Honorable John P. Erlick
Note for Hearing: 1/24/2017, 4:00 p.m.
ORAL ARGUMENT REQUESTED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

ALONCITA MONROE, an individual,

Plaintiff,

vs.

THE CITY OF SEATTLE, a municipal corporation,

Defendant.

Case No.: 15-2-11126-4-SEA

PLAINTIFF'S MOTION FOR NEW TRIAL

I. INTRODUCTION AND RELIEF REQUESTED

In this case, the Plaintiff and one juror were Black. The eleven other jurors were White or Asian Americans. This jury lacked instructions on implicit bias; defining the importance of catching management lying as a pretext for discrimination; properly outlining the elements of the disparate treatment claim (for which there is no "essential functions" element); and describing the employer's "continuing duty" to accommodate and re-engage the interactive process. The Court declined to provide those instructions, and those decisions, combined with court rulings that prevented Plaintiff from telling the jury that she had considered her

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mistreatment by Manager Jackson to have been sexual harassment, and that redacted documents showing that Plaintiff communicated that perception in complaints to the police and to management, prevented Ms. Monroe from getting a fair trial, and likely led to jury misconduct. A new trial is warranted here.

II. EVIDENCE RELIED UPON

This motion is based on the Declaration of John P. Sheridan filed and the exhibits attached thereto, the declaration of [redacted], and the record herein.

III. STATEMENT OF FACTS

During trial, numerous instances of mendacious testimony was revealed to the jury. Here are some examples:

Paul Jackson

- Jackson testified under oath that he didn't know Monroe was coming over as an "accommodation." (Sheridan Dec., Ex. 1,[1] RP 33). However, transfer letter **Exhibit 279** discussed reasonable accommodation by Shena Brim. (*See* Ex. 5).
- Before Monroe joined his team, Jackson attended a meet-and-greet meeting with Angela Dawson-Milton, Henri McClenney, Shena Brim, Evan Chinn and Ms. Monroe, and still Jackson maintains he had no idea she was coming over as "an accommodation." **Exhibit 276** (Ex. 6).
- Jensen's timeline, **Exhibit 332**, shows that as soon as Jensen arrived, he and Jackson discussed how Ms. Monroe was a "recent SPU accommodation." Jackson explicitly gave his approval to this summary. (Ex. 7).

[1] All exhibits cited herein are attached to the Sheridan Declaration, unless stated otherwise.

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- Jackson testified at trial that Ms. Monroe's eyes were dilated, but did not check the box to write eyes "dilated." (Ex. 1, RP 76). Also, he made no mention of dilated eyes in his deposition.

- Jackson testified that he saw Monroe "swatting at flies." Jensen testified that he never saw Monroe swatting at flies or waiving hands around. (Ex. 3, RP 35).

- Jackson states that he was on the phone "back and forth." (Ex. 2, RP 58). But phone records do not support this. **Exhibit 356.**

- Jackson testified at trial that he never said, "It's too late." (Ex. 1, RP 11-12). He was impeached by his deposition in which he admitted to saying, "it's too late." (*Id*. at 13). Jackson testified that he didn't tell Lisa Jacobs that it was "too late," and instead testified that he told Lisa Jacobs that he "could not do that unless his (my) chain of command told me to do that as she had already signed the declination form." (Ex. 2, RP 59).

- Jackson testified at trial that Monroe was given the opportunity to call her union rep in another room, but she came out and said that she couldn't reach them. (Ex. 2, RP 55).

- According to Jackson, he heard Monroe's name paged to pick up the call from Ms. Jacobs; and then watched Monroe go into the locker room. He testified, "We were sitting in the common area when the loud speaker was -- over the loud speaker, there was a phone call for Ms. Monroe." He says, the "page … cause[d] her to get up from the common area and go into the restroom"; and she "entered the [locker]room to answer the phone." (Ex. 1, RP 10-11). **Yet, later in his testimony, Jackson testified Ms. Monroe "said that she had to use the bathroom and Scott allowed her, he said go ahead."** "And then she also said she wanted to call her sister and her union rep." And by this time, "she already had no badge." (*Id*., at 24-25).

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- Jackson testified that he was going to call Dale or Evan. (Ex. 2, RP 59); instead Chinn called Jackson regarding the decision to take a FFD. Jensen testified that HR called Jackson. (Ex. 3, RP 49). There is no record on phone logs of telephone calls taking place between Jackson & Chinn around 11 a.m. **Exhibit 356** (Ex. 8).

- Jackson testified that he had no information that Monroe wasn't getting regular breaks. (Ex. 2, RP 43, 48, 78). **Exhibit 110** shows concern about Monroe not getting regular breaks. (Ex. 9).

- Jackson testified that he considered Ms. Monroe on admin leave once she couldn't be found. (Ex. 2, RP 92). Jensen testified that he recalls seeing Jackson with her badge in his hands. (Ex. 3, RP 82).

- Jackson testified that he never told Ms. Monroe that she could leave the building (Ex. 2, RP 63). Monroe testified that Jackson told her to leave the building.

- Jackson testified at trial that as they were walking to his office, he asked Ms. Monroe if she was okay. (Ex. 2, RP 94). Impeached by his deposition testimony, Jackson stated that he didn't want to "invade or anything like that. It could have been personal . . ." (*id*., at 98).

- Jackson was asked by the jury if Ms. Monroe was the first encounter where he had to deal with a position being fulfilled by accommodation. Jackson stated that no it wasn't and he had one right at the moment. (Ex. 2, RP 95-96). Impeached by deposition, "have you ever had a person come to you before that came to you as an accommodation . . . . As an accommodation, I can't say that I recall." (Ex. 2, RP 98-99). After impeached, Jackson agreed that on the day of his deposition, he could not recall whether a person had come to him as an accommodation. (*Id*.).

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- Jackson denied receiving a copy of Rutherford's memo transferring him to a position with no supervision duties. (Ex. 1, RP 16).

Scott Jensen

- Jensen testified that he heard Jackson say that he needed to call his boss during the bathroom incident. He was impeached by his sworn declaration in which he wrote that he could not hear what was being said at the bathroom. (Ex. 3, RP 109-110).
- Jensen admits knowing about bladder issues. (*Id*., at 105).

Dale Hitsman

- When asked if Chinn indicated that he posed the question: Did she acknowledge that she was told not to drive and to get a ride? Answer: No, Hitsman says he doesn't understand what that means.
- Testified that most people do not choose to have a union representative when attending an FFD – Monroe says this is the biggest lie. (Ex. 4, RP 76).

Hitsman's Report

- Witness Davhee Enciso denied ever seeing Monroe "just walking around in circles, sort of dancing around and bobbing her head." (Encisco testimony)
- Misleading in report about ride a-longs. Witness Enciso testified that he gave Monroe rides before. (Encisco's testimony)
- Hitsman failed to include in his report that "Mr. Jensen said that the decision could not be reversed." (Ex. 4, RP 57).

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- Hitsman failed to include in his report that Jensen put Monroe on "admin leave effective immediately, and Jackson escorted her to her desk to grab belongings." (Ex. 4, RP 58-59).
- Omitted that Mr. Jackson had said to Ms. Jacobs it's too late. (Ex. 4, RP 71).
- Wrote that Jackson contacted Chinn, who told him to allow her to go forward. Jensen testified that Chinn contacted Jackson. (Ex. 3, RP 49).
- Hitsman omitted Monroe's various complaints in his report.
- With strong evidence to the contrary, Hitsman found that Ms. Monroe had lied about whether she had been through a FFD before. (Ex. 4, RP 69).
- With strong evidence to the contrary, Hitsman found that Monroe was using drugs (Ex. 4, RP 81).
- With strong evidence to the contrary, Hitsman found that Ms. Monroe refused to participate in the FFD. (*Id*.).
- With strong evidence to the contrary, Hitsman found that Jackson was credible and Monroe was not. RP (12/15/16) 63.
- Plaintiff offered a jury instruction to address pretext, which was denied by the Court over objection. *See* Plaintiff's Proposed Instruction No. 17 (Ex. 10).

At trial, Ms. Monroe testified that her depression and anxiety had been with her since 2001. The record contained multiple performance evaluations showing her good performance during that time, but the Court excluded that evidence. *See* Trial **Exhibits 4, 7, 9, 10, 11,** and **12** (attached as Sheridan Dec., Exs. 11-16). The exclusion of that evidence prevented the Plaintiff from establishing that she could competently perform the job of AS1.

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During closing, Defendant argued that Ms. Monroe never asked for accommodation at SDOT, or after she was placed on administrative leave beginning on February 8. Plaintiff argued that Ms. Monroe, without benefit of counsel, had misconstrued her claims as being related to sexual harassment, but the Court undercut that explanation by prohibiting her from testifying about her perceptions of Jackson's inappropriate behavior, and going so far as to order the redaction of the two exhibits in which she reported her perceptions to the police and to management. *See* **Exhibits 336** and **339** (Sheridan Dec., Exs. 17-20). This gap between the argument and the facts hurt her credibility and may have tipped the balance against her during deliberations.

Plaintiff offered jury instructions to address implicit bias, which were denied by the Court over objection. *See* Plaintiff's Proposed Instructions No. 3 and 4 (Ex. 21). Implicit bias permeates society, and needed to be addressed here but was not.

Plaintiff also offered a jury instruction that properly set out the elements of her disparate treatment claim, and a jury instruction on the employer's "continuing duty" to accommodate, which were denied by the Court over objection. *See* Plaintiff's Proposed Instruction Nos. 15 and 30 (Exs. 22-23).

During deliberations, the only Black juror, [redacted] perceived that "the deliberations were unfair and went too fast, and that Ms. Monroe did not get a fair trial owing to her race." [redacted] Declaration, ¶6. He "also felt that the deliberations were not adequate." He observed that, "The foreperson was in charge of pulling up the exhibits so we could discuss them as we went through the jury verdict form, but the jury did not review any exhibits." *Id*. at ¶7.

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There was misconduct during deliberations. [redacted] has declared:

> I also felt that there was misconduct in the jury deliberation process. We deliberated by going through the jury verdict form. The failure to accommodate claim was first. Three of us voted "yes," meaning we voted in favor of Ms. Monroe on that claim, which caused the group to go on to the next claim, and then come back and revisit the first claim. Each time three of us voted "yes." I voted in favor of a "yes" vote to each of the claims. We were told by Judge Erlick not to deliberate when anyone was out of the room. Toward the end of the morning, I went to the bathroom. I was in there for a few minutes. As I went to open the bathroom door to rejoin the group, I could hear the jurors talking, but I could not hear what was being said. When I opened the door, everyone stopped talking, and two of the jurors looked at me with guilty expressions. Then, someone said, "let's do another vote." Without any argument or explanation, one of the jurors who had voted "yes" with me on the first claim, switched her vote to "no." Within seconds, the foreperson hit the buzzer and we were done without further discussion. I felt like this was a rigged outcome, and that the group convinced her to change her mind out of my presence.

[redacted] Declaration, ¶8.

IV. ISSUES PRESENTED

Whether juror misconduct warrants a new trial? Yes.

Whether failure to give the pretext instruction warrants a new trial? Yes.

Whether failure to give the implicit bias instructions warrants a new trial? Yes.

Whether giving an inaccurate disparate treatment instruction warrants a new trial? Yes.

Whether failure to give the "continuing duty" instruction warrants a new trial? Yes.

Whether exclusion of relevant evidence warrants a new trial? Yes.

V. ARGUMENT AND AUTHORITY

A. The Jurors Deliberated In The Absence Of The Only Black Juror In Violation Of The Law

During deliberations, the jury may be allowed to separate unless good cause is shown, on the record, for sequestration of the jury. Unless the members of a deliberating jury are allowed to separate, they must be kept together in a room provided for them, or some other convenient place under the charge of one or

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> more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the best of his or her ability, keep the jury separate from other persons. The officer shall not allow any communication to be made to them, nor make any himself or herself, unless by order of the court, except to ask them if they have agreed upon their verdict, and the officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on.

RCW 4.44.300. "If the jury is separated in violation of RCW 4.44.300, a presumption arises that Defendant has been prejudiced." *State v. Smalls*, 99 Wn.2d 755, 766, 665 P.2d 384, 390 (1983). The "court must, in the absence of any attempted showing by respondent to the contrary, presume that prejudice preventing appellant from having a fair trial did result from this separation of the jury in this case." *State v. Amundsen*, 37 Wn.2d 356, 362, 223 P.2d 1067, 1071 (1950).

Here, [redacted] cannot attest to what was said in his absence, but he observed the guilty looks and the juror's vote change without additional discussion. This raises the presumption of prejudice. A new trial must be granted.

B. The Failure To Give The Pretext Instruction Was Error In This Case.

"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. … Proof that the Defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179, 184, 23 P.3d 440 (2001) (internal quotations and citations omitted).

The WLAD "seeks to remedy an evil that … 'menaces the institutions and foundation

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of a free democratic state.'" *Reese v. Sears, Roebuck & Co.*, 107 Wn.2d 563, 569 (1987), *quoting* RCW 49.60.010. "The overarching purpose of the law is to deter and eradicate discrimination in Washington." *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 360, 20 P.3d 921 (2001. "The legislature directs us to construe the WLAD liberally." *Scrivener v. Clark College*, 181 Wn.2d 439, 445, 334 P.3d 541 (2014).

"The court determines questions of law and imparts the law of the case to the jury by means of instructions." *State v. Shelton*, 71 Wn.2d 838, 843, 431 P.2d 201 (1967). In *Farah v. Hertz*, the Court of Appeals addressed the same instruction and found that, "This instruction is an accurate statement of the law." *Farah v. Hertz Transporting, Inc.*, 196 Wn. App. 171, 383 P.3d 552, 557 (2016). The Court also found that, "this instruction would have been appropriate but was not necessary." *Id*. at 555.

Here, the instruction was necessary. This case is filled with mendacious testimony by City managers, but without a means to connect the dots, the long list of lies proves nothing more than City managers are liars. The pretext instruction would have connected the dots.

In *Hill v. BCTI Income Fund-I*, the Court of Appeals set aside a jury verdict in favor of the Plaintiff for insufficient evidence, applying a "pretext-plus" standard that required the Plaintiff to "prove more than that the employer's stated reason for the employment decision is unworthy of belief." 97 Wn. App. 657, 661, 986 P.2d 137 (1999). The Court vacated that decision, rejecting the "pretext-plus" standard and holding instead that "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." 144 Wn.2d 172, 184, 23 P.3d 440 (2001) (italics in original) (quoting *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

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Under the standard adopted in *Hill,* Plaintiffs' discrediting of the employer's explanation "is entitled to considerable weight, such that [a] Plaintiff should not be routinely required to submit evidence over and above proof of pretext." 144 Wn.2d at 183, *quoting Reeves*, 530 U.S. at 140 and 194. Without a pretext instruction, the jury was confused like the Court of Appeals was confused in *Hill* and misled into believing that the Plaintiff needs to present proof of discrimination beyond the proof of pretext to be able to infer a discriminatory motive. *See Townsend v. Lumbermens Mut. Cas. Co.,* 294 F.3d 1232, 1241 (10th Cir. 2002) (discussing Fifth Circuit Court of Appeals making the same erroneous assumption in *Reeves*).

> [T]he permissibility of an inference of discrimination from pretext alone is a matter of law .... While counsel may be relied on to ... suggest reasoning, the judge's duty to give an instruction on an applicable matter of law is clear. That is particularly true where, as here, the law goes to the heart of the matter.... It is unreasonable… to expect that jurors, aided only by the arguments of counsel, will intuitively grasp a point of law that until recently eluded federal judges who had the benefits of such arguments.

Townsend, 294 F.3d at 1241 n.5; *see also Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 280-81 (3d Cir. 1998) ("In light of the … inordinate amount of ink that has been spilled over the question of how a jury may use its finding of pretext, it would be disingenuous to argue that it is nothing more than a matter of common sense"); *Kozlowski v. Hampton Sch. Bd.*, 77 Fed. Appx. 133, 143 (4th Cir. 2003) ("Given the amount of disagreement among judges of the federal courts of appeals over whether a jury may infer discrimination simply from their disbelief of the employer's stated justifications, it seems unlikely that jurors will uniformly intuit that such an inference is permissible"); *Ratliff v. City of Gainesville,* 256 F.3d 355, 361 n.7 (5th Cir. 2001) ("It does not denigrate the intelligence of our jurors to suggest that they need some instruction in the permissibility of drawing that inference.") (quotation and citation

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omitted).

"An examination of circuit cases reveals that where … a jury is not informed that they are allowed to make an inference [of discrimination based on evidence of pretext], they will not make it." T. Devine, Jr., "The Critical Effect of a Pretext Jury Instruction," 80 Den.U.L.Rev. 549 (2003). Thus, not requiring the permissive inference instruction fails to "best further" the WLAD's purpose and mandate. In contrast, the more protective rule, requiring the pretext instruction that Farah proposed, "equips the jury with the tools it needs to fully assess the possible legal implications of the facts they have discerned." C. Elizabeth Belmont, "The Imperative of Instructing on Pretext: A Comment on William J. Volmer's Pretext in Employment Discrimination Litigation. Mandatory Instructions for Permissible Inferences?", 61 Wash. & Lee L. Rev. 445, 456 (2004).

The ability of counsel to make argument cannot render unnecessary an otherwise mandatory jury instruction. The United States Supreme Court has repeatedly noted that where an otherwise mandatory instruction has been denied, "arguments of counsel cannot substitute for instructions by the court." *Carter v. Kentucky*, 450 U.S. 288, 304, 101 S. Ct. 1112,67 L. Ed. 2d 241 (1981) (argument of counsel is no substitute for instruction that inference of guilt may not be drawn from failure of Defendant to testify in criminal case); *Taylor v. Kentucky*, 436 U.S. 478, 488–89, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978 (argument of defense counsel in both opening and closing statements was no substitute for instruction on presumption of innocence). "[U]nder any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and … his lightest word or intimation is received with great deference." *Starr v. United States*, 153 U.S. 614, 626, 14 S. Ct. 919, 38 L. Ed. 841 (1894). The

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argument of counsel cannot have the same effect.

Unlike an instruction from the court, an argument of counsel is not a view the jury is obligated to accept. As in many cases, the jury here was instructed, "You should disregard any remark, statement or argument that is not supported by the evidence or the law as I have explained it to you." 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.02 (6th ed.). Thus, arguments by counsel, which the trial court's instructions explicitly tell the jury it may "disregard," are no substitute for a clear and appropriate jury instruction by the court addressing the permissibility of an inference of discrimination based on pretext.

"[T]he court must instruct on all the theories to which the facts pertain." *Harris v. Fiore*, 70 Wn.2d 357, 360, 423 P.2d 63 (1967).

> The Plaintiffs were… entitled to have their theories of the case presented to the jury by proper instructions, there being evidence to support them; and their right was not affected by the fact that the law was covered in a general way by the instructions given.

Dabroe v. Rhodes Co., 64 Wn.2d 431, 435, 392 P.2d 317 (1964).

> [I]t is clear that the jury must be given the legal context in which it is to find and apply the facts. It is difficult to understand what end is served by reversing the grant of summary judgment for the employer on the ground that the jury is entitled to infer discrimination from pretext … if the jurors are never informed that they may do so.

Smith, 147 F.3d at 280. The trial Court here, failed to do so, and the abundant mendacious testimony was only distraction to this jury. The failure to give this instruction was error.

C. The Failure To Give The Bias Instructions Was Error In This Case.

Renowned UW Psychologist Anthony G. Greenwald, Ph.D. has opined that, "There is now little doubt that implicit bias, in the form of unconscious attitudes and stereotypes, is a

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cause of discrimination." Anthony G. Greenwald, Ph.D. Declaration at ¶15 (Ex. 26). He has found:

> Implicit biases are pervasive and are often observed in more than 70% of Americans, most of whom genuinely and sincerely regard themselves as lacking in biases. Research using IAT measures finds that persons are often unaware of discrepancies between (on the one hand) their explicitly expressed—and often genuinely endorsed—egalitarian beliefs and attitudes and (on the other hand) the implicit stereotypes and attitudes that are revealed by their IAT measures. Research studies consistently find that a majority of persons who display implicitly biased associations on Implicit Association Test (IAT) measures are unaware of possessing those biases.

Id., at ¶13.

In 2016, the American Bar Association adopted "Principles for Juries and Jury Trials," which recognizes the implications of implicit bias in the deliberations of juries:

> The court should:
>
> 1. Instruct the jury on implicit bias and how such bias may impact the decision making process without the juror being aware of it; and
>
> 2. Encourage the jurors to resist making decisions based on personal likes or dislikes or gut feelings that may be based on attitudes toward race, national origin, gender, age, religious belief, income, occupation, disability, marital status, sexual orientation, gender identity, or gender expression.

ABA Principle Six (attached at Sheridan Dec., Ex. 24). "The American Bar Association recognizes the legal community's ongoing need to refine and improve jury practice so that the right to jury trial is preserved and juror participation enhanced." *Id.*, Preamble to the ABA Principles for Juries and Jury Trials. The ABA recognizes the need for such bias instructions. This Court should have instructed the jury as requested on the issue of bias—it is adopted by the ABA. In this case, it was error not to do so. [redacted] the only Black juror, believes the jury was biased. On retrial, [redacted] declaration is strong evidence that we need to be

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vigilant as attorneys to ensure the next trial is fair—the Court needs to give the implicit bias instructions.

D. The Giving of Instruction No. 13 Was Error In This Case.

The instruction given for Monroe's disparate treatment claim based on disability required her to prove that "she is able to perform the essential functions of the job in question with reasonable accommodation." Court's Instruction No. 13 (Ex. 25). This is an element for her failure-to-accommodate claim; it was not properly an element to the disparate treatment claim, where Defendant made no claim that it terminated Monroe based on disability and her failure to be able to perform the essential functions of the job. *See Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 33, 244 P.3d 438, 446 (2010) ("The instructions were error. **Johnson was required to prove only that his … disability was a substantial factor in Chevron's decisions**."). The *Johnson* court cited 6A Washington Practice: Washington Pattern Jury Instructions: Civil 330.01, at 307 (5th ed. 2005) for the elements of the disparate treatment claim, which do not require proof that Plaintiff can perform the essential functions. 159 Wn. App. at 33, n.32. Pattern instruction WPI 330.01 includes among its bracketed potential protected statuses the word "**disability**." Plaintiff's proposed Instruction No. 15 was based on this pattern instruction. (Ex. 22).

The Court did not use Plaintiff's proposed Instruction No. 15, or WPI 330.01, due to the pattern instruction's contradictory comment: "For disability discrimination cases, do not use this instruction. Instead, use WPI 330.32, Disability Discrimination—Treatment—Burden of Proof, et seq." Plaintiff is aware of no case law to support including an "essential functions" element in a disparate treatment claim instruction, as suggested in WPI 330.32. Such element

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would only be appropriate in cases of "disability separation," where the Defendant admits it terminated based on disability and challenges Plaintiffs' ability to perform the essential functions with accommodation. Those were not the facts here, making it error to include such element in the disparate treatment instruction. Plaintiff was prejudiced by the erroneous instruction, as the theory presented to the jury was that Defendant believed Plaintiff could not successfully perform the job she was most recently assigned, but consciously failed to re-engage the interactive process or to "put her back in the hopper" for reassignment; electing instead to terminate her for pretextual reasons. Plaintiff should not have been required to separately prove that she could perform the "essential functions" to prevail on her disparate treatment claim.

E. The Failure To Give a Continuing Duty to Accommodate Instruction Was Error In This Case.

At summary judgment, the Court was persuaded that Plaintiff created triable issues of fact for the jury after reviewing the case law Plaintiff presented from *Humphrey v. Memorial Hospitals Ass'n,* 239 F.3d 1128, 1137 (9th Cir. 2001). Plaintiff proposed Instruction No. 30 (Ex. 23) based on such law. The instruction Plaintiff proposed was necessary to inform the jury that, under the law:

> The duty to accommodate is a continuing duty that is not exhausted by one effort. Trial and error may be necessary as part of the interactive process to satisfy the employer's burden. The employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed.
>
> If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship. The employer has an obligation to affirmatively take steps to help

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> the disabled employee continue working at the existing position or attempt to find a position compatible with the limitations.

Plaintiff's Proposed Instruction No. 30 (Ex. 23).

The legal concept of the employer's "continuing duty" was not covered by other instructions, and any potential "arguments of counsel cannot substitute for instructions by the court," *Carter*, 450 U.S. at 304, which the jury "received with great deference." *Starr*, 153 U.S. at 626. Thus, the failure to give Plaintiff's proposed instruction No. 30 on Defendant's "continuing duty" to accommodate was error.

F. The Court's Evidentiary Rulings Prevented Plaintiff From Telling The Jury That She Had Considered Her Mistreatment By Manager Jackson To Have Been Sexual Harassment, And Documented That View In Complaints To The Police And To Management, Prevented Her From Getting A Fair Trial

Relevant evidence is admissible. ER 402, 401. The Court's decision to exclude evidence of Ms. Monroe's good performance in the AS1 job makes no sense, especially since the jury was presented with evidence that her SDOT managers claimed she could not do the job. The exclusion of that evidence prevented the Plaintiff from establishing that she could competently perform the job of AS1 at SDOT with proper training and accommodation. The effect of such evidence being excluded was particularly prejudicial where the Court's instructions made proving that Monroe could do the "essential functions" of the job, an element of not just her failure-to-accommodate claim, but also her disparate treatment claim.

During closing, Plaintiff argued that Ms. Monroe, without benefit of counsel, misconstrued her claims as being sexual harassment, but the Court undercut that explanation by prohibiting her from testifying about her perceptions of Jackson's inappropriate behavior, and going so far as to order the redaction of the two exhibits in which she reported her perceptions

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to the police and to management. **Exhibits 336** and **339** (attached in both redacted and un-redacted form at Exs. 17-20). These errors, when combined with the other errors cited above, demand that a new trial be granted.

VI. CONCLUSION

For all of these reasons, the Court should grant Plaintiff's motion for a new trial.

I certify that this motion contains 5,035 words, in compliance with the Local Civil Rules

Respectfully submitted this 3rd day of January, 2017.

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CERTIFICATE OF SERVICE

I, Melanie Kent, certify under penalty of perjury under the laws of the State of Washington, that on January 3, 2017, I electronically filed the foregoing document with the Clerk of the Court using the ECR E-Filing system, and served the following persons using the ECR E-Serve system:

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