Honorable Suzanne Parisien
Noted for Hearing: August 1, 2016
ORAL ARGUMENT REQUESTED

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

MARIA LUISA JOHNSON, CARMELIA DAVIS-RAINES, CHERYL MUSKELLY, PAULINE ROBINSON, ELAINE SEAY-DAVIS, TONI WILLIAMSON, and LYNDA JONES

Plaintiffs,

vs.

SEATTLE PUBLIC UTILITIES, a department of the CITY OF SEATTLE, a municipality,

Defendants.

Case No.: 15-2-03013-2 SEA

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE DR. ANTHONY GREENWALD'S EXPERT TESTIMONY AND REPORT

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I. INTRODUCTION AND REQUEST FOR RELIEF

It appears after defendant's summary judgment motion was denied as to every claim brought by the plaintiffs, the defendant is using this motion in limine to reargue its failed summary judgment motion. The defendant lost because the jury will have to decide whether the alleged misconduct of the plaintiffs (accessing their own accounts and accounts of friends and families) was in fact authorized conduct that had occurred for years without management's criticism, until City managers became the focus of State and City auditors for having no internal controls to prevent theft—then SPU management looked to the customer service center, populated mostly by persons of color and older workers, and began disciplining those employees for conduct going back 10 years—conduct that was permissible and approved—so that management could tell the auditors, the newspapers, and the City Council that they were rooting out theft. None of the plaintiffs are accused of theft, but Caucasian comparators who gained financial benefits or who violated serious policies were treated more favorably. The imposition of discriminatory discipline was done publicly, and no one in management stepped up to say that there were no policies prohibiting the decade old practice, except one supervisor named Beverly Flowers—and she was ignored.

The defendant is seeking to exclude Dr. Anthony Greenwald from testifying at trial while conceding in the same breadth that his testimony is admissible under the *Frye* Rule[1], meaning that his opinions are not "novel" and that his opinions have "a valid scientific basis." The defendants dare not challenge the valid scientific basis of his opinions, or that it his work and theories are well accepted and not novel, because the very same testimony has

[1] When the admissibility of *novel* scientific evidence is at issue, Washington courts initially turn to the general acceptance test derived from *Frye.* The general acceptance standard serves as a shorthand method for judges in deciding whether novel scientific evidence, or evidence which is in the "twilight zone" between the "experimental and demonstrable stages," has a valid scientific basis. Once novel scientific evidence has been deemed admissible under *Frye,* the trial court must analyze whether that testimony is proper expert testimony under ER 702. Reese v. Stroh, 128 Wn.2d 300, 306, 907 P.2d 282 (1995).

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been admitted in federal court in the Eastern District of Washington under the more rigorous *Daubert* standard. Samaha v. Wash. State Dep't of Transp., No. CV-10-175-RMP, 2012 WL 11091843, at *3 (E.D. Wash. Jan. 3, 2012) (the Court is satisfied Dr. Greenwald's opinions are sufficiently "ground [ed] in the methods and procedures of science"; *relying on* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590, 113 S. Ct. 2786, 2795, 125 L. Ed. 2d 469 (1993)). Having admitted that Dr. Greenwald's testimony has a valid scientific basis, the only issue left to resolve is whether it is helpful. That issue has also been addressed by the same federal court. Defendant contends that it is not helpful because, "Dr. Greenwald is unable to state with any degree of scientific certainty that implicit bias played any role in the disciplinary recommendations and decisions made by the decision makers *in this case*." Mot., at 2. However, his testimony is helpful because he does not invade the province of the jury, but instead he will educate the jury on general principles found in his research and that of others in his field—background information well known and often cited by Dr. Greenwald's peers, but not commonly known to laypersons. Such expert testimony is relevant to the jury's understanding of the evidence in this case and to deciding whether race was a "substantial factor" in the disciplinary actions that Defendant took against the Plaintiffs. "Expert testimony is usually admitted under ER 702 if helpful to the jury's understanding of a matter outside the competence of an ordinary layperson." Reese, 128 Wn.2d at 308.

In Samaha v. Wash. State Dep't of Transp., the State of Washington attempted to exclude many of the same opinions of Dr. Greenwald regarding general principles presented here. *Compare id.*, at *1, *with* Simpson Dec., Ex. A ¶¶ 13-32. The State claimed his testimony was "not relevant, … unfairly prejudicial, and fail[ed] to 'appl[y] the principles and methods reliably to the facts of the case," the same arguments Defendant now raises in its motion and which Chief Judge Peterson rejected in Samaha, notwithstanding the higher standard for admission of expert testimony in federal court. *See id*. at *2. This Court should

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likewise reject the arguments and find that "[t]estimony that educates a jury on the concepts of implicit bias and stereotypes is relevant to the issue of whether an employer intentionally discriminated against an employee." *Id*., at *4. Dr. Greenwald's opinions on these issues "consist of relevant subject matter," which assist the jury by providing "information that it will be able to use to draw its own conclusions." *See id*., *citing Rolls–Royce Corp. v. Heros,* Inc., 3:07–CV–0739–D, 2010 WL 184313, at *1, *3 (N.D.Tex.2010) (finding expert testimony about parts manufacture approval industry process admissible "to teach the jury background information to understand the case"). Thus, the motion should be denied.

II. STATEMENT OF FACTS

A. Seattle Public Utilities knew for years that it lacked adequate procedures and training for employees making adjustments to customer utility accounts.[2]

According to the City Auditor, until at least April 2011, "there was no documented policy within the CCSS policies and procedures manual that stated employees were not allowed to enter transactions on their own utility accounts," nor specifying that a supervisor was required to be involved in such transactions. *See* Sub #191, at Ex. 1. As a result, ***more than a third*** *of all employees* with Consolidated Customer Service System ("CCSS") access made transactions on their own account or the account of someone they knew. Sub #157 (¶¶ 3, 6). In 2009, when the Washington State Auditor conducted an audit of SPU, the report of the exit conference from the audit criticized SPU, noting it had a "weakness in internal control over utility customer accounts," Sub. # 191, Ex. 7 at 3, and needed to "to develop more policies and procedures" for the handling of such accounts. Sub. #192, Ex. 3 at 33-34. In June 2009, the State Auditor sent the Mayor and the Seattle City Council a "Management Letter" about these concerns. *See* Sub #191, Ex. 8. In April 2010, Guillemette Regan, then

[2] Due to page limitations, Plaintiffs cannot recite all of the facts and evidence supporting their theory of the case, which were described in detail in the brief opposing summary judgment, Sub #187, and which will be laid out in the forthcoming trial brief. Plaintiffs instead provide here a substantially truncated set of facts.

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Director of Corporate Policy and Performance at SPU, was told by the State Auditor's office that the previously issued management letter about the "utilities' ability to establish effective internal controls over customer's accounts" remained "unresolved."[3] Regan admits the State Auditor continued raising these concerns into 2011. Sub # 192, Ex. 3 at 34.

"Defendant admits that no SPU manager received discipline for failing to create a specific written policy prohibiting employees from performing transactions on their own utility accounts." Sub #192, Ex. 9 at Request for Admission No. 6.

B. SPU discovered fraud and asked for help investigating it from the City Auditor, which decided on its own that it needed to audit SPU's internal controls.

In October 2010, "while performing routine reconciliation of payment reports," SPU discovered that a civil engineer (Joe Phan) used his access to CCSS to create "***fraudulent payments***" totaling $1,049.49 for utility accounts connected to Mr. Phan's properties. Sub #192, Ex. 4. On December 7, 2010, SPU reported to the Seattle City Auditor that Phan and a second SPU employee utilized CCSS system access rights to make inappropriate transactions. Sub #192, Ex. 5. "SPU contacted [the City Auditor] to ask that [it] assist them with this investigation" of these two employees. Sub # 192 Ex. 6, at 6-7. The title that the City Auditor gave to this investigation at its inception indicated it was a "fraud investigation," but admits that changed with time. *See id.*; and Sub #192, Ex. 5 at 1. The original fraud investigation "morphed into different things" and at some point the City Auditor "decided to conduct an audit of internal controls related to utility account transactions," an audit SPU had not requested, but which the City Auditor deemed necessary. Sub #192, Ex. 6 at 8, 11. In February 2011, when Assistant City Auditor Robin Howe wrote in a draft memo about the fraud investigation of Phan that, "***per SPU policy***, employees should not be entering any transactions to their own accounts and certainly not

[3] Sub #192, Ex. 3 at 9-10; Sub #202, Ex. 3 at 97; Sub # 191, Ex. 10.

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posting payments," Ms. Regan responded, "I don't believe we have an actual policy. ... If there is a policy, I would love to see it." Sub #191, Ex. 11; Sub #192, Ex. 3 at 94-95. Such lack of internal controls for making adjustments to utility accounts concerned Howe and the City Auditor's office. Sub #192, Ex. 6 at 11-12.

In July 2011, the City Auditor's office met to discuss "strategy for drafting a memo on CCSS Transaction Controls," which would be a procedural review of the CCSS transaction **procedures**." Sub #192, Ex. 13 at 1. The City Auditor, Dave Jones, felt his office had already completed enough fieldwork at that time to draft the memo, but was concerned about the issuing the memo "while SPU is in the middle of an investigation" and did not want "to jeopardize the results of the investigation in any way." *Id*., at 1-2. By August 2011, the City Council was "applying some pressure" to the City Auditor's office to complete the "'controls memo' highlighting the **internal control weaknesses** with the CCSS transaction processes … as soon as possible." Sub #191, Ex. 19 at 3. Regan and SPU knew that such a report by the City Auditor was going to be "a problem for us," and agreed it "jeopardized" the alleged legitimacy of the disciplinary actions SPU management planned to take against lower-level employees in the Customer Service branch that were predominantly persons of color. *See* Sub #192, Exs. 26 and 29.[4] In February 2012, the City Auditor, Mr. Jones, confirmed in an email to Regan that he intended to tell Councilmember Burgess that the City Auditor "believe[s] it is appropriate for us to let SPU complete the investigation," and after speaking with Jones, Regan responded for Jones to "add to your statement that SPU also felt that the work the City Auditor is undertaking in 2012 overlaps too much with [SPU's] continued investigations into CCSS billing system transactions and

[4] S*ee* Sub # 192, Ex. 28 (report to SPU Director Hoffman that Customer Response division was **67% persons of color** and that as of March 2012 persons terminated from the CCSS investigation were 60% persons of color); Sub #192, Ex. 8 at 145 (Hoffman testified, "**I knew that the composition of Contact Center employees had more people of color than their distribution in the city population and than in some of the other divisions within the department**.")

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would benefit from greater separation in order to avoid conflict or risk to the outcomes of the investigations." Sub #192, Ex. 16; *id.*, Ex. 17 at 222-224, 227. As a result, the City Auditor's report was not released until April 2014**,** more than two and a half years later. *See* Sub #191, Ex. 20. In the intervening period, all of SPU's disciplinary actions related to the CCSS system, including those against the Plaintiffs, were taken. *See generally*, Sub #162.

C. Recognizing its procedures for customer utility account adjustments were inadequate, SPU overhauled its procedures.

On March 9, 2011, Debra Russell, the Director of the Customer Response branch and head of SPU's Call Center sent an email to Labor Relations Coordinator Charlene MacMillan-Davis: "*What do you think about adding to the UAR Expectations the information that employees should not access their own utility accounts?"* MacMillan-Davis replied, "Let's not do it just yet. With everything else going on related to this, I think it would be best to handle that separately. We can - and should - add it once we have a comprehensive approach to managing it." Sub #191, Ex. 13. In March 2011, SPU drafted a policy, CS-106, which "respond[ed] to a need to clarify expectations related to employees performing transactions in our billing system." Sub # 192, Ex. 10. The policy stated on its face that it was "new" and did not supersede any prior policy. Sub #156, Ex. D. The policy's stated purpose: "This policy ***establishes*** employee expectations related to performing transactions involving customer accounts in conformance with SMC 4.16.070" (the Code of Ethics). *Id.* The policy bars employees from performing account transactions involving themselves or people they know. *Id.* In a report generated by the City Auditor around the same time, it confirms that "Customer Service has a **distinct lack of documented policies and procedures**." Sub #192, Ex. 11. Director Hoffman also admits that SPU at that time "didn't have adequate controls over customer accounts." Sub #192, Ex. 2 at 22. On May 17, 2011, the State Auditor issued a blistering audit of SPU, finding the "***Utilities' policies and employee training do not clearly define the process for adjustments***," and

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"***recommend[ed] the utilities adopt formal policies and establish processes for determining when account adjustments are necessary***." Sub #191, Ex. 16 at 13. In November 2011, Director Hoffman received a memo from his management containing a summary of an interview with one Utility Account Representative ("UAR") Supervisor who said "it is acceptable for UARs to do payment arrangements for themselves, a family member, friend, or for co-workers, as long as it is within the policy guidelines which apply to any other customer"; and a report from another of Plaintiffs' supervisors that he "did not recall specifically learning that a UAR should not touch family or friends' accounts," nor recall any ethics training during his orientation. Sub #191, Ex. 4 at 2-3.

C. SPU Management Exercised Discretion in its Decision-Making, Failed to Use Objective Criteria in Making Decisions, and Treated Others Persons Who Engaged in Acts of Comparable Seriousness Different than the Plaintiffs.

Defendant's motion claims "[t]he type of discipline … was based on the objective evidence of the number and character of improper account changes or adjustments the employee made." Mot., at 3, *citing* Sanchez Dec., ¶¶ 5-7; Hoffman Dec., ¶¶ 6-7; *see also* Mot., at 12, fn. 12 (claiming decisions were based on "objective criteria"). In her deposition, Susan Sanchez was asked how she made disciplinary recommendations to SPU Director Hoffman and admitted she had no specific written criteria for deciding who to discipline. *See* Sheridan Dec., Ex. 1, at 56-59. Sanchez later corrected her answer to say she took into account various "considerations," but had not prioritized them and had no formula for her decisions. *See id*., at 72-77. When SPU Director Hoffman was asked for his criteria for disciplining or terminating a person, he listed many subjective criteria (for example, "***whether or not they are contrite***") and did not claim he relied on any set number of alleged improper transactions to trigger one level of discipline versus another. *See* Sheridan Dec., Ex. 2, at 164. In his declaration supporting the present motion, Hoffman testifies vaguely, "I terminated employees who made ***higher*** numbers of CCSS financial adjustments utility

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accounts, at least one of which not otherwise within policy. I suspended employees who made ***lower*** numbers of CCSS financial adjustments, as well as employees who made CCSS financial adjustments that were otherwise within SPU policy." Hoffman Dec., ¶ 7. His prior summary judgment declaration said even less. *Compare* Sub # 156.

It is clear management exercised discretion in deciding which charges to pursue, if any, and what level of discipline to recommend or issue. Many illustrations of this were discussed in Plaintiffs' brief opposing summary judgment. Sub #222, at 29-34. As one example, SPU's investigation found that Debra Warren cancelled a payment arrangement to align the payment date with her pay days, and that 5 of the payment arrangements she created on her own account "failed." Sub #162 (D.W. File, at JOHNSON000138). Hoffman wrote that Warren "misused [her] position as an SPU employee by accessing [her] account for the purpose of managing it for [her] personal benefit," and that her "responses demonstrate an ***apparent failure or unwillingness to comprehend that working on your own account is simply not acceptable***." *Id.* Ms. Sanchez recommended Hoffman terminate Ms. Warren. *Id*., at JOHNSON000142. However, after Hoffman met with Warren, who is white, in a *Loudermill* hearing, he wrote that he had considered, *inter alia*, "the fact that [she] had no prior disciplinary action" and "decided to impose a thirty (30) day suspension, in lieu of termination, on the condition that [she] enter into a last chance agreement." *Id.*, at JOHNSON000138. After Hoffman met with Plaintiffs Johnson and Williamson, who are Filipino and African-American respectively, he made no similar offer of mercy, instead terminating both with no "last chance." *Compare* Sub #162 (Files for Luisa Johnson and Toni Williamson). The City's personnel rules give Hoffman the ability to apply principles of "progressive discipline" using any considerations he "deems relevant." Personnel Rule 1.3.2(C), Sub #192, Ex. 25. Records of the City Auditor's office reflect just how similar Debra Warren's conduct was to the alleged misconduct of Plaintiff Johnson, who was

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terminated, rather than suspended like Ms. Warren:

Name/dept	Analytics Questions	Action	Date (approximate)	$
Luisa Johnson/SPU	16 (pmnt arr own acct) 17 (canceled ˜ own acct)	Made and canceled payment arrangements on spouse's account	2005, 2006, 2008 (2), 2010	116.46, 155.5, 241.8, 199.02, 299.99
Debra Warren/SPU	16 (pmnt arr own acct) 17 (canceled ˜ own acct)	Payment arrangement to spouse's acct Cancel pmnt arr to spouse's account	2002, 2007, 2009, 2010	47.37, 143.69, 121.76, 162.37, 141.06, 230.01, 139.54, 140.05, 121.76
Kimberly	13 (adj own acct)	Adj to account, her address, brother's name	2010	Reversed $30 or $40

Sub #191, Ex. 5, at 4.

III. ISSUE PRESENTED

Whether Dr. Greenwald's testimony would be helpful to the trier of fact? Yes.

IV. ARGUMENT AND AUTHORITY

A. Standard of Review

The rule dealing with admissibility of expert testimony "involves a two-step inquiry —whether the witness qualifies as an expert and whether the expert testimony would be helpful to the trier of fact." Reese, 128 Wn.2d at 305-06, *citing* ER 702. Here, "SPU is not disputing that Dr. Greenwald qualifies as an expert under the *Frye* standard." Mot. at 8, fn. 9.

Under ER 702, a qualified expert's testimony is helpful if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id*. "Expert testimony is usually admitted under ER 702 if helpful to the jury's understanding of a matter outside the competence of an ordinary layperson." Reese, 128 Wn.2d at 308. "Courts generally interpret possible helpfulness to the trier of fact broadly and favor admissibility in doubtful cases." State v. King Cty. Dist. Court W. Div., 175 Wn. App. 630, 638 (2013).

B. Dr. Greenwald's Testimony Is Relevant and Helpful to the Jury

Dr. Greenwald will not opine on the specifics of this case. As in Samaha, in which his testimony was admitted under the more challenging federal standard, Dr. Greenwald will testify on findings from his own research and his knowledge of the research of others relevant to the conditions of this case. *See* Simpson Dec., Ex. A, ¶ 11 (Greenwald testifies "the findings of existing research regarding implicit bias provide a framework that can aid a

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judge or jury in evaluating the facts of this case to better understand the evidence as it relates to discriminatory intent, to counteract common misconceptions concerning the character of discriminatory intent, and to determine whether the plaintiff's race, color, and/or ethnic origin substantially motivated the defendant actions outlined in the complaint.'"); *accord* Samaha, 2012 WL 11091843, at *1, *4 (Greenwald gave same testimony and the Court agreed, finding "Greenwald's testimony is likely to provide the jury with information that it will be able to use to draw its own conclusions"). Other federal courts have relied on the research of Dr. Greenwald and others about implicit bias to find that an employer "behaved in a manner suggesting the presence of implicit bias" and to find a violation of Title VII's prohibition on discrimination "because of" race. *See* Kimble v. Wisconsin Dep't of Workforce Dev., 690 F. Supp. 2d 765, 776, 778 (E.D. Wis. 2010).

C. Dr. Greenwald's testimony is not unduly prejudical

The proposed testimony is not unduly prejudicial, because as Defendant admits in its motion, Greenwald offers no opinion on "whether any of the decisions at issue were the product of implicit bias." Mot. at 10. The same was true in Samaha. See *id.*, 2012 WL 11091843, at *4. In contrast, the testimony by Greenwald that was rejected in Karlo v. Pittsburgh Glass Works, LLC, 2:10-CV-1283, 2015 WL 4232600 (W.D. Pa. July 13, 2015), cited by Defendant, "attempt[ed] to apply his research to the facts of th[e] case." *See id*., at *5 and *7 (noting that the testimony "attempts to highlight flaws in the employment practices of PGW" based on his review of deposition excerpts). *In this case, Dr. Greenwald conducted no such review of evidence and offers no potentially prejudicial opinion regarding the ultimate facts at issue in the case.*

D. Dr. Greenwald's Testimony Will Not Confuse the Jury, as the WLAD is a Mandate to Eliminate All Forms of Discrimination

Defendant writes in a footnote that "[a]llowing Dr. Greenwald to testify would create a significant risk that the jury would find SPU liable under RCW 49.60 based on evidence of

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unintentional discrimination, when the legislature intended to create a cause of action solely for *intentional* discrimination." Mot., at 10, fn. 11. Defendant cites no authority to support the legislative intent it alleges. *See id*. Nowhere in Chapter 49.60 RCW does it state that the prohibition on discrimination "because of race" is limited to discrimination that is "purposeful" or "conscious." *See generally* RCW 49.60 and RCW 49.60.030; RCW 49.60.180; *see also* Thomas v. Eastman Kodak Co., 183 F.3d 38, 58–60 (1st Cir.1999) (stating that the ultimate question under Title VII is whether an employer acted "because of" an employee's protected class, "regardless of whether the employer consciously intended to base the evaluation on race, or simply did so because of unthinking stereotypes or bias"). Requiring plaintiffs to prove conscious ill-will or a similar state of mind is contrary to the letter of federal and state discrimination statutes, which speak only in terms of causation, and it is contrary to the statutes' remedial purposes.

The Washington Law Against Discrimination "embodies a public policy of the 'highest priority.' Martini v. Boeing, 137 Wn.2d 357, 364 (1999). The law contains strong wording about the importance of eliminating discrimination to our "free and democratic state." RCW 49.60.010. It creates a civil right to be "**free from discrimination because of race**," specifically listing the right to hold employment free from discrimination. RCW 49.60.030(1)(a). The law is a "**clear mandate to eliminate all forms of discrimination**." Brown v. Scott Paper, 143 Wn.2d 349, 359–60 (2001), *citing* RCW 49.60.010.

"The legislature directs us to construe the WLAD liberally." Scrivener v. Clark Coll., 181 Wn.2d 439, 441 (2014), *citing* RCW 49.60.020. Thus, the Supreme Court has given meaning to the phrase "because of," utilized in the WLAD, to mean that the plaintiff need only show that her race or other attribute enumerated in the statute was a "substantial factor" in the adverse employment action. *See, e.g.,* Scrivener, 181 Wn.2d at 444 ("At trial, the WLAD plaintiff must ultimately prove that age [or race] was a 'substantial factor' in an

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employer's adverse employment action. ... A 'substantial factor' means that the protected characteristic was a **significant motivating factor** bringing about the employer's decision. ""), *citing* WPI 330.01.01 ("*Employment Discrimination—Disparate Treatment—Burden of Proof—Substantial Factor*"). While Defendant repeatedly claims proof that Defendant "*intentionally* discriminated" against Plaintiffs is a "critical element of their case" (Mot., at 9), no case has held there is any such element to a WLAD claim. *See* WPI 330.01.01 (requiring only that race was "a significant motivating factor in bringing about the employer's decision," with no requirement for discrimination to be shown to be intentional, conscious, or purposeful). Riehl is not inapposite. The quote Defendant relies upon from Riehl is mischaracterized, as the next sentence of the opinion makes clear that the burden is simply to show that "disability was a substantial factor motivating [the] adverse actions." Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 149 (2004). Defendant's reliance on two federal district court decisions from foreign jurisdictions in which Dr. Greenwald's testimony was excluded is equally unpersuasive. Those courts were not applying the WLAD, which unlike the federal anti-discrimination laws, contains a unique provision requiring that it be liberally interpreted. Martini, 137 Wn.2d at 372–73. Federal statutes also differ from the WLAD in another important way—they contain explicit language about proving the employer "*intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice…." *See id.*, *quoting* 42 U.S.C. § 2000(e)-5(g)(1); *compare* RCW 49.60.030(2).

Additionally, the Washington Supreme Court has recently written with approval about the need for courts to address implicit bias. The lead opinion in State v. Saintcalle, 178 Wn.2d 34 (2013), a case concerning a *Batson* challenge to peremptory strikes, discussed at length what it called "The changing face of race discrimination." *Id*. at 46-48. Discussing the pervasive problem of implicit bias, the opinion states, "[W]e are not, on average or generally, cognitively colorblind;" "To put it simply, good people often discriminate, and they often

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discriminate without being aware of it." *Id*. As a result, the opinion strongly suggested the Court "abandon and replace *Batson*'s 'purposeful discrimination' requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious bias," and that a *Batson* challenge should be "sustained if there is a reasonable probability that race was a factor in the exercise of the peremptory…." *Id*. at 54. In effect, the "purposeful discrimination" element to a *Batson* claim—for which there is no analog in the elements of a WLAD claim—ought to be replaced with a substantial factor causation standard that "accounts for… unconscious bias." *Id*.

VI. CONCLUSION

For all of these reasons, the Court should deny the motion to exclude the expert testimony and report of Dr. Anthony Greenwald.

Respectfully submitted this 28th day of July, 2016.

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CERTIFICATE OF SERVICE

I, Melanie Kent, that on July 28, 2016, 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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DATED this 28th day of July, 2016, at Seattle, Washington.

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