No. 35872-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

JULIE ATWOOD,

Plaintiff/Respondent,

v.

MISSION SUPPORT ALLIANCE, LLC and STEVE YOUNG,

Defendants/Appellants.

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Douglas L. Federspiel)

Case No. 15-2-01914-4

BRIEF OF RESPONDENT

THE SHERIDAN LAW FIRM, P.S.

John P. Sheridan, WSBA #21473
Mark W. Rose, WSBA #41916
Alea M. Carr, WSBA #52540
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
(206) 381-5949

Attorneys for Plaintiff/Respondent

TABLE OF CONTENTS

INTRODUCTION 1

ASSIGNMENTS OF ERROR 4

A. Assignments of Error 4

B. Issue Pertaining to Assignments of Error 5

STATEMENT OF THE CASE.....5

A. Procedural History 5

1. This was a long, hard-fought case.....5

2. MSA attempted to use attorney-client privilege as a sword and a shield, offering snippets of CEO Frank Armijo's alleged statement to fire Ms. Atwood during a one-hour meeting with his direct reports while simultaneously instructing witnesses not to answer questions about the meeting under a claim of attorney-client privilege.....6

3. In interrogatory responses, at depositions, and again at trial, the answer to the question, "who terminated Ms. Atwood?" was a moving target.....8

4. MSA and its counsel intentionally withheld the existence of ER 404(b) witness MSA Attorney Sandra Fowler in violation of the trial court's order and then misrepresented facts to the trial court in an effort to quash plaintiff's subpoena of Ms. Fowler 11

5. MSA was sanctioned for misleading discovery practices, which prejudiced respondent Julie Atwood before trial 13

6. MSA challenged every trial judge, but did not challenge any of their pretrial rulings 16

7. The trial court instructed the jury on wrongful discharge, implicit bias, and aiding and abetting but MSA does not challenge those rulings 18

8. The trial court awarded fees and found the bond to be deficient, but MSA does not challenge those rulings 18

B. MSA Was Protecting an Open Secret.....18

C. Young's Statements and Actions Revealed a Man Who Stereotypes and Disparages Women.....20

D. Young Fits Well Into The Sexist Culture Created By Armijo 20

E. Julie Atwood Brought Skill And Experience To MSA 23

F. Steve Young Worked To Hurt Ms. Atwood's Credibility And To Sabotage Her Career As Early As 2012 With The Submission Of An Anonymous Complaint.....24

G. The 2013 Anonymous Complaint Against Steve Young 27

H. The 2013 Fabricated Anonymous Complaint Against Julie Atwood and the Other Document Tampering 29

I. Armijo's Direct Reports Changed The Devere Investigation— Now Ms. Atwood Is Being Investigated For Timecard Fraud While Young Meets With Armijo Managers To Strategize.....30

J. On September 16, 2013, Ms. Atwood Is Interviewed And Reports Young's Misconduct To The Investigators.....33

K. On September 17, 2013, Young's Direct Report Tells Investigators Atwood Is Sleeping With A DOE Manager And Investigators Meet And Report Atwood's Statements To Beyers And Jensen 34

L. On September 19, 2013, Armijo, Ruscitto, Beyers, Jensen, Cherry And Fowler Meet, And After That Privileged Meeting, Beyers And Cherry Force Atwood To Resign 35

M. The Resignation In Lieu of Termination Caused Serious Emotional Harm And Lost Income.....36

N. Ms. Atwood suffered lost wages and retirement 39

O. In Discovery And At Trial, MSA Claimed That The Reasons For Terminating Ms. Atwood Were Those Set Out In Ms. Ashbaugh's Letter To The EEOC 40

P. At Trial, Ms. Atwood's Female Friends And Coworkers Working Under The Supervision Of Steve Young At The Time Of Trial, Attacked Ms. Atwood Rather Than Lose Their Jobs 41

Q. Whitewashed Young Time Card Investigation Found In Discovery.....42

R. Ms. Atwood mitigated her damages 43

ARGUMENT 45

A. Standard of Review.....45

B. The Evidentiary Errors, If Any, Would Be Harmless, As The Law Permits the Jury to Infer Discrimination and Retaliation from Pretext, And the Jury Should Have Been So Instructed.....46

C. Alleged Errors Would Also Be Harmless Given the Closeness In Time Between Atwood's Protected Activity and Discharge 52

D. The Record Strongly Supports The "Perception" Theory Of Retaliation, On Which The Jury Should Have Been Instructed.....53

E. The Hearsay Rulings Were Not Erroneous.....56

F. Limiting Instructions Were Proper 59

G. Armijo's Testimony And Others Were Hearsay Or Improper Owing To The Attorney-Client Privilege Protection Engineered By MSA.....61

H. Qualheim's Exclusion Was Proper Or Was Harmless Error 62

I. The ER 404(b) Rulings were correct under Brundridge.....65

J. Fowler's testimony was properly admitted and not an abuse of discretion 72

K. Other Comparator Testimony Was Properly Admitted Under ER 404(b).....74

L. The Rulings Were Proper So No Cumulative Effect Argument Applies.....77

M. The Use Of WPI 330.82 Was Proper.....78

N. The motion for a new trial on damages was properly decided 82

ATTORNEY FEES AND COSTS 84

CONCLUSION 85

TABLE OF AUTHORITIES

Washington State Cases

Adcox v. Children's Orthopedic Hosp. & Med. Ctr.,
123 Wn.2d 15, 864 P.2d 921 (1993) 46, 83

Bennett v. Dep't of Labor & Indus.,
95 Wn.2d 531, 627 P.2d 104 (1981) 45

Blaney v. Int'l Ass'n of Machinists & Aerospace Workers,
Dist. No. 160, 114 Wn. App. 80, 55 P.3d 1208 (2002) 79, 81

Blaney v. Int'l Ass'n of Machinists And Aerospace Workers,
Dist. No. 160, 151 Wn.2d 203, 87 P.3d 757 (2004). 78, 79, 81

Brundridge v. Fluor Fed. Servs., Inc.,
164 Wn.2d 432, 191 P.3d 879 (2008) ..... *passim*

Bunch v. King Cty. Dep't of Youth Servs.,
155 Wn.2d 165, 116 P.3d 381 (2005) 4, 83, 84

Burnside v. Simpson Paper Co.,
66 Wn. App. 510, 832 P.2d 537 (1992) 84

Collins v. Clark Cty. Fire Dist. No. 5,
155 Wn. App. 48, 231 P.3d 1211 (2010) 45, 82

Cornwell v. Microsoft Corp.,
_ Wn.2d _, 430 P.3d 229 (2018) 52, 54, 56

Currier v. Northland Servs., Inc.,
182 Wn. App. 733, 332 P.3d 1006 (2014) 52

Domingo v. Boeing Employees' Credit Union,
124 Wn. App. 71, 98 P.3d 1222 (2004) 57, 58

Egede-Nissen v. Crystal Mountain, Inc.,
93 Wn.2d 127, 606 P.2d 1214 (1980) 55

Farah v. Hertz Transporting, Inc.,
196 Wn. App. 171, 383 P.3d 552 (2016) 50, 51

Gaglidari v. Denny's Restaurants, Inc.,
117 Wn.2d 426, 815 P.2d 1362 (1991) 84

Hill v. BCTI Income Fund-I,
144 Wn.2d 172, 23 P.3d 440 (2001) 48, 50, 56, 66

Holland v. City of Tacoma,
90 Wn. App. 533, 954 P.2d 290 (1998) 83

Hollingsworth v. Washington Mut. Sav. Bank,
37 Wn. App. 386, 681 P.2d 845 (1984) 63

Johnson v. Chevron U.S.A., Inc.,
159 Wn. App. 18, 244 P.3d 438 (2010) 47, 67

Johnson v. DSHS,
80 Wn. App. 212, 907 P.2d 1223 (1996) 67

Jones v. City of Seattle,
179 Wn.2d 322, 314 P.3d 380 (2013) 45, 63, 64, 65

Joyce v. State, Dep't of Corr.,
116 Wn. App. 569, 75 P.3d 548 (2003) 82

LaMon v. Butler,
112 Wn. 2d 193, 770 P.2d 1027 (1989) 53

Lutz Tile, Inc. v. Krech,
136 Wn. App. 899, 151 P.3d 219 (2007) 46

McClarty v. Totem Elec.,
157 Wn.2d 214, 137 P.3d 844 (2006) 48

Oberg v. Dep't of Nat. Res.,
114 Wn.2d 278, 787 P.2d 918 (1990) 83

Rice v. Offshore,
167 Wn. App. 77, 87, 272 P.3d 865 (2012) 58

Robel v. Roundup Corp.,
148 Wn.2d 35, 59 P.3d 611 (2002) 45

Scrivener v. Clark College,
181 Wn.2d 439, 334 P.3d 541 (2014) 47, 53, 66

State v. Alger,
31 Wn. App. 244, 640 P.2d 44 (1982) 61

State v. Avery,
103 Wn. App. 527, 13 P.3d 226 (2000) 45

State v. Barry,
184 Wn. App. 790, 339 P.3d 200 (2014) 66

State v. Bourgeois,
133 Wn.2d 389, 945 P.2d 1120 (1997) 47

State v. Hansen,
46 Wn. App. 292, 730 P.2d 706 (1986) 61

State v. Kindsvogel,
149 Wn.2d 477, 69 P.3d 870 (2003) 54

State v. Lui,
153 Wn. App. 304, 221 P.3d 948 (2009) 59

State v. Mason,
160 Wn.2d 910, 162 P.3d 396 (2007) 45, 66

State v. Swan,
114 Wn.2d 613, 790 P.2d 610 (1990) 45

State v. White,
74 Wn. 2d 386, 444 P.2d 661 (1968) 63

Terrell v. Hamilton,
190 Wn. App. 489, 358 P.3d 453 (2015) 46

Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,
122 Wn.2d 299, 858 P.2d 1054 (1993) 16

Wilmot v. Kaiser Aluminum & Chem. Corp.,
118 Wn.2d 46, 821 P.2d 18 (1991) 52

Wooldridge v. Woolett,
96 Wn.2d 659, 638 P.2d 566 (1981) 84

Xieng v. Peoples Nat'l Bank of Wash.,
120 Wn.2d 512, 844 P.2d 389 (1993) 81

Federal Cases

Coletti v. Cudd Pressure Control,
165 F.3d 767, 777 (10th Cir. 1999) 77

Fogleman v. Mercy Hosp., Inc.,
283 F.3d 561 (3rd Cir. 2002) 54

Henein v. Saudi Arabian Parsons Ltd.,
818 F.2d 1508 (9th Cir. 1987) 58

Heffernan v. City of Paterson, N.J.,
136 S. Ct. 1412, 194 L. Ed. 2d 508 (2016) 54

Heyne v. Caruso,
69 F.3d 1475 (9th Cir. 1995) 66

Johnson v. Napolitano,
686 F. Supp. 2d 32 (D.D.C. 2010) 55

Kozlowski v. Hampton Sch. Bd.,
77 Fed. Appx. 133 (4th Cir. 2003) 50, 51

Ratliff v. City of Gainesville,
256 F.3d 355 (5th Cir. 2001) 51

Reeves v. Sanderson Plumbing Prods.,
530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) 49

Smith v. Borough of Wilkinsburg,
147 F.3d 272 (3rd Cir. 1998) 50

Sprint/United Mgmt. Co. v. Mendelsohn,
552 U.S. 379, 128 S. Ct. 1140, 170 L. Ed. 2d 1 (2008)... 67, 68, 77

Townsend v. Lumbermens Mut. Cas. Co.,
294 F.3d 1232 (10th Cir. 2002) 50

Statutes

RCW 49.48.030 84

RCW 49.60.020 54

RCW 49.60.030(2)..... 84

Other Authorities

Washington Pattery Jury Instruction 330.82..... 78

Rules

CR 11 15

CR 26(g)..... 18, 73

CR 37 18

CR 59(a)(2) 82

ER 105 59

ER 402 65

ER 403 65

ER 404(b) ..... *passim*

ER 801 62

ER 801(d)(2) 8

ER 802 ..... 57, 59

RAP 10.3(b) 54

INTRODUCTION

Appellants' brief improperly states "facts" in the light most favorable to MSA and Steve Young, while liberally omitting important facts needed to understand the context of each of the trial court's rulings in which the appellants claim to have found error. Appellants build their arguments on this faulty foundation. Thus, Respondent, Julie Atwood, must correct and supplement the "facts" enthusiastically recounted by the appellants as if they were so. If they were so, the trial court would have ruled differently, but Ms. Atwood would still have won at trial.

The Court should take note of the events transpiring before and during trial that are not raised as issues on appeal by MSA and Young: the court's granting of numerous motions to compel MSA's compliance with the Civil Rules, CP 10929, ¶¶13-15; the recusal of every Benton County trial judge at the request of MSA without requesting that earlier rulings by the judges be set aside, see id., and cf. CP 10947, ¶25; MSA's efforts to tactically claim attorney-client privilege at various times and then seek admission of some but not all of the privileged conversations, e.g., CP 5792-93; the entry of detailed findings of fact and the award of serious sanctions against MSA for discovery abuses accompanied by mendacious statements by counsel to the trial court, CP 11079; the creation of jury instructions on wrongful discharge, "implicit bias," and aiding and

abetting, which were all untested at the time; the ruling "as a matter of law, [that] the appropriate standard of proof... for admission of evidence of a prior bad(s) under ER 404(b) in civil cases is 'substantial evidence' … an evidentiary burden lower than a 'preponderance of the evidence,'";[1] multiple motions in limine mostly not appealed; attorney fees, costs and the award of a multiplier to Atwood's counsel; and a bond filed by MSA found to be deficient and increased—all issues abandoned on appeal.

Nor do MSA and Mr. Young challenge the sufficiency of the evidence on any claim: not on the WLAD gender discrimination claim against MSA, not on Young's aiding and abetting MSA in the gender discrimination; not on the WLAD retaliation claim against MSA; not on Young's aiding and abetting MSA in the WLAD retaliation; and not on the common law wrongful discharge claim. The jury finding MSA did not prove its failure to mitigate defense (CP 9819) is also unchallenged.

MSA chose not to appeal any of those meaty issues, because they were correctly and thoughtfully decided by the jury and a hard-working, diligent, and intelligent trial judge, whose well-reasoned written rulings make the case iron clad on appeal. What's left for MSA and Young to appeal are mainly evidentiary objections. When such tertiary issues are

[1] CP 11202, ¶1.

viewed in the context of the case and the overwhelming evidence supporting the claims and damages, coupled with the overwhelming evidence showing that defense witnesses were consistently mendacious and were caught being mendacious in front of the jury, the merits of the appeal will fall away as easily as did the substantive issues listed above.

It's noteworthy that the appellants try to keep important trial court holdings and facts relevant to the appeal secret from this Court. First, on a claim of attorney-client privilege, MSA successfully protected from discovery and from testimony at trial the statements made at a September 2013 meeting in which the CEO Frank Armijo allegedly gave instructions to terminate Plaintiff Julie Atwood.[2] Second, the trial court's ER 404(b) rulings, which are challenged in this appeal, flowed from the fact that the CEO Armijo had a "boys club" atmosphere at MSA that condoned and supported tolerance for male misconduct and supported the harsh treatment of women (finding wrong where there was no wrong), so all of the ER 404(b) evidence is relevant and admissible under Brundridge.[3] Third, MSA and its counsel tried to hide the existence of ER 404(b)

[2] RP 825; CP 5332 (Def.'s MIL #9).
[3] See CP 10293 (trial court finding MSA investigators were told about Ms. Fowler "saying things to [the general counsel] about gender-bias in the Company, particularly about Frank [Armijo] and Dave (Ruscitto]. She had used an acronym of 'FOF' meaning 'friends of Frank'. These comments continued unabated.' There is no evidence in the records produced that Bensussen acted on Fowler's complaints of gender-bias against Armijo and Ruscitto-executives involved in the termination of plaintiff Julie Atwood.").

witness and former MSA Attorney Sandra Fowler. MSA was sanctioned for their improper efforts. See CP 11110-11122.

Fourth, the trial court allowed the defendants to offer evidence supporting the defense strategy at trial, which was designed to attack Ms. Atwood's impeccable work record by claiming wrongly and cruelly that she "cozied up to men with power." RP 4793. Thus, the evidentiary rulings on appeal will have to be addressed in the context for which the testimony was intended. Once these secrets are out, the trial court's rulings on these issues become obviously well measured and within its discretion.

And of course, the damage instruction on appeal, which is WPI 330.82, was either correct as given or harmless error under Brundridge, and the motion for a new trial as to damages was properly denied based on the mountain of expert and lay witness testimony supporting the framework announced in Bunch v Dep't of Youth Services. This appeal has no merit and the verdict should be affirmed in all respects.

ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The court erred in giving Instruction No. 9. CP 11054; and

2. The court erred in giving Instruction No. 12. CP 11057.

3. The court erred in not giving Instruction No. 15. CP 6683; RP 4646.

B. Issue Pertaining to Assignments of Error

1. Does the liberal construction mandated by the WLAD require that employees be protected from retaliation when they are "perceived" to have engaged in protected activity?

2. Were Instructions No. 9 and 12 adequate if they did not allow Ms. Atwood to argue a theory of the case based on the "perceived" theory of retaliation, when there was evidence to support such theory?

3. Whether the court erred in failing to instruct the jury it may infer discrimination from proof that Defendants' stated reasons for their actions are unworthy of belief?

STATEMENT OF THE CASE

A. Procedural History

1. This was a long, hard-fought case

The complaint in this case was filed on August 21, 2015, and the jury returned a verdict for the plaintiff on October 10, 2017. CP 1, CP 11039. The trial court described the intensive level of litigation in this case: "This was a time and labor intensive case … due in large part to the extensive and aggressive motion and discovery practice employed by MSA." CP 10941. It was also a high-risk case, so much so that the trial court awarded a multiplier in addition to the plaintiff's attorney fees. CP 10960 ("I find that the case was high-risk from the outset owing to the fact

that Ms. Atwood was terminated and isolated, so persons who may have been expected to help were of no help, and were in fact, some of the main witnesses against her.") CP 10960.

2. MSA attempted to use attorney-client privilege as a sword and a shield, offering snippets of CEO Frank Armijo's alleged statement to fire Ms. Atwood during a one-hour meeting with his direct reports while simultaneously instructing witnesses not to answer questions about the meeting under a claim of attorney-client privilege

MSA CEO Frank Armijo was the apex manager at MSA throughout the relevant time frame, but left MSA before trial. In pre-trial proceedings and at trial, the respondents executed a strategy. First, MSA made no effort to bring Armijo back for trial. CP 5806. Second, MSA opposed Ms. Atwood's efforts to depose Armijo in Texas (he was never served by Plaintiff despite several attempts).[4] Third, MSA's managers stated at depositions that the decision to terminate Ms. Atwood occurred at one meeting held on September 19, 2013, and was made by Frank Armijo and Steve Young, with Armijo's direct reports (some of whom were his friends and classmates from Pasco High School)[5], and his attorneys in attendance; yet in written discovery MSA alleged the decision to terminate Ms. Atwood was a group decision of which Mr. Armijo was only made

[4] CP 2314; CP 3482; CP 2357, CP 5961; CP 10767; CP 4778; CP 3284.
[5] RP 3268.

"aware." CP 1930-31 (Interrogatory No. 9). Fourth, MSA allowed Armijo's direct reports to state in depositions that at the meeting Armijo directed those reports to terminate Atwood. CP 1952, 1957, 1962; see also CP 1943. Fifth, MSA claimed that the September 19, 2013 meeting, which according to testimony, lasted over an hour, was subject to attorney-client privilege and thus, plaintiff could not inquire as to what was said at the meeting. CP 1957-1966; CP 2360. In an order dated March 31, 2017, Judge Runge denied plaintiff's motion to compel, which argued waiver, and held the testimony at the meeting was not accessible to Ms. Atwood owing to attorney-client privilege. CP 2550 (Order); CP 1987 (Pl.'s Mot.).

The sword and the shield issue regarding Armijo statements came up again repeatedly in pre-trial motions and hearings before Trial Judge Federspiel. See e.g., CP 4994 (Pl.'s MIL 1 and 3), CP 5936 (Def.'s MIL 9), RP (9/11/17) 118-120; RP 262, 383, 637, 825. On September 12, 2017, Ms. Atwood submitted additional briefing on the appellants' tactics, stating in part, "The defendants are seeking a tactical litigation advantage by not calling Armijo as a witness, and thus denying plaintiff the right to cross-examine the alleged apex decisionmaker." CP 6111. Ms. Atwood argued that Armijo's statements like, "fire Atwood," were not admissible orders. They were incomplete parts of a larger group of statements offered in snippets by design and representing only a small part of a larger

conversation, which was not accessible to Ms. Atwood owing to the assertion of privilege, and when viewed in the context of a one-hour meeting, Armijo's statements were inadmissible when offered by MSA and Young under ER 801(d)(2). CP 6112, 1989; R 910-922. Trial Judge Federspiel enforced Judge Runge's ruling that the meeting was "privileged" and prohibited the respondent from discovering and the appellants from admitting evidence from the meeting, owing to the assertion of privilege. RP 902, 907, 925. ("I won't allow [Armijo's statement] if it was made in the meeting," as "that would be using that as a sword improperly").

3. In interrogatory responses, at depositions, and again at trial, the answer to the question, "who terminated Ms. Atwood?" was a moving target

President Armijo's direct-report and Senior Director of Independent Oversight, Chris Jensen, was in the room when the direction to fire Ms. Atwood was given. CP 1957. Mr. Jensen testified at his first deposition, "The decision by the company to sever the relationship [with Atwood] was made by **Frank Armijo** and **Steve Young**." CP 1943.

In response to Interrogatory No. 9, MSA answered that a "group determined" Ms. Atwood's employment, listing: COO Dave **Ruscitto**, Chris **Jensen** and VP Todd **Beyers**; with VP Steve **Young** "provid[ing] background information," and CEO Frank **Armijo** "aware").

As to the reasons for termination, Mr. Jensen testified, "I don't have firsthand knowledge of what Steve [Young] and/or Frank [Armijo] concluded was the threshold for the decision to let her go." CP 1943.

Mr. Sheridan (counsel for the respondent) sought in depositions to ask others who had been present when the decision was made and the direction given to terminate Ms. Atwood what was said, and Ms. Ashbaugh (counsel for MSA and Young) claimed attorney-client privilege and directed the witnesses not to answer. For example, Vice President of HR Todd Beyers (the person who informed Ms. Atwood that MSA was terminating her) testified in his deposition that the meeting in which he was given a direction by the CEO to fire Atwood lasted over an hour, and when Beyers was asked about events at the meeting, he was instructed not to answer. CP 1953, 1957-1966 (asked tell me everything CEO Armijo told you, and instructed not to answer based on attorney-client privilege).

In contradiction of the testimony from Mr. Jensen's first deposition and MSA's Interrogatory Answer No. 9, Defendant Steve Young claimed in his deposition and again at trial, that he had absolutely nothing to do with Ms. Atwood's termination. It is undisputed that Mr. Young, Ms. Atwood's supervisor, did not physically attend the September 19, 2013 meeting with CEO Frank Armijo; Young claimed he was initially unaware

that Ms. Atwood had left MSA because he was traveling. CP 6350-6354; CP 6748 (ruling on Young deposition designations); RP 2586-2589.

Young claimed CEO Armijo first told him Ms. Atwood retired; and then told him she resigned in lieu of termination, and that he (Young) thought MSA made the wrong decision. CP 6350-6354 (Young said MSA made a "huge mistake"); RP 2589 (termination came as "big time" surprise—claiming "no one consulted" Mr. Young before deciding to fire Atwood—"not a single person"). Young's denials that he was not consulted about the decision to fire Atwood were incredible not only because it directly contradicted Mr. Jensen's testimony, but also because Young is a Vice President at MSA and Ms. Atwood's direct supervisor.

Mr. Jensen returned for a second deposition, during which he offered testimony that was more complimentary to Mr. Young's denials:

> In around the time of the decision to let Ms. Atwood go, **nothing**. I don't recall having any direct conversation with him [Steve Young]. In fact, I believe he's out of town, so I want to say and I'm pretty certain that we didn't have conversations with him that week or ten-day period.

RP 3859.

//

//

//

4. MSA and its counsel intentionally withheld the existence of ER 404(b) witness MSA Attorney Sandra Fowler in violation of the trial court's order and then misrepresented facts to the trial court in an effort to quash plaintiff's subpoena of Ms. Fowler

On January 31, 2017, Ms. Atwood's counsel spoke with Sandra Fowler, MSA's former General Counsel, who disclosed to Mr. Sheridan that she had filed an EEOC claim against MSA, which was still pending. CP 1384. MSA had not disclosed this complaint. Id. On February 3, 2017, Judge Runge granted Atwood's motion to compel response to discovery and ordered Defendant to respond "without further delay" to interrogatories seeking the disclosure of, *inter alia*, other complaints involving gender discrimination. See CP 11134 (Order); and CP 880-81, 883 (Answers to Interrogatories 16-17; RFPs 94-95**).** Four days later, the parties appeared on shortened time before the Honorable Bruce Spanner on MSA's motion to quash plaintiff's subpoena for testimony and documents from MSA's former General Counsel, Sandra Fowler. CP 11093, ¶ 27. MSA's counsel, Ms. Ashbaugh, gave Judge Spanner a sworn statement claiming, in part, that plaintiff's requests for "any claims by Ms. Fowler against MSA, who voluntarily left MSA over two years after Ms. Atwood's employment ended, was nothing more than a fishing expedition designed to harass MSA" and "not calculated to lead to the discovery of admissible evidence." Id., ¶ 28.

At the time these claims were made, MSA possessed documentation of Ms. Fowler's EEOC Charge, in which she "clearly alleged she was subject to discrimination as early as August 2013" (the month before Ms. Atwood was fired); "claimed she apprised members of MSA's Board 'how Frank *Armijo*/Dave *Ruscitto*/Todd *Beyers* … had unlawfully treated me'"; and claimed she had not left voluntarily, but instead was "constructively discharged." Id., ¶ 29. Ms. Ashbaugh kept to her declaration testimony in chambers, claiming that the Fowler subpoena was "nothing more than a fishing expedition," and that the content of her document production and testimony would be subject to attorney-client privilege. CP 11093-94, ¶¶ 30-31. Judge Spanner issued no written ruling, but allowed the Fowler deposition to go forward. Id.

The next day, February 8, 2017, defendant produced 16 pages of records related to complaints of gender discrimination and retaliation made by Ms. Fowler. CP 11094, ¶ 32; accord CP 2870 (Def.'s MIL to exclude Fowler complaint, in which MSA admits Fowler claimed gender discrimination by Frank Armijo). The Honorable Douglas Federspiel later determined that "MSA and its counsel waited to produce the EEOC complaint and the other documents until after learning that th[e] Court would not quash the Fowler subpoena." Id., ¶ 33. On March 28, 2017, Judge Runge denied Defendant's motion for reconsideration and

"modifie[d] the February 3, 2017 Order" in the manner proposed by plaintiff, ordering Defendants to "produce all documentation regarding complaints or investigation occurring between 2010 and the time of trial related to: (1) discrimination, retaliation, and misuse or governmental resources; or persons Defendant has disclosed as involved in Plaintiff's termination (Frank Armijo, Dave Ruscitto, Chris Jensen, and Todd Beyers)." CP 11128.

5. MSA was sanctioned for misleading discovery practices, which prejudiced respondent Julie Atwood before trial

In a July 20, 2017 sanctions order, the Honorable Douglas F. Federspiel made the following findings regarding the withholding of documents by MSA during the litigation in violation of a court order to produce requested documents "without further delay," see CP 11092 (¶ 23), which should have included documents related to former MSA General Counsel Sandra Fowler:

- The Court finds that the lack of disclosure in May 2016 with respect to both the external and internal complaints filed by Ms. Fowler and Ms. DeVere reveals either an incompetent investigation (i.e., a lack of a reasonable inquiry), or an intentional withholding of evidence -- if not by Ms. Ashbaugh, then by her corporate client. There is simply no reasonable excuse for these omissions, which necessarily call into question the claim that MSA consistently conducted a 'reasonable, good faith search for documents.' CP 11091 (¶22).
- This documentation, which MSA was withholding, 'contradicted the position' taken by the company in opposing the documents

release, and contradicted Ms. Ashbaugh's sworn statement to the Court. Compare id. with [CP 1068-69] (Ashbaugh Dec.), par 6. CP 11093 (¶29).

- MSA and its counsel waited to produce the EEOC complaint and the other documents until after learning that this Court would not quash the Fowler subpoena. Knowing that the Fowler deposition would go forward on February 10, MSA's production of the Fowler EEOC complaint on February 8th was simply a recognition that the document would be provided to plaintiff on the 10th, so production on the 8th would give the illusion of compliance. Defendant offers no other explanation for why the records were not immediately produced upon request. CP 11094 (¶ 33).

- On February 17, 2017, a week before the deadline for completing discovery, defendant produced 1,138 pages of 'supplemental production' without explanation, index, or any other description of the documents being produced. Rose Dec., par 3, Ex. 2… A sampling of the documents reveals that the 2/17 production includes records of complaints and investigations involving allegations of gender discrimination, harassment/hostile work environment, and retaliation. … The 2/17 production includes records written to, by, or referencing **Todd Beyers, Chris Jensen, Christine DeVere, and Wendy Robbins**, among other witnesses in this matter. Id. CP 11102 (¶53).

- [O]n Saturday, April 15, 2017, defendant served by email an additional 1,555 pages of 'supplemental production,' along with a cover letter stating that [t]hese documents are being produced in response to the Court's March 28, 2017 Order. CP 11104 (¶60).

- On April 17, 2017—more than ten weeks after Judge Runge's Order, and on the same date that the parties were filing their joint Trial Management Report and respective Trial Briefs—defendants produced 126 pages of documents related to Ms. Fowler's complaints and allegations of gender discrimination and/or retaliation by another MSA executive, **Stanley Bensussen** (one of MSA's attorneys in this litigation), as well as top executives, **Frank Armijo** and **Dave Ruscitto**. … The records show that in March 2015, Fowler emailed Todd Beyers, the V.P. of Human Resources, claiming that Mr. Bensussen 'used derogatory and/or demeaning characterization or language toward me. He called or

implied that Frank [Armijo] and Dave [Ruscitto] thought I was 'a man-hater', and made a statement, '... if he was I, I should kiss the ground that Frank and Dave walked on...'. I find them very misogynistic, demeaning, gender-biased, etc.' *Id*. The documents also reveal that Mr. Beyers, the V.P. of Human Resources, failed to adequately address Fowler's complaint of 'gender-bias' when reported to him in March 2015; as Mr. Beyers in May 2015 was himself interviewed regarding his 'investigation' and follow-up on Fowler's report to him. *Id*. The newly disclosed documents show that Fowler also went to MSA's Presidents **Frank Armijo** and **Bill Johnson** complaining of discriminatory treatment in January and May 2015, respectively. *Id.*

- Mark Beller-a paralegal who, in violation of CR 11, signed a number of pleadings in this litigation on behalf Mr. Bensussen and MSA's outside counsel-testifies that 'recently discovered that [he] had been provided certain documents related to Sandra Fowler,' and that he mistakenly failed to pass the documents on to outside counsel for production, which he refers as 'an honest mistake.' Beller Dec. ¶ 8. Such testimony provides no explanation for why none of the three attorneys of record for defendant, who were charged with supervising MSA's compliance with the Court's discovery order and ensuring that responsive records were produced 'without further delay,' failed to do so; particularly after Ms. Fowler testified at her February 10th deposition about the fact that she made a complaint to President Bill Johnson that was investigated by Wendy Robbins. CP 11097-99 (¶¶ 42-44).

- Mr. Sheridan has two to three-week jury trials set in other matters in July, October, November and December 2017. 2nd Supp'l Sheridan Dec.,¶ 3. He and his staff have blocked out most of August for vacations. Mr. Sheridan has indicated that resetting this case in May or June would not give him time to do additional discovery justified by these late disclosures of over 6,500 new documents. Id. Many of those newly disclosed documents relate to investigations conducted by Wendy Robbins (an investigator in this case) and/or Christine DeVere (another investigator in this case). CP 10301 (¶66).

- Mr. Sheridan has indicated that unless he can bump another case already set for trial, and assuming he can depose, re-depose, or

interview about ten witnesses in this case (and any additional witnesses that the discovery uncovers), and submit and obtain prompt responses to additional interrogatories and requests for production which may flow from the 6,500 documents and the resulting depositions, he cannot take this case to trial this year. 2nd Supp'l Sheridan Dec., par. 3. CP 10301 (¶66).

- Ms. Atwood has submitted a separate declaration indicating that she has been unemployed since her termination, and that she has paid out over $36,000 in costs, drawing from savings and retirement to do so. Atwood Dec. She states that the costs of continuing this litigation is a hardship, and that she believes that until this case is resolved, she will not be able to find work. CP 10302 (¶67); CP 3269-70 (Atwood 5/2/17 declaration).

- Just like *Fisons*, MSA's May 23, 2016 discovery answer was 'misleading,' as it led plaintiff to believe that all 'gender discrimination, whistleblower, and/or retaliation complaints, from 2011 to the present' would be identified by MSA and produced. CP 11110 (¶80).

- Under these facts, there can be no question that defendant has stymied plaintiff's ability to investigate the facts and thereby prejudiced her ability to prepare for trial. CP 11116 (¶90).

As a result of the sanctions order, plaintiff conducted additional discovery before trial. CP 4773-74

6. MSA challenged every trial judge, but did not challenge any of their pretrial rulings

MSA does not appeal any of the rulings made in the case by judges who later recused themselves. After Judge Runge issued the order granting plaintiff's motion to compel, CP 11133, and denied MSA's motion for reconsideration on March 28, 2017, CP 11125—which served as a basis for Judge Federspiel's sanctions order, see, e.g., CP 11103, 11113-14—

MSA on April 5, 2017, asked Judge Runge to recuse herself. CP 4369. Over the objection of plaintiff's counsel, CP 4377, Judge Runge on April 7, 2017, recused herself. CP 4380-81. She did so only to avoid "a potential complaint to the Judicial Conduct Commission," stating that to do so "is easier," but that she "could be fair and impartial on this case given extremely limited contacts with Mr. Jensen over the years" and "[f]rankly, … believe[d] this request is nothing more than game-playing." Id. ("I do not see how my attendance at a holiday party 28 years ago at Mr. Jensen's house would impact my ability to be fair and impartial, nor impact the appearance of fairness"). Judge Runge noted, "Jensen is an adverse witness to … Julie Atwood," who "waived any issue on appeal pertaining to a potential conflict of interest between [Judge Runge] and Mr. Jensen." Id. MSA didn't claim Judge Runge might be "biased against MSA." Id.

On April 19, 2017, Judge Shea-Brown recused herself without prompting from a party. CP 4383. Judge Spanner, who also had made rulings that served as a basis for the sanctions order, see CP 11081, 11093-94, 11111, was the next judge assigned to the case, and MSA sought and obtained his recusal on May 10, 2017, CP 4385, over plaintiff's objection, CP 4388. "[E]very single judge in [Benton] County either recused themselves or were asked to recuse themselves," CP 10948, after which Yakima County Superior Court Judge Douglas Federspiel was assigned

the case as a visiting judge. He entered severe sanctions for MSA's misconduct in violation of CR 26(g) and CR 37. CP 11106-22, 10968.

7. The trial court instructed the jury on wrongful discharge, implicit bias, and aiding and abetting but MSA does not challenge those rulings

Defendant took exception at trial to jury instructions given on wrongful discharge in violation of public policy and implicit bias, but abandons these issues on appeal. See CP 11068, 11057; RP 4629, 4633. The aiding and abetting instruction was also not appealed. CP 11056.

8. The trial court awarded fees and found the bond to be deficient, but MSA does not challenge those rulings

The court's award for attorney fees, costs, a .5 multiplier, and tax adjustment was more than $1.5 million. CP 10933. The court found the appeal bond deficient and ordered it raised it to over $10.4 million. CP 10968. MSA does not challenge these rulings.

B. MSA Was Protecting an Open Secret

For most of his career, Steve Young worked as a small business owner providing consulting services in a one-person office. RP 2476. But after he became Mayor of Kennewick, he was recruited by MSA's CEO Frank Armijo to be a Vice President reporting directly to Armijo. Id.; RP 2584. Young joined MSA in 2012. RP 2474. He was paid over $200,000 a year by U.S. taxpayers as Vice President of MSA. RP 2548-49. He billed

taxpayers as though he worked a 40-hour week, but produced no time sheets supporting that contention until 2015. RP 2472, 2475. He admitted he worked 16-20 hours every week on mayor-related business. RP 2471-72. He admitted he used his DOE email account to do mayor-related business. RP 2534, 2537-44; Ex. 155, Ex. 95. He admitted he kept and displayed his mayor-related appointments on his DOE calendar. RP 2483, Ex. 185.[6] He admitted he did mayor-related business in his DOE office, on his DOE computer, during the work day. RP 2534-35.

Young's use of company time to work on mayor-related business was an open secret at MSA and DOE. See RP 2472. Young was perceived as being important, and he explained to the jury just how important and indispensable he was. Young testified that his being mayor advantaged MSA and DOE:

- "The biggest return on me being a mayor is the Department of Energy. I'm able to do what the Department of Energy can't do because I'm an elected official."
- "My job, one of my jobs as mayor, is the ability to go back, meet with the [U.S.] Senate, meet with the House."
- "I can actually bump a regular citizen and testify before a committee about an issue because I'm an elected official."
- "I use my vacation to go back and lobby — and I'll use the word lobby — for the local [DOE] offices for the needs that they have to try to get the money they need for the Hanford site."

RP 2478-79. Young testified at trial, "what's good for MSA is good for

[6] See also RP 2529, Ex. 20 at Bates 191.

the people of Kennewick." Id.; RP 2480.

C. Young's Statements and Actions Revealed a Man Who Stereotypes and Disparages Women

Steve Young does not respect women and tends towards discriminatory misconduct. Some examples follow. Using his government computer and government email, Young distributed the offensive "Barbie" email to his friends during the work day. RP 2542-44; Ex. 95. The email depicted locally named "Barbie" images with offensive comments; there were no such depiction of "Ken." Ex. 95. At trial, Ms. Atwood testified to having reported Young's offensive "mean-a-pause" joke about the pills he saw on Linda Delannoy's desk, which was made in Ms. Atwood's presence, RP 2863, and testified to reporting his demeaning comments about DOE Manager Karen Flynn's abilities, saying the only reason she had her job was because of her "relationship" with DOE Deputy Manager Shoop and that she was incompetent (a sexualized reference to her sleeping her way to the top). RP 3240. Young made no similar comments about males. Id.

D. Young Fits Well Into The Sexist Culture Created By Armijo

General Counsel Sandra Fowler testified she was successful under Armijo's predecessor, MSA CEO Figueroa, and after leaving MSA following Armijo's tenure, she was successful again as General Counsel at

Bechtel. RP 3355, 3365. She described the anti-women culture that permeated MSA under Armijo. RP 3356-58, 3361, 3376. She was verbally attacked and demeaned by Armijo. Id. Armijo hired Stan Bensussen to displace Fowler—taking over most of her job duties—and Bensussen demeaned Fowler, stating she should "kiss the ground" Armijo walks on and calling her a "man-hater" without repercussions to Bensussen. RP 3362-65, 3274; see Exhibit 108.

Under Armijo, good performance did not matter—gender trumped performance. Armijo hired Bensussen to displace Ms. Fowler despite her good performance, while Vice President and HR Manager Todd Beyers was not displaced, or even disciplined, even though he lost millions of dollars through incompetence, much of which was recovered owing to the hard work and persistence of Ms. Fowler. RP 3270-71; RP 3382-85.

Armijo also recruited Chris Jensen who displaced Sally Lampson—a CEO direct report under Figueroa. RP 3357, 3903, 3932-33. Ms. Fowler testified that under Armijo, the "third floor," which housed the MSA upper management, became a good old boys club, with only one woman remaining. RP 3376. Fowler testified "Friends of Frank," as VP Todd Beyers self-identified, help each other out. CP 3358; 3267-68.

In contrast to his treatment of women like Atwood and Fowler, Armijo permitted his direct report to impose light or no discipline on men

in his chain of command who committed serious misconduct.

In 2010, under Armijo, Vice President Todd Beyers, MSA's HR Manager, gave a two-week disciplinary suspension to manager Michael Turner for "ongoing negative and demeaning comments that directly affected the relationship with the DOE client and MSA employees." Ex. 140, RP 3343-45. This is a serious offense under MSA policies that's "close" to the conflicts Ms. Atwood was alleged to have, see RP 2963, but under Armijo, Mr. Turner was not fired. Ex. 140.

In 2011, under Armijo, Vice President Scott Boynton put his hand on the leg (near her crotch) of the spouse of an MSA truck driver. Then Boynton began to send her text messages, and the truck driver confronted Boynton and said, "Stop touching, texting, and talking to my wife." This is a serious offense under MSA policies, but under Armijo, Boynton was not fired. See Ex. 400, RP 3325-28.

In 2015, under Armijo, an MSA manager of power operations, took his employees to an evening dinner, billed DOE for overtime, used a government vehicle, falsified time card records, and left work without permission. The manager only got a two-week suspension. Ex. 83, RP 3321-23. The disparate treatment is astounding.

Young treated men differently. An example of how Young treated men differently from women is his treatment of Jim Santos. When Santos

would not participate in his mayor-related business efforts, he simply aided Santos in transferring out of his organization, but with Ms. Atwood, he orchestrated her termination, and then denied even knowing that she was being terminated. RP 1352-53, 1358.

Of course, Ms. Atwood did nothing wrong to justify any discipline—especially not termination—but even if she had done what MSA said she had done, termination would not have been appropriate based on the discipline given to men under Armijo.

E. Julie Atwood Brought Skill And Experience To MSA

Julie Atwood had a thirty-year career working as a manager for the Washington State Department of Ecology and later for private companies involved in waste management. RP 2678-707. She was an Ecology regulator at Hanford, and had experience working there going back to the days when Hanford was still producing plutonium. Id. After Ecology, she worked for Hanford, and non-Hanford companies. Id. Her employment track was a record of promotions and increased job responsibilities. Id. Former manager Rick Morck testified, "She was excellent to work with. …[S]he was the best." RP 1596-98. Former manager Mike Spillane testified about the good work Ms. Atwood performed as a subcontractor for him, and said he would hire her again if he was hiring for a position she fit. RP 1613-18, 1623. Former Bechtel President Mike Hughes

testified to her "outstanding" performance and "very high quality" work product. RP 1363-72. Former manager Allen Parker testified to having Atwood as a "key person" on a bid to DOE and testified about her abilities and the "great job" she did for him. RP 2326-32.

F. Steve Young Worked To Hurt Ms. Atwood's Credibility And To Sabotage Her Career As Early As 2012 With The Submission Of An Anonymous Complaint

There was uncontradicted evidence at trial that Ms. Atwood performed her job well and was a valuable asset to her customer, DOE. Exs. 5, 6, 7 (performance evaluations). MSA's investigators, in an entry dated September 18, 2013—the day before MSA terminated Atwood—wrote "that Atwood's performance is ***stellar*** and there is no indication of a performance or behavior issue on [her] recent performance appraisal." Ex. 24. Also, "the DOE clients love Julie." Id. DOE Manager Dowell, a client of MSA assigned to Atwood, testified that he "never had any worries about [the] quality [of her work] or her performance," and that she was an "always ... dependable and excellent worker." RP 1558-59, 1565. DOE Manager Jones testified, "She did a good job working on dashboards." RP 1580. DOE Manager Jon Peschong testified to her "valuable advice and counsel" to DOE. RP 1162-66, 1172.

At trial, DOE Manager Doug Shoop was asked if COO Ruscitto told him that Ms. Atwood was being investigated for "time card fraud."

RP 1551. Shoop testified he remembered a meeting with Dave Ruscitto, but "do[es] not recall whether [Ruscitto] said Ms. Atwood was being investigated or … *an employee* was being investigated." Id. At trial, Shoop's direct report, DOE Manager Greg Jones (Mr. Young's good friend, RP 1170, 2236, 1576), admitted to hearing that Ms. Atwood was "fired… [for] timecard fraud, something to that effect," but denied knowing where he heard this. RP 1578-79, 1590. DOE Manager Dowell also heard the time fraud allegation, and testified he heard it from Shoop, who said the news came from Dave Ruscitto. RP 1559-61; RP 2857.

COO Ruscitto was spreading "fake news." VP Todd Beyers and Chris Jensen were told by investigator Wendy Robbins that MSA's official investigation found "nothing" on Ms. Atwood, and specifically "no evidence of time-charging violations." RP 3625-26, 3641.

From the time of his hire, Steve Young began secretly papering Ms. Atwood's record with false and negative allegations. No business reason existed for seeking to remove Ms. Atwood from her position, yet as was done by Armijo to Fowler and to the other women on the third floor, Young sought to sabotage Ms. Atwood. He used other Armijo direct reports and his minions (Legler and Delannoy) to attack Ms. Atwood behind her back without her knowledge.

In 2012, in connection with an investigation following an

anonymous complaint, "Friend of Frank" Vice President Chris Jensen wrote to DOE managers about Ms. Atwood being investigated for time card fraud—a false allegation that would not typically be revealed to DOE unless proven. Ex. 11 (9/19/12 entry); RP 2095. Witness Allan Parker testified that Atwood had been "key personnel" on bids his company had submitted to DOE and "just the smell" on a manager of being unethical or a cheater, or "rumors that [a] person may have engaged in timecard fraud," affects whether to hire or select a person to be key personnel. RP 2336.

During that 2012 investigation, Young told Investigator Wendy Robbins that he thinks Atwood threatens people, that he deals with Atwood issues on nearly a weekly basis, and that his goal is to help Atwood enjoy her job or make a change. Ex. 11 (entry on 10/2/12); RP 2489, 2493, 2500. These were false allegations. Minion Morris Legler told Robbins that Atwood is frequently not where she says she will be. Ex. 11; RP 1701-03. Ms. Atwood was vindicated by the investigation, but the effort to undermine her and to hurt her reputation is obvious. See RP 1709. Notably, Ms. Atwood ***was not told*** about the allegations so she could defend herself, nor subjected to progressive discipline, which would have been the result if any of the allegations had had merit. RP 2799, 2807, 2850-51, 1708, 1806, 1837. Ordinarily, the accused is told. RP 2059-60.

G. The 2013 Anonymous Complaint Against Steve Young

In 2013, someone (not Ms. Atwood) filed an employee concern against Young ("real anonymous complaint"). RP 1861-64. Ms. DeVere is the EEO investigator and she got involved at the request of HR business partner Cindy Protsman who called DeVere because the real anonymous complaint includes a claim of "hostile work environment." Id.[7]

At a meeting in late August, Protsman showed both Young and DeVere the real anonymous complaint (Young claims he never saw it). RP 1862-64, 2454-55, 2562, 2566-67, 2606. Protsman recalls it was stamped. RP 3562-63. It only addressed one issue. RP 1861, 3568. Protsman took notes, but someone took all of her records of the meeting. RP 3565-66.

DeVere began to investigate. RP 1865. She still worked for VP Beyers. RP 1869. She confirmed that the real anonymous complaint just alleged a hostile work environment. RP 1861, 2069; see also RP 1650-51; RP 2852. Meanwhile, Young "brought in … four or five [of his] leads … and talked to them." CP 6819, 6748. He asked employees about whether he was creating a "hostile work environment." RP 2617. Mr. Young wrote to Ms. Atwood, "A complaint has been filed against me." Ex. 9; RP 2230.

On September 5, 2013, Young met DeVere and Protsman. RP

[7] Christine DeVere is the former name of Ms. Moreland. RP 1860. Respondent refers to her on appeal as DeVere, as that is the name used in Exhibits and other records of events.

1866. Young had been told not to discuss the complaint, RP 1864, but after he was confronted with the real anonymous complaint, he told DeVere and Protsman he did his own "mini investigation" and talked to two of his staff who confirmed "he was creating a hostile work environment," so "he was just going to make it easy and … retire." RP 1868-69. DeVere told him to wait for the investigation. Id. She asked Young to tell her by end of day, so she could tell her boss, VP Todd Beyers. Id. Young told DeVere at this meeting that **he thinks Julie Atwood is behind this**. Id. DeVere doesn't know her. Id.; RP 2079, 2860.

Young next went over DeVere's head to CEO Armijo who told VP Beyers that Ms. DeVere is harassing VP Young. VP Beyers called DeVere and told her to cease and desist. Ex. 28; RP 1871 (DeVere); cf. 3282-83, 3286-87 (Armijo "directed" Beyers); RP 2586 (Young testified he went to Armijo "extremely angry[,] … slammed [Armijo's] door and … said, if you're going to do an investigation on me, you ought to have *the balls* to confront me"); CP 6808 (Young testifies he told Ms. DeVere "if I give my resignation I would give it to the president, the **man** who hired me").

Young no longer intends to resign. From this point forward, no one sees the real anonymous complaint. Trial Exhibit 414B is the fabricated anonymous complaint. In future meetings between Ms. DeVere and management, this document is not shown to DeVere. See RP 2058, 2067.

H. The 2013 Fabricated Anonymous Complaint Against Julie Atwood and the Other Document Tampering

A reasonable inference is that MSA managers destroyed the real anonymous complaint and substituted in its place the fabricated anonymous complaint. The fabricated anonymous complaint does not mention Steve Young and alleges three claims much like those contained in the 2012 anonymous complaint. See Ex. 414B. Investigator Wendy Robbins testified she didn't remember who gave her the anonymous concern to investigate; suggesting perhaps it was DeVere. RP 1634, 1639. Most of DeVere's notes of the Julie Atwood interview are missing from the file, which documented a two-hour interview. Only a page or so are left in the file. RP 2071-73, 2083, 2450; Ex. 20, Bates# 179-80. Ms. Lindstrom managed the administrative files. RP 3942. She doesn't know who had DeVere's cabinet key after DeVere left. See RP 3954-55. She found some of the handwritten files out of place and found some of the summaries were missing. RP 3955-57.

There are two versions of the July 2010 to June 2011 performance evaluation. The real performance evaluation, Ex. 6, was signed by Steve Young, Jim Santo, and Ms. Atwood ("real Atwood performance evaluation). RP 2775. A second version was produced in discovery, which was never used (the "fabricated Atwood performance evaluation"). See

Ex. 348, at Bates# 84; RP 3223-31. It was created after Ms. Atwood upset Young's predecessor by refusing to produce work outside the contract, which would have been illegal. Id. Mr. Young told Atwood he wouldn't sign the evaluation either, and did it over. RP 3259; see Ex. 6.

There are two versions of the 2013 investigative log. Two versions of the log were produced in discovery. One version (the "real 2013 investigative log") had an entry on 9/20/2013 that was three lines long. Ex. 24. The other version (the "fabricated 2013 investigative log") had several sentences added and was dated much later. Cf. Ex. 12. Witness Cheryl Biberstine testified that only she and Wendy Robbins could access the log and make changes, and that they would never make changes in the record of events after case is closed—maybe typos but never substantive changes. RP 4353-4359. The jury could properly infer that the real 2013 investigative log was tampered with a year later by Ms. Robbins to help cover up the wrongful termination of Ms. Atwood. See RP 3637-43.

I. Armijo's Direct Reports Changed The Devere Investigation—Now Ms. Atwood Is Being Investigated For Timecard Fraud While Young Meets With Armijo Managers To Strategize

At trial, Mr. Jensen testified about a meeting held on September 12 (one week before Ms. Atwood was fired) that Jensen attended and which included COO David Ruscitto, VP Todd Beyers, and VP Steve Young. RP 3878, 3882, 3909, 4360. This version of events is consistent with the

testimony by Ms. Atwood that she was told by VP Beyers on the day she was fired that "Steve Young's completely aware of what we're doing." RP 2880. It is also consistent with the 7:00 a.m., September 12, 2013 entry for a meeting at Dave Ruscitto's office that Steve Young had calendared. See Ex. 185, Bates# 4259 ("Personnel Issue").

Mr. Jensen's trial testimony and Mr. Young's calendar entry were inconsistent with Mr. Young's sworn testimony that no one consulted him ("not a single person") and the other denials by Young of any knowledge or involvement in the termination. See RP 2589, CP 6353-54. Mr. Jensen testified at trial that Steve Young met and outlined possible allegations against Ms. Atwood as collected by Morris Legler. RP 3883-87, 3910-11.[8]

On rebuttal plaintiff called Legler who admitted he did whatever Young told him to do ("I do what he tells me") and documented Atwood's alleged undocumented absences as follows: when he walked by her office, if she wasn't in her office, he would document her as absent. He did not try to call or text her, claiming he didn't have her number, and didn't try to email her either. The documentation was bogus. RP 4339-4343. Legler's list of Atwood absences was entered into a chart that was presented at the secret meeting, but withheld from the investigators and Ms. Atwood. Ex.

[8] VP Beyers in his deposition had tried to keep VP Young out of the picture. See CP 1952-53 (Beyers denies having any meetings with Young before Atwood's termination).

221 (chart); RP 4359-61 (Biberstine typed it up). The bogus chart appeared again in Ms. Ashbaugh's letter to the EEOC without explanation as to how the data was collected and used as evidence supporting the termination. Compare Ex. 221 with Ex. 16, at 4-6.

Later that day, on September 12, 2013, after having been earlier told to cease and desist her investigation in Young's misconduct, DeVere was called to a meeting with Beyers and Jensen. RP 3905. Also, present was Wendy Robbins. Id. Beyers told DeVere that she would continue her EEO investigation of Young, but that Robbins would lead the investigation and focus on allegations of time-card fraud against Ms. Atwood. RP 2067-69, 2075, 2459, 3915, 3647, Ex. 20 at Bates# 196 (DeVere notes of the 9/12/13 meeting). The investigators were told that CEO Frank Armijo and COO Dave Ruscitto wanted their investigation to conclude by September 18. RP 2069. This time, ***Young was not interviewed*** by the investigators at the direction of Armijo direct reports Beyers and Jensen. RP 2076-77, 2086.

Ruscitto told DOE managers that Atwood is being investigated for time card fraud. RP 1551, 1578-79, 1559-61. DeVere testified that such communications with DOE were never done. DOE may be informed of the fact of an investigation, but MSA does not provide the specific name of persons under investigation. RP 2095.

J. On September 16, 2013, Ms. Atwood Is Interviewed And Reports Young's Misconduct To The Investigators

Ms. Robbins was asked whether Ms. DeVere "was investigating Steve Young in a hostile work environment claim?" Robbins did not deny this and instead testified, "I do not know." RP 1635.

On September 16, 2013, Ms. Atwood was interviewed by DeVere and Robbins. She told the investigators she was afraid of what Young would do if he saw her complaints, but was told her interview would be confidential. RP 3237-40. Atwood reported, "the workplace was a hostile work environment based on gender and that Mr. Young had targeted me and discriminated against me as a woman." Id.; accord RP 2083 (DeVere). She reported being "excluded from activities and meetings" (including the meeting where Young told his leads about the complaint); she reported Young's offensive "mean-a-pause" joke made in her presence; and she reported his demeaning comments about DOE Manager Karen Flynn's abilities, saying she only had her job because of her "relationship" with DOE Deputy Manager Shoop and that she was incompetent (a sexualized reference to her sleeping her way to the top). RP 2863, 2865, 3240, 3243. Young made no similar comments about males. Id.

Ms. Atwood told the investigators that if they were "asking … about [her] time," she expected them to be looking at others too, stating

"Steve Young is doing City of Kennewick work on government time," which "wasn't a secret," RP 2867-68; and that another man in Portfolio Management, Mr. Winters, "routinely left in the middle of the workday to play basketball for a couple of hours … with Frank Armijo." RP 3242. Atwood reported people were afraid to complain since it was Armijo. Id.

K. On September 17, 2013, Young's Direct Report Tells Investigators Atwood Is Sleeping With A DOE Manager And Investigators Meet And Report Atwood's Statements To Beyers And Jensen

On September 17, 2013, DeVere and Robbins interviewed Young direct report Delannoy who attacked Atwood and alleged she was having an affair with Jon Peschong. RP 2164, 2234-35. There was no affair. RP 2263. Delannoy also disclosed that Young turned off his calendar after learning DOE had inquired about his mayor-related calendar entries. RP 2242; Ex. 20 at Bates# 191. A reasonable inference is that Young thought Atwood was behind the DOE inquiry, just like he suspected she was behind the real anonymous complaint against him. See RP 1869.

On September 17, 2013, DeVere and Robbins briefed Todd Beyers and Chris Jensen. RP 2087, 2669. DeVere testified that she briefed them on the fact that Atwood was the only witness to verify that Young discriminated "because she was a woman." RP 2089. DeVere also testified that Robbins brought up to Beyers and Jensen how Ms. Atwood suggested

that MSA should "look at Steve Young's calendar and his work that he was doing and how he was coding the work that he was doing that may possibly have been City of Kennewick work on MSA time." Id. Ms. Robbins' notes of the September 17th meeting confirm that she reported to VP Todd Beyers and Chris Jensen "Conclusions and Recommendations" on such date, including that there was "no time card fraud" and "no time charging violations" by Ms. Atwood, and that she recommended MSA "help Steve [Young] utilize Atwood." Ex. 39E at Bates# 1954; RP 1682.

L. On September 19, 2013, Armijo, Ruscitto, Beyers, Jensen, Cherry And Fowler Meet, And After That Privileged Meeting, Beyers And Cherry Force Atwood To Resign

On September 19, 2013, MSA's CEO, Frank Armijo, met with the COO, David Ruscitto, VP Todd Beyers, Chris Jensen, Steve Cherry and Sandra Fowler regarding Ms. Atwood's employment. CP 1957-60, 1974, 1983. Ms. Fowler testified she only "listened" at the meeting and that neither she nor Mr. Cherry gave any legal advice during the meeting. CP 1983. Nevertheless, the meeting was ruled "privileged." CP 2550. It is undisputed the meeting lasted over an hour and that Beyers was given the instruction by Armijo in the meeting to terminate Atwood. CP 1957-60.

About the same time, Ms. Robbins advised Ms. Atwood that she had been vindicated of the time card fraud allegations. See RP 2873; Ex. 24 (entry on 9/20/13). However, following her vindication, Ms. Atwood

was directed to meet with Beyers. RP 2874-75.

M. The Resignation In Lieu of Termination Caused Serious Emotional Harm And Lost Income

Trial testimony by Ms. Atwood showed that her damages began at the termination meeting with Beyers and Cherry. On her last day of work in September 2013, Ms. Atwood was told by Ms. Robbins that she was vindicated of the charges against her, and then directed to meet with Todd Beyers and Steve Cherry, who told her that she was being terminated. See RP 2876-80. No explanation was given. She could not understand how that could happen; she began to sob. She told them that it was a mistake. Id. Beyers was unfeeling and bullying, yet it was proposed she resign in lieu of termination. Id. Atwood worried about retirement, re-employment, and benefits, and thought that resignation may preserve them. She was so upset that she could not physically write the few lines that would become her resignation. Id. Beyers had a letter drafted and gave it to Ms. Atwood to sign. Id. She was broken. She believed that she could not walk away from the resignation without losing benefits and having her record reflect a termination, which would impair future employment. RP 2887. Then she was made to publicly push her belongings out to her car in a wheel chair, three times, crying all the way. RP 2880-81; accord RP 1096 (Silko testified she was sobbing uncontrollably and looked "absolutely broken").

Driving home that night, she thought about driving into an oncoming truck, but decided not to, as she might harm the truck driver. RP 2884-85. She has been depressed and suffered PTSD-like symptoms since then. Ms.Atwood thoroughly documented her non-medical damages through testimony and charts detailing by month and year, the level of damages suffered on a scale of 1-10. Ex. 280 (does not include all charts; some demonstrative charts were created at trial); RP 2902-15, 2938-41, 2890-92.

Nationally renowned psychologist Dr. Laura Brown testified that she suffered from a mental illness that was like PTSD without the life-endangering event, and that the mental illness was proximately caused by the events of her final days of work, and testified that it may take several years before she would be cured. RP 1908-63.

In rebuttal, the defense offered the testimony of Dr. Biebeault, a psychiatrist without comparable specialized knowledge. Compare resume of Dr. Brown (Ex. 429) with Dr. Biebeault (Ex. 428). Unlike Dr. Brown, Dr. Biebeault testified without stating her opinions be on a more likely than not basis. Compare RP 1926 with RP 3460. Dr. Biebeault did not examine Ms. Atwood or opine on her condition. RP 3466-67, 3511, 3547. Instead, she claimed Dr. Brown's methodology was suspect. RP 3464. In fact, Dr. Biebeault's testimony was weak and ineffective.

Dr. Brown noted that Ms. Atwood suffers from intrusive thoughts—images of the last day—nightmares like being run over by a car, intense emotional distress when she has to think about or talk about what happened on the last day at MSA, distress which the jury saw with their own eyes as Ms. Atwood testified. RP 1930.

Dr. Brown also discussed her marked physiological reaction, which means that Ms. Atwood gets so upset her gut gets hyperactive, affecting "both ends." RP 1931. Dr. Brown testified that when they were meeting, Ms. Atwood had to stop and run to the bathroom in the middle of talking about the events. Id. Dr. Brown testified that Ms. Atwood tries to avoid having thoughts or feelings or being around anything that reminds her of what happened. Id. She testified that avoidance has turned out to be one of the hallmarks of the post-traumatic response, because when something bad happens to people, they try to stay away from it. Id. Dr. Brown testified that Ms. Atwood avoids people and places and things that remind her of, not only what happened, but of her life and her work prior to that, because it's so painful. Id.

Dr. Brown testified that Ms. Atwood has negative beliefs, and that she believes that she has been broken, and that the world that she used to believe to be a just and fair place turns out not to be so predictably just and fair. RP 1932-33. Dr. Brown testified that Ms. Atwood has persistent

shame. Id. She feels badly about herself, has difficulties with concentration and had difficulties with sleep. Id.

All of these symptoms are proximately caused by the misconduct of the defendants. RP 1938. They are life altering, not bumps in the road: instead of enjoying the fruits of her hard work in her later life, Atwood has to fight nightmares and intrusive thoughts, and she must accept she is out of the work environment and will never get back to the level she had achieved before the discrimination and retaliation. RP 2904, 2938.

N. Ms. Atwood suffered lost wages and retirement

Ms. Atwood testified that she intended to stay working on the contract at Hanford and inside the same benefit plan through retirement (age 70), and then planned to work as a consultant. RP 2937-38; see also RP 3962 (Dru Butler testifying how at Hanford, "when a [company's] contract ends… the people who worked [for the company], most of them would get what they called mapped … over to the new contract. … It [is] the same workers, just working for a different company.")

At trial, Harvard-trained Labor Economist Paul Torelli, Ph.D., testified to Ms. Atwood's economic damages, which varied, depending on the scenario, but included a scenario totaling $2.1 million, RP 2109, 2113, 2120-21, 2124, which is the amount awarded by the jury. CP 11043. MSA produced Ms. Barrick, a CPA, who disagreed with Dr. Torelli, but lacked

the stature and analysis to counter his opinions. RP 3723, 3763- 66.

O. In Discovery And At Trial, MSA Claimed That The Reasons For Terminating Ms. Atwood Were Those Set Out In Ms. Ashbaugh's Letter To The EEOC

Neither MSA nor Young gave contemporaneous reasons for Ms. Atwood's 2013 termination. See RP 2878-79. As the jury heard, in pre-trial discovery, when asked the reasons for her termination, MSA directly stated they were set out in Ms. Ashbaugh's 2015 letter to the EEOC. RP 2943-46. The letter to the EEOC identified three reasons:

1. Ms. Atwood repeatedly failed to abide by requests of her supervisor regarding her whereabouts during work hours;
2. Ms. Atwood failed to provide advance notice of leave
3. Ms. Atwood had a practice of using her relationship with a DOE client to avoid and/or circumvent her supervisors' plans and/or directives.

Ex. 16 at Bates# 40. At trial, each of the stated 2015 justifications were rebutted, but even if one were to assume they were true, the evidence shows that men who engaged in serious misconduct were not terminated, but Ms. Atwood, who engaged in no misconduct, was terminated without progressive discipline or even notice of what she did wrong (a courtesy which was provided to men who were disciplined under Armijo). See Ex. 43 (serious misconduct defined).

The letter to the EEOC was deceptive in that it alleged Ms. Atwood was previously "counseled about her lack of communication

concerning her whereabouts," citing to the fabricated Atwood performance evaluation (discussed *supra*), which MSA provided to the EEOC. Ex. 16 at Bates# 40-41; and RP 3221-31; Ex. 348 at Bates# 84. MSA also gave the EEOC the fabricated 2013 investigative log (discussed *supra*). Cf. Ex. 348 at Bates# 168 with Ex. 24 (entry dated 9/20/13).

P. At Trial, Ms. Atwood's Female Friends And Coworkers Working Under The Supervision Of Steve Young At The Time Of Trial, Attacked Ms. Atwood Rather Than Lose Their Jobs

The defendants called women witnesses to attack Ms. Atwood. Marisa Renevitz was called to testify that Ms. Atwood didn't keep her abreast of her location, and that she ran into Ms. Atwood after the litigation began and she felt uncomfortable. RP 4289. She reported to Steve Young at the time of her testimony. RP 4292. She did her best not to compliment Ms. Atwood, and she was impeached on a prior inconsistent statement in which she told the investigator that Ms. Atwood always keeps employee abreast of her whereabouts, and that she likes Ms. Atwood's management style better than Ms. Delannoy's management style. RP 4297-98, 4294-95, 4299-4302.

Dru Butler was a long-time coworker of Ms. Atwood's who at the time of her testimony was an MSA employee who had been a direct report to Steve Young in 2012 and 2013, and at the time of trial was 61 years old and known to be a friend of Ms. Atwood. RP 3960-61, 3966, 4113. She

testified she could not find Ms. Atwood during the work day. RP 3975-76. She also testified that in 2013 it was not fun to work at MSA anymore. RP 3999. On cross-examination, Butler testified that "people were afraid that their jobs would be eliminated if they talked to Ms. Atwood," and that Butler herself was afraid she was going to lose her job. RP 4105, 4113.

Ms. Ollero was also called by MSA. She testified that Ms. Atwood was a terrible employee at M&EC. RP 3394-409. Ollero worked there as a subordinate of Ms. Atwood after previously working with her at Bechtel, where Ollero was a low-level employee. RP 3392-93. What she apparently didn't know was that Mr. Hughes, who was Bechtel president at the time, had already testified as to Ms. Atwood's excellent work. Id.; RP 1364-72.

Q. Whitewashed Young Time Card Investigation Found In Discovery

MSA called Ms. Robbins to testify that Mr. Young's time-charging was reviewed in 2015 and that MSA found no time-charging violations for Young, RP 3628-29. However, Ms. Atwood testified at trial how the later investigation into Young's timekeeping habits had a handwritten note on it claiming there were "no previous concerns re: timekeeping while conducting mayor duties," which Ms. Atwood testified was false given the concern she reported to Robbins and DeVere in 2013 before MSA terminated her. RP 3241; accord RP 2867; Ex. 24 (9/19 entry).

R. Ms. Atwood mitigated her damages

On the mitigation issue, Ms. Atwood testified that she applied for about 60 jobs with no luck. RP 2893. Her personnel file says, "would not rehire." RP 2895-900. She explained that she believed she could not find work at Hanford because she had been blacklisted. Id.; RP 2982-87. DOE managers testified they heard she was being investigated for time card fraud and Greg Jones testified that he thought time card fraud was the basis for her termination. RP 1551, 1559-61, RP 1578-79, 1590, 2857. Ms. Atwood had applied for and was in the running for one Hanford job, but Jones killed the program. RP 1289; cf. RP 1584-87 with RP 1568; RP 2972-73; RP 2982-84. Alan Parker, who had worked with Ms. Atwood, testified that time card fraud allegations were deadly to employment at Hanford based on his years working there. He testified, "Once you get that smell of fraud or safety issues near you, it's over," and when asked if he were selecting Key Personnel today in connection with a DOE bid and there were rumors of fraud, would that affect his selection decision, Parker responded, "absolutely." RP 2336.

In an effort to prove its affirmative defense, MSA called John Fountaine as an expert witness on mitigation. He provided no comparable positions—not even one—for which Ms. Atwood could have and should have applied. RP 3077, 3093. He knew nothing about her mental illness

and the effects, if any, they would have on her job search. RP 3097. He also knew nothing about Hanford and about the importance of not being tied to time card fraud. RP 3085, 3092; see also RP 2937 ("when you have unanswered questions on applications, it creates questions"). The trial court found that Atwood, "much like the plaintiff in Henningsen … worked at other jobs for one or two years in an effort to make money," and that she "did locate and submit a bid on one comparable job (Longenecker & Assoc.); however, the project was subsequently withdrawn" with "conflicting evidence as to why she did not get the job, but … no dispute that she did apply." CP 10988.

Fountaine's opinions were not stated on a more likely than not basis, and the jury rejected his opinions, finding that MSA failed to prove "that Plaintiff failed to use reasonable efforts to mitigate her economic damages." CP 11042 (Verdict - Question No. 7). The jury's finding that MSA failed to prevail on its affirmative defense goes unmentioned and unchallenged in appellant's brief. Nowhere do the appellants discuss the affirmative defense of failure to mitigate or how they met the defense's elements. See Instruction No. 18 (CP 11064).

//

//

//

ARGUMENT

A. Standard of Review

The trial court's "[u]nchallenged findings are verities on appeal,"[9] and the "evidence must be viewed in the light most favorable to [Ms. Atwood], since [s]he prevailed before the jury.[10] This Court can affirm on any basis supported by the record and the law.[11]

Most of the trial court decisions that the appellants claim are objectionable are reviewed for abuse of discretion. See Jones v. City of Seattle, 179 Wn.2d 322, 337, 314 P.3d 380 (2013) (exclusion of witnesses will not be disturbed absent "clear abuse of discretion"); State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990) ("The admission and exclusion of relevant evidence is within the sound discretion of the trial court" and such "decision will not be reversed absent a manifest abuse of discretion"); State v. Mason, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007) ("A trial court's ruling under ER 404(b) will not be disturbed absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did."). The denial of a motion for new trial or remittitur is also reviewed for abuse of discretion. Collins v. Clark Cty. Fire Dist. No. 5, 155 Wn. App. 48, 85, 231 P.3d 1211 (2010) (denial of

[9] Robel v. Roundup Corp., 148 Wn. 2d 35, 42, 59 P.3d 611 (2002).
[10] Bennett v. Dep't of Labor & Indus., 95 Wn.2d 531, 534, 627 P.2d 104 (1981).
[11] State v. Avery, 103 Wn. App. 527, 537, 13 P.3d 226 (2000).

motion for remittitur "strengthens the jury verdict," "we strongly presume the jury's verdict is correct"); and Adcox v. Children's Orthopedic Hosp. & Med. Ctr., 123 Wn.2d 15, 33, 864 P.2d 921 (1993) ("heavy presumption in favor of jury awards").

Even if appellants could establish error or abuse of discretion, to prevail in their appeal, they must also show that any error likely affected the outcome of trial. See, e.g., Lutz Tile, Inc. v. Krech, 136 Wn. App. 899, 905, 151 P.3d 219 (2007) (reversal due to evidentiary error only required if "it is reasonable to conclude that the trial outcome would have been materially affected had the error not occurred"); Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 446, 453, 191 P.3d 879 (2008) (error in failing to balance the probative value versus prejudice on the record is harmless, "unless the failure to do the balancing, 'within reasonable probability,' materially affected the outcome of the trial"); Terrell v. Hamilton, 190 Wn. App. 489, 502, 358 P.3d 453 (2015) ("An erroneous instruction is harmless if it did not affect the outcome of the case.").

B. The Evidentiary Errors, If Any, Would Be Harmless, As The Law Permits the Jury to Infer Discrimination and Retaliation from Pretext, And the Jury Should Have Been So Instructed

"An evidentiary error requires reversal only if it results in prejudice; only if it is reasonable to conclude that the trial outcome would have been materially affected had the error not occurred." Lutz, 136 Wn.

App. 905; see also State v. Bourgeois, 133 Wn. 2d 389, 403, 945 P.2d 1120 (1997) ("The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole."). Thus, "[w]here the trial court has not balanced probative value versus prejudice on the record, the error is harmless unless the failure to do the balancing, within reasonable probability, materially affected the outcome of the trial." Brundridge, 164 Wn.2d at 446. None of the trial court's evidentiary rulings can be said, "within reasonable probability," to have materially affected the outcome of the trial, in view of the evidence as a whole.

While the "comparator evidence is relevant and admissible," it was "**not** required" for Ms. Atwood to prevail. Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 33, 244 P.3d 438 (2010). Similar to Brundridge, there was "other evidence" supporting Atwood's claims of gender discrimination and retaliation. See id., 164 Wn.2d at 447. For example, as the trial court observed, the jury heard about "Young's 'Barbie email' and his alleged off-color gender-based comments," CP 10979, which are both "circumstantial evidence probative of discriminatory intent." See Scrivener v. Clark College, 181 Wn.2d 439, 450, n.3, 334 P.3d 541 (2014) (rejecting "stray remarks" doctrine).

Significantly, the jury also heard Steve Young's mendacious denial of any knowledge or involvement in the termination, directly contradicting the trial testimony of Mr. Jensen. "[I]t is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 184, 23 P.3d 440(2001) (quotation omitted), overruled on other grounds by McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006). "Direct, 'smoking gun' evidence of discriminatory animus is rare, since there will seldom be 'eyewitness' testimony as to the employer's mental processes, and employers infrequently announce their bad motives orally or in writing. … Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." Hill, 144 Wn.2d at 179.

In view of the evidence as a whole, which includes strong evidence of pretext, the evidence MSA takes issue with is of minor significance. MSA's investigators told VP Beyers on September 17, 2013–two days before MSA terminated Atwood via Beyers—that they had found no misconduct or policy violations by Ms. Atwood and recommended MSA "help Steve [Young] utilize Atwood," see Ex. 39E, at Bates# 1954, RP 2087, 2669; noting her "performance is stellar … [with] no indication of a performance or behavior issue on [her] recent performance appraisal," and

that "DOE clients love Julie." Ex. 24; accord RP 2491-92 (Young testifies, "She was doing exactly what she was hired to do."). Yet, MSA fired Atwood based on Young's input, which Young completely denied.

> [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.

Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

The idea that – putting aside any direct evidence or other forms of circumstantial evidence that Ms. Atwood put forward to prove her case – the jury can infer the ultimate fact of discrimination and retaliation from the falsity of MSA's explanation, is not intuitive. For that reason, Ms. Atwood took exception to the Court's failure to give Instruction No. 15. See Appendix at CP 6683; RP 4646. Rather than adopt the rule endorsed by the Second, Third, Fourth, Fifth, and Tenth circuits, which best furthers the purpose and mandate of the WLAD by requiring a "permissible inference" instruction in appropriate cases alleging pretext, Division One of the Court of Appeals has opted to follow the line of cases from the First, Seventh, Eighth, Ninth and Eleventh Circuits, which have held that no permissible inference instruction on pretext is required. See Farah v.

Hertz Transporting, Inc., 196 Wn. App. 171, 176–77, 383 P.3d 552 (2016) ("While the instruction would have been appropriate, it was not necessary. Thus, refusing to give the instruction was not error.")

However, without the requirement that an instruction be given on the permissible "pretext" inference, juries, like the Court of Appeals in Hill, will likely be confused and believe that the plaintiff must present proof of discrimination beyond the proof of pretext to be able to infer a discriminatory motive. See Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002) (discussing Fifth Circuit Court of Appeals making the same erroneous assumption in Reeves).

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

Townsend, 294 F.3d at 1241 n.5; *see also* Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280-81 (3d Cir. 1998) ("In light of the … inordinate amount of ink that has been spilled over the question of how a jury may use its finding of pretext, it would be disingenuous to argue that it is nothing more than a matter of common sense"); Kozlowski v. Hampton Sch. Bd., 77 Fed. Appx. 133, 143 (4th Cir. 2003) ("Given the

amount of disagreement among judges of the federal courts of appeals over whether a jury may infer discrimination simply from their disbelief of the employer's stated justifications, it seems unlikely that jurors will uniformly intuit that such an inference is permissible"); Ratliff v. City of Gainesville, 256 F.3d 355, 361 n.7 (5th Cir. 2001) ("It does not denigrate the intelligence of our jurors to suggest that they need some instruction in the permissibility of drawing that inference.") (quotation and cite omitted).

The Court of Appeals in Farah v. Hertz cited the unpublished decision, Kozlowski v. Hampton Sch. Bd., 77 Fed. Appx. 133, 144 (4th Cir. 2003), as persuasive authority endorsing the requirement of a pretext instruction. 196 Wn. App. at, 180. The facts of Kozlowski illustrate why an instruction on the permissible inference that can be drawn from proof of pretext is needed to avoid misleading the jury. In Kozlowski, the jury, during deliberations, asked the trial court, "By virtue of exclusion of defense's reasons for [the] nonrenewal, must we conclude under the law that age discrimination has occurred?" Id., at 142. After the jury expressed its confusion on the law, "the court decided simply to repeat the general instruction without addressing the question specifically." Id. The jury returned a defense verdict. Id., at 135.

The Court in this case should find Ms. Atwood presented clear evidence of pretext allowing the jury to infer the ultimate fact of

discrimination and retaliation, such that any error in the court's evidentiary rulings were harmless. The Court should further hold that the trial court's refusal to give a permissible inference instruction on pretext was error for the reasons stated.

C. Alleged Errors Would Also Be Harmless Given the Closeness In Time Between Atwood's Protected Activity and Discharge

"Proximity in time between the protected activity and the discharge, as well as satisfactory work performance and evaluations before the discharge, are [also] factors suggesting retaliation." Currier v. Northland Servs., Inc., 182 Wn. App. 733, 747, 332 P.3d 1006 (2014); accord Cornwell v. Microsoft Corp., _ Wn.2d _, 430 P.3d 229, 236 (2018) (retaliation is "reasonable inference" when termination follows shortly after protected activity) Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 69, 821 P.2d 18 (1991) (same). Here, Atwood reported allegations of gender discrimination and conduct by Young contravening the public policy of the False Claims Act shortly before she was terminated. See RP 3237-43, 2863-67, 3242; RP 2083-85 (DeVere); CP 11057 (Instruction No. 12).

Ms. DeVere testified that VP Beyers and Mr. Jensen were informed of such claims by Atwood before Atwood was terminated. RP 2089. Even if Beyers and Jensen hadn't received such information before

Beyers notified Atwood of her termination, Ms. DeVere also testified that Steve Young told her he suspected Ms. Atwood of filing a hostile work environment complaint against him. RP 1869. See Cornwell, 430 P.3d at 238 (adopting "'knew or suspected' test is to protect employees from retaliation to the fullest extent possible").

With regard to the jury's consideration of the proof of retaliation based on Mr. Young's statement of suspicion of Atwood in close temporal proximity to her protected reporting and termination, it bears emphasizing that Ms. Atwood "does **not** ... need to disprove" MSA's stated reasons for the discharge. CP 10976 (Order on Post-Trial Mots.), quoting Scrivener, 181 Wn.2d at 447. Put another away, "Substantial factor does not mean the only factor or the main factor." CP 11055 (Instruction No. 10). Thus, the Court should hold that error regarding the admissibility of evidence (if any) would be harmless and unlikely to affect the outcome, given the close proximity of time between Young's comment and Ms. Atwood's firing.

D. The Record Strongly Supports The "Perception" Theory Of Retaliation, On Which The Jury Should Have Been Instructed

This Court "can sustain the … judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it." LaMon v. Butler, 112 Wn. 2d 193, 200–01, 770 P.2d 1027 (1989). As the prevailing party, Ms. Atwood is not required to

file for cross-appeal to "argue any ground to support a court's order which is supported by record." State v. Kindsvogel, 149 Wn.2d 477, 481, 69 P.3d 870 (2003). Instead, Ms. Atwood seeks review through the assignment of errors in compliance with RAP 10.3(b). See id.

Ms. Atwood plead a claim under the WLAD and the public policy underlying the WLAD based on a "perceived" theory of retaliation. CP 10, 18 (Compl., ¶¶2.34, 3.7). See also Cornwell, 430 P.3d at 238 (adopting "knew or suspected standard" to further WLAD's purpose to protect employees from retaliation). "It would be a strange rule… that … would not protect an employee discharged because the employer merely believed or suspected … she had engaged in protected activity." Id. The WLAD is to be liberally construed to accomplish its purpose. RCW 49.60.020. "Thus, construing WLAD to protect employees from adverse employment actions because they are *suspected* of having engaged in protected activity is consistent with the general purposes of the Act and the specific purposes of the antiretaliation provisions." Cornwell, 430 P.3d at 238 (emphasis in original). See also Heffernan v. City of Paterson, N.J., 136 S. Ct. 1412, 1418, 194 L. Ed. 2d 508 (2016) (holding in First Amendment retaliation case "employer's factual mistake does not diminish the risk of causing precisely that same harm."); and, e.g., Fogleman v. Mercy Hosp., Inc., 283 F.3d 561 (3rd Cir. 2002) ("[t]he laws… focus on the employer's

subjective reasons for taking adverse action … so it matters not whether the reasons behind the employer's discriminatory animus are actually correct as a factual matter"); Johnson v. Napolitano, 686 F. Supp. 2d 32, 36 (D.D.C. 2010).

Ms. Atwood took exception to the trial court's failure to instruct the jury on the "perception" theory of retaliation, either through the WLAD retaliation jury instruction or the wrongful discharge tort instruction. See RP 4628, 4647; and Appendix, Proposed Instructions 17 & 27 (CP 6709-10); cf. Instructions Nos. 9 and 12 (CP 11054, 11057). "[A] party is entitled to have the trial court instruct on its theory of the case if there is substantial evidence to support it." Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). Here, an instruction on the "perception" theory of retaliation was warranted, as the jury heard damning testimony to support the claim, including that, shortly before MSA fired Ms. Atwood, in part, based on Mr. Young's input, Young told DeVere that he suspected Ms. Atwood was the source of the anonymous hostile work environment complaint filed against him that Ms. DeVere, the EEO Officer, was investigating. RP 1869, 1863. The proximity in time between Mr. Young's remark, and Ms. Atwood's pretextual firing—which occurred at the same time she was vindicated of alleged misconduct, see, e.g., Ex. 24, and which Mr. Young mendaciously

denied he was consulted about—was strong evidence that retaliation for Young's perception was a "substantial factor" in the firing. See Cornwell, 430 P.3d at 237 (proximity in time leads to "reasonable inference" of retaliation); and Hill, 144 Wn.2d 184 (inference may be based on "falsity of the employer's explanation").

This Court should hold that Ms. Atwood was entitled to an instruction like either of the two she proposed (Appendix at CP 6709-10), so she could argue the perception theory of retaliation she plead in the complaint, CP 10, 19, and which was supported by the evidence.

The Court should further hold that error regarding the admissibility of evidence, if any, would be harmless in light of the strength of evidence supporting Ms. Atwood's "perception" theory of retaliation claim.

E. The Hearsay Rulings Were Not Erroneous

The defendants repeatedly sought to admit hearsay statements by Armijo through his various direct reports. "The hearsay prohibition serves to prevent the jury from hearing statements without giving the opposing party a chance to challenge the declarants' assertions." Brundridge, 164 Wn.2d at 451–52. The statements identified in appellant's brief are hearsay. In every case, the appellants are trying to admit testimony by third parties and deny Ms. Atwood the opportunity to cross-examine.

First, the statements of Armijo made at the September meeting which was held to be subject to attorney-client privilege are inadmissible, because the privilege cannot be used as both a sword and shield. RP 925. ("I won't allow [Armijo's statement] if it was made in the meeting," as "that would be using that as a sword improperly"). Second, all of Armijo's statements would be hearsay nonetheless under ER 802, because they are recounting substantive facts offered for the truth of the matter asserted by the apex manager. Third, MSA's reliance on Domingo and other such cases is misplaced. Those cases pertain to facts taken in and testimony given by the person who makes the decision to terminate. In Domingo, for example, Supervisor "***Walsh*'s testimony** [about the video she viewed] was not offered for the truth of the matter asserted. Rather, it was offered to show ***Walsh*'s motivation** for the decision to reprimand and eventually terminate Domingo's employment." Domingo v. Boeing Employees' Credit Union, 124 Wn. App. 71, 79, n.20, 98 P.3d 1222, 1226 (2004). In contrast, here Jensen, Beyer and any other manager seeking to quote Armijo or Young are not the decision-makers who took in evidence to make the decision. As Mr. Jensen testified at his deposition, during the motion practice on the issue of attorney-client privilege, "The decision by the company to sever the relationship [with Plaintiff] was made by Frank Armijo and Steve Young." CP 1989. As to the reasons for termination,

Jensen admitted, "I don't have firsthand knowledge of what Steve [Young] and/or Frank [Armijo] concluded was the threshold for the decision to let her go." Id.; see also CP 1953, 1957 (Beyers received "direction" from Armijo); RP 3313 (Beyers pointed to "the individual at highest level of the company" [CEO Armijo] as the source of the firing).

Only the actual decision-makers, Armijo and Young, with personal knowledge of the basis for their decision can stand in Ms. Walsh's shoes. Thus, the appellants' fact pattern is one step removed from Domingo and the other cases appellants cite. See Rice v. Offshore, 167 Wn. App. 77, 84, 87, 272 P.3d 865 (2012) ("***Davis*** fired Rice" after Davis reviewed police reports; thus "reports were… were offered to show ***Davis's motivation*** for the decision to terminate Rice's employment"); accord Henein v. Saudi Arabian Parsons Ltd., 818 F.2d 1508, 1511–12 (9th Cir. 1987) (holding evidence offered to prove "fact that a statement was made" is not hearsay"; thus several managers' "testimony about … act[s] performed by the Saudi government"—based on each manager's personal receipt of information from the Saudi government—was admissible).

As to the claim that Jensen should have been permitted to state "MSA's reasons for terminating Atwood's employment," first, his only knowledge of the reasons flowed from the hearsay statements made by Armijo during the attorney-client privileged September meeting. Second,

at the pages cited in the record, even defense counsel understood that Jensen was simply reciting what others had said in violation of ER 802:

> Q. (By Ms. Aragon) Don't say what anyone told you. Let me move on and ask you the next question.

RP 3842 (after court sustained objection to testimony about what Beyers or Bence told Jensen after HR had already initiated its investigation). Third, the court ultimately ruled that Mr. Jensen could testify as to his understanding of the basis for Ms. Atwood's termination, so long as it was "outside of the shell of" the September 19th attorney-client meeting. See RP 3854, 3862, 3865.

F. Limiting Instructions Were Proper

"When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." ER 105. "[A]n appropriate limiting instruction is available as a matter of right." State v. Lui, 153 Wn. App. 304, 323, 221 P.3d 948 (2009), aff'd, 179 Wn. 2d 457 (2014). Again, Jensen was not the person who decided to terminate Ms. Atwood, so his statements purporting to state the reasons for termination could only parrot the alleged thoughts and opinions of Armijo and Young. The Court should be reminded that in response to interrogatories, MSA claimed that

the reasons for her termination were set out in Ms. Ashbaugh's letter to the EEOC (Ex. 16). See RP 2946; accord CP 206. So the evidence was admitted at trial. There was no need for Jensen to recite hearsay.

Nevertheless, the trial court agreed to allow Jensen's hearsay testimony to the extent the alleged concerns about Ms. Atwood came to him from "outside of the shell" of the September 19, 2013 attorney-client privileged meeting, ruling as follows:

> [M]y ruling is Mr. Jensen can testify that his understanding of the concerns of the company, as they pertain to Ms. Atwood, if they are learned from other people you can introduce those discussions, even though they come from MSA employees, with an **instruction** from the court that explains that the jury is to consider it as the basis of Mr. Jensen's knowledge and **not** a **substantive evidence**.
>
> [COUNSEL FOR MSA] MS. ARAGON: **Correct**.

R 3854; see also RP 3862; RP 3865. The trial court's decision was magnanimous and unnecessary, but in allowing Jensen to testify about the hearsay statements (which MSA's counsel admits were not offered "for the truth," but allegedly to show notice or state of mind, RP 3853); the use of the limiting instruction was appropriate as a matter of right. MSA never objected, and instead appeared pleased to have the hearsay evidence admitted at all, asking the Court to admit the evidence with the "**same limiting instruction**." See id.; and CP 3879-82. The fact that MSA's counsel at trial responded to the proposed instruction with "correct," RP

3854, and then requested the "same limiting instruction," "would seem to suggest the [alleged 'comment'] was considered inconsequential." See State v. Hansen, 46 Wn. App. 292, 301, 730 P.2d 706 (1986); see also State v. Alger, 31 Wn. App. 244, 248-49, 640 P.2d 44 (1982) (that counsel waited through the testimony of several witnesses before objecting to court's use of phrase "the victim" bordered on invited error and "strongly suggests that the comment was insignificant"). The record reflects that the trial court's use of the phrase "substantive evidence" in the limiting instruction was equally insignificant and caused no prejudice to the defense. MSA concedes the testimony was "not 'substantive evidence' of Atwood's [alleged] behavior," Br., at 20, and the instruction to that effect did nothing to reveal the judge's view on the merits of the defense. The jury was instructed that it may consider the evidence for a limited purpose.

G. Armijo's Testimony And Others Were Hearsay Or Improper Owing To The Attorney-Client Privilege Protection Engineered By MSA

Keeping out the Armijo's testimony on hearsay grounds was proper as outlined above, and it was all subject to attorney-client privilege. As to Butler, Cherry, and Beyers (Br. at 20-22), again, the trial court's rulings were proper. MSA claims it was prejudiced and that the court's rulings "prevent[ed] Beyers from divulging who told him to stop [DeVere's] 2013 investigation." Br., at 20-21. Yet, the testimony being

elicited at the cited pages was cumulative, since the jury heard Beyers testify that he was "directed by our chief operating officer" [CEO Armijo] to have Ms. DeVere "stand … down on the investigation." RP 3286-87. That fact was favorable to Ms. Atwood's case, not MSA's, so there can be no prejudice to MSA from the jury not hearing the testimony again.

Ms. Butler's testimony was properly stricken on hearsay grounds because she sought to tell the jury what DOE was thinking and feeling: "DOE was feeling like we weren't doing our jobs very well." RP 3998. How can this not be hearsay? As to Cherry, he improperly sought to tell the jury what Todd Beyer allegedly said at the termination meeting, which was offered for the truth of the matter and was hearsay. See RP 4128-129. ER 801. As to the "emotional reaction" testimony, Cherry was free to say what he did and what Ms. Atwood did and said, but he was not free to say what VP Beyers said. As to Bensussen, he was being asked why Armijo gave him Fowler's job, which addressed Armijo's motive or intent, not Bensussen's. Again, this is pure hearsay. RP 4199.

H. Qualheim's Exclusion Was Proper Or Was Harmless Error

MSA claims Ms. Qualheim is a "true rebuttal witness," and that it had no duty to disclose her in discovery. Br., at 25. Yet, MSA always anticipated Ms. Atwood would put on evidence of her "good performance" and "good work history," and knew Qualheim had relevant

knowledge. CP 1229-30; CP 6570-71; see also RP 3585 (trial court stating that if MSA had not communicated with her, "I'm perplexed as to how MSA would know that Ms. Qualheim would be capable of taking the stand and testifying negatively about Ms. Atwood."). Even if she were properly considered a rebuttal witness, exclusion of this evidence "rests largely on the trial court's discretion, and error in denying … it can be predicated only upon a *manifest* abuse of that discretion."[12] There was no manifest abuse of discretion, since MSA does not claim that Qualheim reported her alleged concerns about Atwood, or that MSA relied on her alleged observations as a basis for termination. "Facts unknown at the time of the [discharge] do not make the alleged unlawful practice more or less probable and are completely irrelevant."[13] Qualheim's testimony was inadmissible evidence of "other wrongs" under ER 404(b).

MSA's failure to disclose Ms. Qualheim was willful or without reasonable excuse. In Jones v. City of Seattle, the trial judge recognized the defendant, like MSA here, proposed calling a witness for a completely different reason than plaintiff had: "'Certainly the plaintiffs would not have been calling Mr. Jones for this purpose, and I guess my question is

[12] State v. White, 74 Wn. 2d 386, 395, 444 P.2d 661 (1968).
[13] See, e.g., Hollingsworth v. Washington Mut. Sav. Bank, 37 Wn. App. 386, 394, 681 P.2d 845 (1984), abrogated on other grounds by Allison v. Hous. Auth. of City of Seattle, 59 Wn. App. 624 (1990).

didn't you [defendant] have an obligation to do your own investigation, if this was a line of questioning you wanted to develop?'" 179 Wn.2d at 347. The Supreme Court agreed. "The trial judge was correct that the City had an obligation to investigate and disclose the substance of Gordon Powell's testimony." Id. Similarly, if MSA wished to present testimony from Ms. Qualheim of alleged misconduct by Atwood, it had a duty to investigate and disclose the substance of that testimony in discovery. See id. It is undisputed that the parties were able to depose DOE witness like Qualheim pre-trial, after seeking *Touhy* authorization from DOE. See CP 3202 (Peschong Dep.).

Moreover, MSA makes no claim that Qualheim was a newly discovered witness; it always knew that she had knowledge relevant to this matter. CP 6569-71. Yet, MSA declined to depose Ms. Qualheim, failed to list her as a lay or rebuttal witness, and never disclosed any subject matter on which she would testify at trial, despite a Court Order and local rule requiring the same. CP 6569-70, 6574 (Order); and LCR 4(h).

The court properly found substantial prejudice to Plaintiff, since she first heard the substance of Qualheim's inflammatory allegations in "week four of the trial and … [with] only a few hours left of trial time and no … meaningful opportunity, to depose [her]." CP 3586. The trial court weighed lesser sanctions on the record, but found them inadequate. Id.

Such decision was not an abuse of discretion. As for alleged error in the trial court's Burnet analysis, any such error is harmless where, as here, "the excluded testimony was irrelevant or unfairly prejudicial." See Jones v. City of Seattle, 179 Wn. 2d 322, 356, 314 P.3d 380 (2013). Ms. Qualheim's slanderous claim that she observed Atwood engaging in unprofessional and "flirtatious behavior" with male managers, allegedly sitting very close to them and whispering in their ears, was not a stated basis for plaintiff's termination; nor were such allegations disclosed in response to discovery requests inquiring about Atwood's misconduct. See RP 2946 (Def.'s Answers to Interrogatory Nos. 1-2, citing only MSA's response to EEOC); accord CP 206.[14] Admission of such evidence was irrelevant. ER 402. It would have confused the jury and required additional rebuttal, resulting in a waste of time. ER 403.

I. The ER 404(b) Rulings were correct under Brundridge

The trial court entered a preliminary order on the admission of evidence offered by Plaintiff under ER 404(b), making clear that it was only a starting point and that the court was "open to the possibility that [he] can reconsider any of the rulings." See CP 11201-07 (Order); RP 1208-1211. "A trial court's ruling under ER 404(b) will not be disturbed

[14] The jury was informed that Ms. Atwood has a long-term partner of over 25 years. RP 4716; RP 3217.

absent a *manifest* abuse of discretion such that no reasonable judge would have ruled as the trial court did." Mason, 160 Wn.2d at 933-34. "Trial courts have considerable discretion to consider the relevancy of evidence and to balance 'the probative value of the evidence against its possible prejudicial impact.'" State v. Barry, 184 Wn. App. 790, 801–02, 339 P.3d 200 (2014). The trial court did not manifestly abuse its discretion by admitting ER 404(b) evidence.

Washington courts recognize that proving a discriminatory motivation is difficult.[15] Courts have "repeatedly stressed that circumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden.... Indeed, in discrimination cases it will seldom be otherwise." Hill, 144 Wn.2d at 179-80. Going back to the seminal case of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973), the Supreme Court explained that an employee may show an employer's proffered reason for decision is pretextual by relying on the employer's "general policy and practice with respect to minority employment." See also Heyne v. Caruso, 69 F.3d 1475, 1481 (9th Cir. 1995) (reversing jury verdict based on holding that exclusion of pattern and practice evidence of sexual harassment was especially damaging in a discrimination case "in

[15] Scrivener, 181 Wn.2d at 445.

which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives"). Washington cases are in accord with the federal precedents. See Johnson, 159 Wn. App. At 33 ("Proof of different treatment by way of comparator evidence is relevant and admissible"); Johnson v. DSHS, 80 Wn. App. 212, 227, n. 20, 907 P.2d 1223 (1996) ("Proof of discriminatory motive … can in some situations be inferred from the mere fact of differences in treatment.") (quotation omitted). See also Brundridge, 164 Wn.2d at 444-46 ("in the civil employment context, evidence of employer treatment of other employees is not impermissible character evidence; rather it may be admissible to show motive or intent for …discharge").

There is no "*per se* rule" making inadmissible evidence of an employer's treatment of other employees because it occurs under a different supervisor. Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 388, 128 S. Ct. 1140, 1146, 170 L. Ed. 2d 1 (2008). As the U.S. Supreme Court stated in Sprint, "The question whether evidence of discrimination by other supervisors is relevant in an individual … case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry." Id., at 388. Thus, evidence of

discrimination or retaliation by different supervisors against other employees at MSA "is neither *per se* admissible nor *per se* inadmissible," id., at 381, and the "questions of relevance and prejudice are for the [Trial] Court to determine in the first instance." Id., at 387 (stating "district court virtually always is in the better position to assess the admissibility of the evidence in the context of the particular case before it").

The Brundridge case provides textbook guidance on how to analyze ER 404(b) evidence in the civil context. It is binding precedent and is the first case to analyze the application of ER 404(b) to civil practice. There, "five of the pipe fitters, refused to install valves that were rated at 1,975 pounds per square inch (psi) in a system of pipes that was to be tested at 2,235 psi. The crew was concerned that the underrated valves could cause nuclear contamination and injury to workers. Fluor laid off the crew as a whole [twice]." 164 Wn. 2d at 438. "Fluor laid off another group of pipe fitters" who "alleged at trial that their [wrongful] discharge was in retaliation for their support of the [first group]." Id. At trial, the pipe fitters offered the testimony of other witnesses under ER 404(b) who had suffered retaliation to show motive and intent. The testimony was admitted and affirmed by the Supreme Court. 164 Wn.2d at 458–59.

The process for admission follows. "When a trial court admits bad acts evidence, it must first identify the purpose for which the evidence is

to be admitted. The court must then, on the record, balance the probative value of the evidence against its potential for prejudice." Id. at 444–45. The procedure is begun with an offer of proof. Id. at 445, n.4, citing State v. Kilgore, 147 Wn.2d 288, 295, 53 P.3d 974 (2002) (stating court may admit bad acts based only on offer of proof). An evidentiary hearing is not required to admit such evidence.

> Requiring an evidentiary hearing in any case where the defendant contests a prior bad act would serve no useful purpose and would undoubtedly cause unnecessary delay in the trial process. In our view, these hearings would most likely degenerate into a court-supervised discovery process for defendants. … We believe, in the final analysis, that the trial court is in the best position to determine whether it can fairly decide, based upon the offer of proof, that a prior bad act or acts probably occurred.

State v. Kilgore, 147 Wn. 2d 288, 294–95, 53 P.3d 974, 977 (2002).

It appears that the preponderance of the evidence standard is not required for admission of ER 404(b) testimony in the civil context, as the Brundridge court called into question its applicability in the civil context:

> The preponderance standard is appropriate in the criminal context, where the ultimate standard for conviction is 'beyond a reasonable doubt.' However, the preponderance standard for testimony may be too stringent in the civil context, where the ultimate standard itself is preponderance. This issue has not been argued or briefed here, and the court specifically declines to decide whether the preponderance standard governs in this context.

164 Wn.2d at 448. In this case, the trial court ruled that "the appropriate standard of proof … for admission of evidence of a prior bad act(s) under ER 404(b) in civil cases is 'substantial evidence,' which th[e] Court

deem[ed] to be an evidentiary burden lower that a 'preponderance of the evidence.'" CP 11202. MSA does not challenge that ruling on appeal.

The Court in Brundridge provided an example of the process for determining if there is adequate evidence for admission under the preponderance standard.

> Regardless, the pipe fitters' evidence would meet the preponderance standard if it applied. The evidence that Fluor managers tried to identify a caller to a safety hotline was presented in the testimony of Ivan Sampson, Fluor construction manager. He testified that he interrupted a meeting of managers and that someone told him that the people in the meeting were trying to identify the caller. Sampson testified that he did not hear the tape, but he provided substantial detail about the persons who were in the meeting. Assuming that Sampson's testimony was credible, the testimony provided substantial circumstantial evidence of the bad act in question. Any doubts about the witness's credibility would have gone to the weight of the evidence, rather than to its admissibility.

Id. at 448–49.

The purpose of such evidence is to show motive or intent. "Federal courts have long recognized that in the civil employment context, evidence of employer treatment of other employees is not impermissible character evidence; rather it may be admissible to show motive or intent for harassment or discharge." Id. at 445. Similarly, the Court in Brundridge held, "In the context of wrongful discharge in violation of public policy, … evidence that Fluor retaliated against other employees

for making safety complaints [was] admissible to show motive or intent." Id. at 445–46.

"The court must still evaluate whether the probative value of the evidence outweighed its potential for prejudice. Where the trial court has not balanced probative value versus prejudice on the record, the error is harmless unless the failure to do the balancing, 'within reasonable probability, materially affected the outcome of the trial.'" Id. at 446. The Court provides useful examples of facts in which the balancing results in admission of the ER 404(b) evidence.

> With regard to the 'paint fumes' testimony, Marquardt testified that she made specific safety complaints 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. She further testified that her supervisors treated her disrespectfully and eventually passed her up for a promotion based on her safety complaints. This evidence is highly probative of Fluor's intent to retaliate against those who raised safety concerns.
>
> . . . .
>
> The 'Jacobs ethics' comment is similarly probative. Marquardt testified that she met with Jacobs to address the fact that the paint fumes concern had not been resolved, and he told her 'not to sacrifice [her] career for [her] ethics.' … This statement tends to prove that raising safety concerns would jeopardize her employment. Had the trial court weighed the 'paint fumes' and 'Jacobs ethics' evidence, it would have concluded that the evidence was more probative than prejudicial. The trial court's failure to do the balancing was therefore harmless error.

164 Wn.2d at 446.

J. Fowler's testimony was properly admitted and not an abuse of discretion

Though not required under Brundridge, Judge Federspiel held an evidentiary hearing prior to ruling on the admission of Sandra Fowler's testimony. See RP 660, 675-717. The court found Ms. Fowler to be a credible witness based on observing her answers and demeanor in response to direct examination and cross-examination. RP 773; CP 11073. The court also found that Ms. Fowler's testimony about complaints of gender discrimination and the resulting retaliation were established by "substantial evidence." CP 11203-04. In the Order and Findings on the ER 404(b) evidence, the court found as follows:

> Corporate culture comes through its key managers—those at the top. So, regardless of whether the configuration of the individuals compromising the management is identical as between the plaintiff and Ms. Fowler, it is MSA and its corporate culture, and the cumulative effect of that corporate culture its key managers manifest upon their subordinates that is relevant, probative evidence.

CP 11204, ¶5.

The trial court found that the evidence's probative value for purposes of showing "motive, plan, intent and/or a pretext for discrimination" outweighed any prejudice, because the managers involved "were roughly the same high-level MSA core management team … as were present in the adverse actions allegedly taken against the plaintiff"

[*i.e.*, Frank Armijo, Dave Ruscitto and Todd Beyers, see, e.g., RP 11093, ¶29]. CP 11204.

This Court may affirm on any basis and should hold that the admission of Sandra Fowler's ER 404(b) testimony was also not an abuse of discretion owing, in part, to MSA's "withholding [of] records related to the gender bias and retaliation complaints of Sandra Fowler," which the trial court described as "egregious and in violation of CR 26(g)." CP 11110. Appellant's improper efforts at hiding Fowler's complaints reveal the importance of her testimony. It is hard to imagine how facts about CEO Armijo and COO Ruscitto calling a female subordinate a "man-hater," leading her to report the matter to VP Todd Beyers, who "failed to adequately address Fowler's complaint of 'gender-bias' when reported to him," would not at least be deemed relevant to a gender discrimination claim against the same managers. See CP 11097, 11084, CP 11098. Ms. Fowler's experience was also relevant because General Counsel Bensussen admits he heard Ms. Fowler "saying things to [him] about gender-bias in the Company, particularly about Frank [Armijo] and Dave [Ruscitto]," and there was no record that Bensussen took any action on the complaints of gender-bias against Armijo and Ruscitto. CP 11098.

K. Other Comparator Testimony Was Properly Admitted Under ER 404(b)

> There are at least two different circumstances in which the failure to weigh prejudice on the record under ER 404(b) is harmless error. The first is when the record is sufficient for the reviewing court to determine that the trial court, if it had considered the relative weight of probative value and prejudice, would still have admitted the evidence. …
> The second circumstance is when, considering the untainted evidence, the appellate court concludes the result would have been the same even if the trial court had not admitted the evidence.

State v. Carleton, 82 Wn. App. 680, 686–87, 919 P.2d 128 (1996).

Both circumstances apply here. The first circumstance applies, because in advance of ruling on MSA's motion in limine concerning 85 exhibits, the trial court was briefed by the parties on what ER 404(b) requires and the trial judge indicated he would be reviewing the exhibits to determine if he found them relevant to proving motive or intent. RP 943-44; accord CP 11076 ("The Court took several days to read each and rule on every identified exhibit" in response to MSA's ER 404(b) objections.). The court at trial spoke to some of the exhibits cited by MSA and noted, for example, that Atwood showing that male employees received disparate discipline related to their absences had relevance, and that while the court was "not sure that [ER] 404(b) is the accurate analysis" for considering MSA's more favorable treatment of men, the evidence would not be excluded under ER 404(b). RP 979-80.

Other exhibits the trial court ruled were "other bad acts too remotely situated from Ms. Atwood's claim." RP 981. The court continued with its ruling, "even if they were—the prejudicial value of those would out strip the relevance and just being offered for painting MSA as a bad actor." RP 981. From the record, it is clear that had the trial considered the relative probative value and weight of all the contested exhibits individually on the record, the court still would have admitted the evidence. The evidentiary rulings of the trial court were well within its discretion and should be given deference, since the trial court is best situated "to assess the admissibility of the evidence in the context of the particular case before it". Sprint/United Mgmt. Co., 552 U.S. at 387. For example, Mr. Boynton was a Vice President who engaged in serious misconduct under MSA policies, but under Armijo, Boynton as not fired. See Ex. 400, RP 3325-28. Another manager, Mr. Turner was given a two-week disciplinary suspension for "ongoing negative and demeaning comments that directly affected the relationship with the DOE client and MSA employees." Ex. 140, RP 3343-45. The allegations were similar to the charges made against Ms. Atwood, see RP 2963, but under Armijo, Mr. Turner was not fired. Ex. 140. The trial court did not manifestly abuse its discretion in admitting Exhibits 400 and 140. Thus, there is no error regarding comparators, and even if there were, the error would be

harmless under the first scenario discussed in Carleton, 82 Wn. App. at 686-87. The alleged errors are also harmless, since the allegedly "tainted" evidence is unlikely to have affected the outcome, considering "the untainted evidence" of pretext and temporal proximity between Young's comment to DeVere and Atwood's firing. Id.

Appellants' string citation and limited discussion of "exhibits 68, 69, 73, 82, 84, 86-90" at page 40 of their brief should be disregarded, first, because MSA cites no instance where this evidence was shown to the jury; and second, because Appellants do not assign error to any ruling on these exhibits. Cf. Br. at 40 with id. at 2, ¶5, and 3 (¶3). Third, MSA's counsel affirmed that MSA was "satisfied" with the court's proposal to admit the exhibits for "illustrative" purposes. See RP 3178-80. Fourth, the court's ruling was not an abuse of discretion. MSA's arguments went to the weight of the evidence, not admissibility. MSA could still argue that a particular employee's more favorable treatment may have been distinguishable owing to union contract rights, if such rights applied.

MSA's objection to Ex. 163 is unclear since its brief acknowledges the exhibit's "obvious purpose." Br., at 44 ("purpose of this inquiry was to demonstrate that MSA used progressive discipline for non-union members [like Mary Todd Robertson], but not for Atwood."); accord RP 3340-42 (showing that others who engaged in "serious misconduct" could receive

letters of reprimand at the discretion of management). In Johnson v. Dep't of Soc. & Health Servs., 80 Wn. App. 212, 227, 907 P.2d 1223 (1996), the Court of Appeals stated, "[o]ne test for pretext is whether (1) an employee outside the protected class (2) committed acts of comparable seriousness (3) but was not demoted or similarly disciplined." Here, although the better treated person was a woman, Ms. Robertson remained a useful comparator since Atwood alleged retaliation and there was no evidence that Ms. Robertson engaged in protected activities like Ms. Atwood.

Appellants at page 34 of their brief cite "Coletti v. Cudd Pressure Control, 165 F.3d 767, 777 (1999)," which they repeatedly reference as an opinion by the "Ninth Circuit." See id. In fact, Coletti is a Tenth Circuit decision, and it should be considered bad law following the U.S. Supreme Court's landmark decision in Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 128 S. Ct. 1140, 170 L. Ed. 2d 1 (2008) discussed *supra*.

L. The Rulings Were Proper So No Cumulative Effect Argument Applies

The trial court did not err, and even if it had, the outcome would be no different based on the strong evidence of pretext and temporal proximity between Mr. Young's comment to DeVere and Atwood's firing.

M. The Use Of WPI 330.82 Was Proper

"Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." Blaney v. Int'l Ass'n of Machinists And Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 210, 87 P.3d 757 (2004). Appellants allege WPI 330.82 was improperly given. It provides:

> In calculating damages for future wage loss [front pay], 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] [fully recover from the continuing effects of the discrimination], decreased by any projected future earnings [from another employer].

This is Jury Instruction No. 17, which was properly given to the jury. See Appendix. The note on use states, "Use of the term 'retire' may not be appropriate in all cases. This instruction may have to be modified if there is proof in the case that the business was or will be sold."

Here, Ms. Atwood was 58 at the time of her termination, and almost 63 at the time of trial. See Ex. 348 at Bates# 5; RP 2115. The appellant argues, "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." Br., at 48. This statement is hardly conclusive evidence, and the jury necessarily rejected Fountaine's

opinions when it found that MSA did not prove Atwood that failed to mitigate her damages when she was unable to find comparable employment **four years** after MSA terminated her. Compare CP 11042 (Verdict - Question No. 7); with CP 11064 (Instruction No. 18, requiring that "there were openings in comparable positions available for Ms. Atwood" and "Ms. Atwood failed to use reasonable diligence in seeking those openings"). Atwood testified that she intended to stay working into the future on the contract at Hanford so that she could stay on the same benefit plan, RP 2937, and there was testimony that typically "the same workers" working on a contract at Hanford will be "mapped over" to the new contract whenever a new company wins the contract. RP 3962.

The jury instruction given in this case parallels the language of the instruction given in Brundridge—not Blaney. Compare Brundridge 164 Wn.2d at 454-55 ("trial court instructed the jury that it should calculate front pay from the day of its decision 'until the time the plaintiff may reasonably be expected to **retire or fully recover from the continuing effects** of the wrongful discharge."), with Instruction No. 17 (Appendix at CP 11063). In contrast, the instruction used in Blaney left the jury without "any substantive discretion in arriving at its front pay award." Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160, 114 Wn. App. 80, 89, 55 P.3d 1208,(2002), aff'd in relevant part, 151 Wn. 2d 203,

87 P.3d 757 (2004).

As in Brundridge, the trial court did not abuse its discretion in giving Instruction No. 17.

> The jury awarded Hodgin front pay, and Fluor argues that the award was improper because Hodgin would have retired by the time of the 2005 trial. Hodgin testified, "Who knows how many years I would have worked [at Fluor]?" 11 VRP (Aug. 1, 2005) at 1498. He later testified, "If I would have stayed at Hanford, no telling how long I would have stayed working. That was a very nice, easy job for an old man like me." *Id.* at 1537. He then stated that he thought he would have worked until 2003 or 2004 if his wife had also stayed on at Fluor. *Id.* The jury could have reasonably inferred that Hodgin might work beyond his 2004 estimate.

164 Wn.2d at 455.

> The jury awarded Cable $230,000 in front pay. Fluor contends that Cable is entitled to only one year of front pay, the value of which the pipe fitters' expert calculated at $76,665. Cable was retired at the time of trial, but he testified that he would have continued to work at Hanford "until at least [age] 62." 12 VRP (Aug. 2, 2005) at 1675. In quick succession, Cable answered the question, "So you would have gone through 2006?" by saying, "The end of 2006." *Id.* The jury could have reasonably believed that "the end of 2006" referred to the time he would turn 62, but that it was still modified by "at least" from his first answer. The jury's award was equivalent to three years' salary and more than $100,000 less than the pipe fitters' expert's figure. It was within the range of the evidence under this interpretation. *456 The trial court did not abuse its discretion in denying the CR 59 motion with regard to Cable.

164 Wn. 2d at 455–56. Dr. Torelli made his calculations based on the assumption that Ms. Atwood would stay until retirement. RP 2113-14, 2121. This was a proper approach.

Finally, "courts will presume for the purposes of awarding relief that an illegally discharged employee would have continued working for the employer until he or she reached normal retirement age, unless the employer provides evidence to the contrary." Brundridge, 164 Wn.2d at 456, citing, Xieng v. Peoples Nat'l Bank of Wash., 120 Wn.2d 512, 531, 844 P.2d 389 (1993). "The employer bears the burden of showing that the employee would not have been retained." Id. at 456. MSA and Young have failed in their burden.

Even if the giving of Instruction No. 17 was error, it was harmless. The Supreme Court in Blaney affirmed the Court of Appeals holding that the giving of the front pay instruction was harmless error, since whether the plaintiff "would have either resigned or been terminated before retirement [was] purely speculative"; and "there [was] no evidence of any steps being taken to terminate her employment." 114 Wn. App. at 91, aff'd in relevant part, 151 Wn.2d at 212. The same is true here. Notably, the expert in Blaney had calculated the plaintiff's lost future wages using an assumption that the plaintiff would have worked for the District for a period of time nearly twice the length of the period Dr. Torelli used for his calculation of Ms. Atwood's lost future wages. See Blaney, 114 Wn. App. At 89–90 (stating expert calculated future wages based on "her age at the time of trial (50) until the estimated retirement age of 62.8").

N. The motion for a new trial on damages was properly decided

Appellants' brief only addresses the motion for new trial as it relates to the verdict on damages, having abandoned all arguments made below based on an alleged insufficiency of evidence supporting the bases for liability. The trial court did not abuse its discretion in denying the motion for new trial or remittitur.

First, CR 59(a)(2) provided no basis for a new trial. As the trial court found, counsel's closing arguments were not improper; and had counsel for MSA believed it was an improper closing, "counsel should have interposed an objection," which "counsel admittedly did not." CP 10983. Thus, MSA failed to preserve the issue for appeal. CP 10983-85 (citing, e.g., Joyce v. State, Dep't of Corr., 116 Wn. App. 569, 603, 75 P.3d 548, 566 (2003) (in appeal claiming $22 million verdict was excessive, court declined to review allegedly improper closing owing to failure to object), aff'd in part, rev'd on other grounds, 155 Wn.2d 306 (2005)); see also Collins v. Clark Cty. Fire Dist. No. 5, 155 Wn. App. 48, 96-97, 231 P.3d 1211 (2010) ("Defendants … argue[d], based on [counsel's] comments during closing argument, that the jury based its verdict on passion and prejudice," but failed to "properly preserve this issue for review by timely objection and request for curative instruction").

Second, the defendants claim that the size of the verdict is a basis

for remittitur or a new trial, which would contravene Washington State Constitutional requirements; those requirements are clearly stated in Bunch v. King Cty. Dep't of Youth Servs., 155 Wn.2d 165, 183, 116 P.3d 381 (2005) (verdict of a jury does not carry its own death warrant solely by reason of its size). Appellants' comparison to the verdict in Brundridge is of no use, since "it is improper to assess the amount of a verdict based upon comparisons with verdicts in other cases." Adcox, 123 Wn.2d at 33. The emotional harm damages were not outside the scope of the evidence, particularly given Dr. Brown and Ms. Atwood's testimony concerning the severe and ongoing damage to Ms. Atwood caused by MSA.

MSA's failure to assign error to the jury's finding that MSA failed to prevail on its affirmative defense, and the lack of a reasoned argument in its brief addressing the defense, should be treated as an abandonment of the issue on appeal.[16] The jury, having found that Ms. Atwood did not fail to mitigate her damages—despite having failed to find comparable employment four (4) years after her termination—could reasonably have inferred that the "continuing effects of the discrimination and/or retaliation" would last seven (7) more years until age 70.

[16] Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290, 292 (1998); see also Oberg v. Dep't of Nat. Res., 114 Wn.2d 278, 280, 787 P.2d 918 (1990) ("DNR does not challenge the sufficiency of the evidence to support the specific findings of negligence…. We necessarily assume, because it is now beyond challenge, that there was sufficient evidence that DNR was negligent…").

MSA also abandons its claim that Plaintiff's closing argument misstated the law on mitigation—an argument the trial court rejected. CP 10988; but see CP 109877-88 (finding that Mr. Fountaine, MSA's expert, in contrast, testified that Atwood "should have taken the kind of job that the law says is **not** required," working minimum wage), quoting RP 3089.

The trial court did not abuse its discretion in denying the motion for new trial on damages. See CP 10990. The Court "will not disturb a jury's verdict on damages if it is within the range of the evidence." Burnside v. Simpson Paper Co., 66 Wn. App. 510, 530–31, 832 P.2d 537 (1992), aff'd, 123 Wn. 2d 93, 864 P.2d 937 (1994); accord Wooldridge v. Woolett, 96 Wn.2d 659, 668, 638 P.2d 566 (1981) ("If the damages are within the range of evidence they will not be found to have been motivated by passion or prejudice."). The verdict on economic damages was consistent with the figures used by Atwood's expert. CP 10990. "The jury was entitled to accept his testimony, and those amounts are therefore supported by the evidence." Burnside, 66 Wn. App. at 530–31.

ATTORNEY FEES AND COSTS

Respondent requests attorney fees and costs for this appeal under RCW 49.48.030 and RCW 49.60.030(2). See Bunch, 155 Wn.2d at 184, n.10; Gaglidari v. Denny's Restaurants, Inc., 117 Wn.2d 426, 451 (1991).

CONCLUSION

For the reasons stated, the Court should find no error in the issues raised by the appellants. If any error is found, the Court should hold it was harmless and unlikely, within reasonable probability, to have materially affected the outcome. The Court should also hold that the trial court erred in failing to instruct the jury on the "perception" theory of retaliation that Ms. Atwood plead in her complaint and that it is error for the trial court to not instruct the jury on the permissible inference that may be drawn from evidence of pretext when such an instruction is requested.

The verdict of the jury and judgment of the trial court should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 29th day of January, 2019.

THE SHERIDAN LAW FIRM, P.S.

By:
s/ John P. Sheridan
John P. Sheridan, WSBA # 21473
Mark W. Rose, WSBA # 41916

DECLARATION OF SERVICE

Mark Rose state and declares as follows:

On January 29, 2019 I served the foregoing pleading on the following attorneys via the Court's electronic filing application:

Kenneth W. Masters
Shelby R. Frost Lemmel
241 Madison Avenue North
Bainbridge Island, WA 98110
ken@appeal-law.com
Shelby@appeal-law.com

Denise L. Ashbaugh
1218 Third Ave., Suite 2100
Seattle, WA 98101
dashbaugh@aretelaw.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of January, 2019.

s/ Mark Rose
Mark Rose, WSBA # 41916

APPENDIX

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. 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. 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. 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.

Honorable Douglas L. Federspiel
Trial Date: September 11, 2017

SUPERIOR COURT OF WASHINGTON
FOR BENTON COUNTY

JULIE M. ATWOOD,

Plaintiff,

vs.

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

Defendants.

Case No.: 15-2-01914-4

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS (with citations) and PLAINTIFF' [PROPOSED] SPECIAL VERDICT FORM

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS
(with citations)

Attached are the Plaintiff's proposed jury instructions with citations.

Dated this 5th day of August, 2017, in Seattle, Washington.

THE SHERIDAN LAW FIRM, P.S.

John P. Sheridan, WSBA # 21473
Attorney for Plaintiff

THE SHERIDAN LAW FIRM, P.S.
Attorneys at Law
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
Tel: 206-381-5949 Fax: 206-447-9206

INSTRUCTION NO._____

(PROPOSED) INSTRUCTION NO. 15

You may find that the plaintiff's gender or retaliation was a substantial factor in the defendant's decision to terminate the plaintiff if it has been proved that the defendant's stated reasons for the decision is not the real reasons, but is a pretext to hide gender discrimination or retaliation.

Farah v. Hertz Transporting, Inc., No. 73268-4-I, 2016 WL 5719836, at *4 (Wash. Ct. App. Oct. 3, 2016) (while the instruction might be appropriate, the arguments in its favor are not compelling enough to hold that it is an abuse of discretion to refuse to give the instruction). 8th Circuit's Model Jury Instruction 5.20. http://juryinstructions.ca8.uscourts.gov/civil_instructions.htm; Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002) ("hold[ing] that in cases such as this, a trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may—but need not—infer that the employer's true motive was discriminatory"; and that the refusal to give an instruction identical to the 8th Circuit Court of Appeals' Model Instruction was not harmless error); *discussing with approval* Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280 (3rd Cir. 1998) ("It is difficult to understand what end is served by reversing the grant of summary judgment for the employer on the ground that the jury is entitled to infer discrimination from pretext ... if the jurors are never informed that they may do so.") *and* Cabrera v. Jakabovitz, 24 F.3d 372, 382 (2nd Cir.), *cert. denied,* 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994). The Supreme Court of Iowa has likewise held that "[i]f the plaintiff ... presents evidence of pretext, failure to provide a pretext instruction will result in prejudice." Deboom v. Raining Rose, Inc., 772 N.W.2d 1, 11 (Iowa 2009).

THE SHERIDAN LAW FIRM, P.S.
Attorneys at Law
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
Tel: 206-381-5949 Fax: 206-447-9206

INSTRUCTION NO._____

(PROPOSED) INSTRUCTION NO. 17

Under the Washington Law Against Discrimination ("WLAD"), 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.

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

(1) That the plaintiff was opposing, or perceived to be opposing, what she reasonably believed to be discrimination on the basis of gender; and

(2) That a substantial factor in termination was the plaintiff's opposition, or perceived opposition, to what she reasonably believed to be discrimination.

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 that plaintiff on her retaliation claim. On the other hand, if any one of these propositions has not been proved, your verdict should be for MSA on this claim.

The plaintiff does not have to prove that opposition, or perceived opposition, was the only factor or the main factor in MSA's decision.

WPI 330.05 (6th ed.) (added "perceived opposition")

THE SHERIDAN LAW FIRM, P.S.
Attorneys at Law
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
Tel: 206-381-5949 Fax: 206-447-9206

INSTRUCTION NO. _____

(PROPOSED) INSTRUCTION NO. 27

The plaintiff asserts she was discharged in violation of public policy. An additional public policy at issue here is a policy against managers retaliating against persons who report allegations of gender discrimination. 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 was perceived by Defendant to have reported allegations that Mr. Young engaged in gender discrimination; and

(2) that the perception that plaintiff reported Mr. Young for alleged gender discrimination was a substantial factor in employer's decision to discharge plaintiff.

Rickman v. Premera Blue Cross, 184 Wash. 2d 300, 314, 358 P.3d 1153, 1160 (2015), *as amended* (Nov. 23, 2015), citing, *Wilmot v. Kaiser Aluminum & Chem. Corp.,* 118 Wash. 2d 46, 71-71, 821 P.2d 18, 30 (1991) (we conclude that the substantial factor test is preferable) (citations and quotation marks omitted; emphasis added); *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 274, 358 P.3d 1139, 1141 (2015); *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 359 P.3d 746 (2015).

THE SHERIDAN LAW FIRM, P.S.
Attorneys at Law
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
Tel: 206-381-5949 Fax: 206-447-9206