

WASHINGTON CASE UPDATE

Employment Discrimination: “Pretext” Jury Instruction Held to be Unnecessary

case in point...

From the Desk of John Kreutzer: When a fired employee accuses his employer of discrimination, the employer will likely provide legitimate reasons for the allegedly disparate treatment. The employee must then show that the offered reasons were mere pretext, and the plaintiff’s race, national origin, religion, or other preferred classification was a substantial factor in the employer’s decision. This can be confusing, and plaintiffs often request that jury instructions be tailored to the case to ensure the jury understands pretext. Read on to see how the Washington appellate courts approach this issue.

Claims Pointer: In this employment discrimination case, the Washington Court of Appeals held that it was not required for the trial court to give a jury instruction on the permissible inferences the jury could draw if they believed the employer’s stated reasons for terminating the plaintiffs were mere pretext. The case underscores the Washington approach to employment discrimination, namely that the employee must simply prove that his race or other characteristic was a substantial factor in the employer’s decision.

Farah v. Hertz Transporting, Inc., No. 73268-4-1, Washington Court of Appeals, Div. I (October 3, 2016)

Hassan Farah (“Farah”) and 24 other Somali immigrants, all practicing Muslims, were employed by Hertz Transportation, Inc. (“Hertz”) as “shuttlers.” Shuttlers move rental vehicles around the grounds, for example, from where customers return the rental vehicles to locations for cleaning or maintenance.

Hertz implemented a break policy for its shuttlers in September 2011. The new policy required shuttlers to clock out for all personal activities, including prayer. The policy officially went into effect on September 30, 2011. On that day or shortly afterwards, Farah and others prayed without clocking out, and Hertz suspended them. On October 13, 2011, one of the Hertz managers sent a letter to the suspended employees informing them that they could return to work if they acknowledged that they had to clock out for prayer. Eight of the suspended employees signed the acknowledgement form and returned to work. The remainder did not, and Hertz terminated their employment. Farah and the other plaintiffs (referred to collectively as “Farah”) sued Hertz and two of the Hertz managers for discrimination based on national origin and religion.

The trial court gave the pattern jury instructions for employment discrimination cases where the plaintiff alleges disparate treatment. Farah requested an instruction on a permissible inference that the jury would be allowed to draw if it disbelieved Hertz’s stated reasons for terminating Farah (referred to as a “pretext instruction”). The court did not give the instruction, and the jury returned verdicts for the defense. Farah appealed.

On appeal, Farah argued that the court erred by refusing to instruct the jury on pretext, contending that without the instruction, the jury was not fully informed of the applicable law. Hertz argued that the instructions given were adequate, and further that the pretext instruction would be inappropriate under Washington law.

Generally, jury instructions are sufficient when they allow parties to argue their theory of the case, they are not misleading, and they inform the jury of the applicable law. The trial court has discretion to determine what instructions are necessary to avoid misleading the jury.

The specific jury instruction Farah requested was taken from the Eighth Circuit’s model jury instructions: “You may find that a plaintiff’s religion or national origin was a substantial factor in the defendant’s decision to suspend



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or terminate a plaintiff if it has been proved that the defendant’s stated reasons for either of the decisions are not the real reasons, but are a pretext to hide religious or national origin discrimination.” Such an instruction is referred to as a “permissible inference” instruction.

There is not prior Washington case law on the exact issue of whether a “permissible inference” instruction is required, so the Court of Appeals surveyed federal appellate courts on the issue. In the end, the Court of Appeals determined that the instruction may be appropriate in certain circumstances, but it should not be required, partly because the pattern jury instruction permits jurors to draw the reasonable inferences justified by the evidence. Because the general instructions the trial court did give were sufficient to inform the jury of the applicable law and allow Farah to argue his theory of the case, it was not an abuse of discretion to refuse to give the instruction. The trial court’s ruling was affirmed.

View full opinion at: <https://www.courts.wa.gov/opinions/pdf/732684.pdf>

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