolerance policies apply harsh penalties to relatively minor student conduct. For example, under zero-tolerance and other exclusionary policies, when college authorities perceive a child to be violating a school rule or law, they remove him or her from college by suspension or expulsion. In essence, these policies allow for no margin of error - even the most minor student infraction is subject to immediate disciplinary action. Research has found that zero tolerance policies have been disproportionately applied to youth of color, especially African-American youth. A national report, referring to zero tolerance policies as a form of "racial profiling in schools," pointed out that in 1998, African-Americans students comprised 17.1 percent of the student population nationally, but 32.7 percent of those suspended. Other critics have referred to zero tolerance policies as resulting from an attitude of "hyper-vigilance." (Ziming, F.E. (2001). American youth violence. New York, NY: Oxford University Press; Johnson, T., Boyden, J.E., and Pittz, W.J. (2001). Racial profiling and punishment in U.S. public schools: How zero tolerance policies and high stakes testing subvert academic excellence and racial equity. Oakland, CA: Applied Research Center, 16.)

### B. Hate Speech Policy

Caution is advised. Free speech issues are inevitably implicated as a community attempts to control speech, even speech as noxious as hate speech. The fact of this controversy should be faced, and provides a potential subject for discussion in non-crisis study or discussion circles. This is an educational opportunity for the campus community to explore, so that the community is better informed with the fundamental rights of people in the United States in this regard, and the historical consequences of efforts to control speech, in and outside campus settings. (See further related materials in the resources section.)

## IX. FOLLOW-UP AND COMMIT RESOURCES

1. **Follow-up by Administration.** The administration should follow up and commit resources to fulfill the recommendations.
2. **Financial Commitment.** Commitment of financial resources to fulfill the recommendations.

3. **Dissemination.** Dissemination of this report to the university community and interested parties
4. **Accountability.** Accountability/Goal Setting/Assign Tasks Based on Recommendations.
5. **Monitoring.** Monitor, Measure and Evaluate Progress/Report Out on Progress/Make Course Corrections as Necessary to Achieve Goals.
6. **Further Research.**
7. **Impact of budget cuts.** Impact of past budget cuts on equity and diversity efforts. Is there a "scarcity mentality" that has led to such issues not being considered a core function of the University.
8. **Commitment of the Task Force to Remain Involved and Monitor**

*The Task Force is committed to stay involved with the process and the parties at their request, and to monitor implementation of the recommendations.*

#### X. CONCLUDING STATEMENT

The University is in a paradoxical situation, in that despite near-unanimity in core values and goals regarding diversity, there is also a near-universal subjective experience surrounding the core incident of disappointment, betrayal, and distrust. Students of color and administrators have come to an important fork in the road, where legitimacy of needs should not be confused with recriminations. The Task Force is not in any way recommending that the past be put behind everyone and forgotten; rather, we are encouraging the parties to ask themselves what taking the proper path would look like, and to examine what could be achieved if the parties came together to join forces for a common goal.

#### XI. RESOURCES

Appendix 1: The Preliminary Report.....	48
Appendix 2: Written Statement by Ms. A .....	50
Appendix 3: Statement by President Rawlins.....	51
Appendix 4: Flowchart of Student Conduct Process .....	52
Appendix 5: Statement by accused students Mr. D and Mr. E .....	53
Appendix 6: List of allegedly unaddressed racial incidents .....	54
Appendix 7: Portions of Conduct Board Manual .....	62
Appendix 8: Sanctions and Incident Summaries from Conduct Office.....	70
Appendix 9: WSU Compilation of Diversity Accomplishments.....	76



STATE OF WASHINGTON

## HUMAN RIGHTS COMMISSION

711 South Capitol Way, Suite 402 • PO Box 42499 • Olympia, Washington 98504-2499

(360) 753-6770 • 1-800-277-3247 • FAX: 360-756-2782

<http://www.wa.gov/hrc>

### Preliminary Status Report of Human Rights Commission Task Force – WSU

In the early spring of 2005, employees, members, and affiliates of the State Human Rights Commission (HRC) became aware of a controversial situation at the Pullman Campus of Washington State University (WSU), surrounding a series of incidents of apparent racial harassment. After the incident was handled internally by WSU administrators, many students, faculty, and community members remained dissatisfied with the result, believing that justice had not been served. The broader civil rights community, including private groups, individuals, and government entities, expressed urgent concern and a desire to help address the situation.

HRC Executive Director Marc Brenman contacted Vice President for Equity and Diversity Dr. Mike Tate, offering assistance in addressing the situation as a neutral, objective government civil rights agency. While the primary mandate of the HRC is to address specific allegations of violations of the state law against discrimination (RCW 49.60), the Executive Director proposed that the HRC might be able to play a role pursuant to its ability to further mutual goals with public and private agencies and individuals toward eliminating discrimination. It is in this cooperative, outreach capacity, rather than its investigatory, enforcement capacity, that the HRC is addressing the situation.

Accordingly, WSU invited the HRC to lead a task force to take a fresh look at the situation and make recommendations. On behalf of the HRC, Mr. Brenman formed a task force, including HRC Chair Reiko Callner, Thi Huynh, Commissioner on the State Commission on Asian and Pacific American Affairs (CAPAA), advisory members, and Mr. Brenman, as coordinator.

The task force has proceeded in close contact with the Office of the Governor and with CAPAA, which exists under the Office of the Governor. Before making formal recommendations, the task force will also solicit input from various community-based organizations.

Ms. Callner, Mr. Huynh, and Mr. Brenman, visited the WSU campus on May 1<sup>st</sup> and 2<sup>nd</sup>, in an accelerated outreach schedule. Efforts were made to respond to the frustration expressed within the WSU community. The task force worked from early morning into the night to interview as many key people as possible - over 30 - in the WSU community who were affected by the controversy. Among those interviewed included the principal students involved in the underlying incidents, faculty, student leaders in a variety of organizations, staff, and administrators.

Those interviewed were questioned as to their views of the immediate situation and with respect to larger aspects of the community "climate" at WSU. In the course of gathering information, all participants were cooperative and readily provided the task force with relevant documents and materials when requested.

The information gathered has led to a more complete understanding of the dynamics leading to the current sense of crisis. The task force observed many commonly-voiced areas of concern, including a lack of transparency, trust in the system, and clear articulation of goals. There is great potential for relationship building and improvement in areas of misconception and communication-barriers that inhibit a more fully integrated campus experience. The task force is committed to elaborating on these issues and will be developing recommendations and referrals for resources in time for the upcoming Board of Regents meeting in June.

While frustration, anger, and a sense of misunderstanding have been voiced, the task force outreach team gained the impression from this early, intense immersion that overall, this is a university community dedicated to the best possible potential of each of its constituents. Though communication lapses, misperceptions and historical issues have created mistrust, and people have experienced pain in the process, it is evident to the outreach members of the task force that the WSU constituents share a strong desire for justice and for fair treatment. They are optimistic that change for the better is possible, and under the right conditions, are willing to work together to facilitate that change. The task force is hopeful that, thanks to the good will of all the parties, solutions can be found to mend relationships and rebuild trust. Many individuals and groups perceiving themselves deeply at odds with each other actually share common sentiments. It is therefore important to have channels of communication available in which these groups may effectively express these common concerns.

The task force is dedicated to remaining involved with the WSU community in this endeavor. We intend to deliver a full report on our observations from the early outreach experience, including a description of some of the broader themes contributing to what has led to some failures in the present situation.

We shall also deliver a thoughtful set of recommendations for implementation to the various players in the WSU community beyond the administration, including various commissions, departments, and student organizations. Among the resources made available will be community organizations, sister educational organizations, individuals, and written/net materials. We will strive to provide the tools and recommendations in this ongoing process of genuine inclusion and respect for all aspects of the WSU family.

We applaud the community's readiness to acknowledge the need for assistance and openness to change where change is plainly needed. Those encountered have manifested a readiness to shift their energy from disappointment and recrimination to a renewed sense of community and dedication, which reflects great potential moral courage and magnanimity. The task force appreciates the kindness and cooperation of all.

## Testimony of incidents

First day: (1<sup>st</sup> semester sometime)

was standing in front of me while I was at the front desk, sitting, and talking to him about a topic of some sort. I was working at the time and I don't remember what the time was. A group of white male guys, who looked like fraternity brothers, walked by and made some animal noises, danced around a little bit, and made some "minstrel" type movements at me. I felt like an animal in the zoo and that the guys were mimicking me as if I was a monkey doing something odd or funny.

Second day (First of second semester)

I was sitting at the front desk and the group of white guys walks by again and starts pounding against the window to get my attention. They keep making noises to get my attention. One of them is laughing. The others are just standing and the one guy who is trying to get my attention; points to his eyes and makes a motion to indicate that I have "chinky eyes". I shake my head, trying to ignore it...They laugh and walk off...making noises as they keep walking down the hallway.

Third day (2<sup>nd</sup> day of second semester)

The third time, the same guys walk in the same direction as the time before. The taller one of the group pounds the window next to my window to get my attention. I ignore them. The guy says, "Just look at me real quick please?" "Please look at me", ... or something to this extent. So I finally look at him and he motions to his eyes to imply "I"...motions the heart sign, and points at me... His friends laugh again and they walk away. They make more noises as they go down the hallway.

Fourth day (3<sup>rd</sup> day of second semester)

This time the same group of guys walks by again IN THE SAME DIRECTION. One of the guys says, "Hey it's that girl again". The taller guy tries to get my attention but this time I don't give it to him and they all start making noises at me and laugh. They all walk on while STILL MAKING NOISES.

Fifth day (4<sup>th</sup> day of the semester)

is working while I'm working and while we're just both at the computers, the group walks by again but this time in the opposite direction. The shorter one this time, stops and makes weird screeching/animal type noises at me while waving his hands wildly to get my attention. Since I didn't give him my full attention the first time, he continues to make noises and comes to the window next to me and starts to wave his hands and make more noises at me. The rest of the guys are laughing and walking while the shortest guy keeps moving alongside the window and sees me turn to talk to I tell to look at the window and he sees her looking and he stops and waves.

6<sup>th</sup> Day when building employees and my friends, about 15 of them are waiting around to see if the guys come again... A group of white guys walk by but the short one isn't with them or at least I'm guessing cuz I don't really recognize the other guys. They look into the center and keep walking quietly.

DES 2-28-05

# Rawlins: students have right of due process

V. Lane Rawlins  
President, WSU  
Guest commentary

I was away from campus for a family responsibility last week on the day that there was a demonstration in the French Administration Building and a set of demands was presented to my executive assistant. In the nearly 15 years that I have served as a president of a university, I have never turned down a request for a meeting with students and I will certainly meet with a group of students, and discuss their demands. I believe that most of these students are serious in their desire to see WSU become a place that is more accepting of all people.

On a personal level, I have always rejected and fought against prejudice and harassment. These things are especially despicable when they are aimed at people because of their religion, ethnicity, race, nationality, religion or sexual orientation. This is not an academic matter for me. My values have been reinforced by my personal experiences which have strengthened my commitment to support others. It has always been my belief that we need to protect people from all forms of discrimination and harassment. I have tried to act on this belief whenever the challenge came my way. There is no aspect of my responsibilities as presi-

dent of this university that is more important than this, and I am proud of my efforts in this regard.

We all agree that we must fight hard for justice, and pursue rules and processes that protect us. But we must be careful that we do not sacrifice exactly what we are trying to protect in the process. Do we protect people from fear by threatening others? Do we make ourselves safer by threatening the safety of others? Do we protect our privacy by invading the privacy of others?

*... harassing people for harassing others is both destructive and counterproductive.*

We cannot tolerate harassment of those who stand accused of misbehavior. And yet, that is what we have seen happening on our campus this past week. Posters, signs and remarks targeting accused students violate the principles of our university, and the very values sought to be protected, namely the right to be treated fairly and with respect.

The students who have been accused of conduct violations have the right to due process, which, after all, is one of the fundamental rights upon which our society was built.

See RAWLINS, Page 19

## RAWLINS

continued from page 17

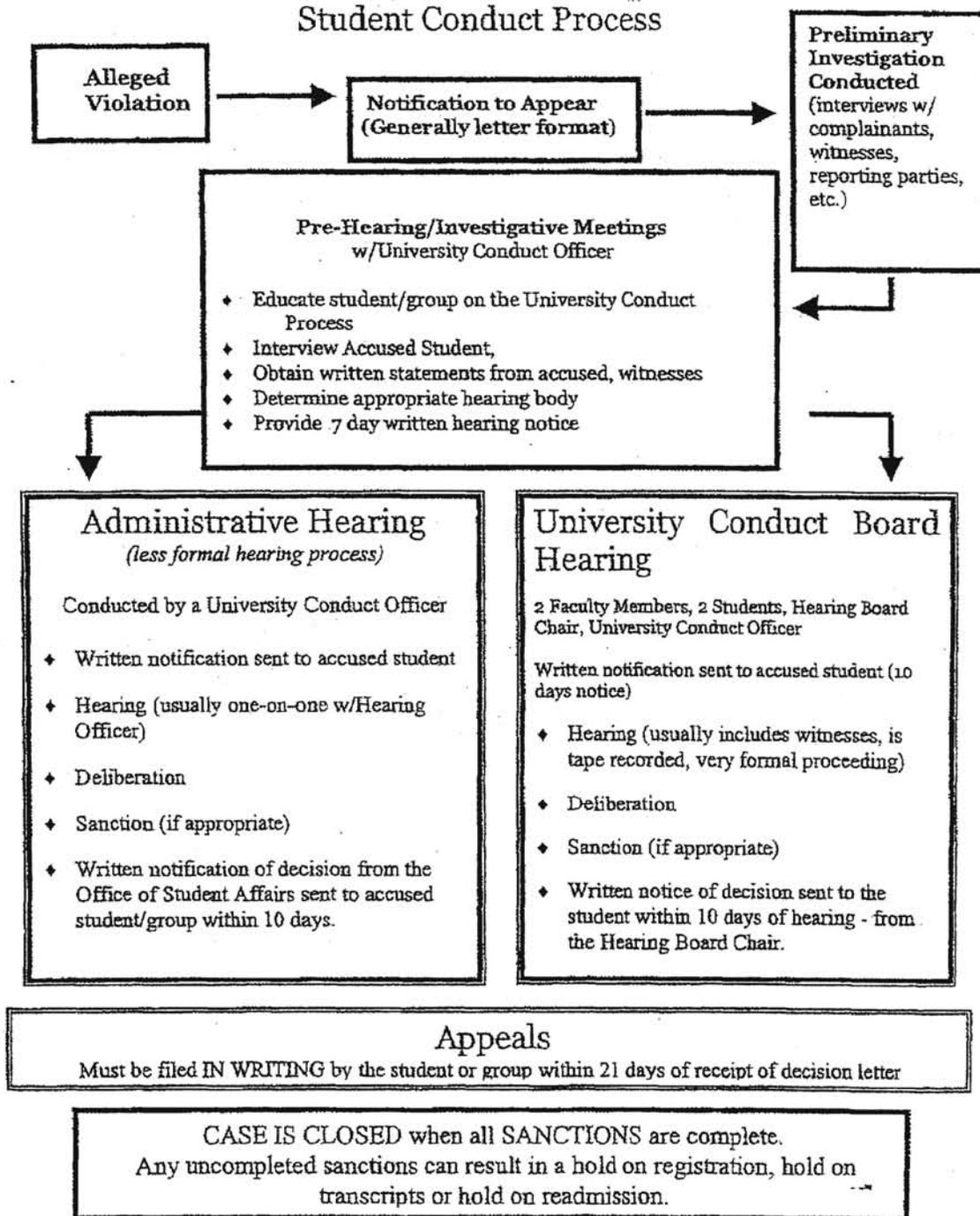
No finding has been made that the students in question are guilty of harassment. But even were that not the case, harassing people for harassing others is both destructive and counterproductive.

Our dedication to our highest and best principles can be most sorely tested when emotions are running high. If we truly believe that it is important to create and maintain a community of trust and respect, we must all strive to live that principle every day.

Our campus climate survey showed that we have some problems but a strong majority of our students, staff, and faculty, believe that this is a good and caring community. I know that many of you have looked at that survey, and I encourage all of you to review it again.

It shows that we have some strengths and some weaknesses. It is my deepest hope that together we can build on our strengths and address our weaknesses in order to create an environment where all can feel safe and where trust and respect can flourish.

## Washington State University Student Conduct Process



The following is a statement from [Mr. D] and [Mr. E] regarding the harassment issues that have been in the news over the past couple of weeks. It is a personal statement from the two student-athletes and is not a statement from the Washington State University Athletics Department nor is it a statement from University Administration.

The purpose of this statement is to give the public an opportunity to hear the truth as justified by the University Police Department and the Student Conduct Board.

We are pleased that both the investigation by the WSU Police Department and the review by the University's Student Conduct Board have exonerated us from guilt in the events that led to us being accused of harassment.

We feel it is also important to note that any interaction we had with members of the Multicultural Center was intended to be friendly with a group of people we passed by regularly and, as found by the University Student Conduct Board, did not warrant a harassment charge.

At no time did we make gestures, comments or noises directed at anyone that were racially motivated. We have a racially diverse team and group of friends, both back home and in Pullman.

We are upset by the accusations of racism, the damage to our reputations and the hurtful way our names and pictures have been associated with these events. We recognize a student in the Multicultural Center was offended and for that we are apologetic. However, again we maintain our actions were not racially offensive or harassing in nature and we were only attempting to be friendly with a group of people.

We are hopeful that this issue can become a page of the past and that we can concentrate on being student-athletes at Washington State University.

[Mr. D] and [Mr. E]  
3-2-05

We, the students of Washington State University, recognize the history of racism, sexism, and homophobia on our campus. We see the recent Multicultural Student Services harassment incidents as yet another crime that is symptomatic of an oppressive campus climate. These crimes have gone on unchallenged by the university; fostering hate and discrimination amongst the students.

Here is a short history of WSU according to its marginalized students:

Early 1990s: East Indian woman commits suicide because of racial harassment on campus

1994: Column in Evergreen spurs on racial stereotypes of Native Americans (Tuesday, January 25, 1994 Neal MacDonald: The man and the Letters. Subheadline: Native American Tuition Break guilt-driven.)

1994: March to French Ad by the people of color community to voice anger on low numbers of faculty of color

1995: Sorority caught objectifying Native American culture as part of their initiation process

1995: Two African American males beaten by a fraternity

1996: 18 African American faculty leave WSU, now called the Black Exodus

1997: Hate letters posted on a Jewish faculty's door and the Chicana/o/Latina/o center Wilson hall

1998: Racial slurs against African Americans found written on walls in Rogers Hall

1998: Racial slurs against African Americans found written on walls in the Veterinary building.

1999: A gay freshman living in Stephenson Hall is severely harassed and forced move out of his dorm because of repeated threats to his safety.

1999: An Asian American is beaten on campus while called numerous racial slurs

1999: Students organize the Brown Flu and demonstrate in front of the President's home

2000: Anti-Gay leaflets posted around campus during summer semester

2000: Fall semester. An African American student severely beaten (teeth kicked out) on Greek row

2000: Students protest beating and overall campus climate and administration calls for a committee on campus climate to decide what to do.

2000: An anonymous caller left a message at the GLBTA center, noting that he had, "found a faggot" on his doorstep and that someone should come and get the "faggot" so he didn't have to "hang his ass from a tree."

2001: The week following the 9-11 attacks in New York and Washington DC several Middle Eastern students were harassed. One male student with a cast on his foot almost beaten by a two white students yelling racial slurs, student yells for help and a friend intervenes. Campus climate is dangerous for Middle Eastern students, prompting several to leave WSU.

2001: Fall semester. Diversity Kick-off- the resolution that came out of the committee on campus climate is held at the Beasley Coliseum; included the signing of a "diversity pledge" and free hot dogs.

2001: In response to empty rhetoric, concerned students hold a silent demonstration at the Diversity Kickoff, holding picket signs and wearing white t-shirts with the word "token"

written on them. The students pass out a flyer with information about why the demonstration that was to be published in the Daily Evergreen but was not published until two days later.

2002: Spring Semester, "WSU = fag lovers" spray painted on Glen Terrell mall. No suspects named or apprehended.

2002: Spring semester: "N\*\*\*\*\* go home" is carved into an African American student's door in Orton Hall.

2002: Flyering campaign immediately organized against rash of hate crimes, with flyers like "Fags bash Back." Students, faculty, and staff join in the activity receiving permission to hang flyers in several buildings around campus.

2002: While hanging signs in Todd Hall, two students were confronted by two suited white males, asking if they had permission to hang signs, quoted saying, "I've been following your people and tearing these down. This isn't about homophobia, it's about building procedures."

2002: An ROTC student ripped down "Fags bash Back" flyers hung at the Avery Building while in sight of two people participating in the flyering campaign. ROTC student was reported to have said, "Fuck them," while in the act of tearing down the sign.

2002: A faculty member caught up with ROTC student tearing down signs to ask why he had done it. The student was angry at being questioned and filed a formal assault charge because the faculty member touched his sleeve.

2002: The same ROTC student was verbally reprimanded for inappropriate conduct within ROTC for the same incident. ROTC admitted that the student was known to be, "a bit of a hot head"

2002: Spring Semester; in response to the flyering campaign, a group identifying themselves as the, "Center for a Disease Free America and the White Students Union" hung signs that read, "Fags don't bash back when they're dead." The signs were reported to a bias hotline by concerned students, but with no suspects were named or apprehended.

2002: Spring Semester: Rawlins administration holds a student forum to discuss tuition hikes and concerned students and staff attend in order to discuss recent hate crimes. When asked about the campus climate, Rawlins stated that he... (page cut-off)... members suggested ideas that her class had come up with to help deal with the problems the community was facing, she was told, "shame on you!" for not knowing what the administration was doing about the situation, referring to the conclusion that the committee on campus climate had come up with.

2002: Summer semester, a new round of "Center for a Disease Free America and the White Students Union" signs went up, these signs read, "People wearing rainbows make great targets." Again, nothing happened.

2002: Fall semester; "I LOVE DICKS" and "FAGS" spray-painted a newly renovated Sigma-Nu Fraternity House

2002: Fall Semester; a few weeks into the school year, African American student groups and WSU's multicultural community held a dance at a local club called the Attic in downtown Pullman. Police were called in to deal with a fight at the club as the conflicting people were brought downstairs to the lobby and WSU faculty of color were attempting to mediate and control the conflict, police came in and pepper-sprayed the conflicting parties and the faculty and the pepper spray permeated the entire club.

2002: Fall semester, over 300 WSU students affected by the pepper spray claim that police used excessive force to handle the incident, many innocent victims came to a forum organized by the YWCA with the WSU administration, the city Mayor and the city Police Chief. A few of the victims had hospital bills that they couldn't pay for.

2002: Fall semester, Trouble over in Greek row as a fraternity invites a sorority and their freshman pledges over for a "party." Several of the sorority members start feeling queasy and go to the Pullman Memorial Hospital to find out what's wrong. Blood tests reveal that there's rophenal or date rape drugs in their system. It appeared that the fraternity members had spiked the punch as they report that the fraternity members did not drink from the punch bowl. One sorority member did not drink from the punch bowl. One sorority member who did not make it to the hospital was reportedly raped by a member host fraternity. The WSU administration blocks efforts to publish the story in the Daily Evergreen. The Fraternity's national chapter gives the WSU chapter the boot, nothing is done by the WSU administration to reprimand or make example of the incident.

2002: Fall semester; Students, faculty, and staff join together to demonstrate against the second annual Diversity Celebration, The demonstration involves a silent protest with armbands, a street theatre component, media liaisons, a public reading of student demands inside the Celebration and an orchestrated walk out at the beginning of President V. Lane Rawlins address. The demonstration was well organized and it was the last annual diversity celebration.

2003: Summer semester; Multicultural Student Services is moved from the Office of Human Relations and Diversity to Student affairs with no input from students. Counselors and students, after repeated meetings with the vice-provost for student affairs, demanded to be notified and consulted before another such move were to take place. During this move, the multicultural recruiter positions were moved out of MSS and into the admissions office in efforts to "streamline" the admissions office. At this time, only the Asian American and Pacific Islander recruiter position is filled. The African American recruiter had not been filled for a year, and the Native American and Chicana/o/Latina/o positions had not been occupied since the end of the 2002 Fall semester.

2003: Fall semester; eggs are thrown by a Greek row fraternity at African American students during the Coalition for Women Student's Take Back the Night march; some nearly missing small children.

2003: Fall semester; a young African American woman has a noose hung above her door as a "joke" by her white dorm-mates.

2004: Spring semester: The last of the multicultural recruiters' contract expires and it takes a year for two out of the four positions to be filled- (as of now, there has been no African American recruiter for WSU for over two years and no Asian American and Pacific Islander recruiter for over a year.)

2004: Fall semester; President Rawlins creates the Office of Equity and Diversity (OED) and appoints Dr. Michael Tate as the vice-provost- within one month MSS, the WRC, CHR, and many other "diverse" offices are take over by the OED. There is no input from the staff or students.

2004: Fall semester; concerned students meet with Tate to discuss the role of the OED with students of color and the vice-provost uses consistent comparisons about the inter-workings of the University and those of Boeing.

2004-2005: Asian American women are harassed with racial comments, animal noises, dancing, and lewd gestures in front of the doors to the multicultural center and the administration refuses to release names or any other information to those who were terrorized.

As students, we want the best for the WSU community, for ourselves, for the future, and for those who came before us. All the things that have been demanded in the past are still being asked for because oppression is still a problem. The ways in which the university deals/does not deal with instances of racism, sexism, and homophobia is not, and has never been, sufficient. The following is a list of demands that must be instituted immediately in order to address this oppressive campus climate.

- Expulsion of the Victimiziers as a Change in Policy

A Zero-Tolerance policy towards acts of discrimination and harassment must be implemented and effective immediately. This policy must be based on the definition of violence outlined in the Council on Campus Climate Plan of Action (2001). According to this Zero-Tolerance policy, the perpetrators in the MSS harassment incidences must be expelled immediately. In the interest of justice, these perpetrators must be identified and confronted by those who were terrorized.

The 2001 President's Committee on Campus Climate defines violence as "words and actions that hurt people, misuse of power and control or doing physical, sexual or psychological harm to others. Violence is a learned behavior." A zero-tolerance policy will state that conduct violators must have right to a public trial in which the student conduct board acts as a jury. In this "trial" a defense and a prosecution team must be available to represent the reporting parties and the accused. If a student is found guilty of harassment, discrimination, and/or hate and bias acts on the basis of race, sex, color, creed, sexuality, or national origin they will automatically be expelled from the university.

If the terrorists in the MSS harassment incidences of Spring 2005 are sanctioned with anything less than expulsion, the university would be committing a gross injustice by compromising the safety of the multicultural community as well as the perpetrators.

For a campus that presents itself as, "world-class, face-to-face," we currently have no policies that address the specifics of discrimination and harassment without the act of physical violence. Why must marginalized students wait until they are physically assaulted for the university to properly sanction those who violently display lewd and hateful student conduct? The perpetrators said that they meant their actions to be "jokes," and they, "didn't mean for it to be racial." However, saying "Asians take all the good jobs," is, in fact, racial. In 1983 Vincent Chin was beaten to death by a white man named Ronald Ebens who said that he was tired of "Asians taking all the jobs." Slanting ones eyes while staring into Asian American faces has everything to do with

race and can be historically traced to late-1800s minstrelsy shows and images of Asian Americans in popular culture.

The terrorists chose the Multicultural Student Center as their primary target for harassment for a reason. The harassment and psychological violence inflicted upon front desk workers was built on a set of assumptions fostered by a hostile and oppressive university campus climate. First, the fact that the perpetrators chose to harass individuals in front of the multicultural student center suggests a feeling of resentment towards students of color by these individuals. Secondly, these terrorists consistently harassed Asian American women based on the racist assumptions of passivity among Asian American women, and also the assumption that they would not be caught. Each time those white males came back they terrorized Asian American women at the front desk thinking that the women would never report, and the fact that they came back that many times suggests that they did not fear sanction. Finally, the fact that this incident was not reported until at least three months of harassment shows that students of color at WSU are desensitized to overt racism. We live in a place where racial slurs, bigotry, and more subtle forms of racism are

Asian women at Washington State University are no longer safe. The news has shown pictures of one woman who has reported the incidents. The Evergreen has repeatedly published the name of the same one woman who has reported the violence. She is not allowed to know the names of those individuals reported to the student conduct board, but they now know her. Now all students, with similar feelings about students of color and Asian Americans in particular can make her a target for their feelings of hatred. This is particularly apparent in the fact that a group of white males, who are not the ones that have been reported, came by MSS last week to intimidate this woman. Because we live in a society where the dominant rhetoric poses that all Asians "are the same/ look alike," the entire community is at risk of backlash for the reporting of the terror. And, because there is no zero-tolerance policy in place, the perpetrators will still have full access to the university, to their accusers, and to other Asian American Women at WSU.

The Student Conduct Board representative official, Elaine Voss, stated that in instances such as these, students receive sanctions such as community service. If the individuals were caught harassing students once then some form of community service would be in order. If they were caught a second time education would definitely be needed, but these so-called "non-racial" "jokes" were repeated twice a week, every week, for a semester and a half. That is almost six months; averaging out to 34 separate incidences of harassment (and that is just those incidences in front of MSS). Surely these repeated offenses justify a harsher university sanction.

- **Guaranteed Autonomy and Funding**

Each student center must have guaranteed autonomy now, during, and after the potential CUB renovation project; never to lose the minimum square footage which

they currently obtain. In order to foster diversity, marginalized peoples must have a safe space to gain effective role-models and leadership experiences. There must now and always be a space for marginalized students, and specifically students of color and GLBT students, at WSU. These students must have this safe space during the CUB renovation.

In addition, the recruitment efforts for these centers must be guaranteed full funding from the University. Any move or policy that would threaten this autonomy must be voted on by the major attendees of the student centers. Full funding will consistently reinforce university's commitment to diversity. By increasing resources for student run recruitment efforts the university assists in diversifying the student body, while simultaneously encouraging interested students to apply, and then stay, at WSU.

- Diversification of admissions and upper-level administration

The positions of the multicultural admissions specialists must be filled no later than April 31, 2005 with no exceptions. In addition, the entire admissions staff, as well as all of the vice-provosts and provosts, should consistently and actively recruit, collaborate, and participate in student run recruitment efforts per the request of student organizers. According to the racism subcommittee report (Council on Campus Climate Plan of Action; Recommendations, Sol. 1), "Diversity-related programs and events initiated and funded by students of color at WSU should receive support from the central administration. Financial support from University funds should be earmarked... Support from the administration as opposed to ASWSU is a significant show of commitment to valuable diversity related programming as well as an appreciation for the students involved."

In 2002, the Office of State Superintendent of Public Instruction recognized WSU as a model program for the recruitment and retention of students of color. Currently, in 2005, there have been no recruiters in the Asian American, Pacific Islander American and African American communities for over a year and a half. That is 12 months, and two years worth of potential WSU students of Asian, Pacific Islander, or African American descent will not attend WSU. Currently, students who are interested in the Fall 2005 semester are receiving letters of acceptance. They need to know what WSU can offer students of color.

If the university has these positions filled by the end of April the new admissions counselors will still have one month to start talking to students about attending WSU. They will have time this summer to train for the Fall admissions rush. But, more importantly, these individuals will have time to meet with students of color and to familiarize themselves with the resources provided by other students at this university. They will also have time to go to community functions in their targeted geographic areas in order to make contacts with high school seniors as soon as possible. Finally, the admissions counselors will assist with alive! and other summer programs for underprivileged youth. Facilitating introductions between current and

new students increases the probability of retention by initiating personal quality contacts.

The current students must always be supported in their recruitment efforts. The admissions staff should always recruit and attend these conferences in order to foster relationships with applicants as well as student leaders. This practice will also familiarize all of the admissions staff with the services and programs provided to underrepresented students. It is important for the multicultural recruiters to do this, but recruiters from other areas must also attend in case they are asked questions about these services and/or programs. For example, if a white recruiter works in a mostly white central Washington district it would not seem like participation in these conferences would matter, but in that district there is probably at least one school that is mostly Latino/a/Chicana/o. It would be important for the recruiter to talk to those students about the CASHE conference in order to increase over-all enrollment of under-represented groups.

The provosts and vice-provosts must be required to attend a recruitment and/or informational and/or empowerment conferences as well as one forum, workshop, and/or speaker series per semester. This practice allows university officials a certain kind of diversity training that involves direct interaction with marginalized students on campus. In addition, this practiced commitment to diversity will familiarize administrators, first hand, about the services, history, and issues particular to students of color, and GLBT students in higher education.

- Diversity Proficiency Requirement

A restructuring of the general education requirements must take place immediately in order to institute diversity proficiency amongst the student population. Another Diversity requirement must be taken by the students in order to demonstrate proficiency in working with diverse populations. Diversity classes must also institute a maximum cap of thirty students in each class.

Instituting another diversity requirement will ensure that students are proficient in diversity-related issues and will assist in addressing the hostile campus climate which we now have. Diversity proficiency courses also serve as preventative training for those who might also choose to lash out at marginalized groups through the use of violence.

Thirty students or less is more conducive to an interacting learning environment in the classroom, and particularly when learning about diversity-related issues.

- The True Task for the Committee on Race and Ethnicity

In 2001 the Council on Campus Climate assessed the difficult issues students deal with at Washington State University and made recommendations for these issues in their Plan of Action. Today, the ills of our campus remain the same and the strategies for addressing them in this document remain relevant. Thus, the task for the President's Commission on Race and Ethnicity is not to *re-assess* or *re-recommend*, but to oversee the implementation of this Plan of Action, and specifically those relating to race and violence.

The President's Commission on Race and Ethnicity should oversee implementations of the Plan of Action to make sure the new statutes are addressing the specific needs of racialized communities. Similarly, the Commission on the Status of Women, and a commission for the GLBTQ community (which, has yet to be instituted), must examine the sub-committee section documents of the Plan of Action related to their communities and examine the ways in which they may or may not be helpful in creating a hate-free campus climate.

This university is a land-grant institution whose motto is "world-class, face-to-face." Oppressed communities of students are on fliers, websites, and promotional materials, in feeble attempts for the university to show that it values diversity. But when hate and bias incidences of discrimination or harassment occur we are not protected. Students have demanded protection over the years, but they have never been taken seriously. Their demands have been submitted over and over again and the only action that the university has taken was to create committees, commissions, and councils. Even when these groups create formal documents for action their plans are not implemented. What has to happen for the university to hear the voice of students? If Washington State University really valued diversity it would implement these demands immediately.

Investigation Final Report  
Complaint No. 201078  
Complainant: Anna E. Mitson

### Complaint Summary

On December 14, 2010, Ms. Anna E. Mitson (Ms. Mitson, or the Complainant), an employee at Washington State University (WSU) Tri-Cities, telephoned the Office for Equal Opportunity (OEO), and expressed her concern that Mr. Jaime Contreras, Director (Mr. Contreras, or the Respondent), Student Affairs, WSU Tri-Cities, her direct supervisor, may have engaged in conduct that violated the WSU Policy Prohibiting Discrimination and Sexual Harassment (the WSU Policy Prohibiting Discrimination and Sexual Harassment, or the Policy). Ms. Mitson did not file a complaint; however, based on her concerns, OEO opened an investigation of the Respondent's treatment of her. Ms. Mitson's official title is Student Services Supervisor in Student Affairs; however, her working title is Assistant Director.

### Allegations

Ms. Mitson alleged the following specific acts:

1. On approximately five to six occasions, the Respondent referred to Ms. Mitson as "Tokyo Rose,"<sup>1</sup> in reference to her Japanese heritage, instead of using her name.
2. On more than one occasion, the Respondent referred to Ms. Mitson as "Gojira", in reference to her Japanese heritage, instead of using her name. "Gojira" is the Japanese name for the film monster known as "Godzilla" in the United States.
3. On one occasion, the Respondent referred to Ms. Mitson as a "Nip,"<sup>2</sup> in reference to her Japanese heritage, instead of using her name.
4. On or about December 2010, the Respondent told Ms. Mitson to enter another employee's office for a work-related conversation by saying, "Get your Chinese ass in here", notwithstanding that Ms. Mitson is of Japanese and not Chinese heritage.

<sup>1</sup>"Tokyo Rose" was a U.S. citizen of Japanese heritage who, during World War II, made broadcasts for the Japanese Government in English, which were intended to break the morale of U.S. soldiers fighting Japanese forces. After the war, she was prosecuted by the U.S. Government for treason and war crimes.

<sup>2</sup>"Nip" is an abbreviated form of the word Nipponese, meaning Japanese; however, it was a derogatory term used in the United States during World War II to refer to Japanese persons.

5. On at least one occasion, the Respondent referred to a WSU student of Chinese origin as a "Stupid Chinaman." "Chinaman" is a derogatory term used in the United States to refer to persons of Chinese origin, dating back to the years of high Chinese immigration to the United States.
6. On at least one occasion, the Respondent referred to a WSU student of Chinese origin as "General Mao," instead of using his name. Ms. Mitson explained that this was a reference to General Mao Zhe-Tung, founder of the Chinese Communist Party and the People's Republic of China and that the Respondent meant to suggest that the student was acting dictatorially.
7. On at least one occasion, the Respondent referred to an African American employee as "Kunta Kinte,"<sup>1</sup> instead of using his name.
8. On at least one occasion, the Respondent referred to an African American employee as "Thurgood Marshall,"<sup>2</sup> instead of using his name.
9. In reference to his Mexican American heritage, on several occasions, the Respondent referred to himself with derogatory racial or ethnic terms.
10. During the period, October to December 2010, provoked by his belief that Ms. Mitson, in her job as advisor to student organizations, had not protected his daughter, Ms. Amber Contreras (Ms. Contreras), a WSU Tri-Cities undergraduate student, in a dispute with another undergraduate student, Ms. Lynn Collins (Ms. Collins), the Respondent retaliated against Ms. Mitson by:
  - a. Making unfounded direct statements and/or strongly suggestive statements to his supervisor, Dr. James R. Pratt, Vice Chancellor (Vice Chancellor Pratt), WSU Tri-Cities, and several employees, including subordinates of Mr. Contreras, that Ms. Mitson was having an extra-marital affair with a subordinate employee;
  - b. Making unfounded statements to his supervisor, Vice Chancellor Pratt, and some of Mr. Contreras' subordinates, that Ms. Mitson was a poor manager;
  - c. Removing a program from her responsibility.
11. On or about October 2010, the Respondent opened an investigation of Ms. Collins for the improper advising of fellow students regarding the taking or not taking of certain courses, which Ms. Mitson alleged was mere pretext for retaliation against Ms. Collins for her conflict with Ms. Contreras, which the Respondent regarded as bullying.

<sup>1</sup> "Kunta Kinte" is a reference to an African character in the Alex Haley novel, Roots.

<sup>2</sup> Thurgood Marshall was, among other things, the first justice named to the U.S. Supreme Court who was African American.

### University Policy at Issue

WSU Policy Prohibiting Discrimination and Sexual Harassment, Executive Policy #15.

### Interviewees

During the course of the investigation, OEO conducted interviews of 16 individuals, including the Complainant and the Respondent, as follows:

1. Ms. Eddie Balint, Program Coordinator, WSU Tri-Cities;
2. Ms. Karina Barajas, Human Resource Analyst (Ms. Barajas), Human Resource Services (HRS), WSU Tri-Cities;
3. Mr. Evan Buelt, Admissions Counselor and former student, WSU Tri-Cities;
4. Dr. Vicky Carwein, Chancellor (Chancellor Carwein), WSU Tri-Cities;
5. Ms. Collins;
6. Mr. Contreras;
7. Ms. John M. Curtiss, Assistant Director, Student Affairs, WSU Tri-Cities;
8. Ms. Christina M. Davis, Academic Coordinator (Ms. Davis), WSU Tri-Cities;
9. Ms. Kallie N. Davis, Student Affairs Advisor/Counselor, WSU Tri-Cities;
10. Ms. Lindsay Lightner, Academic Coordinator, WSU Tri-Cities;
11. Ms. Linda L. Miller, Student Affairs Officer 2, WSU Tri-Cities;
12. Ms. Mitson;
13. Ms. Amanda L. O'Leary, Student Affairs Advisor/Counselor (Ms. O'Leary), WSU Tri-Cities;
14. Vice Chancellor Pratt;
15. Ms. Kristen M. Wilson, Curriculum Advisor, WSU Tri-Cities;
16. Ms. Zannatha M. Wilson, Human Resource Consultant, HRS.

### Timeline of Events Prior to Investigation

Statements from the 16 interviewees allowed OEO investigators to establish dates of significant events, which are succinctly described by the following timeline (all dates shown are "on or about" the date indicated):

**February 2009:** The Respondent, who is Ms. Mitson's supervisor, begins making racial and/or ethnic comments in the workplace in reference to himself and others, including Ms. Mitson.

**May 7, 2010:** The Respondent alleged that Ms. Mitson danced inappropriately and provocatively with a female student for which the Respondent verbally reprimanded Ms. Mitson.

**May 24, 2010:** The Respondent continues attempting to obtain a favorable position reclassification for Ms. Mitson.

August 12, 2010: HRS approves Ms. Mitson's position reclassification from an Admissions Counselor to a Student Services Supervisor with an annual salary increase of \$6,151.44.

September 2010: Ms. Mitson is informed by a co-worker that rumors are circulating within the unit that she is having an extra-marital affair with a subordinate employee.

October 5, 2010: Mr. Contreras' daughter resigns from her position as Senator Pro-Tempore with the Associated Students of Washington State University Tri-Cities (ASWSUTC) after a conflict with another ASWSUTC Senator.

October 5, 2010: The Respondent asks Ms. Mitson to intervene on his daughter's behalf. Ms. Mitson alleges that her professional relationship with the Respondent deteriorates immediately after this date because she does not intervene.

October 7, 2010: The Respondent removes the Ambassadors program from Ms. Mitson's work duties.

October 11, 2010: A co-worker informs Ms. Mitson that the Respondent stated in front of her and another co-worker that he has informed Vice Chancellor Pratt about the alleged affair she is having with a subordinate.

October 11 to 22, 2010: On multiple occasions, Ms. Mitson is told by three co-workers that the Respondent is publicly criticizing her work performance stating that Ms. Mitson is a poor manager.

November 2010: On two occasions, the Respondent makes inquiries of Ms. Barajas about Ms. Mitson's position type, possible reversion rights, and separation notification period. The Respondent explains to Ms. Barajas that he and Vice Chancellor Pratt are "working on something."

December 2, 2010: OEO receives an anonymous complaint about the Respondent alleging the Respondent is creating a hostile work environment for WSU Tri-Cities Student Affairs staff and students. The anonymous complaint requests an investigation of the Respondent and his workplace conduct. OEO investigators subsequently learn that the anonymous complaint was authored by Ms. Davis.

#### Summary of Investigation

The Respondent is the Director of Student Affairs at WSU Tri-Cities. He has supervised Ms. Mitson since March 2009. Ms. Mitson and the Respondent had some personal interaction outside work, but they differ on the extent of that relationship. Ms. Mitson considered it minimal and the Respondent considered the relationship to be quite close. However, the allegations concerned the Respondent's behavior toward his subordinate, Ms. Mitson, during the course of his employment.

The Complainant stated that the Respondent began making racial and ethnic comments in reference to himself and others, including her, around February 2009, soon after he started his employment, prior to becoming her supervisor. The Complainant said that she was offended by such comments and did not invite them, but she chose to ignore them to maintain a good working relationship with the Respondent. She stated that she did not use such language. The Complainant alleged that this behavior continued after Mr. Contreras became her supervisor. Ms. Mitson complained that the Respondent's use of such language made the workplace unprofessional and uncomfortable for her and other employees.

The Complainant told OEO that she had a good working relationship with the Respondent until around October 2010. The Respondent said that he and Ms. Mitson enjoyed an excellent working relationship until May 2010. As evidence of her good working relationship with the Respondent, the Complainant pointed out that, as recently as June 2010, he had sought to provide her a substantial job reclassification commensurate with her existing duties, change her position title to Assistant Director, and give her a significant salary increase. HRS personnel reported to investigators that Mr. Contreras had been very adamant about changing Ms. Mitson's position title to Assistant Director. HRS opposed the change because her duties and experience would not support such a change in position title. On August 12, 2010, Ms. Mitson's position was reclassified to Student Services Supervisor with an accompanying annual salary increase of \$6,151.44. The Respondent also enabled Ms. Mitson to use the working title of Assistant Director.

The Complainant said that her relationship with the Respondent began to deteriorate in October 2010. She said after that date, the Respondent removed her responsibility over the Ambassadors program and began to criticize her work to other co-workers. Co-workers told her that Mr. Contreras had made statements to them that she was a poor manager. She was also told by co-workers that Mr. Contreras had directly stated or strongly suggested that she was having an extra-marital affair with a subordinate employee. Co-workers also told Ms. Mitson that Mr. Contreras told Vice Chancellor Pratt and possibly other members of the WSU Tri-Cities administration that she was having an extra-marital affair with a subordinate employee.

The Complainant stated that the Respondent's use of racial and ethnic comments always bothered her, but the rumor that she was having an extra-marital affair with a subordinate, which she denied, was the most concerning to her and compelled her to complain to OEO. She stated that such a rumor, which she believed the Respondent had initiated and shared with Chancellor Carwein and Vice Chancellor Pratt, could devastate her personal and professional reputations.

The Complainant regarded the Respondent's actions as retaliation because he believed she had not protected his daughter from personal attacks while she was a WSU Tri-Cities student and Senator Pro Tempore in ASWSUTC. Mr. Contreras' daughter had a dispute with another ASWSUTC Senator starting on or around August 2010. This

conflict led Mr. Contreras' daughter to resign her position on October 5, 2010. The Complainant stated that the Respondent told her he believed that the other student was bullying his daughter, and asked her to intervene. She did not intervene to the Respondent's satisfaction, which led him to believe that she had not protected his daughter.

The Respondent stated that his working relationship with Ms. Mitson became strained after the Crimson and Grey Ball at WSU Tri-Cities on May 7, 2010. The Respondent said that at that event Ms. Mitson danced inappropriately and provocatively with a female student. The Respondent stated that he warned Ms. Mitson about her unprofessional behavior. Ms. Mitson denied dancing inappropriately or provocatively with anyone at the event, and said she had attended the event with her husband. In subsequent interviews with the Complainant's co-workers who attended the event, OEO investigators found no one who could confirm that Ms. Mitson had danced inappropriately or provocatively with anyone. Investigators found substantial evidence that Mr. Contreras sought to obtain Ms. Mitson's reclassification and salary increase after this alleged provocative dancing.

The Respondent stated that after the Crimson and Grey Ball and his warning about her unprofessional behavior, Ms. Mitson started to distance herself from him. He said that Ms. Mitson even began to conspire with other staff members against him, which is what culminated in her OEO complaint against him. Questioned by investigators why he would, nevertheless, continue to advocate for a position reclassification and salary increase, he was unable to provide a credible reason.

The Respondent admitted to OEO that he had used racial language in reference to Ms. Mitson, other employees, a student, and himself. He stated that other co-workers, especially including Ms. Mitson, also used inappropriate racial and ethnic language in the workplace. The Respondent stated that Ms. Mitson was the source of many racial statements, some of which he only repeated. He stated that his racial references made to Ms. Mitson constituted only friendly banter between friends. He said his statements were not meant to discriminate against her or make her uncomfortable, and that they were not intended for other employees to hear.

The Respondent stated in his written statement to OEO, dated January 2011, that Ms. Mitson participated in the racial name calling. He stated that Ms. Mitson referred to him as "Burrito man", "Taco Boy" and "Senor Basically". He stated that when using these terms, Ms. Mitson "feigned a bad accent". The Respondent stated that "in a joking and friendly matter [sic]" he twice told her:

[T]o get her Chinese ass' in here (my office). She responded, "Si, Senor Burrito!" and we both laughed about it and said we should stop [using racial references].

The Respondent stated that:

There was a time when some of the students and staff (including Anna Mitson) referred to our new ASWSUTC President, Zixu Ha as "Mao." I did refer 1-2 times to him as "Mao" to Anna but then stopped.

The Respondent stated that he called himself "Brown man" and "brownie" and would make "general statements about my Latino heritage in regards to misunderstandings about what the term 'residence' means to many Latinos."

In response to Ms. Mitson's clarifying that she is Japanese American and not Chinese, the Respondent said:

"You're right, you are from the island country, the land of the 'Rising Sun,' 'the Nikei Stock Exchange,' and 'big monster movies.'" Mrs. Mitson smiled and said, "Yes." I answered, "I'll just remember 'Gojira.' She looked at me with confusion. In turn, I explained, 'Gojira' is the Japanese version of the mythical movie monster, Americans know as 'Godzilla.'

OEO investigators found no one who could confirm that Ms. Mitson used racial language in the workplace. When asked by investigators to provide names of individuals who could confirm that Ms. Mitson had used racial and ethnic language in the workplace, the Respondent initially stated that no such witnesses existed. He said that he and Ms. Mitson only used such language behind closed doors. Interviewed a second time, the Respondent said that witnesses did exist but only individuals who he knew would lie. OEO investigators found no one who could confirm that Ms. Mitson used derogatory racial or ethnic language.

Four of the Respondent's subordinates alleged that the Respondent used racial language in the workplace in reference to himself, staff, and students. Five of the Respondent's subordinates alleged that the Respondent used sexual language in reference to himself, staff, or students, concerning body parts, sexual activity, pregnancy status, or sexual orientation. Five of the Respondent's subordinates also alleged that the Respondent frequently engaged in conversations concerning religion in the workplace.

The Respondent denied telling anyone that Ms. Mitson was engaged in an extra-marital affair with a subordinate. He attributed the source of the rumor to another staff member in the unit. The Respondent stated that staff members in Ms. Mitson's unit came to him with concerns that Ms. Mitson was favoring another co-worker. The Respondent stated that he responded to the situation by sending out an email message concerning staff-student interaction to all his staff members. The message referenced the WSU Administrative Professional Handbook and Executive Policy Manual and went

beyond by directing his staff members to, "act with diligence to and an adherence to strong ethical principles and moral uprightness."

OEO investigators recorded witness statements indicating that on or around September to December 2010, the Respondent made statements to several employees directly stating or strongly suggesting Ms. Mitson was engaged in an inappropriate relationship with a subordinate employee, spending time with the employee at locations and times he labeled as "inappropriate". Two employees credibly said that the Respondent said to them that he, in fact, was counseling Ms. Mitson's husband who believed she was having an inappropriate relationship with her subordinate. The Respondent also made a statement to one employee stating that Ms. Mitson's marriage was "in a bind." Such statements made to the employees led them to believe the Respondent was suggesting Ms. Mitson and her subordinate were engaged in an extra-marital affair. Two employees stated that he, in fact, used the word "affair."

Investigators confirmed that the Respondent talked to Vice Chancellor Pratt about Ms. Mitson's alleged inappropriate relationship with the subordinate employee. Vice Chancellor Pratt stated that the Respondent never used the word "affair." Nevertheless, he said, it was clear that the Respondent suspected an extra-marital affair; although, the Respondent provided no significant evidence. Ms. Barajas said that the Respondent talked to her on three occasions regarding his concern that Ms. Mitson was showing favoritism to the subordinate employee, but that the Respondent never discussed a potential policy violation.

The Respondent denied removing the Ambassadors program from Ms. Mitson's work duties and telling other employees in their unit that she was a poor manager as alleged retaliation against Ms. Mitson for not protecting his daughter during her dispute with another student. He cited business reasons for removing the program and increasing performance problems for saying anything to anyone that Ms. Mitson was a poor manager. The Respondent stated that he had recently approved a significant salary increase for Ms. Mitson, but later he began to have legitimate concerns with Ms. Mitson's work performance. Investigators documented that the Respondent made inquiries of Ms. Barajas about eliminating Ms. Mitson's position. The Respondent told investigators that he was just exploring all options given WSU's fiscal problems and the fact that Ms. Mitson's work quality was lagging. The Respondent explained the changes he made to Ms. Mitson's work duties as based on changing unit needs. Vice Chancellor Pratt said to investigators that prior to September 2010, the Respondent had not reported that Ms. Mitson had any significant performance problems. OEO investigators reviewed Ms. Mitson's 2008 and 2009 annual performance evaluations and found no performance problems.

On December 2, 2010, OEO received an anonymous complaint alleging the Respondent was creating a hostile work environment for WSU Tri-Cities Student Affairs staff and students. The anonymous complaint requested an investigation of the Respondent and his workplace conduct, including his use of offensive racial language.

OEO did not open an investigation because the complaint was anonymous. OEO forwarded the complaint to HRS and the appropriate administrative units. Ms. Davis later informed investigators that she was the author of the anonymous complaint. Ms. O'Leary also complained to investigators about the Respondent's offensive language, including his use of offensive racial and ethnic terms.

The Respondent's own writings demonstrate that his relationships with his subordinates became increasingly strained after the incidents concerning his daughter in early fall 2010. He became increasingly suspicious of their actions and believed they were conspiring against him. The Respondent regarded Ms. Mitson's complaint to OEO as baseless and stated the complaint could only be understood as a personal attack against him.

On January 2, 2011, the Respondent filed a written complaint with OEO against two employees. His complaint alleged that his daughter had been the subject of personal attacks by Ms. Mitson and Ms. O'Leary. He further alleged that Ms. Mitson had been remiss in her duties as the ASWSUTC Advisor and a member of the Office of Student Affairs with respect to the alleged personal attacks on his daughter. He further alleged that Ms. O'Leary had spied on him, spread gossip about him and had "violated my trust by carrying on clandestine investigations of me...". OEO referred the Respondent's complaint to HRS because it did not implicate a violation of the Policy.

OEO advised the Respondent not to engage in conduct that might influence potential witnesses. On January 26, 2011, a witness reported that the Respondent asked him into his office to explain that he had no animus against Asians and Asian Americans.

### Findings

Based on the investigation in this matter described above, OEO makes the following findings:

1. The Respondent was Ms. Mitson's supervisor and called Ms. Mitson and/or referred to her by demeaning, derogatory racial or ethnic terms numerous times in the workplace, as witnessed by other subordinates, and uninvited and unwelcomed by Ms. Mitson. These terms included: "Tokyo Rose", "Nip", and "Gojira." The latter is the Japanese name for the film monster "Godzilla." On several occasions, the Respondent also addressed Ms. Mitson, referring to her person, and her posterior in particular, as "Chinese ass." Specifically, on one such occasion, calling her to a meeting, he said, "Get your Chinese ass in here."
2. The Respondent created an uncomfortable and unprofessional work environment for the Complainant and other employees, who witnessed the Respondent using demeaning, derogatory racial or ethnic terms numerous times in the workplace.

3. The Respondent also referred to other employees (some of whom he supervised) and at least one student by derogatory racial or ethnic terms.
4. The Respondent also referred to himself, in front of other employees (some of whom he supervised) by derogatory racial or ethnic terms.
5. Ms. Mitson did not call or refer to the Respondent or any other person by demeaning, derogatory racial or ethnic terms. She did not engage in mutual racial banter with the Respondent as he alleged.
6. Prior to the alleged personal attacks on his daughter, the Respondent's professional relationship with the Complainant was good and he sought to advance her career.
7. In response to the alleged personal attacks on his daughter, the Respondent tried to negatively affect Ms. Mitson's employment at WSU, including approaching HRS on or about November 2010, to express his interest in eliminating her position.
8. Also in response to the alleged attacks on his daughter, the Respondent began spreading rumors to his subordinates, his supervisor and HRS that Ms. Mitson was behaving inappropriately, only in some instances intimating that she was involved in an extra-marital affair with an employee whom she supervised. In some instances with subordinates, the Respondent stated bluntly that he thought Ms. Mitson was having "an affair."
9. In response to the alleged attacks on his daughter, the Respondent, without factual basis, also began criticizing the quality of Ms. Mitson's work to other subordinates and his supervisor.
10. OEO advised the Respondent not to engage in conduct that might influence potential witnesses. In the course of the investigation, a witness reported that the Respondent asked him into his office to explain that he had no animus against Asians and Asian Americans, which could have had the effect of influencing this witness.
11. When asked to provide witnesses to substantiate his allegations, the Respondent replied that none existed because the acts in question occurred in private. A few days later, he provided a different response, claiming that no witnesses existed who would be truthful.
12. Investigators found many inconsistencies, both substantial and minor, in the Respondent's version of events. All of these factors lead OEO to find that the Respondent is not credible.
13. Investigators found no significant inconsistencies with the Complainant's version of events. She readily named witnesses who credibly confirmed important facts.

Her version of events was consistent and did not vary over the course of the investigation. OEO finds the Complainant to be credible.

14. The Respondent's actions against Ms. Mitson, August to December 2010, were in response to his belief that Ms. Mitson had not protected his daughter.

### Conclusion

Based on the foregoing findings and the totality of the investigation, OEO concludes as follows:

1. The Respondent's references to Ms. Mitson using derogatory ethnic and racial terms, and his conduct in making statement to others about her that she was having an extra-marital affair violated the WSU Policy Prohibiting Discrimination and Sexual Harassment.
2. The Respondent's references to himself and others with derogatory ethnic and racial terms violated the WSU Policy Prohibiting Discrimination and Sexual Harassment. These violations were exacerbated by the Respondent's position as a supervisor.

### Recommendations

OEO makes the following recommendations:

1. To the extent not done to date, the Respondent should be instructed to cease all conduct that violates the WSU Policy Prohibiting Discrimination and Sexual Harassment.
2. Corrective action should be taken with respect to the Respondent, which is consistent with the Findings and Conclusions of this report.

### Report Disclaimer

OEO's findings and conclusions in this matter are based on the WSU Policy Prohibiting Discrimination and Sexual Harassment. Nothing in this report is intended to be understood as a statement or interpretation of local, state, or federal law.

Office for Equal Opportunity  
March 7, 2011.

RECEIVED  
OCT 21 2011

ATTORNEY GENERAL'S OFFICE  
TORTS DIVISION  
SEATTLE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF BENTON

JOHAN CURTIS,  
CHRISTINA DAVIS STEVENSON,  
and ANNA MITSON

Plaintiffs,

vs.

THE STATE OF WASHINGTON,  
through WASHINGTON STATE  
UNIVERSITY; JAIME CONTRERAS  
and ANNA CONTRERAS, husband and  
wife,

Defendants

NO. 11-2-02187-1

AMENDED COMPLAINT

Plaintiffs allege:

I.

All plaintiffs reside in Benton County, Washington.

II.

All three plaintiffs are female. Plaintiff Anna Mitson is Japanese-American.

///

COMPLAINT - 1

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.  
2415 W. Falls  
Kennewick, WA 99336  
(509) 736-1330  
Fax: (509) 736-1580

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

III.

Defendant State of Washington conducts business in Benton County, Washington. Defendant Jaime Contreras formerly conducted business in Benton County, Washington, and is believed to remain a resident of Benton County, Washington. The conduct of Jaime Contreras was in furtherance of his marital community.

IV.

During the course of employment with defendant WSU Tri-Cities and during the last three years, all three plaintiffs were subjected to sexual discrimination and a hostile work environment. The discrimination and hostile work environment were imposed upon the plaintiffs by their manager Jaime Contreras, for which the State of Washington is automatically and vicariously liable.

V.

During the course of employment with defendant WSU Tri-Cities and during the last three years, plaintiff Anna Mitson was subjected to racial discrimination and a hostile work environment. The discrimination was imposed upon Anna Mitson her manager Jaime Contreras, for which the State of Washington is automatically and vicariously liable.

VI.

All three plaintiffs reported the discrimination and hostile work environment to their employer, WSU Tri-Cities. In turn, they were retaliated against by defendants WSU Tri-Cities and Jaime Contreras.

///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

VII.

Plaintiffs sue defendant WSU Tri-Cities only under Washington law. They assert no claims under federal law.

VIII.

The retaliation and discrimination resulted in a constructive discharge from employment for plaintiffs Anna Mitson and Christina Davis Stevenson. The retaliation and discrimination could later lead to constructive discharge of plaintiff Johan Curtiss.

IX.

As a result of the wrongful conduct and constructive discharge, plaintiffs Christina Davis Stevenson and Anna Mitson have respectively experienced lost wages and benefits and loss earning capacity. Plaintiffs Christina Davis Stevenson, Anna Mitson, and Johan Curtiss have suffered emotional distress, humiliation, injury to reputation, and other pain and suffering. In the event of a constructive discharge, Johan Curtis will also suffer lost wages and benefits and loss earning capacity.

X.

Defendant WSU Tri-Cities negligently hired, retained and supervised defendant Jaime Contreras, to the injury and harm of all plaintiffs

XI.

Jaime Contreras engaged in intentional infliction of emotional distress and negligent infliction of emotional distress that harmed all plaintiffs.

///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

XII

Defendant Jaime Contreras either directly or through family members defamed plaintiffs. Jaime Contreras has written false statements about all three plaintiffs, which statements have injured the reputation of plaintiffs. Jaime Contreras also falsely told other employees of WSU Tri-Cities that plaintiff Anna Mitson was engaged in an extramarital affair.

WHEREFORE, plaintiffs seek the following relief against all defendants jointly and severally:

1. For judgment in an amount to be determined at trial;
2. For reasonable attorney's fees and costs as provided by RCW 49.48.030 and RCW 49.60; and
3. For such further relief as seems just and equitable.

DATED this 19<sup>th</sup> day of October, 2011.

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.  
Attorneys for Plaintiffs Johan Curtis,  
Christina Davis Stevenson, and Anna Mitson



\_\_\_\_\_  
GEORGE FEARING #12970

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

RECEIVED  
2011 SEP 30 PM 1:28  
ATTORNEY GENERAL  
OF WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF BENTON

JOHAN CURTISS, CHRISTINA DAVIS, )  
and ANNA MITSON )

Plaintiffs, )

NO. 11-2-02187-1

vs. )

COMPLAINT

THE STATE OF WASHINGTON, )  
through WASHINGTON STATE )  
UNIVERSITY; JAIME CONTRERAS )  
and ANNA CONTRERAS, husband and )  
wife, )

Defendants )

<b>Washington State</b>	
<b>Office of the Attorney General</b>	
Acknowledged Receipt, this <u>30<sup>th</sup></u> day	
of <u>September</u> , 20 <u>11</u>	Time: <u>1:35 pm</u>
Washington.	
By: <u>[Signature]</u>	
Name: <u>Terrell Rault</u>	
Assistant Attorney General	

Plaintiffs allege:

I.

All plaintiffs reside in Benton County, Washington.

II.

All three plaintiffs are female. Plaintiff Anna Mitson is Japanese-American.

III.

Defendant State of Washington conducts business in Benton County, Washington.

COMPLAINT - 1

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.  
2415 W. Falls  
Kennewick, WA 99336  
(509) 736-1330  
Fax: (509) 736-1580

1 Defendant Jaime Contreras formerly conducted business in Benton County, Washington, and is  
2 believed to remain a resident of Benton County, Washington. The conduct of Jaime Contreras  
3 was in furtherance of his marital community.  
4

5 IV.

6 During the course of employment with defendant WSU Tri-Cities and during the last three  
7 years, all three plaintiffs were subjected to sexual discrimination and a hostile work environment.  
8 The discrimination and hostile work environment were imposed upon the plaintiffs by their  
9 manager Jaime Contreras, for which the State of Washington is automatically and vicariously  
10 liable.  
11

12 V.

13 During the course of employment with defendant WSU Tri-Cities and during the last  
14 three years, plaintiff Anna Mitson was subjected to racial discrimination and a hostile work  
15 environment. The discrimination was imposed upon Anna Mitson her manager Jaime Contreras,  
16 for which the State of Washington is automatically and vicariously liable.  
17

18 VI.

19 All three plaintiffs reported the discrimination and hostile work environment to their  
20 employer, WSU Tri-Cities. In turn, they were retaliated against by defendants WSU Tri-Cities  
21 and Jaime Contreras.  
22

23 VII.

24 Plaintiffs sue defendant WSU Tri-Cities only under Washington law. They assert no  
25 claims under federal law.  
26

27 COMPLAINT - 2  
28

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.  
2415 W. Falls  
Kennewick, WA 99336  
(509) 736-1330  
Fax: (509) 736-1580

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

VIII.

The retaliation and discrimination resulted in a constructive discharge from employment for plaintiffs Anna Mitson and Christina Davis. The retaliation and discrimination could later lead to constructive discharge of plaintiff Johan Curtiss.

IX.

As a result of the wrongful conduct and constructive discharge, plaintiffs Christina Davis and Anna Mitson have respectively experienced lost wages and benefits and loss earning capacity. Plaintiffs Christina Davis, Anna Mitson, and Johan Curtiss have suffered emotional distress, humiliation, injury to reputation, and other pain and suffering. In the event of a constructive discharge, Johan Curtiss will also suffer lost wages and benefits and loss earning capacity.

X.

Defendant WSU Tri-Cities negligently hired, retained and supervised defendant Jaime Contreras, to the injury and harm of all plaintiffs

XI.

Jaime Contreras engaged in intentional infliction of emotional distress and negligent infliction of emotional distress that harmed all plaintiffs.

XII.

Defendant Jaime Contreras either directly or through family members defamed plaintiffs. Jaime Contreras has written false statements about all three plaintiffs, which statements have injured the reputation of plaintiffs. Jaime Contreras also falsely told other employees of WSU

COMPLAINT - J

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.  
2415 W. Falls  
Kennewick, WA 99336  
(509) 736-1330  
Fax: (509) 736-1580

1 Tri-Cities that plaintiff Anna Mitson was engaged in an extramarital affair.

2 WHEREFORE, plaintiffs seek the following relief against all defendants jointly and  
3 severally:  
4

- 5 1. For judgment in an amount to be determined at trial;  
6 2. For reasonable attorney's fees and costs as provided by RCW 49.48.030 and RCW  
7 49.60; and  
8 3. For such further relief as seems just and equitable.

9 DATED this 8th day of September, 2011.

10  
11 LEAVY, SCHULTZ, DAVIS & FEARING, P.S.  
12 Attorneys for Plaintiffs Johan Curtiss,  
13 Christina Davis, and Anna Mitson

14   
15 \_\_\_\_\_  
16 GEORGE FEARING #12970

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27 COMPLAINT - 4

28  
LEAVY, SCHULTZ, DAVIS & FEARING, P.S.  
2415 W. Falls  
Kennewick, WA 99336  
(509) 736-1330  
Fax: (509) 736-1580

FILED

**Aug 12, 2013**

Court of Appeals

Division III

State of Washington

Supreme Court No. \_\_\_\_\_

Court of Appeals No. 30873-1-III

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

ERIC CHRISTOPHER TRUITT,  
Defendant/Petitioner.

---

APPEAL FROM THE STEVENS COUNTY SUPERIOR COURT  
Honorable Patrick Monasmith, Judge

---

PETITION FOR REVIEW

---

SUSAN MARIE GASCH  
WSBA No. 16485  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Petitioner

## TABLE OF CONTENTS

I.	IDENTITY OF PETITIONER.....	1
II.	COURT OF APPEALS DECISION.....	1
III.	ISSUES PRESENTED FOR REVIEW.....	1
	1. Should this court decline to find invited error under the circumstances of this case and review the instructional misstatement of the law as a manifest error affecting a constitutional right?.....	1
	2. As a matter of first impression, in a criminal trial does a “to- convict” instruction, which affirmatively informs the jury it has a duty to return a verdict of guilty if it finds the elements have been proven beyond a reasonable doubt, violate a defendant’s right to a jury trial, when there is no such duty under the state and federal Constitutions?.....	1
IV.	STATEMENT OF THE CASE.....	2
V.	ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....	2
	1. The policy behind the “invited error” doctrine is not served by its application to Petitioner’s case.....	3
	2. Petitioner’s constitutional right to a jury trial was violated by the court’s instructions, which affirmatively misled the jury about its power to acquit...7	
	a. Standard of review.....	7
	b. The United States Constitution.....	8

c. Washington Constitution, including Gunwall analysis  
.....8, Brief of Appellant at 5–10

d. Jury’s power to acquit.....9

e. Scope of jury's role regarding fact and law.....12

f. Current example of correct legal standard in instructions.....13

g. Contrary case law is based on a poor analysis; this Court should  
decide the issue differently.....15

h. The court’s instructions in this case affirmatively misled the jury  
about its power to acquit even if the prosecution proved its case  
beyond a reasonable doubt.....18

VI. CONCLUSION.....19

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page</u>
<u>Duncan v. Louisiana</u> , 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).....	8
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	12
<u>Neder v. United States</u> , 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999).....	6, 9
<u>Sullivan v. Louisiana</u> , 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182, (1993).....	17
<u>United States v. Gaudin</u> , 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).....	9, 12

<u>United States v. Garaway</u> , 425 F.2d 185 (9th Cir. 1970).....	9
<u>United States v. Powell</u> , 955 F.2d 1206, 1209 (9th Cir.1991).....	11–12, 17
<u>United States v. Moylan</u> , 417 F.2d 1002, 1006 (4th Cir. 1969), <i>cert. denied</i> , 397 U.S. 910 (1970).....	11
<u>Bellevue School Dist. v. E.S.</u> , 171 Wn.2d 695, 257 P.3d 570 (2011).....	7
<u>Hartigan v. Washington Territory</u> , 1 Wash.Terr. 447 (1874).....	11, 19
<u>Leonard v. Territory</u> , 2 Wash.Terr. 381, 7 Pac. 872 (Wash.Terr.1885).....	13–14, 15, 18, 19
<u>Pasco v. Mace</u> , 98 Wn.2d 87, 94, 653 P.2d 618 (1982).....	8, 9
<u>Sofie v. Fiberboard Corp.</u> , 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989).....	9
<u>State v. Bennett</u> , 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).....	7–8
<u>State v. Bonisisio</u> , 92 Wn. App. 783, 964 P.2d 1222 (1998), <i>rev. denied</i> , 137 Wn.2d 1024 (1999).....	15, 17, 18
<u>State v. Boogaard</u> , 90 Wn.2d 733, 585 P.2d 789 (1978).....	15
<u>State v. Brown</u> , 130 Wn. App. 767, 124 P.3d 663 (2005).....	15, 17, 18
<u>State v. Carlson</u> , 65 Wn. App. 153, 828 P.2d 30, <i>rev. denied</i> , 119 Wn.2d 1022 (1992).....	13
<u>State v. Fischer</u> , 40 Wn. App. 506, 512, 699 P.2d 249, <i>rev. denied</i> , 104 Wn.2d 1004 (1985).....	5
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	13
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	8, 9
<u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	2, 3, 4, 5, 6

<u>State v. Holmes</u> , 68 Wash. 7, 12-13, 122 Pac. 345 (1912).....	9
<u>State v. Kyllo</u> , 166 Wn.2d 856, 864, 215 P.3d 177 (2009).....	8, 11, 18
<u>State v. Mak</u> , 105 Wn.2d 692, 749, 718 P.2d 407, <i>cert. denied</i> , 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).....	3
<u>State v. Meggyesy</u> , 90 Wn. App. 693, 958 P.2d 319, <i>rev denied</i> , 136 Wn.2d 1028 (1998), <i>abrogated on other grounds by State v. Recuenco</i> , 154 Wn.2d 156, 110 P.3d 188 (2005).....	7, 15, 16, 17, 18
<u>State v. Nunez</u> , 174 Wn.2d 707, 719, 285 P.3d 21 (2012).....	15
<u>State v. Pam</u> , 101 Wn.2d 507, 511, 680 P.2d 762 (1984).....	3, 4
<u>State v. Primrose</u> , 32 Wn. App. 1, 4, 645 P.2d 714 (1982).....	11
<u>State v. Rice</u> , 110 Wn.2d 577, 611 n.19, 757 P.2d 889 (1988), <i>cert. denied</i> , 491 U.S. 910, 109 S.Ct. 3200, 106 L.Ed.2d 707 (1989).....	3
<u>State v. Salazar</u> , 59 Wn. App. 202, 211, 796 P.2d 773 (1990).....	11
<u>State v. Studd</u> , 137 Wn.2d 533, 546, 973 P.2d 1049 (1999).....	4, 5
<u>State v. Vander Houwen</u> , 163 Wn.2d 25, 29, 177 P.3d 93 (2008).....	8
<u>State v. Wakefield</u> , 130 Wn.2d 464, 475, 925 P.2d 183 (1996).....	5

*Other Jurisdictions*

<u>State v. Hargrove</u> , 48 Kan. App. 2d 522, 547, 293 P.3d 787, 804 (2013)....	6
---	---

### Statutes

U.S. Const. amend. 5.....	8, 10
U.S. Const. amend. 14.....	8
Const. art. I, § 9.....	10
Const. art. I, § 21.....	9
Const. art. I, § 22.....	9

### Court Rules

RAP 13.4(b)(3).....	3
RAP 13.4(b)(4).....	3

### Other Resources

<i>The American Heritage Dictionary</i> (Fourth Ed., 2000, Houghton Mifflin Company).....	18
Alschuler & Deiss, <u>A Brief History of the Criminal Jury in the United States</u> , 61 U. Chi. L. Rev. 867, 912-13 (1994).....	10
<u>Bushell's Case</u> , Vaughan 135, 124 Eng. Rep. 1006 (1671).....	10
Ninth Circuit Model Criminal Jury Instructions.....	17
WPIC 160.00.....	14
John H. Wigmore, " <u>A Program for the Trial of a Jury</u> ", 12 Am. Jud. Soc. 166 (1929).....	12

**I. IDENTITY OF PETITIONER.**

Petitioner, Eric Christopher Truitt, the defendant/appellant below, asks this Court to accept review of the following Court of Appeals' decision terminating review.

**II. COURT OF APPEALS DECISION.**

Mr. Truitt seeks review of Court of Appeals, Div. III's unpublished opinion filed July 11, 2013, which affirmed his conviction for an inferior degree offense of fourth degree assault. A copy of the opinion is attached hereto as **Appendix A**. This petition for review is timely.

**III. ISSUES PRESENTED FOR REVIEW.**

1. Should this court decline to find invited error under the circumstances of this case and review the instructional misstatement of the law as a manifest error affecting a constitutional right?

2. As a matter of first impression, in a criminal trial does a "to-convict" instruction, which affirmatively informs the jury it has a duty to return a verdict of guilty if it finds the elements have been proven beyond a reasonable doubt, violate a defendant's right to a jury trial, when there is no such duty under the state and federal Constitutions?

#### **IV. STATEMENT OF THE CASE.**

A jury found Truitt guilty of fourth degree assault—domestic violence, having acquitted him of second degree assault as charged, third degree assault as a lesser degree and harassment—threats to kill as charged. CP 25–26, 145–48. The jury was given “to convict” instructions containing the language, “If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.” CP 122, 123, 125, 126. Defense counsel and the State both proposed the quoted language, which was taken from the criminal WA pattern jury instructions. CP 39, 41, 43, 44; 73, 74, 75, 76.

On appeal, Division III declined to consider Truitt's argument, holding that “even if the appellate court finds that the appellant's rights were violated by the jury instructions”, the failure to object barred consideration of the constitutionality of the “to convict” instruction under the invited error rule as set forth in this court's decision in State v. Henderson, 114 Wn.2d 867, 869–71, 792 P.2d 514 (1990).

#### **V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

Petitioner believes that this court should accept review of these issues because, as a matter of first impression, the decision of the Court of

Appeals involves significant questions of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)), and/or involves issues of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(4)).

1. The policy behind the “invited error” doctrine is not served by its application to Petitioner’s case.

Division III of the Washington Court of Appeals held that Truitt is precluded from appellate review of this issue under the invited error doctrine, relying on State v. Henderson, 114 Wn.2d 867, 792 P.2d 514 (1990). Because Washington does not always rely on invited error to avoid review of constitutional issues regarding jury instructions, this Court should decline to apply the doctrine under the circumstances of this case. *See* State v. Rice, 110 Wn.2d 577, 611 n.19, 757 P.2d 889 (1988), *cert. denied*, 491 U.S. 910, 109 S.Ct. 3200, 106 L.Ed.2d 707 (1989) and State v. Mak, 105 Wn.2d 692, 749, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

Invited error should only be invoked where it will prevent a party “from setting up an error at trial and then complaining of it on appeal.” State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984). Reviewing courts reasonably condemn such inconsistency because “[t]he adversary

system cannot countenance such maneuvers.” Pam, 101 Wn.2d at 511.

Washington decisions that invoke the doctrine “rest on a desire to prevent a party from strategically trapping a court, and thus leave room for applying the doctrine more flexibly when the error is unintentional.” Henderson, 114 Wn.2d at 873 (Utter, J., dissenting) (citing cases).

For several reasons, this Court should not apply cases such as Henderson or State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999), beyond their limited facts. First, Justice Utter’s thorough and well-reasoned dissent significantly undermines the persuasive value of the Henderson majority’s (five to four decision) rigid application of the invited error doctrine. *See* Henderson, 114 Wn.2d at 871–79 (Utter, J., dissenting). Second, while Justice Madsen concurred with the judgment in Studd, she pointed out the hypocrisy of the Court recommending the use of pattern jury instructions and then denying review to defendants who proposed them:

The invited error doctrine should not be applied to preclude claimed error resulting from a pattern jury instruction proposed by the defense. The pattern jury instructions are the result of considerable work of the Washington Supreme Court Committee on Jury Instructions which was created in 1963 by order of this court. (citation omitted) In remarks addressing the third edition of the civil Washington pattern jury instructions, the members of this court observed that the pattern instructions reduce the time and effort which must be expended on the preparation of jury instructions in the day to day trial of cases. Furthermore, these

pattern instructions have greatly enhanced the quality of justice in our courts by improving the quality of instructions given to juries. The intention is to present patterns for simple, brief, accurate and unbiased statements of the law... . We recommend the use of these pattern instructions.

Studd, 137 Wn.2d at 553 (Madsen, J., concurring).

Third, both before and after Henderson, Washington courts have declined to apply the doctrine rigidly when its purpose would not be served. *See e.g.*, State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996) (court unanimously refused to find court's erroneous plea advice to be invited error even though defense counsel had requested the court's involvement); State v. Fischer, 40 Wn. App. 506, 512, 699 P.2d 249 (stating that "invited error" should apply only in the situation where a party "request[s] some affirmative action from the trial court, and then, after having been afforded that action, complain[s] on appeal that it constituted error"), *rev. denied*, 104 Wn.2d 1004 (1985).

As a practical matter, the invited error doctrine serves no legitimate purpose here when the language at issue, "then it will be your duty to return a verdict of guilty", is found in virtually all of the "to convict" instructions assembled in the criminal Washington pattern jury instructions. The State cannot seriously argue that Truitt's attorney "set up" an error or that the instructions served Truitt's tactical purposes or that the error

would not have occurred but for defense counsel's proposed instructions<sup>1</sup>, because the State proposed the *same language*.<sup>2</sup>

Where jury instructions, as here, are requested by defense counsel (and the State) with no intended manipulation or strategic designs, fundamental fairness requires that Truitt's issue be considered on its merits. As one jurisdiction has recently noted:

In reconciling invited error and resulting constitutional defects in jury instructions adversely affecting criminal defendants, we balance competing considerations bound up in fairness—individual fairness for the person standing as the accused and institutional fairness for the system as an adjudicatory process. *See Neder [v. United States]*, 527 U.S. at 18–19, 119 S.Ct. 1827.<sup>3</sup> If the lawyer representing a criminal defendant makes a calculated decision to sacrifice certain constitutionally protected interests of his or her client for tactical advantage in attaining an acquittal and in doing so induces the district court to act or rule in particular ways, then those actions or rulings generally cannot be asserted as points of error on direct appeal of a conviction. To hold otherwise would invite game-playing and manipulation incompatible with a fair adjudicatory process. *See [State v. ]Henderson*, 114 Wn.2d at 868, 792 P.2d 514 (Less than strict application of the invited error rule to jury instructions “would put a premium on defendants misleading the court; this we decline to encourage.”). At the same time, however, an invited error of constitutional import in a jury instruction should not be immune from review on direct appeal if defense counsel requested the instruction through inadvertence and without strategic designs. To hold otherwise would deprive an accused of individual fairness.

State v. Hargrove, 48 Kan. App. 2d 522, 547, 293 P.3d 787, 804 (2013).

---

<sup>1</sup> CP 73, 74, 75, 76.

<sup>2</sup> CP 39, 41, 43, 44.

<sup>3</sup> Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999).

For all these reasons, this Court should decline to apply the invited error doctrine to this case, and instead review the instructional error directly.

2. Petitioner's constitutional right to a jury trial was violated by the court's instructions, which affirmatively misled the jury about its power to acquit.

As part of the "to-convict" instructions used to convict Truitt, the trial court instructed the jury as follows: "If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty." CP 122, 123, 125, 126. This is standard language from the pattern instructions. Truitt contends there is no constitutional "duty to convict" and that the instruction accordingly misstates the law. The instruction violated Truitt's right to a properly instructed jury.<sup>4</sup>

a. Standard of review. Constitutional violations are reviewed *de novo*. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are reviewed *de novo*. State v. Bennett, 161

---

<sup>4</sup> Division One of the Court of Appeals peripherally rejected the arguments raised here in its decision in State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, *rev denied*, 136 Wn.2d 1028 (1998), *abrogated on other grounds by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005). As discussed *infra* counsel respectfully contends Meggyesy did not address the precise issue and/or was incorrectly decided.

Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Kylo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). The elements instruction given in this case affirmatively misled the jury to conclude it was without power to nullify, therefore, it was improper. *E.g.*, State v. Vander Houwen, 163 Wn.2d 25, 29, 177 P.3d 93 (2008) (explaining that jury instructions are improper if they mislead the jury). Moreover, because this error occurred in the elements instruction, which is the “yardstick” by which the Jury measures a defendant’s guilt or innocence, the error directly prejudiced Mr. Truitt’s right to a fair trial and, thus, constituted a manifest constitutional error.

b. The United States Constitution. In criminal trials, the right to jury trial is fundamental to the American scheme of justice. It is thus further guaranteed by the due process clauses of the Fifth and Fourteenth Amendments. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); Pasco v. Mace, 98 Wn.2d 87, 94, 653 P.2d 618 (1982).

c. Washington Constitution. The Washington Constitution provides greater protection to its citizens in some areas than does the United States Constitution. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Under the Gunwall analysis, it is clear that the right to jury trial is such an area. Pasco v. Mace, *supra*; Sofie v. Fiberboard Corp., 112 Wn.2d 636, 656,771 P.2d 711, 780 P.2d 260 (1989).

All six Gunwall factors favor an independent application of Article I, Sections 21 and 22 of the Washington Constitution in this case.

Petitioner hereby incorporates his analysis of all Gunwall factors, Brief of Appellant at 5–10. The state constitution provides greater protection than the federal constitution, and prohibits a trial court from affirmatively misleading a jury about its power to acquit.

d. Jury's power to acquit. A court may never direct a verdict of guilty in a criminal case. United States v. Garaway, 425 F.2d 185 (9th Cir. 1970) (directed verdict of guilty improper even where no issues of fact are in dispute); State v. Holmes, 68 Wash. 7, 12-13, 122 Pac. 345 (1912). If a court improperly withdraws a particular issue from the jury's consideration, it may deny the defendant the right to jury trial. United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (improper to withdraw issue of "materiality" of false statement from jury's consideration); *see* Neder v. United States, 527 U.S. 1, 8, 15-16, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999) (omission of element in jury instruction subject to harmless error analysis).

And, a jury verdict of not guilty is non-reviewable because the constitutional protections against double jeopardy also protect the right to a jury trial by prohibiting a retrial after a verdict of acquittal. U.S. Const. amend. 5; Const. art. I, § 9.<sup>5</sup>

Also well-established is "the principle of noncoercion of jurors," established in Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (1671). Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jurors for disregarding the evidence and the court's instructions. Bushell was imprisoned for refusing to pay the fine. In issuing a writ of habeas corpus for his release, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts. *See generally* Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 912-13 (1994).

Thus, if there is no ability to review a jury verdict of acquittal, no authority to direct a guilty verdict, and no authority to coerce a jury in its decision, there can be no "duty to return a verdict of guilty." Indeed, there is no authority in law that suggests such a duty.

We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the

---

<sup>5</sup> "No person shall be ... twice put in jeopardy for the same offense."

judge and contrary to the evidence... . If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

Under Washington law, juries have always had the ability to deliver a verdict of acquittal that is against the evidence. Hartigan v. Washington Territory, 1 Wash.Terr. 447 (1874). A judge cannot direct a verdict for the state because this would ignore "the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power." State v. Primrose, 32 Wn. App. 1, 4, 645 P.2d 714 (1982). *See also State v. Salazar*, 59 Wn. App. 202, 211, 796 P.2d 773 (1990) (relying on jury's "constitutional prerogative to acquit" as basis for upholding admission of evidence). An instruction telling jurors that they *may not* acquit if the elements have been established affirmatively misstates the law, and deceives the jury as to its own power. Such an instruction fails to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864.

This is not to say there is a right to instruct a jury that it may disregard the law in reaching its verdict. *See, e.g., United States v. Powell*,

955 F.2d 1206, 1213 (9th Cir. 1991) (reversing conviction on other grounds). However, if the court may not tell the jury it may disregard the law, it is at least equally wrong for the court to direct the jury that it has a duty to return a verdict of guilty if it finds certain facts to be proved.

e. Scope of jury's role regarding fact and law. Although a jury may not strictly determine what the law is, it does have a role in applying the law of the case that goes beyond mere fact-finding. In Gaudin, the Court rejected limiting the jury's role to merely finding facts. Gaudin, 515 U.S. at 514-15. Historically the jury's role has never been so limited: "[O]ur decision in no way undermine[s] the historical and constitutionally guaranteed right of a criminal defendant to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts." Gaudin, 515 U.S. at 514. *See also* John H. Wigmore, "A Program for the Trial of a Jury", 12 Am. Jud. Soc. 166 (1929).

Furthermore, if such a "duty" to convict existed, the law lacks any method of enforcing it. If a jury acquits, the case is over, the charge dismissed, and there is no further review. In contrast, if a jury convicts when the evidence is insufficient, the court has a legally enforceable duty to reverse the conviction or enter a judgment of acquittal notwithstanding the verdict. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d

560 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); State v. Carlson, 65 Wn. App. 153, 828 P.2d 30, *rev. denied*, 119 Wn.2d 1022 (1992).

Thus, a legal "threshold" exists before a jury may convict. A guilty verdict in a case that does not meet this evidentiary threshold is contrary to law and will be reversed. The "duty" to return a verdict of not guilty, therefore, is genuine and enforceable by law. A jury must return a verdict of not guilty if there is a reasonable doubt. However, there is no corresponding constitutional "duty" requiring a jury to return a verdict of guilty if it finds every element proven beyond a reasonable doubt. In such a case, the law is that the jury should find the defendant guilty or may exercise its prerogative to acquit against the evidence. To tell a jury instead that it has a "duty" to return a verdict of guilty if it finds every element of a crime proven beyond a reasonable doubt is a misstatement of the applicable law.

f. Current example of correct legal standard in instructions. The duty to acquit and permission to convict is well-reflected in the instruction in Leonard v. Territory:

If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you **may** find him guilty of such a degree of the crime as the facts so found show him to

have committed; but if you do not find such facts so proven, then you **must** acquit.

Leonard v. Territory, 2 Wash.Terr. 381,399, 7 Pac. 872 (Wash.Terr.1885)

(emphasis added). This was the law as given to the jury in murder trials in

1885, just four years before the adoption of the Washington Constitution.

This allocation of the power of the jury “shall remain inviolate.”

The Washington Pattern Jury Instruction Committee has adopted accurate language consistent with Leonard for considering a special verdict. *See* WPIC 160.00, the concluding instruction for a special verdict, in which the burden of proof is precisely the same:

... In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. ... If you unanimously have a reasonable doubt as to this question, you must answer “no”.

The due process requirements to return a special verdict—that the jury must find each element of the special verdict proven beyond a reasonable doubt—are exactly the same as for the elements of the general verdict. This language in no way instructs the jury on “jury nullification.” But it at no time imposes a “duty to return a verdict of guilty.”

In contrast, the “to convict” instruction at issue here does not reflect this legal asymmetry. It is not a correct statement of the law. As such, it provides a level of coercion, not supported by law, for the jury to

return a guilty verdict. Such coercion is prohibited by the right to a jury trial. Leonard, *supra*; State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978).

g. Contrary case law is based on a poor analysis; this Court should decide the issue differently.<sup>6</sup> In State v. Meggyesy, the appellant challenged the WPIC’s “duty to return a verdict of guilty” language. The court held the federal and state constitutions did not “preclude” this language, and so affirmed. Meggyesy, 90 Wn. App. at 696.

In its analysis, Division One of the Court of Appeals characterized the alternative language proposed by the appellants—“you **may** return a verdict of guilty”—as “an instruction notifying the jury of its power to acquit against the evidence.” 90 Wn. App. at 699. The court spent much of its opinion concluding there was no legal authority requiring it to instruct a jury it had the power to acquit against the evidence.

Division Two has followed the Meggyesy holding. State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), *rev. denied*, 137 Wn.2d 1024 (1999); State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005).<sup>7</sup> Without much further analysis, Division Two echoed Division

---

<sup>6</sup> A decision is incorrect if the authority on which it relies does not support it. State v. Nunez, 174 Wn.2d 707, 719, 285 P.3d 21 (2012).

<sup>7</sup> Division 3 has not issued a published opinion on this issue to date.

One's concerns that instructing with the language 'may' was tantamount to instructing on jury nullification.

Petitioner respectfully submits the Meggyesy analysis addressed a different issue. "Duty" is the challenged language herein. By focusing on the proposed remedy, the Meggyesy court side-stepped the underlying issue raised by its appellants: the instructions violated their right to trial by jury because the "duty to return a verdict of guilty" language required the juries to convict if they found that the State proved all of the elements of the charged crimes.

However, portions of the Meggyesy decision are relevant. The court acknowledged the Supreme Court has never considered this issue. 90 Wn. App. at 698. It recognized that the jury has the power to acquit against the evidence: "This is an inherent feature of the use of general verdict. But the power to acquit does not require any instruction telling the jury that it may do so." Id. at 700 (foot notes omitted). The court also relied in part upon federal cases in which the approved "to-convict" instructions did *not* instruct the jury it had a "duty to return a verdict of guilty" if it found every element proven. *See, Meggyesy*, 90 Wn. App. at

698 fn. 5.<sup>8,9</sup> These concepts support Truitt's position and do not contradict the arguments set forth herein.

The Meggyesy court incorrectly stated the issue. The question is not whether the court is required to tell the jury it can acquit despite finding each element has been proven beyond a reasonable doubt. The question is whether *the law* ever requires the jury to return a verdict of guilty. If the law never requires the jury to return a verdict of guilty, it is an incorrect statement of the law to instruct the jury it does. And an instruction that says it has such a duty impermissibly directs a verdict. Sullivan v. Louisiana, 508 U.S. 275, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993).

Unlike the appellant in Meggyesy,<sup>10</sup> Truitt does not ask the court to approve an instruction that affirmatively notifies the jury of its power to acquit. Instead, he argues that jurors should not be affirmatively misled. This question was not addressed in either Meggyesy or Bonisisio; thus the holding of Meggyesy should not govern here. The Brown court

---

<sup>8</sup> E.g., United States v. Powell, 955 F.2d 1206, 1209 (9th Cir.1991) ("In order for the Powells to be convicted, the government must have proved, beyond a reasonable doubt, that the Powells had failed to file their returns.").

<sup>9</sup> Indeed, the federal courts do not instruct the jury it "has a duty to return a verdict of guilty" if it finds each element proven beyond a reasonable doubt. See Ninth Circuit Model Criminal Jury Instructions: "In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: ..."

erroneously found that there was “no meaningful difference” between the two arguments. Brown, 130 Wn. App. at 771. Meggyesy and its progeny should be reconsidered, and the issue should be analyzed on its merits.

h. The court’s instructions in this case affirmatively misled the jury about its power to acquit even if the prosecution proved its case beyond a reasonable doubt. The instruction given in Truitt’s case did not contain a correct statement of the law. The court instructed the jurors that it was their “duty” to accept the law as instructed, and that it was their “duty” to convict the defendant if the elements were proved beyond a reasonable doubt. Instructions No. 1 and 15 at CP 109, 125. A duty is “[a]n act or a course of action that is required of one by... law.” *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company). The court’s use of the word “duty” in the “to-convict” instruction conveyed to the jury that it *could not* acquit if the elements had been established. This misstatement of the law provided a level of coercion for the jury to return a guilty verdict, deceived the jurors about their power to acquit in the face of sufficient evidence, and failed to make the correct legal standard manifestly apparent to the average juror. Leonard, *supra*<sup>10</sup>; Kyllo, 166 Wn.2d at 864.

---

<sup>10</sup> And the appellant in Bonisisio.

<sup>11</sup> Under the common law, juries were instructed in such a way as to allow them to acquit even where the prosecution proved guilt beyond a reasonable doubt. In Leonard, the Supreme Court reversed a murder conviction and set out in some detail the jury

By instructing the jury it had a duty to return a verdict of guilty based merely on finding certain facts, the court took away from the jury its constitutional authority to apply the law to the facts to reach its general verdict.

The instruction creating a "duty" to return a verdict of guilty was an incorrect statement of law. The error violated Truitt's state and federal constitutional right to a jury trial. Accordingly, his convictions must be reversed and the case remanded for a new trial. Hartigan, *supra*.

#### VI. CONCLUSION.

For the reasons stated, Petitioner asks this Court to reverse and remand the matter for a new trial.

Respectfully submitted on August 12, 2013.

---

s/Susan Marie Gasch, WSBA #16485  
P. O. Box 30339  
Gasch Law Office  
Spokane WA 99223-3005  
Telephone: (509) 443-9149  
FAX: None  
E-mail: [gaschlaw@msn.com](mailto:gaschlaw@msn.com)

---

instructions given in the case. The court instructed the jurors that they "should" convict and "may find [the defendant] guilty" if the prosecution proved its case, but that they "must" acquit in the absence of such proof. Leonard, at 398-399. Thus the common law practice *required* the jury to acquit upon a failure of proof, and *allowed* the jury to acquit even if the proof was sufficient. Id.

Renee S. Townsley  
Clerk/Administrator

(509) 456-3082  
TDD #1-800-833-6388

*The Court of Appeals  
of the  
State of Washington  
Division III*



July 10, 2013

500 N Cedar ST  
Spokane, WA 99201-1905

Fax (509) 456-4288  
<http://www.courts.wa.gov/courts>

**FILED**  
**Aug 12, 2013**  
Court of Appeals  
Division III  
State of Washington

Susan Marie Gasch  
Gasch Law Office  
PO Box 30339  
Spokane, WA 99223-3005  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)

Timothy Rasmussen  
Stevens County Prosecutor  
215 S Oak St  
Colville, WA 99114-2862  
[rasmussen@co.stevens.wa.us](mailto:rasmussen@co.stevens.wa.us)

Kenneth Tyndal  
Attorney at Law  
PO Box 1071  
Colville, WA 99114-5012  
[katyndal@aol.com](mailto:katyndal@aol.com)

CASE # 308731  
State of Washington v. Eric Christopher Truitt  
STEVENS COUNTY SUPERIOR COURT No. 111001231

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley  
Clerk/Administrator

RST:sh  
Enclosure

c: **E-mail**  
Honorable Patrick Monasmith

c: Eric Christopher Truitt  
2423 Quinns Meadow Road, Lot H  
Colville, WA 99114-9609

**FILED**  
**JULY 11, 2013**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 30873-1-III
Respondent,	)	
	)	
v.	)	
	)	
ERIC CHRISTOPHER TRUITT,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, C.J. — Eric Truitt challenges his fourth degree assault (domestic violence) conviction on the grounds that the jury instructions misled the jury about its power to acquit. Our courts have repeatedly rejected this argument and we again do so here. The conviction is affirmed.

The facts are of no consequence to this appeal and we need not dwell on them other than to note that a jury heard allegations that Mr. Truitt committed second degree

assault and felony harassment against a household member. The jury, however, convicted him solely of the inferior degree offense of fourth degree assault.<sup>1</sup>

Prior to closing argument, both parties presented jury instructions that included the standard pattern elements instruction. The court used that instruction to advise the jury concerning the elements it must find before returning a guilty verdict. After sentencing, Mr. Truitt timely appealed to this court.

Mr. Truitt argues that the trial court's "duty to convict" instruction violated his constitutional right to a jury trial because it affirmatively misled the jury about its power to acquit. We decline to consider Mr. Truitt's argument because it is barred by the invited error doctrine.

"A party may not request an instruction and later complain on appeal that the requested instruction was given." *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (quoting *State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979)). This iteration of the invited error rule applies even if the appellate court finds that the appellant's rights were violated by the jury instructions. *Id.* at 869-71.

Mr. Truitt requested the Washington Pattern Jury Instructions that all contained the same language he now challenges on appeal. His argument is barred under the

---

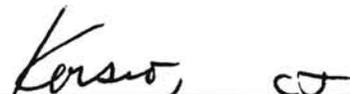
<sup>1</sup> Mr. Truitt filed a statement of additional grounds that raises three issues that have no merit. We note that his claim that he had no notice that he could face inferior offenses is governed by statute. *See* RCW 10.61.003; RCW 10.61.010.

No. 30873-1-III  
State v. Truitt

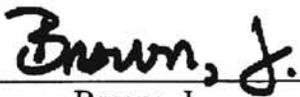
invited error doctrine, and thus we do not reach his arguments concerning the constitutionality of the “to convict” instruction.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
\_\_\_\_\_  
Korsmo, C.J.

WE CONCUR:

  
\_\_\_\_\_  
Brown, J.

  
\_\_\_\_\_  
Kulik, J.