No. 35872-1

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION III

JULIE ATWOOD,

Respondent,

v.

MISSION SUPPORT ALLIANCE, LLC and STEVE YOUNG,

Appellants.

The Honorable Douglas L. Federspiel

BRIEF OF APPELLANTS

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INTRODUCTION

Plaintiff Julie Atwood's gender discrimination, wrongful discharge, and retaliation claims stem from complaints about her supervisor Steve Young, and his management of their department at defendant MSA. Atwood sued Young and MSA, claiming she was an excellent employee despite complaints *she* created a hostile work environment. She admits she made her case through "comparators."

The trial court's many erroneous hearsay rulings prevented MSA from straightforwardly addressing its lawful, nondiscriminatory reasons for terminating Atwood's employment. Its repeat improper comments on MSA's evidence compounded those errors.

The court then allowed Atwood to put on a trial within the trial, calling MSA's former general counsel to assert her own gender discrimination claims about different issues, involving a different superior and department, largely occurring long after Atwood's employment ended. Next, a series of additional erroneous ER 404(b) rulings let in evidence and exhibits about alleged "comparators" who simply were not. The court then gave a legally incorrect jury instruction on damages.

The result was a truly shocking $8.1 million verdict. This Court should reverse and remand for a new trial.

ASSIGNMENTS OF ERROR

1. The trial court erred in repeatedly excluding as hearsay MSA's lawful, nondiscriminatory reasons for terminating Atwood. *E.g.*, RP 3324-25, 3348-49, 3839-42, 3998, 4127-30, 4198-99;

2. The court erred in repeatedly commenting on the evidence when it advised the jury that MSA's lawful, nondiscriminatory reasons for terminating Atwood's employment were not substantive evidence. RP 3853-54, 3868-69, 3875-76, 3880-82, 3884;

3. The court erred in excluding Margo Qualheim's rebuttal testimony under ***Burnet v. Spokane Ambulance***. RP 3584-87;

4. The court erred in permitting Sandra Fowler's testimony under ER 404(b). CP 11072-78;

5. The court erred in admitting exhibits 87, 140, 163, and 400, and related testimony under ER 404(b). CP 6745-46; RP 3302-03, 3324-25, 3336-37, 3339;

6. The court erred in giving instruction No. 17. CP 11063;

7. The court erred in denying MSA's motion for remittitur or new trial. CP 10972-11026; and

8. The court erred in entering judgment for Atwood. CP 11038-11044.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where hearsay is an out-of-court statement offered to prove the truth of the matter asserted: (a) did the trial court erroneously prevent MSA from offering testimony about its lawful, nondiscriminatory reasons for terminating Atwood under ER 801, where an employer's lawful, nondiscriminatory reasons for terminating an employee are not offered for their truth, but to prove the motive for the decision to terminate employment; and (b) did the trial court erroneously prevent MSA from eliciting out-of-court statements that were not offered for their truth, apparently on the ground that such statements, offered by MSA, did not fall under ER 801(d)(2) (admissions by a party opponent)?

2. Where MSA sought to call a true rebuttal witness, did the trial court err in applying ***Burnet v. Spokane Ambulance***, and even if ***Burnet*** applies, did the court erroneously exclude the witness who was known to Atwood and disclosed by MSA immediately after the need for her rebuttal testimony became apparent?

3. Where a court may permit evidence of other bad acts in a Washington Law Against Discrimination case, but only insofar as the complained of conduct is so relevant as to outweigh its potential for prejudice, did the trial court err in allowing: (1) testimony from former

MSA general counsel Sandra Fowler whose complaints were far different from Atwood's and involved different actors and accusations post-dating Atwood's employment by 9-to-18 months; and (2) testimony and exhibits about four other alleged comparators involving different accusations, different departments, different chains of command, and different time-frames?

4. If these errors are not independently sufficient to warrant reversal, then is their cumulative effect sufficient to warrant reversal?

5. Did the court err in instructing the jury to award future economic damages until the date Atwood may reasonably be expected to retire, contrary to controlling Supreme Court precedent holding that such instructions are legally incorrect?

6. Did the court err in refusing to grant a remittitur or new trial, where an $8.1 million verdict shocks the conscious given that Atwood is entirely capable of working and that her best evidence is that she needed therapy for one-to-four years?

STATEMENT OF CASE

A. Procedural history.

Mission Support Alliance ("MSA") is a 2000-employee federal contractor that collaborates with the U.S. Department of Energy ("DOE") and others to support the clean-up mission at Hanford. RP 4307; CP 5130-31. Plaintiff Julie Atwood was an "at-will" MSA employee from February 2010, to September 2013. RP 2671, 2987, 2989. Atwood was a project manager in Portfolio Management. RP 2671, 2702, 2768-70. She reported to Steve Young, MSA's Vice President of Portfolio Management and the Mayor of Kennewick. RP 2671, 3779-80.

As addressed *infra*, there were issues with Atwood's employment early on, including two complaints and related investigations. *See* Statement of the Case §§ B-D. MSA terminated Atwood in September 2013 due to these unresolved issues. *Id*.

Atwood filed a complaint with the EEOC on March 10, 2015, claiming: (1) gender discrimination, (2) retaliation, and (3) disparate unfavorable treatment of female employees. CP 9512-17. She filed suit against MSA and Young[1] on August 21, alleging intentional

[1] The complaint also named David Ruscitto as a defendant, but he was never served and is not a party. CP 2, 4914 n.1.

discrimination under the Washington Law Against Discrimination, RCW 49.60, et seq. ("WLAD"), disparate treatment, hostile work environment, gender-based retaliation, and wrongful discharge in violation of public policy. CP 2-19. MSA and Young answered on September 25, denying liability and raising, among other defenses, legitimate, non-discriminatory, non-retaliatory reasons for terminating Atwood. CP 26-36. Atwood later withdrew her hostile work environment claim, and narrowed her remaining claims to: (1) wrongful constructive discharge; (2) retaliation; and (3) gender discrimination. CP 4914, 4914 n.1.

Trial lasted 22 court days. Atwood's claims against MSA focused on how MSA handled her termination. RP 2877-84, 3152, 3159-60. She complained that she had to use a wheelchair to move her personal belongings while others were present. RP 2880-82, 3144-45. She claimed that when she went to clear out her office, her email account had been turned off. RP 3145-46.

Regarding her employment at MSA, Atwood alleged that Young created a hostile work environment, treating Atwood and other women less favorably. RP 2863-65, 3238-40. She claimed that Young falsely accused her of "timecard fraud" and that MSA "management" told DOE the same. RP 2857, 3241, 3243. She

alleged that an MSA subcontractor, Longenecker & Associates, later removed her name from a list of candidates for a contract between Longenecker and DOE. RP 2899-900, 2983-87. She claimed that Young told her she was not being investigated in 2013, while excluding her from the staff meeting where he told others he was being investigated. RP 3242-43.

The jury awarded $8.1 million: $2.1 million in economic loss, and $6 million in emotional distress. CP 11038-44. MSA moved for a new trial or remittitur. CP 9824-46. Atwood answered, and petitioned the court for $813,722 in attorney fees and costs. CP 9977-95, 10450-77. MSA opposed Atwood's fee request. CP 10427-49.

On January 10, 2018, the court issued a combined order on post-trial motions, denying MSA's motions and granting Atwood's request for attorney fees and costs. CP 10972-1037. The court awarded Atwood $1,523,186.72 in attorney fees and costs including a .5 multiplier on February 1. CP 10932-67. MSA timely appealed. CP 10928-11139.

B. MSA had issues with Atwood's employment early on.

Many at MSA felt that Atwood did not support Young's role as the vice president and was undermining him. RP 4005-06, 4152, 4272-73. It was "critical" for those in Portfolio Management to

communicate quickly, but Atwood was very difficult to find and it "was getting more and more difficult to track her down." RP 3781-82. Atwood seemed to feel Young "was not important enough for her to communicate with." RP 3782.

C. In September 2012, MSA received a complaint that Atwood had created a hostile work environment.

In September 2012, MSA received an anonymous complaint through its Employee Concerns Program alleging that Atwood "has created a hostile work environment through intimidation tactics, bullying, and her influence with Jon Peschong of DOE . . . ." Exs 10A & B; RP 1653-56. The 2012 complaint alleged that Atwood "openly bragged about her influence with DOE, and her ability to have people removed from their jobs." Exs 10A & B; RP 1656. She was often unaccountable at work, came in late and left early, and called in sick while reporting full work days. Exs 10A & B; RP 1657.

The 2012 complaint accused Atwood of "sabotag[ing]" others' careers, including influencing management to forcibly dismiss a female coworker. *Id*. The writer also accused Atwood of using her influence with DOE to retaliate against MSA senior management for poor performance feedback. *Id*. He or she refused to reveal their identity, fearing that Atwood could affect their continued employment

at MSA. Exs 10A & B; RP 1658. In short, Atwood's behavior was causing "a lot of unrest in the organization." RP 3834.

MSA's senior director of independent oversight, Chris Jensen, ordered an investigation. RP 1628, 3829, 3835. Wendy Robbins, MSA's Employee Concerns Program manager, learned that human resources was already working with management to resolve the issues within Portfolio Management. RP 1658. Robbins' interview with Young revealed that Atwood was "often not where she's supposed to be," recorded days she called in sick as workdays, and threatened people. RP 1696-97. The investigation also revealed that while there were violations of MSA's internal time-charging policies, they did not amount to mischarging the government or falsifying records. RP 1809, 3840. Ultimately it was determined that HR and management would continue addressing the 2012 hostile-work-environment complaint against Atwood and that a formal investigation would be detrimental to their ongoing efforts. RP 1703. Robbins closed her investigation in November 2012. *Id*.

D. MSA received a similar complaint in August 2013.

The Atwood situation "revived" in August 2013, when MSA received a similar anonymous complaint alleging that Atwood was receiving favorable treatment due to her influence with DOE. Ex 215;

RP 1703-04, 1821, 3870. This complaint, filed the day Atwood returned from a last-minute two-week trip to Malaysia, alleged that staff and management in Portfolio Management did not know where Atwood was or when she would return to work. Ex 215; RP 2961, 3120. This was seen as a "double-standard," where absences must be pre-approved and others had to cover for Atwood. *Id*. The same thing happened the year prior when Atwood had an elective medical procedure without advanced planning. *Id*. The complainant alleged that Atwood's favorable treatment was on its way to becoming a "hostile work environment" – if it was not already. *Id*.

In late August, Young met with HR to address Atwood having left for Malaysia without notice. RP 2579, 2644-47, 3559, 3677-78. MSA then-EEO Officer Christine Moreland (formerly DeVere) arrived 5-to-10 minutes before the meeting was over, explaining that she was attending the meeting because someone had raised a hostile work environment complaint involving Atwood. RP 1863, 2560, 2564, 2647-48, 3560, 3567-68, 3594, 3679. When Young commented on the issues with Atwood, Moreland commented that it was a "manager problem." RP 2564-65, 2648. Young did not recall Moreland saying anything else. RP 2564-65.

Young followed up with HR and they agreed he would just speak to Atwood. RP 2648-49. He did so, also sending Atwood an email. RP 2649-51.

When Young followed up with HR and Moreland on September 5, Moreland said she was conducting an investigation and had questions for Young. RP 2565-66. Young had heard about an investigation, but when he inquired as to the purpose, "nobody had an answer." RP 2567. There was a lot of confusion at MSA at the time, and although Young had not seen a complaint, he assumed there was one since Moreland was investigating. RP 2567, 3808. He thought Moreland had "predetermined" there was a "manager problem," so told her he would retire before allowing her to investigate him. RP 2565-68, 2654.

Young then advised his team, including Atwood, to cooperate and answer any questions honestly. RP 2582, 3808. He also confronted MSA then-President Frank Armijo, telling him that if he was going to have Young investigated, he ought to tell him why. RP 2586, 2667. Armijo knew nothing about it. RP 2586.

HR shared Young's account: (1) at the late-August meeting, they addressed a complaint about Atwood, and did not receive or discuss a complaint about Young; and (2) at the September 5

meeting, Young calmly stated he would retire before being investigated by Moreland. RP 3560, 3567, 3594, 3597-98, 3678-80, 3683, 3701-02.

Moreland denied that the late-August meeting was about Atwood, claiming instead that she was investigating an anonymous complaint that Young was creating a hostile work environment in Portfolio Management. RP 1861-63, 2058. She claimed that at the September 5 meeting, Young said he would retire to make the "process" easier. RP 1866-68. Although Young seemed frustrated, he was professional and the meeting ended without further discussion. RP 1867, 1870.

Moreland was the only witness who claimed there was a complaint against Young. *Compare* RP 1861-63 (Moreland) *with* RP 2562, 2566, 2654 (Young); 3282-83, 3597-98, 3679-80, 3701-02 (HR); 3842-43, 3916 (Jensen). Jensen has never seen one. RP 3916. There is no complaint against Young in the record.

E. MSA then directed a joint investigation.

On September 6, MSA Vice President of HR Todd Beyers and Jensen put Moreland's investigation on hold temporarily so they could engage Robbins and Moreland in a joint investigation. RP 1628, 1634-35, 1643-44, 1861, 1872, 2065, 3286-87, 3871-72. They

ordered a joint investigation on September 12. RP 2066-67, 3288-89, 3873. Moreland was to "continue" the investigation that was on hold, and Robbins was to investigate labor-charging practices in Portfolio Management and whether Atwood was receiving special treatment. RP 1631-33, 1644-45, 1647-48, 2069, 3289, 3920, 3925.

Days later, Robbins and Moreland interviewed Atwood, who reported a hostile work environment in Portfolio Management. RP 2083, 2087, 2439-40. Atwood expressed that Young retaliated against her and treated her differently based on gender, but could not recall any specifics. RP 1726, 2083-84. She also mentioned that they should check Young's timekeeping, alleging that he was conducting Kennewick business on MSA time. RP 2085.

Robbins and Moreland reported back to Beyers and Jensen later that day. RP 2087, 2094. They reported that Atwood was the only person in Portfolio Management who indicated Young treated her differently based on gender, also raising Atwood's accusations about Young's timekeeping. RP 2088-90. Beyers and Jensen authorized further investigation. RP 2089-90. After more interviews on September 17, Robbins wrapped up the investigation while Moreland moved onto another matter. RP 2090-91.

The investigation revealed that there was no hostile work environment based on gender or any other protected class. RP 1761-62, 2439, 2446-47, 3875. Although there were time-charging issues that violated MSA policy, they found no "violations" *per se*, or related special treatment. RP 1722-23, 1740, 1761-62, 3875. Roughly half the group thought Atwood was treated differently, and half did not. RP 3875-76. But they found morale problems and unrest in the group, that Atwood and Young "clashed," and that Atwood was perceived as showing little respect for Young. RP 1740, 3874.

F. MSA terminated Atwood in September 2013.

As addressed fully below, various erroneous rulings prevented MSA from fully addressing the reasons for Atwood's termination. *See* Argument § B. On September 14 or 15, Beyers and Jensen met with Young and MSA then-COO David Ruscitto to address Atwood's ongoing attendance issues, but made no decision with respect to her employment. RP 3878-80, 3887, 3905, 3909. On September 17, Robbins and Moreland briefed Jensen and Beyers on their investigation results. RP 2443, 2669-70. MSA "management" (as discussed fully below, MSA could not mention who) met on September 19 and decided to terminate Atwood. RP 3308-09.

Beyers and MSA attorney Steve Cherry met with Atwood and gave her a termination letter. RP 3307-08. She asked if she could resign, but when she was too upset to draft a letter, Beyers offered and did it for her. RP 3309, 4129. Cherry then met Atwood at her office to help her move her belongings to her car. RP 4133-35. They looked for a cart, but found only a wheelchair, so used it. RP 4134. He was not trying to embarrass her. RP 4134. Atwood was understandably upset regarding her termination. RP 4136, 4138.

As stated above, the jury awarded Atwood $8.1 million, principally for emotional distress stemming from the day her employment was terminated. As addresses below, numerous trial court errors, including a legally erroneous jury instruction, prevented a fair trial. This Court should reverse.

ARGUMENT

A. Standards of review.

This Court reviews evidentiary rulings and rulings on post-trial motions for an abuse of discretion. ***Minehart v. Morning Star Boys Ranch, Inc.***, 156 Wn. App. 457, 463, 232 P.3d 591 (2010); ***State v. Jackman***, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). Incorrect legal analysis or other legal error may constitute an abuse of discretion. ***Green v. City of Wenatchee***, 148 Wn. App. 351, 368, 199 P.3d 1029

(2009). This Court reviews *de novo* alleged legal errors in jury instructions. ***Blaney v. Int'l Ass'n of Machinists & Aerospace Workers***, 151 Wn.2d 203, 210, 87 P.3d 757 (2004).

B. The trial court's repeat erroneous rulings surrounding MSA's lawful, nondiscriminatory reasons for terminating Atwood's employment prevented a fair trial.

An employer's lawful, nondiscriminatory reasons for terminating employment are not offered to prove the truth of the matter asserted, so are not hearsay. Yet time and again, the court prevented MSA from addressing its reasons for terminating Atwood. These rulings collectively prejudiced MSA's ability to put on a defense. This Court should reverse.

1. The court repeatedly prevented MSA from addressing its lawful, nondiscriminatory reasons for terminating Atwood, misapplying ER 801.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Statements offered to show an employer's motivation for terminating employment are not offered for their truth, so are not hearsay. ***Domingo v. Boeing Employees Credit Union***, 124 Wn. App. 71, 79, 98 P.3d 1222 (2004). There, the plaintiff asserting wrongful discharge under the WLAD argued that the court erroneously considered her supervisor's declaration containing hearsay references to video footage BECU could not

produce at trial. ***Domingo***, 124 Wn. App. at 79. The appellate court held that the supervisor's description of the video footage was not hearsay, where it was not offered to prove the truth of the matter asserted, but to show the "the motivation for the decision to reprimand and eventually terminate Domingo's employment." 124 Wn. App. at 79.

Similarly, in ***Rice v. Offshore Systems, Inc.***, the appellate court held that a police report documenting the WLAD plaintiff's drunk and disorderly conduct was not offered to prove the truth of the matter asserted, but was offered to show his employer's "motivation for the decision to terminate . . . ." 167 Wn. App. 77, 86-87, 272 P.3d 865 (2012) (citing ER 803(a)(3) and ***Domingo***, *supra*). This is consistent with the Ninth Circuit's application of Federal ER 803(3) in ADA cases.[2] ***Henein v. Saudi Arabian Parsons Ltd.***, 818 F.2d 1508, 1512 (9th Cir. 1987).

In direct contrast to these controlling cases, the court repeatedly sustained hearsay objections when Jensen attempted to address MSA's reasons for terminating Atwood's employment. RP

[2] Washington courts often look to federal anti-discrimination law in WLAD cases. ***Kumar v. Gate Gourmet, Inc.***, 180 Wn.2d 481, 490-91, 325 P.3d 193 (2014).

3839-42. When MSA attempted to elicit testimony about Jensen's conversations with Young regarding Atwood's performance, the court sustained a hearsay objection. RP 3839-40. But as MSA noted, that testimony was not offered for its truth, but to demonstrate MSA's lawful, nondiscriminatory reasons for terminating Atwood. *Id*.; ***Domingo***, 124 Wn. App. at 79. This happened again and again.

When Jensen attempted to explain the results of the 2012 investigation into the hostile work environment complaint against Atwood, the court sustained Atwood's hearsay objection that Jensen was "saying what [the investigator] said." RP 3840-41. But again, out of court statements are hearsay only if offered for the truth. ER 801(c). MSA was merely trying to establish one of its lawful reasons for terminating Atwood's employment: her "behavior was causing unrest in the organization." RP 3840; ***Domingo***, 124 Wn. App. at 79.

The court even prevented Jensen from talking about the allegations in the 2013 complaint against Atwood, or who brought it to his attention. RP 3841-42. This too went to MSA's lawful reasons for terminating Atwood's employment. ***Domingo***, 124 Wn. App. at 79. The court prejudiced MSA's defense.

2. The court then repeatedly gave a related limiting instruction that improperly commented on the evidence.

After this series of incorrect rulings rendered Jensen's testimony utterly ineffective, MSA asked the court to revisit the cases MSA previously cited holding that an employer's lawful, nondiscriminatory reasons for termination are not hearsay. RP 3845, 3851-53. While MSA agreed it would be "proper" for the court to give an instruction to that effect, the court then *sua sponte* interrupted Jensen's remaining testimony not less than four times, stating that his testimony was "not substantive evidence," but only showed his "state of mind." RP 3853-54, 3868-69, 3875-76, 3880-82, 3884. This incorrect statement is an improper comment on the evidence.

"To prevent the trial judge's opinion from influencing the jury's verdict, article IV, section 16 of the Washington Constitution prohibits the court from commenting on the evidence." ***Smith v. Behr Process Corp.***, 113 Wn. App. 306, 335, 54 P.3d 665 (2002). A statement is a comment on the evidence if the jury can infer "the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue." ***Smith***, 113 Wn. App. at 335.

Telling the jury that Jensen's testimony was not substantive evidence is false. MSA's lawful, nondiscriminatory reasons for

terminating Atwood's employment were not offered for their truth, so are not hearsay. *See* ***Rice***, 167 Wn. App. at 86-87; ***Domingo***, 124 Wn. App. at 79; ER 801(c). While testimony on this point is not "substantive evidence" of Atwood's problematic behaviors, it *is* substantive evidence of MSA's motivation for terminating Atwood. *Id*. The court falsely told the jury that MSA's motives for terminating Atwood were not evidence, revealing his opinion of MSA's defense.

3. These erroneous rulings and others prejudiced MSA's ability to put on a defense.

The court's erroneous hearsay rulings did not begin or end with Jensen. Rather, the court's misapplication of ER 801(c) was repeatedly coupled with misapplications of ER 801(d)(2). Atwood's motion *in limine* No. 3 sought to preclude MSA from offering statements made by Armijo and other MSA executives, arguing that such statements offered by MSA are hearsay offered by the party, so do not fall within the party-opponent exception. RP 147-49, 151-52; CP 4994. Specifically, Atwood sought to prevent anyone from testifying as to what Armijo said, or instructions he gave. *Id*. The court granted motion *in limine* No. 3 insofar as a party could not offer inadmissible hearsay through its own witnesses. ER 801(d)(2); RP 152-53, 161-62. The court reserved as to Armijo. RP 162. The court

never addressed MSA's arguments that Atwood had not identified speaking agents to whom the ruling would apply, or that testimony about lawful reasons to terminate employment are not offered for its truth, so are not hearsay, rendering ER 801(d)(2) inapplicable. RP 150-51; CP 5795-97.

The court's misapplication of ER 801 prejudiced MSA's defense. The court sustained a hearsay objection preventing Beyers from divulging who told him to stop Moreland's 2013 investigation. RP 3348-49. This was not long after Atwood warned Beyers on direct, "I think you're getting into hearsay here. Don't tell us about what Armijo said." RP 3313. "Who" told Beyers to stop the investigation is not hearsay, nor is everything "Armijo said" hearsay. RP 3313, 3348-49.

Dru Butler, Atwood's coworker, was cut off from addressing that the Portfolio Management group was stressed in 2012-13 because DOE felt they were not performing well. RP 3998. The issue was not how DOE felt, but the work environment in Portfolio Management. *Id*.

Cherry, who was present when Atwood was terminated, was prevented three times from even addressing how MSA told Atwood she was being terminated. RP 4127-29. The court explained, "I'll

sustain the hearsay because he didn't indicate who said that." RP 4128. Who said it is irrelevant. MSA was not attempting to prove that it told Atwood she was being terminated – an undisputed fact.

In the same context, the court sustained another hearsay objection preventing Cherry from testifying that Beyers, who was also present when Atwood was terminated, asked Atwood if she would like him to draft a letter of resignation for her to sign. RP 4129-30. But again, the issue is not whether Beyers did or did not offer to draft the letter, but how MSA handled Atwood's emotional reaction to the news her employment was being terminated. *Id*.

Multiple sustained hearsay objections also prevented MSA Chief Legal Counsel Stan Bensussen from testifying that Armijo asked him to take on that position over Fowler, why Armijo made that request, or even his own "understanding" of why the request was made. RP 4198-99. The court's rationale was that this testimony was based on what Armijo said or "was thinking." *Id*. MSA was not trying to prove that what Armijo said or was thinking was true. RP 4199. Rather, this went to MSA's lawful, nondiscriminatory reasons for promoting Bensussen over Fowler. *Id*. That is not hearsay. *See* ***Rice***, 167 Wn. App. at 86-87; ***Domingo***, 124 Wn. App. at 79.

Time and again, the court erroneously prevented MSA from providing basic information about the environment in Portfolio Management, the 2012 and 2013 investigations, and the reasons for, and handling of, Atwood's termination. As addressed below, preventing Bensussen's testimony was particularly prejudicial, where the court erroneously permitted Fowler's testimony that she was "demoted" as a result of Bensussen's new role. *Infra*, Argument § C1. This prevented a fair trial.

4. The court erroneously excluded DOE employee Margo Qualheim under *Burnet*.

Under 10 C.F.R. § 202.22, the parties were required to obtain DOE's permission to call DOE employees at trial. CP 6023-24. Before trial, Atwood obtained DOE's permission to call John Silko and Jon Peschong (DOE employees who worked with Atwood) to testify about "the scope of work [she] performed." CP 6623-24. During trial, DOE expanded its authorization, allowing them to opine on the quality of Atwood's work and her character. RP 1090-91. Yet the court denied MSA's request to call a rebuttal DOE witness, incorrectly invoking ***Burnet***, and then misapplying it. RP 3588. This Court should reverse.

Atwood originally asked DOE to permit testimony about the scope of her work, not the quality of her work and work product, her attendance, or her responsiveness. CP 6623-24. DOE initially agreed to allow testimony on scope, but only as to facts, not opinions. CP 6627-28. On the first day of trial, however, Atwood argued that the "scope" of her work permitted questions regarding how she interacted with others, how she did her job, whether she was late, and so forth. RP 1089-90. After conferring with DOE's in-court counsel, the court agreed – much to MSA's surprise. RP 1090-91.

Silko then testified that Atwood was timely, professional, and very approachable, also denying that she was manipulative. RP 1091-92. Peschong testified at length about Atwood's skills. RP 1166-68, 1261-70. He stated that he had no trouble finding Atwood and that she was not late, did not act "snobby," and never undermined Young. RP 1172.

The day after the court's ruling, MSA notified Atwood that it was requesting DOE's permission to call Margo Qualheim to rebut Silko and Peschong's testimony. CP 6592-93. MSA notified DOE that day, and DOE granted MSA's request on September 27, 2017. CP 6596-98. Qualheim would testify that she interfaced with Atwood every three weeks, finding her interactions with senior male

managers "somewhat unprofessional," to the point of making Qualheim uncomfortable. RP 3576-78. This included "flirtatious behavior," such as sitting very close to male co-workers and whispering in their ears. RP 3578.

Atwood filed a motion *in limine* to exclude Qualheim's testimony under ***Burnet v. Spokane Ambulance***, claiming that she was untimely disclosed. CP 6559-68 (addressing 131 Wn.2d 484, 933 P.2d 1036 (1997)). The court granted Atwood's motion, excluding Qualheim's rebuttal testimony in its entirety. RP 3584-88. But ***Burnet*** – which deals with discovery violations – does not apply to a true rebuttal witness, who need not have been disclosed before trial. *Cf.* ***State v. White***, 74 Wn.2d 386, 395, 444 P.2d 661 (1968). MSA could not reasonably have foreseen that DOE would agree to expand the permitted testimony from the factual "scope" of Atwood's work to opinions about the quality of her work and character. Qualheim directly rebutted the other DOE-witness testimony.

While ***Burnet*** is inapplicable to pure rebuttal testimony, the court's ***Burnet*** analysis is also in error. "[B]efore imposing a severe [discovery] sanction, the court must consider the three ***Burnet*** factors on the record: whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether

the violation substantially prejudiced the opposing party." ***Keck v. Collins***, 184 Wn.2d 358, 368-69, 357 P.3d 1080 (2015) (citing ***Jones v. City of Seattle***, 179 Wn.2d 322, 338, 314 P.3d 380 (2013). The burden under ***Burnet*** fell on Atwood. ***Jones***, 179 Wn.2d at 338 (burden on party seeking exclusion).

Atwood principally relied on LR 4(H),[3] the sort of local rule that impermissibly "create[s] a presumption that late-disclosed witnesses will be excluded absent 'good cause.'" 179 Wn.2d at 343; CP 6562-63. But "***Burnet*** and its progeny require the opposite presumption: that late-disclosed testimony will be admitted absent a willful violation, substantial prejudice to the nonviolating party, and the insufficiency of sanctions less drastic than exclusion." 179 Wn.2d at 343. Local rules are "subordinate" to ***Burnet***. *Id.* at 344. ***Jones*** directly contradicts the local rule upon which Atwood relied.

Jones also directly contradicts Atwood's arguments on, and the court's analysis of, willfulness. The court's only comment on willfulness was: "[i]t's a failure to comply with the local rule." RP 3585.

[3] The local rule provides (1) that parties must disclose "rebuttal" witnesses "whose knowledge did not appear relevant until the primary witnesses were disclosed . . . ."; and (2) that "Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause . . . ." LR 4(H).

But ***Jones*** holds that willfulness is not merely the lack of "good cause" or "reasonable justification," or mere noncompliance with a local rule. 179 Wn.2d at 345 (citing ***Blair v. TA-Seattle E. No. 176***, 171 Wn.2d 342, 350 n.3, 254 P.3d 797 (2011)). "Something more is needed." ***Jones***, 179 Wn.2d at 345. But Atwood led the court into error, arguing that a "party's disregard of a court order without reasonable excuse or justification is deemed willful." CP 6564 (quoting ***Magaña v. Hyundai Motor Am.***, 167 Wn.2d 570, 584, 220 P.3d 191 (2009)). ***Jones*** rejects this analysis. 179 Wn.2d at 345.

Atwood also led the court into error in arguing: "it's too close to the end [of trial] for this to be permitted." RP 3434. MSA raised Qualheim two days into trial – it was Atwood who waited until "the end" to move to dismiss, and trial actually lasted another week. CP 6559-68, 6592-93. Yet the court ruled it was too prejudicial to permit Qualheim's testimony in the fourth week of trial. RP 3586. Atwood, not MSA, caused the only identified prejudice.

The court's lesser-sanctions analysis is equally flawed. RP 3587. The court ruled that allowing Atwood to depose Qualheim would not suffice as she could not be deposed that day. *Id*. The deposition did not have to occur that day – trial lasted another week.

In short, ***Burnet*** does not apply to true rebuttal witnesses, but even if it did, the court erroneously excluded Qualheim under ***Burnet***. This Court should reverse.

C. The trial court's repeat erroneous ER 404(b) rulings permitted Atwood to present evidence of numerous other "bad acts," tainting the trial with alleged comparators who were not comparators at all.

The court erroneously permitted Atwood to bring in numerous alleged comparators who had different issues, with different chains of command, at different times. These rulings prevented a fair trial, particularly where Atwood acknowledges the case was all about comparators. RP 4732, 4906-08. This Court should reverse.

1. The court may admit alleged comparators under ER 404(b) only when the subject matter, chain of command, and time of complaint make the testimony so probative that it is not outweighed by the potential for prejudice.

Evidence of a person's character or character trait is not admissible to prove action in conformity therewith. ER 404(a); ***Brundridge v. Fluor Fed. Servs., Inc.***, 164 Wn.2d 432, 444, 191 P.3d 879 (2008). But courts may allow evidence of "prior bad acts . . . . for other purposes, such as proof of motive, intent, plan, knowledge, etc." ***Brundridge***, 164 Wn.2d at 444; ER 404(b). In the employment context, evidence of how an employer treats other

employees "may be admissible to show motive or intent for harassment or discharge." ***Brundridge***, 164 Wn.2d at 445.

When a trial court considers admitting evidence of other bad acts, it must first identify the purpose for which the evidence is offered. 164 Wn.2d at 444. The court must then balance the proffered evidence's probative value against its potential for prejudice. *Id*. at 444-45.

In ***Brundridge***, a group of pipe fitters asserted wrongful discharge in retaliation for refusing to install sub-standard valves, concerned they posed a safety risk. *Id*. at 438. Fluor laid off the entire crew, later reinstated that crew, but laid off another crew who had supported them. *Id*. Six months later, Fluor again laid off the crew of pipe fitters it had previously reinstated. *Id*. Both groups filed suit. *Id*.

Plaintiffs prevailed at trial, and the appeal was transferred from this Court to the state Supreme Court. *Id*. at 439. Fluor argued that the admission of another employee's testimony of three specific other bad acts warranted a new trial. *Id*. at 444. On the first, industrial hygienist Lauri Marquardt testified that she made specific safety complaints regarding burning paint fumes "to the same chain of command that was involved in the pipe fitters' discharges at the same time the pipe fitters raised their safety concerns." *Id*. at 446.

When she met with a supervisor to address her concern, he told her not to put her ethics above her career. *Id*. at 444. Afterward, her supervisors treated her disrespectfully and passed her up for promotion. *Id*. at 446.

The Court held the paint-fumes testimony was "highly probative of Fluor's intent to retaliate against those who raised safety concerns." *Id*. The ethics testimony was similarly probative, tending to show that raising safety concerns jeopardized employment. *Id*. This was more probative than prejudicial. *Id*.

The Court went on to hold that the trial court erred in admitting Marquardt's testimony about two instances of potentially dangerous gases. *Id*. at 447. The first had "some" probative value, where testimony that a foreman downplayed the event showed managers were motivated to downplay safety concerns. *Id*. The second incident had only "extremely limited probative value, if any," where there was no indication the event was downplayed or affected Marquardt's employment. *Id*. This evidence had the potential to prejudice the jury into thinking that Fluor was a "'bad company' in general." *Id*. But the error was harmless, where the jury heard testimony about safety issues from the pipe fitters, Marquardt, and at least two others. *Id*.

In short, the 404(b) inquiry turns on whether the alleged comparator has: (1) a similar complaint, (2) involving the same chain of command, (3) in the same timeframe.

2. The court erroneously allowed former MSA general counsel Sandra Fowler to allege gender discrimination and retaliation under ER 404(b).

Atwood sought to introduce the following evidence through Fowler: (1) that Fowler was compensated disparately based on gender, and retaliated against when she raised the issue; (2) that her male supervisor discriminated against her based on gender; and (3) that Armijo treated men and women differently. RP 681-88 (offer of proof). Fowler worked in MSA's legal department, initially reporting to Frank Figueroa and then to Armijo, Figueroa's successor. RP 729; CP 4667. Atwood and her superior Young, on whom Atwood's claims are based, worked in Portfolio Management. RP 729; CP 4103, 4667. Fowler did not work with Atwood, rarely worked with Young, and had nothing bad to say about him. RP 704; CP 4103, 4667.

The outside investigator MSA hired determined that Fowler's disparate-pay claim was "unfounded." CP 5265. The EEOC agreed. RP 4223. Atwood did not claim disparate pay.

Fowler's gender-discrimination claim centers around Armijo's decision to shift Bensussen from a contract attorney to chief counsel

in June 2014, nine months after Atwood's employment was terminated. RP 4198-99; CP 4105. Atwood made no similar claim.

In December 2014, fifteen months after Atwood was terminated, Fowler reported to Lockheed Martin that Armijo, who also served as Lockheed Martin's Vice President, made charitable donations and remitted the invoices to MSA. RP 689-90, 693. Fowler relatedly claimed that Bensussen made disparaging remarks about her in spring 2015 (over 1.5 years after Atwood was terminated) around the same time that Lockheed Martin found her claims against Armijo "unsubstantiated."[4] RP 693, 704; CP 4104. Fowler claims that Armijo treated her differently "after" this point. RP 693-94, 709.

In short: (1) Atwood never worked with Bensussen who post-dated her employment; (2) Fowler rarely worked with Young and had no issues with him; and (3) Fowler's complaints about Bensussen and Armijo relate to events that occurred 9-to-18 months *after* Atwood was terminated.

What's left is Fowler's assertion that Beyers retaliated against her for seeking salary reviews by accusing her of filing a gender discrimination claim. RP 688-89. But Fowler cited no adverse

[4] MSA also found that Fowler's complaint against Bensussen was "unsubstantiated." RP 705; CP 5263-64.

employment action. *Id*.; ***Cornwell v. Microsoft Corp.***, No. 94846-1, 2018 Wash. LEXIS 833 at *9 (November 29, 2018). Rather, her supposed "retaliation" is that Beyers interpreted her claim that she was not paid enough to be a gender-based claim. *Id*. That is not retaliation.

The parties exchanged a series of motions *in limine* pertaining to Fowler and other alleged comparators. CP 2862-73, 3084-98, 4099-112, 4665-77, 5232-45, 5263-79, 5318-19, 5908-16, 5922-23, 5946-60. The court ultimately granted in part and denied in part MSA's stand-alone motion *in limine* to exclude Fowler's testimony under ER 404(b). RP 737; CP 11072-78.

The court initially ruled that Fowler did not prove disparate pay and that her disparate-pay claim was too dissimilar to Atwood's claims to go to the jury. RP 739-40. But the court then distinguished between the "fact" that Fowler complained and whether her complaint was "true." RP 740-41. The court ultimately ruled that Fowler could testify that she "perceived" retaliation after claiming disparate pay, but could not explore whether she "was or was not paid a comparable wage." RP 749-50. The court otherwise admitted Fowler's testimony without limitation. RP 747-48.

a. Fowler's testimony was minimally relevant where she raised different complaints, involving different superiors, largely occurring after Atwood's termination.

Fowler's testimony was minimally relevant at best, where her complaints about Bensussen's promotion and subsequent events all occurred long after Atwood's termination. ***Coletti v. Cudd Pressure Control***, 165 F.3d 767, 777 (1999). MSA hired Bensussen as a contract attorney in November 2013, and hired him full-time in June 2014, both after Atwood's termination. RP 4197-98. Fowler's accusations that Bensussen used derogatory language, and her specific complaints about Armijo, arose in spring 2015, 1.5 years after Atwood's termination. RP 689-90, 693-94, 704, 709; CP 4104. This timeline alone renders Fowler's testimony minimally relevant at best. ***Coletti***, 165 F.3d at 777.

In ***Coletti***, the Ninth Circuit affirmed the district court's exclusion of comparator evidence under Federal ER 403, where the events alleged occurred after the plaintiff's discharge. 165 F.3d at 777. The Ninth Circuit held that evidence of "later" "bad acts" is "even less relevant" than evidence of prior bad acts, where "the logical relationship between the circumstances of the character testimony and the employer's decision to terminate is attenuated." *Id*. As in

Coletti, any relationship between Atwood's termination and Fowler's much later complaints regarding Bensussen and Armijo is "attenuated" at best. *Id*.

Fowler's testimony was minimally relevant for the additional reason that she and Atwood worked in different departments for different superiors. ***Brundridge***, 164 Wn.2d at 445. Again, Fowler complained about her superior Bensussen, whose employment began after Atwood's ended. RP 683, 687-88, 693, 704, 2671, 3362, 4197-98; CP 4104-05. Atwood complained about her superior Young, but Fowler never worked closely with Young and had nothing bad to say about him. RP 729, 3374-75; CP 4103-04, 4667. While Fowler also complained about Armijo, Atwood did not report to Armijo, and said nothing about him other than that he played basketball with a male employee during the workday, but did not give women the same flexibility. RP 3242.

Finally, Fowler's complaints are far different than Atwood's. Fowler claimed that she was paid disparately and that she was unfairly bypassed by a male co-worker, neither of which Atwood alleged. Her remaining claims about disparaging comments and behaviors involve Bensussen and Armijo in 2015. Atwood said little

about Armijo, and nothing about Bensussen who post-dated her. She never ties her complaints about Young to Armijo.

Rather, Atwood's principal complaint was the way she was terminated. *Supra*, Statement of Case § A. Fowler resigned, telling Bensussen and Armijo, "I can truly state I am better for having gotten to know you." RP 711-12. Atwood's remaining complaints all go to her discord with Young, which Fowler did not share. *Supra*, Statement of Case § A.

The court's rationale for allowing Fowler's testimony falls far short. The court applied a "maxim" that "corporate culture comes through its key players, those at the top." RP 742-43. The fact that both Bensussen (Fowler) and Young (Atwood) reported to Armijo simply is not enough. RP 2476, 2671, 4207. MSA is a 2000-person company. RP 4307. Everyone in management reported to Armijo. RP 2348, 2627, 2988-89, 3267, 3355-56, 3364-65, 3830, 4207-08.

Brundridge requires a tighter nexus. There, the comparator had the same chain of command as the plaintiffs. 164 Wn.2d at 446. And like those plaintiffs, she asserted that she was retaliated against after raising safety concerns in the same timeframe as plaintiffs raised theirs. *Id*. at 444-47. Her testimony that directly linked raising safety concerns with adverse employment action was more

probative than prejudicial. *Id*. at 446. But her testimony that merely raised safety concerns without linking them to adverse employment action was more prejudicial than probative. *Id*. at 447.

Fowler had a different chain of command, different time frame, and different complaints. Her testimony should have been excluded.

b. Any probative value was outweighed by prejudice.

The risk of improperly admitting ER 404(b) evidence in WLAD cases is that the jury views the defendant as a "'bad company' in general." *Id*. Here, erroneously admitting Fowler's testimony materially affected the outcome of the trial. *Id*.

Fowler's testimony strongly suggested that MSA generally treats female employees differently and came with the weight of her status as former general counsel. Fowler testified that Beyers accused her of filing a suit against MSA after she sought salary reviews. RP 3364. She complained that Armijo promoted Bensussen and "reduced" her to an "associate." RP 3362-63. She claimed that Bensussen was dismissive and failed to give her meaningful work, also alleging that he said degrading things to her, including calling her a "man hater" and telling her she should "kiss the ground" Armijo and Ruscitto walk on. RP 3364-65, 3372. She claimed that only men

had offices on the same floor as Armijo, that Armijo was dismissive and failed to compliment her work on one occasion, and that he did not say hello to her on a plane after she raised a concern that Armijo expected MSA to pay for charitable contributions he made at local events. RP 3376, 3380, 3383-84.

Admitting Fowler's testimony required a trial within a trial, made more difficult by MSA's inability to counter Fowler's accusations without waiving privilege given her general-counsel role. MSA had to call Bensussen to address the supposed demotion, though as discussed above, he was largely prevented from doing so. RP 4197-99. Beyers too had to address Fowler's complaints. RP 3273-74. And MSA also had to call MSA then-president William Johnson for the sole purpose of responding to Fowler. RP 4306-20.

Atwood's closing illustrated her reliance on Fowler (and others): "Comparators. This is how we prove this case. We have proved it with comparators." RP 4906. She emphasized Fowler's 2015 complaints against Bensussen and Armijo, reiterating Bensussen's alleged derogatory comments while claiming that Armijo "attack[ed] and demean[ed] her." RP 4727-28. She used Fowler's testimony to accuse MSA of "ganging up on the women." RP 4729. Through Fowler, Atwood asserted a "cultural problem

under Armijo," claiming Fowler (as counsel) saw a "disturbing" "corporate culture" of gender discrimination Atwood did not see. RP 4728, 4905-06. Atwood's closing amply demonstrates the immense prejudice caused by erroneously admitting Fowler's testimony.

3. The court erroneously permitted numerous other alleged comparators, violating ER 404(b).

a. The court allowed testimony and exhibits about alleged comparators without an on-the-record ER 404(b) analysis.

Brundridge plainly requires an "on the record" ER 404(b) analysis, identifying the purpose of the proffered evidence, and then balancing its probative value against its potential for prejudice. 164 Wn.2d at 444-45. For many alleged comparators, the court did not engage in an ER 404(b) analysis at all, or professed to do so without ever explaining its rationale. The result is overtly prejudicial evidence related to MSA employees who plainly are not comparators.

Atwood sought to introduce approximately 85 exhibits purporting to be comparator evidence admissible under ER 404(b). CP 5232-33, 5235. MSA moved *in limine* to exclude. CP 5232-43. Atwood did not respond in writing.

On September 14, the court advised the parties that he had not reviewed the exhibits, but would "let [them] know" his ruling. RP 945. The next day, the court addressed the "first half," ruling that

some were “okay” – they satisfied ER 404(b); and others were “not okay” – they are “other bad acts too remotely situated from Ms. Atwood’s claim.” RP 979-81. On September 18, the court addressed the remaining exhibits and apparently provided the parties copies of his handwritten notes. RP 1208-11. The court invited the parties to object to any specific exhibits it had ruled on. RP 945, 981-82, 1211.

Before testimony on September 29, MSA objected to the use of any union members as comparators, where union members are entitled to progressive discipline, but non-union members like Atwood are not. RP 3171-72 (exhibits 68, 69, 73, 82, 84, 86-90). The court allowed them in as illustrative only (a distinction lost on any jury), with the limitation that they could be used only to show the importance of timeliness. RP 3180.

Atwood did not satisfy her burden for any of the alleged comparators at issue on appeal, exhibits 87, 140, 163, and 400. Any ER 404 analysis begins with the assumption that the proffered evidence is inadmissible. ***Brundridge***, 164 Wn.2d at 444; ER 404(a). ER 404(b) operates as an exception, allowing evidence of other bad acts for limited purposes, and only after the court has identified their purpose and is satisfied that the probative value outweighs the potential for prejudice. 164 Wn.2d at 444-45. The court “must”

conduct the required balancing "on the record," otherwise precluding appellate review. *Id*.

The court did not record its ruling on two of the four exhibits at issue, deeming exhibits 163 and 400 "okay" without comment. RP 979-81, 1208-11; CP 6745. The court initially deemed exhibit 140 "not okay," but later ruled it "close enough." CP 6745; RP 3302-03.[5] It is impossible to "infer the specific basis for admission." 164 Wn.2d at 445. These errors are not harmless. *Id*. at 446.

b. Many preceded or post-dated Atwood's termination by years, worked in different departments for different management, and involved very different circumstances.

During her direct examination of Beyers, Atwood asked a series of questions related to the professed comparators. RP 3320-29, 3334-46. In particular, Atwood emphasized exhibit 400, an investigative summary report of an incident in which teamster Maurice Gerry Ireland complained that MSA Vice President of Site Infrastructure Scott Boynton was "sexually harassing" his wife off-duty. Ex 400; RP 3323. After stating that she was not offering the exhibit into evidence, and being admonished not to read it, Atwood

[5] As discussed below, exhibit 87 was allowed for a limited purpose, which Atwood exceeded over objection.

read from the exhibit in the guise of a question, emphasizing the claim that Boynton "had his hand on his wife's inner thigh, near her crotch." Ex 400; RP 3324.

The court initially sustained MSA's hearsay objection, but when Atwood offered the exhibit into evidence, the court admitted it over MSA's ER 401, 404, 801, and 802 objections. RP 3324-25. Atwood then proceeded to have Beyers read the account again, reemphasizing that "Boynton had placed his hand on his wife's inner thigh, near the crotch area, and was rubbing it." RP 3326. Atwood then made her point: Boynton, unlike Atwood, was not terminated. RP 3327.

Exhibit 400's extremely little probative value was greatly outweighed by its obvious prejudice, so should have been excluded under ***Brundridge***. The alleged incident occurred in May 2011, 1.5 years before Atwood was terminated, and involved a different department (site infrastructure) and different manager (Boynton). Ex 400 at 2. What's more, the incident took place at a local bar, not at MSA. *Id*. After the incident, Ireland confronted Boynton off MSA premises, and the unwanted behavior stopped. *Id*. at 3. "Ireland confirmed it did resolve the issue and Mr. Boynton did stop the behavior." *Id*. at 4. Moreland investigated, rejected Ireland's

retaliation claim, and concluded that no further investigation was needed.[6] *Id*. at 5.

Atwood then moved to "the next one," eliciting testimony about union members entitled to progressive discipline. RP 3328-29, 3334-36. Since Atwood is not a union member, she is not entitled to progressive discipline, a right outlined in the collective bargaining agreement. RP 3172, 3176. The court sustained MSA's objection to these supposed comparators in part, allowing Atwood to use exhibits documenting progressive discipline "not as comparators," but only to show "the importance of timeliness." RP 3179-80, 3333.

But over multiple objections, Atwood was permitted to show the jury a "last chance letter" used to discipline a male union member, and to inquire at some length as to whether this was a disciplinary step MSA uses. Ex 87; RP 3337-39. This inquiry evaded the court's limitation, plainly suggesting that male MSA employees are warned prior to termination. *Id*. But again, the employee at issue was a union member entitled to progressive discipline, working in a different department, for a different chain of command. Ex 87. This letter was issued in November 2015, more than two years after Atwood was

[6] Although Moreland addressed exhibit 400 too, it was not as an alleged comparator. RP 2347-52.

terminated. Ex 87. This letter had zero probative value and was overtly prejudicial, so should have been excluded under ***Brundridge***.

Atwood continued in the same vein, proceeding to exhibit 163, a "written warning." RP 3339-42. Over multiple objections, Atwood elicited that MSA did not have to give the employee at issue, a non-union member, "progressive discipline," but elected to. RP 3341-42. The obvious purpose of this inquiry was to demonstrate that MSA used progressive discipline for non-union members, but not for Atwood. *Id*.

The court overruled MSA's ER 404(b) objection (and others) to exhibit 163 without any analysis whatsoever. RP 3339-40; CP 6745-46. This incident occurred in December 2010, nearly three years before Atwood was terminated. Ex 163. Although the employee at issue worked in Portfolio Management, the manager was Young' predecessor. *Id*. Here too, this exhibit had exceedingly little probative value and was overtly prejudicial, so should have been excluded under ***Brundridge***.

Finally, Atwood turned to exhibit 140, a two-week suspension issued to a male employee. RP 3342-45. Over objection, the exhibit was admitted – and read – Atwood making the point that this "guy"

was suspended and may still be employed at MSA. RP 3344-45. The court initially ruled that exhibit 140 was inadmissible under ER 404(b), but later ruled it "close enough to the exposed conflicts with DOE." RP 3302-03. That is not "close enough."

This discipline occurred in June 2010, over three years before Atwood was terminated. Ex 140. Atwood could not establish the employee's department or chain of command. Ex 140; RP 3345. Here too, this alleged comparator should have been excluded.

c. What little (if any) probative value these alleged comparators had was greatly outweighed by their potential for prejudice.

The prejudicial effect of these exhibits and related testimony was considerable to say the least. Atwood plainly used these exhibits to demonstrate that MSA gave male employees progressive discipline for worse offenses than Atwood's. *Supra*, Argument § C 3(b); RP 3323-45. Atwood connected the dots in closing, arguing that MSA uses progressive discipline, repeatedly questioning why MSA did not "give[] her progressive discipline." RP 4714-15, 4732. She even claimed that Young was "setting her up to get her out . . . . no progressive discipline." RP 4736.

Atwood asked the jury to "compare her to other people who got disciplined," arguing "we have a vice president who engages in

what sounds like sexual assault [and] got demoted." RP 4907. She emphasized the importance of "comparators" to her case. RP 4906-08. Her point – these alleged comparators, who never should have come in under ***Brundridge***, did not get terminated: "That's our case. That's our discrimination case." RP 4908.

In sum, the trial was, as Atwood admits, about Fowler and other alleged comparators. But the alleged comparators simply do not satisfy ***Brundridge***. This Court should reverse.

D. The cumulative effect of the above errors, in addition to many more, requires reversal.

The cumulative error doctrine may warrant reversal when several trial errors are harmless and/or do not warrant reversal standing alone, but prevent a fair trial when combined. ***Pers. Restraint of Cross***, 180 Wn.2d 664, 690, 327 P.3d 660 (2014); ***State v. Greiff***, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); *see also* ***Storey v. Storey***, 21 Wn. App. 370, 374, 585 P.2d 183 (1978) ("The cumulative effect of many errors may sustain a motion for a new trial even if, individually, any one of them might not"). The cumulative effect of the court's many errors is that Atwood was permitted to make a case through "comparators" who should have been excluded under ER 404(b), while MSA was prevented from straightforwardly

sharing its lawful, nondiscriminatory reasons for terminating Atwood's employment. *Supra*, Arguments §§ B & C. And while the trial court allowed Atwood's DOE witnesses to offer glowing opinions about her work and character, it prohibited MSA from calling one DOE witness in rebuttal. *Id*. at § B4. The combined effect severely limited MSA's ability to put on a defense, preventing a fair trial. This Court should reverse.

E. The court erroneously instructed the jury on damages.

Jury instructions must permit the parties to argue their theories of the case, must properly inform the jury of the applicable law, and must not mislead the jury. ***Blaney***, 151 Wn.2d at 210. The court instructed the jury to calculate future wage loss "from today until the time the plaintiff may reasonably be expected to retire or recover from the continuing effects of the discrimination and/or retaliation . . . ." RP 4661; CP 11063. This was error.

It is legal error to instruct "the jury to calculate future earnings 'from today until the time [plaintiff] may reasonably be expected to retire.'" ***Blaney***, 151 Wn.2d at 210 (quoting ***Lords v. Northern Automotive Corp.***, 75 Wn. App. 589, 605, 881 P.2d 256 (1994)). This is so because a jury may award front pay only for a reasonably certain time period "'that does not exceed the likely duration of the

terminated employment.’” 151 Wn.2d at 210 (quoting ***Lords***, 75 Wn. App. at 605 (quoting ***Hayes v. Turlock***, 51 Wn. App. 795, 802, 755 P.2d 830 (1988))). Plaintiff’s future employment “is a question of fact” and “may not necessarily extend until retirement.” *Id.*

Where, as here, an instruction misstates the law, prejudice is presumed. *Id*. at 211. The burden is thus on Atwood to show that this error was harmless.

Unlike in ***Blaney***, this erroneous statement of the law was not harmless because MSA put on evidence that Atwood would not have been employed at MSA through retirement. *Id*. at 211-12. Atwood conceded that she moved jobs often. RP 2678-707. In the fifteen years before starting at MSA, she had six different jobs, including self-employment. *Id*. Her average job lasted two-to-three years, the total time she had already been employed at MSA when she was terminated. *Id*. MSA raised this issue in closing. RP 4862.

Expert testimony proved that it is common for project managers like Atwood to change jobs when the project is up and going and that Atwood could find comparable employment in six months, eliminating future wage loss. RP 3066-67, 3078, 3739-40. No one said she was incapable of working. Indeed, Atwood was part

of a former employer's "team" on a new contract he had just bid at the time of trial. RP 1619-20.

In sum, instruction 17 was legally wrong, and prejudice is presumed. It was harmful, not harmless. This Court should reverse.

F. The court erred in denying MSA's motion for new trial or remittitur.

The court should remit a verdict that is outside the range of evidence or is shocking to the court's conscience, or the jury was motivated by passion or prejudice. ***Bunch v. Dep't of Youth Servs.***, 155 Wn.2d 165, 175, 116 P.3d 381 (2005); RCW 4.76.030.

The jury awarded Atwood $2.1 million in economic damages, her salary from the termination date to age 70. RP 2113, 2936, 3736; CP 11043. This amount is shocking, where every indication was that Atwood could find comparable employment in six months, eliminating future wage loss. RP 3078, 3739-40. Atwood submitted few applications, and there was no indication she was using online job-search programs. RP 3066, 3069-74. And while Atwood claimed she was "blacklisted," multiple witnesses testified they would recommend or hire her. RP 1568, 1583, 1610, 1622-23, 2333-34.

The jury also awarded Atwood $6 million for emotional distress, a claim stemming solely from the day she was terminated.

RP 2306, 2886-87; CP 11043. But Atwood's experts recommended therapy for *one-to-four years*. RP 1108-10, 1118, 2036-37. The shocking $6 million award likely resulted from Atwood improperly inviting the jury to "call [MSA] out," stop their "conduct tomorrow," and "eradicate discrimination." RP 4900.

In sum, the $8.1 million award is shocking. By comparison, the ***Brundridge*** verdict for economic loss and emotional distress damages was $4.8 million for *11* plaintiffs. 164 Wn.2d at 439. This Court should reverse and remand for a new trial or remittitur.

CONCLUSION

This Court should reverse, as many errors alone or cumulatively warrant a new trial. At minimum, the Court must reverse the damages award based on a legally erroneous jury instruction.

RESPECTFULLY SUBMITTED this 30th day of November 2018.

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APPENDIX

Court's Instructions to the Jury. CP 11045-11071.

SUPERIOR COURT OF WASHINGTON
FOR BENTON COUNTY

JULIE M. ATWOOD,

Plaintiff,

vs.

MISSION SUPPORT ALLIANCE, LLC, and STEVE YOUNG, an individual,

Defendants.

Case No.: 15-2-01914-4

COURT'S INSTRUCTIONS TO THE JURY

Dated this 9th day of October, 2017.

Douglas L. Federspiel

The Honorable Douglas L. Federspiel

INSTRUCTION NO. 1

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 2

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony and exhibits presented by, or relating to, Sandra Fowler regarding her own complaints against MSA. This evidence may be considered by you only to the extent you find it relevant to issues of MSA's motive or intent. It may not be considered by you for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

INSTRUCTION NO. 3

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. 4

Defendant Mission Support Alliance (MSA) is a limited liability company. A limited liability company can act only through its officers and employees. Any act or omission of an officer or employee is the act or omission of the limited liability company.

The law treats all parties equally whether they are limited liability companies or individuals. This means that limited liability companies and individuals are to be treated in the same fair and unprejudiced manner.

For the purposes of this lawsuit, corporation and limited liability company are the same.

INSTRUCTION NO. 5

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or his information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

Plaintiff was an "at-will" employee who could be lawfully discharged at any time without good cause, or for bad cause, or for no cause at all, unless otherwise prohibited by law.

INSTRUCTION NO. 7

Under the Washington Law Against Discrimination ("WLAD"), discrimination in employment on the basis of gender is prohibited.

To establish her discrimination claim, the plaintiff has the burden of proving each of the following propositions:

(1) That Ms. Atwood resigned in lieu of termination; and

(2) That Ms. Atwood's gender was a substantial factor in MSA's decision to terminate her.

If you find from your consideration of all the evidence that each of the propositions stated above has been proved, your verdict should be for the plaintiff. On the other hand, if either of the propositions has not been proved, your verdict should be for the defendant.

INSTRUCTION NO. 8

"Substantial factor" means a significant motivating factor in bringing about the employer's decision. "Substantial factor" does not mean the only factor or the main factor in the challenged act or decision.

INSTRUCTION NO. 9

It is unlawful for an employer to retaliate against a person for opposing what the person reasonably believed to be discrimination on the basis of gender, or providing information to or participating in a proceeding to determine whether discrimination or retaliation occurred.

To establish a claim of unlawful retaliation by MSA, Ms. Atwood has the burden of proving each of the following propositions:

(1) That Ms. Atwood was opposing what she reasonably believed to be discrimination on the basis of gender, or was providing information to or participating in a proceeding to determine whether discrimination or retaliation had occurred; and

(2) That a substantial factor in the decision to terminate Ms. Atwood was her opposition to what she reasonably believed to be discrimination or retaliation on the basis of gender.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for Ms. Atwood on this claim. On the other hand, if any one of these propositions has not been proved, your verdict should be for MSA on this claim.

Ms. Atwood does not have to prove that her opposition was the only factor or the main factor in MSA's decision, nor does Ms. Atwood have to prove that she would not have been terminated but for her opposition or participation.

INSTRUCTION NO. 10

"Substantial factor" means a significant motivating factor in bringing about the employer's decision. "Substantial factor" does not mean the only factor or the main factor in the challenged act or decision.

INSTRUCTION NO. 11

It is unlawful for any person to aid, abet, encourage, or incite the commission of discrimination or retaliation on the basis of gender.

If you find that MSA engaged in discriminatory or retaliatory conduct against Ms. Atwood, then Ms. Atwood has the burden of proving by a preponderance of the evidence that Steve Young participated or engaged in some conduct that aided, abetted, encouraged or incited MSA's discriminatory or retaliatory conduct against Ms. Atwood.

Mere knowledge by Mr. Young that discrimination or retaliation occurred is insufficient to meet Ms. Atwood's burden on this claim. Rather, Ms. Atwood has the burden of proving by a preponderance of the evidence that Mr. Young actually participated in the discriminatory or retaliatory conduct for the purpose of discriminating or retaliating against her.

If you find that Steve Young engaged in conduct that aided, abetted, encouraged, or incited the commission of discrimination or retaliation by MSA owing to gender, or acted to attempt to obstruct or prevent any other person from complying with Washington Law as it relates to gender discrimination or retaliation, you should find for Ms. Atwood and against Steve Young holding him liable for aiding and abetting.

INSTRUCTION NO. 12

The plaintiff asserts she was discharged in violation of public policy. The public policy at issue here is the False Claims Act, which imposes liability on any person who knowingly submits a false claim to the government or causes another to submit a false claim to the government or knowingly makes a false record or statement material to a false claim to be paid by the government. The False Claims Act asserts a policy against the misuse of federal government resources for private benefit.

To establish her claim of wrongful discharge in violation of public policy against MSA, plaintiff has the burden of proving each of the following elements:

(1) that plaintiff engaged in conduct directly related to that public policy or was necessary for the effective enforcement of that public policy; and

(2) that plaintiff's public policy-linked conduct was a substantial factor in employer's decision to terminate her.

The Plaintiff does not have to prove an actual violation of the False Claims Act.

INSTRUCTION NO. 13

"Substantial factor" means a significant motivating factor in bringing about the employer's decision. "Substantial factor" does not mean the only factor or the main factor in the challenged act or decision.

INSTRUCTION NO. 14

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the acts of the defendant.

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 the defendant's 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.

INSTRUCTION NO. 15

You may not award damages to Ms. Atwood for any emotional distress, loss of enjoyment of life, humiliation, embarrassment, fear, anxiety, and/or anguish proximately caused by litigation stress.

INSTRUCTION NO. 16

The term "proximate cause" means a cause when in a direct sequence unbroken by any superseding cause, produces the injury complained of and without which such injury would not have happened.

INSTRUCTION NO. 17

In calculating damages for future wage loss you should determine the present cash value of salary, pension, and other fringe benefits from today until the time the plaintiff may reasonably be expected to retire or recover from the continuing effects of the discrimination and/or retaliation, decreased by any projected future earnings from another employer.

Noneconomic damages such as emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish are not reduced to present cash value.

"Present cash value" means the sum of money needed now which, if invested at a reasonable rate of return, would equal the amount of loss at the time in the future when the earnings and/or benefits would have been received.

The rate of interest to be applied in determining present cash value should be that rate which in your judgment is reasonable under all the circumstances. In this regard, you should take into consideration the prevailing rates of interest in the area that can reasonably be expected from safe investments that a person of ordinary prudence, but without particular financial experience or skill, can make in this locality.

In determining present cash value, you may also consider decreases in value of money that may be caused by future inflation.

INSTRUCTION NO. 18

The Plaintiff, Julie Atwood, has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

To establish a failure to mitigate, Defendants have the burden of proving by a preponderance of the evidence:

(1) There were openings in comparable positions available for Ms. Atwood elsewhere after MSA terminated her;

(2) Ms. Atwood failed to use reasonable care and diligence in seeking those openings; and

(3) The amount by which damages would have been reduced if Ms. Atwood had used reasonable care and diligence in seeking those openings.

You should take into account the characteristics of Ms. Atwood and the job market in evaluating the reasonableness of Ms. Atwood's efforts to mitigate damages.

If you find that Defendants have proved all of the above, you should reduce your award of damages for wage loss accordingly.

INSTRUCTION NO. 19

Whether or not a party has insurance, or any other source of recovery available, has no bearing on any issue that you must decide. You must not speculate about whether a party has insurance or other coverage or sources of available funds. You are not to make or decline to make any award, or increase or decrease any award, because you believe that a party may have medical insurance, liability insurance, workers' compensation, or some other form of compensation available. Even ifthere is insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to consider only those questions that are given to you to decide in this case.

INSTRUCTION NO. 20

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claims has been proved, you must consider all of the evidence that I have admitted that relates to that claims. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the

issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

As was discussed in jury selection, growing scientific research indicates we may have "implicit biases," or hidden feelings, perceptions, fears and stereotypes in our subconscious. These hidden thoughts may impact how we remember what we see and hear, and how we make important decisions. While it is difficult to control one's subconscious thoughts, being aware of these hidden biases can help counteract them. As a result, I ask you to recognize that we may be affected by implicit biases in the decisions that we make. Because you are making very important decisions in this case, I strongly encourage you to critically evaluate the evidence and resist any urge to reach a verdict influenced by stereotypes, generalizations, or implicit biases.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 21

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict. Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

~~(Appropriate directions for use of the particular verdict forms may be inserted here. See Note on Use.)~~ (DEL)

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted, or in any other way indicate how

your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to reach a verdict *TEN* of you must agree. When *TEN* of you have agreed, then the presiding juror will fill in the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with it. The presiding juror will then inform the bailiff that you have reached a verdict. The bailiff will conduct you back into this courtroom where the verdict will be announced.

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