SUPERIOR COURT IN AND FOR BENTON COUNTY

STATE OF WASHINGTON

JULIE ATWOOD, Plaintiff, vs. MISSION SUPPORT ALLIANCE, LLC, & STEVE YOUNG, Defendants.	Case No.: 15-2-01914-4 ORDER ON POST-TRIAL MOTIONS

After a month-long trial, the jury returned a verdict in favor of Julie Atwood on all theories of liability[1], rejected the affirmative defense of failure to mitigate, and awarded $2.1 million dollars in economic damages accompanied by $6 million dollars in noneconomic damages as requested by Ms. Julie Atwood in her closing argument. Julie Atwood (hereinafter "Atwood"), Mission Support Alliance, LLC (hereinafter "MSA"), and Mr. Steve Young (hereinafter "Young") filed numerous post-trial motions.

[1] Gender Discrimination; Retaliation under Washington's Law Against Discrimination; and, Wrongful Discharge in Violation of Public Policy.

Oral argument on the post-trial motions was heard in person in Benton County Superior Court on Thursday, December 21, 2017. After studying all of the briefing, reviewing the proposed Findings of Fact and Conclusions of Law filed by each side, reviewing portions of the trial transcript, and entertaining the positions advanced at oral argument[2], I make the following rulings set forth below.[3]

Here are the Motions and Issues addressed by this Order:

1.) MSA's Motion for a Judgement as a Matter of Law on the cause of action for Gender Discrimination[4] pursuant to CR 50(b). – page 3

2.) MSA and Young's Motion for a New Trial pursuant to CR 59(1)[5], (2), (5), (7) & (9). – page 9

3.) MSA and Young's Motion for remittitur. – page 29

4.) MSA and Young's Motion to Revise and/or Clarify the Findings of Fact and Conclusions of Law. – page 32

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[2] The Parties brought to the Court's attention that post-trial, one of the witnesses disclosed that a juror seated on the jury may have had some knowledge of that witness which was not (to the best of the parties' recollection) disclosed during *voir dire*. This issue was not argued or decided as part of these post-trial motions, and is reserved for future motion practice and/or hearings.

[3] I have set forth the rulings in the same order as the oral arguments. No particular issue was more or less important, and the order of the issues set forth herein should not be interpreted as an order of importance.

[4] Included within this issue is Young's Motion for a Judgement as a Matter of Law regarding his liability for "aiding and abetting" the Gender Discrimination Claim.

[5] To the extent that the defendants' Motion pursuant to CR 59 (1) is based upon the issue of a juror's possible failure to disclose knowing one of the witnesses, that issue is reserved until further development of the record on that issue.

5.) MSA and Young's Motion to Strike Plaintiff's Motion for Attorney Fees and Costs as untimely pursuant to CR 54(d)(1) & (2). – page 32

6.) Atwood's Motion for Attorneys' Fees and Costs.[6] – page 35

7.) Atwood's Motion for a "Multiplier" under the loadstar analysis. – page 54

8.) Atwood's Motion for a tax penalty. – page 55

9) Atwood's Motion for an award of pre-judgment interest. – page 55

10.) Atwood's Motion to declare the Supersedes Bond deficient. – page 56

It is ORDERED, ADJUDGED AND DECREED as follows:

1.) <u>MSA's Motion for a Judgment as a Matter of Law on the cause of action for Gender Discrimination[7] pursuant to CR 50(b).</u>

MSA filed a motion for "Judgment as a Matter of Law" accompanied by the Supporting Declaration of Denise Ashbaugh, challenging Atwood's claim for Gender Discrimination pursuant to RCW Chpt. 49.60. The Motion was filed pursuant to CR 50(b). CR 50(b) provides a party the right to file a Motion for a Judgment as a Matter of Law after a jury verdict notwithstanding the fact that the identical motion was made after all of the evidence but prior to

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[6] Included within this Motion is Atwood's Motion requesting the Court to take judicial notice of opposing counsels' website. In addition, counsel for the Defendants sought an Order sealing their declarations regarding their attorney fee rates for various clients.

[7] Included within this issue is Young's Motion for a Judgement as a Matter of Law regarding his liability for "aiding and abetting" the Gender Discrimination Claim.

submission to the jury consistent with CR 50(a).[8] According to CR 50(b), if a verdict was returned by the jury, a court may respond to the Motion for a Judgment as a Matter of Law in one of three ways:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law.

The relevant portion of CR 50(a)(1) reads as follows:

> *"If, during a trial by a party, 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, . . . , that cannot under the controlling law be maintained with a favorable finding on that issue."*

Consistent with their obligation under the rule, both MSA and Young set forth lengthy recitations of some of the relevant facts from the trial which they believe establish the merits of their argument supporting their relevant positions pro and con; i.e., no substantial evidence (or lack of any evidence) of gender discrimination by MSA; and, circumstantial evidence tending to establish gender discrimination by Atwood.

MSA and Young emphasized the fact that in response to a jury question asking Atwood to describe, in her own words, why she was fired, Atwood failed to allege or even reference gender discrimination.[9] To counter Atwood's answer to the jury question referenced above,

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[8] This was the situation in the case at hand. The substance of this Motion had been filed and denied prior to being submitted to the jury.

[9] Defendants' Motion dated October 20, 2017, pp. 10-11; and Exhibit K to the Declaration of Denise Ashbaugh.

Atwood submitted her response to one of Defendants' Interrogatories in which she specifically references gender discrimination.

MSA and Young directed the Court's attention to *Bishop vs. Corporate Bus. Park*, 138 Wn.App. 443, 158 P.3d 1183 (2007). This was a case where the trial court denied a party's Motion for a Judgment as a Matter of Law and the Court of Appeals reversed under CR 50(a)(1). However, a close reading of the opinion leads this Court to believe that the opinion stands for the proposition that the trial court below erred on issues of law; i.e., the actions in question did not, as a matter of law, constitute a viable cause of action between two members of a limited liability company. I believe that the statement of the law, and the Court of Appeals' conclusion is correct but the decision was based on legal issues and not on factual determinations.

Atwood filed a lengthy response memorandum. Within the memorandum, Atwood set forth all of the facts from which she believed the court could find evidence, albeit circumstantial, of gender discrimination sufficient to submit the issue to the jury and deny the post-verdict Motion for a Judgment as a Matter of Law.

Atwood directed the Court to *Scrivener v. Clark College*, 181 Wn.2d 439, 446-447, 334 P.3d 541 (2014), likening the standard for a Motion for a Judgment as a Matter of Law to the standard used in assessing the merits of a Summary Judgment. *Scrivener* centered around an age discrimination case. Atwood's purpose in pointing to *Scrivener* was to have the Court focus on the legal standard that the Plaintiff does not necessarily need to disprove each of the employer's stated reasons for discharge, but that there is another option for the Plaintiff. A Plaintiff may satisfy the "Pretext Prong" if the Plaintiff can establish that the unlawful discrimination was a "substantial factor" in the decision to take the adverse employment action. The obvious

question, from a legal standpoint, is *"what constitutes a substantial factor?"* In Scrivener the Washington State Supreme Court emphasized that the motivation for the adverse employment action need not be based solely upon the unlawful discrimination, to the exclusion of the employer's otherwise legitimate, legal motivations for the adverse employment action. A viable cause of action for unlawful discrimination could be one of many motivations, as long as it played a substantial factor.

The legal issue remains, is there a threshold "percentage" of all motivations that is necessary to qualify for a "substantial" factor; i.e., does it have to represent the "main" motivation exceeding 50% of the overall motivation; i.e., does it have to be the primary motivation when taking all lawful and unlawful motivations into consideration? The *Scrivener* opinion does not address that legal issue; consequently, we will need to find guidance elsewhere.

While not directly on point, Atwood points the Court to *Martini v. Boeing Co.*, 137 Wn.2d 357, 366, 971 P.2d 45 (1999) to support her argument by analogy. *Martini* centered around the Plaintiff's allegation that he was unlawfully discharged in violation of the law against disability discrimination; i.e., sleep apnea. In its analysis on page 366, the State Supreme Court stated that the Plaintiff would have a cause of action for damages based upon evidence of any violation of the law against discrimination juxtaposed against a requirement that it be a condition precedent. The import being that it need not be the sole reason. This case does not help us answer the fundamental question regarding the comparative motivations.

To answer this question, I am turning to the pertinent jury instruction (Instruction No. 10) used in this case to instruct the jury. It reads:

> **"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.**

This jury instruction was fashioned after WPI 330.01.01. The notes behind WPI 330.01.01 reference *Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 898 P.2d 284 (1995)(a case cited by Defendants at p. 10 of their initial brief). In *Mackay* the trial court had given a jury instruction requiring the jury to find that the motivation for the discriminatory employment action was "the determining factor" or stated another way, "but for." The State Supreme Court stated "*Underlying this State's determination to insulate an employee from retaliation is its resolve to eradicate discrimination.*" *Mackay* 127 Wn.2d 302, 309. The Court ruled that the "determining factor" test (or "but for" test) used by the trial court placed an unreasonably high burden on the employee and was inconsistent with this State's interest in eradicating discrimination.

Therefore, the law does not require Atwood to prove that gender discrimination was the only motivation, nor does she have to prove it is the "main" or "primary" motivation. Nor does she have to disprove each of the employer's stated reasons. She simply has to establish that her gender played a role in MSA's decision to terminate her.

Was there "legally sufficient evidence" for a reasonable jury to find that gender played a "substantial factor" in the motive to discharge Atwood? After reviewing the extensive record, I answer in the affirmative. I will not identify all of the evidence from the extensive record in this Order that would support my decision. If appealed, the reviewing court will review my decision to deny this motion *de novo* on the record. *Gorman v. Pierce County*, 176 Wn.App. 63, 74, 307 P.3d 795 (2013)(*"We review a trial court's denial of a CR 50 motion for judgment as a matter of law de novo, engaging the same inquiry as the trial court." Citing Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P3d 273 (2007)) It is a huge record and some nuances may not be readily apparent to anyone who did not spend five weeks in the courtroom.

One of the nuanced facts that could easily be missed but in my opinion cannot be ignored was the nature of the "joint" investigation which included both the HR department (Cindy Protsman) investigating the allegations of a hostile work environment and a separate representative, Christine Devere, from the EEO office, whose only involvement was to investigate Title VII allegations of discrimination based upon gender.[10] While I admittedly did not appreciate the nature and importance/relevance of the dual investigation when the issue was first developed during the trial, it became apparent to me by the end of the trial that the dual investigation evidenced that the company was in fact investigating a Title VII compliant which was discrimination based upon gender separate and distinct from the "hostile work environment" complaint. This combined with evidence of the "corporate culture" developed on the record during trial, Young's "Barbie email" and his alleged off-color gender-based comments, provided me with sufficient circumstantial evidence[11] of gender discrimination to allow the issue to be submitted to the jury.

MSA's Motion for a Judgment as a Matter of Law on the cause of action for Gender Discrimination is therefore, respectfully denied. For the same reasons, Young's Motion for a Judgement as a Matter of Law on the cause of action for aiding and abetting regarding Gender Discrimination is also denied. I am going to "allow the judgment to stand" under CR 50(b)(1)(A).

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[10] Oral testimony made the issue clear and is part of the record, but to get a flavor of the structure and differences, please see the email from Christine Devere to Kathrine "Kadi" Bence (and CC others) dated August 26, 2013) attached as Exhibit G to the Declaration of Denise Ashbaugh in Support of Defendants' Motion for Judgment as a Matter of Law and a New Trial or in the Alternative Remittitur, signed October 20, 2017.

[11] As Atwood's briefing points out, there is rarely direct evidence in the form of a "smoking gun" to prove gender discrimination. These actions are frequently based on circumstantial evidence, which by terms of Jury Instruction No. 1 is not distinguishable from direct evidence – both are given equal weight under the law.

2.) MSA and Young's Motion for a New Trial pursuant to CR 59(a)(1)[12], (a)(2), (a)(5), (a)(7) & (a)(9).

MSA and Young's post-trial motions included a section of briefing asking the Court to Order a New Trial under several sections of CR 59(a). (Defendants' Motion for Judgement as a Matter of Law and a New Trial or in the Alternative Remittitur (*hereinafter "Defendants' Brief*), pp. 13-18) Each section will be addressed separately below, with the exception of CR 59(a)(1) which may be addressed in future hearings and/or motions.

CR 59(a) provides"

> *On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes* ***materially affecting the substantial rights*** *of such parties: (emphasis added)*

Subsection (2) of CR 59(a) reads as follows:

> *(2)* ***Misconduct*** *of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from the juror's own conclusions,* ***and arrived at by a resort to the determination of chance or lot****, such misconduct may be proved by the affidavits of one or more of the jurors; . . . . (emphasis added)*

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[12] To the extent that the defendants' Motion pursuant to CR 59(a)(1) is based upon the issue of a juror's possible failure to disclose knowledge of one of the witnesses, that issue is reserved until further development of the record.

CR 59(a)(2) has two separate and distinct bases upon which the Court can afford relief: (1) misconduct of the prevailing party or jury; and (2) conduct of any one of more of the jurors reaching their decision on one or more issues by way of "chance or lot."

In the briefing and in oral argument these issues bled into and sometimes overlapped other assignments of error or issues in the post-trial motions. I am going to deal with each individually (to the best of my ability) realizing and admitting that aspects of some of the issues may be relevant to one or more aspects of the other issues presented.

I did not see an argument, either in the briefing or in the oral argument, alleging that one or more of the jurors made their decision on any issue(s) by way of "chance or lot" consequently the only argument addressed is an allegation of misconduct by the prevailing party, here Mr. Jack Sheridan, counsel for Atwood.[13] The only two identified actions of Mr. Sheridan that defendants assert constitute "misconduct" are (1) that Mr. Sheridan improperly encouraged the jury to punish MSA; and (2) that in his closing argument Mr. Sheridan misstated the law on MSA's defense that Atwood failed to mitigate her damages. (Defendants' Brief, pp. 14-18)

On the first issue, MSA and Young point to the following section of Mr. Sheridan's closing argument:

> *The discrimination claim, ... This is a harder case for us to prove. . . . But we kept this claim in because it's important. And it's important to hold them 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 terms of their conduct today and their*

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[13] There was an argument that there may be misconduct of a juror in failing to disclose his knowledge of a witness during voir dire. As mentioned elsewhere, that issue is reserved pending development of the record.

conduct tomorrow. Our goal is to ***eradicate discrimination****. So that's why this claim is still here. (emphasis added)*[14]

Defendant asserts that by making this argument, Mr. Sheridan was encouraging the jury to punish MSA (Defendant's Brief, p. 14, ll. 19-20) and "*award damages for a reason the jury instructions did not authorize.*" *Broyles v. Thurston County*, 147 Wn.App. 409, 445, 195 P.3d 985 (2008). Defendant's legal argument is that there is no allowance for punitive damages in Washington State on this cause of action and "there can be no question that the jury's award was punitive" citing *See Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 577, 919 P.2d 589 (1996). In *Dailey* the State Supreme Court, in a 5-4 decision, ruled that RCW 49.60.030(2) did not provide a legal basis for an award of exemplary (punitive) damages. (The four-member dissent argued that RCW 49.60.030(2) did provide for exemplary damages.) *Dailey* involved an allegation of sex discrimination in violation of Washington's Law Against Discrimination codified in RCW Chpt. 49.60. Both parties moved for summary judgment regarding whether the statute provided for punitive damages. The trial court granted summary judgment to the plaintiff, allowing for punitive damages under Washington's Law Against Discrimination by incorporating by reference the federal remedy in the United States Civil Rights Act of 1991. The Washington Supreme Court reversed stated: "*Governing resolution of this case is the court's long-standing rule prohibiting punitive damages without express legislative authorization.*" (*Dailey*, Id. at 575) And, "*[i]f the Legislature intended to make punitive damages available for*

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[14] Exhibit L, page 24, ll. 1-18, Declaration of Denise Ashbaugh, October 20, 2017.

employment discrimination under the LAD, it would have unambiguously so provided." (*Dailey*, Id. at 577)

Granted, the citation to *Dailey* was preceded by the introductory signal "*see*"; however, that signal is used instead of no signal when the proposition is not directly stated by the cited authority but obviously follows from it. I cannot read *Dailey* in such a way that Defendants' proposition ("there can be no question that the [Atwood] jury's award was punitive") obviously follows from the holding or analysis.

In this case, the statement made by Mr. Sheridan does not expressly ask the jury to award exemplary damages or punitive damages. The statements made by Mr. Sheridan generally reflect Washington State's public policy against discrimination in the workplace based on gender. *See, Roberts v. Dudley*, 140 Wn.2d 58, 61-77, 993 P.2d 901 (En Banc, 2000). "*Underlying this State's determination to insulate an employee from retaliation is its resolve* ***to eradicate discrimination.***" (emphasis added) *Mackay*, 127 Wn.2d 302, 309.

Additionally, had counsel for MSA believed this was an improper closing argument, counsel should have interposed an objection. MSA's counsel admittedly did not. Thus MSA and Young failed to preserve this issue for appeal. *Joyce v. State, Depart. Of Corrections*, 116 Wn.App. 569, 603, 74 P.3d 548 (2003)[15] ("*DOC further contends that statements made by counsel for the Joyce family during closing argument were improper. But DOC made no objections during the family's closing argument. Therefore any error was not preserved for appeal." Citing Kain v. Logan,* 79 Wn.2d 524, 528, 487 P.2d 1292 (1971)); and, *Taylor v.*

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[15] *Reversed on other grounds in Joyce v. State, Dept. of Corrections, 155 Wn.2d 306, 119 P.3d 825 (2005).*

Cessna Aircraft Co., Inc., 39 Wn.App. 828, 832, 696 P.2d 28 (1985)(*"The failure to timely object generally precludes review."* citing RAP 2.5(a), & *Nelson v. Martinson*, 52 Wn.2d 684, 328 P.2d 703 (1958) and *"[Granted] appellant need not have made a timely objection and requested a curative instruction if misconduct was so flagrant no instruction could cure it."* *Taylor*, Id., citing, *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967) and *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956)).

It is my opinion that Mr. Sheridan's statements about "calling them out" and "Our goal is to eradicate discrimination" walked close to the line of a prohibited closing argument such as "send them a message" or "deter future misconduct" but did not cross the line.[16] However, *"not every misguided closing argument warrants a new trial."* *Broyles v. Thurston County,* 147 Wn.App. 409, 445, 195 P.3d 985 (2008), *citing Carnation Co. v. Hill*, 115 Wn.2d 184, 186-87, 796 P.2d 416 (1990)(*misconduct must have a substantial likelihood of affecting the jury's verdict.*)

Even if it were ruled improper on appeal, any alleged error was waived by MSA counsel's failure to timely object. Mr. Sheridan's statements were not so inflammatory that a curative instruction would have been useless. In fact, in at least one reported case, it was held on appeal that a contemporaneous curative instruction on a relatively close "improper argument" would have sufficed. *Wuth ex rel. Kessler v. Laboratory Corp. of America*, 189 Wn.App. 660,

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[16] What complicates this issue is the stated policy of Washington State. Mr. Sheridan attempted to inform the jury about the public policy behind the law prohibiting discrimination based upon gender, but the narrow gap between a proper argument and an improper argument is difficult to navigate.

710, 359 P.3d 841 (2015)[17](*"The court's written instructions to the jury set forth the proper measure of damages, as set forth in Harbeson, and the court's curative instruction during closing arguments flatly refuted any inference the jury could have drawn from the Wuths' and Dr. Harding's arguments that deterrence is a permissible basis for damages. Washington courts presume that juries follow all instructions given."* citing *State v. Stein,* 144 Wash.2d 236, 247, 27 P.3d 184 (2001).) Therefore, had counsel for MSA and Young objected, the Court could have provided a curative instruction that would have solved the problem. The absence of an objection and/or a curative instruction does not warrant a mistrial. Wuth ex rel. Kessler v. Lab. Corp. of Am., 189 Wash. App. 660, 710, 359 P.3d 841, 866 (2015).

The second issue regarding Mr. Sheridan's closing argument pertains to Mr. Fountaine's opinions not being evidence and lacking examples of specific jobs available to Atwood. Let me start where I left off with the first issue. This argument was presented to the jury without objection from counsel for MSA / Young. It was therefore waived. In addition, given my instructions to the jury, I do not believe that Mr. Sheridan's statement(s) in question were so flagrant as to preclude the effectiveness of a curative instruction.

The primary legal issue in question is whether or not Mr. Fountaine (MSA / Young's expert) was required to put on evidence of *comparable positions* available to Atwood (as suggested by Mr. Sheridan's closing argument) as part of Defendants' burden of proof regarding mitigation of damages. Defendants argue: "There is absolutely no authority supporting the assertion that an employer is required to present to the jury as exhibits evidence of *specific*

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[17] review denied sub nom. Wuth v. Lab. Corp. of Am., 185 Wash. 2d 1007, 366 P.3d 1244 (2016), and review denied sub nom. Wuth v. Lab. Corp. of Am., 185 Wash. 2d 1009, 366 P.3d 1244 (2016)

positions for which the plaintiff should have applied." (Defendants' Brief, p. 15, l. 25 – p. 16, l. 1)

Atwood counters that Jury Instruction No. 18, proposed by Defendants, requires such a showing by its own terms. The jury instruction states in part:

> *The Plaintiff, Julie Atwood, has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.*
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> *To establish a failure to mitigate, Defendants have the burden of proving by a preponderance of the evidence:*
>
> *(1) There were* ***openings in comparable positions*** *available for Ms. Atwood elsewhere after MSA terminated her;*
>
> . . . .
>
> *You should take into account* ***the characteristics*** *of Ms. Atwood and the job market in evaluating the reasonableness of Ms. Atwood's efforts to mitigate damages.*

This jury instruction follows WPI 330.83, so the use of that instruction should not be interpreted against the Defendants as the party "offering" the instruction. The Defendants' Brief directs the Court to *Burnside v. Simpson Paper Co.*, 66 Wn.App. 510, 832 P.2d 537 (1992). The legal question, as I understand it, is this:

> *Does evidence of the general job market satisfy the employer's burden of proof to establish the availability of a* ***comparable position****?*

The Defendants argue that they only have to put on evidence of the general job market. (Defendant's Brief, pp. 15-16) I have given this issue a great deal of thought and undertaken significant efforts to find analogous Washington cases – all to no end. I note with some interest the comment following WPI 330.83: "*Washington cases have not defined "comparable position".*"

I believe that the Defendants' argument is internally inconsistent with the portion of the Defendants' Brief at page 15, ll 1-4 which acknowledges: "Although Ms. Atwood **need**

not "*go into another line or work, accept a demotion, or take a demeaning position*," she does have an affirmative obligation "*to accept a job* ***substantially equivalent*** *to the one [s]he was denied.*"(emphasis added) *Citing, Kloss v. Honeywell, Inc.*, 77 Wn.App. 294, 302, 890 P.2d 480 (1995).

A case worth reviewing for purposes of this issue is *Henningsen v. Worldcom, Inc.*, 102 Wn.App. 828, 9 P.3d 948 (2000). This case involved a claim of hostile work environment based on gender / sex discrimination. (Due to the underlying claim, it is not precisely on point; however, it is sufficiently analogous to warrant review.) Like MSA, the defendant alleged that the plaintiff failed to mitigate her damages. The Court addressed the issue as follows:

> ***III. Back Pay Award***
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> *WorldCom contends that the trial court erred in awarding Henningsen full back pay because there was evidence that she "traveled extensively, had a baby, married the baby's father, and then proceeded to assist him in the management of his own business" after she left WorldCom. Appellant's Reply Br. at 20. Henningsen contends that the trial court properly concluded that WorldCom failed to satisfy its burden of proving that she failed to mitigate her damages.*
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> *"[T]he burden of proving a failure to mitigate damages in an employment discrimination suit [is] on the defendant." Burnside v. Simpson Paper Co., 66 Wash.App. 510, 529, 832 P.2d 537 (1992), aff'd, 123 Wash.2d 93, 864 P.2d 937 (1994); accord Kloss v. Honeywell, Inc., 77 Wash.App. 294, 301, 890 P.2d 480 (1995). " 'To satisfy its burden, the [employer] must show that there were suitable positions available and that the plaintiff failed to use reasonable care and diligence in seeking them.' " Id. at 301, 890 P.2d 480 (quoting Burnside, 66 Wash.App. at 529, 832 P.2d 537). "Once discrimination has been found, any doubts concerning back pay are to be resolved against the employer." Burnside, 66 Wash.App. at 531, 832 P.2d 537. The plaintiff's failure to "make an ongoing, concerted effort to find comparable employment" does not preclude a back pay award. Id. at 530, 832 P.2d 537.*

> *In the present case, there is evidence that Henningsen failed to make an ongoing, concerted effort to find comparable employment. In fact, the trial court expressed "some concerns about [Henningsen's] underemployment in 1997 [.]" Clerk's Papers at 2942. But there is also evidence that she worked on a limited basis for her husband's business and tried to start a home business.* ***And most importantly, WorldCom presented no evidence that employment comparable to her position at WorldCom was in fact available.*** *Therefore, substantial evidence supports the trial court's finding that WorldCom did not prove that Henningsen failed to mitigate her back pay damages.* (emphasis added)

Henningsen v. Worldcom, Inc., 102 Wash. App. 828, 846, 9 P.3d 948, 958 (2000). *Henningsen* Id., emphasized the obligation on the employer to present evidence that there was a comparable position available to the former employee and she failed to reasonably avail herself of the opportunity.

MSA represents: "Defendants proved, through their expert John Fountaine, that there were literally hundreds of comparable jobs available to Ms. Atwood for which she is exceedingly qualified." (Defendants' Brief, p. 17) Mr. Fountaine's trial testimony reveals his inability to identify a comparable position open and available to Atwood. He testified on direct:

> "Question: Are you able to testify as to any specific job that would have been available to Ms. Atwood, say, in the beginning of 2014?
> Answer: **Not a specific job** because I wasn't doing my research in 2014."
> . . . . .
>
> "Question: Let me ask you this: You said she should have gotten a job in six months; right?
> Answer: Could have.
> Question: But you can't tell us what job.
> Answer: **Yeah, nobody really can.**" (emphasis added)

He also testified that he thought she should have taken the kind of job that the law says is not required:

Question: "So would you advise her, if you can't find work as a project manager, you should be willing to take a job at McDonalds?
And he answered: "That's an interesting question. I think if you can work you should work, . . .

> ***"I don't know that we need to try to degrade any particular place of employment, but I think that the bottom line would be working full time and making minimum wage, which is $11.00 an hour."***[18] (emphasis added)

I conclude that by having an expert, such as Mr. Fountaine, testify regarding the general job market, and the general availability of jobs within that general job market, that the evidence does not ***without reference to a specific, comparable job,*** satisfy the requirement that the employer (here MSA) establish by a preponderance of the evidence that Atwood failed to mitigate her damages. To the contrary, Atwood did locate and submit a bid on one comparable job (Longenecker & Assoc.); however, the project was subsequently withdrawn. I do not find Mr. Sheridan's closing argument to be a misstatement of the law.[19]

Even if it was a misstatement of the law, my Jury Instruction number 20 included the following caution: "You should disregard any remark, statement or argument [of the lawyer] that is not supported by the evidence or the law as I have explained to you." Presumably the jury understood this instruction and applied the law set forth in my Jury Instruction No. 18

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[18] These quotes came from an unedited (i.e., not "clean") transcript prepared on an expedited review ordered by me to double check my memory and my notes. The precise citations to the record will likely differ from the rough draft, consequently, I have not included them.

[19] In the case at hand, the evidence allowed the jury to find that Atwood, much like the plaintiff in *Henningsen*, Id., worked at other jobs for one or two years in an effort to make money. And, importantly, there was a comparable position which became available, and she did bid on the position. There is conflicting evidence as to why she did not get the job, but there is no dispute that she did apply.

and disregarded any argument or statement made by Mr. Sheridan inconsistent with that statement of the law.

CR 59(a)(5) reads as follows:

> *Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice.*

MSA and Young ask this Court to enter an Order entitling them to a new trial because the award of $2.1 million in economic damages and $6 million in noneconomic damages "can only be explained by passion and prejudice." (Defendants' Brief, p. 14, ll. 14-15) In reading the rule and Defendants' Brief, it does not appear that I am being asked to modify the monetary judgment down, as in a remittitur. (The request for remittitur comes in a separate section of this Order.) It appears I am being asked to Order a new trial on both liability and damages, and not simply a retrial on damages.

First, let me observe that the Defendants could have asked the Court to enter an Order for a new trial on the issue of damages alone because liability and damages in this case are "fairly separable and distinct." (CR 59(a)) Having asked me to enter an Order requiring a retrial on all of the issues would be fundamentally unfair to Atwood having secured a unanimous verdict on liability on each and every cause of action. CR 1 mandates that the rules "shall be construed and administered to secure the **just**, speedy, and inexpensive determination of every action." In my opinion, even if the amount of damages was high on the basis of "passion and prejudice" an Order for a new trial on both liability and damages would not be just.

Regarding the economic damages, Defendants' argument that the award of $2.1 million dollars can only be explained by "passion and prejudice" ignores the fact that the award was within the range of substantial evidence because – as Defendants would have to admit – Atwood's economic damage expert did compute her damages at that amount. As long as the damages awarded by the jury are within the range of evidence and consistent with the testimony of the Plaintiff's expert's computations, the jury's verdict will not be disturbed. *Burnside v. Simpson Paper Co.,* 66 Wn.App. 510, 530-531, 832 P.2d 537 (1992)

Regarding the non-economic damages, MSA and Young argue that the jury's award of $6 million dollars can only be explained by "passion and prejudice." First, the right to an award of damages for emotion distress or mental anguish against an employer arising out of a wrongful discharge in violation of public policy was solidified by the Washington State Supreme Court in *Cagle v. Burns and Roe, Inc.* 106 Wn2d 911, 726 P.2d 434 (1986). That case acknowledges that an award of damages for emotional distress is recoverable for discriminatory discharge under RCW 49.60. *Id.*, at 919.

As will be seen when remittitur is discussed, there are slight, but materially different tests when assessing noneconomic damages under this rule. In this section of the Order, we are dealing with CR 59(a)(5). To warrant a new trial based on CR 59(a)(5) the passion or prejudice "*must be of such manifest clarity as to make it unmistakable.*" *Lian v. Stalick,* 106 Wn.App. 811, 824, 25 P.3d 467 (2001) quoting *Bingaman v. Grays Harbor Comty. Hosp.*, 103 Wn.2d 831, 836, 699 P.2d 1230 (1985); *Brundridge v. Flour Federal Services, Inc.*, 164 Wn.2d 432, 457, 191 P.3d 879 (2008)("*For a court to find passion or prejudice [under CR 59(a)(5)], it must "be of such manifest clarity as to make it unmistakable*".") *quoting James v. Robeck*, 79 Wn.2d 864, 870, 490 P.2d 878 (1971).

Both Parties direct the Court to *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 116 P.3d 381 (2005) for different purposes. (Defendants' Brief, p. 18, ll. 18-21; and Atwood's Brief, p. 23, l. 15 – p. 25, l. 18) While *Bunch,* Id. dealt with remittitur (which will be addressed in more detail in that section of the Order) two aspects of that opinion warrant attention in this section of the Order.

First, I assume from the opinion, given the discussion therein, that the Appellant argued that the non-economic damages could not be sustained because they fell outside of the "range of substantial evidence." The Respondent, Bunch, "**argues the 'range of substantial evidence' standard is meaningless in the context of noneconomic damages**." (emphasis added) *Bunch*, 155 Wn.2d 165, 180. The State Supreme Court, while not directly addressing the issue in its written ruling, must have agreed with the Respondent (Bunch). The Court, quoting *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 838, 699 P.2d 1230 (1985), stated: "*The verdict of a jury does not carry its own death warrant solely by reason of its size.*" The Court's opinion, read carefully, would indicate that the evidence presented by Bunch, while limited, supported an award of damages for emotional distress, and the amount fell within the purview of the jury. The Court did not draw upon a mechanical analysis resulting in a "cap" on noneconomic damages in the fashion that such a "cap" is placed on economic damages.

Second, notwithstanding the analysis and conclusions set forth immediately above, the Court did take a look at the case of *Hill v. GTE Directories Sales Corp.*, 71 Wn.App. 132, 856 P.2d 746 (1993). *Bunch*, 155 Wn.2d 165, 181. There, in an offhand but revealing comment, the State Supreme Court noticed that the jury's award for noneconomic damages was ten times the amount of the economic damages. While the opinion did not set a mathematical equation capping noneconomic damages, it is clear from their reference that they took that factor into

consideration. In the case at hand, unlike the situation in *Hill*, Id., the noneconomic damages was less than three times the economic damages awarded by the jury and substantially less than two times the remaining judgment for economic damages, attorney fees, and costs. That favors a finding that the $6 million dollar award for noneconomic damages in favor of Atwood does not reflect either an abnormality in the proceedings or "passion or prejudice" triggering the remedies provided by CR 59(a)(5).

In written and oral argument, MSA and Young's counsel point the Court to lower verdicts suggesting that by comparison alone the jury verdict of $6 million dollars in noneconomic damages in favor of Atwood is excessive. That approach has been ruled inappropriate. *Joyce v. State, Dept. of Corrections,* 116 Wn.App. 569, 603, 75 P.3d 548 (2003)(overruled on other grounds at 155 Wn.2d 306, 119 P.2d 825 (2005))("*DOC makes comparisons with other jury verdicts. It is well settled that it is inappropriate to compare verdicts."* citing *Adcox*, 123 Wn.2d at 33, 864 P.2d 921 (*improper to assess the amount of a verdict based upon comparisons with other verdicts*))

I have benefitted from *Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn.App. 275, 78 P.3d 177 (2003)(hereinafter *"Conrad"*), a Division III case directly on point on this issue, but oddly[20] not cited by either party. *Conrad* involved a case for injuries to, and the death of, a patient in a nursing home. The jury verdict was $4.755 million, which included an award of $2.75 million for pain and suffering. As part of the nursing home's appeal, it challenged the size of the $2.75 verdict for non-economic damages arguing: ". . . ., *the nursing home challenges the*

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[20] The Court assumes that neither party was aware of the case and did not intentionally withhold the opinion from the Court.

size of the verdict here [under CR 59(a)(5)] as punitive or undeniably the product of passion and prejudice." *Conrad*, 119 Wn.App. 275, 279.

I commend the reader to a study of the lengthy factual history and the other legal challenges set forth in the opinion as interesting but not relevant to the issue at hand. I will set forth what I believe to be the operative facts pertinent to the relevant legal issue; i.e., CR 59(a)(5), but I confess that the lengthy quote set forth below is a better analysis than I could provide by way of an attempted summary of the Appellate Court's analysis and decision. Please note the similarity in the appellant's arguments in *Conrad*, Id. to those arguments advanced by MSA in its CR 59(a)(5) motion.

> **"Jury's Award Punitive or Unmistakably Result Of Passion Or Prejudice**
> Alderwood next argues that the award here is shocking and unmistakably excessive. It notes that Enid's injuries were admittedly significant and obviously made her endure pain and suffering. But it argues, nonetheless, that the damages exceeded all bounds of appropriate compensation. It argues that the various awards defy logic and show outrage, animosity, or a desire to punish Alderwood.
> Again, we review a trial court's decision to grant or deny a CR 59(a)(5) motion for reconsideration or new trial for abuse of discretion. *E.g., Lian v. Stalick,* 106 Wash.App. 811, 823–24, 25 P.3d 467 (2001). To grant the motion, the damages must be so excessive as to unmistakably indicate that the verdict was the result of passion or prejudice. *Id.* at 824, 25 P.3d 467; *Nord v. Shoreline Sav. Ass'n,* 116 Wash.2d 477, 486, 805 P.2d 800 (1991). " 'Before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable.' " *Miller v. Yates,* 67 Wash.App. 120, 124, 834 P.2d 36 (1992) (quoting *Jacobs v. Calvary Cemetery & Mausoleum,* 53 Wash.App. 45, 49, 765 P.2d 334 (1988)). Absent such passion or prejudice, the amount of damages must be so excessive as to be outside the range of evidence or so great as to shock the court's conscience. *Id.* at

124–25, 834 P.2d 36. There must be no reasonable evidence or inference to justify the award. *Nord,* 116 Wash.2d at 486–87, 805 P.2d 800.

. . . .

Alderwood points to the $2.75 million pain and suffering award as patently excessive and obviously motivated by outrage or the desire to punish rather than compensate. Alderwood admits Enid's injuries obviously caused her pain and suffering, but says the award is way too much given Enid's compromised condition prior to her injuries and "the relatively short period of time (a maximum of 10 months and 13 days) she suffered from her injuries prior to her death." Br. of Appellant at 44. But the jury could certainly deem 10–plus months to be a long time for Enid—a highly vulnerable adult—to suffer the pain from injuries attributable to Alderwood's negligence and neglect.

Alderwood compares some specific damage awards to others in an attempt to show that the jury's verdict defies logic. But the jurors' collective thought processes inhere in the verdict. *Kiewit–Grice v. State,* 77 Wash.App. 867, 870–71, 895 P.2d 6 (1995). That said, the award to Conrad does not defy understanding in any event.

....

The trial judge stated the verdict was perhaps surprising, but within the range of evidence and not punitive. We agree. We as a society make all sorts of judgments about value, ranging from contract/salary compensation for school teachers, professional athletes, corporate executives, and government workers, to the dollar amount placed on a plaintiff's injuries. Here, a jury of 12 people makes and made that decision. And barring some extraordinary factor, which the trial judge did not see here, and neither do we, courts should leave that judgment where it is vested by tradition and law—with the jury.

The court did not abuse its discretion in denying Alderwood's CR 59(a) motion. There was substantial evidence for the jury to make the award that it did."

Conrad, 119 Wn.App. 275, 292-299.

The case at hand involves a similar situation. MSA and Young do not dispute that Atwood suffered emotional distress arising out of her termination. They do argue, like the employer in *Conrad*, Id., that the $6-million-dollar award for noneconomic damages reflects the passion or prejudice addressed by CR 59(a)(5). However, like the plaintiff in *Conrad*, Id., the record in the case at hand shows not only emotional distress on the day of Atwood's termination, but a continuing series of mental infirmities and resultant physical side effects severe enough in this Court's opinion to support the jury's award.

There was lay and expert testimony that Atwood's maladies were proximately caused by MSA's wrongful termination[21] (and Young's conduct) including but not limited to the following: Atwood testified about her emotional distress and associated physical symptoms on the stand (which is sufficient, under *Bunch*, 155 Wn.2d 165, 180-181 *("The county argues that Bunch never consulted a healthcare professional, and no one close to him testified about his anxiety. That is true, but such evidence is not strictly required; our cases require evidence of anguish and distress, and this can be provided by the plaintiff's own testimony. . . . Corroborative evidence is certainly helpful, but it is for the jury to weigh the credibility of the witness and determine if he in fact suffered mental anguish."*)); Dr. Brown testified that Atwood suffers from depression, anxiety, and other specified trauma and stressor related disorders which did not predate her termination. There was evidence that she would "freeze up" and when pressed, feel nausea and suffer diarrhea. Atwood felt "broken", isolated from work and her work friends, blacklisted in

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[21] I am of the opinion that the jury read the jury instructions correctly, including Instruction No. 15, which made it clear that they were not to consider or award any damages resulting from litigation stress, and thus properly included only those things addressed by Instruction No. 14 as it pertains to Atwood's noneconomic damages.

the Hanford Community, truncated social network, and robbed of the simple joys of life. Other testimony from Atwood's experts likened her experience and symptoms to PSTD and other serious syndromes. There was testimony about her crying during her termination, and the extraordinary shame, embarrassment and humiliation she endured in being escorted out of the building for all to see, moving the contents of her office out to her car in a wheelchair. The evidence, if believed by the jury, indicates that her mental suffering went far beyond "simple disappointment" from losing her job.

MSA and Young argue that the noneconomic damages resulted from a single day. There was evidence regarding the duration of time Atwood endured the mistreatment by Mr. Young and/or the corporate culture of MSA leading up to her termination. And, unlike the unspoken suggestion by MSA that her distress only lasted one day; i.e., the date of her termination, the evidence, if believed, established long-lasting emotional harms and physical side effects.

As one can see, there was evidence that, if believed, supports the noneconomic damages resulting from Defendants' wrongful actions. The jury's award was, in this Court's opinion, within the range of the substantial evidence offered regarding those noneconomic damages. I don't perceive any extraordinary factor that would lead me to a different conclusion. It does not shock my conscience. I am therefore **DENYING** the Defendant's Motion under CR 59(a)(5). I decline to exercise a "*rarely exercised power to overturn a jury's determination of noneconomic damages.*"[22]

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[22] *Joyce*, Id., at 603.

MSA and Young's Brief Includes a Motion for a New Trial under CR 59(a)(7)[23]

CR 59(a)(7) provides a basis for relief upon the following showing:

> *"That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;"*

MSA and Young set forth this legal basis on page 13 of the Defendants' Brief. Defendants did not provide a separate legal analysis or argument in their brief on CR 59(a)(7) and consequently, it is difficult for the Court to address their argument. Giving MSA and Young the benefit of the doubt, it appears that they may have intended their CR 59(a)(7) argument to mirror their argument under CR 50, set forth earlier in their brief. (Defendants' Brief, pp. 8-13) To the extent that this assumption is true, my ruling on CR 59(a)(7) mirrors my ruling on MSA and Young's Motion for a New Trial under CR 50(a) set forth earlier in this Opinion. Their Motion for a New Trial under CR 59(a)(7) is therefore **DENIED**.

MSA and Young's Brief Includes a Motion for a New Trial under CR 59(a)(9)[24]

CR 59(a)(9) provides a basis for relief upon the following:

> *"That substantial justice has not been done."*

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[23] Defendants' Brief, p. 13, l. 25
[24] Defendants' Brief, p. 13, l. 26.

The sum and substance of Defendants' argument under this provision is the following: "*If the trial court, in the proper exercise of its discretion, is satisfied that substantial justice has not been done in a given case, it is the right and duty of the court to set the verdict aside.*" *Potts v. Laos,* 31 Wn.2d 889, 897, 200 P.2d 505 (1948).[25]

In *Potts,* Id., the plaintiff sued for damages for personal injuries and property damages resulting from an accident involving a police motorcycle driven by the plaintiff (a motorcycle policeman) and a car driven by the defendant. The jury returned a defense verdict. The officer/plaintiff filed a Motion for a New Trial on two different grounds: (1) that the interests of justice warranted a new trial; or (2) there was no evidence to justify the verdict and that it was contrary to law. The trial court judge granted the plaintiff's motion for a new trial. The trial court judge was asked, on the record, to state the basis for his decision to grant a new trial, but the trial judge refused and Ordered that his decision be documented simply as "a new trial was granted."

The trial court made several statements throughout that he did not think substantial justice had been done, including a comment that the jury pool was likely prejudiced against police officers. In a truncated opinion which is of little help to the issues before the court, the appellate court simply concluded that the trial court judge had not abused his discretion in ordering a new trial.

There was sufficient evidence on this record to support Atwood's causes of action and her damages, and there was nothing in the trial process that was so unusual, or so out of the

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[25] Defendants' Brief, p. 14, ll. 6-8.

ordinary, as to effect the outcome of the trial. It would be improper for me to conclude, based on this record, that substantial justice has not been done. Defendants' motion is **DENIED**.

3.) MSA and Young's Motion for Remittitur.

MSA and Young filed a Motion for Remittitur pursuant to RCW 4.76.030, which states in part as follows:

> *If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict, ...*

"*RCW 4.76.030 creates a presumption favoring a jury verdict, ...*" *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 178, 116 P.3d 381 (2005) *quoting Hendrickson v. Konopaski*, 14 Wn.App. 390, 394, 541 P.2d 1001 (1975). One interesting aspect of *Bunch*, Id., is the opinion's extended discussion of the difference in the analysis, at both the trial court level and the appellate level, between remedies granted (or denied) under RCW 4.76.030 and those under CR 59. It also notes that there is conflicting authority regarding the standards on appeal for CR 59 and RCW 4.76.030. (Id., 178) In the same quote from *Hendrickson*, Id., *Bunch* points out that decisions made pursuant to CR 59 are more akin to decisions resulting from the exercise of judicial discretion and are accordingly reviewed under an abuse of discretion standard.[26]

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[26] A trial judge's ruling under RCW 4.76.030 is reviewed de novo against a statutory presumption that the verdict of the jury was in fact correct. *Usher v. Leach*, 3 Wn.App. 344, 345, 474 P.2d 932 (1970).

MSA and Young seek remittitur on both the $2.1 million dollar award for economic damages, and on the $6 million dollar award for noneconomic damages. MSA, Young and Atwood all direct the Court's attention to *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 116 P.3d 381 (2005), but as pointed out earlier in this Opinion, for different propositions.

Bunch sets out the proper framework for analysis:

> "An appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice." *Bingaman,* 103 Wash.2d at 835, 699 P.2d 1230. "The requirement of substantial evidence necessitates that the evidence be such that it would convince 'an unprejudiced, thinking mind.' " *Indus. Indem. Co. of N.W., Inc. v. Kallevig,* 114 Wash.2d 907, 916, 792 P.2d 520 (1990) (quoting *Hojem v. Kelly,* 93 Wash.2d 143, 145, 606 P.2d 275 (1980)). The "shocks the conscience" test asks if the award is "flagrantly outrageous and extravagant." *Bingaman,* 103 Wash.2d at 836–37, 699 P.2d 1230. Passion and prejudice must be "unmistakable" before they affect the jury's award. RCW 4.76.030; *Bingaman,* 103 Wash.2d at 836, 699 P.2d 1230. We once stated the rule this way:
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> > "The damages, therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess."

> *Kramer v. Portland–Seattle Auto Freight, Inc.*, 43 Wash.2d 386, 395, 261 P.2d 692 (1953) (quoting *Coleman v. Southwick,* 9 Johns. 45, 6 Am. Dec. 253 (N.Y.Sup.1812) (Kent, Ch. J.)).
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> The jury is given the constitutional role to determine questions of fact, and the amount of damages is a question of fact. *Robeck,* 79 Wash.2d at 869, 490 P.2d 878. We strongly presume the jury's verdict is correct. *Sofie v. Fibreboard Corp.,* 112 Wash.2d 636, 654, 771 P.2d 711, 780 P.2d 260 (1989). "The jury's role in determining noneconomic damages is perhaps even more essential." *Id.* at 646, 771 P.2d 711. A trial court's denial of a remittitur strengthens the verdict, *Fisons Corp.,* 122 Wash.2d at 330, 858 P.2d 1054, and, as determined above, we review for abuse of discretion.
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> . . . .
>
> 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 County Dept. of Youth Services, 155 Wn.2d 165, 179-180, & 183, 116 P.3d 381 (2005)

Neither the $2.1 million dollar award for economic damages nor the $6 million dollar award for noneconomic damages shocks my conscience. Neither is "flagrantly outrageous." They are not so "manifestly unreasonable" that they could only have been the product of "prejudice or passion." The size of each of the two verdicts is, in my opinion, within the bounds of the evidence presented. The Defendants' Motion for Remittitur is **DENIED**.

4.) MSA and Young's Motion to Revise and/or Clarify the Findings of Fact and Conclusions of Law.

This will be handled separately and submitted to the parties at a later date.

5.) MSA and Young's Motion to Strike Plaintiff's Motion for Attorney Fees and Costs as untimely pursuant to CR 54(d)(1) & (2).

CR 54(d)(2), pertaining to an award of attorneys' fees and expenses provides:

> *"Claims for attorneys' fees and expenses, other than costs and disbursements, shall be made by motion . . . Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment."*

Atwood did not file her Motion for Attorneys' Fees and Expenses within this 10-day window as required by CR 54(d)(2). MSA and Young have filed a Motion asking the Court to Strike Atwood's Motion for Attorneys' Fees and Expenses as untimely.

The relevant chronology is as follows. After a lengthy trial, the jury announced its verdict on October 10, 2017. Immediately following the jury's verdict, Atwood's counsel, Mr. Sheridan, proposed the entry of a Judgment reflecting the jury's award, sans attorneys' fees and expenses. Counsel for the Defendant signed off on the proposed judgment as to form, and this

Court signed the Judgment[27] as of October 10, 2017. On the first page of the Judgment after the line item for Attorney Fees and Costs is the statement: "To be determined." On the second page of the Judgment is the following language: "Attorney fees and costs shall be addressed separately upon the filing of a fee petition, which will be filed in accordance with a briefing schedule to be proposed by the parties and set by the Court, or through the submission of a stipulated order and judgment." Atwood filed her Petition for Attorneys' Fees and Expenses on November 14, 2017. MSA filed its Motion to Strike on December 14th, 2017. Atwood filed her response in Opposition to the Motion to Strike dated December 20, 2017. Both sides take non-frivolous positions and ask this Court whether or not to allow Atwood's Motion for Attorneys' Fees and Expenses to go forward.

MSA directs the Court to *Clipse v. Commercial Driver Services, Inc.*, 189 Wn.App. 776, 358 P.3d 464 (2015). In that case the Plaintiff filed his Motion for Attorneys' Fees and Expenses twelve days after the entry of the initial judgment, missing the 10-day deadline imposed by CR 54(d)(2) by two days. The trial court judge did not find excusable neglect, did not find a basis to extend the deadline after the deadline had passed and strictly adhered to the 10-day deadline, striking the Plaintiff's Motion for Attorneys' Fees and Expenses. That ruling was upheld on appeal as within the Court's discretion. MSA seeks the same ruling in the case at hand.

Atwood acknowledges the holding in *Clipse*, Id., but directs the Court's attention to three alternative reasons why the 10-day deadline of CR 54(d)(2) should not be imposed: (1) the language of the October 10, 2017 Judgment extended the deadline beyond 10 days; (2) it was the

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[27] A copy of the proposed judgment is attached as Exhibit A to the Declaration of Denise L. Ashbaugh in Support of MSA, LLC's Motion to Strike, dated December 14th, 2017.

understanding of the parties that these motions would be filed and heard at a later time forming the basis for excusable neglect; and/or (3) the liberal construction and application of Washington's Law Against Discrimination should be factored into this analysis.

On the face of the October 10, 2017 Judgment, there are two separate and distinct references to "Attorney Fees and Costs." On the first page, below the Judgment amount, is a line-item for Attorney Fees and Costs: with the entry "to be determined." This language, by itself, is sufficiently similar to the language in *Clipse*, Id., so as to leave the 10-day deadline imposed by CR 54(d)(2) intact.

On page two of the Judgement is the following sentence: "Attorney fees and costs shall be addressed separately upon the filing of a fee petition, ***which will be filed in accordance with a briefing schedule to be proposed by the parties and set by the Court, or through the submission of a stipulated order and judgment.***" (emphasis added). While no stipulated order and judgment was offered to the Court, the parties did work out a briefing schedule between themselves, which was approved by me via email correspondence which I am making part of the record by including it as **Exhibit A** to this Order. Thus, in my opinion, there is sufficient evidence of excusable neglect to override the time limitations of CR 54(d)(2). While the Order was not signed and entered by me on the official record, I did approve the parties' briefing schedule which in my opinion was the functional equivalent of an Order envisioned by the provisions of the language in the Judgment.

I also agree with Mr. Sheridan's observation that the Defendants did not initially object to the timing of Atwood's petition for Attorneys' Fees and Expenses. Instead, the Motion to Strike, filed after the Response Opposing Attorneys' Fees and Expenses, appears to be an afterthought. It is not dispositive, but it does factor in Atwood's favor.

If not a formal Order, then my express approval of the parties' negotiated briefing schedule certainly provided a reasonable excuse relieving Atwood from the 10-day requirement of CR 54(d)(2). This is also consistent with the liberal construction to be afforded the Washington Law Against Discrimination.[28]

Therefore, I am denying the Defendants' Motion to Strike the Plaintiffs' Motion for Attorneys' Fees and Expenses as untimely.

6.) Atwood's Motion for Attorneys' Fees and Costs.[29]

Atwood filed a Motion for Presentation of Attorneys' Fees and Costs based upon RCW 49.60.030(2).[30] MSA filed an extensive response, dated December 14, 2017, raising a large number of issues regarding Atwood's requested Attorneys' Fees as a whole, internal Motions to Strike portions of opposing Declarations, and challenging various entries as well as categories of Attorneys' Fees and specific Expenses on various bases. In this Order I will attempt to address each challenge raised by MSA separately.[31]

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[28] Although the Court acknowledges that the Statutory framework does not directly address the timing of an attorney fee award, and does not expressly override the applicable Court Rule.

[29] Included within this Motion is Atwood's Motion requesting the Court to take judicial notice of opposing counsels' website. In addition, counsel for the Defendants sought an Order sealing their declarations regarding their attorney fee rates for various clients.

[30] In addition, the fee request is based upon RCW 42.41.040(7) and RCW 49.48.030 and statutory attorney fees must be construed liberally in favor of the employee as a remedial statute. *Flower v. TRA Industries, Inc.*, 127 Wn.App. 13, 35, 111 P.3d 1192 (2005).

[31] If this Order fails to address an Objection raised by MSA in this section, then I have denied the objection. I issued a written decision on those which I deemed warrant a written explanation.

Before discussing the law and its application to this issue, it is necessary to address a procedural matter and rule on MSA's Motion(s) to Strike portions of the Declarations of Judith A. Lonnquist, and Scott Blankenship both having been submitted in support of Atwood's motion for attorneys' fees and expenses. (Defendant's Brief, p. 20, l. 1 – p. 21, l. 7)

(A) *Declaration of Judith A. Lonnquist in Support of Plaintiff's Petition for Attorney Fees, Costs, Prejudgment Interest, and Tax Penalty*[32]

MSA asked this Court to Strike Paragraphs 11 and 13 of Judith A. Lonnquist's Declaration on the basis that both paragraphs (i) contained impermissible legal argument(s), and (2) Judith A. Lonnquist lacked personal knowledge on the subject(s) contained within both paragraphs. Taking paragraph 11 first, I am **GRANTING** MSA's Motion to Strike on all of the content of paragraph 11 with the exception of the first sentence. MSA is correct in that a Trial Court should not consider the legal argument(s) or legal conclusion(s) contained in a supporting declaration, even if submitted by an expert who is a lawyer, or is familiar with the law (such as a law professor). *King County Fire Protection Districts No. 16, No. 36 and No. 40 v. Housing Authority of King County,* 123 Wn.2d 819, 825-826, 872 P.2d 516 (*En Banc.* 1994); and *Cf. Orion Corp. v. State*, 109 Wn.2d 621, 637-638, 747 P.2d 1062 (*En Banc.* 1987).

Looking at paragraph 13, I am **GRANTING** MSA's Motion in part, striking the second sentence, the third sentence, and the sixth sentence on the basis that those sentences are legal arguments and/or conclusions. It should be noted that the content of those sentences have been

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[32] Dated November 10, 2017, attached as Exhibit 21 to the Declaration of Sheridan.

adequately briefed in Atwood's legal memorandum and are duplicative in that respect. I am leaving in place the first sentence, the fourth and fifth sentences, and the seventh and eighth (the last) sentences with the modification of the seventh sentence as follows: "That [these types of employment cases are difficult to try and represent a substantial risk] is certainly true in this case." This modification provides context from the prior sentence which would be lost given my ruling on MSA's Motion to Strike. Judith A. Lonnquist's review and preparation may certainly have provided the factual basis upon which to provide her observation allowing the other sentences to remain notwithstanding the objection regarding lack of personal knowledge.

(B) *Declaration of Scott Blankenship in Support of Plaintiff's Petition for Attorney's Fees and Costs*

MSA asked this Court to Strike Paragraphs 20-21, 23 and 29 of the November 10, 2017 *Declaration of Scott Blankenship in Support of Plaintiff's Petition for Attorney's Fees and Costs*, (attached as Exhibit 22 to the Declaration of Sheridan) on the basis that those paragraphs contain improper legal argument(s). (Defendant's Brief, p. 20, ll. 17-20) Looking at paragraph 20, I am **GRANTING** MSA's Motion and striking all but the first and last sentences of that paragraph. I believe that the first and last sentences are proper and thus **DENY** the Motion to Strike with regard to those two sentences. Looking at paragraph 21, I am **GRANTING** MSA's Motion in part and striking all but the last sentence of paragraph 21.

Turning to paragraph 23, I am **GRANTING** MSA's Motion in part, and I am striking the last sentence of that paragraph. I am **DENYING** the motion as it pertains to the first sentence as I am of the opinion that the first sentence is a factual assertion. With regard to paragraph 29, I

am **GRANTING** MSA's Motion in part, striking the first and last sentences of that paragraph. I am **DENYING** the Motion to Strike the second sentence of that paragraph.

Number of Hours Expended Not Contested

Subject to certain limited "line-item" objections, the number of hours expended by Atwood's counsel is not contested. However, the larger dispute between the parties is the hourly rates requested by Mr. Sheridan and the other attorneys and professionals on Atwood's legal team. The hourly rates shall be addressed below, but first, it is necessary to review the framework for an analysis of attorneys' fees and expenses in Washington State.

Computation of Reasonable Attorneys' Fees and Expenses

A starting point to determine the reasonableness of an attorney fee request is the "lodestar" method. *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wn.App. 841, 846-47, 917 P.2d 1086 (1995). The "lodestar" method is the mathematical product of a reasonable hourly rate multiplied by a reasonable number of hours expended, supported by an itemized description of the time entries. The *Absher Const. Co.* Id., opinion also allows a court to look to a "factors" approach for this determination. Id., *citing Allard v. First Interstate Bank*, 112 Wn.2d 145, 149, 768 P.2d 998, 773 P.2d 420 (1989). This is presumably not a separate and independent

test, but a related method to assist the trial court in making a determination of "reasonable"[33] in the "lodestar" equation.

Allard draws the "factors" test from at least three sources: (1) RPC 1.5(a); (2) the contingent fee agreement; and (3) the Court's belief that the plaintiffs should be made whole. Id., at 149. There were other factors, but those predominated.

RPC 1.5(a) provides several factors in determining the amount of attorneys' fees to be awarded:

> *(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;*
>
> *(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;*
>
> *(3) The fee customarily charged in the locality for similar legal services;*
>
> *(4) The amount involved and the results obtained;*
>
> *(5) The time limitations imposed by the client or by the circumstances;*
>
> *(6) The nature and length of the professional relationship with the client;*

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[33] "Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate." *Bowers v. Transamerica Title Ins. Co.*, 100 Wash. 2d 581, 597, 675 P.2d 193, 203 (1983) The rate requested by Mr. Sheridan ($550 per hour) is Mr. Sheridan's normal hourly rate which he has been charging since January of 2013. (Sheridan Declaration, P. 26)

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

I will go through these factors from RPC 1.5(a)

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

MSA's brief paints this case as a simple, straightforward single-Plaintiff employment case. (Defendants' Opposition to Plaintiff's Petition for Attorney Fees, p. 2, l. 21 – "*a single-Plaintiff employment lawsuit.*" repeating this verbatim several additional times throughout the brief.) It was anything but that. This was a time and labor intensive case for Atwood driving up Attwood's costs and fees due in large part to the extensive and aggressive motion and discovery practice employed by MSA. This is an appropriate factor to take into consideration. *Herring v. Department of Social and Health Services*, 81 Wn.App. 1, 34, 914 P.2d 67 (1996)("*The trial court considered the appropriate factors in setting the attorney fee judgment. . . . The trial court then found DSHS's counsel's tendency of "stubborn and aggressive resistance to discovery" was a large factor in lead counsels' need for associate counsel.*") As just one example, when it came to light that MSA had failed to disclose a material witness when that witness should have been disclosed pursuant to an Interrogatory Question, this Court sanctioned MSA (but not the lawyers), Ordered the production of the witness, and allowed Atwood to depose the witness at

MSA's expense. This was just one example of numerous discovery fights. I am not saying MSA was solely to blame as Atwood filed her share of Motions of motions as well.[34]

This wasn't a "standard" employment case. There was a significant amount of discovery and an unusually large number of motions all the way through trial, and now post-trial. As just one example of the complexity, we had interactions with the Department of Energy (hereinafter "DOE"). DOE had actual involvement in parts of the trial by the General Counsel of the Department of Energy (located on the East Coast) represented by Ms. Marla Marvin as the General Counsel's representative in the courtroom. They would communicate regarding a number of issues, and Ms. Marvin would provide us with guidance from the General Counsel. Another layer of complexity were the rules and restrictions occasioned by the DOE's *Touhy* authorization[35] and the associated rules surrounding what the government witnesses could and could not say, including financials, and the obvious confidentiality of National Nuclear secrets. This added layer of complexity was both novel and difficult. It took great skill, time and effort, which was evidenced by Mr. Sheridan's performance, to battle this case through to a successful jury verdict.

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[34] I do not know if this carries any weight, but – with the caveat that I have been on the Superior Court Bench now for just five years and on the District Court Bench for two years – even though I have had my share of complex litigation both as a trial attorney for 17 years, I can represent that this case presented me with the most number of motions, the most number of complex issues, and certainly the most issues of first impression. I enjoyed the challenge of the volume and quality of the Motions – it has certainly been my pleasure to be intellectually challenged by the excellent briefing and aggressive and yet respectful argument on both sides. I want to make this observation for any reviewing court for the purpose of my input on the amount of time expended by both sides and supporting the award for the requested attorneys' fees – and state, for the record, that without exception it was possibly the highest quality litigation I have had the pleasure to be associated with. With all sincerity, I complement both sides on their excellent lawyering, and their excellent representation of their respective clients. I will always remember this case as a high mark and an example of the utmost professionalism and excellence all attorneys should emulate.

[35] Please see the email from Marla Marvin to myself and counsel dated September 14, 2017, attached as Exhibit B to this Order as a fair summary of the complexities occasioned by the *Touhy* authorization.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

It had to be obvious to Atwood that Mr. Sheridan would not be working on other cases while he was consumed with representing her during the discovery phase, and at trial.

(3) The fee customarily charged in the locality for similar legal services.

This is a hotly contested issue, admittedly complicated by my ruling on a pre-trial Motion for Attorneys' Fees arising out of a straightforward Discovery Dispute. It does not escape me that my decision on that issue allows MSA to advance an argument that may have a material and significant impact on the amount of attorneys' fees awarded to Atwood. For that reason, I have taken extra time and effort to attempt to make the decision which I believe is correct and justified for the reasons set forth below.

In this case, MSA put on evidence that other lawyers practicing employment law in Eastern Washington and more specifically the Benton County area charged less than Mr. Sheridan. The Court does not challenge those observations. However, there was no evidence offered by MSA that any other firm in the Benton County area was skilled enough, or could absorb the time loss if unsuccessful, or could cash flow the out-of-pocket expenses of this type of litigation. There may well be such a firm, but MSA did not produce evidence of one. In circumstances where you have a unique case requiring specialized skills and there is no evidence in the record that a local firm could have handled the case, then the average hourly rate of the

locality is not, by itself, given much weight, and the Court is more amenable to finding Mr. Sheridan's rate reasonable under the circumstances.

By way of analogy (albeit not perfect) consider the scenario that I lived in a city of moderate size and means located in a rural area of the state, where there was the typical assortment of grocery stores, pharmacies, farm supply in implement stores, and a used car dealership. Through ways not relevant to this story, I became monetarily very successful and despite that, I lived outwardly modestly to fit into the local population, with one exception. Ever since I was a young child, I wanted to own a Corvette, Z-06. On a whim, while on a trip to a larger metropolitan area, after great study and research regarding the best Corvette Z-06 on the market, I purchased a bright shiny red one with all of the electronic and mechanical "bells and whistles." This car does things and performs substantially above any other vehicle I could purchase off the lot at our local used car dealership. I drove the car home and proudly drove it around town almost every day allowing myself that one extravagance.

Then, on one very bad day, an inattentive driver missed a stop sign, ran full speed into the intersection and completely totaled my beautiful new Corvette Z-06. While thankfully no one was injured, I was forced to sue the driver for damages to my Corvette Z-06.

Would it be fair for either the defendant's insurance company, the Defendant's lawyer, the Judge or the Jury to say, "Well, the average price of a vehicle in our area is $15,000.00, and there is just no way you should recover $95,000.00 for the expensive car you chose to purchase in a larger metropolitan area? " or, "You should have purchased a vehicle here – then your damages would only be $15,000.00." Or, "It was your choice to buy an extremely expensive vehicle and I should not bare the economic burden of your expensive choice when you could have purchased a moderately priced car here."

I am of the opinion that if I want to drive an expensive car that is my privilege. If they don't sell a Corvette Z-06 in my town, I am not constrained to buying only local cars, I can buy cars wherever I want. And if someone damages my car, they must pay for the damages to the car, even if they exceed the cost of a car available locally.

A similar analogy could be used examining the cost of a medical specialist, such as a surgeon, when only local family physicians are available when facing a complex surgery.

Does this sound fair and equitable? And, should the same hold true for attorneys and their rates? Here, both parties hired law firms headquartered out of Seattle. If MSA choses to retain a Seattle firm, shouldn't Atwood have the same right? I am assuming no one would say that Atwood must hire counsel from Benton County even when the opposing counsel is from Seattle. Secondly, while much was made of the difference between the hourly rates of local counsel and the rates requested by Atwood's counsel, there was very little evidence of the Defendant's hourly rates for similar cases involving "non-negotiated" fee reductions.[36] Third, while there may have been a handful of law firms in Benton County that handle plaintiff-oriented gender discrimination cases, the Defense did not persuade me that there were firms as skilled, as ready to assume risks of the case, as able to afford the lost cash-flow resulting from taking this contingent fee case, and as able to absorb and pay for all of the costs and expenses of the trial, and as willing to be as responsive to the tsunami of legal motions, discovery, and pleadings as was generated by Yarmuth Widsdon, PLLC before, during and after the trial.

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[36] One fact available to the trial court when examining this issue is the hourly fees and total bill of opposing counsel charged in the case to compare with the amount requested by the prevailing party. In this case, Yarmuth Wilsdon, PLLC, had negotiated a reduced rate with MSA due to the volume of work they handled for the client. It made it very difficult, and almost impractical, to attempt a comparison.

My point is that while average hourly rates of a community are placed into evidence in the context of an attorney fee award, that is not necessarily helpful if the evidence does not include proof that those attorneys in the community could have handled the same case with the similar results. In my opinion, evidence of local hourly rates is not a helpful (or relevant/material) piece of information without the latter part of the equation providing a "full picture" of the local market.

This approach has been approved in cases such as *Collins v. Clark County Fire Dist. No. 5*, 155 Wn.App. 48, 231 P.3d 1211 (2010). There the trial court faced the same argument; i.e, the out-of-town counsel asked for his customary hourly rate of $300 per hour and the other side offered evidence that the Clark County legal community would reflect hourly rates of somewhere between $210 to $225. Id. at 77-79. The trial court stated: "*To argue that Clark County standards would set the fee is not persuasive as counsel in this highly specialized field often would be from Seattle or Portland where they're with firms more highly specialized in this type of case and management.*" Id. at 79. Interestingly, that case involved allegations of employment discrimination based on gender. On appeal, the Court of Appeals affirmed the trial court's decision in part based on that very observation. Id. at 101

Another case of note is *Broyles v. Thurston County*, 147 Wn.App. 409, 195 P.3d 985 (2008). Under similar circumstances, the appellate opinion noted: "*[T]he trial court noted that these rates were consistent with that charged by other lawyers in the Puget Sound area. In using such a large geographic area for measuring reasonableness, the trial court noted that very few attorneys in the Puget Sound area would take such a case of this nature and that it would be unreasonable to limit the plaintiffs to using an attorney from Mason or Thurston County.*" Id., at 452. I believe that this is entirely consistent with my analysis, and my ruling on this issue.

An additional factor comes into play in this case – specifically, conflicts of interest. As a perfect example, every single judge in the County either recused themselves or were asked to recuse themselves. It does not take a leap of logic to believe that there may not be a firm in the Benton County area that could have taken this case due to conflicts of interest. While not within the regimented analysis, I consider this another worthwhile factor to take into consideration when looking at the reasonableness of Atwood retaining counsel from Seattle and outside of the Benton County bar.

Now, I had previously ruled in this case, in the context of a limited discovery dispute, that lower rates should be applied to Mr. Sheridan's attorney fee request. The nature of that discovery dispute was relatively straightforward and didn't warrant, in my opinion at the time, the higher rate which I have awarded for the overall case. In isolation, that discovery dispute could have been handled by local counsel at their local rates. Perhaps in hindsight I would have ruled differently had I realized the complication it presented in the final award of Attorneys' Fees; however, I stand by my prior ruling. They are two separate and distinct situations. That was and remains limited to that particular discovery dispute, and I do not consider it binding on me for any other part of the case, and certainly not on the trial or the overall litigation. It admittedly complicated the issue, unfortunately, but I believe my decision is internally consistent.

(4) <u>The amount involved and the results obtained</u>.

Atwood sought and recovered $2.1 million dollars in economic damages. Atwood requested between $6 and $8 million dollars in noneconomic damages in her closing argument, and suggested to the jury that the noneconomic damages could be even higher. The jury awarded the lowest amount of noneconomic damages requested by Atwood; i.e., $6 million dollars. A great amount of money was at stake, and Atwood was extremely successful in securing a jury award giving her what she requested. The results, realistically, reflected what Atwood asked the jury to award which by anyone's assessment constitutes a great result.

(5) <u>The time limitations imposed by the client or by the circumstances</u>.

There was no evidence that I am aware of regarding any time limitations placed on Atwood's legal team by her or any outside forces.[37]

(6) <u>The nature and length of the professional relationship with the client</u>.

There was no evidence to the best of my knowledge regarding the length of the professional relationship between Mr. Sheridan and Atwood, other than the case at issue.

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[37] At one point during the trial I placed a time limit on both counsel to assure that the trial did not last beyond 5 weeks. We had indicated to the jury that the trial would last 3 weeks, and many had travel plans or other obligations beyond the 5-week mark. However, neither side used all of their available time – so neither side "ran out" of time or were materially affected by the imposition of time limits by the Court.

(7) <u>The experience, reputation, and ability of the lawyer or lawyers performing the services.</u>

It was clear to this Court from the record that Mr. Sheridan is very experienced and has acquired a high level of expertise in this area of employment law, and in particular with regard to the Hanford labor market. The record provided evidence of Mr. Sheridan's reputation as follows: "Mr. Sheridan enjoys an excellent reputation in Washington's legal community." *Declaration of Judith A. Lonnquist in Support of Plaintiff's Petition for Attorney Fees, Costs, Prejudgment Interest, and Tax Penalty*, (dated November 10, 2017; p. 3, P. 8, ll. 21-22).

(8) <u>Whether the fee is fixed or contingent</u>.

The fee agreement between Mr. Sheridan's office and Atwood is a Mixed Hourly / Contingent Fee Agreement[38] properly reduced to writing, and made part of the record. Of importance to this Court, Atwood agreed to pay Mr. Sheridan and his attorneys and staff at the agreed-upon hourly rates up to a maximum of $40,000.00. This is not an inconsequential amount of money to pay Mr. Sheridan on an hourly fee basis and evidences an agreement at arm's length between Atwood and Sheridan at an agreed upon hourly rate of $550 for Mr. Sheridan, and the other hourly rates as set forth on page two of the agreement.

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[38] Signed by Atwood on May 14, 2015 and signed by Mr. Sheridan on behalf of his firm on June 1st, 2015. A true and correct copy of the Fee Agreement is attached as Exhibit #18 to the Declaration of Mr. Sheridan in Support of his Petition for Attorneys' Fees and Expenses, dated November 14, 2017.

Like the Court in *Allard*, I would like to see Atwood fully compensated. Upholding the requested hourly rates will go a long way in fully compensating Atwood as she already paid out $40,000.00 at those hourly rates.

Other considerations:

Mr. Sheridan asks the Court to consider the legislature's pronouncement that the statute in question is to be applied liberally pursuant to RCW 49.60.020. This is allowed under case law. *Berryman v. Metcalf*, 177 Wn.App. 644, 668, 312 P.3d 745 (2013)("*In determining the amount of an [*attorney fee*] award, the court must consider the purpose of the statute allowing for attorney fees. A statute's mandate for liberal construction includes a liberal construction of the statute's provision for an award of reasonable attorney fees."(citations omitted)*. RCW 49.60.020 states in relevant part: "*The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof."*

In addition, "The Court has called for liberal construction of the attorney fee entitlement in order to encourage private enforcement of the Law Against Discrimination." *Martinez v. City of Tacoma*, 81 Wn.App. 228, 235, 914 P.2d 86 (1996). So, not only does the express language of the statute itself provide for liberal construction, the "Court" has called for liberal construction of the statute; specifically, RCW 49.60.030(2). In addition, Atwood advances the "private attorney general" theory to bolster her claim that Mr. Sheridan's attorneys' fees are reasonable. "*The 'private attorney general' theory lets the attorneys recover more than the benefit to their client would make reasonable, because they also confer benefits on others throughout society by winning a civil rights claim." McGinnis v. Kentucky Fried Chicken of California*, 51 F.3d 805,

810 (9th Cir. 1995)[39] (applying Washington State law on discrimination) These various theories support Mr. Sheridan's argument that his requested attorneys' fees and expenses should be awarded at the rates requested for the totals requested.

Both parties hired Seattle counsel. The only two practical distinctions were the years in practice between the two firms (favoring Atwood's counsel), and the reduced rate of defense counsel due to a negotiated "volume discount" with MSA. It also seems eminently reasonable that both parties hired Seattle counsel. Both parties should have anticipated paying Seattle rates regardless of the venue of the lawsuit. There was no challenge to Mr. Sheridan's rate in the Seattle market. The evidence, bolstered by declarations, supported the reasonableness of those fees in Benton County under the circumstances presented by this case.

I am awarding the requested hourly rates by Atwood's legal team, with one exception. In the discovery dispute where I lowered the rate, that rate shall apply to those hours and are not compensable now at the higher rate, or the net difference between the rate requested and the rate awarded. That was a ruling which I believe was appropriate under the facts as presented at the time, and I am going to stand by that ruling.

In setting and approving the hourly rates requested by Mr. Sheridan's team I am not factoring in the contingent nature to the exclusion of a separate multiplier.

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[39] This citation is not exactly on point due to the fact that Atwood received a verdict for her damages far in excess of the attorneys' fees requested. One of the angles that "private attorney general" action addresses is whether Atwood would have paid Mr. Sheridan and his legal team the amounts now requested based on an hourly rate not knowing the outcome of the lawsuit? *"The 'private attorney general' theory allows the fee award to exceed what a reasonable individual would pay lawyers for the benefit conferred on him." McGinnis*, Id. Here, we only know that with hindsight.

I agree with and accept the attorneys' fees and costs withdrawn by Mr. Sheridan as outlined in his briefing. I disagree with MSA's proposal that I withhold attorneys' fees for Motions which were unsuccessful. Motions are filed subject to CR 11 and impliedly filed in good faith. No one is expected to win every motion. That is unrealistic. What is not subject to an award is any time that is proven to be duplicative or unproductive. Filing and losing a Motion is not necessarily unproductive. I have reviewed the time entries and I do not find any were duplicative or unproductive.

"[T]he determination of a fee award should not be an unduly burdensome proceeding for the court or the parties. As long as the award is made after considering the relevant facts and the reasons given for the award are sufficient for review, a detailed analysis of each expense claimed is not required." *Steele v. Lundgren*, 96 Wn.App. 773, 982 P.2d 619, 626 (Div. 1 1999) I looked at a very large number of the representative entries filed by Atwood, and relied in part on the time entries disputed by MSA and individually itemized in its brief.

In addition to the reductions referenced above, I am awarding the Attorneys' Fees and Expenses requested by Mr. Sheridan except as set forth below.

There were entries by Mr. Sheridan[40] related to drafting a press release. Those were not reasonably related to the lawsuit, should not be borne by MSA, and shall not be part of the award. Mr. Sheridan shall be responsible for excising any time and expense spent on a press release(s).

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[40] In referencing "Mr. Sheridan" in relation to a discussion of attorneys' fees here and elsewhere throughout this Order, I am necessarily including the time entries, time expended and hourly rates of the other lawyers and professionals on his team.

As mentioned earlier, Mr. Sheridan's Reply Brief identifies a number of line items from various counsel that he agrees to withdraw. I accept those revisions as set forth in that brief.

Regarding the expenses, I hereby award all expenses as necessary and reasonable with the exception of the following: (1) In my opinion, the credit card fees are not a recoverable expense and they shall be removed; (2) the cost of the Lonnquist Declaration is capped at $3,000.00 – anything above that is deemed unreasonable and unrecoverable[41]; (3) Alan Parker's trial Expenses of $2,141.21 were not supported with sufficient detail to allow me to determine whether it was legally a recoverable cost, or that the expenses were reasonable; and, (4) the following meal charges are excessive and unrecoverable – (i) 2/2/17 - $119.21; and (ii) 9/12/17 - $134.95. Those expenses identified in this paragraph shall be removed from the cost bill by Mr. Sheridan.

The other lawyers and professionals utilized as part of Atwood's team.

Given Anne Mjaatvedt's impressive medical education, legal education and background[42] (paragraph 32 and Exhibit 14 to the Declaration of Mr. Sheridan, November 14, 2017) I find her more than qualified to have assisted in this case. Her fees shall be awarded on the time entries produced at $350 per hour.

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[41] I say "unrecoverable" due to MSA's Motion to Strike portions of her Declaration. I granted the majority of MSA's Motion and struck a substantial portion of paragraphs 11 and 13. Those sections affected included what were obviously the work product of legal research. I attempted, to the best of my ability, to estimate the time put into that legal research, and factoring in her hourly rate, reduced her bill by the amount of the value of the excised portions of her Declaration. It may not be exactly accurate, but it was my best estimate.

[42] I am Denying MSA's Motion to strike her CV.

Mr. Rose is qualified and produced high-quality timely briefing in this case, as well as providing valuable assistance in drafting the final set of jury instructions throughout the various edits. He shall be compensated at the requested rate of $350.00 per hour for the time requested.

"An award for attorneys' fees may also include recovery for time spent by qualified paralegals or legal assistants where the hourly rate and amount of time spent are reasonable." 16 Wash.Prac., Tort Law and Practice, Section 6.27 (4th ed.), citing *TJ Landco, LC v. Harley C. Douglass, Inc.*, 186 Wn.App. 249, 346 P.2d 777 (Div. 3 2015), *rev. denied*, 184 Wn.2d 1003, 357 P.3d 666 (2015). Here the work done based on the entries and rate of $200 charged by Mr. Sheridan's legal assistant, Ashalee May, were necessary and proper, appear more than secretarial work, and appear warranted. She appears to be well qualified and worked under Mr. Sheridan's direction. I incorporate as findings Paragraph 31 of Mr. Sheridan's First Declaration regard fees and costs dated November 14, 2017 as factual findings regarding Ms. May as though set forth hearing. They shall be awarded as requested.

I am awarding the full costs of all expert witnesses (unless otherwise expressly disallowed by this Order) used by Atwood in this case. "[A]s to employment discrimination claims . . . an award of expert witness fees is clearly authorized by RCW 49.60.030(2)." *Xieng v. Peoples Nat. Bank of Washington*, 120 Wn.2d 512, 528, 844 P.2d 389 (1993). While MSA did not make a direct attack on the experts who testified at trial, MSA does challenge the propriety of awarding the costs and expenses of a consulting or "non-testifying" expert. (Defendant's Brief in Opposition to Plaintiff's Petition for Attorneys' Fees and Expenses, p. 10 (December 14, 2017))

With regard to the costs of a consulting or non-testifying consulting expert, I am awarding those costs as part of Atwood's judgment. I am persuaded that the use of the non-

testifying experts was reasonable and necessary to Mr. Sheridan's preparation of the case, including but not limited to assisting in cross-examination of one or more of MSA's expert witnesses.

With the few exceptions outlined herein, Atwood met her burden to establish that the attorneys' fees and expenses requested by Mr. Sheridan and his team were both reasonable and necessary to her successful representation in this litigation. Mr. Sheridan shall be responsible for revising his fee request consistent with this ruling for presentation of a final judgment, and adjust his proposed Findings of Fact and Conclusions of Law according to and consistent with my ruling, either by way of incorporation by reference, or a complete redraft pulling in my findings and conclusions.

7.) Atwood's Motion for a "Multiplier" under the loadstar analysis.

I am awarding Atwood a multiplier of .5 times (i.e., increased by 50%) the attorneys' fees incurred by her legal team as awarded by this Court (with the exception of those that were billed and paid on an hourly basis) due to the risk of loss to the Sheridan firm had the jury returned a defense verdict, the complex nature of the factual issues, the skill of Atwood's counsel, and the Court's desire to encourage other attorneys to take cases such as this one. The relevant factors stated are supported by the record.

8.) Atwood's Motion for a tax penalty.

The Defendants are not challenging a requested tax penalty, and the properly computed tax penalty shall be awarded as part of the final judgment.

9) Atwood's Motion for an award of pre-judgment interest.

In my opinion, the economic damages were not liquidated, and thus Atwood is not entitled to prejudgment interest as requested. MSA directs the Court's attention to the holding of *Pannell v. Food Services of America*, 61 Wn.App. 418, 810 P.2d 952 (Div. I, 1991). *Pannell* involved a similar issue; i.e., whether or not prejudgment interest was appropriate on an award of back pay. (*"In Washington, prejudgment interest can be awarded only in those cases where the claim is for a fixed sum or the evidence provides a basis for computing the recovery with exactness, without reliance on opinion or discretion."* Id. at 449, *citing, Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662 (1986)) In the case at hand, the jury's award of the $2.1 million dollars in economic damages was not segregated into back pay and front pay.

Like jury instruction #23 in *Pannell*, jury instruction #17 used in the case at hand instructs the jury to take into consideration a large number of factors. They had to make discretionary determinations about the duration of employment, growth rate, and a large number of other factors to compute the economic damages. Prejudgment interest only applies to awards in which "the evidence finds a basis for computing the recovery with exactness, without reliance

on opinion or discretion." *Pannell*, Id. at 449, *citing, Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662 (1986). In my opinion, the jury used its discretion to compute the amount of economic damages and thus the award is not liquidated and consequently, Atwood is not entitled to prejudgment interest on this amount.

10.) Atwood's Motion to declare the Supersedes Bond deficient.

I find the proper duration of time for the initial Supersedes Bond to be 24 months. The current $10 million dollar Supersedes Bond may be deficient given the Court's rulings if the final judgment as adjusted by this Order, combined with 24 months of post-judgment interest, is more than the current bond. If it becomes apparent that the appellate process will exceed 24 months, then either of the parties may bring the issue back before the court to determine if an adjustment in the Supersedes Bond is warranted.

Dated this 10 of January, 2018.

Doug Federspiel
Visiting Judge

EXHIBIT A

Doug Federspiel

From: Doug Federspiel
Sent: Friday, December 01, 2017 9:46 AM
To: Maria Espinoza
Subject: RE: Benton County Case No. 15-2-01914-4 | Atwood v. Mission Support Alliance, et al.

Yes – that is fine by me.

From: Maria Espinoza
Sent: Friday, December 01, 2017 9:45 AM
To: Doug Federspiel <dougf@co.yakima.wa.us>
Subject: FW: Benton County Case No. 15-2-01914-4 | Atwood v. Mission Support Alliance, et al.

Reference email below for your FYI from Mr. Sheridan.

Maria

From: Jack Sheridan [mailto:jack@sheridanlawfirm.com]
Sent: Friday, December 1, 2017 4:45 AM
To: Maria Espinoza <maria.espinoza@co.yakima.wa.us>; Tiffany Deaton <tiffany.Deaton@co.benton.wa.us>
Cc: Ashbaugh Denise <dashbaugh@yarmuth.com>; Suzette Barber <sbarber@yarmuth.com>; Mark Rose <mark@sheridanlawfirm.com>; Cristin Kent Aragon <caragon@yarmuth.com>; Bensussen, Stanley J (Stanley_J_Bensussen@rl.gov) <Stanley_J_Bensussen@rl.gov>; Beller, Mark A <Mark_A_Beller@rl.gov>; Charles Prutting <cprutting@yarmuth.com>; Alea Carr <alea@sheridanlawfirm.com>; John <john@sheridanlawfirm.com>
Subject: Re: Benton County Case No. 15-2-01914-4 | Atwood v. Mission Support Alliance, et al.

Maria and Tiffany,
The parties jointly propose a briefing schedule as follows for the 12/21 hearing:

- Responsive pleadings due on 12/14
- Replies due 12/19

Would you please pass that along to Judge Federspiel for his consideration?
Thanks.
Jack

Jack Sheridan
jack@sheridanlawfirm.com

On Nov 16, 2017, at 11:23 AM, Maria Espinoza <maria.espinoza@co.yakima.wa.us> wrote:

Mr. Sheridan and Ms. Ashbaugh:

Judge will hear all pending motions on Thursday, December 21st starting at 1:30 p.m. in Benton County. Please file your Note for Hearing with Benton County and provide us with a copy of notice and all supporting documents in advance for Judge to review.

Tiffany:

Judge is asking for a courtroom and clerk for December 21st. Thank you Tiffany.

From: Jack Sheridan [mailto:jack@sheridanlawfirm.com]
Sent: Thursday, November 16, 2017 9:26 AM
To: Maria Espinoza <maria.espinoza@co.yakima.wa.us>
Cc: Ashbaugh Denise <dashbaugh@yarmuth.com>; Tiffany Deaton <tiffany.Deaton@co.benton.wa.us>; Suzette Barber <sbarber@yarmuth.com>; Mark Rose <mark@sheridanlawfirm.com>; Cristin Kent Aragon <caragon@yarmuth.com>; Bensussen, Stanley J (Stanley_J_Bensussen@rl.gov) <Stanley_J_Bensussen@rl.gov>; Beller, Mark A <Mark_A_Beller@rl.gov>; Charles Prutting <cprutting@yarmuth.com>; Patrick Leary <patrick@sheridanlawfirm.com>; Alea Carr <alea@sheridanlawfirm.com>; John <john@sheridanlawfirm.com>
Subject: Re: Benton County Case No. 15-2-01914-4 | Atwood v. Mission Support Alliance, et al.

Maria,
Ms. Ashbaugh and I have conferred, and we are both available on 12/21 or 22 in the afternoon. Thanks again.
Jack

Jack Sheridan
The Sheridan Law Firm, P.S.
705 2nd Ave., Suite 1200
Seattle, WA 98104
Tel: 206-381-5949

Cell: 206-931-7430
jack@sheridanlawfirm.com

On Nov 14, 2017, at 5:19 PM, Maria Espinoza <maria.espinoza@co.yakima.wa.us> wrote:

Judge Federspiel is starting a two-week/12-jury trial on December 4th – 15th, 2017. He would like parties to agree on a date/time for half-day week of December 18th, 2017.

Judge prefers to hear the requested motions in Benton County.

Mr. Sheridan, you indicated that you have new support staff – would you let me know who they are so that I may include them in the correspondence. Thank you.

Maria V. Espinoza

From: Jack Sheridan [mailto:jack@sheridanlawfirm.com]
Sent: Monday, November 13, 2017 4:39 PM
To: Ashbaugh Denise <dashbaugh@yarmuth.com>; Maria Espinoza <maria.espinoza@co.yakima.wa.us>
Cc: Tiffany Deaton <tiffany.Deaton@co.benton.wa.us>; Suzette Barber <sbarber@yarmuth.com>; Mark Rose <mark@sheridanlawfirm.com>; Cristin Kent Aragon <caragon@yarmuth.com>; Bensussen, Stanley J (Stanley_J_Bensussen@rl.gov) <Stanley_J_Bensussen@rl.gov>; Beller, Mark A <Mark_A_Beller@rl.gov>; Charles Prutting <cprutting@yarmuth.com>; Patrick Leary <patrick@sheridanlawfirm.com>; Alea Carr <alea@sheridanlawfirm.com>; John <john@sheridanlawfirm.com>
Subject: Re: Benton County Case No. 15-2-01914-4 | Atwood v. Mission Support Alliance, et al.

Is the Court available on 12/6? If so, it looks like both parties are available then. I would make myself available 12/12-15 as well if that works better for the Court.
Thanks again.
Jack

Jack Sheridan
jack@sheridanlawfirm.com

On Nov 13, 2017, at 4:34 PM, Denise L. Ashbaugh <dashbaugh@yarmuth.com> wrote:

I am unavailable on 12/4 and 12/5. I could also do 12/12-12/15 as well, depending on the Court's and opposing counsel's availability.

From: Jack Sheridan [mailto:jack@sheridanlawfirm.com]
Sent: Monday, November 13, 2017 4:33 PM
To: Denise L. Ashbaugh <dashbaugh@yarmuth.com>
Cc: Maria Espinoza <maria.espinoza@co.yakima.wa.us>; Tiffany Deaton <tiffany.Deaton@co.benton.wa.us>; Suzette Barber <sbarber@yarmuth.com>; Mark Rose <mark@sheridanlawfirm.com>; Cristin Kent Aragon <caragon@yarmuth.com>; Bensussen, Stanley J (Stanley_J_Bensussen@rl.gov) <Stanley_J_Bensussen@rl.gov>; Beller, Mark A <Mark_A_Beller@rl.gov>; Charles Prutting <cprutting@yarmuth.com>; Patrick Leary <patrick@sheridanlawfirm.com>; Alea Carr <alea@sheridanlawfirm.com>; John <john@sheridanlawfirm.com>
Subject: Re: Benton County Case No. 15-2-01914-4 | Atwood v. Mission Support Alliance, et al.

I have oral argument in the 9th Circuit on 12/8, prep on 12/7, and a deposition set for 12/6. How about 12/4 or 5? If not, I'll move the 12/6 deposition if the Court is available that day.
Thanks.
Jack

Jack Sheridan
jack@sheridanlawfirm.com

On Nov 13, 2017, at 4:28 PM, Denise L. Ashbaugh <dashbaugh@yarmuth.com> wrote:

I am in hearings on those dates and Ms. Aragon is unavailable as well. Possibly we could look to a hearing if necessary during December 6-8.

From: Jack Sheridan [mailto:jack@sheridanlawfirm.com]
Sent: Monday, November 13, 2017 4:21 PM
To: Maria Espinoza <maria.espinoza@co.yakima.wa.us>; Denise L. Ashbaugh <dashbaugh@yarmuth.com>
Cc: Tiffany Deaton <tiffany.Deaton@co.benton.wa.us>; Suzette Barber <sbarber@yarmuth.com>; Mark Rose <mark@sheridanlawfirm.com>; Cristin Kent Aragon <caragon@yarmuth.com>; Bensussen, Stanley J (Stanley_J_Bensussen@rl.gov) <Stanley_J_Bensussen@rl.gov>; Beller, Mark A <Mark_A_Beller@rl.gov>; Charles Prutting <cprutting@yarmuth.com>; Patrick Leary <patrick@sheridanlawfirm.com>; Alea Carr <alea@sheridanlawfirm.com>; John <john@sheridanlawfirm.com>
Subject: Re: Benton County Case No. 15-2-01914-4 | Atwood v. Mission Support Alliance, et al.

Thanks Maria. We got our last declarations signed today in support of our fee petition, so we'll be filing a petition for attorney fees tomorrow. We also have our objection to the

amount of the bond posting pending. I could do a hearing on 11/27, 28, or 30? Do any of these date work for the Court? Under the Benton County local rule, I believe we don't respond to MSA's CR 59 motion unless directed to do so, so we have not responded to date. You may also note that we have new staff supporting us, so please copy them on any future emails. Thank you.

Ms. Ashbaugh,
Do those dates work for you?
Thanks.
Jack

Jack Sheridan
jack@sheridanlawfirm.com

> On Nov 13, 2017, at 4:09 PM, Maria Espinoza <maria.espinoza@co.yakima.wa.us> wrote:
>
> Judge Federspiel received several documents last week from parties --- are you all wanting to schedule a hearing to discuss these issues? If so, please let me know of some dates/times you would be available so I may check court calendar. Thank you,
>
> Maria Espinoza
>
> **From:** Jack Sheridan [mailto:jack@sheridanlawfirm.com]
> **Sent:** Thursday, November 2, 2017 3:47 PM
> **To:** Denise L. Ashbaugh <dashbaugh@yarmuth.com>
> **Cc:** Tiffany Deaton <tiffany.Deaton@co.benton.wa.us>; Suzette Barber <sbarber@yarmuth.com>; Maria Espinoza <maria.espinoza@co.yakima.wa.us>; Mark Rose <mark@sheridanlawfirm.com>; Ashalee May <ashalee@sheridanlawfirm.com>; Melanie Kent <Melanie@sheridanlawfirm.com>; Cristin Kent Aragon <caragon@yarmuth.com>; Bensussen, Stanley J (Stanley_J_Bensussen@rl.gov) <Stanley_J_Bensussen@rl.gov>; Beller, Mark A <Mark_A_Beller@rl.gov>; Charles Prutting <cprutting@yarmuth.com>
> **Subject:** Re: Benton County Case No. 15-2-01914-4 | Atwood v. Mission Support Alliance, et al.

Agreed. I think our judge is out until 11/4.

Jack Sheridan
Sheridan Law Firm, P.S.
705 2nd Ave., Suite 1200
Seattle, WA 98104
Tel: 206-381-5949
Cell: 206-931-7430

On Nov 2, 2017, at 3:25 PM, Denise L. Ashbaugh <dashbaugh@yarmuth.com> wrote:

> I don't believe so. Thank you.
>
> **From:** Tiffany Deaton [mailto:tiffany.Deaton@co.benton.wa.us]
> **Sent:** Thursday, November 2, 2017 3:23 PM
> **To:** Suzette Barber <sbarber@yarmuth.com>; Maria Espinoza <maria.espinoza@co.yakima.wa.us>; Jack Sheridan <jack@sheridanlawfirm.com>
> **Cc:** Mark Rose <mark@sheridanlawfirm.com>; Ashalee May <ashalee@sheridanlawfirm.com>; Melanie Kent <Melanie@sheridanlawfirm.com>; Denise L. Ashbaugh <dashbaugh@yarmuth.com>; Cristin Kent Aragon <caragon@yarmuth.com>; Bensussen, Stanley J (Stanley_J_Bensussen@rl.gov) <Stanley_J_Bensussen@rl.gov>; Beller, Mark A <Mark_A_Beller@rl.gov>; Charles Prutting <cprutting@yarmuth.com>
> **Subject:** RE: Benton County Case No. 15-2-01914-4 | Atwood v. Mission Support Alliance, et al.
>
> Is there a hearing tomorrow?
>
> ***TIFFANY DEATON***
> ***Assistant Administrator***
> **Benton & Franklin Counties Superior Court**
> **7122 W. Okanogan Pl., Bldg A**
> **Kennewick, WA 99336**

"Leadership is a potent combination of strategy and character. But if you must be without one, be without the strategy." - Norman Schwarzkopf

Ph: 509-736-3071 x 3219

Website: Benton and Franklin Counties Superior Court

From: Suzette Barber [mailto:sbarber@yarmuth.com]
Sent: Thursday, November 02, 2017 11:24 AM
To: Maria Espinoza <maria.espinoza@co.yakima.wa.us>; Tiffany Deaton <tiffany.Deaton@co.benton.wa.us>; Jack Sheridan <jack@sheridanlawfirm.com>
Cc: Mark Rose <mark@sheridanlawfirm.com>; Ashalee May <ashalee@sheridanlawfirm.com>; Melanie Kent <Melanie@sheridanlawfirm.com>; Denise L. Ashbaugh <dashbaugh@yarmuth.com>; Cristin Kent Aragon <caragon@yarmuth.com>; Bensussen, Stanley J (Stanley_J_Bensussen@rl.gov) <Stanley_J_Bensussen@rl.gov>; Beller, Mark A <Mark_A_Beller@rl.gov>; Charles Prutting <cprutting@yarmuth.com>
Subject: Benton County Case No. 15-2-01914-4 | Atwood v. Mission Support Alliance, et al.

Dear Maria, Tiffany and Mr. Sheridan,

Attached are the following documents:

1. MSA' s Opposition to Plaintiff's Motion to Have Supersedeas Bond Ruled Deficient;
2. Declaration of Cristin Kent Aragon in support of motion; and
3. Proposed Order denying plaintiff's motion.

These documents are being filed with Benton County Superior Court.

Maria, I will be sending Judge Federspiel's bench copies via Federal Express to your attention (for arrival tomorrow morning). Please let me know if you have any questions.

Sincerely,

Suzette Barber
Legal Assistant

<image001.png>
1420 FIFTH AVENUE, STE 1400 SEATTLE, WA 98101
T 206.516.3800 F 206.516.3888
D 206.516.3879
www.yarmuth.com

EXHIBIT B

Doug Federspiel

From: Marvin, Marla K <marla.marvin@rl.doe.gov>
Sent: Thursday, September 14, 2017 4:23 PM
To: Maria Espinoza; Doug Federspiel
Cc: 'Jack Sheridan'; Cristin Kent Aragon; 'Denise L. Ashbaugh'; Marvin, Marla K
Subject: Federal Employees in Atwood v. MSA

Greetings Judge Federspiel (and Ms. Espinoza) –

On the September 7, 2017, pre-trial conference call, you asked that I provide some suggestions for ensuring compliance with the Touhy regulations limiting testimony by US Department of Energy (DOE) employees to that authorized by the DOE General Counsel. Below are my recommendations.

- **Location:** At the pre-hearing call last week, we agreed I should have a table in an "unobtrusive location," in a manner that does not suggest DOE's support of either party. Now that you all have used the courtroom, do you have ideas? Shall I appear before trial Friday to work on this with court staff?
- **Explaining my presence to the jury:** The jury will wonder about my appearance, so maybe a simple summary of the Touhy authorization should be provided the jury when the first federal witness appears?? For example: "A representative of the US Department of Energy will be present for testimony of current and former employees of DOE whose participation was requested by the parties. Several DOE employees have been authorized by the DOE General Counsel to provide specific, factual information requested by either Ms. Atwood or MSA that these employees acquired as part of their official duties. Because DOE is not a party to this case and these DOE employees do not speak on behalf of or represent the agency, it is important that they not answer questions for which they have not received approval, nor should counsel attempt to elicit such information. The DOE representative will notify me should she believe the parties or witnesses have acted beyond their authorization."
- **Questions or testimony outside of Touhy authorization:** Should questioning or testimony veer into unauthorized territory, you recommended that I not object, but that I say something like, "Judge I have something I'd like to speak with you about." Presumably then, you would instruct counsel to withdraw the question or the witness not to answer the question until after a break at which point we would discuss it in chambers?

Please let me know how I can unobtrusively assist in ensuring a smooth process with DOE witnesses. Thank you,

Marla Marvin, Attorney
Richland Operations Office
U.S. Department of Energy
Richland, WA 99352
(509) 376-1975