No. 59763-9-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

PHI TRINH AND MATTIE BAILEY

Plaintiffs/Respondents,

v.

SEATTLE CITY LIGHT, A DEPARTMENT OF THE CITY OF SEATTLE

Defendant/Appellant,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Sharon Armstrong)

RESPONSE TO APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Asian American Phi Trinh and African American Mattie Bailey shared a common experience at Seattle City Light ("SCL"). Through the 1980s and into the 1990s, under Superintendents Hardy and Bradley, their careers flourished. Then, after Caucasian Gary Zarker became superintendent, their careers stagnated and they found themselves in a hostile work environment that continued throughout Zarker's tenure. After Zarker left, the hostile work environment continued under Superintendent Jorge Carrasco. With no legal error at trial, in all respects, the jury's verdict should be affirmed.

II. ASSIGNMENTS OF ERROR

Trinh and Bailey assign no error to the trial.

III. STATEMENT OF THE CASE[1]

A. The Parties

Phi Trinh is a Vietnamese Asian American who came to the United Stated on scholarship to MIT where he graduated with a Bachelor of Science degree in mechanical engineering. Ex 34, RP 1100–05, 2002. Trinh speaks with an accent. RP 1664-1665, 2455. Mattie Bailey is an African-American who was raised and educated in Seattle. RP 591. She

[1] This brief has been reduced substantially in length after the Court denied respondents' motion to file an over length brief and motion on the merits for the City's failure to fairly state the facts.

obtained a Bachelor of Arts degree in Community Services from Seattle University in 1972 and a Master's Degree in 1974. RP 591-2.

B. City Policies And Procedures

The Seattle Municipal Code ("SMC") contains personnel policies applicable to SCL; other written City personnel policies and procedures supplement the SMC. Ex 658. The evidence presented at trial demonstrated that under Zarker and Carrasco, SCL managers regularly manipulated City personnel rules to favor Caucasians, which adversely affected the respondents' careers and caused them emotional harm. RP 540-541, Ex 658, RP 566, RP 3170-3171, RP 3070-3071. At SCL, the EEO organization is answerable to the Director of Human Resources who is a direct report to the superintendent of SCL. RP 581. There is no oversight by City Personnel of the activities of the departments which further enables discrimination. RP 579, 581.

C. Under Superintendents Hardy And Bradley, Trinh And Bailey Were Permitted To Reach Their Potential

In 1983, Trinh began working at SCL's Skagit Project,[2] and during a period at the Skagit, which Trinh described as the best of his life,

[2] The Skagit Project area north of Seattle contains the hydroelectric plants and dams that supply energy to SCL. RP 1105–07. Seattle City Light is a Department of the City of Seattle. SCL is headed by a superintendent who reports to the Mayor. In turn, SCL is organized into Divisions along business lines including: distribution, generation, finance and administration, and customer accounts.

he was quickly promoted through the ranks to generations supervisor. RP 1105-09, 1113, 1124. Under Superintendents Hardy and Bradley, Trinh was involved in decision making, sat on committees, was involved in personnel selections, asked for feedback on policies, was given awards for his performance, and consistently given high marks in his annual performance reviews from 1986–1993.[3] RP 1114–27, 608, Exs 463, 22.

Mattie Bailey joined SCL in 1981 as a Consumer Education Supervisor and became Public Information Manager in 1986 under Superintendent Randy Hardy. RP 594-7, Ex 11. Under Superintendents Hardy and Bradley, Bailey's job responsibilities were extensive. She supervised approximately 13 people, was responsible for planning and monitoring a $2 million budget, chaired two task forces, was responsible for advertising, drafting the utility's annual financial report, handling planned outages, school programs, numerous internal and external communication-related programs, she held the position of interim-Superintendent, was a direct report to Bradley and a member of her Executive Team on a temporary basis, she was assigned special projects, traveled on business with the superintendent, engaged in "public involvement" activities, and consistently received ratings of "Outstanding"

[3] The Seattle Municipal Code requires that employees be given annual performance evaluations. SMC 4.04.260.

and “Highly Proficient” in annual performance reviews from 1982 through the end of 1992. RP 597–620, Ex 6. She rated her level of job satisfaction as 10 out of 10.

D. Under Zarker And Carrasco, They And Their Executive Teams Failed To Enforce City Personnel Rules That Protect Minorities And Favored Caucasians

Gary Zarker was Superintendent of SCL from 1994 through 2003, and Jorge Carrasco replaced Zarker as superintendent in February 2004, and held that position through trial. RP 1138, 2759. Both superintendents utilized an executive team of direct reports to manage SCL and had weekly staff meetings to stay well informed. RP 2900-2901, 3167-68, 1192. Soon after Zarker took over, he abolished Bailey’s division, cut her personnel down to nine full-time employees, increased her job responsibilities, and assigned African American Andrew Lofton as her second level supervisor, leaving Bailey in charge of Communications. RP 630-635, 3432-3, 3436-40, 3467. Beginning in September 1999, Bailey reported to Caucasian Bob Royer who became part of Zarker’s executive team when Zarker took Communications away from Lofton and hired Royer as Director of Communications. RP 3066, 3097, 705, 1140, 2763, 3472-3473. Royer remained on Carrasco’s executive team after Zarker left. RP 3118-3119.

Dana Backiel was a member of Zarker's and Carrasco's executive team until she retired in 2005 and was in charge of the Skagit, and thus in charge of decision-making regarding Phi Trinh. RP 1192, 2900, 2778-2779, 2809-2810, 2869-2870, 1263, 1126-27, 2699, 2702.

Bill Kolden was a member of both executive teams as Director of Human Resources from 1999 through June 2005.[4] Senior Personnel Specialist Iris Hodge worked in SCL Human Resources. RP 1002, 1016-1017. After working in the private sector, Hodge was surprised "[b]y the way people did things." RP 1044, 6–16. She testified that SCL manipulated hiring on interview panels by selecting panelists who would rate the desired candidate highly.[5] She also testified that at one point Backiel pressured her to put false information into a document to "beef up" the qualifications of Skagit Caucasian Manager Mike Bruno for reclassification purposes to Manager III.[6] She complained to her supervisor and Kolden, but nothing was done to stop the false process. RP 1060-1062. Hodge also witnessed Director Royer seek to "beef up" his

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[4] RP 3166-3167, 3268, 2809-2810. He was interim Director in 1999 and became permanent in 2000. RP 3268. Bea Hughes replaced Kolden after he retired as interim Director. RP 819, 2781, 2809

[5] RP 1064-5, 1092. A former SCL Personnel Director testified that it would be up to the SCL Superintendent to intervene and prohibit somebody at SCL from putting together an interview panels that included a panelist biased against a candidate. RP 540, 550–51. In Trinh's case, the hiring was either Backiel or Howell. RP 1096–97.

[6] RP 1983, 1030–38, 1042–3, 1048–51, 1073–74, 1079–83, 739-40, Ex 623. Bruno's job was reclassified to Utilities Manager 3, though he continued to report to Hannigan, also a Manager 3. RP 1932.

Caucasian direct reports' submissions for promotion (called PDQs) by redrafting job duties until City personnel would accept the job description, which listed jobs supposedly assigned to Bailey. RP 1004-15, 1029, 741-3. Ex 134. Under the Zarker/Carrasco regime, discrimination complaints climbed at SCL, but management reduced EEO office resources and harassed the only EEO staff. RP 3553–58, 3581.

Although annual performance evaluations were required by the SMC, under Zarker and Carrasco, for the most part, they stopped for Bailey and Trinh, eliminating any formal record of their work performance, but evaluations continued for Caucasians under Zarker and Carrasco. Ex 658 [SMC 4.04.180], RP 1126, 1302, 542, 575, 577, 1120-21, 2891-2, 2901-01, 1178-80, Ex 7, 8.

E. From 1994 Through 1999, Under Superintendent Zarker, The City's Conduct Toward Trinh And Bailey Was Hostile

In 1994, Gary Zarker became the Superintendent of Seattle City Light. RP 1138. Things began to change for Trinh around 1998 when Zarker brought a new management team to the Skagit. In 1998, Caucasian Dana Backiel became Deputy Superintendent for the Generation Branch of Seattle City Light, which included responsibility for the Skagit until her departure in 2004. RP 1263, 1126-27, 2699, 2702. Backiel hired Caucasian Dave Howell as Director of Operations and Caucasian Jim

Hannigan as the Skagit Project Manager. RP 1263–64, 1331, 1267. Trinh reported to Caucasian Jim Hannigan, who, in turn, reported to Howell. Howell reported to Backiel. RP 1264, 1222-1223.

Within three years of Howell's arrival at the Skagit, all minorities of Asian lineage in positions of responsibility at the Skagit had been moved, except for Trinh.[7] A workplace assessment of the Skagit found that Caucasians held 100 percent of manager jobs, 80 percent of supervisor jobs, 100 percent of the crew chief jobs, 97 percent of the powerhouse crew jobs, and 88 percent of the professional and administrative jobs. Ex. 644 [CTY LGT 23001–02]. Trinh testified that Backiel undermined his efforts to promote safety at the Skagit almost as soon as she arrived. Trinh learned that engineers reporting to Backiel were working at Diablo without personal locks.[8] Trinh notified Backiel, but she failed to support him leaving him feeling undermined. RP 1303, 1522, 1304, 1307–08, 1522. Even as Trinh introduced other

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[7] Ex. 1200 [Cty Lgt 20663], RP 1263–64, 1126–27. Backiel became Deputy Superintendent of the Generation branch in 1998. RP 2702. When she started, deMello, Nonog, and Trinh were employed at the Skagit. RP 2949. Felix deMello was moved to the Communication branch of SCL, working under Mattie Bailey, in January 2000. Ex. 531. Nonog gradually had his responsibilities given to Caucasians after they were hired into positions senior to his.

[8] In 1997, SCL set out "Lock Out/Tag Out" (LOTO) policies and procedures. RP 1243. The LOTO procedures called for the use of a safety device known as a lock. RP 1302. By 1998, Trinh had essentially brought the Diablo Powerhouse into compliance with SCL's LOTO policies and procedures; he had trained his employees and even distributed written procedures to other Powerhouse Supervisors. RP 1302.

improvements to the Skagit in 1998,[9] Zarker's chain of command began to reduce Trinh's career opportunities eliminating "out of class" assignments, excluding him from eight significant hiring decisions, removing him from his committee assignment, ignoring efforts that would have resulted in awards under Hardy and Bradley, and diverting his resources to Caucasian supervisors.[10] RP 1300-1, 1327–31, 1314, 1332, 1324–25, 1324. Trinh's regular staff were strained since they were entirely responsible for the Diablo project and worked with reduced resources. RP 1320. Trinh's request for help was denied, though Backiel eventually provided some temporary staff. RP 1326.

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[9] Trinh recognized a shortcoming in the regular design for station service batteries. RP 1305–06. When a fuse blew out, two qualified constructors were needed to operate a tool used in replacing the fuse. Because these personnel were not always available, Trinh devised a reconfiguration of the system that both ensured power to the system during a fuse failure as well as allowed a single operator to fix the fuse. RP 1305–06. The design was eventually adopted at the Ross Powerhouse and other utility locations. RP 1307. Trinh received no recognition for his work. RP 1307.

[10] Significant hires or promotions of Caucasians in this time frame included Brad Howell (from Skagit plumber to Hydroelectric Operator to Management System Analyst Supervisor), RP 1328, Lynn Mills (MSA Senior), RP 1331, Mike Haynes (Civil and Mechanical engineering Manager), RP 1444–45, Jim Hannigan (Oct. 1999, Skagit Project Manager), RP 1223, 1923, 1925, Les Swalling (Mechanical Supervisor), RP 1331, Kathi Rice Wilson (Generation Supervisor at Gorge Powerhouse), RP 1298, Tom Purcell (Maintenance Manager), RP 1330, and Oren Wilson (Generation Supervisor at Ross Powerhouse), RP 1241. RP 1293, 1328–31. Brad Howell also was granted Out-of-Class upgrade to Generation Supervisor at Diablo and Gorge while Trinh was working on the SIP project. RP 1347. SCL instituted the OJT program to ensure that new hires were qualified to operate SCL's hydroelectric power plants. The OJT Committee had authority, normally vested only in the SCL Superintendent, to remove employees who failed to complete the program. RP 1312–14. Kathi Rice Wilson suggested she too had accomplished a number of large projects at the Gorge without praise. RP 1862–63; 1863. But on cross she admitted that much of the work she cited involved successes that should be expected of any supervisor. RP 1895–96.

Things began to change for Bailey as soon as Zarker became Superintendent in 1994. RP 667. Zarker cut Bailey's staff, then pursued and hired Bob Royer, a former Mayor's brother, for a position above Bailey, claiming it was necessary to grow the communication function. RP 3070, 3076–77, 1177. Royer, in turn, hired Caucasians alongside Bailey, then transferred her and her staff's responsibilities to the new hires. RP 704.

Zarker alleged that Bailey's Division, which consisted of approximately 30 employees (including three Managers), should be abolished and should consist of only seven or eight people. RP 630-633. After that change, the majority of Bailey's staff was African-American and Asian. RP 634.[11] Although the staff had been cut and the division had been abolished, management and Superintendent Zarker still expected most of the same duties to be performed. RP 635. To make matters worse, many additional new duties were assigned. RP 639–643. Bailey lost her high profile management duties including chairing task forces, acting as Division Director, as a member of the Executive Team, and as Acting Superintendent. RP 635–39. Then Bailey was pushed down the chain of

[11] Bailey and what was left of her team were moved to the Customer Relations Division under Director Carol Dickinson. RP 634, 635. Bailey testified that her Division Director referred to African American Andrew Lofton as "Zarker's diversity hire." RP 668–69. Bailey was "very upset," because that type of comment can lead to a reputation that a minority hire is not qualified. RP 669.

command when Andrew Lofton was hired as Deputy Superintendent, but her performance continued to excel. RP 634, 669, 690-691.

In 1995, Bailey began to ask about pay equitably and a process began to reclassify her with support from Carol Dickenson, her immediate supervisor. RP 644, 647 650–55. In 1997, Bailey was classified as Manager Level 2 (of 3 classification levels) under the new APEX program, and sought a raise from Zarker because, although salary was dictated by classification, Zarker had the authority to award salaries within a broad range. RP 652, 543, 3277-78, 656. Zarker's staff laughed at Bailey while she waited to see Zarker about a raise, and during the meeting, while she was speaking, Zarker got up from the conference table where he and Bailey had been sitting, walked to his desk, sat down and started working, which humiliated Bailey. RP 656-59. Shortly after the salary meeting, Bailey was instructed by Dickenson and Lofton to make a presentation to Zarker and Zarker again treated her with disrespect and walked out of the meeting. RP 671–73. Zarker denied being rude to Bailey or African American Lofton, but Lofton confirmed Bailey's abilities, Zarker's conduct, and Zarker's refusal to give Bailey direct access, which hurt her ability to do her job. RP 1184, 1170, 3470-71, 3468, 3473, 3467.

Zarker further humiliated Bailey by assigning her to "reinvent" herself and her unit requiring her to submit some 14 proposals and then denying to the jury that he did so, and admitting that such action might be considered discriminatory. [12] Around the same time or shortly thereafter Bailey and her mostly minority unit were moved away from the rest of the Division to the far corner of the half unoccupied 28th floor in their building. RP 634, 682. Bailey was the highest ranking person to be moved, and morale hit an all-time low. RP 682.

In 1999, Bailey applied for a new position as Director of Communications for which Lofton admitted she was well qualified. RP 699, 3472–73. She was led to believe it was a competitive hire and was given a cursory interview by Zarker but rejected in favor of Royer. RP 700-4, 1139, 563-4, Ex 73. [13]

Even though Zarker had slashed Bailey's staff, under Royer, he wanted to "grow the Communication function" in part based on the recommendation of a golfing buddy he hired as a consultant. RP 1182, 1149, 1174, Ex 1192. Zarker did not simply terminate Bailey after hiring

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[12] RP 674-7, 680-3, 689, 1181-90, 1147, 694-95, Exs 303, 12, 308, 305. This Performance evaluation was written by Carol Dickenson, who reported to Andrew Lofton, who reported to Gary Zarker. Thus, the term, "upper-management," referred to Andrew Lofton and Gary Zarker.

[13] Although Bailey clearly understood that this meeting was a job interview, Zarker's testimony on Bailey's "interview" compelled a juror to ask, "Was that an interview or a talk, as you described earlier?" RP 1225.

Royer because City layoff rules are "Byzantine" and it would be very difficult to move Mattie Bailey from her Manager 2 position or to lay off a Manager 2. RP 1220-21. After a few months, Royer began to hire Caucasian[14] employees who were higher-level than Bailey's staff, and he then began giving his new Caucasian staff the jobs that Bailey and her minority staff had been doing. RP 704, 3096, 3101, 3104, 3191, 3203–04, 710, 1175, 3243. Even as Royer was hiring staff to perform Bailey's functions, she was seeking additional work and telling him that she felt underused. RP 3235. Although Royer was aware that Bailey performed many of the functions that he and his new hires did, he never attempted to put Bailey into any one of those positions. RP 3204–05. Under Royer and Zarker, Bailey's unit stopped handling employee training regarding deregulation, planning for strategic communication, public engagement and outreach, and Bailey's level of interaction with other managers became almost nonexistent. RP 705–08, 734. The members of the new Caucasian unit were considered "Team Leaders" and were authorized to assign work to Bailey's staff. RP 727. On paper, Bailey was supervising

[14] When hired, Bailey believed that all of Royer's new staff were Caucasian. RP 725–26. Bailey had believed that Boman was Caucasian, However, after Hispanic Superintendent Jorge Carrasco was hired, Janice Boman began identifying herself as Hispanic. RP 936.

several people. RP 734. In reality, she supervised only one full-time-equivalent. RP 734–35, 704, 711.

F. From 2000-2002, SCL Management Successfully Removed Two Of Three Asian Mid-Level Managers From The Skagit, Leaving Trinh To Fight For His Position, And Further Marginalized Bailey While Breaking Rules To Benefit Caucasian Managers

Generally, City employees can only be terminated for cause or if their positions are abrogated. Ex 658 [SMC 4.04.070(C) and 4.04.220(A)(1)], RP 540. And if an employee's duties change by more than fifty percent, that employee is subject to reclassification, which means their job title and pay status may change. RP 547, Ex 658 [SMC 4.04.130]. The evidence produced at trial leads to the conclusion that Backiel, Howell, and Hughes trumped up false charges against Asian American Felix deMello to position him for removal from the Skagit for cause, which was approved by Zarker. The same group under Zarker hired less qualified Caucasians to displace Asian American Paul Nonog so his position could be abrogated, and sought to change Asian American Phi Trinh's duties more than fifty percent so he could be reclassified and removed. The City failed only with Trinh. Those actions, if successful, would have removed all mid-level Asian Americans from the Skagit.

Felix deMello was born in Malaysia. RP 1726. Under Superintendents Hardy and Bradley, deMello was Manager for Camps and

Services; he managed 11 maintenance crews, totaling between 125 and 145 people, and received excellent to outstanding performance evaluations.[15] RP 1334, 1726–9, 1731–2. After Zarker's arrival, things changed. In 1995 deMello's position was abrogated, and Caucasian Don Hundahl, took over his old responsibilities. RP 1732–34. In 1999, deMello was given responsibility for managing the company store and cookhouse, and was later disciplined on false charges stemming from an employee incident at the cookhouse. RP 1735, 1745, RP 1738–39, Ex. 533, 1741, 2647, 1784. deMello was told he would be given a five-day suspension without pay, which was approved by Zarker and appealed by deMello to the Civil Service Commission. [16] deMello was concerned that the discipline and abrogation spelled the end of his career, so without legal representation he accepted a settlement that moved him to Bob Royer's Communications organization in Seattle. RP 1736-7, 1748-50, 1786-8,

[15] These crews were responsible for carpentry, plumbing, gardening, ground maintenance, logging, heavy equipment operations, and truck drivers. RP 1729–30. His crews also managed passenger boat operations on the lake, tour support, sewage treatment, and a Canadian crew responsible for patrols. RP 1730–31. He was also responsible for coordinating with the Canadian immigration and border patrol agencies and working with Seattle-based engineers. RP 1729.

[16] Exs 532, 533, RP 1739, 1747. Howell said he recommended discipline, but it was Backiel who wanted a five days suspension. RP 2620; 2642–43. Howell said he was under the impression that deMello had already been disciplined for another incident. RP 2627–28. When presented with evidence that deMello had not been previously disciplined, Howell said that if he had known, he might have made a different disciplinary recommendation regarding deMello's handling of the store incident. RP 2644. He "absolutely" would have wanted to give deMello more of a chance to correct his alleged deficiencies. RP 2644.

1790-91, Exs 531 at 3, 661. The City intentionally withheld exculpatory information from deMello during the grievance. RP 1806-07. Once at Communications under Royer, the discrimination continued and he ultimately retired rather than face more discrimination. RP 1754-55, 1757.

Paul Nonog was a Management Systems Analyst (MSA) at the Skagit. RP 1665. Nonog is an American citizen of Filipino descent and speaks with an accent. RP 1664–65, 2455. Like Trinh, Bailey and deMello, under Superintendents Hardy and Bradley, his career thrived. RP 1668–71. Things changed when Dave Howell arrived under Superintendent Zarker. RP 1670. Howell never gave him assignments, stopped giving him performance evaluations, and stopped out of class assignments. RP 1670-2. His managers created an MSA Supervisor position over him and denied Nonog promotion into that position in favor of a less qualified Caucasian (Brad Howell), then required him to train his new supervisor, took away his duties, hired another Caucasian in another newly created position above him, and with Zarker's approval, notified him he would be laid off for lack of work; with that, Nonog retired and sued.[17] Nonog accepted an offer of judgment and returned to SCL but

[17] RP 1675-80, Ex 524, 1336–37, 1658, 1330, 1644–54, Ex. 529, at 882, 2451-55, Ex 530, 2578–79, 1653–54, 1654, *compare* Ex 524 with Ex 1301, RP 1671-81, 2680, 2600, 2696, 2685–86, 2684–85, 2673, 1683, Ex 523, Ex 523, 2751, 2590, 2592, 1685, Ex 566, RP 1720.

was not allowed to do budgeting or workload planning; instead, he was "key punching" for three months and then resigned again. RP 1710-11, 1685–86, 2686–87.

Trinh's Manager Jim Hannigan told Director Howell that it might look wrong to some people to be moving the Asians at the Skagit off the workforce. RP 2003-04. Nevertheless, SCL worked diligently to remove Trinh as the last Asian American manager from any position of responsibility on the Skagit by changing his duties from those of Generation Supervisor to investigator.

In contrast to Zarker's imposition of a suspension of deMello for a minor workplace disturbance that was properly addressed, in June 2000, a serious accident occurred at the Ross Powerhouse, which was supervised by Caucasian Generations Supervisor Oren Wilson. Ex 112. The accident reflected a breach in clearance and LOTO procedures and resulted in serious burns to two powerhouse employees and thousands of dollars in fines from WISHA for safety breaches and Wilson's subsequent failure to correct those breaches. RP 1195-97, 1308–11, 1241, 2270, 1357, 1363–64, 2302–03, 1935-36, Exs 28, 75, 481. Trinh was not appointed to the panel investigating the Ross Accident but Oren Wilson was initially on the panel, which drafted a report that contained factual errors identified by Trinh and ignored by Zarker and Backiel. RP 2967, 1339–40, Exs 666–9.

On September 29, 2000, Backiel appointed Skagit Manager Jim Hannigan to review the Ross Accident Report and to provide a plan to address the Report's recommendations. Ex 112. Then, without any advance notice to Trinh, Hannigan told Trinh at a November 2000 staff meeting that Trinh would step down as Generation Supervisor and take on a Safety Improvement Project (SIP) to make recommendations regarding the Ross investigation. RP 1127–28, 1341. Trinh insisted that the appointment be for a limited duration and be in writing. Ex 55, RP 1246.

Backiel and Dave Howell used the SIP appointment to move Trinh out of his position and move in Caucasians Brad Howell and Kathy Rice as the Diablo Generations Supervisor; Dave Howell just grinned at Trinh's expressed concerns, which caused Trinh confusion, depression, and humiliation. RP 1343-1349, 1849, 1861. Trinh completed the investigation within six months except for pieces he could not complete without the cooperation of his managers, yet he was prohibited from returning to his position and denied the assistance he needed to complete the project. RP 1132, 1373, 1247–48, 1367, 2975-6, 2868. During this time, Howell offered Trinh sham jobs which once turned down, were not offered to others. RP 1367–69, 1455-6, 1371, 1395-97, 1456, 1412–16, 1953–54, Ex 430. Howell's journal notes show that during this time he

was seeking to move Caucasian Glenna Finney into Trinh's position.[18] Howell instructed Hannigan on May 18, 2001 to start collecting evidence of "alleged" performance problems with Trinh. Ex. 60; RP 2026. In response, Hannigan alleged that Trinh was insubordinate in an email he wrote one year earlier. RP 1974–76, 1375–77. Howell later criticized Trinh for writing things down. RP 1374. See Ex 77. Caucasian Generations Supervisor Kathi Rice falsely claimed to Howell that Trinh was disruptive at an August 2001 LOTO training session because, as it turned out, he asked questions and refused to sign a form saying he received training that was not provided.[19] Howell's notebook entries shows he sought to use this claim as a basis for removing Trinh from his position.[20] RP 1388, 1393–94. Yet on the stand, Hannigan admitted that Trinh was "good," or "mostly great," smart, capable and detail oriented, and questioned whether Trinh had acted inappropriately at the training

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[18] RP 2013, Ex. 657 [at Cty Lgt 10549001]. This is consistent with Hodge's testimony that, "if you wanted a certain decision" from a hiring panel, you could manipulate the panel's composition to get that result. RP 1064–65. Hodge said she had seen examples of it. RP 1064. Hannigan testified that Finney was a close personal friend who he and Howell considered for a position as a Generation Supervisor. RP 1978, 1382.

[19] RP 1389-91, 3540–41, 1852–53, 1874, 1911–16, Ex 662.Toni LeClare likewise did not sign the form. She testified she was not trying to cause trouble, but instead thought it was not in "our best interest in any way, shape, or form for me to be signing something that I believed to be untrue." RP 3551-3552.

[20] At the time, Kathi Rice Wilson had taken over Trinh's Generation Supervisor position at the Gorge Powerhouse. RP 1385. She told the jury that at the time she contacted Howell, she had heard rumors that Howell and Hannigan were trying to get Trinh removed as a Generation Supervisor. RP 1884–85.

session. RP 2016, 1938, 1949, 2005-6, 2023, 1980–81. Seeking to scapegoat Trinh, months later, Backiel claimed to the Washington Department of Labor & Industries that Trinh was "disruptive" at the meeting. Ex 452, at 6, RP 1403, 2964, 2962. Backiel admitted that she, Hannigan, and Howell hoped Trinh would take the SIP project on a permanent basis. RP 2981. Trinh feared that his job would soon be reclassified, and that he would be among the first to be cut if layoffs were required. [21]

Beginning in October 2001, Zarker, Backiel and Howell implemented a plan to advertise Trinh's Diablo Generations Supervisor position while he was on vacation in late December all the time stalling on Trinh's request for assistance to close out the SIP. They obtained a hiring freeze waiver from Zarker, completed the necessary paperwork and advertised his position during the Christmas Holiday. 1406–10, Exs 56, 57, 436, 437, 439, 440, 496. One of Trinh's staff alerted Trinh on December 24, 2001, that Trinh's position had been publicly posted, which prompted him to confront Hannigan, who refused to withdraw the advertisement and suggested he wait a week. RP 1132-3, 1424, Ex 663.

[21] RP 1417-8, 1457. Howell offered Trinh a fourth job, involving a combination of work managing spares and the SIP position. Again, Trinh was not enticed to leave the Generation Supervisor position. Again, no one was ever hired to fill the position. RP 1457.

Trinh later learned that waiting a week meant foregoing his rights under City grievance procedures.[22] Trinh filed a Civil Service Appeal and Zarker backed down and claimed it was all a mistake, but Hannigan was later recommended for discipline by Howell for failing to document Trinh's alleged poor performance, which Howell said required the withdrawal of the advertisement in direct contradiction of the City's later claim that it was all a "mistake." RP 563, 1423–28, 2026, 1163-64, 2613, Exs 60, 434, 30, 25, 60, 534. Other "White preferences" that were detrimental to Trinh included Rice and Wilson being assigned four wheel drive vehicles, being given better housing, and being given "comp. time." RP 1293–99, 1891, 2238–39, 2302, 1859 1891–9.

Beginning in 2000, Under Royer, Mattie Bailey's responsibilities were gradually removed from her and her staff and given to new Caucasian hires in newly created positions, and Bailey was directed to assist in those hirings. RP 3601, compare with RP 3205 and 3097- 98, 3139, 3605. In September 2000, Bailey was asked by Royer to work with Hodge on a new position for Peter Clarke. Hodge helped "enhance" Clarke's resume for Royer, and Clarke got the job. RP 1058–61. Hodge complained, but was told that "that's the way things are." RP 1061. Then,

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[22] RP 1134–35. Failure to do so may result in a waiver of civil service rights. RP 561–63.

in October 2000, Royer sought to create a new position for Caucasian Larry Vogel as a Strategic Advisor.[23] A Position Description Questionnaire (PDQ) was submitted. Ex 134. Iris Hodge had concerns about whether the job duties in the PDQ were actually going to be performed by Vogel. RP 1016. The PDQ was problematic and listed many of Bailey's duties. RP 740-3, 1004-07, Ex 134. Vogel told Bailey that he and Royer had been discussing Bailey's function and placement, and decided they thought Bailey should be an Executive Assistant. RP 760–63.[24] When Vogel told her of their conversation, Bailey felt "anxious and anguished and angry." RP 762.

Bailey testified that her role was constantly pushed down until she was often fulfilling only a clerical function. RP 757-60, 746. Royer and his new hires took over her job duties but Royer was paid approximately $25,000-$32,000 more than Bailey annually. RP 732–33. Bailey never received a base salary increase from the time of Royer's arrival in 1999, until 2004, after Royer became aware of Bailey's belief that she was being discriminated against based on her race. RP 3132, 3224. Royer claimed a financial downturn was the basis for not increasing her pay, but

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[23] RP 1007. The actual position title Vogel had was Senior Public Relations Specialist. Vogel sought to have his title be Public Relations Supervisor. RP 1010.

[24] An Executive Assistant helps a high-level person, does not manage personnel, and does not make independent decisions. RP 762.

he and other executives received pay increases and he hired Caucasian staff to perform her duties. RP 3109, 3127, 3185, 3189–90, Ex. 124.

In 2002, Bailey was humiliated at a meeting with Royer at which Bailey was the only African American, when after several minutes discussing a subordinate African American employee, Royer said, "I really love Thomas Jefferson. I love how he had such a fatherly relationship with his slaves. His slaves called him 'Dad.' And they all treated him as though he was all their father -- the white family and the black family -- the black slaves." RP 763-7.[25] There is also evidence that Zarker and Royer discussed laying off Ms. Bailey after removing her duties. Ex 590, RP 3217-19. In any event, the City's organizational chart shows how Bailey was viewed after Royer's arrival with her below all the Caucasian new hires supervising mostly minority staff. Exhibit 1021.

G. From 2003 Through The Date Of Trial, Trinh And Bailey Endured An Ongoing Hostile Work Environment And Disparate Treatment In Promotion And Pay

In 2003, Trinh sought to hire temporary help for the Diablo Powerhouse, but without consultation, the worker was sent to Ross Powerhouse instead while Backiel cut 3300 of Trinh's O&M hours

[25] Royer admitted saying he admired Thomas Jefferson for the way he treated his slaves, but new hire Janice Boman said she did not recall it. RP 3412; 765; 3226.

without inquiring into the effect it would have on his operations. RP 1465–68, 1473, 1617–18.

Trinh was unsuccessful in his attempts to move up in the Skagit management structure. Backiel denied him temporary out of class assignments and promotion to Skagit Manager favoring less qualified men without Skagit experience, and utilizing a biased interview panel, resulting in Dave Bowers, a Caucasian, getting the job even though he lacked the minimum qualifications because the interview panel was biased--including a friend of Backiel's brought over from the Parks Department.[26]

In 2004, Trinh filed an administrative claim with the City of Seattle alleging race-based discrimination. RP 1474. Afterwards, Bowers transferred a hydroelectric operator position from Diablo to Oren Wilson at the Ross Powerhouse without consulting Trinh. RP 1475, 3565–66, Ex 477, 2426. The jury may not have believed Bowers or Backiel as they denied their motives were discriminatory. RP 2923, 2924, 2879–80, 2862–63.

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[26] RP 1991, 2886, 2882, 2358, 1434, 1437–40, 2049, 2121, 2064, 1441, 2066-7, 2120–21, 29511442–44, 2145, Ex. 1198 [BS 01643], RP 2063, 2127, 2129-30, 2133, 2099, 2089, 2186–88, 2132, 2128, 2190–91, 2339–40, Ex. 1198, 2341, Ex. 1198 at 219,[26] Ex. 1198 at 226, CTY LGT 01657, 2544-46, 2355-57, 2367.In October 2003 Caucasians held 100% of manager jobs at Skagit and 80% of Supervisor jobs. RP 2915. When asked if the statistics caused Backiel any concern, Backiel said she would have liked more diversity. RP 2915. Employees also reported feeling that management were, among others, dishonest, playing favorites, and lacking management competency. RP 2920.

Jorge Carrasco asked Shanna Reese Crutchfield to look into Trinh's discrimination claims instead of using EEO Manager Stephanie Lieberman, resulting in a finding of no discrimination after a superficial investigation.[27] RP 2773–75, 2784, 2790–91, 2798, 2777, Ex 674, 675, RP 3560-65, *compare* RP 3553-3557.

For Bailey, this period saw continued pay equity discrimination and harassment during which she was paid lower than the video person in the Division who had no supervisory or budget-related responsibilities, and she was assigned jobs like making sure the floors were mopped and vacuumed, and ordering refreshments for meetings. RP 767-8, 774, 807, Exs 235, 238. HR Manager Kolden acknowledged her pay issues and showed her a spreadsheet with APEX women and minorities clustered at the bottom of managers for pay. RP 3270-8, 3289, 777–78. Management's actions violated City policies. RP 583-86, Ex 66, 67. A similar document was produced in discovery, and after Carrasco was made aware of the problem and took no action, Ms. Bailey complained of discrimination.[28]

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[27] Reese Crutchfield was asked if she had experience doing investigations. Crutchfield testified that she has taken course work "relevant to" investigations. RP 3057. She also attended training sponsored by SCL and received a human resources management certificate. RP 3058. The "city law department" also did investigation training that she attended. RP 3059. She testified that she did investigations as an executive assistant. RP 3059.

[28] *See* Ex. 11; RP 777-9, 3291-94, 3275-6, 788, Exs 243, 244. On cross, Kolden said that he kept the spreadsheet he showed to Bailey on a floppy disk. When he stopped working for the City, he did not take it with him. RP 3287. He said Ex 124 looks like the

Six days after Bailey complained of discrimination, Royer directed Erik Poulson and Dan Williams to meet with Bailey and to propose another reorganization that would remove all of her authority; Bailey reacted by becoming sad. RP 791–98, 793-5, Ex 283.[29]

Later in 2004, Royer made a racist comment and a racist salary increase proposal to Bailey. First he said, "You're back here trying to be Superfly" (a pejorative reference to an African-American movie pimp)," and later that day proposed to give her a raise of "twice "the average we give African-Americans here." RP 808–13, Ex 10, RP 3169, 3221-24. Shocked, speechless, and disenfranchised, Bailey felt afraid to respond. RP 810. Through it all, Royer had Carrasco's support. RP 2763–65, 2768, Ex 1006, 2803–04, 2807, 2767.

In July 2005, at an employee meeting, Director of Asset Management, Hardev Juj stated that Seattle City Light had difficulty finding qualified minority applicants to fill positions at the Utility, which prompted a response from Bailey. RP 993, 3601–03, Ex 352.

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same spreadsheet. RP 3289. Bailey finally received a response from the Office for Civil Rights one month after her memo. RP 789. Bailey was told that another staff member would call to set up a meeting. RP 789. A few days later Bailey received the call, but when they tried to schedule a meeting the Office for Civil Rights representative was away at training and then on vacation. RP 789. She seemed "tired and overworked," and her timeframe was not what Bailey expected. RP 789–90. Disillusioned, Bailey cancelled the meeting. RP 790.

[29] A transcript cannot depict the emotion of Bailey's statement that she felt "bad." The visual record is unavailable, but the audio record captures some of the emotion. RP 658, 676, 765, 796.

H. Trinh And Bailey Suffered Damages

At trial, Trinh said he felt "helpless, hopeless, discouraged, depressed, had insomnia, energy loss, and suffered from neck pain and heartburn rating his health in 2000 as a two out of ten and as a one out of 10 in 2001. RP 1475-1478. From 2002 through 2006 he rated his health as a 2 on the same scale and experienced those symptoms with the same frequency and with neck tension that progressively worsened. RP 1479–80. He had none of those symptoms under Superintendent Bradley. RP 1476. Trinh calculated his lost wages without overtime, based on the salary range in the job description for Skagit Manager, because overtime is not guaranteed as a generation supervisor. RP 1481–84, Ex 660, 1606. Ex 593, Ex 31, 2792, Ex 677.

Mattie Bailey testified that from the time of Zarker's arrival in 1994 through trial in 2006 she felt devalued, had a lower mood, sadness, problems sleeping and concentrating, loss of enjoyment, was tense, irritable, just wanting to be alone and to sleep. RP 836–40. By the year 2000, Bailey had developed high blood pressure, which by the time of her testimony in 2007, still could not be controlled by medication. RP 840. Bailey had planned to work until she reached the age of 62, but by trial felt she had to leave. RP 3601, 3604. Bailey presented evidence of lost wages

noting that Royer was doing the same job as she, and therefore she compared her salary to Royer's. RP 1119-1125, 592, Ex 677.

I. Procedural History

The case was filed on October 4, 2004, Trinh, Bailey, and Juan Rodriguez.[30] On September 21, 2005, before the Court issued multiple orders compelling discovery from the City and appointing a special master, the City obtained an order severing the Bailey and Trinh cases except for discovery. CP 638-40, 2823-24, 4094, 3998-4004, 4446-47, 6160-63, 4561-62, 4844, 4843-45, 5460-62, RP 18 and CP 10698.

The trial began on January 16 and went to the jury on February 20, 2007. The King County jury awarded Phi Trinh $947,290.00 ($772,000 as damages for emotional harm). The jury awarded Mattie Bailey $503,195.00 ($462,000 as damages for emotional harm). CP 3324-26, 3330-31. The City filed six post-trial motions seeking to dismiss or reduce the jury's verdicts. Each of the substantive motions was denied. CP 3624-25. The trial Court awarded fees and costs of more than $700,000. CP 11197-11219.

[30] Rodriguez had already been dismissed from the case after accepting an offer of judgment. CP 689-710.

IV. ARGUMENT

A. On The City's Substantial Evidence Claims, The Court Must View All Evidence and Inferences Strongly Against the City—No Discretion Is Permitted

To prevail on appeal on a substantial evidence theory, the City must admit "the truth of the opponent's evidence and all inferences that can be reasonably drawn therefrom." Hill v. BCTI, 144 Wash.2d 172, 187-188, 23 P.3d 440 (2001), reversed in part on other grounds, McClarty v. Totem Electric, 157 Wash.2d 214, 137 P.3d 844 (2006), superseded by statute as stated in Delaplaine v. United Airlines, Inc., ___ F.Supp.2d ___, 2007 WL 2821494 (W.D.Wash. Sep 28, 2007). In addition, the evidence must be "interpreted most strongly against the moving party and in the light most favorable to the opponent. No element of discretion is involved." Id. at 188.

The City has not challenged the time frame of the respondent's hostile work environment claims, which go back to the 1990s. CP 3312. The City has not sought to preserve this issue for appeal nor has it been briefed.[31] Therefore, all the incidents of harassment over those years may be considered in support of the respondents' claims for liability and emotional harm damages.

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[31] The only objection to this instruction was based on constitutional grounds claiming that the Supreme Court exceeded its authority in Antonius v. King County, 153 Wash.2d 256, 103 P.3d 729 (2004). RP 3649.

B. Phi Trinh and Mattie Bailey Presented Substantial Evidence Of a Hostile Work Environment Under a Totality of the Circumstances

1. Legal Standard

To establish a prima facie case for a hostile work environment claim based on race or national origin, the plaintiff-employee must show: (1) the harassment was unwelcome; (2) the harassment was because of race or national origin; (3) the harassment affected the terms or conditions of employment; and, (4) the harassment is imputed to the employer. Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 406-407, 693 P.2d 708 (1985), see McGinest v. GTE Service Corp., 360 F.3d 1104, 1112-1118 (9th Cir. 2004) The City admits to elements one or four. For the purposes of this response, respondents will address elements two and three.

The cumulative effect of the harassing actions amounts to an unlawful hostile work environment when it degrades the work experience to where it is more difficult for the victim to do her job, take pride in her work and to desire to remain in her position. McGinest, 360 F.3d at 1113. In ascertaining whether an employee has been subjected to a hostile work-environment, courts must examine the "totality of the circumstances." Antonius, 153 Wn.2d at 261; Davis v. West One Automotive Group, 140 Wash.App.449, 166 P.3d 807 (2007); Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Williams v. General

Motors Corp.**,** 187 F.3d 553, 563 (6th Cir. 1999) (courts must be mindful of the need to review the work environment as a whole). This analysis must comprehend all harassing behavior directed against the employee, even that which is not explicitly racial, so long as the behavior was motivated by the employee's race or national-origin. See Williams, 187 F.3d. at 565. "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for [the conduct] also to be psychologically injurious." Harris, 510 U.S. at. 22. In Davis, the court held the following conduct to be sufficient to make the "terms and conditions" element a question for the jury:

> Davis asserts he was humiliated by . . . comments [made about Martin Luther King Day and calling him a bitch]. He claims emotional distress. The record shows Davis was often late and absent from work. There was friction between him and other employees. When he called in ill a few days before his termination, Davis testified that he was "[p]robably mentally sick, drained."

Davis, 166 P.3d at 809, 811-12.

In evaluating whether a defendant's unlawful conduct created a hostile work environment, such conduct "cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. . . . Such claims are based on the cumulative effect of individual acts." Antonius, 153 Wn.2d at 268-270, 273; *see* National

R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2004). Trinh and Bailey each endured daily humiliation by their managers going back to the late 1990s. Jury Instructions 13 and 15, pertaining to Trinh's and Bailey's harassment claims, were unchallenged at trial. CP 3305.[32] These instructions are not challenged by the City on appeal (and although not perfect, they are not challenged by the plaintiffs). Thus, this is the standard by which plaintiffs' claims are measured.

2. Under The Totality Of The Circumstances, Phi Trinh Presented Substantial Evidence That The City's Conduct Was Because Of His Race And/Or National Origin And That The Conduct Affected The Terms And Conditions Of His Employment

Under Glasgow, the first question raised by the City is, would Trinh have been singled out and caused to suffer the harassment if he had been of a different race? Glasgow at 406. Under the totality of circumstances, and treating all favorable evidence and inferences as true, the record is replete with evidence that Trinh would not have been singled out had he not been an Asian American. Management engaged in harassing conduct toward him because of his race or national origin. Some examples follow. He was a proven success at SCL for more than a decade before Zarker's arrival. The hostile actions of Zarker and his subordinates

[32] Taken from WPI 330.23. Jury Instruction 13 applied to Trinh and was the same as 15 except that included national origin in addition to race.

and Carrasco and his subordinates toward Trinh are inconsistent with good business practices and cannot be explained by any other motive, leaving discrimination as the only motive.

There is no business reason for removing more and more of Trinh's responsibilities or for seeking to remove him from his position of generation supervisor. He had excellent performance evaluations before Zarker, but none under Zarker and Carrasco, although his performance remained high quality. But Caucasians received performance evaluations. There was no business reason for stopping his performance evaluations in violation of the SMC. There was no business reason for removing Trinh from the OJT Committee and then giving the post to Oren Wilson. RP 1909-10. Given his fine performance, the jury could easily have believed that the motive for offering Trinh sham job assignments and delaying his return under the SIP was to favor Caucasian Brad Howell who was placed in his Diablo Powerhouse position while he was on the SIP assignment. This is evidence that the conduct was because of his race and/or national origin.

Keeping in mind that at the City, management cannot remove or terminate an employee except for cause or if their position is abrogated, it is relevant that all three Asian Americans on the Skagit either lost their jobs or were at risk of losing their jobs through a structure that

manufactured scenarios to remove them. It was the same management chain leading up to Zarker at the same time using the tools available to remove two of three Asian Americans from the Skagit. Felix deMello had performed his job without criticism for many years. After being told that his position would be abrogated, he was brought up on false charges and HR Manager Hughes and Director Dave Howell withheld an exculpatory statement that may have caused him to contest the false charge. Without that evidence, deMello, fearing that he would not be able to find another SCL position after being disciplined, left the Skagit for Royer's Communications organization. Paul Nonog's position as an MSA was secure until Zarker arrived. Then he put Brad Howell, former plumber and operator, in a position above him, hired another Caucasian as a senior MSA although the record shows that Nonog was the best qualified, gave him nothing to do after he trained Howell, and then abrogated his position. At that point, two of three Asians were gone. Had Phi Trinh stayed in the SIP position, more than fifty percent of his job duties would have changed and he could have been reclassified. In comparison, Caucasians like Oren Wilson received light discipline or no discipline for serious safety breaches and he remains in the Skagit. There was no business reason for any of these moves—harassment is all that is left.

The City has not challenged the jury's decision that race and/or national origin was a substantial factor in the decision to promote Bowers over him to the position of Skagit Manager. The fact that the same management discriminated against him regarding promotion during the same time frame by using a biased interview panel is evidence supporting his harassment claim. If the City would engage in such deceptive conduct in promotion, they are more likely to engage in deceptive conduct to remove Trinh from his position in favor of Caucasians.

Carrasco's use of Reese Crutchfield to investigate Trinh's discrimination claim instead of using EEO Manager Lieberman on the pretext that she was ill is evidence supporting his claim. Lieberman was being driven from her job because her resources were cut and she was not able to handle the large influx of EEO complaints. She was only unavailable to the extent that SCL orchestrated her unavailability. RP 2784, 3557–58.

Many of the witnesses testified inconsistently including Zarker, Carrasco, Backiel, Howell, and Hannigan. The jury could easily have considered their testimony to be mendacious, which provides supporting evidence of Trinh's claim, because why lie except to cover discrimination? *See* Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000) (disbelief of the reasons put forward by the defendant,

(particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination), *citing*, St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993); *Cf.*, Hill, 144 Wn.2d at 190 n.14 (there no suspicion of mendacity).

Hodge testified that after Zarker became superintendent, SCL managers and human resources personnel violated procedures, fixed promotion and hiring panels, falsified documents to support reclassification of favored Caucasians in the Skagit and in the Communications organization with the complicity of Human Resources and Zarker's staff. This is evidence supporting the conclusion that the harassing conduct was because of his race and/or national origin, because harassment is less likely to occur in an organization that holds its workers accountable by following established procedures. There is no accountability at SCL.

The second question raised by the City under Glasgow is, did the harassment affect the terms or conditions of employment? 103 Wn.2d at 406. Again, this question must also be answered in the affirmative. Under the totality of circumstances, and treating all favorable evidence and inferences as true, the record is replete with evidence that the conduct was so offensive or pervasive that it altered the conditions of Trinh's

employment. The frequency of the conduct was high and conduct was severe. Trinh's management engaged in a constant course of conduct to marginalize him and to remove him from his position. The conduct was humiliating and caused Trinh emotional harm as set forth above. The conduct interfered with Trinh's ability to do his job, at some points removing him completely from his job duties, and consistently taking him out of the information loop. "No single factor is required" to prove this element. Harris, 510 U.S. at 23. Under the totality of circumstances, and treating all favorable evidence and inferences as true, Trinh has met his burden.

3. Mattie Bailey Under The Totality Of The Circumstances, Presented Substantial Evidence That The City's Conduct Was Because Of Her Race And That The Conduct Affected The Terms And Conditions Of Her Employment

Under Glasgow, the first question raised by the City is, would Bailey have been singled out and caused to suffer the harassment if she had been of a different race? 103 Wn.2d at 406. Under the totality of circumstances, and treating all favorable evidence and inferences as true, the record is replete with evidence that Bailey would not have been singled out had she not been an African American. Management engaged in harassing conduct toward her because of her race. Some examples follow. Royer's Thomas Jefferson and Superfly comments were of a

racial nature and themselves satisfy this element. See Jury Instruction 15. Bailey was recognized as a top performer under Superintendents Hardy and Bradley. She was given meaningful work and increased responsibility. Her annual performance evaluations reflected her excellent work. For Bailey, harassment began in 1998 when Superintendent Zarker stopped Bailey's performance evaluations, isolated her by virtually eliminating her access to the Superintendent, and in the rare instances where Zarker met with Bailey, humiliating her through rude treatment. The only other person who Zarker is known to have treated rudely is another African American: Andrew Lofton. There is no business reason for isolating Bailey or for treating her and Lofton rudely.

Zarker cut Bailey's personnel and resources but increased her workload. Though this time, she continued to receive accolades from outside sources. Again, there is not business reason for Zarker's hostile conduct. Then Zarker commissioned a study by a golf buddy to justify hiring Caucasian Royer to do the very same jobs Bailey was charged with doing. Zarker also directed Bailey to submit about fourteen versions of "reinvention packages." Zarker testified that "reinvention" would not be a term he would use and that it might even be discriminatory. He was then impeached by showing him the performance evaluation that was produced by the City during discovery that recounted the "reinvention" efforts made

by Bailey at the cost of her division's morale owing to Zarker's whims. Carrasco, Lofton and Royer also were impeached on cross-examination, which again raises the likelihood that the jury found their testimony to be mendacious. As with Trinh's case, why lie except to cover up discrimination?

Zarker then hired Royer in late 1999, and he hired Caucasians during a budget crisis to do pieces of Bailey's job. Royer then directed Bailey to work on getting pay increases for the Caucasians while her own pay equity complaints remained unresolved. Indeed, Caucasian Videographer Peter Clarke earned more than Bailey in 2002 and 2003 even though he had fewer duties and no subordinates. Ex 1065-1072 and Ex 592. Bailey was isolated and finally relegated to performing secretarial tasks as Royer and his new Caucasian subordinates took most of Bailey's substantive duties. Royer's subordinates even worked behind Bailey's back to restructure the division until Bailey was left processing invoices as her prime job duty. Keeping in mind that the City protects employees from termination without cause, Zarker and Royer's conduct could reasonably have been viewed by the jury as designed to drive Bailey out of the Communications organization. Since she was a proven asset, her race can be the only motive for their behavior.

Management's treatment of Bailey is similar to management's treatment of Trinh, deMello, and Nonog during the same time frame. The method followed by Zarker's executive team was to isolate the minority and either pressure that employee to leave the assigned position, either through direct pressure or by eliminating that employee's job responsibilities and creating a demeaning work environment, or by outright abrogation of the position. The process whereby Mssrs. Trinh, Nonog and deMello were removed from their positions is remarkably similar to the process undertaken against Bailey. They all were taken from positions of responsibility and marginalized until they voluntarily left or were removed. The actions by the same management, during the same time frame, directed against minorities, is evidence supporting the conclusion that the actions taken against Bailey were because of her race.

Hodge testified that after Zarker became superintendent, SCL managers and human resources personnel violated procedures, fixed promotion and hiring panels, and falsified documents to support reclassification of favored Caucasians in the Skagit and in the Communications organization. This is evidence supporting the conclusion that the harassing conduct was because of her race, since harassment is less likely to occur in an organization that holds its workers accountable by following established procedures. There is no accountability at SCL.

The second question raised by the City under Glasgow is, did the harassment affected the terms or conditions of employment? 103 Wn.2d at 406. Again, this question must also be answered in the affirmative. Under the totality of circumstances, and treating all favorable evidence and inferences as true, the record is replete with evidence that the conduct was so offensive or pervasive that it altered the terms and conditions of Bailey's employment. The frequency of the conduct was high and the conduct was severe. Bailey's management engaged in a constant course of conduct to marginalize her in order to drive her from her position. The conduct was humiliating and caused Bailey emotional harm as set forth above. The conduct interfered with her ability to do her job, at some point converting her from a manager to a secretary. "No single factor is required" to prove this element. Harris, 510 U.S. at 23.

Under the totality of circumstances, and treating all favorable evidence and inferences as true, Bailey has met her burden.

C. Mattie Bailey Presented Substantial Evidence Of Disparate Treatment

1. Legal Standard

In post-trial review, a prima facie case of employment discrimination under the WLAD may be established by showing: 1) the plaintiff is a member of a protected class, 2) he was qualified to receive a benefit, 3) he was denied the benefit, and 4) that a similarly situated

employee, who is not a member of the protected class, received the benefit. *See* Jones v. John Morrell & Co., 243 F.Supp.2d 920, 947 (N.D. Iowa 2003); Hill v. BCTI Income Funds-I, 144 Wn.2d. 172, 181, 23 P.3d 440 (2000); *see also* Lyons v. England, 307 F.3d 1092, 1114-1115 (9th Cir. 2002) (standards for prima facie case under shifting burden method must be flexibly applied).

Upon making such a case, if the employer adduces a legitimate non-discriminatory reason for the disparity, the plaintiff must present evidence that the employer's proffered justification is pretextual. *See* Hill, 144 Wn.2d. at 183-184; Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133 (2000) In Hill, the Court noted the difficulties in proving discrimination:

> Direct, "smoking gun" evidence of discriminatory animus is rare, since there will seldom be 'eyewitness' testimony as to the employer's mental processes and employers infrequently announce their bad motives orally or in writing. Consequently, it would be improper to require every plaintiff to produce direct evidence of discriminatory intent. Courts have thus repeatedly stressed that circumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden. Indeed, in discrimination cases it will seldom be otherwise .

Hill at 180 (citations, quotation marks, and brackets omitted). Thus, "any indication of discriminatory motive may suffice to raise a question that can only be resolved by a fact finder, and for that reason summary

judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits. . . . " Lyons, 307 F.3d at 1113 (internal quotations omitted).

The final prong of this analysis is the "pretext" analysis whereby the plaintiff is "afforded a fair opportunity to show that [defendant's] stated reason for [the adverse action] was in fact pretext." *Id*. at 182 *quoting* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). The Hill Court adopted the reasoning and holding of Reeves v. Sanderson Plumbing, 530 U.S. 133, 148 (2000). Id. at 184. Under the totality of circumstances, and treating all favorable evidence and inferences as true, there is sufficient evidence to support the prima facie case and to show pretext.

2. Mattie Bailey Presented Substantial Evidence Of Disparate Treatment

Here, Zarker could not move or terminate Bailey because she was performing her duties extremely well. He could not drive her out—she endured his rude and isolating behavior. Instead, he pushed her to the side and hired Royer to do her job. He paid Royer what he believed the job was worth and denied Bailey that benefit. Accordingly, Royer's salary is the correct measure of the lost income to Bailey. She complained to Carrasco

after Zarker left, and to Human Resources Manager Kolden, but nothing was done.

Evidence of pretext includes Zarker's "reinvention" impeachment, Carrasco's "lack of knowledge" about Royer's conduct toward Bailey, which the jury may have taken as mendacious testimony given Royer's position on the executive team as a direct report, and Royer's sudden pay increase offer to Bailey based on her status as an African American within days of her having complained about race discrimination combined with Royer's claim that the timing of his offer was not connected to Bailey's having lodged a discrimination complaint, which Royer claimed to have no knowledge. Hodge's testimony of rule manipulation by Zarker, Royer, and Backiel, and Kolden's unwillingness to enforce personnel policies makes it more likely that such disparate treatment occurred. Also, Carrasco's and Bea Hughes' actions to cut EEO investigative staff and functions during a time when the need for investigations was great also makes it more likely that such disparate treatment occurred.

Under the totality of circumstances, and treating all favorable evidence and inferences as true, Bailey has met her burden.

D. The Damages Awarded to Phi Trinh and Mattie Bailey Were Appropriate

1. Emotional Harm Damages Were Proven

Bunch v. King County Dept. of Youth Services, 155 Wn.2d 165, 180-81, 116 P.3d 381 (2005), is binding precedent on the issue of emotional harm damages and emphasizes that "the jury is given the constitutional role to determine questions of fact, and the amount of damages is a question of fact." Id. at 179-180 *citing* James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971), *citing and quoting* Sofie v. Fibreboard Corp., 112 Wn.2d 636, 646, 654, 771 P.2d 711 (1989).

The defendant argues that passion and prejudice infected the jury's significant emotional harm award, but fails to cite the applicable statute which provides that a new trial should not be granted on damages unless the court finds the award to be "***so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice***." RCW 4.76.030 (emphasis added). In Bunch, the Supreme Court found there were sufficient facts to uphold the trial court's denial of remittitur and to overturn the Court of Appeals' grant of remittitur. In Bunch, which is also a discrimination case brought under the WLAD, the Court found, "The plaintiff, once having proved discrimination, is only required to offer proof of actual anguish or emotional distress in order to have those damages included in recoverable

costs pursuant to RCW 49.60." 155 Wn.2d at 180. Bunch had no expert testimony or third person testimony about his emotional harm. 155 Wn.2d at 181. His testimony was limited to being depressed and angry over a period of six years. 155 Wn.2d at 180. The Supreme Court found that his own testimony was sufficient to support the verdict and that his brief testimony provided "a sufficient basis from which the jury could infer emotional distress." 155 Wn.2d at 181, 180.

Here, the defendant fails to show that the damages awarded by a jury are *so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice*. The hostile work environment endured by Bailey and Trinh began in the 1990s and extended for a decade under Zarker and Carassco. Bailey and Trinh each outlined detailed facts showing ongoing mistreatment by management, and each recounted their humiliation, anguish, loss of joy, and other emotional damages throughout their testimony ranking the suffering from 1-10 and creating a record of their pain. Their suffering extended for more than a decade and included damages for hostile work environment and disparate treatment. This mountain of evidence requires the Court to uphold the jury's verdict.

The City's efforts to take one line out of Bunch in which Justice Sanders discusses the relationship by multiples between economic and

noneconomic damages is not dispositive. Bunch lists that relationship as one factor. The Constitutional protection is the only real factor to be considered. In fact, in another harassment case brought against the City, Hairston v. City, Hairston won a verdict of $400,000 in emotional harm damages only—she had no lost income. CP 10775-78. There is no record of the City having appealed that verdict. Of course, it makes sense that in a discrimination case, some victims may have no economic loss but suffer serious emotional harm over many years. Our constitution does not limit those damages. To follow the City's argument, Hairston could have no claim for emotional harm because she had no economic loss. That argument makes no sense.

2. Economic Damages Awarded To Phi Trinh Were Appropriate

Trinh's front pay verdict is not speculative. Trinh provided details regarding the pay for the Skagit Project Manager job he sought in 2003 and his pay rate in 2003. RP 1481–82, Ex. 660. Trinh said he intended to work another 14 years from 2006. RP 1484. He intends to apply for promotions. RP 1606. Trinh calculated his lost wages without overtime, based on the salary range in the job description for Skagit Manager, because overtime is not guaranteed as a generation supervisor. Ex 593, Ex 31. Trinh's unrebutted testimony was that there is no guarantee of

overtime as a generation supervisor. RP 1608. The jury may have believed that SCL would not pay Trinh overtime in the future as a generation supervisor because overtime is discretionary, and especially because the City's failure to give him overtime was one of the claims he raised to Carrasco and Reese Crutchfield, which they found had no merit. RP 2792. No back pay was requested or awarded up to trial because Trinh had received overtime that brought those damages to zero. If fact, Trinh had to work extra hours as a generation supervisor to make the same money that he would have gotten in a forty hour week had he been promoted.

The jury was provided with treasury rates to aid in calculating present value. Ex 677. The future lost wages found by the jury were consistent with the calculation.

E. The Testimony of Felix deMello, Paul Nonog, and Stephanie Lieberman Was Admissible Under ER 404(b) And For Other Purposes

The testimony of Felix deMello and Paul Nonog supported Trinh's and Bailey's contentions that they were in a hostile work environment and victims of disparate treatment. The testimony of Stephanie Lieberman supported the claims of both plaintiffs because it directly refuted Superintendent Carrasco's claim that he went outside established procedure to conduct the Trinh investigation on the issue of pretext. Any evidence of "dissembling to cover up a discriminatory

purpose" is critically relevant to the Respondents' case under Washington law. The testimony of Nonog and deMello demonstrated that Zarker, Backiel, Howell, Royer and other managers were dissembling.

ER 404(b) permits evidence of other crimes, wrongs, or acts to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). The admissibility of such evidence lies within "the sound discretion of the court." Doe v. President of Church of Jesus, __ Wn.2d. __, 167 P.3d 1193, 1207 (2007). The two-part test is whether the evidence is relevant and necessary to prove an essential element of the crime, and whether it's probative value must be shown to outweigh its potential for prejudice. State v. Robtoy, 98 Wn.2d 30, 42-3, 653 P.2d 284 (1982). Plaintiffs must show the connection to the defendant by a preponderance of the evidence. State v. Norlin, 134 Wn.2d 570, 577-79, 951 P.2d 1131 (1998). Here, each Respondents' evidence as applied to the other plaintiff's cases is relevant and admissible to show pretext.[33]

Nonog, deMello, and Lieberman's testimony is relevant to each plaintiff and admissible to show pretext, and the parties are exactly the same. *Cf.* Lords v. Northern Automotive Corp., 75 Wash.App. 589, 881

[33] Admission of "other wrongs" evidence is common and is usually made based simply on offers of proof. State v. Kilgore, 147 Wash.2d 288, 53 P.3d 974 (2002).

P.2d 256 (1994)(evidence of an employer's other discriminatory acts is admissible in appropriate circumstances, but different parties and facts not sufficiently similar), *overturned on other grounds,* Mackay v. Acorn Custom Cabinetry, Inc., 127 Wash.2d 302, 306, 898 P.2d 284, 286 (1995).

1. The Testimony of Nonog and deMello was Admissible

Just like Bailey, Nonog was displaced by less qualified Caucasians and although he kept his job for a time, was given less responsibilities and was finally left with demeaning duties. Just like Trinh, Skagit managers worked to move Nonog out of his position although he was doing an excellent job. Nonog and Trinh are Asian Americans who speak with accents. All were moved or threatened with being moved by the same mangers during the same time frame.

deMello was moved to the same unit as Bailey. He too was paid less than he should have been (the testimony was that Royer said he could not pay more) although Caucasians working for Royer got high pay and good job responsibilities. deMello ultimately retired after his "Tours" responsibilities were removed and his job duties became menial and meaningless.

Such evidence has been admitted in other employment discrimination cases and should be admitted here because it is relevant to

whether race or national origin was a substantial factor in the decision to layoff the plaintiffs. Hume v. American Disposal Co., 124 Wash.2d 656, 666, 880 P.2d 988 (2004), (trial court correctly found that the testimony of the former employees regarding their experiences with the defendants was relevant to the issue of the defendants' intent, plan, and pattern regarding the alleged harassment).[34] The Nonog and deMello testimony was relevant and admissible.

2. The Testimony of Stephanie Lieberman Was Admissible

SCL EEO Investigator Stephanie Lieberman investigated EEO complaints at SCL and herself became a victim of retaliation in 2004 and 2005. After Carrasco testified on defendant's case how he had gone out of his way to investigate Phi Trinh's claims, and appointed Shanna Reese (Crutchfield) for that purpose in 2004, the Court permitted plaintiffs to cross examine him on the fact that he intentionally did not utilize his own EEO Office and the services of Lieberman. His use of Reese called into question whether his goal was to learn the truth or to cover up the facts that Trinh had presented supporting race discrimination and harassment.

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[34] Roberts v. Atlantic Richfield Company, 88 Wn.2d 887, 568 P.2d 764 (1977), relied on by City Light, is distinguishable as in that case the plaintiff did not state a prima facie case of discrimination. There, plaintiff's "offer of proof contained no evidence that these employees held comparable positions with Arco, that they worked under similar circumstances, or that they had been discharged in a like manner." 88 Wn.2d at 893. Here, the plaintiffs share the same managers, time frame, and racial characteristics.

Carrasco testified that he did not use Lieberman because she was ill. Lieberman later rebutted that testimony by indicating that she was retaliated against in 2004-2005 for trying to do her job and to the extent she was ill, it was caused by her management's treatment of her. Lieberman's supervisory duties were subsequently removed, she was not allowed to work overtime or obtain support for her caseload. RP 3556. Carrasco heard her claim for assistance and instead of providing support he suspended her for three days. RP 3558. Lieberman testified that the EEO office was overwhelmed with complaints. The Court's analysis and ruling permitting the Lieberman testimony occurred on February 8, 2007.

This evidence was relevant under ER 402. And her testimony directly rebutted Carrasco's testimony as to why he used Reese instead of Lieberman, who was the SCL EEO investigator. This testimony supported the conclusion that Carrasco was dissembling to cover up a discriminatory purpose. *See* Hill, 144 Wash.2d at 184.

This is evidence supporting the conclusion that the harassing conduct and disparate treatment was because of his race and/or national origin, because harassment and discrimination is less likely to occur in an organization that holds its workers accountable by following established procedures. Here, the EEO office was being gutted to the point where

policies protecting minorities could not be enforced. There is no accountability at SCL.

F. Joinder was Appropriate In This Case

Under the plain language of CR 20, plaintiffs were entitled to joinder. CR 20 (a). In Washington, the policy to join related cases is strong and is supported by case law. In Mangham v. Gold Seal Chinchillas, Inc., 69 Wash.2d 37, 416 P.2d 680 (1966), the Supreme Court permitted six separate plaintiffs to maintain one lawsuit against one defendant alleging fraud in the sale of chinchillas. There, the dates of the claims ranged from 1956 to 1962 and involved various salespersons selling chinchillas to different persons in different locations. Id. at 39. The Court found significant that even though these were different sales involving different independent sales agents and six different alleged victims, the "sales presentation . . . is essentially the same." Id. at 40. The court found these to be a "series of related transactions" even though the claim involved separate transactions spread over years involving different salesmen and different victims. Id. at 40-41. Here, Zarker and his executive team, including Backiel, Kolden, and Royer, and Carrasco and his executive team, including Backiel, Kolden and Royer, are the source of authority for the wrongs done to Trinh and Bailey. They acted to strip Bailey and Trinh of meaningful work and their supervisory duties. When plaintiffs

complained, they were ignored. During the same time frame, under the same management structure, including the superintendent and his executive team, management manipulated the same personnel rules within the same department of the City. Iris Hodge identified misconduct at the Human Resources office that included the Skagit and Communications during the same time frame. The Human Resources office reports to the superintendent, namely Zarker and Carrasco. The movement of deMello from the Skagit to Communications shows that all actions occurred within only one discrete department of the City. The claims are "logically related." This all occurred in what amounts to one hostile work environment created by and permitted by Zarker that infected his entire department with what amounts to an atmosphere of "White Privilege." In this atmosphere it does not matter if one is Asian American or African American. All that matters is whether one is Caucasian, which is the criteria for promotion (which is uncontested in this case), for higher pay, and for a peaceful work environment. In both cases, Zarker and Carrasco were linked to all of the improper acts from moving Trinh from his job to pushing aside Bailey. Again, the facts are "logically related." Furthermore, each proved his or her case by showing, *inter alia*, SCL's Equal Employment Opportunity (EEO) Office and its Human Relations department promote discrimination at SCL by failing to investigate

complaints of discrimination and by failing to support EEO investigators who try to do their jobs. In addition, the respondents showed SCL-wide discrimination through reliance on subjective criteria for the allocation of advantages and benefits of employment at SCL, even if it mean violating the Seattle Municipal Code by failing to give annual performance evaluations, and by seeking to move qualified persons out of their jobs or less qualified Caucasians into jobs or less qualified Caucasians into jobs. *See e.g.* Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 598-599 (2nd Cir. 1986); Hartman v. Duffey, 19 F.3d 1459, 1468-1469 (D.C. Cir. 1994). The economy of using a single suit, rather than two suits, to present the above-mentioned evidence, is obvious. The Mangham Court found common questions of law and fact. Magham, 69 Wash.2d at 41. Here, common questions of fact and law are involved in that both respondents prosecuted claims of hostile work environment against SCL under the same time frame. The mode used to harass the respondents flowed from the top down, and required violations of City policies to achieve. The Court did not abuse its discretion in joining these two cases.

Federal case law construing FRCP 20 (a) is persuasive authority for construction of CR 20 (a), since CR 20(a) follows FRCP 20 (a). Comment, CR 20. "The impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of

claims, parties and remedies is strongly encouraged." King v. Ralston Purina Co., 97 F.R.D. 477, 479-480 (W.D.N.C. 1983)(secondary citations omitted).

As to the definition of the first prong of CR 20, "transaction or occurrence," federal courts agree with our Supreme Court that the phrase encompasses "all logically related claims." Mosley v. General Motors Corp., 497 F.2d 1330, 1333 (8th Cir. 1974); Blesedell v. Mobil Oil Corp., 708 F.Supp. 1408, 1421 (S.D.N.Y. 1989). In Fong v. Rego Park Nursing Home, 1996 WL 468660 (E.D.N.Y. Aug. 7 1996), three plaintiffs who were terminated under different circumstances, at different times, and by two different named defendants, joined in a discrimination suit brought against their employer. Fong at *3. The court denied defendants' motion for misjoinder because the plaintiffs alleged "actions by Defendants which subjected them to intense scrutiny and strict punishment." Id. In Blesedell, three female employees sued their employer for sex discrimination and sexual harassment. Blesedell, 708 F.Supp. at 1410. Defendant's motion for severance was denied because all three plaintiffs

alleged injury by the same general policy of permitting discrimination against women. Id. at 1422.[35]

Under federal and state law, the second requirement of Rule 20(a), that the action raises a question of law or fact common to all the parties, does not require the commonality of all questions of law and fact raised in the dispute, rather, the requirement is satisfied if there is any question of law or fact common to all parties. Blesedell, 708 F.Supp. at 1422. Plaintiffs alleged intentional discrimination against the defendants in violation of the Washington Law Against Discrimination, RCW 49.60 *et al.* for harassment, disparate treatment and retaliation. They adduced evidence at trial that similar discriminatory practices were carried out against the plaintiffs by either the former superintendent, Zarker, or his

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[35] Moreover, allegations of a hostile work environment are tantamount that there was widely held policy of discrimination at the employer thereby constituting a single transaction. *See, e.g.*, Ramirez v. Bravo's Holding Co., No. 94-2396, 1994 WL 719215, at *1 (D. Kan. Dec. 23, 1994) (determining that plaintiffs, who were employees at a restaurant, alleged individual claims that together constituted a sexually hostile work environment claim and therefore satisfied Rule 20(a)); Streeter v. Joint Indus. Bd. of the Elec. Indus., 767 F.Supp. 520, 529 (S.D.N.Y.1991) (holding that plaintiffs' claims of a hostile work environment due to discriminatory treatment constituted a single transaction); see also Best v. Orner & Wasserman, Nos. 92 C 6477, 93 C 2875, 1993 WL 284145 (N.D.IL. July 27, 1993) (holding that the "same transaction or occurrence" condition was met to find relatedness of two cases where plaintiffs alleged a hostile work environment at a law firm, even though their periods of employment did not overlap); *cf.* Yaba v. Roosevelt, 961 F.Supp. 611, 622 (S.D.N.Y.1997) (holding that the plaintiff's additional claims of harassment were insufficient to defeat res judicata because an allegation of a hostile work environment, by its nature, included any claims of an on-going pattern of conduct, and regardless of separate pleadings the plaintiff's claims involved a single transaction).

direct reports, Backiel and Royer. Each plaintiff shares the same prayer for relief. First Amended Complaint, ¶¶ 4.1-4.10.

Other federal courts have found that the commonality test under Rule 20 (a) was met under analogous circumstances. For example, in Puricelli v. CNA Insurance Comp., 185 F.R.D. 139, 143 (N.D.N.Y. 1999) the court found commonality where plaintiffs alleged claims under the Age Discrimination in Employment Act, the New York State Human Rights Law, and intentional inflection of emotional distress; the plaintiffs also alleged actions taken against them during a similar time frame involving the same personnel. See, Smith v. Northeastern Illinois Univ., 2002 WL 377725, *3-4 (N.D.IL.) commonality test met because hostile work environment claims were to be the primary area of the examination).[36] It should be noted that the City's reliance on Bailey v. Northern Trust Co., *196* F.R.D. 513, 517 (N.D. Ill., 2000) and Grayson v. K-Mart Corp., 849 F.Supp. 785, 787 (N.D. Ga. 1994), is misplaced because they are not hostile work environment cases. This explains why

[36] *See also* Disparte v. Corporate Exec. Bd., 223 F.R.D 7, 16 (D.D.C. 2004) (finding common issues of fact, in part, because management was aware of racial issues but failed to act swiftly and effectively in department where plaintiffs worked; a witness also testified that defendant promoted discriminatory policy by having him alter performance reviews; also offered evidence of more lenient treatment of Caucasians in their department, etc.).

the Court in Smith, which is a hostile work environment case, distinguished and rejected that line of cases. Smith at *4-*5.

Plaintiffs would have presented the same evidence of other discrimination twice if their cases were tried separately, and the evidence would have been admissible. *See* Hume v. American Disposal Co., 124 Wn.2d 656, 665-666, 880 P.2d 988 (1994); Burnside v. Simpson Paper Co., 66 Wn.Ap. 510, 521-522; 832 P.2d 537 (1992); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805-806, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1974); Conway v. Electro Switch Corp., 825 F.2d 593, 597-598 (1st Cir. 1987). As such, to have required plaintiffs to present the same evidence and witnesses before two separate juries would have amounted to a waste of time and resources.

V. ATTORNEY FEES

Plaintiffs request attorney fees and costs on appeal pursuant to RCW 49.60.

VI. CONCLUSION

Trinh and Bailey have met their burdens of showing sufficient evidence. They have shown that damages were appropriately awarded and that the all witnesses were appropriately called to testify. The cases should have been joined, and the verdict should be affirmed in all respects.

RESPECTFULLY submitted this 31st day of December, 2007.

THE SHERIDAN LAW FIRM, P.S.

By: _____
John P. Sheridan, WSBA # 21473
Attorney for Plaintiffs/Respondents

DECLARATION OF SERVICE

Aileen Luppert states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, and am the paralegal for Respondents' the attorney of record. I make this declaration based on my personal knowledge and belief.

2. On December 31, 2007, I caused to be delivered via legal messenger to the following attorneys:

Katrina Kelly
Seattle City Attorney
600 Fourth Ave., 4th Floor
Seattle, WA 98104-4769

a copy of the RESPONSE TO APPELLANT'S OPENING BRIEF.

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

DATED this 31st day of December, 2007, at Seattle, King County, Washington.

_____

John P. Sheridan
WSBA #21473