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DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

HASSAN FARAH, ILEYS OMAR, MARIAN MUMIN, DAHIR JAMA, FOUZIA M. MOHAMUD, MARIAN ALI, ABDIAZIZ ABDULLE, SAALIM ABUBAKAR, MOHAMED ISMAIL, SUDI HASHI, HALI ABDULLE, MURAYAD ABDULLAHI, ZAINAB AWEIS, FARDOWSA ADEN, MARYAN MUSE, ASLI MOHAMED, SAHRA GELLE (A/K/A Hani Huseen), ASHA FARAH, ALI ADAM ABDI, MUNA MOHAMED, FARAH GEEDI, AHMED HASSAN HUSSIEN, IBRAHIM SALAH, AHMED A. HIRSI, and MOHAMUD A. HASSAN,

Plaintiffs/Appellants,

v.

HERTZ TRANSPORTING, INC., MATT HOEHNE, and TODD HARRIS,

Defendants/Respondents,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Mary E. Roberts)

Case No. 11-2-41759-0

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Plaintiffs appeal a unanimous jury verdict dismissing their employment discrimination claims. For years, Plaintiffs improperly took prayer breaks in addition to, rather than during, their allotted paid rest breaks. This excessive break time hurt operations and fellow Shuttlers' morale. Plaintiffs' employment ended when they refused to follow a requirement that all Shuttlers begin clocking out for all breaks, effective September 30, 2011. Plaintiffs do not claim a failure to accommodate their religion, but rather disparate treatment based on their national origin (Somali) and religion (Muslim).

Plaintiffs improperly ask this Court to ignore the realities of the nearly seven week trial below. Plaintiffs contest fact issues the jury resolved against them, based on overwhelming evidence that Plaintiffs knowingly refused to follow a neutral and evenly applied rule, while other Somali Muslim Shuttlers complied without consequence. Similarly, Plaintiffs challenge that the trial court prevented the courtroom from becoming a stage for their counsel, yet ignore that discretionary rulings on evidence and objections went both ways. Despite their obfuscation, Plaintiffs had a full and fair opportunity to argue their case and no reason exists to overturn the jury's verdict or the reasoned decisions of the trial court along the way. As such, the Court should deny this appeal.

II. COUNTER STATEMENT OF THE CASE

A. The Sea-Tac Operation

The Hertz Corporation[1] is the largest vehicle rental operation serving Sea-Tac International Airport ("Sea-Tac"). 11/13 RP 92:24-93:2.[2] In late 2011, Hertz employed approximately 140 hourly employees at Sea-Tac to maintain a fleet of 2,500 vehicles.[3] *Id.* at 90:25-94:5. Hertz's rental operations were located on the first and second levels of the Sea-Tac parking garage. 12/4 RP 192:17-193:3. Each floor was equal in size to two to three football fields and took two to three minutes to drive, and as many as ten to walk, from one end to the other. *Id*.

Hertz's Sea-Tac hourly workforce was divided into five job classifications: Shuttlers, Vehicle Service Attendants ("VSAs"), Counter Sales Representatives ("CSRs"), Instant Return Representatives ("IRRs") and Dispatchers. 11/13 RP 93:13-25. Teamsters Local Union No. 117 (the "Union") represented all hourly employees. *Id.* at 95:23-96:1.

The management structure for Sea-Tac consisted of ten individuals in three tiers. *Id.* at 87:14-88:25. Zaidun Abdallah, General Manager for Pacific Northwest operations, was at the top. *Id*. Area Manager Todd Harris, who held that position since February 2002, reported to Mr.

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[1] The Hertz Corporation is the corporate affiliate of Defendant Hertz Transporting, Inc. 12/4 RP 144:18-21. "Hertz" refers to both entities collectively.
[2] Cites to the Report of Proceedings are [month/day] RP [page:line(s)].
[3] Unless otherwise noted, references are to the operation as it existed in 2011. Hertz moved in May 2012 to a new rental car facility. 11/13 RP 92:2-3.

Abdallah. *Id*. Matt Hoehne, City Operations Manager since February 2010, reported directly to Mr. Harris. *Id*. Two Senior Location Managers reported directly to Mr. Hoehne.[4] *Id*. The Senior Location Managers were supported by five Location Managers. *Id*. Although all Location Managers managed the hourly workforce, two (Tony Luchini and Jeff Wilson) focused primarily on day-to-day management of the Shuttlers. 12/4 RP 190:9-19. HR Business Partner Carey Martin also supported the operation. 11/17 RP 28:10-15.

B. The Shuttler Position

Shuttler is a casual position responsible for moving vehicles within the garage and between offsite service and storage locations. 12/4 RP 191:7-21. As of September 30, 2011, more than 50 percent of the Shuttlers were practicing Muslims.[5] 12/3 RP 85:21-86:9. At the time of trial, the Shuttler workforce was again about 50 percent practicing Muslim. *Id*.

Location Managers led Shuttler "shift huddles," informal group meetings, on a regular basis to discuss objectives for each shift. 12/4 RP 200:22-201:15. Dispatchers then relayed Shuttlers' initial tasks and other management directives. *Id.* at 16:21-18:12. Shuttlers typically worked in

[4] One of the two Senior Location Managers was Mohamed Babou, a Somali Muslim who prayed at work. 12/3 RP 79:10-80:12. Mr. Babou began as a Shuttler in 1996 and became a manager in 1999. *Id.* at 77:11-79:9.

[5] Most of Hertz's Muslim workforce was from Somalia. 12/3 RP 84:24-85:3.

groups under a Lead Shuttler, who ferried Shuttlers in a van and communicated via radio with Dispatchers. *Id.* at 192:3-16.[6]

C. Managers Communicated with Plaintiffs in English

While there was a range of fluency among the diverse Shuttler workforce, managers and Dispatchers did not have difficulty speaking in English with Shuttlers, including the Plaintiffs.[7] Discussions included cars going out for rentals, cars coming in for returns, needs for the day, specific car requests, and everyday conversational topics. 12/9 RP 63:23-64:4. Plaintiffs also managed to communicate freely with their English-speaking co-workers.[8] Moreover, several Plaintiffs had been Lead Shuttlers, which required them to speak with Dispatchers over the radio in English.[9] Many other Plaintiffs also admitted that they could communicate in English.[10] While a few Plaintiffs appeared to have more limited English abilities, they were able to rely on one of their Somali co-workers, including

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[6] Rounding out the hourly workforce, CSRs rent customers vehicles, IRRs meet customers as they return, and VSAs clean and fuel cars. 11/13 RP 94:23-95:14.
[7] 11/17 RP 127:17-128:1; 12/4 RP 19:1-15, 83:22-24, 196:16-198:22; 12/8 RP 105:22-106:6; 12/9 RP 63:20-65:8. Mr. Babou, who spoke English and Somali, usually communicated with the Plaintiffs in English. 12/3 RP 101:17-105:19.
[8] 12/4 RP 126:2-4; 12/9 RP 36:4-11, 198:21-24, 206:14-24.
[9] 11/19 RP 88:13-15 (M. Ismail); 11/20 RP 7:15-8:2 (H. Abdulle); 11/24 RP 102:10-12, 103:13-16 (F. Aden); 12/1 RP 105:13-16 (M. Hassan); 12/4 RP 192:11-16.
[10] *See, e.g.*, 11/13 RP 132:9-18 (M. Mohamed); 11/18 RP 42:14-16, 52:7-10 (A. Abdi), 63:2-15 (A. Farah); 11/25 RP 13:5-6 (A. Mohamed), 56:17-22 (Z. Aweis); 12/1 RP 32:15-16 (I. Salah). Other Plaintiffs claimed to not speak any English, only to be admonished by the Judge to wait for the interpreter before answering. *See, e.g.*, 11/25 RP 67:1-2, 69:1-6 (M. Abdullahi); 12/1 RP 73:12-13, 77:16-20 (F. Geedi).

Plaintiffs Ileys Omar, Mohamud Hassan, Asha Farah and Hassan Farah, for clarification.[11]

Hertz generally provided written communications to employees in English. 12/8 RP 18:25-19:6. This included overtime notices posted near the dispatch area containing detailed information. *Id.* at 63:11-64:15. Upon request, the Company provided translators for meetings or documents. *Id.* at 106:7-13; 12/4 RP 83:25-84:6. However, Shuttlers rarely requested a translator. 12/8 RP 106:14-19.

D. Accommodations Provided to Muslim Employees

Hertz allowed Muslim employees to take paid rest breaks to engage in prayer and related activities.[12] 11/13 RP 96:7-97:13. Hertz allowed great flexibility with regard to the frequency and timing of these breaks and maintained two prayer rooms, which employees divided by gender. *Id.*; 12/3 RP 139:2-23. Hertz also installed a foot washing station and designated a sink in the break area so its Muslim employees could wash prior to prayer. 11/13 RP 96:7-97:13; 12/3 RP 82:6-11. Hertz also agreed in the Shuttler collective bargaining agreement ("CBA") that Muslim employees could leave work for up to 1.5 hours to attend Friday

[11] 11/13 RP 133:24-134:6 (M. Mohamed); 11/19 RP 104:25-105:15 (M. Ismail); 12/4 RP 19:16-21, 198:23-200:6; 12/9 RP 65:15-22.

[12] Shuttlers received a paid ten minute rest break (along with a five minute grace period) for every four hours worked, as well as an unpaid 30 minute meal period for every five hours worked. 11/13 RP 98:6-17. Shuttlers could spend their paid breaks eating, making personal calls, using a prayer room, using the break room, or on any other personal activity. *Id.* at 100:6-11.

mosque. 12/3 RP 83:1-5. Additionally, during Ramadan, Hertz allowed Muslim employees to break fast together, despite the impact on operations. *Id.* at 84:7-85:3.

E. Concerns with Shuttlers' Abuse of Paid Rest Breaks

Hertz expected Shuttlers to clock out for their rest periods, regardless of what they did with their time. 11/13 RP 98:22-100:22; 12/3 RP 86:10-87:20. In the past, Shuttlers were required to sign out for their breaks on a sheet posted on the dispatch booth. *Id.* In September 2007, Hertz modified its timecards so employees could record their breaks. 11/13 RP 98:24-99:9. The time card machine and employees' timecards were located at the dispatch booth. *Id.* at 99:19-100:5.

Hertz expected Shuttlers to clock for their paid rest breaks so it could objectively monitor the frequency, timing and duration of breaks. *Id.* at 99:10-15. While the requirement was in place for years, Hertz knew that some Muslim Shuttlers were taking unclocked breaks for prayer and related activities (*e.g.*, washing and walking to prayer areas) while also taking full clocked rest breaks.[13] *Id.* at 100:24-105:6; 12/4 RP 208:4-21.

Hertz undertook periodic efforts to monitor and curb abuse of paid rest breaks. 11/13 RP 101:23-102:6. For example, in January 2008, Mr. Harris observed a large group of Shuttlers (including Plaintiff Hassan

[13] These unclocked breaks negatively impacted operations. 12/8 RP 109:12-111:24.

Farah) on an unclocked prayer break. *Id.* at 102:7-25; Ex. 1892. Mr. Harris explained to Mr. Farah that Shuttlers could engage in any personal activity while on a break, but they needed to punch out first. *Id.* Mr. Harris sought Mr. Farah's assistance in correcting this issue with the Shuttlers. *Id*. Following his conversation with Mr. Farah, Mr. Harris asked managers to remind employees to clock out for prayer, monitor whether they did, and report back. 11/13 RP 106:6-107:2; Ex. 1892.

In May 2008, Eddie Nielsen, then City Operations Manager, sent Mr. Harris an email regarding a group of Muslim Shuttlers who had prayed but not clocked out, and he documented that he coached them to clock out going forward. 11/13 RP 107:3-109:12; Ex. 1862. Some of the Shuttlers complied, but many did not. 11/13 RP 109:18-24. Continuing efforts to counsel Shuttlers to clock out for prayer breaks were either ignored or met with open defiance. 12/8 RP 114:16-115:10. In April 2009, Hertz issued a memo to all Shuttlers reminding them that unclocked breaks were a violation of company policy that could lead to discipline, up to termination. 11/13 RP 167:20-170:10; Ex. 1735. Despite translating it into Somali, the non-compliance continued. *Id*.

While the policy to clock for all breaks remained, prayer was a sensitive issue and obtaining compliance became more difficult with a

growing operation.[14] 12/3 RP 112:16-113:8. Managers had ongoing conversations with employees to coach and remind them to clock out for all breaks, but Hertz also resolved to address the increasing problem of prayer break abuse in upcoming CBA negotiations for the Shuttlers. *Id*. at 87:1-88:12; 11/13 RP 171:3-23.

The Union's CBA negotiating team included Union Business Representative Cetris Tucker, Shop Steward Ileys Omar and three additional Shuttlers, two of whom were Somali Muslims. 11/17 RP 8:23-9:6; 12/9 RP 191:1-18. Hertz initially proposed language requiring clocking for all rest periods, as Hertz wanted to use the CBA negotiations to correct the prayer abuse issue. 11/17 RP 9:24-13:21. The Union countered with language which kept Hertz's clocking concept, but specifically excluded prayer. *Id*. Hertz rejected the Union's proposal because it would continue rather than correct the problem. *Id*. Hertz countered that all breaks would be clocked, but added language allowing Shuttlers to break their 10-minute rest periods into "mini-breaks." *Id*. This language was incorporated into the CBA. *Id.*; Ex. 20.

Hertz agreed to the mini-break concept because Plaintiff Ileys Omar said it would allow Shuttlers to break the 10-minute rest period into smaller pieces to accommodate prayer. 11/17 RP 14:4-19; 11/12 RP

[14] Hertz's operation expanded from one to two floors of the Sea-Tac parking garage, while onsite managers went from sixteen to seven or eight. 11/13 RP 101:6-22.

118:10-119:23.[15] To use a mini-break, a Shuttler was expected to tell a manager or Dispatcher but would not be required to clock out, so long as the mini-breaks were not abused. 11/17 RP 15:6-16. It was agreed that Shuttlers did not get prayer breaks in addition to rest breaks, as there was much discussion over the subject, the parties created the mini-break option to accommodate prayer, and Hertz would never have agreed to a contract with separate prayer breaks. *Id.* at 15:17-16:1.

Hertz hoped that the CBA negotiations would curb rest break abuses. *Id.* at 16:2-15. Unfortunately, most or all Muslim Shuttlers continued to pray on the clock. 12/4 RP 215:23-216:4. Thus, in February 2011, Location Manager Wilson reviewed a series of expectations with the Shuttlers, including the need to be "off the clock and/or on an approved rest period" when spending time in non-work locations. *Id*. at 216:5-218:13; Ex. 1744. Mr. Wilson also covered that Shuttlers could take 10-minute clocked breaks or unclocked mini-breaks per the new CBA, which he explained applied to prayer. 12/4 RP 222:19-227:11; Ex. 1745. Mr.

[15] Ms. Omar first testified that she did not understand mini-breaks were intended to accommodate prayer breaks. 11/12 RP 117:17-24. However, Defendants impeached Ms. Omar with prior sworn testimony from an arbitration between Hertz and the Union. *Id.* at 118:10-119:23 (confirming testimony that "'the whole reasoning why we put the mini language in there [is] [s]o anyone who is praying who used the mini language, the mini prayer, the mini time to pray, which is that they will not be clocking out. And all the other people, even though that choose to take the ten minutes, they will clock out for the ten minutes and do whatever they want to do. **And if you choose not to take the ten minutes, you take the mini-breaks, which means you don't clock out, but you can use it to pray or whatever you want to do**.'") (emphasis added).

Wilson gave attendees an opportunity to ask questions and confer with co-workers. 12/4 RP 216:20-218:13; 12/8 RP 26:25-28:14. Many Plaintiffs refused to sign off on these expectations and continued to take both full clocked rest breaks and unclocked prayer breaks. 12/4 RP 216:20-217:23.

In response, Mr. Wilson issued warnings for misuse of company time to seven Plaintiffs in February who took prayer breaks without clocking out or providing notice of a mini-break. *Id.* at 227:13-231:14; Ex. 1746. Mr. Wilson had no doubt these Plaintiffs understood why they received the warnings, as Shop Steward Omar complained that the warnings did not specifically refer to prayer and argued that prayer was not included as part of rest breaks. 12/4 RP 231:3-20; 11/12 RP 78:18-80:2; Ex. 1887.

Given the continued rest break problems, Mr. Harris spoke with Union Business Agent Tucker in April to confirm that prayer was to be done during a Shuttler's break time. 11/17 RP 18:3-19:11. Hertz tried again to explain the mini-break option to Shutters in spring 2011, issuing a memo which stated, "[i]f you select to take intermittent breaks, you must notify dispatch [at] the beginning and end of each intermittent break." 12/4 RP 232:19-233:25; Ex. 1748. Mr. Wilson again met with the Shuttlers to explain the memo, which many Plaintiffs refused to sign. *Id.* Moreover, when Mr. Wilson explained to Shuttlers that Ms. Tucker had confirmed

that prayer is part of break time, Ms. Omar refused to believe him or comply unless she heard it directly from Ms. Tucker. 12/4 RP 234:21-235:14. Two days later, Mr. Wilson left Ms. Tucker messages asking that she contact him, but she did not respond. 12/4 RP 235:15-236:5.

Despite Mr. Wilson's repeated efforts to communicate the expectation that prayer was to be done during break time, Shuttlers continued to eschew the mini-break option and instead take prayer breaks in addition to full clocked breaks. 12/9 RP 73:23-74:6, 196:1-4. As a result, on August 4, Mr. Wilson posted another memo in various locations and discussed it with the Shuttlers. 12/4 RP 237:15-241:1, Ex. 1884. The memo stated that "all religious observation must take place off company time." Ex. 1884. Shuttlers nevertheless continued to take prayer time in addition to their breaks. 12/4 RP 241:13-17.

F. Employees Raise Concerns in August and September 2011

In mid-August, General Manager Abdallah convened a "skip level" meeting with hourly Sea-Tac employees to see how they were doing. 12/8 RP 170:19-174:7. Hertz uses such meetings to 'skip' management layers to communicate directly with employees. *Id*. The employees told Mr. Abdallah that some Shuttlers were abusing the system by taking both clocked rest breaks and lengthy unclocked prayer breaks. *Id.* at 190:11-17. Mr. Abdallah also learned that other Shuttlers often had

to work harder in order to help alleviate the issues caused by break abuse. *Id.* at 176:19-177:13. One Muslim gentleman at the meeting stated, "I pray, and I pray within my break time, and I'm tired of doing the work of someone else, and the company needs to do something about that." *Id*. Mr. Abdallah had seen how excessive break time affected the rental cycle, as there was no space for him to return a car at Sea-Tac on a recent trip due to Shuttlers not working. *Id.* at 177:16-179:6. As a result of his skip level meeting, Mr. Abdallah expressed concerns to Mr. Harris about the impact break abuse had on employee morale, customer service and productivity. 11/17 RP 22:5-14. Mr. Abdallah, who is himself a practicing Muslim, encouraged Mr. Harris to require clocking for all rest breaks as a way to monitor and eliminate break abuse. *Id.*; 12/8 RP 179:12-181:7.

On September 8, as part of a tour of Hertz's larger operations, representatives from Hertz headquarters visited to conduct their own skip level meetings. 12/4 RP 145:25-148:18. During one meeting, Dispatcher Richard Best spoke out regarding the impact that rest break abuses were having on the operation and employee morale. *Id.* at 26:11-27:21, 154:1-22.[16] Mr. Best explained that some Muslim Shuttlers were taking excessive amounts of paid rest break time for prayer. *Id*. at 26:11-27:21. In

[16] Given their job duties and location in the Dispatch booth, Dispatchers have unique knowledge regarding the movement and activities of the Shuttlers and their use of break time. 12/4 RP 16:21-17:9, 23:19-24:13.

a separate skip level meeting, Manager Tony Luchini also raised concerns regarding prayer break abuse with the senior executive team. 12/9 RP 77:17-78:19. Lou Franzese, one of the executives conducting the skip-level meetings, learned that some Muslim Shuttlers would take prayer breaks up to 30 minutes long and could be off the floor for about an hour if they combined prayer and lunch breaks.[17] 12/4 RP 151:7-152:12. Mr. Franzese was concerned about the impact this had on employee morale and operations. *Id.* at 154:23-157:19.[18] Mr. Franzese advised the Sea-Tac managers in attendance that the issue needed to be fixed, employees treated fairly, the rest break policy enforced consistently, and all personal activities conducted within the allotted break times. *Id*. at 155:24-157:9.

G. Hertz Enforces Clocking For All Rest Breaks

Following the September 8 meetings, the representatives from headquarters told Mr. Harris to address the issue. *Id.* at 157:2-19; 11/17 RP 24:17-26:16. Specifically, senior management told Mr. Harris that they understood there was a significant amount of prayer break abuse occurring in the workplace, were concerned it was causing morale issues with other employees, and both customer service and productivity were suffering

[17] Plaintiffs' co-workers also testified that prayer breaks often lasted from fifteen to forty minutes. 12/4 RP 128:22-129:3; 12/9 RP 38:9-12, 200:9-11, 207:23-208:1. One Senior Shuttler timed that his crew of Muslim Shuttlers took between 12 and 23 minutes for a prayer break one day. 12/9 RP 200:20-201:18.

[18] While Plaintiffs took prayer breaks, other Shuttlers continued working. 12/4 RP 24:21-25:8, 129:9-17; 12/8 RP 83:18-84:9; 12/9 RP 39:2-4, 200:12-15, 208:20-209:9.

because there were not enough Shuttlers to move cars. 11/17 RP 24:17-26:16. Mr. Harris took the feedback seriously and believed that, with the support of senior management, Hertz could finally fix the issue. *Id*., *Id.* at 74:15-75:1. To get an accurate and objective sense of the problem and to resolve it fairly, Hertz decided to require clocking for all rest breaks as of September 30. *Id.* at 26:17-32:20; 12/8 RP 179:14-182:6.

Hertz hoped that the clocking requirement would make Shuttlers aware of the amounts of rest break time they were using and allow them to adjust their behavior accordingly. *Id*. If self-correction were not enough, this systematic and uniform approach would give Hertz the data needed to individually address any violations. *Id*. Mr. Abdallah also hoped that clocking would help management determine proper staffing levels, as well as assure all employees that their co-workers were being held to the same accountability standard. 12/8 RP 179:14-181:7.

At a manager meeting on September 27, Mr. Harris announced that beginning September 30, Hertz would require Shuttlers to clock out for all time spent on personal activities.[19] 12/9 RP 81:5-82:14. Mr. Harris instructed the other managers to inform each Shuttler to clock out for all non-work activities, including praying, smoking, talking on a cell phone, or getting food or coffee. *Id.* Mr. Harris instructed the Shuttler Managers

[19] Hertz excluded restroom and water fountain use. 11/17 RP 26:22-27:1.

to post memos describing the policy, distribute them to Shuttlers, and answer questions to ensure that all Shuttlers understood. *Id.* at 83:17-84:1.

As a result, Hertz posted a memo to the Shuttlers in numerous places on September 27, which included the following:

> Beginning 9/30 we will begin enforcing the following provisions of which you have already been informed:
>
> …
>
> 4) Per the CBA, all rest and meal periods must be punched, including any religious observation you do when you're here.

Ex. 1; 12/4 RP 244:7-245:19. On September 28, Hertz replaced the initial memo with a slightly modified version:

> Per the CBA, ALL rest and meal periods must be punched, including ALL religious observation. Failure to punch for a rest period will result in progressive disciplinary action up to and including termination.

Ex. 2 (emphasis in original); 12/9 RP 84:12-86:8. Hertz posted this memo in approximately 10 locations, including the break room, around dispatch (where managers commonly posted notices), and beside the time clocks and time cards. 12/4 RP 207:12-17; 12/9 RP 85:25-86:8. Mr. Luchini also distributed copies to Shuttlers as they rode in vans (including Plaintiffs Mohamud Hassan and Ahmed Hussien), placed them on break room tables and had a stack available during daily shift huddles. 12/9 RP 85:25-86:19.

Moreover, during four shift huddles on September 28 and 29, Location Managers Luchini and Wilson reviewed the policy and emphasized that Shuttlers would need to clock out for all rest breaks,

including prayer. 12/8 RP 60:2-8; 12/9 RP 88:9-89:4. Mr. Luchini performed head counts before his meetings to ensure that each Shuttler on duty was in attendance. 12/9 RP 87:19-88:8. Based on previous interactions, Mr. Luchini had no reason to expect that any Somali Shuttler would have difficulty understanding his instructions. *Id.* at 89:5-18. Dispatcher Best heard Shuttlers discussing the break policy near dispatch in the days leading up to September 30 and had a discussion with Plaintiff Su'di Hashi regarding the posting, who considered it just another memo from Hertz that would be ignored. 12/4 RP 29:22-31:7. Lead Shuttler Richard Bibbs also explained the break policy to his crew, including Plaintiff Marian Ali and other Somali Shuttlers. *Id.* at 131:4-132:8.

H. Plaintiffs Choose Not to Comply

On September 30, managers and Dispatchers reiterated the expectations. For example, Mr. Luchini individually reminded each Shuttler working during his shift of the clocking requirement. 12/9 RP 96:7-14. Likewise, when Mr. Best arrived at work at 5 a.m., he reminded the Shuttlers on duty that they would need to punch out for prayer. 12/4 RP 31:8-17. Mr. Luchini also met with Shuttlers as they were clocking in and told them that if they were leaving the work floor for any personal activity, they must punch out first. 12/9 RP 96:7-14. Managers also gathered Shuttlers in shift huddles four times throughout the day to

emphasize the need to clock for all rest breaks, including prayer breaks. 12/4 RP 87:23-89:11, 95:8-96:2; 12/9 96:25-97:22. Mr. Luchini again used headcounts to ensure that all Shuttlers on duty were present at the meetings he hosted and provided time for questions at each. 12/9 RP 96:25-97:22. Shuttlers appeared to understand this simple direction, there were no questions related to prayer and no one requested interpretation. 12/4 RP 90:16-91:12, 95:8-96:10; 12/9 RP 98:2-10.

Despite these efforts, 16 Plaintiffs refused to clock out for prayer that day, often right after attending a shift huddle. 12/4 RP 91:16-92:1, 96:17-23; 12/9 RP 97:14-99:12. For example, Manager Mike Dixon reminded Shuttlers to clock out for breaks and then went over specific examples: eating, sleeping, smoking, drinking coffee or praying. 11/12 RP 170:23-171:6; 12/4 RP 88:11-89:11. Many Shuttlers at the meeting immediately went to pray without first punching out. 12/4 RP 42:25-44:8. As Shuttlers approached the men's prayer area, Mr. Hoehne and Mr. Dixon stood about 60 feet away and asked if they had clocked out for a break. 11/12 RP 217:8-17; 12/4 RP 88:11-92:1, 96:17-97:6. Likewise, immediately following another shift huddle, seven female Shuttlers proceeded towards the women's prayer area. 12/9 RP 97:14-100:25. Mr. Luchini informed them, as a group, that what they were doing was an act of insubordination which was a terminable offense. *Id.* Each ignored Mr.

Luchini's instruction and entered the prayer area without clocking out. *Id.*; *see, e.g.*, 11/18 RP 96:19-101:11. Faced with such open defiance, Hertz suspended the Shuttlers it observed refusing to comply with the clocking requirement. 12/4 RP 88:11-93:14, 96:17-98:16; 12/9 RP 97:14-101:24.

The jury received extensive additional evidence that the Plaintiffs understood the clocking rule on September 30, but simply refused to comply. For example, after Hertz suspended Plaintiff Muna Mohamed,[20] Plaintiff Asha Farah left a voicemail for Union Business Agent Tucker at 7:15 a.m. in which she stated, in relevant part:

> So, this morning, **yesterday they came** whatever **they say you guys have to, if you are religious_____, you have to punch out anytime you praying**. So, this morning and Ali and Muna, they came, starting 6, when they went to pray, they sended home, and for us, our prayer is 1:30 so they waiting us when we pray to go home. Everybody, like 3:00, 1:30 and 4:30. So, Cetris, a lot of problem. It's the time they're starting a lot of problem on everybody. **They don't care. We don't care. We praying. They have to send us home.**

Exs. 1773 (voicemail), 1893 (transcript) (emphasis added).

Although Shop Steward Omar testified that she was unaware of the rule, she was present for two of the shift huddle meetings on September 30

[20] Ms. Mohamed admitted that she prayed without punching out despite Dispatcher Best telling her twice that she needed to punch out before she prayed. 11/13 RP 151:1-152:7. After Mr. Luchini instructed her to punch out for prayer, she responded, "like I told him [motioning towards Mr. Best], that is not ok." 12/9 RP 92:9-93:1. Plaintiff Asli Mohamed likewise testified that she understood Mr. Hoehne's instruction that she punch out for prayer, but refused because she believed it was contrary to the CBA. 11/25 RP 33:3-34:2. Similarly, Plaintiff Saalim Abubakar admitted that he understood that Hertz expected him to clock out for all rest breaks, including time spent in prayer, but had no intention of complying. *Id.* at 142:24-143:24.

and confronted Mr. Dixon with a copy of the CBA to argue that Hertz could not require Shuttlers to clock out for prayer. 12/4 RP 88:11-89:6, 94:16-95: 19. When Mr. Luchini handed a stack of break policy memos to Ms. Omar that afternoon, she responded, "[p]eople are not going to like this." 12/9 RP 109:25-110:9. She also admitted on cross examination that she (i) saw the posting at dispatch when she arrived to work on September 30th, (ii) learned shortly thereafter from Plaintiff Su'di Hashi that Hertz was sending Shuttlers home for refusing to clock out for prayer, (iii) spoke telephonically with Ms. Tucker shortly after starting work, who informed Ms. Omar that nine people had been sent home after praying; (iv) met with Ms. Tucker in person that afternoon at work, and (v) discussed with Ms. Tucker and others whether to clock out and file a grievance, but decided against it. 11/12 RP 97:5-105:20.[21]

This scenario essentially repeated the next day on October 1. Manager Anna Commes conducted a shift huddle meeting to review the clocking memo with the Shuttlers. 12/8 RP 123:18-124:23. Again, none of the Shuttlers asked any questions, although some appeared visibly upset. *Id.* at 141:23-142:12. At one point, Plaintiff Ahmed Hussien began to ask a question, but Plaintiff Mohamud Hassan stopped him and said, "no, it's

[21] Ms. Tucker also spoke with Hassan Farah and a group of other Shuttlers prior to his suspension. Mr. Farah told Ms. Tucker, "[s]ince it's not part of the contract, if we punch out and start this new procedure, it means we will lose our rights." 11/24 RP 26:2-23.

done." 12/4 RP 49:15-25. Hertz again reminded Shuttlers of the clocking rule immediately before they prayed.[22] *Id.* at 44:9-47:5; 12/8 RP 119:18-120:10, 143:19-25. In most instances, the Shuttlers prayed immediately after a shift huddle meeting. *Id.* at 143:2-18. Ms. Commes suspended six Plaintiffs she observed praying who refused to comply with her or Mr. Best's instruction. 12/4 RP 44:9-47:5; 12/8 RP 117:23-121:13, 143:19-149:3. Additional suspensions of Plaintiffs for openly defying the clocking requirement occurred on October 3 (one) and October 4 (two). 12/9 RP 123:22-125:22. Hertz was not aware of any other Shuttler who refused to comply with the rule during this time.[23] 12/4 RP 53:10-24; 12/8 RP 151:13-17; 12/9 RP 130:23-131:1.

After the suspensions, HR Business Partner Martin and Mr. Harris conducted an investigation to determine whether management had effectively communicated the new rule to the Shuttlers and whether those

[22] Plaintiff Mohamud Hassan testified that he spoke to Manager Commes only after he prayed on October 1, 2011. 12/1 RP 115:16-121:19. Defendants impeached Mr. Hassan with his prior testimony that Ms. Commes instructed him and Plaintiff Ahmed Hussien to punch out before they prayed. *Id.*

[23] Although Plaintiffs claimed Hertz did not enforce the rule with respect to Shuttlers taking coffee or smoking breaks, managers, Dispatchers and Plaintiffs alike testified that they did not see any Shuttlers taking smoking or coffee breaks without clocking out throughout the four days in which the suspensions occurred. *See, e.g.*, 11/12 RP 116:14-23; 11/18 RP 107:12-110:5; 11/20 RP 42:12-17; 11/24 RP 35:2-10, 66:13-67:17, 108:12-109:5; 11/25 RP 8:23-9:1, 61:19-62:1, 100:24-101:2; 12/2 RP 13:13-14:5, 89:11-16; 12/3 RP 18:11-21; 12/4 RP 53:4-9; 12/8 RP 151:18-23.

suspended were insubordinate.[24] 11/17 RP 33:19-34:2. The investigation included: (1) gathering detailed manager[25] and employee statements;[26] (2) surveying employees regarding their understanding of the rest break policy;[27] (3) reviewing Shuttler training documents; and (4) conversations with managers involved in the events. 11/17 RP 33:19-35:9. Hertz concluded from the investigation that the suspended Shuttlers were informed of the clocking rule and had refused to follow it.[28] *Id.* Hertz therefore upheld the suspensions. *Id*.

While surprised by their insubordination, Mr. Abdallah drafted a letter encouraging the suspended Shuttlers to accept the clocking rule and return to work. 12/8 RP 181:14-25, 185:5-186:2. Hertz sent the draft to the Union and explained that: (1) Hertz did not want to terminate the suspended employees; (2) there was no justification for their refusals to

[24] Company policy defined insubordination as a refusal to follow a directive of management. 12/4 RP 160:15-161:7. Insubordination could result in discipline up to and including immediate termination. *Id*. at 165:6-25; Ex. 1076.
[25] Exs. 1719, 1807, 1808, 1809, 1815, 1817, 1818, 1819, 1824.
[26] Exs. 1882, 1883. The collection of statements included a report from a co-worker that Plaintiff Saalim Abubakar said, "I can see big money coming. Ten[,] Twenty or maybe $30,000 apiece. Big money[,] Big money." Ex. 1882.
[27] Ex. 1880.
[28] The investigation also identified two Somali Muslim Shuttlers who complied with the clocking rule on September 30, including Hassan Hassan, who appeared to have the most limited English skills. 11/17 RP 59:2-11; 12/9 RP 126:24-127:3. Mr. Hassan exemplified the clocking rule working as planned, as his time card showed he had taken prayer breaks in addition to, rather than as part of, his allotted break time. 12/3 RP 92:12-93:5. Hertz simply reminded him that prayer was to be part of break time; he agreed to comply going forward; and he received no discipline. *Id*. at 93:6-94:5.

follow management's instructions; and (3) if they returned to work, Hertz would expedite any challenge under the CBA. 12/9 RP 170:9-19; Ex. 58.

On October 13, Mr. Abdallah sent each suspended Shuttler his letter, stating that: (1) Hertz was not denying them an opportunity to pray while at work; (2) Hertz did not intend to dock their pay for prayer breaks; (3) Hertz expected them to follow instructions of management when asked to clock out for rest breaks; (4) if they disagreed with any such instruction, they were free to file a grievance under the CBA; and (5) they had until October 18 to return an enclosed form acknowledging the clocking rule. 12/8 RP 185:5-186:2.[29] Mr. Abdallah wanted the suspended Shuttlers to return to work and not lose their jobs. *Id.* at 203:24-205:13. He had no problem with the suspended Shuttlers filing a grievance challenging Hertz's decision to require clocking and encouraged them to do so. *Id.* at 184:14-25, 205:20-206:10. Ms. Omar translated the letter at a meeting at the Union hall. 11/12 RP 113:9-17.[30]

On October 14, each Plaintiff sent Hertz a letter (drafted by Ms. Omar) asserting that Hertz violated the CBA and federal labor law by requiring them to clock out for mini-breaks and offering to return to work

[29] Exs. 58, 65, 72, 79, 87, 93, 100, 106, 114, 121, 129, 141, 151, 160, 169, 177, 185, 192, 201, 209, 216, 225, and 232.

[30] Ms. Omar understood that if she signed the letter she could have returned to work and still challenged the clocking rule. 11/12 RP 113:9-115:3. The Union in fact filed a grievance on October 17, 2011, challenging the rule and the suspensions. *Id.*

if Hertz dropped the requirement.[31] The mini-break argument was inapposite, as Shuttlers were not using mini-breaks as allowed under the CBA, but rather were taking prayer breaks in addition to full ten-minute rest breaks.[32] 12/9 RP 73:23-74:6; 12/4 237:10-14. Because they still refused to follow the clocking rule, Hertz rejected their conditional offers to return to work. 12/8 RP 206:11-207:3.

In response, Union Secretary-Treasurer Tracy Thompson emailed David Friedman, Senior Staff Counsel for Hertz, on October 18. 12/9 RP 177:13-16. From that email, Mr. Friedman had the impression the Shuttlers were planning to accept Hertz's offer to return to work. *Id.* at 177:13-178:13. However, only 8 of the 34 suspended Shuttlers chose to sign and return the acknowledgment. 12/8 RP 186:17-187:6. Hertz was surprised that the Plaintiffs preferred to lose their jobs rather than clock

[31] Exs. 59, 66, 73, 80, 88, 94, 107, 115, 122, 130, 142, 152, 161, 170, 178, 193, 202, 210, 217, 226, 233 and 243; 11/12 RP 44:8-45:22. Many Plaintiffs admitted they refused to follow the clocking rule because they believed it violated the CBA, a position completely at odds with their claimed lack of notice of the rule prior to their suspensions. *See, e.g.*, 11/12 RP 110:21-24 (I. Omar); 11/18 RP 107:8-11 (A. Farah); 11/19 RP 110:20-111:16 (M. Ismail); 11/24 RP 39:18-40:23 (H. Farah), 71:24-72:16 (H. Huseen); 11/25 RP 61:14-16 (Z. Aweis), 141:1-9 (S. Abubakar); 12/1 RP 64:15-17 (I. Salah), 93:9-11 (F. Geedi);12/3 RP 73:2-13 (M. Muse).

[32] Plaintiffs admitted this key point. 11/12 RP 31:6-13 (I. Omar); 11/13 RP 136:25-137:13 (M. Mohamed); 11/17 RP 173:3-10 (A. Abdi); 11/18 RP 65:7-22 (A. Farah), 125:5-8 (S. Hashi); 11/19 RP 79:7-13 (M. Ismail); 11/20 RP 10:14-23 (H. Abdulle), 24:21-25:1 (D. Jama); 11/24 RP 26:2-23 (H. Farah), 49:12-21 (H. Huseen), 84:7-20 (F. Aden), 114:24-115:9 (A. Hirsi); 11/25 RP 14:19-15:10 (A. Mohamed), 47:15-25 (Z. Aweis), 69:9-16 (M. Abdullahi), 112:24-113:6 (S. Abubakar); 12/1 RP 34:15-18 (I. Salah), 74:25-75:7 (F. Geedi), 107:2-6 (M. Hassan); 12/2 RP 26:6-10 (A. Hussien), 59:13-21 (M. Mumin), 98:10-17 (A. Abdulle), 120:25-121:6 (F. Mohamud); 12/3 RP 31:25-32:13 (M. Ali), 57:19-58:15 (M. Muse).

out for all paid breaks. *Id.* But, faced with Plaintiffs' refusal to even provisionally follow this rule (*i.e.*, while grieving it), Hertz discharged them for their refusals to comply with the reasonable instructions of management and their attempts to dictate their own terms and conditions of employment. 11/17 RP 61:1-62:19. On October 21, to offset the loss of the Plaintiffs, Hertz hired nine Shuttlers, including three previously laid off VSA's known by Hertz to be Somali Muslims who prayed at work. *Id.* at 68:6-69:24. These three, together with the two Muslim Shuttlers who chose to comply from the outset, the eight Shuttlers who returned to work after receiving Mr. Abdallah's letter, and five Muslim Shuttlers who were on leave during the suspensions, all complied with the clocking rule. *Id.*; 12/3/RP 95:22-96:6; 12/9 RP 127:20-128:2.

I. Hertz Applies the Clocking Rule to All Types of Breaks

While break abuse by Muslim Shuttlers (a majority of the workforce) was open and obvious, Hertz was not aware of any other common or recurrent instances of Shuttlers disengaging from work without clocking out. 12/9 RP 129:6-9; 11/17 RP 62:20-63:8; 12/4 RP 209:7-18, 246:12-19.[33] Other than prayer breaks, there were no other

[33] Despite allusions to smoke break abuse among Shuttlers, Plaintiffs could only identify a handful who they claimed took smoke breaks without punching out during 2011, many of whom were Somali Muslims. *See, e.g.*, 11/25 RP 39:10-40:11 (A. Mohamed) (two of four identified), 101:3-102:9 (M. Abdullahi) (three of five identified); 12/1 RP 48:22-49:12, 65:4-66:8 (I. Salah) (two of four identified); 12/2 RP 14:6-16:1 (M. Hassan) (three

examples of Shuttlers claiming, over Hertz's objection, a right to take any break in addition to clocked rest breaks. 12/4 RP 248:21-249:1; 12/8 RP 151:13-17, 71:6-8, 92:6-8; 12/9 RP 130:23-131:1. Nevertheless, Hertz instituted the clocking rule across the board to be fair and consistent and evenly enforced that rule for all personal activities. 11/17 RP 63:19-67:24; 12/3 RP 95:22-97:18. Accordingly, while it was difficult for the few managers on duty to observe Shuttlers as they moved vehicles through the expansive worksite, Hertz made a concerted effort to periodically confirm that Shuttlers engaged in personal activities were clocked out.[34] As part of that effort, frontline managers documented hundreds of random time card checks to confirm employees on breaks were clocked out.[35]

III. ARGUMENT

A. Plaintiffs' Statement of the Case Violates RAP 10.3(a)(5)

Plaintiffs offer a Statement of the Case replete with unsupported assertions and argument. In no less than 35 instances, Plaintiffs cite to self-serving Clerk's Papers for alleged facts, rather than the Report of Proceedings. Brief of Appellants ("Br.") at 4-17. These cites often include disputed factual allegations that they were unable to prove at trial. For

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of four identified spoke Somali), 52:13-53:23 (A. Hussien) (four of six identified); 12/3 RP 18:22-19:18 (F. Mohamud) (two of two identified).

[34] 11/17 RP 63:19-67:24; 12/4 RP 99:5-23, 192:17-193:3, 202:14-203:11, 204:5-207:11;12/8 RP 114:16-115:1, 149:10-150:18; 12/9 RP 129:24-130:8 .

[35] 11/17 RP 64:6-67:4; 12/3 RP 95:22-97:18; 12/4 RP 99:5-23, 247:8-20; Ex. 1766; 12/8 RP 150:19-24; 12/9 RP 162:16-163:2.

example, to support the assertion that "Hertz suspended every single Somali Muslim who prayed regardless of whether they were engaging in break abuse," Plaintiffs cite to a convoluted exchange from the deposition of Harris (*id*. at 13), ignoring that all Plaintiffs admitted that they took prayer breaks without clocking on the days they were suspended. Plaintiffs also discuss a 'CNN' interview of a Union representative that the trial court excluded via a pretrial order and no manager saw.[36] In short, the story Plaintiffs tell is not reflective of the evidence presented at trial and on which the jury based its verdict.[37] The Court should disregard their argumentative assertions lacking record cites.[38]

B. The Trial Court Did Not Limit Plaintiffs' Examinations

1. Standard of Review

Plaintiffs claim the trial court repeatedly erred in sustaining objections as to the form of certain questions they posed to defense witnesses (*e.g.*, argumentative, lack of foundation). Br. at 40, 19-31, 40-47. However, Evidence Rule 611(a) obligates the trial court "to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation

[36] Br. at 14-15; CP 1572-1577; RP *passim*.
[37] *See* RAP 10.3(a)(5) (requiring a "fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.").
[38] *See, e.g., Hous. Auth. of Grant County v. Newbigging*, 105 Wn. App. 178, 184-85, 19 P.3d 1081 (2001) (refusing to consider "self-serving statements" unsupported in the record).

effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." The trial court has a duty "to see that neither side is over-reached by unfair trial tactics" and that "truth is established." *Talley v. Fournier*, 3 Wn. App. 808, 819, 479 P.2d 96 (1970). Accordingly, the trial court "has broad discretion" and is "in the best position to perceive and structure its own proceedings." *State v. Dye*, 178 Wn.2d 541, 547-48, 309 P.3d 1192 (2013).

2. Trial Court Did Not Abuse Its Discretion Under ER 611

Plaintiffs claim the trial judge made an amazing number of errors when ruling on objections and thereby prevented "any meaningful cross-examination that would have shown pretext." Br. at 40, 19-31, 40-47. However, none of these rulings precluded, or placed any limits on the scope, content or duration of, their examination of any defense witness.[39] Instead, they merely precluded the use of complex and compound questions embedded with assertions of contested fact, argument, generalization and ambiguity. Judge Roberts did not err in requiring Plaintiffs' counsel to structure his questions in a manner that would allow the jury to identify admissible testimony from the witnesses' answers.

[39] In contrast, while Defendants agreed to shorten their cross-examinations of Plaintiffs (via interpreter no less) and reduce their witness list, Plaintiffs continued to complain that Defendants' examinations were taking too long. CP 2072-2089; 12/1 RP 4:17-5:5.

Thus, the rulings on these objections did not prevent Plaintiffs from pursuing evidence of pretext or impeachment, as they remained free to (and did) rephrase their questions and alter their approach.[40]

At trial, Plaintiffs had a full opportunity to vigorously examine defense witnesses concerning issues they now suggest they were precluded from exploring. For example, while Plaintiffs claim they were most prejudiced by alleged limits to their examinations of Harris and Hoehne (Br. at 39), they called both to testify in their case-in-chief and questioned them multiple times through direct, re-direct and cross-examination.[41] Plaintiffs were able to question all defense witnesses regarding their veracity, memory and bias. Plaintiffs' counsel often did so in an aggressive, repetitive and fast-paced manner, which the trial court allowed him to employ while putting reasonable limits on his use of theatrical tactics and improper questions that defied meaningful answers.[42]

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[40] Of the approximately 187 objections sustained during Plaintiffs' cross-examinations, counsel rephrased his questions in response to at least 102 of them. CP 2962-63.

[41] 11/12 RP 143-215, 224-237; 11/13 RP 14-82; 11/17 RP 72-101, 116-130; 12/9 RP 26-31.

[42] *See, e.g.*, 11/12 RP 169:22-25 (asking Hoehne: "Well, it's true, is it not, that now you've had a chance to read and review Mr. Harris's testimony, right? You know what he's going to say."); 11/17 RP 143:2-145:16 (asking Babou same question five times);12/3 RP 122:17-123:5 (sustaining objection regarding Plaintiffs' counsel physically approaching Babou), 123:14-125:9 (attempting to re-read same portion of witness's testimony and ask same questions); 12/4 RP 105:16-106:1, 111:8-11 (repeatedly failing to permit witness time to review exhibit before asking him about its contents), 168:7-177:19 (asking Franzese whether defense witness Best was a "liar" who made a "bigoted comment");12/8 RP 19:7-19 (asking Wilson: "Now did you testify that Mr. Harris did skip level meetings? … You know he's already testified, right? … All right. And he didn't mention that during his deposition, during his testimony. Do you

Plaintiffs discuss various instances where they claim the trial court erred in sustaining objections to the form of a question. Br. at 19-31, 39-47. While Plaintiffs specifically selected these instances, even a cursory review reveals the obvious problems that prompted the objections to form and compelled the trial court to act. Moreover, the string-cite record citations (*id*. at 43-47) to what Plaintiffs claim to be improperly sustained objections do not merit review, because Plaintiffs offer no discussion or citation to legal authority to support their claims of error.[43] Plaintiffs likewise attempt to incorporate by reference a 55 page appendix filed with their motion for a new trial which is filled with legal argument on the trial court's alleged errors. Br. at 20 n.22 (citing CP 2601-55). These arguments should not be considered.[44]

a. Repetitive Questions

Plaintiffs make much of the fact that the trial court sustained an "asked and answered" objection when their counsel for a third time read an excerpt from Hoehne's deposition and asked him to confirm the testimony. Br. at 22-23, 41 & fn.28. At his deposition, Hoehne testified

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know why?"), 132:1-133:1 (mischaracterization of exhibit and use of finger quotes to refer to "these people"); 12/9 RP 146:24-147:7 (court admonishing counsel for physically approaching Luchini).

[43] RAP 10.3(a)(6); *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 84, 180 P.3d 874 (2008) (pursuant to RAP 10.3(a)(6), appellate courts "do not address issues that a party neither raises nor discusses meaningfully with citations to authority").

[44] *See Multicare v. State, Dep't of Soc. & Health Servs.*, 173 Wn. App. 289, 299, 294 P.3d 768 (2013) (Washington courts reject attempts to incorporate by reference arguments contained in trial court briefs; refusing to consider 114 pages of appendices).

that he did not recall "asking anyone that was entering the prayer area 'are you clocked out for break.'" CP 1649. Plaintiffs claim they should have been allowed the third repetition to further emphasize the alleged difference from Hoehne's testimony at trial that he and Dixon had asked a group of Shuttlers if they had clocked out before they entered the prayer room. 11/12 RP 164:23-171:21. The trial court did not err in this ruling, however, particularly given Plaintiffs' detailed cross of Hoehne on this issue.[45] *Id.* Moreover, while Plaintiffs argue that this was "some of the most important testimony in the case" and the trial court did not allow them to fully emphasize "such lies by key defense witnesses" (Br. at 41), Plaintiff Hassan Farah also testified that Hoehne had asked him if he had punched out as he approached the prayer room to pray that day. 11/20 RP 49:11-51:12.[46] As such, Plaintiffs suffered no prejudice from this ruling, nor did they even mention this "dramatic change" in testimony during their closing argument. Br. at 41; 12/10 RP 64-181 (closing).

b. Questions Based on Disputed/Asserted Facts

Plaintiffs claim error as to a number of sustained objections where the question they asked presumed a factual foundation that had not been

[45] *See State v. Eichman*, 69 Wn.2d 327, 331, 418 P.2d 418 (1966) (where object sought has been obtained, "it is not an abuse of the trial court's discretion to refuse a repetition of the examination").

[46] Hoehne explained that he was able to recall more detail at trial, because he had refreshed his recollection with his contemporaneous email recording the events of that day. 11/12 RP 216:3-217:17 (referring to Ex. 1819). Dixon's testimony was also consistent with that of Hoehne and Farah. 12/4 RP 91:16-92:1, 96:17-97:6.

established with the witness. For example, referring to a warning Wilson wrote to Ms. Omar, Plaintiffs asked Hoehne: "So if it had to do with prayer, you actually could have instructed him to write down the word 'prayer,' right?" 11/12 RP 151:25-152:4. Defendants objected to the question, because Plaintiffs did not first establish that Hoehne had any involvement in Wilson's warning. Regardless, the trial court's ruling did not prevent Plaintiffs from exploring the scope of Hoehne's authority and learning that he was not involved in drafting the warning and did not know why Wilson did not reference prayer on it. 11/12 RP 152:11-17.

Plaintiffs also take issue with the sustained objection to the question to Hoehne: "We know that on September 30 there was a confrontation where managers asked employees if they prayed, and if they said 'Yes,' they were sent home correct?" Br. at 21. Defendants objected to this question, because it assumed Hoehne agreed with the testimony of Ms. Omar that employees received no notice of the clocking rule. This was a core dispute between the parties that the jury was engaged to resolve, and Hoehne was not obligated to accept the testimony of an opposing party as true.[47]

[47] *See* 1 McCormick on Evidence § 7 (Kenneth S. Broun, ed., 7th ed. 2013) ("the examiner may not ask a question that merely pressures the witness to assent to the questioner's inferences from or interpretations of the testimony already admitted"). The question was also improperly vague and compound.

c. Questions Based on Mischaracterizations of Evidence

Another tactic Plaintiffs repeatedly employed at trial was to phrase questions based on mischaracterizations of prior testimony or exhibits. For example, after questioning Luchini regarding warnings he provided to Shuttlers as they approached the prayer area on September 30, Plaintiffs referenced Exhibit 1744 (a document from February 2011) and asked Mr. Luchini if, "looking at this," he agreed that, "certainly at least as of February, in order to get somebody for insubordination, you need to tell them three times that they have to clock out for prayer and failure to do so could result in a finding of insubordination up to -- and termination, right?" 12/9 RP 142:4-13. The objection was properly sustained as mischaracterizing the document and vaguely referencing two different time periods. Ex. 1744. The document stated that failing to follow an instruction, regardless of how many times it was given, would place a Shuttler at risk of discipline for insubordination. *Id.* Plaintiffs cannot show the trial abused its discretion in rejecting such questions (Br. at 44-45) or otherwise blocked them from pursuing admissible evidence.[48]

[48] *See* Wright & Miller, 28 Fed. Prac. & Proc. Evid. § 6164 (2d ed.) ("a question is misleading where it mischaracterizes earlier received evidence or in some other manner tricks the witness into assuming a fact that has not been proven").

d. Argumentative and Misleading Questions

Plaintiffs' questions were often simply vehicles for the arguments and assertions of their counsel.[49] In such instances,[50] the trial court's rulings merely functioned to compel counsel to structure his questions to allow the witness to give, and the jury to hear, meaningful and admissible testimony. Similarly, the trial court also properly sustained objections to Plaintiffs' requests for witnesses on the stand to identify individual Plaintiffs from among the large group sitting far away in the public gallery of the crowded court room, with the women wearing traditional clothing which covered their heads. *E.g.*, 11/12 RP 23:3-16, 226:21-227:10. Under these circumstances, a witness's ability to see and identify specific Plaintiffs who had not worked at Hertz since being suspended more than three years before the trial did not have probative value. Instead, Plaintiffs' questions were intended for pure theatrics,[51] as were their argumentative questions falsely insisting that managers made no effort to

[49] *See, e.g.*, Wright & Miller, 28 Fed. Prac. & Proc. Evid. § 6164 (2d ed.) (an argumentative question "asserts facts with such a forceful tone it suggests those facts are established and the answer is of no consequence"); *Eichman*, 69 Wn.2d at 331 (questions on cross-examination "were properly disallowed since they were argumentative").

[50] *See, e.g.*, 11/12 RP 235:15-19 (asking Hoehne: "Well, would you agree that on October 3rd you suddenly came up with a list of people that you claim you talked to beforehand?"); 11/13 RP 50:10-16 (asking Harris: "As a matter of fact, you actually set up a plan for how you were going to coax other employees to sort of fill out a form of how they had notice, correct?"); 12/9 RP 160:18-25 (sustaining objection to characterization and use of the word "fact" after counsel asked Luchini if he was "aware that Tracey Thompson had been interviewed by the media and talked about the fact that the policy was only being applied against people praying and not against smokers?").

[51] Plaintiffs made no proposal, for example, to bring any Plaintiffs from the distant gallery up to the vicinity of the witness stand to enable identification.

identify individuals who violated the rest break rules and instead just assumed all Plaintiffs engaged in such violations. Br. at 26-27.

e. Plaintiffs Were Not Prejudiced

Plaintiffs would have this Court believe that Judge Mary Roberts erred in 120 (or 64%) of the approximately 187 objections she sustained against Plaintiffs. CP 2590, 2600-2655, 2955. This amounts to an unfounded attack on her competence, credibility and impartiality. Moreover, Plaintiffs' implication that the trial court favored Defendants in its rulings on objections and its control of the proceedings is disingenuous. The trial court also sustained approximately 179 of Plaintiffs' objections to Defendants' testimony and evidence. CP 2972. Additionally, the trial court allowed Plaintiffs' counsel to employ leading questions throughout Plaintiffs' direct examinations.[52]

Finally, while Plaintiffs cannot show that the trial court abused its discretion in its rulings on objections to form, even if they could, they cannot show any resulting prejudice, because they remained free to (and most often did) simply rephrase their questions and/or alter their approach in order to continue pursuit of the desired evidence. *See Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 924, 250 P.3d 121 (2011) ("there are grounds for reversal only if the error was prejudicial");

[52] *See, e.g.*, 11/12 RP 52:2-8; 11/18 RP 71:20-24; 12/2 RP 64:19-65:2; 12/1 RP 7:15-23.

Falk v. Keene Corp., 53 Wn. App. 238, 250, 767 P.2d 576, *aff'd*, 113 Wn.2d 645, 782 P.2d 974 (1989) (limits on cross of witness did not prejudice party's ability to impeach his credibility, because evidence sought was "already in the record and available for appellant's use in closing argument").

C. No Error in Exclusion or Admission of Evidence

1. Standard of Review

Trial court rulings regarding the admission of evidence are reviewed for abuse of discretion. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937 (1994). "Discretion is abused only when it is exercised in a manifestly unreasonable manner, or based on untenable grounds." *Id*. Evidence Rule 103(a) further provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Thus, if error occurs, the question is whether it was prejudicial, for error without prejudice is harmless and not grounds for reversal. *Brown v. Spokane Cnty. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). To find an error prejudicial, the Court must determine, "within reasonable probabilities, if the outcome of the trial would have been different if the error had not occurred." *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

2. The Trial Court Properly Excluded Exhibit 1929

Plaintiffs claim the trial court committed prejudicial error in failing to allow into evidence an email written by Jeff Wilson on March 26, 2011 (CP 2666-67), more than six months before they were suspended for refusing to clock out for their prayer breaks. Br. at 47-48. While Plaintiffs do not contest the trial court's conclusion that the email was hearsay pursuant to ER 801(c), they argue that it was an admission by a party-opponent pursuant to ER 801(d)(2) and/or a record of regularly conducted activity pursuant to ER 801(a)(6). *Id*. at 47-51. The trial court did not fail to recognize those potential bases for admission, but rather determined that neither applied under the facts presented. 12/8 RP 30:4-35:3; 12/9 RP 5:16-6:23. Accordingly, the trial court did not engage in an "incomplete legal analysis or a misapprehension of legal issues" (Br. at 35) or otherwise make an error of law subject to *de novo* review.

a. Plaintiffs' Failure to List Exhibit 1929 as Trial Exhibit

As a preliminary matter, Plaintiffs' challenge to the exclusion of Exhibit 1929 should be rejected, because they failed to identify it as an exhibit prior to trial. King County Local Civil Rules ("LCR") require parties to exchange "lists of the exhibits that each party expects to offer at trial, except for exhibits to be used solely for impeachment," not later than 21 days before trial. LCR 4(j) (emphases added). Plaintiffs did not identify

Exhibit 1929[53] prior to their attempt to introduce it during their cross examination of Wilson (33 days after trial began). 12/8 RP 29:17-30:5. At a minimum, Plaintiffs' failure to identify this email as an exhibit before trial fatally undermines their claim that it is "outcome determinative" and that its exclusion requires a new trial. Br. at 2-3; 12/8 RP 33:4.

b. Rejection of ER 801(d)(2) Exclusion from Hearsay

The trial court did not abuse its discretion in determining that, "because of Mr. Wilson's level in the company," Exhibit 1929 was not an admission of a party opponent. 12/9 RP 6:20-6:23. In fact, Wilson was one of five managers at the lowest level of management at SeaTac, three levels below Area Manager Harris and four levels below General Manager Abdallah. 12/4 RP 189:1-191:6; 11/13 RP 86:17-88:25. And while Plaintiffs claim that Exhibit 1929 shows that Wilson created a plan "back in March 2011" to "set up the Plaintiffs for 'insubordination,'" there is no evidence that Wilson disciplined any Plaintiff at any time after he sent this email, nor was he involved in any of the suspensions or terminations of the Plaintiffs in September and October 2011. Moreover, while Plaintiffs now claim Wilson was the mastermind of a plan that came to fruition six months later, they did not seek to include him as an individual defendant

[53] *See* CP 676-866 (Joint Statement of Evidence, filed by Plaintiffs on September 22, 2014, pursuant to LCR 4(k); Ex. 1929 not listed).

in this case, nor did they examine him during their case-in-chief, as they did with Hoehne and Harris. CP 1-24, 25-36, 2250; RP *passim*.

While Plaintiffs rely on Wilson's duty to ensure "policies and procedures were understood and enforced," there is no evidence to show that he had any authority to, or ever did, (a) make or change any material policies or (b) terminate any Shuttler.[54] *See Ensley v. Mollmann*, 155 Wn. App. 744, 751-53, 230 P.3d 599 (2010) (rejecting application of ER 801(d)(2) where overall nature of witness's authority to act for party was extremely limited). Moreover, it would be untenable to conclude that Wilson had authority to speak not only on behalf of Hertz, but also on behalf of defendants Harris and Hoehne.[55] Under the circumstances, the trial court did not abuse its discretion in determining that Exhibit 1929 did not constitute an admission by a party opponent, while still allowing Plaintiffs to fully explore the content of that email during their cross examination of Wilson and argue it as evidence of pretext in closing.[56] 12/8 RP 28:23-30:12, 36:13-42:19; 12/10 RP 85:15-21.

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[54] 12/4 RP 190:25-191:6 (Wilson was "responsible for the efficiency of the [Shuttler] group and sort of the day-to-day operations. Just making sure that scheduling was taken care of and that policies and procedures were understood and enforced").

[55] *See Feldmiller v. Olson*, 75 Wn.2d 322, 323-24, 450 P.2d 816 (1969) (noting with approval trial court's sustaining of objection that admission as to one defendant is not admission as to second defendant).

[56] *See Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 771, 115 P.3d 349 (2005) (no abuse of discretion in excluding hearsay statement of employee where no proof of employee's authority to speak for employer on subject); *Jackson v. Sara Lee Bakery Grp.*, 677 F. Supp. 2d 1268, 1272 (N.D. Ala. 2009) (statements of regional vice-president

c. Rejection of ER 803(a)(6) Exception to Hearsay

The trial court also did not abuse its discretion in concluding that Exhibit 1929 was not a business record subject to ER 803(a)(6).[57] A business record is a "record of an act, condition or event" (RCW 5.45.020), and thus is a "routine product of an efficient clerical system."[58] "What such records have in common is that cross-examination would add nothing to the reliability of clerical entries: no skill of observation or judgment is involved in their compilation."[59] Here, Exhibit 1929 is not a routine notation of the occurrence of any act, condition or event. Instead, it is a detailed document in which Wilson (a) proposes to repeat training on rest breaks, (b) sets forth a proposal to "get break time commitments" from Shuttlers, and (c) speculates as to the ways in which continued abuse could be detected and addressed. Ex. 1929. Thus, the trial court did not abuse its discretion in concluding that it was not a business record.[60]

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in discrimination action were not admissions of his employer because, *inter alia*, he was not one of "the decision-makers with regard to the elimination of plaintiff's job").

[57] 12/8 RP 33:18-23 (trial court: Exhibit 1929 "is not a routine document that indicates that a particular event has happened").

[58] *See Young v. Liddington*, 50 Wn.2d 78, 83, 309 P.2d 761 (1957) ("Typical of such records are payrolls, accounts receivable, accounts payable, bills of lading, and so forth.")

[59] *In re J.M.*, 130 Wn. App. 912, 924, 125 P.3d 245 (2005).

[60] *See Young*, 50 Wn.2d at 83 (business records rule was not "intended to admit into evidence conclusions based upon speculation or conjecture"); *United States v. Cone*, 714 F.3d 197, 220 (4th Cir. 2013) (insufficient to say that, "since a business keeps and receives e-mails, then *ergo* all those e-mails are business records falling within the ambit of" the business records exception).

d. Exclusion Pursuant to ER 403

Exhibit 1929 addresses the rest break requirements in place in March 2011, six months before Harris and Abdallah decided to require clocking for all rest breaks. 11/17 RP 20:9-21:7, 23:4-12; 12/8 RP 179:14-22. Wilson played no role in that decision or in Plaintiffs' subsequent suspensions and terminations. Moreover, Plaintiffs' legal claims were based solely on their suspensions and terminations, not any prior actions of Hertz. CP 2277 (individual verdict forms). For these reasons, exclusion of Exhibit 1929 can also be alternatively upheld pursuant to ER 403, because its probative value (if any) is greatly outweighed by the risks of "confusion of the issues, or misleading the jury." ER 403.[61]

e. The Exclusion of Exhibit 1929 Was Harmless

Even if erroneous, the exclusion of Exhibit 1929 was harmless. This conclusion necessarily follows from the fact that Plaintiffs were able to establish the timing and recipients of the email and fully explore its contents through their leading questions of Wilson, which amounted to Plaintiffs' counsel effectively reading the email to the jury. 12/8 RP 34:11-35:3, 36:13-43:9. Plaintiffs were also free to emphasize the existence and contents of this communication during closing arguments. 12/10 RP

[61] *See State v. Jones*, 71 Wn. App. 798, 823-24, 863 P.2d 85 (1993) (trial court erred in excluding testimony on hearsay basis, but appellate court determined testimony still should be excluded on basis that it was unduly prejudicial).

85:14-21. Accordingly, the email itself was cumulative of testimony Plaintiffs introduced via their cross examination of Wilson, and there is no basis to reasonably conclude that its admission would have changed the jury's unanimous verdict.[62] Moreover, rather than evidencing any discriminatory bias or plot, Exhibit 1929 simply reiterates Wilson's efforts to address the most legitimate concern an employer can have—ensuring its employees are actually working during the hours they are being paid to work. Consequently, even if erroneous, its exclusion was harmless.[63]

3. Court Properly Allowed Testimony Regarding the CBA

Plaintiffs claim the trial court should have excluded a reference to statements by Union Business Agent Tucker regarding the CBA's rest break language. Br. at 32. While identified as alleged error (*id*. at 3-4), this claim need not be considered, because Plaintiffs offer no argument or legal authority.[64] RAP 10.3(a)(6); *see also Saviano*, 144 Wn. App. at 72.

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[62] *Savage v. State* (Br. at 48-49) did not analyze whether the exclusion of the document affected the jury's verdict or was instead harmless error, because the party challenging its exclusion (the plaintiff) had prevailed at trial and was raising the issue on cross-appeal only in "the event of a remand." 72 Wn. App. 483, 496-498, 864 P.2d 1009 (1994).

[63] *See Silves v. King*, 93 Wn. App. 873, 884-86, 970 P.2d 790 (1999) (exclusion of medical record was harmless error and not grounds for reversal of jury verdict for defendant physician, because record was cumulative of other testimony as to plaintiff's medical condition and not probative as to the cause of harm to plaintiff); *San Juan County v. Ayer*, 24 Wn. App. 852, 861, 604 P.2d 1304 (1979) (in trial addressing location of corner of property, exclusion of testimony not prejudicial where evidence "could hardly have been corroborative of the location of the corner").

[64] The alleged error also mischaracterizes the statements by Tucker as pertaining to company policy, when in fact they related to the CBA. 11/17 RP 18:3-19:17.

Even if considered, the trial court did not abuse its discretion in allowing the testimony. Challenged as hearsay, the testimony involved Tucker's confirmation to Harris that prayer was to be done within, and not in addition to, rest break time provided by the CBA. 11/17 RP 18:12-19:11. The testimony was part of a larger examination of the steps Harris took to confirm and pursue compliance with his understanding of the CBA. *Id*. at 15:17-20:12. Defendants elicited the testimony not to show the truth of the matter asserted by Tucker, but rather as notice to Harris and to explain the motivations for Hertz's next steps. *See, e.g.*, *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 87, 272 P.3d 865 (2012) (reports not inadmissible hearsay where offered to show employer's motivation for the decision to terminate employee). Moreover, pursuant to the National Labor Relations Act, Tucker was Plaintiffs' statutory agent for the CBA negotiations and interpretation (*id*. at 18:7-11). *Vaca v. Sipes*, 386 U.S. 171, 191, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967) (noting union's role "as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement"). Therefore, her statement regarding the negotiations is not hearsay. ER 801(d)(2)(iv) (admission made by party's agent acting within scope of authority to make statement is not hearsay). In addition, even if it were hearsay, the Plaintiffs opened the door to this testimony when Plaintiff

Omar testified regarding her understanding of the new break language as part of the Union's negotiating team. 11/12 RP 59:14-65:8.[65]

D. The Trial Court Properly Instructed the Jury

1. The Trial Court Properly Rejected "Pretext" Instruction

Plaintiffs argue that the trial court erred in rejecting their "pretext" instruction, which they based on a model instruction for the Eighth Circuit Court of Appeals.[66] This instruction would have informed the jury that it "may find that a plaintiff's religion or national origin was a substantial factor in the defendant's decision to suspend or terminate a plaintiff if it has been proved that the defendants' stated reasons for either of the decisions are not the real reasons, but are a pretext to hide religious or national origin discrimination." Br. 51-52, App. 2. In arguing for this instruction, Plaintiffs ignore both controlling authority in Washington and the jury's charge to assess credibility and find facts.

In *Kastanis v. Educational Employees Credit Union*, the Washington Supreme Court held that a trial court did not err in refusing to give a pretext instruction to a jury deciding a claim of discrimination

[65] *See, e.g., Ang v. Martin*, 118 Wn. App. 553, 563, 76 P.3d 787 (2003), *aff'd*, 154 Wn.2d 477, 114 P.3d 637 (2005) ("Because the [plaintiffs] opened up the subject of the possible verdict [in an earlier criminal proceeding], the trial court did not abuse its considerable discretion in permitting further questioning on that topic, even if it necessitated admitting hearsay.").

[66] Eighth Circ. Civil Jury Instr. § 5.20 (2014).

under the WLAD.[67] The Court concluded that the burden shifting test developed by courts to assess dispositive motions (including a plaintiff's burden to prove pretext) was "never intended as a charge to the jury." 122 Wn.2d at 490-92.[68] Accordingly, while a "plaintiff must prove pretext … to survive a motion for judgment as a matter of law, his or her burden at trial is to prove the employer intentionally discriminated." *Id*. at 494-95. The Court thus concluded "that a separate instruction on pretext was unnecessary." *Id*. at 495. *Kastanis* is dispositive here,[69] and any jury "instruction or language on pretext is inappropriate."[70]

In addition, the absence of any express instruction on pretext did not render the trial court's instructions insufficient, because those instructions (1) allowed Plaintiffs to argue their theory of the case, (2) were not misleading, and (3) when read as a whole, properly informed the jury of the applicable law. *E.g.*, *Douglas v. Freeman*, 117 Wn.2d 242,

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[67] 122 Wn.2d 483, 494-95, 859 P.2d 26 (1993), *modified*, 865 P.2d 507 (1994).
[68] *See also Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 522-24, 832 P.2d 537 (1992) *aff'd*, 123 Wn.2d 93, 864 P.2d 937 (1994) (no error in failing to instruct jury on shifting burdens of proof, because such steps are "irrelevant once all the evidence is in," and "[i]t creates needless confusion to instruct the jury on these burdens").
[69] Even the Eighth Circuit has held that a trial court in a Title VII discrimination case "did not abuse its broad discretion by declining to give an instruction on pretext." *Moore v. Robertson Fire Prot. Dist.*, 249 F.3d 786, 789-90 (8th Cir. 2001). *See also Browning v. U.S.*, 567 F.3d 1038, 1039-41 (9th Cir. 2009) (no abuse of discretion in declining pretext instruction); *Williams v. Eau Claire Pub. Sch.*, 397 F.3d 441, 446 (6th Cir. 2005) (same); *Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1234-35 (11th Cir. 2004) (same); *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994) (same).
[70] 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.01 (6th Ed. 2013) (quoting the Comment accompanying the pattern jury instruction for disparate treatment claims). WPI 330.01 was proposed by both Plaintiffs (CP 1107 (Prop. No. 9)) and Defendants (CP 1159 (Prop. No. 8) and adopted by the trial court (CP 2282 (No. 7)).

256-57, 814 P.2d 1160 (1991). In particular, the agreed upon jury instructions left Plaintiffs free to convince the jury during their closing argument that Hertz's concerns regarding their excessive use of paid rest break time and open refusal to comply with the requirement to clock for all paid rest breaks were "not the real reasons" for their suspensions and terminations, but were instead "a pretext to hide religious or national origin discrimination."[71] Br., Appx. 2. The fact that Plaintiffs' evidence and closing argument did not convince the jury to find in their favor does not mean that the jury was not properly instructed.[72] *Burnside*, 66 Wn. App. at 522 ("The absence of a specific instruction on a matter at issue is not error if the instructions given clearly inform the jury of the applicable law on that issue and permit each party to argue his theory of the case.").

2. The Trial Court Properly Rejected Limiting Instruction

Plaintiffs claim the trial court should have instructed the jury that evidence of a CBA ratification meeting was admitted for a limited purpose. Br. at 52-3. However, Plaintiffs never made a request for such an instruction at trial. Instead, after the jury had deliberated for a full day,

[71] 12/10 RP 70:17-71:17, 74:11-14, 80:7-18, 85:14-21, 86:24-87:2, 88:5-10, 90:7-25, 93:17-25, 94:24-95:6, 99:10-102:3, 175:13-21(Plaintiffs' closing: claiming no legitimate business concerns; referring to "the plan," "the set up," "the code"; "so when you have three different justifications, that's circumstantial evidence of discrimination").
[72] Notably, Plaintiffs failed to convince the jury of their claims of discrimination notwithstanding the misleading argument by their counsel at closing that "there can be a hundred substantial factors" and national origin or religion need only be "in the mix" for Plaintiffs to "win." 12/10 RP 72:10-25 (emphasis added).

they filed an additional "objection" seeking a mistrial or, in the alternative, to interrupt deliberations to reinstruct the jury. CP 2255-2258. The trial court properly rejected these extraordinary requests, noting *inter alia* that Plaintiffs failed at least three times to request a limiting instruction prior to deliberations. CP 2269-2271.[73] *See* ER 105 ("When evidence which is admissible…for one purpose but not admissible… for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.") (emphasis added); *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 624, 762 P.2d 1156 (1988) ("Failure to request an appropriately worded limiting instruction waives the right to the instruction and fails to preserve the error for appeal.") (1988).[74]

The untimely request for a limiting instruction also fails on its merits. James Kidd was a member of the Union's CBA bargaining committee. 12/9 RP 190:8-17. Kidd testified, without objection, that he attended a CBA ratification meeting where Plaintiff Mohamud Hassan interpreted for Somali attendees. *Id.* at 196:17-197:11. Kidd also testified, over objection, that at the meeting Union leadership explained the mini-

[73] Plaintiffs knew they needed to request a limiting instruction if they believed it prudent, as they did for certain evidence Harris relied upon in upholding the Plaintiffs' suspensions. 11/17 RP 57:23-58:8. Defendants did not object to that request (*id*. at 113:23-114:7), and the trial court gave that instruction during the examination of Harris (*id*. at 115:15-116:1) and again with the other instructions at closing. CP 2280.

[74] Plaintiffs' claim that they needed a transcript is specious, as Kidd testified on the afternoon of December 9 and Defendants' closing argument was the next day. Moreover, given that Plaintiffs' argument here mirrors their objection during closing, they knew enough to request a limiting instruction at that point.

break option available in the new CBA and that it could be used for prayer. *Id*. at 197:12-198:4, 203:4-15. The trial court allowed this testimony to show that Mr. Hassan and other attendees had notice of the Union's position on the new break language. *Id*. at 197:12-19. Knitting together evidence at closing, Defendants made a brief and appropriate reference to Kidd's testimony on the purpose of the meeting, Mr. Hassan's role and the Union's explanation. 12/10 RP 125:8-21. Given Plaintiffs' objections during closing argument and deliberations and their motion for a new trial, the trial court evaluated the reference in context on multiple occasions. CP 3235-3237 (noting "[t]he court also listened to the audio recording of the pertinent testimony and argument"). Nothing suggests it found the reference inappropriate, let alone actionable misconduct.[75]

Moreover, while Plaintiffs now claim Kidd's testimony was critical, they did not ask him a single question on cross examination (12/09 RP 203:23) or call Mr. Hassan or the Union leadership (whom they identified as trial witnesses) in rebuttal.[76] CP 677-678. In addition, the record contained alternative evidence from which the jury could

[75] *Kuhn v. Schnall*, 155 Wn. App. 560, 571, 576-77, 228 P.3d 828, 836-37 (2010) (even where misconduct occurs, the trial court is in best position to evaluate its impact and determine whether it is sufficiently prejudicial to require a new trial).

[76] The critical issue for the jury, which they resolved against Plaintiffs, was whether Defendants believed in fall 2011 that Plaintiffs knowingly refused to clock out for prayer. Ultimately, what Plaintiffs knew regarding the new CBA (back in January 2011) is not material to that issue, as Plaintiffs argued in closing. 12/10 RP 68:8-17.

reasonably conclude that the new mini-break option was an accommodation to those employees who chose to pray during break time. For example, Plaintiff Omar admitted on cross examination to her prior sworn testimony that the mini-break was created to provide Shuttlers the option to pray without clocking out. 11/12 RP 117:19-119:23. Defendants referenced this exchange in closing immediately prior to the challenged reference. 12/10 RP 123:21-125:7. Finally, the trial court properly instructed the jury that arguments of counsel are not evidence and both sides repeated that point during closing arguments. *Id*. at 50:4-8; 112:19-113:1; 174:4-9.

E. The Trial Court Properly Rejected Motion for New Trial

Plaintiffs claim the trial court erred in denying their motion for a new trial (Br. at 4), but they offer no supporting legal argument. Thus, the claim does not merit review.[77] Regardless, this claim is duplicative of Plaintiffs' other claims of error in this appeal, which (as shown above) do not individually or collectively provide a basis to disregard the jury's unanimous verdict. Thus, the trial court did not abuse its discretion in denying the motion for a new trial, particularly given the deference due a trial court in matters involving its assessment of occurrences during trial.[78]

[77] RAP 10.3(a)(6); *Saviano*, 144 Wn. App. at 84.
[78] *Levea v. G. A. Gray Corp.*, 17 Wn. App. 214, 225-26, 228-29, 562 P.2d 1276 (1977) ("primary question presented by a motion for a new trial is whether losing party received

IV. CONCLUSION

Rather than prove their disparate treatment claims, the trial laid bare Plaintiffs' demands for continued preferential treatment. The jury properly held Plaintiffs accountable for the choices each made to refuse to clock for paid break time and to reject Hertz's offer to return to work. For all of the foregoing reasons, the Court should affirm the jury's unanimous verdict.

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fair trial"; finding no abuse of discretion in trial court's denial of motion for new trial based on alleged errors in evidentiary rulings, claims of misconduct by counsel for prevailing party, and claims of jury misconduct); *see also* CP 2955-2969.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on December 11, 2015, I served a true and correct copy of the attached *Brief of Respondents* by delivering same via e-mail to:

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Dated this 11th Day of December, 2015.

s/Anita Spencer
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