The Honorable Douglas L. Federspiel

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

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW, A NEW TRIAL, OR REMITTITUR

Trial Date: September 11, 2017

Hearing Date: December 21, 2017, 1:30 p.m.

I. INTRODUCTION

Having had their day in court, the defendants now want a "do over" without having a legal or factual basis. In support of their motion, the defendants state the facts in the light most favorable to the defendants, and omit important facts, which is contrary to the standard of review for these motions. Having misstated the facts, the defendants then seek a new trial or remittitur on three grounds. First, the defendants claim that the size 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). Second, the defendants claim that plaintiff's closing

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argument, as it related to mitigation, is a basis for remittitur or a new trial, because it was allegedly an inaccurate statement of the law, when in fact the closing was supported by the law, and in any case, was only the lawyer's argument, and not binding on the jury. Third, the defendants argue that a new trial should be had because the jury did not believe their expert's testimony on mitigation, but as with all of their allegations, the unopposed jury instruction addressed their concern, and eliminate any question as to the validity of their arguments.

Of note in this motion, the defendants do not challenge any of the Court's jury instructions. Nor do the defendants challenge the jury's verdicts on plaintiff's retaliation claims: the common law wrongful discharge in violation of public policy claim (the public policy being the False Claims Act) and the retaliation claim under RCW 49.60.210 (WLAD). Nor does MSA Vice President Steve Young challenge the jury's verdict finding that he aided and abetted MSA's retaliation under the WLAD. The only claims challenged on a sufficiency of the evidence theory are the discrimination claim under the WLAD in which Ms. Atwood proved that gender was a substantial factor in MSA's decision to coerce her resignation in lieu of termination, and that MSA Vice President Steve Young is liable for aiding and abetting the commission of that retaliation. In each case, the defendants omit the facts supporting the claims.

The motion has no basis in law or fact, and simply delays the progress of the appeal. Plaintiff asks that the Court deny the motion.

II. STATEMENT OF FACTS

A. MSA Was Protecting an Open Secret

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. She

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was an Ecology regulator at Hanford, and had experience working there going back to the days when Hanford was still producing plutonium. After Ecology, she worked for Hanford, and non-Hanford companies. Her employment track was a record of promotions and increased job responsibilities. See trial testimony of Rick Morck, Mike Spillane, and Mike Hughes.[1] She joined MSA in 2010 as a program manager and was evaluated as a top performer by her MSA managers and her customer, which was the Department of Energy (DOE). See Trial Exhibits 5, 6, and 7 (Atwood performance evaluations), and trial testimony of John Santo, Greg Jones, Dough Shoop, and Jon Peschong.

For most of his career, Steve Young worked as a small business owner providing consulting services in a one-person office. But after he became Mayor of Kennewick, he was recruited by MSA CEO Frank Armijo to be a Vice President reporting directly to Armijo. Mr. Young joined MSA in 2012. He was paid over $200,000 a year by U.S. taxpayers as Vice President of MSA. He billed taxpayers as though he worked a 40-hour week, but produced no time sheets supporting that contention until 2015. He admitted he worked 16-20 hours every week on mayor-related business. He admitted he used his DOE email account to do mayor-related business. He admitted he kept and displayed his mayor-related appointments on his DOE calendar. He admitted he did mayor-related business in his DOE office, on his DOE computer, during the work day. Young's use of company time to work on mayor-related business was an open secret at MSA and DOE. Young was perceived as being important, and he explained to the jury just how important, and indispensable, he was. Young testified that being mayor advantaged MSA and DOE:

[1] As stated by the defendant, the complete trial transcript has not been ordered as yet by the defendant, although some portions of the transcript were completed.

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- "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."

Ms. Atwood was forced to resign or be fired in September 2013. She was fired three days after she was interviewed by two internal investigators, who reported to MSA vice presidents that Julie Atwood had stated that Young created a hostile work environment, that he treated her differently, and that he used work time to do mayor-related business. She told the jury:

> My complaints [to the investigators] included that the work place was a hostile work environment based on gender and that Mr. Young had targeted me and discriminated against me as a woman. I reported that I believed PFM did have a hostile work environment based on gender. I reported that Steve Young treated women differently and that from my own experience he treated me differently and poorly.

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 suggested that Santos transfer out of his organization, but with Ms. Atwood, he orchestrated her termination, and then denied even knowing that she was being terminated.

B. 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. Trial Exhibit 95.

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The email depicted locally named "Barbie" images with offensive comments; there were no such depiction of "Ken."

Ms. Atwood also testified at trial to 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, and she testified to Young's demeaning comments about DOE AMMS Manager Karen Flynn's abilities, saying that the only reason she had her job was because of her "relationship" with DOE-RL Deputy Manager Doug Shoop and that she was incompetent (this was a sexualized reference to her sleeping her way to the top). Young made no similar comments about any males.

C. Young Fit Well Into The Discriminatory Culture Created By Armijo

General Counsel Sandra Fowler testified that she was successful under MSA CEO Figueroa, and after leaving MSA after Armijo's tenure, she was successful again as General Counsel at Bechtel. She described the anti-women culture that permeated MSA under Armijo. She was verbally attacked and demeaned by Armijo. Armijo hired Stan Bensussen and he displaced Fowler—taking over most of her job duties—and then Bensussen demeaned her by stating that she should kiss the ground Armijo walks on and called her a man hater without repercussions to Bensussen.

Under Armijo, good performance did not matter—gender trumped performance. Ms. Fowler was displaced despite her good performance, while 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.

Armijo also hired Chris Jensen who displaced Sally Landsen—a CEO direct report under Figueroa. Ms. Fowler testified that under Armijo, the "third floor," which housed the

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MSA upper management, became a good old boys club, with only one woman remaining who was the ex-wife of another "friend of Frank."

Armijo was ultimately responsible for Ms. Atwood's termination for nebulous allegations of misconduct that were never articulated during her employment, but which included false allegations of time card fraud, although she was vindicated of those allegations in 2012 and 2013.

Neither MSA nor Young gave contemporaneous reasons for Ms. Atwood's 2013 termination. In pre-trial discovery, and later at trial, MSA relied on Ms. Ashbaugh's 2015 letter to the EEOC, to provide the alleged reasons for termination:

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.

Trial Exhibit 16 at Bates #0040. At trial, each of these stale 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 Trial Exhibit 41 (serious misconduct defined).

In 2010, under Armijo, HR Manager Todd Beyers 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." Trial Exhibit 140. This is a serious offense under MSA policies, but under Armijo, he was not fired.

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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 Trial Exhibit 400.

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 got a two-week suspension. Trial Exhibit 83. The disparate treatment is astounding.

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.

D. From the Beginning, Young Worked to Hurt Ms. Atwood's Credibility and To Sabotage Her Career

There was uncontradicted evidence at trial that Ms. Atwood performed her job well and that she was a valuable asset to her customer, which was DOE. Yet, from the time of her hire, Young began to secretly paper Ms. Atwood's record with negative allegations.. See Trial Testimony of Shoop, Jones, Dowell, and Peschong. Thus, 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 remove Ms. Atwood from her position. He used other Armijo direct reports and his minions (Legler and Delannoy) to attack Ms. Atwood behind her back.

In 2012, in connection with an investigation following an anonymous complaint,

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Armijo Direct Report Jensen told DOE managers that Ms. Atwood was being investigated for time card fraud—a false allegation that would not typically be revealed to DOE unless proven. Trial Exhibit. 11 (10/2/12 entry in Record of Events). During that 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. These were false allegations. Minion Morris Legler told Robbins that Atwood is frequently not where she says she will be. Ms. Atwood was vindicated by the investigation, but the effort to undermine her and to hurt her reputation is obvious. Notably, Ms. Atwood was not told about the allegations, nor subjected to progressive discipline, which would have been the result if any of the allegations had had merit.

In 2013, in connection with another investigation following another anonymous complaint, Armijo Direct Report Ruscitto told DOE managers that Ms. Atwood was being investigated for time card fraud—a false allegation that would not typically be revealed to DOE unless proven. This time, Young was not interviewed by the investigators at the direction of Armijo direct reports Beyers and Jensen. The investigation cleared Ms. Atwood of all allegations, but she was terminated anyway.

At trial, contrary to Young's sworn testimony that he played no role in Ms. Atwood's termination, other witnesses revealed that Young met secretly with Ruscitto, Beyers, and Jensen, and at the meeting they reviewed evidence collected by Young Minion Morris Legler about Ms. Atwood's alleged failure to be at work. On rebuttal plaintiff called Legler who admitted he did whatever Young told him to do, and that he documented Ms. Atwood's alleged undocumented absences as follows: when he walked by her office, if she wasn't in her office he

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would document her as absent. He did not try to call or email Ms. Atwood claiming he didn't have her number, and he didn't try to text or email Ms. Atwood either. The documentation was bogus.

Legler's list of Atwood absences was entered into a chart that was presented at the secret meeting, but withheld from the investigators. The bogus chart appeared again in Ms. Ashbaugh's letter to the EEOC without explanation as to how the data was collected, and was used as evidence supporting her termination.

Young Minion Delannoy also used the investigation to attack Ms. Atwood's character with a uniquely sexist allegation that Ms. Atwood was having sex with DOE Manager Peschong. Of course, this was also a false allegation, and so it becomes some of the additional evidence showing disparate treatment, because there was no evidence that such false and damaging rumors were used against men under Armijo.

E. Ms. Atwood Suffered Damages Proximately Caused By MSA

Plaintiff produced witnesses and exhibits in support of damages. The emotional harm damages available and the process for proving them were outlined in the Court's jury instructions. 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. No explanation was given. She could not understand how that could happen; she began to sob. She told them that it was a mistake. Beyers was unfeeling and bullying, yet it was proposed she resign in lieu of termination. Ms. Atwood worried about retirement, re-employment, and benefits, and thought that resignation may preserve them. She was so upset that she could not

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physically write the few lines that would become her resignation. Beyers had a letter drafted and gave it to Ms. Atwood to sign. 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. Then she was made to publicly push her belongings out to her car in a wheel chair, three times, crying all the way. See Atwood and John Silko Testimony. Driving home that night, she thought about driving into an oncoming truck, but decided not to, because she might harm the truck driver. 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. Trial Exhibit 280 (does not include all charts; some demonstrative charts were created at trial).

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.

In rebuttal, the defense offered the testimony of Dr. Biebeault, a psychiatrist without comparable specialized knowledge, who, unlike Dr. Brown, testified without stating that her opinions would be on a more likely than not basis. Compare resumes of Dr. Brown (Trial Exhibit 429) and Dr. Biebeault (Trial Exhibit 428). Dr. Biebeault did not examine Ms. Atwood or opine on Ms. Atwood's condition. Instead, she claimed that Dr. Brown's methodology was suspect. In fact, Dr. Biebeault's testimony was weak and ineffective.

Dr. Brown noted that Ms. Atwood suffers from intrusive thoughts—images of the last

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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.

Dr. Brown also discussed her marked physiological reaction, which means that Ms. Atwood gets so upset her gut gets hyperactive, affecting "both ends." 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.

Dr. Brown testified that Ms. Atwood tries to avoid having thoughts or feelings or being around anything that reminds her of what happened. 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. 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.

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.

Dr. Brown testified that Ms. Atwood has persistent shame. She feels badly about herself, has difficulties with concentration and had difficulties with sleep.

All of these symptoms are proximately caused by the misconduct of the defendants. They are life changing and are not bumps in the road: instead of enjoying the fruits of her hard work in her later life, Ms. Atwood has to fight nightmares and intrusive thoughts, and she must accept that she is out of the work environment and will never get back to the level she had

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achieved before the discrimination and retaliation.

F. Defendants Did Not Prove A Failure To Mitigate

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, which is the amount awarded by the jury. The defendants produced Ms. Barrick, a CPA, who disagreed with Dr. Torelli, but lacked the stature and analysis to counter his opinions.

On the mitigation issue, Ms. Atwood testified that she applied for about 50 jobs with no luck. She explained that she believed she could not find work at Hanford because she had been blacklisted. DOE managers testified that 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. He killed the program for which Ms. Atwood was in the running. 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 he select that person, he responded, "no."

In an effort to prove its affirmative defense, MSA called Mr. Fontaine who provided no comparable positions—not even one—for which Ms. Atwood could have and should have applied. He also knew nothing about Ms. Atwood's mental illness and the effects, if any, they would have on her job search. He also knew nothing about Hanford and about the importance of not being tied to time card fraud. Mr. Fontaine's opinions were not stated on a more likely than not basis, and the jury did not accept his opinions. MSA failed to prove the affirmative

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defense.

III. ARGUMENT

A. There Is Substantial Evidence To Support The Gender Claims

CR 50(a)(a) provides:

> If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.

CR 50(a). These motions may be renewed post-verdict. CR 50(b). "[A] motion for judgment notwithstanding the verdict should not be granted unless the court can say, as a matter of law, that there is neither evidence nor reasonable inference from the evidence to justify the verdict." *Simmons v. Cowlitz Cty.*, 12 Wn.2d 84, 87, 120 P.2d 479, 480 (1941).

In evaluating the evidence, "[a]ll competent evidence in the record which is favorable to the [plaintiff] we must regard as true and must give to them the benefit of every favorable inference which may reasonably be drawn from such evidence." *Id.* If "there is substantial evidence to sustain the verdict, the judgment thereon must be affirmed." *Id.* Here, plaintiff has produced substantial evidence that gender was a substantial factor in the termination and that Steve Young aided and abetted.

Washington's Law Against Discrimination provides that it is an unfair practice for any employer: "[t]o discriminate against any person in . . . [the] terms or conditions of employment" or "[t]o discharge or bar any person from employment" because of the person's

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gender. RCW 49.60.180. At trial, Atwood bears the "burden of proving discrimination to the jury." *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 492 (1993) *amended,* 122 Wn.2d 483, 865 P.2d 507 (1994). She need only show that discrimination was a **substantial factor** in her termination, and importantly, discrimination ***need not be the main factor or the only factor.*** WPI 330.01.01. "Substantial factor" is broadly defined:

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

WPI 330.01.01.

Substantial factor does ***not*** mean Atwood would have been retained "but for" her gender. *See* WPI 330.01.01; *accord Wilmot v. Kaiser Aluminum and Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991) ("[T]he plaintiff may respond to the employer's articulated reason either by showing that the reason is pretextual, *or* by showing that although the employer's stated reason is *legitimate*, the worker's [protected activity] was nevertheless a substantial factor motivating the employer to discharge the worker."); *Scrivener v. Clark Coll.,* 181 Wn.2d 439, 446–47, 334 P.3d 541 (2014) (same).

Frequently in these cases, the employer's motivation must be shown by circumstantial evidence because the employer is not likely to announce discrimination as his motive:

> Direct, 'smoking gun' evidence of discriminatory animus is rare, since "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983), and "employers infrequently announce their bad motives orally or in writing." *deLisle v. FMC Corp.,* 57 Wn. App. 79, 83, 786 P.2d 839 (1990). Consequently, it would be improper to require every plaintiff to produce "direct evidence of discriminatory intent." *Aikens,* 460 U.S. at 714 n.3, 103 S.Ct. 1478. Courts have thus repeatedly stressed that "[c]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden." *Sellsted v. Wash. Mut. Sav. Bank,* 69 Wn. App. 852, 860, 851 P.2d 716, *review denied,* 122 Wn.2d 1018, 863 P.2d 1352 (1993).

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Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 179-80, 23 P.3d 440, 445 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006).

Circumstantial evidence is just as relevant, powerful, and important as direct evidence, and is given equal weight under the law. The Washington Patterned Jury Instructions provide, in part, that, "the law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other." WPI 1.03.

Plaintiff's "[p]roof of different treatment by way of comparator evidence is relevant and admissible but not required." *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 33, 244 P.3d 438, 446 (2010); *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."), *quoting International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335, n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977); *see also Brundridge v. Fluor Federal Servs., Inc.*, 164 Wn.2d 432, 444-46, 191 P.3d 879 (2008) ("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).

The jury may also consider the gender-based comments of Steve Young and other top managers at MSA—even comments made outside of a decisional process or when uttered by a non-decision-maker, as they remain "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, as its "unnecessary and categorical exclusion of evidence might lead to unfair results").

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Thus, relevant circumstantial evidence of gender discrimination includes Young's "Barbie" email and comments about "mean-o-pause" pills. It also includes testimony by another woman, former General Counsel for MSA, Sandra Fowler, about how President Armijo raised his voice at Fowler in one of her initial meetings with Armijo and told Fowler to "shut up" in front of several Vice Presidents. It also includes Fowler's testimony how another executive, Stanley Bensussen, told Fowler that she "should kiss the ground they [Messrs. Armijo and Ruscitto] walk on that you still have a job." Such conduct "tending to demonstrate hostility towards a certain group is both relevant and admissible where the employer's general hostility towards that group is the true reason behind firing an employee who is a member of that group. ... [E]vidence of the employer's discriminatory attitude *in general* is relevant and admissible to prove [unlawful] discrimination. " *See Heyne v. Caruso*, 69 F.3d 1475, 1479–80 (9th Cir. 1995). While "proof of a general atmosphere of discrimination is not the equivalent of proof of discrimination against an individual," it "may add 'color' to an employer's decisionmaking process." *Ruiz* v. *Posadas de San Juan Assoc.,* 124 F.3d 243, 249 (1st Cir.1997).

Furthermore, "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Hill*, 144 Wn.2d at 184, *quoting Reeves v. Sanderson Plumbing Prods., Inc*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 747, 332 P.3d 1006 (2014) (*quoting Reeves,* 530 U.S. at 147. "[T]he trier of fact can reasonably infer from the falsity of

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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.'" *Hill*, 144 Wn.2d at 184, *quoting Reeves*, 530 U.S. at 147.

Additionally, "when [the employer's] explanations ... change over the course of an action ... [the fact-finder] may consider this as evidence that the employer's proffered explanation is pretextual." *Dumont v. City of Seattle*, 148 Wn. App. 850, 869, 200 P.3d 764, 772 (2009).

Plaintiff presented evidence from which the jury found that Defendant's stated reasons for terminating Atwood were not believable, that Defendant was "dissembling to cover up a discriminatory motive," and that Atwood's gender and protected activities were a substantial factor in MSA's actions.

Significantly, Atwood's own manager, Young, testified that any issue about her time keeping was "resolved" and "not a crisis"; that her performance was "fine"; and that MSA made a "huge mistake" in firing Atwood. MSA's EEO Officer similarly advised the VP of Human Resources, Todd Beyers, that the Chief Operating Officer leaking the fact of the investigation was discrimination, and that terminating Atwood was arguably retaliation.

The jury did not believe Young's incredible claim that he was never told "why" MSA fired Atwood; particularly where Young's colleague, Chris Jensen, testified that Young in fact made the decision with Armijo to terminate Atwood. Compare with Young's Test. (when asked, "Can you tell us why did [Atwood] leave the organization?" and Young answered under oath, "I honestly don't know").

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The jury found that MSA's 2015 explanation for terminating Atwood was unworthy of belief and more likely than not the result of an unlawful motive due to the fact that H.R. exonerated Atwood for misconduct immediately before she was fired.

The fact that Defendant must rely on **shifting explanations** for why Atwood was terminated, now citing **undocumented allegations** (which Young failed to cite in his deposition testimony) about Atwood "allegedly providing her ongoing DOE client with confidential information prematurely," is also relevant circumstantial evidence of unlawful motive. *See Griffith v. Schnitzer Steel Industries, Inc.,* 128 Wn. App. 438, 450, 115 P.3d 1065 (2005 ("An employer's "lack of documentation ... may be circumstantial evidence that the proffered ... justifications were fabricated post hoc."); *Dumont*, 148 Wn. App. at 869 (evidence the explanations "change over the course of an action" is evidence Defendant's explanation is pretextual).

The fact that VP Todd Beyers, who presented Atwood with the termination action, gave a male manager accused of comparably serious misconduct a two-week suspension, yet coerced Atwood to resign in lieu of termination, also supports finding that Atwood's gender or protected activity was a substantial factor in her termination. *See, e.g., Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. at 33; *Johnson v. DSHS,* 80 Wn. App. at 227, n. 20.

MSA is liable for gender discrimination. Young is liable for aiding and abetting.

> It is unlawful for any person to aid, abet, encourage, or incite the commission of discrimination or retaliation on the basis of gender.
>
> If you find that MSA engaged in discriminatory or retaliatory conduct against Ms. Atwood, then Ms. Atwood has the burden of proving by a preponderance of the evidence that Steve Young participated or engaged in some conduct that aided, abetted, encouraged or incited MSA' s discriminatory or retaliatory conduct against Ms. Atwood. Mere knowledge by Mr. Young that discrimination or retaliation occurred is insufficient to meet Ms. Atwood's

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> burden on this claim. Rather, Ms. Atwood has the burden of proving by a preponderance of the evidence that Mr. Young actually participated in the discriminatory or retaliatory conduct for the purpose of discriminating or retaliating against her.
>
> If you find that Steve Young engaged in conduct that aided, abetted, encouraged, or incited the commission of discrimination or retaliation by MSA owing to gender, or acted to attempt to obstruct or prevent any other person from complying with Washington Law as it relates to gender discrimination or retaliation, you should find for Ms. Atwood and against Steve Young holding him liable for aiding and abetting.

JI #11. Young was the mastermind of the discrimination. He began working against Ms. Atwood soon after he was hired. He used his minions to collect and spread false information about her. He also made false statements to Wendy Robbins about her. He participated in meetings with managers to pass on false information to provoke her termination, and he misrepresented his role. There is substantial evidence to support this claim.

B. Despite The Defendants' Offensive and Sexist Closing Argument, There Is No Evidence That The Jury Acted With Passion And Prejudice

Granted that Ms. Ashbaugh's closing argument saying that Ms. Atwood's success was based, not on her knowledge, ability, experience, and work ethic, but instead on her "cozying up to men with power," was offensive and sexist, and turned out to be a losing argument, but the offensiveness and sexist nature of Ms. Ashbaugh's argument is not evidence that the jury acted with passion and prejudice in assessing damages. The defendants do not claim (and could not claim) that Ms. Ashbaugh use of an offensive and sexist argument engendered passion and prejudice in the jury. Nor do the defendants allege that plaintiff's closing argument engendered passion and prejudice (except for the conflated and misleading argument which is addressed below); or that the Court's statements to the jury engendered passion and prejudice;

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or that the jury instructions engendered passion and prejudice. The defendants point to no facts supporting their claim of "passion and prejudice" other than the size of the verdict, which is supported by the evidence.

C. The Defendants Conflate A Liability Argument With A Damage Argument In An Attempt To Support Their "Passion And Prejudice" Claim

In yet another misleading argument to the Court, the defendants heavily edit a portion of plaintiff's closing argument, which is about liability on the discrimination claim, to make it seem as though the argument is about damages and punishing MSA. This is what the defendants wrote:

> The jury verdict unquestionably reflected an animosity toward Defendants that is not supported by the evidence presented, and can only be explained by passion and prejudice. In this regard, the damages speak for themselves: economic damages - $2.1 million; emotional distress damages - $ 6 million. Washington State does not allow punitive damages for Ms. Atwood's claims, but there can be no question that the jury's award was punitive. See *Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572,577, 919 P.2d 589 (1996). Indeed, Plaintiff's counsel improperly encouraged the jury to punish MSA. As he stated in closing arguments, "**We have to call them [Defendants] out or it won't stop .... Our goal is to eradicate discrimination. So that's why this claim is still here.**" Ashbaugh Decl. Ex. L (Plaintiffs closing argument 10/10 Tr. 24: 11-18).

Motion at 14 (bold added).

In fact, the unedited transcript reveals that Mr. Sheridan argued only about liability and holding MSA accountable for discrimination. The unedited transcript shows that Mr. Sheridan did not encourage the jury to punish MSA. He made the opposite argument: he argued that damages would be unaffected by the finding of discrimination. He said:

> The discrimination claim. I can't, I can't substitute "Joe," so we have to deal with this and this is harder. This is a harder case for us to prove. But let me say first that you could find against Julie Atwood on her discrimination claim and it wouldn't matter for her damages. Even if you find against her on this, the two retaliation claims, the damages are the same. That's – we're already there. But we kept this claim in because it's important. And it's important to hold them

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> accountable for what really is discrimination. **We have to call them out or it won't stop**. This is – it's important that you give this a really solid look in the jury room. It doesn't make a difference to us in terms of damages, but it does make a difference in their conduct today and their conduct tomorrow. **Our goal is to eradicate discrimination. So that's why this claim is still here.**

Ashbaugh Dec., Ex. L at 24 (bold shows MSA's selective misuse of the argument). Without MSA's conflating edits, one can clearly see that the argument is about liability and accountability, not about damages—there is no improper argument seeking to punish MSA, but MSA is seeking to mislead the Court.

D. Passion And Prejudice Did Not Affect The Economic Damage Verdict, Which Was Supported By Substantial Evidence

The jury's award of $2.1 million in economic damages was supported by the expert testimony of Paul Torelli, Ph.D., the testimony of Julie Atwood, and by her financial records, which were admitted as trial exhibits. Dr. Torelli opined that her damages, under one scenario, totaled $2.1 million. He was subjected to vigorous cross-examination, and the defendants called their own witness in rebuttal.

The jury was properly instructed on damages, proximate cause, and front pay. Appendix, JI #s 14, 15, 16, and 17. The jury was also instructed on the use of expert testimony.

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

JI #5. The jury was free to accept or reject Dr. Torelli's testimony. They accepted his calculations and accepted Ms. Atwood's testimony regarding her intent to work at MSA until

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age 70, and to do consulting after that. The jury awarded no more than the amount calculated by Dr. Torelli. Just because the defendants asked for a different amount does not mean the verdict is based on passion and prejudice.

E. The Jury Was Properly Instructed On Mitigation And There Was No Error

Despite her serious mental illness, which is like PTSD, and which was proximately caused by the wrongful acts of the defendants, Ms. Atwood applied for work after her termination from MSA. Some of those applications are summarized in Trial Exhibit 257. She also applied for a job through Longenecker & Associates. The testimony indicated that the job duties were similar to her job duties while at MSA, but she was not hired, and that Steve Young friend Greg Jones scrapped the project.

The defendants proposed and got their own jury instruction on mitigation, which stated:

> The plaintiff, Julie Atwood, has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.
> To establish a failure to mitigate, Defendants have the burden of proving:
> (1) There were openings in comparable positions available for Ms. Atwood elsewhere after MSA terminated her;
> (2) Ms. Atwood failed to use reasonable care and diligence in seeking those openings; and
> (3) The amount by which damages would have been reduced if Ms. Atwood had used reasonable care and diligence in seeking those openings.
> You should take into account the characteristics of the plaintiff and the job market in evaluating the reasonableness of the plaintiff's efforts to mitigate damages.
> If you find that the defendant has proved all of the above, you should reduce your award of damages for wage loss accordingly.

JI # 18.

Mitigation is an affirmative defense. The defendant has the burden to show that the employee failed to exercise reasonable diligence to find a comparable job. Finding a job is not required. "'Once discrimination has been found, any doubts concerning back pay are to be

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resolved against the employer.' The plaintiff's failure to 'make an ongoing, concerted effort to find comparable employment' does not preclude a back pay award. *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 9 P.3d 948, 958 (2000), *quoting Burnside v. Simpson Paper*, 66 Wn. App. 510, 529-530 (1992) *affirmed on other grounds* 123 Wn.2d 93 (1994). *See also Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 300, 890 P.2d 480 (1995); *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978) ("The burden of proving a failure to mitigate damages in an employment discrimination suit is on the defendant. To satisfy this burden, defendant must establish (1) that the damage suffered by plaintiff could have been avoided, i.e. that there were suitable positions available which plaintiff could have discovered and for which he was qualified; and (2) that plaintiff failed to use reasonable care and diligence in seeking such a position"). Here, MSA presented no evidence on the first element, and the jury properly rejected the claim.

F. Passion And Prejudice Did Not Affect The Emotional Harm Damage Verdict

The Supreme Court has spoken on the standard for the Court to invade the province of the jury.

> Before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable. The verdict of a jury does not carry its own death warrant solely by reason of its size. As to the other factors from which the idea of passion and prejudice may be derived, sometimes there may occur during the trial untoward incidents of such extreme and inflammatory nature that the court's admonitions and instructions could not cure or neutralize them. As explained above, the size of this verdict is within the bounds of the evidence presented, and there is no indication of anything untoward in the proceedings that justifies setting the verdict aside based on passion and prejudice.

Bunch v. King Cty. Dep't of Youth Servs., 155 Wn.2d 165, 183, 116 P.3d 381, 391 (2005) (citations and quotation marks omitted). Here, no evidence is in the record to support a finding

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of passion or prejudice. There was nothing of an extreme and inflammatory nature, and the verdict is within the bounds of the evidence presented. In fact, the award was $2 million less than requested.

Plaintiff testified about her damages. Plaintiff's expert, Dr. Laura Brown testified that she suffers from depression, anxiety, and other specified trauma and stressor related disorder—none of these conditions pre-date her coerced resignation—which were proximately caused by the events of the last day of her employment. Atwood also testified about the non-medical damages outlined in the Washington Patterned Instructions. WPI 330.81 (6th Ed.) provides in part:

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

Id.

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Medical testimony was present but was not required to obtain noneconomic damages under the WLAD: "'The plaintiff, once having proved discrimination, is only required to offer proof of actual anguish or emotional distress in order to have those damages included in recoverable costs pursuant to RCW 49.60.'" *Bunch*, 155 Wn.2d at 180, *quoting Dean v. Municipality of Metro. Seattle–Metro,* 104 Wn.2d 627, 641, 708 P.2d 393 (1985)). The Supreme Court has held, "The distress need not be severe" for the plaintiff to recover. *Id.*

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

Here, Dr. Brown testified to Atwood's onset of mental illness caused by MSA's actions, and the ongoing challenges she will face. In addition, the non-medical emotional harm damages were proven through testimony regarding plaintiff's level of stress, humiliation, etc. on a scale of 1-10.

Emotional harm verdicts may be hundreds of thousands or a million dollars. For example, in *Hairston v. City of Seattle*, Case No. 95-2-01141-1SEA (King County), a 1995 case

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involving race discrimination, harassment, and retaliation case brought under the WLAD, a jury awarded Hairston $400,000.00 for emotional distress with no lost wages claimed. Plaintiff was employed by the City at the time of trial.

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

Atwood gave testimony to explain the impact of the discrimination and retaliation she experienced at MSA, and was heard on that issue by the jury. The verdict reached by the jury in this case does not carry its own death warrant solely by reason of its size.

IV. CONCLUSION

Atwood proved her claims by substantial evidence, and her damages were not based on passion or prejudice. The defendants' motion should be denied.

Dated this 14th day of December, 2017.

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CERTIFICATE OF SERVICE

I, Alea Carr, certify that on December 14, 2017, I served the document to which this Certificate is attached to the party listed below in the manner shown.

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