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IN THE SUPREME COURT OF THE

STATE OF WASHINGTON

Case No. 1027982

CAROL ALLREAD,

Petitioner

vs.

CITY OF BURIEN,

Respondent

CITY OF BURIEN'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent, City of Burien, was the Defendant in the trial court and the Respondent in the Court of Appeals.

II. COUNTER-STATEMENT OF THE CASE

Petitioner Carol Allread's position as Executive Assistant to the City Manager was eliminated in July of 2020 amidst a series of budget cuts by the City in response to the economic impact of the Coronavirus pandemic, and she was laid off. RP 1223-1224. Allread claims she was actually terminated for using family leave in violation of Washington's Paid Family Medical Leave Act ("PFMLA")[1] and public policy. After a 10-day trial, the jury returned a defense verdict in favor of the City.

A. The City Faced Substantial Budget Hurdles in 2020.

In 2020, Burien, like most public agencies, scrambled to respond to the impacts of the COVID-19 pandemic. RP 375, 621-627. Adapting to the unprecedented risk of financial

[1] RCW 50A.40.

catastrophe as funding sources dried up was an ongoing process. RP 630, 652-653. In April, the Finance Department projected a potential $4.6-$6.5 million budget gap. RP 629. The City began implementing personnel reductions, including mandatory furloughs and layoffs of long-term intermittent and seasonal staff. RP 435-436, 457-458, 483, 502, 504. The Parks Department alone cut 29 intermittent workers and another long-term employee by July, reducing its budget by 5%. RP 897-906, 913, 216-218, 633-634, 546-547. Throughout this process, City Manager Brian Wilson consistently communicated that it "remained critically important for the City to address these financial issues early in order to reduce the level of impact in the future." RP 460-463, 547-548, 629-630, 637-642; Ex. 130.

However, as Wilson testified, "[f]or 2020 it was not enough. We were still faced with shortfalls." RP 458-459. Finance Director Eric Christensen explained that, even a with an adopted budget, the City needed the ability to pivot and

revisit it when forecasted circumstances change, noting "no one anticipated a pandemic." RP 549, 617-618.

By June, Wilson asked each department director to have proposed cuts of an additional 12% from their respective budgets ready by early August. RP 473-475, 907-909, 646-650, 655; Ex. 133, 135, 27. Wilson performed the same analysis within his own department, ultimately deciding to eliminate the Executive Assistant position—a job that primarily provided administrative support internally to him. RP 377, 402, 408, 467-473.

On July 24, 2020, Wilson and Administrative Services/Human Resources Director Cathy Schrock met with Ms. Allread and explained that the Executive Assistant position was cut from the budget due to projected revenue shortfalls, and she would be laid off at the end of July. RP 1273-1274, 27-29, 227-230, 408-410; Ex. 19. However, Allread speculated that she was actually being "fired" because she had used family leave. RP 1289-1290, 235-237. The position was never brought

back, and Allread was not replaced. RP 62, 739, 484, 484.

B. Allread Was Routinely Approved for Family Leave.

Throughout her employment with Burien, Allread was routinely approved for "intermittent" FMLA leave to care for a disabled family member. RP 11-12, 30, 44-46,133-136, 1238, 300, 353-354. In January of 2020, the City notified employees of the State's new Paid Family Medical Leave Act ("PFMLA"), RCW 50A.40, which provided an additional source of paid leave. RP 1238-1239, 29, 885-890,141, 145, 209, 215; Ex. 140. The City encouraged eligible personnel to apply. *Id*.; RP 294-299.

On June 24, 2020, Allread emailed Wilson, her direct supervisor, notifying him that an issue with her son had arisen. RP 1272-1273; Ex. 17. She confirmed she was still planning to take leave that week for days she had scheduled months earlier, and noted she was not sure what leave she might need in the future. RP762-764; Ex. 156. The email was no different than the many communications she routinely sent scheduling leave

over the years. RP 1318-1322. Wilson immediately responded, "*I'm sorry to hear this. Thank you for the notification. Moving forward, let us know what time off you need*." RP 1322-1223, 300-301, 440-441, 1322-1333, 300-301, 1223-1224; Ex. 156, 144, 158. He testified that Allread's email and use of leave had nothing to do with the decision to eliminate the Executive Assistant position as part of Citywide budget reductions. RP 440-441.

Contrary to Allread's personal assumptions, Wilson testified that he was never upset about her use of family leave and had no idea that she harbored a secret belief that he was. RP 448, 450, 474-476. In three years working together, Wilson never denied Allread leave and he also approved her requested flex schedules for various reasons, including family leave, personal errands, and to take elective classes. RP 354-358, 364, 505, 299-300, 448-453, 478-479; Exs. 206, 214, 169.

At trial, Allread presented her own testimony and that of Wilson, Schrock, Christensen, and former co-workers.

Numerous witnesses with first-hand knowledge contradicted Allread's speculative characterizations of events; none corroborated her descriptions of her interactions with Wilson or other City staff they had observed.

C. Evidence Presented at Trial Provided The Jury Substantial, Objective, And Credible Bases To Support Its Verdict.

First, the jury heard protracted testimony from Ms. Allread confirming Wilson's repeated approvals of her leave requests each year, in 2017 (RP 31-37; Ex. 206-207), 2018 (RP 95-106; Ex. 209), 2019 (RP 40, 42; Ex. 209), and 2020 (RP 106-112; Ex. 210). Allread's leave was approved as consistently during Wilson's tenure as City Manager as in prior years. RP 299-300, 353-354, 448-452, 452-453, 478-479, 758, 763; Exs. 206, 214, 169. Human Resources witnesses confirmed that many City's employees who had used family leave still worked there, and that Wilson had directed HR to ensure employees knew and were able to exercise their rights. RP 291-298; Ex. 20, 140-141.

Second, every trial witness involved in Leadership Team meetings and budget decisions corroborated the facts and circumstances leading to the City Manager's layoff decision, such as revenue depletions and operational changes due to COVID 19 restrictions necessitating cuts in all departmental budgets, including in the City Manager's Office. RP 651-652, 655-656, 283-289. They confirmed that, consistent with meeting minutes and emails, it was well-known that "things will be in flux as decisions are made and new information comes forward," which might (and did) include more layoffs. RP 281-289, 314-317, 332; Ex. 132-134. These witnesses contradicted Allread's assertion that Wilson ever suggested there would be "no more layoffs." RP 16-17, 27-29, 121.

Though admittedly never having managed a department or budget, or understanding how City departments might cut budgets by 12%, Allread told the jury that, in her opinion, the explanation of the budget concerns in her own layoff notice "was just lies." RP 1289, 235-237, 14-19, 121. Wilson

denied this and explained to the jury how he reached the difficult decision to eliminate his own Assistant's position and absorb, re-distribute, or do without the administrative tasks she had provided; his contemporaneous communications consistently reflected that the layoff was solely budget-related. RP 466-473, 485; Ex. 136, 137. The Finance Director corroborated that additional 2020 layoffs were always among considerations discussed at the time. RP 656-659, 661.

The jury of six returned a unanimous defense verdict on Allread's claims of: 1) PFMLA interference; 2) PFMLA retaliation, and 3) wrongful termination in violation of public policy. CP 3996-3997, 3979-3995; RP 976-1005.

III. ARGUMENT

Allread fails to establish RAP 13.4(b) standards governing acceptance of review as to any of the issues identified; therefore, her Petition for Review should be denied.

A. <u>The Court of Appeals Properly Affirmed the Trial Court's Exercise of Discretion Regarding Admissibility of Non-Party Co-Worker Testimony.</u>

There is nothing "arbitrary" about the Court of Appeals opinion affirming the trial court's decisions regarding admissibility of "comparator" evidence, nor does the opinion create a conflict with precedent such as *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 445–46, 191 P.3d 879, 888 (2008).[2] Allread's Petition reflects nothing more than continued disagreement with a series of sound discretionary evidentiary decisions by the trial court.

The Court of Appeals properly recognized that "deference is owed to the judicial actor who is 'better positioned than another to decide the issue in question'" in finding the trial court did not abuse its discretion here. *See*, *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,*

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[2] The term "comparator" typically describes similarly-situated employees outside a class protected by RCW Ch. 49.60 (WLAD) alleged to have been treated *more favorably* than a plaintiff alleging "disparate treatment". *See, e.g.*, *Johnson v. DSHS.,* 80 Wn. App. 212, 226, 907 P.2d 1223, 1231 (1996)).

122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Noting that two different trial judges reached the same discretionary conclusion based on the record, the Court of Appeals found the court appropriately applied ER 403 by balancing the probative value of the proffered evidence against "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Opinion*, at 8-11; RP 1166.

On review, the Court specifically explained how the trial court's discretionary rulings were entirely consistent with *Brundridge*, which confirmed that evidence is not necessarily admissible just because it might be relevant. *Opinion* at 12. In *Brundridge*, this court actually approved exclusion of similar evidence in an employment retaliation case.

In *Atwood v. Mission Support All., LLC,* 13 Wn. App. 2d 1126 (2020), the court found that admission of evidence of alleged retaliation against other, non-party employees in

different positions and circumstances was so prejudicial that it required reversal of a Plaintiff's verdict ("None of the four employees was a proper comparator. Admission of evidence of their treatment was error… Atwood misused this irrelevant evidence" by characterizing it as comparator evidence to argue retaliation was unsurprising, given its culture).

Here, the record was replete with evidence of the trial court repeatedly evaluating Allread's recurring demands for a different result on this evidentiary ruling throughout all stages of the litigation. CP 700-704, 574-590 (order severing actions); CP 322, 245-256 (motions in limine); RP 1161-1164, CP 453-461 (seeking "clarification" of rulings); RP 563-578, 587 (continuing offer of proof); RP 1166 (court balancing prejudicial effect) CP 520 (post-trial motion for new trial).

Far from Allread's characterization of an "arbitrary" ruling, the record reflects the trial court's careful analysis of the evidence consistent with the standards set forth in *Brundridge*. Though *Brundridge* acknowledges that "…evidence of prior

bad acts may be admissible for … proof of motive, intent, plan, knowledge" this permissive language derived from ER 404(b) does not end the inquiry. Rather, it merely allows the court to then go on to evaluate the probative value of co-worker testimony in relation to the elements of the specific claims at issue, balanced against "whether the probative value of the evidence outweighed its potential for prejudice." ER 403; *Petition* at 15, citing *Brundridge* at 446.

1. Legal Precedent Supports Exclusion of Testimony From Co-Workers Using Leave Pursuant to ER 403 Balancing of Probative Value and Potential Prejudice.

Allread erroneously asserts that "no court has required comparators have "the same minutiae, such as the same disability or the same person dealing with the disability," arguing "[T]hey were all members of the same protected class: persons who took legally-protected absences from work to address disabilities." *Petition* at 18. Her suggestion that *Brundridge's* reliance on the Ninth Circuit's ruling in *Heyne v.*

Caruso, 69 F.3d 1475, 1481 (9th Cir. 1995) supports her position is incorrect.

To the contrary, since its 1995 decision in *Heyne*, the Ninth Circuit has specifically rejected the position proffered by Allread, declining to extend its own ruling to "such an amorphous group" as employees with medical problems, or those who miss work for medical appointments or family illness. *See*, *Beachy v. Boise Cascade Corp.*, 191 F.3d 1010, 1014 (9th Cir. 1999). The *Beachy* court also noted that it was not an abuse of discretion to exclude such co-worker testimony where it was not clear the examples of the employer's response to medical leave were actually unlawful and where the trial court determined that admission of the testimony would be more prejudicial than probative under FRE 403. *See also*, *Romero v. Cnty. Of Santa Clara*, 666 F. App'x 609, 612 (9th Cir. 2016) (court properly excluded testimony comparing a group not "defined by clearly established parameters such as gender or race," finding limited probative value).

Similarly, in *French v. Providence Everett Med. Ctr.,* No. C07-0217RSL, 2009 WL 10676494, at *2 (W.D. Wash. Mar. 19, 2009), the District Court relied on *Beachy* to distinguish *Heyne* and exclude testimony of co-workers who also alleged they suffered discrimination for taking medical leave in a case involving claims of FMLA and WLAD (RCW Ch. 49.60) discrimination and retaliation. Noting differing reasons for taking leave and potential for undue prejudice and confusion if the jury "punished" the defendant employer for actions not involving the plaintiff, the court also recognized that allowing such evidence would also likely require "mini-trials" into the circumstances of each one of the other employment situations. *Id*.

Based on this legal precedent, the trial court could have excluded the co-worker evidence by simply finding that the *Heyne/Brundridge* rulings simply do not apply to claims involving use of protected leave as opposed to discriminatory treatment of employees in a more homogenous class, such as

gender or race. However, the lower courts here nevertheless went on to apply the ER 403 balancing test endorsed in *Brundridge* to the proffered evidence in this case to reach the same results on the merits. The Court of Appeals did not hold that "only comparators who used the same leave type as Allread hold probative testimony." Rather, it found the record reflected that the trial court properly weighed the probative value of the evidence offered against potential prejudice in the context of the claims asserted by Allread and did not abuse its discretion in limiting some testimony. *Opinion* 9-13.

2. The Trial Court Properly Evaluated the Probative Value of the Proffered Evidence in Conducting an ER 403 Analysis.

Acknowledging that evidence of unlawful treatment of other employees *can sometimes* be probative of an employer's attitude toward certain classes of protected employees, it is the court's duty to then determine the relative worth of such evidence in proving the claims at issue. *See, Brundridge, supra*. This requires an understanding of the elements of the claims at

issue.

Here, the trial court found the Eidmann and Mejia testimony was of minimal value in helping the jury determine whether it was "more likely than not" that the City Manager considered Allread's use of PFMLA leave a negative factor in the 2020 layoff decision, primarily due to significantly different circumstances of each employee.[3]

For example, Eidmann's allegations and employment circumstances were materially dissimilar from those of Allread. She did not merely "use a different type of leave;" she did not allege "interference" with or denial of any type of leave at all. Unlike Allread, Eidmann alleged that the City had failed to make reasonable accommodations for her disability pursuant to RCW Ch. 49.60 (WLAD). Such claims require consideration of

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[3] Allread's PFMLA "interference" claim required proof the City used her request for PFMLA leave as a negative factor in the in the July 2020 layoff decision. CP 3987. Her PFMLA "retaliation" claim required proof she engaged in "opposition activity" protected by the PFMLA prior to her July 2020 termination, which she had not.

notice, communication, and interactive processes regarding that employee's ability to perform her particular job duties and the sufficiency of the accommodations provided in light of medical necessities related to her specific medical conditions—none of which are pertinent to Allread's PFMLA claims. *See*, *Opinion* at 10*, Frisino v. Seattle Sch. Dist. No. 1*, 160 Wash. App. 765, 777, 249 P.3d 1044, 1049 (2011).

Further, Eidmann worked in the Public Works Department, not for the City Manager, and quit her job in 2019—before the COVID 19 pandemic. She was not terminated, disciplined, or laid off. Nor was there any finding that the City's handling of her disability accommodation was unlawful.

Mejia worked in the Parks Department under Parks Director Carolyn Hope. RP 905, 715. She was expected to testify she "believed" she had been discriminated against in how the Parks Department administered accommodations for her unique medical condition and restrictions in connection

with her performing her own job as a Recreation Coordinator. RP 709-717, 718, 917; CP [4]

The Parks Director testified that she laid off numerous seasonal, part-time, and full-time staff due to the pandemic's financial impacts on her department. RP 902, 905-906. Allread actually argued at trial that Mejia was treated *better* than her as her layoff did not occur until the end of 2020, rather than mid-year. RP 1532 (closing argument). Her theory emphasized she believed the City Manager's characterization of her separation as a COVID layoff was a cover-up for PFMLA interference because of the *timing* of the decision, i.e. that she believed no more layoffs would be considered until the end of 2020, when Meija's layoff became effective. *See*, RP 1274-1275. See Section III (C) for argument regarding the scope of Councilmember Tosta's testimony.

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[4] The "pretext" standard in *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cnty.*, 189 Wn.2d 516, 527, 404 P.3d 464, 471 (2017) falls away at trial. *See, e.g.*, *Farah v. Hertz Transporting, Inc.*, 196 Wn. App. 171, 180, 383 P.3d 552, 558 (2016).

3. <u>The Trial Court Properly Exercised its Discretion in Finding the Potential for Prejudice Outweighed Minimum Probative Value of Co-Worker Testimony.</u>

Like the courts in *Beachy*, *Romero*, and *French*, the Court of Appeals found the trial court reasonably concluded the potential for unfair prejudice outweighed the probative value of co-worker testimony based on the specific facts of this case. *Opinion*, at 9-13. These opinions involved evidence much more like Allread's than that evaluated in *Heyne*, where female co-workers had testified they were subjected to similar sexual advances or comments reflecting the same supervisor's objectification of women—all of which would be indisputably inappropriate conduct in the workplace.

In contrast, it would be far from obvious that the City of Burien's administration of confidential and complex disability accommodations unique to each employee performing a different job and their specific medical limitations recommended by their treating physicians was "discriminatory"

or "retaliatory" based solely on a co-worker's "belief" that their circumstances could have been handled differently. For the jury to make sense of such evidence, they would need to be educated on the legal standards of disability accommodation, WLAD discrimination,[5] and the City would have to put on "mini-trials" within the Allread trial to explain the legitimate basis for each different employment decision.

Absent such additional and remote proceedings, the jury could have been improperly misled to assume the City somehow acted improperly based solely on "beliefs" of other employees and to assume an improper motive with respect to Ms. Allread. In reality, such speculation by other employees would provide little, if any, insight into the City Manager's decision to eliminate the Executive Assistant position from the City Manager's Office in the height of COVID cutbacks in 2020.

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[5] None of which were claims or issues in Allread's case.

B. **The Lower Courts Properly Applied CR 50 Standards and Washington Law to Deny a Directed Verdict in Plaintiff's Favor on Her PFMLA Retaliation Claim.**

Allread identifies no conflicting appellate decisions or issues of substantial public interest warranting review of her unsuccessful "retaliation per se" claim; in fact, she cites no precedential authority supporting this legal theory at all. The only citation to Washington law regarding this issue is to RCW 49.44.211, a statute that was not passed by the legislature until more than a year after Allread was laid off during COVID and declined to enter into a separation agreement offered by the City in 2021. Further, Allread failed to timely raise this statutory argument in lower courts, and therefore has waived it. *Opinion* at 27; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

1. The Court Properly Submitted Allread's PFMLA Retaliation Claim to the Jury and the Defense Verdict Was Supported by Substantial Evidence.

The ruling Allread seeks review of on this issue is denial of her own motion for directed verdict in her favor, which is

reviewed *de novo*. *Ramey v. Knorr*, 130 Wn. App. 672, 676, 124 P.3d 314, 317 (2005). Allread's CR 50 motion requires the evidence to be considered in the light most favorable *to the City* and the trial court denial can only be reversed if, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the City. *Id*.; *Chaney v. Providence Health Care*, 175 Wn.2d 727, 732, 295 P.3d 728 (2013).

Admittedly close to directing a verdict in favor of *the City* on Allread's PFMLA retaliation claim, the trial court instead permitted it to go to the jury. RP 980-984, 1010-1011; CP 3988. Properly instructed, the jury rejected Allread's assertion that the City violated the PFMLA by merely proposing a draft of the subject Severance Agreement. RP 1523-1525, 1559-1561.

A PFMLA "retaliation" claim is actionable only when "an employee is punished for opposing unlawful practices by the employer" that allegedly violate the PFMLA. *McMinimee v. Yakima Sch. Dist. No. 7,* 2021 WL 1559369, at *11

(E.D. Wash. Mar. 26, 2021).[6] It was undisputed Allread never opposed a PFMLA practice, nor does the draft Severance Agreement term reflect punishment of an employee.

2. The Proposed Severance Agreement Did Not Force a Choice Between Pursuing Retaliation Claims or Receiving Unemployment Benefits.

The Severance Agreement terms were offered as consideration in exchange for the City's payment of severance pay, compensation Allread would not otherwise be entitled to receive. CP 791-793 (separation agreement). The terms only activated if the employee chose to agree to release potential claims against the employer—including potential claims of discrimination or retaliation, *i.e.*, that she did not intend to allege any such claims. If the employee later alleged unlawful termination in a subsequent application for unemployment benefits, this would be taking a position contrary to her

[6] *Recon. den.*, 2021 WL 6275065 (E.D. Wash. Apr. 7, 2021), *appeal dism.*, 2021 WL 8154944 (9th Cir. Dec. 15, 2021).

voluntary agreement to not assert such claims.[7]

Allread argued this retaliation theory to the jury, and it was rejected. The City's Human Resources Director testified that the City merely intended to preserve its ability to contest *the reason* an employee might give for employment separation if the employee did not cite the real reason in an unemployment application: that she was laid off. RP 945-946. She confirmed the City had no intent to contest Allread's ability to *receive* unemployment benefits following the layoff and did not contest them. RP 945.

3. Legislation Passed Two Years After Allread's Layoff Does Not Create an Actionable PFMLA Retaliation Claim.

Allread's assertion that RCW 49.44.211(1) "makes Burien's terms unlawful retaliation as a matter of law" is contrary to the statute itself. The draft Severance Agreement offered to Allread in 2020 did not include "non-disclosure" or

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[7] And unnecessary to qualify for unemployment benefits, which are awarded to an employee who is laid off. RCW 50.20.010. RP 945-946.

"non-disparagement" provisions requiring Allread to:

> (1) "Not to disclose or discuss conduct, or the existence of a settlement involving conduct, that the employee reasonably believed… to be illegal discrimination…illegal retaliation… or that is recognized as against a clear mandate of public policy;"

Further, retroactive application of statutory law is determined by the language the Legislature chose to include in the statute itself. *See*, *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1013, 1307 (an amendment - like a statute generally - applies prospectively). Here, RCW 49.44.211(11) expressly states that it is retroactive prior to June 9, 2022 <u>only</u> to *invalidate* "nondisclosure or non-disparagement provisions" which were agreed to *at the outset of employment* or during the course of employment. The draft Separation Agreement offered to Allread at the end of her employment contains neither type of provision. Nor was the Agreement ever executed, so there is no agreement to "invalidate."

Allread fails to cite a single Washington State case

supporting her argument that RCW 49.44.211(1) somehow "codifies existing State law" and warrants a finding of a *per se* violation of the PFMLA. *See, DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193, 195 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after a diligent search, has found none.").

4. <u>The Court of Appeals Applied the Appropriate Standard to PFMLA Retaliation Claims Submitted to the Jury.</u>

The claim presented to the jury was one of alleged retaliation in violation of the PFMLA. CP 3996. A PFMLA retaliation claim is distinguishable from an "interference" claim; it does not arise for adverse actions for merely using PFMLA leave, but only for engaging in PFMLA opposition activity. RCW 50A.40.010(2)(a)-(c).

Additionally, the jury heard testimony as to why the City may want to defend itself if a laid off employee asserted

different *reasons* for the employment separation in a proceeding for unemployment benefits. RP 945. Such a proceeding does not involve a determination of rights or benefits provided by the PFMLA or any other law, only whether an employee qualifies for unemployment benefits pursuant to the Employment Security Acti, RCW Ch. 50.20.

C. **Councilmember Tosta's Executive Session Testimony Was Properly Limited Based on the City's Attorney-Client Privilege.**

Further, Allread misrepresents the record in framing this issue. *Petition* at 1-2. The trial court never ruled that "all executive session communications were privileged." Rather, Allread affirmatively represented that she did not intend to offer any testimony from Councilmember Tosta from the City Council's Executive Session meetings. CP 272, 274-275 (only offering testimony *outside* of Executive Session); CP 275:3-6 ("Ms. Tosta's testimony… not based on executive sessions"); RP 1099-1105. CP 351-353, 3379-3381. The City reasonably

relied on this assertion.[8]

When Allread reversed her position mid-trial and revealed that she did, in fact, intend to elicit testimony from Tosta about City Council communications during Executive Session, admissibility did not turn on "executive session privilege" because, in any event, those identified communications were *also* subject to attorney-client privilege. CP 473, RP 596-598. *Soter v. Cowles Pub. Co.,* 162 Wash. 2d 716, 748–49, 174 P.3d 60, 77 (2007) (public agency lawyers entitled to privacy to safeguard the public treasury by defending against civil liability).

1. Proffered Testimony Regarding Executive Session Communications Were Subject to the City's Attorney/Client Privilege.

Once Allread finally disclosed—after several requests that Plaintiff's counsel identify the nature of Tosta's proffered

[8] Nor did Allread never attempted to depose Tosta, pursue a motion to compel discovery, or otherwise challenge discovery objections in the lower courts; thus, waiving this unsupported argument. RAP 2.5(a). RP 593-594.

testimony—*which* executive session Council meeting she intended to testify about (RP 580-581, 585, 596-598), the City Attorney confirmed the referenced communications were subject to attorney-client privilege. RP 596. Tosta was not authorized to individually waive the privilege on behalf of the City. RP 569, 581-584, 596-598, 1103; CP 3000, 3998-4000.

Allread continued to re-raise the issue, changing her evidentiary position repeatedly; regardless, the trial court gave ample consideration to each of her new arguments. *See*, CP 3867- 3875, 3906-3945, 453- 476; RP 779-82, 564-576, 568, 574:6-8 (Plaintiff's counsel failed to make offer of proof, claiming he did not even know what Tosta was going to say).

2. <u>Councilmember Tosta's Proffered Testimony Regarding Privileged Communications Was Also Irrelevant to Allread's Claims.</u>

Allread suggests Tosta's testimony would reveal "Wilson's pattern of unlawful discrimination and retaliation in violation of the PFMLA." Nancy Tosta was one of seven City Councilmembers previously elected to the Burien City Council.

She did not exercise PMFLA rights, and was never part of an employer-employee, or supervisor-subordinate relationship with the City, the former City Manager, the City Attorney, or Plaintiff Allread. Nor was she in any way involved in management of City employees or personnel decisions such as Allread's layoff; in fact, state law forbids such interference by Councilmembers. *See*, RCW 35A.13.080(1)-(2); RCW 35A.13.100; RP 352:7-14. Finally, the executive session Allread finally disclosed that Tosta would testify about took place 1 ½ years *after* Allread was laid off, while this lawsuit was pending. RP 596; CP 3865. Such testimony lacked any probative value regarding the 2020 layoff decision or exercise of PFMLA rights. ER 401, 402, 403.

DATED this 18th day of March, 2024.

I certify that this memorandum contains 4,712 words, in compliance with RAP 18.17.

Respectfully submitted,

/s/ Jayne L. Freeman
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IN THE SUPREME COURT OF THE

STATE OF WASHINGTON

CAROL ALLREAD, Petitioner vs. CITY OF BURIEN, Respondent.	No. 1027982 DECLARATION OF SERVICE

I, LaHoma Walker, declare that I am over the age of 18 and am a legal assistant at the law office of Keating, Bucklin & McCormack, Inc. P.S. I further declare that on March 18, 2024, a true and correct copy of the foregoing was sent to the following parties of record **via email**:

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DATED this 18th day of March, 2024, at Seattle, Washington

/s/ LaHoma Walker
LaHoma Walker, Legal Assistant

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

March 18, 2024 - 9:48 AM

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