Hon. John P. Erlick
Trial Date: December 5, 2016

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR 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 TRIAL BRIEF**



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## I. INTRODUCTION

Ms. Monroe brings claims under the Washington Law Against Discrimination for failure to accommodate her disability, discrimination owing to her disability, hostile work environment because of her disability and/or sex, and retaliation for requesting accommodation and for reporting Jackson's misconduct. She suffers from anxiety and depression. As outlined below, while at SPU, the City acknowledged and accepted that she suffered from depression and anxiety, the City identified Ms. Monroe as needing accommodation for her disabilities, and in response, moved her from her job at SPU to a similar job at SDOT allegedly for the purpose of accommodating those disabilities, with the only limitations from her treating physician and from the psychiatrist hired by the City to do an IME, being that she not be moved into a hostile work environment (which would aggravate her disabilities), and that she be given time to recover when her anxiety overcomes her ability to work. Of all the places the City could have moved her, in knowing violation of the medical requirements outlined by the doctors, the City assigned her to SDOT in a position working under the supervision of the most hostile manager one could imagine—Paul Jackson—a well-known bully who was removed from supervision by SDOT management only days after the February 8th "fit for duty" incident, which he provoked and which he presided over.

SDOT HR Manager Evan Chinn was well-aware of Jackson's track record of terror, having investigated and found evidence supporting the charge that in 2009, Jackson had threatened to throw a hand grenade into a manager's meeting. In 2011, Chinn and Traffic Management Division Director Mary Rutherford addressed a petition directed against Jackson by a dozen employees who complained that Jackson leads through fear and intimidation. Yet,



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this same management chain moved Ms. Monroe under Jackson's supervision without notifying Ms. Monroe or the doctors of the risk.

On February 8, over a fit for duty test, Ms. Monroe was bullied into a bathroom/locker room and soiled herself owing to Jackson's intimidation, and while Jackson beat on the door, Ms. Monroe was able to contact Union Representative Lisa Jacobs, who told him that Monroe would take the test so long as a woman accompanied her—just not Jackson—but Jackson responded, "it was **too late.**" Monroe left the premises after that, because Jackson had taken away her ID badge, and she was not authorized to be there without it. Jackson told her, "I … need her ID badge and security badge." No one told her to stay.

SDOT never wanted Ms. Monroe to be there—she was hired at SDOT without a competitive process—so throughout the following disciplinary process, the City ignored her disability, and ignored that her badge had been taken by the bully, and terminated her for "refusing" the test, and for leaving the premises—without contacting her doctors, or the ADA accommodation coordinators, and without analyzing whether the incident was precipitated by, and could be explained by, her depression or anxiety. Suffice it to say that no one with a medical degree inputted into the City's decision to terminate Ms. Monroe, and once she left the building on February 8th, no one sought to contact her at home to obtain the fit for duty, or sought to get it done the next day.

The jury will be asked to return a verdict finding that Defendant engaged in unlawful discrimination and/or retaliation under the WLAD, resulting in lost income and emotional harm proximately caused by Defendant.



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## II. STATEMENT OF FACTS

### A. The City Knew Paul Jackson Was a Bully Who Manages Through Intimidation.

In 2009, Paul Jackson, who was an executive at SDOT, "was sort of demoted to Manager 2." In May 2009, Jackson, then Director of the Street Maintenance Division, was called a "bully" and alleged to have harassed employees in the Seattle P-I. The newspaper quoted an employee who said, "The way he managed was kind of to put fear in people and make them walk on egg shells when he was around." The paper also reported, "The city's investigator described Jackson as unsafe, dictatorial and vindictive." The year prior, the City's attorney had found hiring decisions by Jackson and SDOT were discriminatory and based on disability and/or retaliation or for use of L&I leave. In December 2009, following an investigation conducted by Evan Chinn, SDOT's H.R. Director, Jackson was issued a written reprimand for "conduct … found to be bullying" after he threatened to "throw a hand grenade into a room with the channelization group in it."

On January 30, 2012, fourteen persons from Jackson's assignment at SDOT's Sunny Jim facility signed a petition, asking SDOT management to again address concerns about his "behavior and management style":

> For years now, we at the Sunny Jim location have been subjected to a continuous barrage of threats and intimidation by Mr. Jackson. His management style of leading through fear and intimidation is unfair, counterproductive and completely unnecessary. Employees of the City of Seattle in 2012 should not be forced to work in such a toxic and hostile environment.

Jackson admits his physical stature is intimidating. He is over six feet two inches tall, and in 2012, weighed approximately 305 pounds. In April 2012, Mary Rutherford became Traffic Management Division Director, Jackson's boss, and inherited the unresolved petition



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regarding a "toxic and hostile environment" at the Sunny Jim facility. Rutherford had heard Jackson was a "bully" who used threats and intimidation to manage. She had concerns from what she knew about him. When she became Jackson's boss, the Director of SDOT, Peter Hahn, told Rutherford "an investigation was ongoing and… that [***Hahn***] ***was concerned*** ... ***there could be other incidents like this because of [Jackson]'s management history***."

**B. Plaintiff's Doctor Notified The City Of Her Disability and Need to Leave a Hostile Work Environment; Then the City Sent Her to an Independent Medical Examination, Which Confirmed Her Disability and Need for Accommodation.**

Plaintiff Aloncita Monroe has a documented history of anxiety and depression, of which the City knew. (*See* June 2012 letters). In July 2012, Monroe's doctor, Dr. Bjarke, responded to the City's questionnaire about Plaintiff's disabilities. Dr. Bjarke informed the City that Monroe's impairments are exacerbated by working in a "**hostile work environment**," limiting her ability to work in such environment, and that she may suffer "panic attacks."

After receiving this and other information from Dr. Bjarke, the City "question[ed] whether [Monroe] need[ed] an accommodation" of reassignment, given that the essential functions of the AS1 position at SDOT, which had been proposed as an accommodation, are similar to those for the AS1 position at SPU. The City asked Monroe to undergo an Independent Medical Examination ("IME"). *Id*. Monroe agreed and on September 24, 2012, the report from the IME was sent to Citywide Safety Manager, Pam Beltz. (Beltz is also the Fitness-For-Duty Examination ("FFDE"), or Drug Test Coordinator.).

The IME report addressed "five specific questions" posed by the City. In describing how Monroe's disabilities impact her performance at SPU, the examiner wrote that "**her increase in anxiety and depression symptoms** … **limit her ability to adequately concentrate, withstand day-to-day usual work stresses and interact appropriately with**



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**supervisors and coworkers**." The examiner wrote, "If Ms. Monroe is reassigned to an AS1 position at a different department, she will probably have substantially less difficulty with anxiety and depression symptoms given the reported circumstances of the aggravation of those symptoms at her previous work assignment."

The Citywide ADA Coordinator, Henri McClenney, was also given the IME report and testified it was his goal to "place [Monroe] in an environment that was less stressful than the one she was coming from." However, he did not know about the history of intimidation and bullying by Jackson; no one brought that information to his attention. Monroe also knew nothing about Jackson when she agreed to the SDOT transfer as an accommodation. When the ADA Coordinator in his deposition was asked, "Would you have liked to have had that information [about Jackson] before making any placement of Ms. Monroe" and whether this was a case where a known "supervisory style interfered with the accommodation process," the ADA Coordinator answered, "Certainly if I had known about this, **it's something which would not have been ignored**."

**C. Jackson Denies Knowing Monroe Was Transferred to Work at SDOT Based on a Disability Accommodation; the City's Records Contradict His Denials.**

At his deposition, Jackson was asked, "[D]id you understand that [Monroe] was coming to fill a vacancy as part of an accommodation?" Under oath, Jackson claimed, "I never knew why." He was also asked, "You didn't have an understanding as to what caused her to fill the vacant position, that's your testimony?" and answered, "Correct."; "I didn't know any reason as to why this was happening." Jackson claimed he could not recall anyone coming to work for him as an accommodation. He admitted knowing Monroe had not interviewed for the job, and



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when asked, "Did you think that she would go through a competitive process?" he answered, "I was wondering why we weren't having one."

On November 6, 2012, the City mailed Monroe a letter notifying her of the transfer to SDOT, reporting to Jackson. The letter, which shows "cc: Paul Jackson," states Monroe's transfer was based on "conclusion of our reasonable accommodation process." That same day, the H.R. Director asked Jackson to develop a "tight statement of expectations" for Monroe. On November 8, Jackson sent a draft statement of expectations "for review," then fifteen minutes later, Jackson wrote to request Monroe's personnel and supervisor files, stating, "We can't have expectations set if there are *reasons* one can't do them."[1] On November 14, Rutherford replied with suggestions and commented about "having a lot better success either getting [Monroe] to improve her performance or replacing her if necessary," causing Jackson to reply on November 15 with a second draft and a note about how the initial expectation statement was given to "the gentleman from **City ADA**… so someone … should give him our updated draft or it could become an issue."

**D. Jackson Made Monroe Feel Uncomfortable As Soon As She Started at SDOT.**

Monroe began reporting to Paul Jackson, at the Sunny Jim building, on November 7, 2012. That day, two women who work in the field "basically informed [Monroe]… watch out for Mr. Jackson because he's a womanizer and he had several affairs, one being with the lady … doing some training with [Monroe] named Esther" who worked in the office. Also that day, Jackson asked Monroe if she is married, which she answered, "Yes." Monroe did not understand why her marital status was relevant and felt Jackson was being flirtatious. When she

[1] Jackson also testified he did not "look her up."



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had first been introduced to him and shook his hand, she felt he held onto her hand a "bit too long"; it felt "inappropriate[,] [s]o [she] just kind of jerked [her] hand back." Starting the first week working for Jackson, she would see him "looking at her"; he "would make little smiles," "little smirky smiles… a gesture … to see what kind of response [she] would give back to him." "[H]e made [her] feel uncomfortable in such a way that [she] didn't want to be left in a room with him alone." Her response was "to keep it professional"; she "wasn't really friendly towards him."

**E. Jackson Is Poorly Reviewed After The Petition Is Investigated.**

In December 2012, Rutherford issued Jackson an extremely negative performance review writing, for example, "I have had many discussions with Paul about his leadership style which tends to be dictatorial and at times intimidating"; and "I have witnessed Paul's intimidating behavior and he seems to be unaware of how his voice and his body language are received by others." Rutherford gave Jackson the lowest possible rating in four of eight domains: personal working relations, communication, job reliability and supervision/management. The review referenced the petition, its investigation and its "outcome," which generally found that the petition was an accurate characterization of Jackson's behavior.

**F. Monroe's Coworkers Were Quickly Frustrated With Training Her, Resulting in Tension in the Office and Repeated Communications with the ADA Coordinator, But With No Effort to Re-Engage Plaintiff or Her Doctor In the Interactive Process.**

The Citywide ADA Coordinator testified that the City's accommodation of Monroe was to "mov[e] her out of her current environment … [i]nto a position that she could do." He testified it was the job of SDOT's ADA Coordinator "to monitor Ms. Monroe's performance to



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ensure that this was a good accommodation." Despite repeated emails from Jackson to H.R. about his perception that Plaintiff was "not able to perform the duties asked of her" in the new assignment, and similar messages from H.R. to the Citywide ADA Coordinator, no one—neither H.R. nor the ADA Coordinators—attempted to re-engage Plaintiff or her doctor in an interactive process.

In his deposition, Jackson was asked if he spoke with SDOT H.R. Director Evan Chinn about how Monroe was behaving prior to the February 8th incident. Jackson said he contacted his manager, Rutherford, "about six weeks in," but he denied contacting H.R. Director Chinn. Jackson's emails, however, show repeated contact with H.R. Director Chinn about Monroe. Three weeks in, on November 28, 2012, Jackson emailed Rutherford and H.R. Director Chinn about Monroe's concerns with training and about how Jackson's staff, "Linda and Sharon were really frustrated" with training her. Rutherford responded, suggesting, "Perhaps she can ask Personnel to put her back in the hopper because she is not comfortable with the job." H.R. Director Chinn forwarded Jackson's email to the Citywide ADA Coordinator with the note, "FYI."

Jackson testified that Linda "asked [him] where [Monroe] came from, and [told him]…, she just acts very strangely," saying, for example, that "She doesn't want to talk, doesn't want to listen." Jackson testified they had to repeat things and "to help her on the same things over and over again." He says he heard about Monroe "many times from Linda, because she was in there all the time," and "[m]any times from Sharon." Monroe testified that Rosemary Bachman also complained to Jackson about her, after Bachman received a misdirected email from Monroe and responded, cc'ing Jackson, and "making a bigger deal of [it] than it needed to be."



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These three women (Sharon, Linda, and Rosemary) all "came to work together in a van pool." However, Jackson claimed the criticisms were not limited to these three; he testified his "whole group" told him that Monroe "acts very strangely," and also claimed that he told Plaintiff this.

On December 6, 2012, one month in, Monroe requested a meeting with Jackson and Sharon DeWitt, after DeWitt told Monroe to only "communicate via email for any at all work related issues." Monroe testified the email from DeWitt, Monroe's trainer and lead, "didn't make sense … because she was sitting like less than one to two feet away from [her]." Jackson again emailed H.R. Director Chinn and Mary Rutherford, writing, "I'm Bcc'ing all of you because I consider this a '***special issue***' and want you to know what's going on."

On January 23, 2013, Chinn wrote to ask Jackson to "compile the issues for a meeting with me and Henri," the **ADA coordinator**, as he "wants an overview of the problems." Jackson replied, "Set it[.] I have tons." Two days later, January 25, 2013, Jackson forwarded H.R. Director Chinn a complaint from DeWitt about Monroe, asking Chinn, "Have you made an appt with our friend? I hope you're saving what I send. We need to address this my front office staff are becoming extremely frustrated and **I'm afraid something is going to give**." In a second email that day, Jackson confirmed "now the others are refusing to help" Monroe and said he "informed [Monroe about] the frustration the others are having." *Id.* Separately, Jackson emailed DeWitt, cc'ing Rutherford and Chinn," asking her to "Please hang in there"; "We are working on this and [it] is a ***delicate personnel issue***."

On January 28, 2013, Rutherford wrote Jackson and Chinn, asking "how can we say [Monroe] is not performing," after learning Monroe "had 12 hours of training and the rest of the admin staff have had 19 hours."



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Jackson admits Monroe told him that working at Sunny Jim was "uncomfortable for her." On January 30, a little more than a week before the day Jackson asked Monroe to take the FFDE, Plaintiff wrote her husband, describing a work environment where there was "tension you can cut with a knife." Monroe testified there was "tension … between Sharon, Linda and myself. … **I started to feel more anxiety**, **feeling pressured**." Monroe testified that DeWitt was "looking for things," and when she found an error in Monroe's work, she reported it to Jackson.

**G. On February 8th, Persons With Knowledge of the IME Report Are Contacted.**

Chin, Rutherford, and Jackson all claimed to know nothing about Monroe's disabilities or accommodations. But the City policy, which is the City Disability Resource Guide, does not prohibit management from knowing—and here all management needed to know, so the jury may infer that they did know. Plaintiff testifies that on February 8, 2013, the date she allegedly refused to take the FFDE, she took no illegal drugs or prescription medication not prescribed to her. After the July 2011 incident in which Monroe self-medicated at SPU, she promised herself "it would never happen again" and testifies, "it hasn't happened again." A drug test administered on September 26, 2011, confirmed she had no drugs in her system.

When Jackson came to Plaintiff's office on February 8, after again hearing from Sharon and Linda about Monroe, Jackson observed Monroe sitting at her desk doing "work-related stuff." He observed her moving papers around, going into drawers, and viewing her monitor. Jackson sat down and tried to act sociable. He did not give Monroe directions or attempt to discuss her work assignments. Nor did Jackson attempt to ask Monroe what she was doing or why; he testified he was "just watching to see." Monroe testified Jackson later told her she was "walking around in circles, jerking motion, staring at my computer without producing any



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work, … and bobbing my head up and down."

In her deposition, Monroe was asked why she felt she was treated differently because of a disability and testified, "SPU and SDOT had knowledge of … my disability … [and] they assumed [this] was a reaction to some drugs. No one took the time to investigate to see if it was a medical condition that could have been causing this problem that they claim they saw." SDOT's timeline of investigation shows Jackson contacted SDOT's Safety Office regarding Monroe at about 8:45 a.m., and SDOT Safety and Health Specialist Scott Jensen arrived on site around 9:05 a.m. When Jensen arrived, he and Jackson met and discussed how Monroe "was a new employee (~2 months) and a **recent accommodation from SPU**." Before beginning his own observation of Monroe, Jensen called Citywide Safety Manager, Pam Beltz. As of 9:51 a.m., "Pam Beltz and Evan Chinn have been contacted" and it was confirmed "the employee was a transfer from SPU as a **reasonable accommodation**." Again, Jackson, in his deposition, testified he did not know Monroe was "coming from SPU" as an accommodation.

SDOT's timeline reflects that during the call with Beltz, "**Pam mentioned she is familiar with this employee from SPU**." (**She received the IME report**.). The timeline states Jensen also "contact[ed] Evan Chinn, HR Director, to inform him of observations and to find background on the accommodation and determine if behavior observed could be associated with details of her accommodation."

In his deposition, Chinn denied having details of Monroe's disability and denied contacting the ADA coordinator to find out if Monroe's conduct could be related to her disability." When asked, "Why not?" Chinn answered, "We didn't understand that there was any disability."



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Yet, at 9:52 a.m., Chinn immediately forwards the email about Monroe's behavior that morning and the possible FFDE to the Citywide ADA Coordinator. The Citywide ADA Coordinator was asked in his deposition, "During, leading up to the time that she was terminated, did anyone consult with you to ask for your help in terms of – before implementing discipline against her, did anybody from SDOT ask you whether or not her disability might affect the facts that were occurring on the date of the fitness for duty?" The ADA Coordinator answered, "No." Like Beltz, the ADA Coordinator was a recipient of the Vendenbelt letter, so he knew everything he needed to know to intervene, but he did not.

**H. The City Required Monroe to Sign the Form, Knowing She Has Been Unable to Speak to Her Union; Tells Her Union Its "Too Late" After They Call Back; Takes Monroe's Badge and Tells Her to Leave the Premises.**

The termination letter claims Monroe was not credible in saying she was "forced" to sign the FFDE authorization and medical release form. It is undisputed Jackson and Jensen "requested again that [Monroe] make a decision about signing the form," even though they knew she had not been able to reach a union representative. Jackson testified in the Unemployment Hearing that Monroe "made several attempts to call the union [and] couldn't reach them from what she had said." Jensen similarly admits "I told her that I would give her a few more minutes to reach a representative, but **that we needed to move on** with the FFD process. The union representative, Lisa Jacobs, testifies that Monroe "wasn't given a reasonable amount of time to contact us." Monroe testifies she was given 15-20 minutes and then basically told, "*you've had enough time*," before being made to decide whether to consent to the FFDE.

Ms. Monroe had a right to union representation in the February 8, 2013 investigation. Under Article 4.3 of the City's Collective Bargaining Agreement with Ms. Monroe's union,



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PTE Local 17, "[i]f the employee desires Union representation" in discussing any matter that may lead to discipline or termination, "they shall so notify the City at that time and shall be provided reasonable time to arrange for Union representation." Monroe requested representation and recorded her request in the form she signed. She was only given a matter of about 15 minutes to decide whether or not she would sign yes or sign no. In the heat of the moment, she wrote, "I request union representation as of 10:33 a.m." As Mr. Jackson testified, he had gone into his office only 20 minutes earlier, a little after 10:00.

In the complaint received by Evan Chinn, SDOT's H.R. Director on March 15, 2013, during the City's investigation of Plainitff, Ms. Monroe wrote:

> Paul [Jackson] proceeded to say '*it has been fifteen minutes and you would either have to go now or sign this form immediately that you refused to go*'…. Then I asked 'could we wait a few extra minutes for my sister or local 17 representative to come?' again I got no response. Instead of him answering my questions, he put the form in front of me and said in a **very hostile voice***, 'you are going to have to do one or the other at this moment.*' From fear and panic I **wet my panties**; because I have never had a man the size of Paul put that much fear in me. … I signed the form requesting union representation or my sister before I could finish writing the statement, Paul in a hostile way snatched the form away from me, saying 'you cannot write on that and you are now on administrative leave.'

Monroe testifies she felt intimidated and had "never seen Paul that upset before, … he is a big guy." After signing the form and being placed on administrative leave, Jackson escorted her to her desk to remove all her personal items. According to Jackson, "[A]fter she signed the form…, I told her I would have to escort her to her desk so she can remove all her personal items, and that I would need her ID badge and security badge that would let her in the building."

At his deposition, Jackson offered a different story, testifying, "I'm not so sure of that. … I honestly thought [Jensen] did" that—asked Monroe for her badge. Jackson's declaration



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on summary judgment contradicts that deposition testimony ("I asked her for her security badge, which she gave me."). Plaintiff agrees it was Jackson who told her to turn over her security badge, but testifies it happened later, after Jackson spoke with her union representative and yelled "it is too late" for her to take the FFDE.

After getting her things, Monroe retreated to the restroom to address her urine issue. Meanwhile, Lisa Jacobs, the union representative "got a call from Dale Hitsman, who is HR at SDOT, telling me that [Monroe] had refused to take a Fit For Duty and said that she had spoken to somebody at the union,[2] and after that she decided not to take it. And I said, 'Well, she hasn't spoken to me, she hasn't spoken to anybody at the union." While Monroe was in the restroom, she gets "an intercom type call that came through into the … ladies' restroom, and the operator or the person said, 'Aloncita, pick up line 1.'" It was Ms. Jacobs**.** Jacobs testified about the phone call with Monroe:

> I asked a little about what was going on. … [S]he was in the restroom, … where my call had been patched into. … [**S**]**he was very intimidated by her manager and the security person, and she would take the Fit For Duty if either I or her sister could be present**. **She wanted a woman present**. … [W]e were talking (inaudible) and **there had been some loud knocking, and then the loud knocking happened again. It was really kind of startling**, **it was really loud and I kind of like jumped. And I asked her what was that noise and what was going on. And she said that that was her manager** … So I asked if she would give the phone to him so I could speak to him. … [H]e identified himself as Paul Jackson. I identified myself and I said that, 'You know, it looks like everything is going to work out, Cita is willing to take the Fit For Duty, she just wants to have her sister come who has already been contacted.' And **he very sternly said**, '***No, it's too late***.' **I mean, he kind of like yelled**. And I said, 'Well, she hadn't had an opportunity to talk to me before.' And he said, '**We gave her a chance**.' And I said, 'I have spoken to HR, to Evan in' – 'I spoke to Evan earlier and I spoke to Dale, and it's okay. Could you please check with them to see if she can take it?' And **he said**, '***No, it was too late***.'

[2] Jacobs testified she "found out later … [Monroe] spoke to our receptionist when I was on the phone."



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In Jackson's deposition, he denied telling Monroe, "it was too late" to take the FFDE, but later when asked, "[Y]ou said to Ms. Jacobs over the phone that it was too late…?" answered "Yes." Then, in his summary judgment declaration, Jackson attempted to alter his testimony, stating, "I do not recall if I used the phrase 'it's too lat.e'"

Monroe testified that Jackson "had one foot in the bathroom door" and had been banging on the door, which "was very humiliating and intimidating because he is a big person, a big guy." After Jackson spoke with Jacobs, Monroe testified she left the ladies' room and met Jackson in the kitchen area, where Jackson asked for her security badge, which she handed him and then "asked [her] to leave the premises, which [she] did."

Jackson admits he was told Monroe was "willing to take the exam." Jacobs testified, "**I very clearly communicated to Paul Jackson that she was willing to take it, and I had already spoken with HR and they were permitting that**. So she revoked [the refusal] clearly through me after she had a right to consult, and she was given the impression that that was not going to happen, and then she left." Jacobs further testified that Monroe "left because she was under the impression that she would not be allowed to take the Fit For Duty, which I understood because Paul Jackson made it very clear in a very forceful way that he wasn't going to let her do it." Monroe similarly testified that she did not believe the City "would have let [her] take the Fitness For Duty Exam if [she] had stayed on the premises," testifying Jackson "was very adamant about that." However, "[i]f Paul Jackson when speaking with [her] union representative had allowed [her] to take the test with someone present, [she] would … have taken the test that day[.]" *Id*. H.R. Director Chinn admits he did not seek to contact Monroe to "Come right back. Don't leave." Instead, "two or three days after the fact," Chinn informed



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Monroe's union representative, "It's too late; she can't return and take the test."

## I. City Policy on Urgent Fit for Duty Medical Examinations Was Not Followed.

The City has a detailed policy and procedure for Conducting Urgent Fit for Duty Medical Examinations.[3] The policy states, "The City respects employee rights under collective bargaining agreements (*Weingarten*)."[4] Under the related procedure, the Supervisor:

- "**meets** with employee and **presents** the '***Behavior Observation Form***' documenting the supervisor's observations." p. 2, ¶ 9 (bold in original).
- "If the employee could receive discipline as a result of the incident, **arranges** for an opportunity for the employee to consult with the most readily available union representative (*Weingarten*)." *Id.*
- "If employee provides no response or refuses to cooperate… **allows** employee opportunity to reconsider." *Id.*, at p. 5, ¶ 7d. (underline and bold in original).
- After that, "If employee: **cooperates,** continue with FFD process." *Id*.

The above procedures were not followed. Monroe was not presented with Jackson's "written observations" as required. *See, e.g.,* SDOT Timeline (reflecting presentation to Monroe of just "the 'Employee Acknowledgement and Medical Release' form"). Plaintiff was not permitted a reasonable opportunity to consult with an available union representative before being made to make her election and sign the medical release form. And when Monroe's union representative called back, Jackson did not permit Monroe the opportunity to reconsider and to continue with the FFD process.

[3] "A non-urgent medical exam can be scheduled when an employee has a medical condition that is ongoing, long-term and non-urgent in nature."

[4] According to its policy, "the City … will allow you to speak with the most readily available union representative when reasonable prior to the exam."



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**J. Three Days After Jackson Yelled At Monroe And Jacobs That It Was "Too Late" to Agree to Take the FFDE, Causing Jacobs to Call HR On Jackson—Jackson Is Transferred To A Position Where He No Longer Supervises Anyone.**

On February 11, 2013, Jackson was removed from his job "managing personnel" and assigned a program management job, based on, *inter alia*, "[s]everal instances of loud, intimidating, rude and disrespectful behavior" by Jackson, the creation of a "toxic work environment," and Jackson's continued inability to "demonstrate[] sufficient understanding and awareness of how you communicate," as evaluated by an outside consultant and Jackson's manager, Ms. Rutherford.

**K. Monroe Reports Jackson's Behavior and Then Is Recommended for Termination.**

Defendant claims that "SDOT and all City departments take harassment complaints seriously; City and SDOT policies mandate reporting of harassment and investigation into any harassment complaint, and prohibit retaliation against anyone who reports harassment." The City's managers "deny Plaintiff … ever made allegations about Mr. Jackson's 'sexual advances' prior to filing this lawsuit in 2015." *See, e.g.*, Chin Dec., ¶ 6 ("At no point prior to filing this lawsuit did Ms. Monroe… or anyone else inform me that Ms. Monroe alleged that Mr. Jackson made sexual advances toward [her] while she was employed at SDOT.") Records produced in discovery show that on March 15, 2013, H.R. Director Chinn received a "Complaint" made by Monroe "regarding treatment of female staff by male manager." The complaint attached a memorandum Monroe wrote that primarily addressed Jackson's hostile treatment of Monroe on February 8. The memo, stated, *inter alia*, that she had been concerned to be around Jackson, because she "had been warned that he's a womanizer"; he "had asked [her] twice if [she] was married"; "numerous … times [she] caught him starring at [her], and when [she] shook his hand at the time he welcomed [her] to the group, [she] had to jerk [her]



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hand away." As the City and Chinn claim they received no such allegations of harassment, Monroe's complaint about how Jackson made her "very uncomfortable… was never investigated. It … fell on deaf ears."

On April 19, 2013, Chinn recommended to Rutherford that Monroe be terminated and Rutherford concurred. Rutherford then recommended Plaintiff's termination to SDOT's Director, who fired Monroe.

## III. ARGUMENT & AUTHORITY

### A. Mendacious Testimony and Failure to Follow Policy is Evidence of Discrimination

"[I]t would be improper to require every plaintiff to produce direct evidence of discriminatory intent. … Courts have thus repeatedly stressed that '[c]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden.'" *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179-80, 23 P.3d 440 (2001) (*citing Sellsted v. Wash. Mut. Sav. Bank,* 69 Wn. App. 852, 860, 851 P.2d 716, *review denied,* 122 Wn.2d 1018 (1993)), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006); *accord deLisle v. FMC Corp.,* 57 Wn. App. 79, 83, 786 P.2d 839 (1990).

An employer's deviation from normal policy or procedures is relevant evidence of motive. *See*, *e.g*., *Lyons v. England*, 307 F.3d 1092, 1101-02, 1115-16 (9th Cir.2002); *Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201 (9th Cir. 2008); *Nicholson v. Hyannis Air Service, Inc*., 580 F.3d 1116, 1127 (9th Cir. 2009).

"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." *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 747, 332 P.3d 1006 (2014) (*quoting Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 147, 120 S.Ct. 2097, 147



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L.Ed.2d 105 (2000)), *review denied*, 182 Wn.2d 1006, 342 P.3d 326 (2015); *accord* Hill, 144 Wn.2d at 184 ("[T]he trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *See also Reeves,* 530 U.S. 133 (holding that if factfinder rejects employer's proffered nondiscriminatory reasons as unbelievable, it may infer "the ultimate fact of intentional discrimination" without additional proof of discrimination).

**B. Under *Kimbro*, The City Had Notice Of The Disability And The Accommodation**

The medical records, including the doctor's questionnaire and the Vandenbelt letter, were in the possession of various SPU and City managers, so even if the Court believes that SDOT managers did not see those records and correspondence, the City is still held to having knowledge of those facts. The City knew and is held to that knowledge.

> It is well settled under Washington law that "'the principal is chargeable with, and bound by, the knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority and in reference to a matter over which his authority extends.'" *Zwink v. Burlington* Northern*, Inc.,* 13 Wash.App. 560, 566, 536 P.2d 13, 17 (1975) (quoting 3 Am.Jur.2d *Agency* § 273 at 635 (1962)); *Pilling v. Eastern & Pacific Enterprises,* 41 Wash.App. 158, 163, 702 P.2d 1232, 1236 (1985) ("Knowledge of the agent is imputed by law to the principal."); *Roderick Timber Co. v. Willapa Harbor Cedar Products, Inc.,* 29 Wash.App. 311, 316–17, 627 P.2d 1352, 1355 (1981) ("As a general rule, the knowledge of the agent will be imputed to the principal only where it is relevant to the agency and the matters entrusted to the agent."); *Rocky Mountain Fire & Casualty Co. v. Rose,* 62 Wash.2d 896, 903, 385 P.2d 45, 49 (1963) (same); Restatement (Second) of Agency § 272 (1958). More specifically, if notification is given to an agent who has, or appears to have authority "'either to receive it, to take action upon it, or to inform the principal or some other agent who has duties in regard to it,'" then such notice is chargeable to the principal. *Roderick Timber,* 29 Wash.App. at 317, 627 P.2d at 1355 (quoting Restatement (Second) of Agency § 268, comment c (1958)).



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> Applying the foregoing principles to this case, it is clear that ARCO is bound by Jackson's knowledge of Kimbro's medical condition. The district court's findings and Jackson's testimony at trial clearly establish that Jackson not only had authority to receive information regarding Kimbro's medical condition, but also had a responsibility to disclose the nature and severity of ARCO's serious medical condition to ARCO management.

*Kimbro v. Atl. Richfield Co.*, 889 F.2d 869, 876 (9th Cir. 1989); *cited favorably in*, *Hume v. Am. Disposal* Co., 124 Wn.2d 656, 671, 880 P.2d 988, 996 (1994).

**C. The Jury Will Find Defendant Liable Regarding The Failure To Accommodate Claim And The Disparate Treatment Claim**

> An employee does not *need* to disprove each of the employer's articulated reasons to satisfy the pretext burden of production. Our case law clearly establishes that it is the plaintiff's burden at trial to prove that discrimination was a substantial factor in an adverse employment action, not the only motivating factor. An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable under the WLAD.

*Scrivener v. Clark Coll.*, 181 Wn.2d 439, 447, 334 P.3d 541, 546 (2014).

The WLAD "gives rise to a cause of action for at least two different claims: for failure to accommodate, when the employer fails to take steps reasonably necessary to accommodate an employee's condition, and for disparate treatment, when the employer discriminates against an employee because of the employee's condition." *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 27-28, 244 P.3d 438, 443 (2010) (internal quotation marks and citations omitted). Ms. Monroe is proceeding forward on both claims.

"[F]ailure to reasonably accommodate the sensory, mental, or physical limitations of a disabled employee constitutes discrimination unless the employer can demonstrate that such accommodation would result in an undue hardship to the employer's business." *Id*. at 28 (citations omitted). Defendant does not argue undue hardship. Also, "Medical necessity" is no longer the sole basis for a right to accommodation. *Id*. at 30-31.



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> Under the new statute, the question is not whether the accommodation was "medically necessary" in order for Johnson to do his job, such as hearing enhancements or a wheelchair might be. Instead, it is whether Johnson's impairment had a substantially limiting effect upon his ability to perform the job such that the accommodation was reasonably necessary, *or* doing the job without accommodation was likely to aggravate the impairment such that it became substantially limiting.

*Id.*

Like the defendant in *Dean*, the City failed to accommodate Monroe in her job and failed to provide her with alternate jobs in violation of the WLAD:

> It was the duty of Metro to reasonably accommodate Dean by informing him of job openings for which he might be qualified. It was correspondingly the duty of Dean to cooperate with the employer in the hunt for other suitable work by making the employer aware of his qualifications, by applying for all jobs which might fit his abilities and by accepting reasonably compensatory work he could perform.

*Dean v. Municipality of Metro. Seattle-Metro*, 104 Wn.2d 627, 637-38, 708 P.2d 393, 399 (1985). The City failed to provide a reasonable accommodation.

As to the disparate treatment claim, Monroe is "required to prove only that her … disability was a substantial factor in [the City's] decisions. Proof of different treatment by way of comparator evidence is relevant and admissible but not required, and in many cases is not obtainable. Disability cases in particular often involve situations where, because of the unique nature of the disability, there is no relevant comparison evidence." *Johnson*, 159 Wn. App. at 33. The City failed to provide a reasonable accommodation.

Disability is defined as follows:

(a) "Disability" means the presence of a sensory, mental, or physical impairment that:

(i) Is medically cognizable or diagnosable; or

(ii) Exists as a record or history; or



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(iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

(c) For purposes of this definition, "impairment" includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

According to the Washington Human Rights Commission, and codified in WAC 162-22 065, a "reasonable accommodation" is one that "[e]nable[s] the proper performance of the particular job held." Examples of reasonable accommodations include "[a]djustments in job duties, work schedules, or scope of work, or "[c]hanges in the job setting or conditions of work."



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The ADA specifically lists "reassignment to a vacant position" as a form of reasonable accommodation. This type of reasonable accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship.

The Washington's Supreme Court has held that, as part of reasonable accommodation, employers have an affirmative duty to assist a disabled individual in seeking comparable employment within the company:

> The employer must take affirmative steps to assist the employee in the internal job search by determining the extent of the employee's disability, by inviting the employee to receive personal help from the employer's personnel office, and by sharing with the employee all job openings in the company.

*Davis. v. Microsoft Corp*., 149 Wn.2d 521, 536-37, 70 P.3d 126 (2003).

Washington courts have upheld the duty to provide lateral transfer for thirty years. For example, in *Clarke v. Shoreline School Dist. No. 412*, 106 Wn.2d 102, 720 P.2d 793 (1986), in addressing the accommodation of a visually disabled and hearing-impaired schoolteacher, the court noted, "we believe the Law Against Discrimination, RCW 49.60.180, as interpreted by this court in *Dean,* requires the School District to transfer Clarke to a nonteaching position, if such a position exists and Clarke is qualified to perform it." *Id*. at 122 (citing *Dean v. Municipality of Metropolitan Seattle-Metro*, 104 Wn.2d 627, 639, 708 P.2d 393 (1985)).

The City made a bad placement. City managers may have both legitimate and illegitimate reasons for the bad placement, and for terminating the plaintiff. Under *Scrivener*, in such case, the jury may find disability was a "substantial factor" for the City's actions.

**D. The Jury Will Find Defendant Liable For The Hostile Work Environment Claim**



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In this fact pattern, the evidence and case law is equally applicable to the disability and sex hostile work environment claims.

In determining whether conduct is sufficiently severe or pervasive, the Court considers, *inter alia*, whether the conduct includes "public humiliation," false accusations of misconduct, and "whether the conduct interfered with the employee's work performance." *Adams,* 114 Wn.App. at 297; *Ray v. Henderson*, 217 F.3d 1234, 1245-46 (9th Cir. 2000). Here, the public humiliation was so severe that Ms. Monroe urinated in her pants and hid in a locker room while Jackson banged on the door.

That single act of loudly banging on the door takes this case beyond summary judgment and to trial. The standard for linking discriminatory acts together in the hostile work environment context is not high." *Loeffelholz v. Univ. of Washington*, 175 Wn.2d 264, 276, 285 P.3d 854, 859 (2012).

The Washington Supreme Court in *Loeffelholz* held that **a single comment** a supervisor made to a group of employees, saying he was going to return from military duty an "angry man," "could be severe enough, ***on its own***, to alter the conditions of employment and establish a hostile work environment." 175 Wn.2d at 277. Here, under *Loeffelholz*, the jury may find Defendant liable for creation of a hostile work environment.

Jackson's harassment is imputed to the City. *Robel v. Roundup* does not help the City. "To hold an employer responsible for the discriminatory work environment created by a plaintiff's supervisor(s) or co-worker(s), the employee must show that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action." *Robel v. Roundup Corp*., 148 Wn 2d 35, 47, 59 P.3d



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611, 617 (2002). Jackson ran a department, and was a Manager 2. He meets the standard under *Robel*, and if not, it is uncontroverted that City managers were aware of Jackson's actions and excused or adopted them as appropriate in the fact finding and process leading to Monroe's termination.

**E. The Jury Will Find Defendant Liable For Retaliation**

"To establish a prima facia case of retaliation, a person must have engaged in a statutorily protected activity. An employee who opposes employment practices reasonably believed to be discriminatory is protected by the opposition clause whether or not the practice is actually discriminatory." *Moon v. City of Bellevue*, 142 Wn. App. 1037 (2008) (citations and quotation marks omitted). Asking for accommodation invokes the retaliation provision of the WLAD. "[T]he decision to request a reasonable accommodation is a way to oppose the non-accommodated workplace status quo. This interpretation of "opposition" activity within the meaning of RCW § 49.60.210 is consistent with the court's mandate to construe the WLAD broadly." *Hansen v.* Boeing *Co*., 903 F. Supp. 2d 1215, 1218 (W.D. Wash. 2012)

Ms. Monroe sought accommodation, which was known to the City, and was placed in a hostile work environment, after doing so, and then terminated. Also, she reported Jackson's misconduct to Chin and was terminated thereafter. Under *Scrivener* and the substantial factor standard, the jury may find Defendant liable even if it finds Defendant also had legitimate bases for its actions.

## IV. DAMAGES

**A. Plaintiff Will Present Evidence Of Lost Income And Emotional Harm Proximately Caused By the Defendant.**

Plaintiff will testify about her damages, including back and front pay damages caused



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by the discrimination. As to the claim for emotional harm damages, plaintiff will testify about the non-medical damages outlined in the Washington Patterned Instructions. WPI 330.81 (6th Ed.) provides in part:

> If you find for the plaintiff, you should consider the following elements:
> (1) The reasonable value of lost past earnings and fringe benefits, from the date of the wrongful conduct to the date of trial;
>
> (2) The reasonable value of lost future earnings and fringe benefits; and
>
> (3) The emotional harm to the plaintiff caused by one or both of the defendants' wrongful conduct, including emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish experienced and with reasonable probability to be experienced by the plaintiff in the future.
>
> The burden of proving damages rests with the party claiming them, and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.
>
> Any award of damages must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

Medical testimony is not required to obtain noneconomic damages under the WLAD: "'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.'" *Bunch v. King Cnty. Dep't of Youth Servs.*, 155 Wn.2d 165, 180, 116 P.3d 381 (2005) (*quoting Dean v. Municipality of Metro. Seattle–Metro,* 104 Wn.2d 627, 641, 708 P.2d 393 (1985)). The Supreme Court has held that, "[t]he distress need not be severe" for the plaintiff to recover. *Id.*

In *Bunch*, the Supreme Court opined that "the evidence of emotional distress is limited,



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but it is sufficient to support an award of noneconomic damages. Bunch testified that he was overwhelmed by the discrimination, and that he was depressed and angry. The county discriminated against him over a six year period, which is substantial." *Id*. The Court noted that the "record contains numerous instances in which he was disciplined for petty offenses that others committed with impunity. He now works for significantly less pay with minimal benefits. He had to explain to his family why he was fired. All of these facts provide a basis from which the jury could infer emotional distress." *Id*. Bunch was awarded $260,000 in noneconomic damages without the benefit of medical testimony or medical records, an amount affirmed by the Court. *Id*. at 167.

Here, the plaintiff, like Bunch, will testify about her non-medical damages. The non-medical emotional harm damages will be proved through testimony regarding plaintiff's level of stress, humiliation, etc. on a scale of 1-10. Recent cases show comparable or higher damages.

Emotional harm verdicts may be hundreds of thousands or a million dollars. For example, in *Hairston v. City of Seattle*, a 1995 case involving race discrimination, harassment, and retaliation case brought under the WLAD, a jury awarded Ms. Hairston $400,000.00 for emotional distress with no lost wages claimed. Plaintiff was employed by the City at time of trial. *See Pham v. City of Seattle*, 120 Wn. App. 1038 n.1 (2004) (Heney's conduct was the focus of a prior discrimination action against City Light by employee Lois Hairston, an African–American woman).

In *Martini v. Boeing*, 137 Wn.2d 357, 971 P.2d 45 (1999), a disability discrimination case brought under state law, a jury awarded Mr. Martini approximately $776,000.00 in damages with a total recovery after appeal of +$1.4 million in 1999.



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In *Trinh, Bailey, and Rodriguez v. City of Seattle*, 145 Wn. App. 1011 (2008), a three plaintiff race discrimination/hostile work environment case against Seattle City Light, after a 6 week trial, the jury awarded Trinh and Bailey $1.48 million in damages. Later, the judge awarded plaintiffs more than $700,000.00 in attorney fees and costs (Mr. Rodriguez had settled pretrial). Mr. Trinh was awarded $772,000 in emotional harm alone.

In *Corey v. Pierce County*, 154 Wn. App. 752, 225 P.3d 367 (2010), a former Pierce County prosecutor was awarded over $3 million, after a jury found that she had been wrongfully terminated in January 2004. The prosecutor, Barbara Corey, was a 20-year veteran of the prosecutor's office. After she announced that she might run for county prosecutor, Corey alleged that County Prosecutor Gerry Horne engaged in repeated discriminatory acts against her, including allegedly "manufacturing" a criminal investigation and leaking information to the media that suggested Corey was fired for mishandling public money.

In 2015, the jury in *Chaussee v. State*, Cause No. 11-2-01884-6 (Thurston County) awarded Mr. Chaussee $1 million in emotional harm damages, even though he was still employed with the State, and this award was without medical testimony or economic losses.

Plaintiff has testimony to explain life after the discrimination and retaliation by SDOT, and will be heard on that issue.

## V. CONCLUSION

Plaintiff will prove at trial that the testimony of City managers regarding the treatment of Ms. Monroe is mendacious; that Defendant failed to follow required policies and procedures; that a substantial factor in the City's actions was Plaintiffs' disability, gender, and/or protected activities under the WLAD; and that substantial economic and non-economic damages resulted



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from the City's discrimination, failure to accommodate a disability, and retaliation.

RESPECTFULLY submitted this 28th day of November, 2016.

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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 November 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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