Division One No. 76354-7-I
Supreme Court No. 97088-2

SUPREME COURT

OF THE STATE OF WASHINGTON

SUSAN CARLSON, an individual,

Appellant,

vs.

THE BOEING COMPANY, INC., a foreign corporation,

Respondent.

Amended APPELLANT'S MOTION FOR DISCRETIONARY REVIEW

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A. Identity of Petitioner

Susan Carlson is the petitioner and was the plaintiff at trial.

B. Court of Appeals Decision

Ms. Carlson seeks review of the attached Court of Appeals decision.

C. Overview of Issues on Review

The Court of Appeals' decision contradicts Goodman v. Boeing, 75 Wn.App. 60 (1994) and Kimbro v. Atlantic Richfield, 889 F.2d 869 (9th Cir. 1989). It reverses twenty years of disability discrimination protection.

Boeing fired appellant for behavior it knew was caused by a mental disability it purposely kept its discipline decision makers ignorant of then argued that intentional ignorance as a defense: "Its just a logical impossibility that somebody can discriminate if they don't even know the person they are making a decision about has the protected characteristic…" VRP 1313-1314. The Court of Appeals' affirmed that intentional ignorance defense. It is explicitly rejected by Goodman, Kimbro, and the WLAD.

Boeing offered defenses and evidence contrary to law. It had to; it admitted it applied an illegal policy against appellant:

> Q: …the fact the behavior is caused by a mental impairment… doesn't matter, you're still going to discipline them for the behavior, even though the behavior is caused by a mental impairment; correct?
>
> A: I – that's the process, yes.

VRP 84 and VRP 1165-6. Riehl v. Foodmaker, 152 Wn.2d 138, 152 (2004)

found that is discrimination: "conduct resulting from the disability… is part of the disability and not a separate basis for termination."

In addition to years of disability history, Boeing had a report the conduct it fired appellant for was caused by disabilities. Boeing asserted it has no duty to account for disability if it learns of it after the employee has a problem.[1] Its medical officer testified: "there is a principle in the disability law that talks about the fact that you don't have to excuse conduct if somebody brings up the disability after the conduct." VRP 986.

D. Issues Presented For Review

1. Whether an employer can escape WLAD duties by keeping decision makers ignorant of information known by the employer;

2. Whether Boeing offering defenses contrary to the WLAD was error;

3. Whether (a) the exclusion of comparator evidence and (b) the admission of evidence of character and past acts was error;

4. Whether the trial court's instructions to the jury were error;

5. Whether the trial court erred denying appellant's motions for summary judgment, directed verdict, and JNOV.

6. Whether review should be accepted of other errors assigned by appellant to Division One that Division One did not correct.

E. Facts

Ms. Carlson was hired November 1996, Tr.Ex. 6, and fired October 2013. Tr.Ex. 3. Boeing asserts it fired her because of a "threat" she made to

[1] Boeing had notice before the conduct as well. Infra.

her manager on August 12, 2013. Tr.Ex. 1, p. 2 and Tr.Ex. 5.

1. Boeing Had Actual Notice Of Disability

Ms. Carlson was sexually abused for years starting at age 15. VRP 465-471, 612, 684. She did not disclose the abuse but when hired reported having PTSD and "counseling" for it. Tr. Ex. 9, p.3.

Ms. Carlson took two, three month medical leaves for "work stress." Tr. Ex.9, p. 5. June 19 to August 22, 2001 she was off; her doctor told Boeing she had "major depression, recurrent, moderate… is experiencing anxiety and depression related to work stress." Id. Boeing found the "cause of injury" was a "stress incident" in a "conference room," id. at p.8, and required she be "under the appropriate care of a mental health professional…and/or in treatment…" (Tr.Ex.10, p.4) It approved FMLA leave for a "serious health condition that makes you unable to perform the essential functions of your job." Id. at p. 1 and 9.

She took a second medical leave from April 15 to July 1, 2010 for the same thing, identified by Boeing as an "injury" of a "stress incident" in a "conference room." TrEx 9, p. 15. Again, her doctor told Boeing she needed time off because of the stress of the meeting, id. at p. 13. Boeing again recorded the disability and "notified" her "supervisor/lead" Id. at p. 15.

Boeing never initiated an accommodation process despite twice being told of an ongoing disability it acknowledged affected Ms. Carlson's ability

to "perform the essential functions of (her) job." Tr.Ex. 10, 1-10.

Boeing suspended Ms. Carlson after the threat, ordering her to its psychologist to "determine why (she) engaged in the behavior (the threat) in the first place." 11/3 VRP 77. Boeing required that report before a discipline decision was made, Tr. Ex. 14, p. 11, and for her to sign a release so the psychologist could "report (to Boeing)… my findings from this assessment." The release said "all information obtained during assessment will be shared with (your) employer." Tr.Ex. 39. The psychologist admitted he told Ms. Carlson he would tell Boeing everything she said. VRP 461-2.

Boeing told Ms. Carlson: "you're not allowed to talk to anyone who works for Boeing" other than its psychologist. VRP 782, 789. That was the place to explain what happened and seek help. VRP 782-5. She told the psychologist of her abuse, counseling, work stress triggers and why her behavior resulted from her emotional/mental disability. VRP 645-6,470-2.

The psychologist's report told Boeing she "spent multiple years in therapy," "has not processed some of her early experiences (sexual and other abuse) to completion," and was "scared" when she made the threat. Tr.Ex. 2, p. 5. He identified impairments that caused, including a "limited set of coping resources for dealing with stress" at work, an "increas(ed) likelihood that she will misinterpret the actions of others" and that "appears to be particularly likely in the case of her current manager" who she allegedly threatened. Id.

Those are impairments under RCW 49.60.040(7)(c)(ii) directly related to Ms. Carlson's behavior with Heckt. The psychologist reported she saw him "as a threat to her safety," recommending she be "made aware of… available mental health benefits." He diagnosed "Anxiety Disorder" with "Posttraumatic features" saying she had "difficulty regulating emotions." Id.

Despite that, Division One found the report did not link her impairments to her behavior. That ignores (1) Boeing's admission the purpose of the report was to determine "why (she) engaged in the behavior (the threat) in the first place," 11/3 VRP 77, (identifying disabilities alongside the behavior evaluated makes that link), and (2) the language of the report.

A decision maker who voted to fire Ms. Carlson was shown the report at deposition for the first time and asked if she read it as Ms. Carlson's "behavior was, at least in part, cause by an anxiety disorder" she replied: **"Yes, that's what he's saying."** 11/3 VRP 121. Carlson's HR expert testified no HR employee could read it differently. VRP 384, 386.

Ms. Carlson told HR she was "trigger(ed) and (it) caused me to behave in a way that I – even I – myself cannot fully control." 11/13 VRP 181-2. Boeing's investigator admitted she told him the same thing, but he told no one saying, "that is not part of my job." VRP 1206.

Boeing admitted in closing it knew of the disabilities, VRP 1316, ("Boeing did get notice of the impairment after she saw Dr. Bailey…").

Boeing's Chief Medical Officer conceded that as well:

> There is no question she has a mental health disorder. She's had depression. She's had anxiety. There's no question.

VRP 1004. She admitted they were present at the time of the threat. VRP1005.

2. Ms. Carlson's Conduct Was Not Considered A Threat

In 2013 Ms. Carlson transferred from a female manager to Richard Heckt. Tr Ex 11, p. 57, VRP 1035. She felt he had an aggressive and dictatorial style. VRP 769-770. He consistently reassigned her projects nearing completion to men thus depriving her the goal accomplishment necessary to progress forward at Boeing. Id. 716, 719-722, 728.

This continued until April 2013 when Heckt during a conference room meeting reassigned another project nearing completion to a male. VRP 725-727. That was a trigger. Ms. Carslon felt the same stress and inability to cope as past conference room incidents causing prior leaves. VRP 729-730. She left to deescalate her stress. Id. Heckt admitted she did so. VRP 1042-5.

In August 2013 Heckt conducted a performance review of Ms. Carlson. Tr Ex 11, p. 58. She was told to sit at a table opposite the door, Heckt and a male manager sat across, VRP 751-2, putting them between her and the door; she felt physically trapped. VRP 926. Ms. Carlson testified Heckt acted aggressively and was hostile. VRP 751-3. She gave her presentation. Heckt interrupted saying "now let's do what we came here for," and for the first time in 18 years reviewed her low all categories. VRP 753, Tr Ex. 11, p. 58.

Heckt blamed her for having "broken" the "relationship" by leaving his April meeting to descelate stress. VRP 753-4. He admitted that soured the relationship. VRP 1042-5. She told him she "needed to leave the meeting." He said, their "relationship is broken and it is 100 percent your fault." Id.

Ms. Carlson testified that was a trigger: I "traveled back to 15, 16 years old, and I related to my sexual abuse experience where I was told that everything was my fault…" VRP 754. She relived "all that shame of my youth," "felt fear," "I'm going to die. I'm scared." VRP 755-757. Boeing's psychologist admitted she told him that during the evaluation. VRP 471-2 ("That's what she reported, yes.") Dr. Covell, retained for trial, testified that was a PTSD trigger and caused what happened next. VRP 618, 620-1.

Ms. Carlson testified she wanted to illustrate how Heckt made her feel. VRP 755-7. She parroted how he walked to the table and glared. Id. His response was to laugh. Id. at 758. Dr. Covell testified that heightened the PTSD reaction and she experienced "hyperarousal symptoms." Id. at 673.

She "blurted," "this makes me --- it makes me feel like I want to get a gun or a knife." VRP 758-759. She testified she gasped and "immediately" said "that was not a threat." "I wanted to explain – I got battered – I said, that wasn't a threat. I'm a battered woman and you can't treat me like this." Id.

Heckt testified identically. VRP 1067. He "understood it as being an illustration of feelings" and no threat. VRP 1085, 1069-70. Tr. Ex. 42, p. 2.

He emailed HR and Security confirming that. Tr. Ex. 41. No person saw it as a threat; they continued and she went back to work. VRP 760, 775, 1082.

Ms. Carlson emailed him confirming it was no threat, but a statement of "feelings and fear of harm." Tr Ex. 41. She said "I do not think this is a healthy environment," asking to be "reassigned." Id. She took the next week off using sick time for this third, conference room stress incident. VRP 774. Heckt admitted he knew she took sick time. VRP 776, 1076, Tr Ex 44.

Boeing's policies required Heckt to immediately report any threat to security and for security to immediately suspend the employee until an investigation takes place. TrEx 14, p. 8 and VRP 427. Heckt did not call security. VRP 1090, 11/3 VRP 45. Only after Ms. Carlson sent her email did he contact HR, forwarding it for "input." TrEx 41, p.2. Policy also requires HR to immediately call security. TrEx. 14, p. 8 and VRP 38. HR also did not view it as a threat and did not call security. VRP 1090, 11/3 VRP 45. Security was not contacted until the following week and Heck ignored its calls for another week. VRP 1090, 1214. HR knew that and did nothing. 11/3 VRP 52. No one viewed this as a threat. Ms. Carlson came back from sick leave and worked 2 weeks before being suspended. Tr Ex 113, VRP 768.

Once Heckt responded, he identified the mental health issue: "I am not a psychiatrist so won't venture too far but to say that she is apparently transferring a large amount of built up anger onto me." Tr Ex 117, p. 1. That

is essentially identical to what Boeing's psychologist reported. Supra.

When Ms. Carlson returned from leave Heckt met her, telling HR: "she agreed without fuss to adhere to the behavior guidelines I gave her." Tr Ex 52. HR's reply: "…That is really great news Rick. I am really glad to hear it went well." Id. She worked until suspended August 26. TrEx 113, VRP 768.

3. Boeing's Response To Ms. Carlson's Conduct

Boeing's policy required a human resources generalist (HRG) to shepherd the investigation, Tr.Ex.14,p.8, and an investigator from Security to conduct a fact investigation and submit a report. Id. at 10, Tr.Ex. 15, p. 7. At the same time, the psychological evaluation discussed above is to take place. Tr.Ex. 20. Boeing's Chief Medical Officer (Dr. Cain) admitted once all that is complete, its policies require it to "pull the (employee's) entire medical record," review the report, and consider "the entire picture of the employee's health status and what we know about the employee's medical history" to "make the decision about what we (Boeing) may need to do. VRP 991.

Dr. Cain admitted "no one from Boeing" did that. VRP 992.

Boeing has a discipline committee to evaluate misconduct. Tr Ex 18. The HRG compiles all information and provides it to the committee's chairperson. Tr.Ex15, p. 7. That chairperson admitted the committee knows there has been a psych report because policy requires it. 11/3 VRP 167, VRP 1165. The committee evaluates all information against a conduct matrix with

discipline outcomes to decide discipline, if any. TrEx 18, p 9.

Boeing's policy is to withhold from the committee any disability that may have caused the behavior under review. VRP 46-48, 1008, 1130. 11/3 88. It has no process after the committee decides, to pass the decision to a person with knowledge before punishment is administered. VRP 1012. Boeing's testimony and argument was (1) its policy is it does not matter the behavior was caused by disability, it fires them anyway, VRP 11/3 84, 1165, and (2) it can ignore a disability if it learns of it after the conduct. VRP 986.

F. ARGUMENT

1. Boeing's Ignorance Defense Requires A New Trial

Ms. Carlson moved in limine to bar Boeing arguing the ignorance it intentionally created was a defense. VRP 38-9, 53, 55, 79. The trial court denied the motion and Division One erred not finding that error.

An employer cannot claim as a defense, ignorance it creates. First, basic agency principles charge decision makers with the entity's knowledge even if ignorant of it. McVicar v. Peters, 12 Wn.2d 92, 120 (1942). It is "absurd" to protest otherwise. Id. See also State v. Parada, 75 Wn. App. 224, 230–31 (1994). Second, the WLAD rejects it. See Goodman and Kimbro.

Goodman charged Boeing with knowledge it did not have: an outside workers comp program knew Goodman aggravated a previous injury. 75 Wn.App. at 64. The work continued, the injury worsened, plaintiff quit. Id.

As here, Boeing argued that because its managers did not know of the aggravation (the disability) it had no WLAD duty to act on it.[2] Id. Goodman rejected that: "knowledge of the agent will be imputed to the principal." Id. Boeing was "bound by" the "notification directed towards" its "agent" because the agent was to "convey (information) to Boeing Medical" to take action and the "personnel department of that particular Boeing employee division…would take whatever action they felt was appropriate." Id. at 86. That was the exact same policy Boeing had in this case. Supra.

No one at Boeing knew of Goodman's disability but was accountable because its outside agent knew. Here, Boeing had actual knowledge of Ms. Carlson's disabilities but still was allowed to offer evidence/argument it was not accountable because it intentionally kept its discipline committee ignorant. That nullifies the WLAD and contradicts Goodman.

Kimbro reached the same result. As here, the employer used a committee to make discipline decisions. 889 F.2d at 876. Plaintiff was late and missed work due to headaches. Id. He did not request accommodation and "ARCO management personnel who made the final decision to discharge Kimbro were personally unaware…" Id. at 875. As here, ARCO argued it

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[2] Division One distinguished Goodman saying Boeing knew of the disability. That is wrong. One manger knew of an earlier injury in May 1987. The knowledge imputed was from June 1987 when Goodman's doctor wrote a new report on an "aggravation" of the previous injury. 75 Wn.App. at 64. Goodman imputed knowledge of the later aggravation not known by Boeing. Id. at 86. Division One errs on what was imputed.

"could not be held liable… since the ARCO management personnel who made the decision to terminate Kimbro were not aware that many of Kimbro's absences were attributable to his cluster migraine condition." Id. at 874. But, his "medical record indicate(d) that he has been plagued by cluster migraines" for years. Id. at 875. Applying the WLAD, Kimbro rejected an ignorance defense: "it is well settled under Washington law that the principal is chargeable with, and bound by, the knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority and in reference to a matter over which his authority extends." Id. at 876 (Washington cases omitted). Citing Zwink v. Burlington Northern, Inc., 13 Wn.App. 560, 566 (1975), Kimbro explained "traditional agency principles are fully applicable in the employment context." Kimbro, 889 F.2d at 876. Kimbro held "it is clear" Arco as the employer "is bound" to its employees' and agents' knowledge even if the decision makers were ignorant. Id. at 876. "Arco, as a matter of law, was on notice… (and) should be held responsible…" Id. at 877.

Division One distinguished Goodman and Kimbro saying

> In each case, a supervisor knew about the employee's disability and its impact on the employee's work… In contrast, Carlson did not show that Heckt or EAP knew she had PTSD and that it affected her ability to work."

Carlson at 7-8. That was error. That does not distinguish the cases.

First, Boeing knew before termination of Ms. Carlson's "PTSD,"

"major recurrent depression," "anxiety disorder," and the other psychological impairments reported by its psychologist. It was in Boeing's files, Tr.Exs. 2; Ex. 9, p. 3, p. 5, inter alia., and admitted in closing and testimony. Supra.

Second, Division One miscomprehends Kimbro and Goodman. In Kimbro the issue (as here) was not whether the employee's managers knew, it was whether the employer may use their ignorance of the employer's knowledge as a defense. Kimbro is identical to Boeing's ignorant discipline committee, imputing the employer's knowledge to the committee despite its ignorance. On Goodman, the facts here are "worse." In Goodman Boeing knew of a prior injury, not the later aggravation but knowledge was imputed. Here, Boeing actually knew the disability and it kept its committee ignorant.

The trial court and Division One also distinguished them as accommodation cases. Ms. Carlson made an accommodation claim and still Boeing was allowed to argue ignorance. More important, being accommodation cases is not distinguishing; that requires a lesser protection from disparate treatment. The WLAD has different duties for accommodation and disparate treatment with notice, but what constitutes notice of a disability is not different. Once an employer has notice, it must account for it. See RCW 49.60.040(7) and Clipse v. CDS, 189 Wn.App. 776, 793 (2015).

It conflicts the WLAD to require an employer with imputed notice of an impairment to account for it on accommodation, but ignore it on

termination (disparately treat them) with the same notice. Worse, that incentivizes firing the disabled as Boeing did: we had no duty to accommodate because we fired her for behavior caused by the disability first. To not protect the behavior caused by a mental disability would protect such "in name only." Gambini v. Total Renal Care, 486 F.3d 1087, 1095 (9th Cir. Wash 2007).

Division One erred concluding there was no prejudice assuming error because there was evidence supporting a verdict: (1) There was not sufficient evidence given Boeing admitted its policy to fire employees for behavior caused by disability and that it did so here, (2) reasonable minds could not differ based Boeing's 10 years of notice of the same disability linked to meetings plus the psychologist's report, and (3) even if it could be said there was evidence Ms. Carlson's behavior was not caused by disability, Division One applied the wrong standard of error; the issue is not, as Division One held, whether there was evidence a jury could use to find the behavior was not caused by disability, it is whether the testimony and argument of false ignorance may be presumed to have "affect(ed) the outcome of the trial." Diaz v. State, 175 Wn.2d 457, 472 (2012).

When inadmissible evidence "was such a minor feature it could scarcely have impacted the jury's determination of nonliability" it cannot be said to have effected the trial. Id. Diaz found inadmissible evidence coming

"up twice," and only going to damages where the jury returned a defense verdict, did not meet the standard. Id. Evidence "could have affected the outcome if the jury used it to change its assessment on liability." Id. at 474.

The ignorance of Boeing's discipline committee was not a "minor feature" of trial. It was its primary theme introduced in opening, repeated in testimony, and argued in closing. Boeing told the jury to make "its assessment on liability" on it. It abused discretion to admit that evidence and improper legal theory. See Brouillet v. Cowles Pub. Co., 114 Wn.2d 788, 802 (1990) and State v. Pegs, 178 Wn.App. 1034, 8 (2013). A new trial is required.

2. The Court Improperly Instructed The Jury

Instruction 22 instructed it was illegal for Boeing to consider the 10 years of disability information it already had unless provided a new release to consider it at the time. CP 135. Boeing argued 29 CFR 1630.14 supported the instruction. It did not, that CFR only addresses how reports from compelled medical examinations are handled. The instruction omitted that, telling the jury a new release was required for "medical information" Ms. Carlson already voluntarily gave Boeing over 10 years before it could be considered. Ms. Carlson took exception. VRP 1234-1235, CP 144-145.

Review is "de novo" requiring reversal when "an instruction's erroneous statement of the applicable law… prejudices a party." Hue v. Farmboy Spray Co., Inc., 127 Wn.2d 67, 92 (1995). When an instruction

makes a "clear misstatement of law, prejudice is presumed and is grounds for reversal unless it can be shown that the error was harmless." Fergen v. Sestero, 182 Wn.2d 794, 803 (2015). Instruction 22 was a "misstatement of law." It misstated the CFR and contradicted Goodman and Kimbro; it effectively nullified Boeing's 10 years of disability notice. That is how Boeing argued it, VRP 1330-1, even making a speaking objection in Ms. Carlson's closing to that effect, VRP 1353, and has never offered an explanation how, if error, that was "harmless."

The court erred not giving plaintiff's proposed instruction 14 that it is not a defense to treat the disabled the same as the non-disabled. CP 18, VRP 1236. Boeing testified throughout that was a defense. VRP 43, 51-54, 1236. 11/3 VRP 94, 575, and closing VRP 1309. That misstates the law: "Identical treatment may be a source of discrimination in the case of the handicapped." Gambini, 486 F.3d at 1095. Argument contrary to the law should result in a new trial. See ALCOA v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 539 (2000). It is error to refuse an instruction where "the subject matter is (not) adequately covered in the court's other instructions." Cf. State v. Etheridge, 74 Wn.2d 102, 110 (1968). Ms. Carlson moved in limine to exclude such argument, CP 168, was denied, and no instruction "covered" the issue. Refusing the instruction was error requiring a new trial. Its "…use is prejudicial, for the reason that it is impossible to know what effect they may have on the verdict."

Hall v. Catholic Archbishop of Seattle, 80 Wn.2d 797, 804 (1972).

3. The Court Improperly Excluded Comparator Evidence

Boeing requires a detailed investigation, report, and committee vote for every threat. TrEx 14. Ms. Carlson discovered investigation reports of many threats, much worse than her's, where the employee had no disability and was not terminated. TrEx 22-39 (summarized in the appendix). She offered only 17 as comparator evidence: she was treated less favorably than the non-disabled and it would have been reasonable to accommodate her as others were not fired and her accommodations were reasonable and would work. VRP 13-21, 27-30, 33-35, 172, 176-178, 182, 183-184.

The Court ruled they were not relevant and only admissible to "impeach" Boeing as inconsistent. VRP 169. It excluded the reports and gave a sanitized script of what appellant could say about only 5. VRP 178-180, 370-378. But, it allowed Boeing to offer more, creating the appearance Ms. Carlson withheld evidence. VRP 1135-9 and 1140-4. When she responded with the reports, Boeing repeatedly objected she was "purposefully misrepresenting" them and was sustained, VRP 1156-7, despite the fact Ms. Carlson was only trying to read directly from them. VRP 1268, 1269.

The trial court applied the wrong standard; it expressly applied ER 608(b) finding it was evidence of impeachment by prior acts. VRP 18. It was not. Comparator evidence is relevant in discrimination cases. See Lauer v.

Longevity Medical Clinic, 2104 WL 5471983, p. 5 (WD Wash 2014). The evidence should have been balanced under ER 403; it was error not do so. See Erickson v. Kerr, 125 Wn.2d 183, 190 (1994). Applying the wrong standard is a per se abuse of discretion. State v. Gentry, 183 Wn.2d 749, 764 (2015).

The exclusion was prejudicial. Limiting her to only five and sanitizing them lent support to Boeing's claim it was a threat-free environment – it was not. It deprived Ms. Carlson material, comparator evidence. Allowing Boeing to go beyond what Ms. Carlson could offer and sustaining objections she "misrepresented" them when she was merely only the actual reports was a comment on the evidence and prejudicial. VRP 1156-7.

4. The Trial Court Improperly Admitted Evidence

Boeing turned the trial into a character assassination going back 10 years in Ms. Carlson's journal to paint her as an unhappy person mad at her boss. VRP 837-9, 1326. Boeing was allowed to ask one witness, referring to an email the witness did not even write, whether she agreed with the email's author that Ms. Carlson was "condescending." 11/3 VRP 147-8.

The issue in the case was whether Boeing fired her for dissabilty or failed to accommodate. If she disliked Heckt or acted poorly some other day Boeing did not discipline her over, is irrelevant. Boeing offered hearsay, character evidence over objection and in closing exploited it, arguing because she was mad at Heckt some other day, or acted poorly some other day, she

was not in a PTSD moment but acting in conformity with past acts or character on the day in question. VRP 1326-7. ("That's how she treated him. You saw the different emails…")

Ms. Carlson moved in limine to exclude, VRP 71-2, renewed that during trial, VRP 804-7, and objected repeatedly, 830, 835, 886. Division One excused it saying: "her theory… included an assertion that she was a model employee." She never contended that, conceding the opposite in opening: "Look, 18 years she wasn't perfect. There were issues." VRP 240. The evidence was hearsay under ER 803, irrelevant under ER 403, inadmissible under ER 404, and highly prejudicial. It tainted the trial and prejudiced the jury requiring a new trial. See Diaz, supra.

5. The Trial Court Erred Denying Judgment As A Matter Of Law

The trial court denied Ms. Carlson's motion for summary judgment on the undisputed facts of Boeing's files and its admitted policy to terminate employees for behavior caused by a dissability it applied against her. It denied her motions for directed verdict and JNOV on the evidence above.

Reversing denial of summary judgment is appropriate if the facts are undisputed and the Court relied on an issue of law. Bulman v. Safeway, 96 Wn.App. 194, 198 (1999) (reversed on other grounds, 144 Wn.2d 335 (2001)). Reversal of a denied JNOV is appropriate when "the evidence and reasonable inferences are insufficient to support the jury's verdict." Cf.

Wright v. Engum, 124 Wn.2d 343, 356 (1994).

There was no disputed of fact on summary judgment. Boeing's file and psychologist's report were what they were. Boeing admitted its policy to terminate for conduct caused by disability, VRP 84 and VRP 1165-6, and that it ignored Ms. Carlson's disability here. VRP 159, 558, 987, 992, 1166, inter alia. Boeing's summary judgment defense was only its "ignorance" defense. CP 565-598. Summary judgment should have been granted; Division One's statement Boeing disputed her disability is without weight. Base denial does not create a question of fact. CR 56(e)

Directed Verdict and JNOV should be been granted. Even Boeing admitted the "basic story is not in dispute." VRP 268. Its defense at trial is stated above and actually admits liability. Again, base denial does not create a question of fact nor do illegal defenses. Reasonable minds could not differ on this evidence. ALCOA, 140 Wn.2d at 529.

G. Conclusion

Ms. Carlson asks for reversal of the denial of her summary judgment and JNOV motions and the case be remanded for a damages trial. Failing that, she asks for a new trial and correction of the errors identified above.

Dated this 25th day of April, 2019.
McGAUGHEY BRIDGES DUNLAP, PLLC

Dan Bridges, WSBA 24179
Attorney for petitioner Carlson

Carlson v. The Boeing Company
Threats to kill or with weapons

Legend:
Outcome – Term = Termination, # = days
0 = same day
? = unknown
DIRECT – Direct Threat under Boeing's definition

	Name	Location	Date	Outcome	Suspend	Description
22	Arocha, Pedro	Everett	9/13	10	0	ECARB almost all the same as Susan's. Chris Madison: said Archoa made statements: "If ever got in trouble, when he came back, he would bring his gun and take care of business." 4457. Brice Braillard: "you know, I just need to bring a gun in here and take out all these idiots... all the people that don't know what they are doing." Another time, "said something about bringing a gun to work, and said 'this is why people kill people.'" Told someone, *"I'm going to throw a grenade in the back of your truck."* 4458 "Has said on occasion, that he would bring in a gun and shoot individual people." "I know I have heard him say he would shoot Mel Godina or Jim Zerby." 4459. TOV: Low risk. Difficulty regulating emotions. Recc. EAP. No diagnosis.
23	Black, Dilbert	Renton	11/11	5	?	Told to do some work to move a plane. Did not want to, said had to do paperwork. When one on one with an employee involved, referring to person that told him to do the work, "People like that, we kill motherfuckers like that, I'm going to kill you." Was told another person would be called (unclear if mgr) continued "to cuss" at the employee and told him "you must think I'm your motherfucking slave, you treat me like you're my slavemaster." 7650. Ultimately, did the work. Later in the day, said about same person "I'm gonna cut his motherfucking head off and shit down his throat." Later said, "I'm still going to kill that son of a bitch." Other witnesses corroborated, slightly different language but generally same, saying will kill the person.
24	Blacker, Barbara	Everett	1/13	3	0	Threat to shoot self and EAP counselor. 7 W statements. "I'm either going to commit homicide or suicide. It's a good fucking thing I don't own a gun, cause if I did, there would be a few less people in the EAP program. This fucking place doesn't give a shit about its people." 4608 She denied making comments about killing people. Did in QA office. Speaking loudly, using profanity. Said she "hated her fucking manager." 4608 Was "very aggressive in her approach,"

	Name	Location	Date	Outcome	Suspend	Description
						then said threats re gun and killing. "I believe she has the potential of being dangerous." 4609 A lot of witnesses corroborated the statements. TOV: Underlying Biploar II Disorder.Also likely a personality disorder. Does not present risk of self harm or to others. Recco see a psychiatrist.
25	Corey, Kim	Everett	5/10	5	1	Told co-workers want to kill another co worker. CAM 6083. HR from Kathy Valenzuela: She had "a hit list" and "would like to shoot (two peoples') heads off with an AK-47." 6518. Kathy Johnson interview: Said "Matt Corbet is a dumb fuck, I would like to put the extra clip in the magazine of my AK-47 and blow his head off." 6519.Tammy Cotterill interview: said "no one liked" her (the mgr) and that she was "a fucking bitch." She was "tense, spoke in raised voice, somewhat red faced, very direct, hard eye contact, leaning close in body space..." She was scared. 2 months ago said she hatted Matt Corbet and "I hate him. I want to blow Matt Corbett away with my AK-47." Always makes negative comments about emps and mgrs., and is very critical. Says others are idiots. 6519. Denied comments or owning a AK 47 but owns two guns.
26	Desanctis, Fred	Everett	7/13	5	0	CAM for 5 days off in '15 but notes from 2013 for termination, oddly both in July. Invest: Threatened to but a bullet in Stake's head and made **stabbing gestures** at stake with a knife on a separate occasion. 4723. Also said would punch in head. 4724. Stake says the bullet comment was the week before. 4725 Felt threatened. Also, stabbing motions that week w/knife. You are lucky we are on Boeing property, I know where you live and **I should put a bullet in your head.** 4726
27	Francis, George	Renton	1/13	5	?	Man threatened women: "Shut up, you talk too much... If you were my wife I would have killed your ass. Just shut the fuck up." 7878. You are getting on my nerves, shut the fuck up." "I carry a gun with me at all times and I would have killed your ass. I don't know how your boyfriend deals with you." 7878. Admitted the comments but watered them down a bit, denied having a gun. 7879. ECARB committee hand notes say "very serious threat." 8762
28	Jacobsen, Keith	Everett	8/12	5	?	Two employees heard him say if say Huckabay outside of work would harm him. 7939. At the time, no one heard and was denied. Later, said to two managers, "He doesn't know whether to kill Huckabay and/or do 30 years in prison." Has heard him say that "multiple times." 7939. Another person heard him say only reason Huckabay is alive is he "does not want to spend time in prison." Another person has heard him make threats against many different people. Says is a "growing trend." 7940. Another employee reports hearing him three or four times talk about killing Huckabee in doing 20 years time and it being worth it. 7941. Another employee heard him say was not sure whether killing Huckabee worth time in prison. Specific comments about "it might be worth it." Said that three or four times. Claims can be very intimidating and threatening.
29	LeRoy, Ralph	Renton	8/12	1	?	One employee reported said if another employee **"did something like that again, he was going to slit his throat and take him out like he had been trained to do."** Reports made similar

	Name	Location	Date	Outcome	Suspend	Description
						statements like that in the past. Is often angry and aggressive. Has mentioned he is a bodybuilder and trained killer. Said he had training in martial arts. 8125 Another employee said talks up he is a bodybuilder and trained fighter, said to be intimidating. Claims it to be a trained killer. Another employee said he threatened to "punch him in the throat and take him down." 8126 many employees all corroborated but appears only one heard the slit the throat comment. CAM 7508. ECARB 8657, **"persistent depictions of violent physical injury."**
30	Morrisson, Richard	Everett	2/13	5	?	"The easy thing to do would be is to get a gun and take care of all this mess," relating to an upcoming SPEA contract vote and strike. He denied a threat.
31	Neff, David	Everett	7/10	1	0	Told coworkers **wanted to be "the next Ridgeway" and that "wanted to line up 1st shift crew and shoot them."** 6122 (cam). Comments re "gutting" female members of his crew. 6957. Facebook page has a picture of him face on with assault rifle pointing it at camera. (pretty shockingly graphic) 6959. Said after crew meeting he would like to "line up day shift people and shoot them." Comments re **"shooting and killing MTs on dayshift as well as people that were in the meeting held yesterday."** 6960. Lots of other comments via the investigation. Neff: admitted saying some conduct would make people take the good out from the bad and "line them up" but denied it was a threat. Admitted Ridgeway comment but said it was a common Army joke. 6962.
32	Reneau, Benjamin	Everett	2/11	1	0	From CAM: Told two coworkers would stab them. Directly asked two co workers if would be they would be interested in inflicting harm on one of your acquaintances. 6132. Investigation summary: Said "was going to stab or kill Erickson Notarte and other employees" on more than one occasion. Offered employees money to harm his ex wife. 7145. Said at different times, "I am going to stab you," and "I'm going to kill you," while holding a screwdriver that looked like an ice pick. 7147 Admitted in interview said, "I am going to stick you" Admitted said holding a screwdriver. Admitted saying "I wish I could get somebody to take care of him" referring to his ex-wife's husband but denied offering money. Told one employee," Ben, I will give you $700 to kill somebody." 7149. Started talking about ex wife's husband. Told other employees he would stab them.
33	Reyes, Ronald	Renton	2/13	1	?	Said his manager is setting him up for failure. Said something to the effect of "**I feel like I can shoot her."** He acknowledged that given the current events in relation to shootings, that "due to my culture, I could wait outside the gate and shoot her." He said he was venting. 8380 Another employee confirmed, said "in my culture I could get a gun and be outside the gate and just shoot Tammy." He repeated this. 8381. Ronald admitted he said there was "a lot of gun violence out there," but not "recall what words I use." Said I offered this statement just to make a comment, I do not know why I said that. I do not make it to threaten.

	Name	Location	Date	Outcome	Suspend	Description
34	Rooke, Ricardo	Auburn	4/12	Warning	?	**Threatened employee by holding a cigarette lighter looking like a gun to a person's neck and saying he would kill him.** On at least 15 past occasions has pointed his fingers in a manner resembling a gun. Employee: heard him specifically mention an employee's name and that he was going to kill him. Took a small pistol out of his pocket that looked real. 8401 see also 8411. Saw him took what appeared to be guns but showed him they were lighters out of his pocket.
35	Schmeichel, Arnold	Renton	3/12	1	?	Said, "he was going to get someone to get a gun and shoot and kill him before Derek does it to him." 8433. Employee admitted telling a manager when reporting a threat himself that he would "have to hire somebody to shoot him." Denied intending to shoot or hurt him. But, admitted saying it. 8434 Mgr confirmed hearing this.
36	Shiley, Jerrad	Everett	7/13	1	?	Pattern of behavior, threats to kill with gun, sexual harassment. If you piss me off again, I'm going to shoot you, and said his gun was not very far away." Brags about keeping gun in car. Said was going to shoot me with a 9mm he keeps under the seat of his truck. Shiley claims the employee making it up to retaliate for his taking his job. No witness corroboration. Some things a year old. ECARB said "a pattern of threatening comments to other employees." Sec. rpt says "threats c/n be verified..." TOV: No diagnosis, low risk.
37	Thomas, Robert	Everett	11/13	5	0	(ECARB: no one voted discharge. Ess identical ECARB committee) Told employee wanted to get a gun and shoot his mgr. Invest. Thomas said "he hated Couls (his mgr) and wanted to get a gun and shoot him." His mgr says performance not good and attendance issue, failed certification test needed for job. 6051. Same person said heard Thomas say, "I want to bring in an automatic weapon and shoot him" (the mgr). Thomas admitted "may have made a comment about getting a gun and shooting someone" but did not id his mgr. 6055. Said owes no guns. Has a BOLO: If seen, immediately call for back up, approach w/extreme caution.
38	Weinz, William	Everett	12/13	3	0	When QA would not certify a part, he said, "I'd like to put a bullet in her head." One witnesses heard that. Weinz Admitted: "I'd like to put an extra hole in her head," but as soon as said it, said "yeah, not really." One witness said if made, was just "popping off" out of "frustration." TOV: Narcissistic personality disorder. "May very well act with a threatening demeanor at the work place in the future." Should do anger mgt treatment. Once makes an appointment to initiate, "it would be approp. To return him to the workplace and he likely would not represent a threat of violence. In my opinion documented ongoing participation in anger management until the therapist felt otherwise should be a requisite for his ongoing employment.

FILED
3/18/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SUSAN PURNELL-CARLSON, Appellant, v. THE BOEING COMPANY, INC., a Delaware corporation, Respondent.	)	No. 76354-7-I DIVISION ONE UNPUBLISHED OPINION FILED: March 18, 2019

LEACH, J. — In this employment discrimination case, Susan Purnell-Carlson (Carlson) appeals a judgment entered after a jury verdict in favor of The Boeing Company. She challenges trial court decisions about requests for summary judgment, a directed verdict, a judgment notwithstanding the verdict, and a new trial. She also challenges certain jury instructions and various trial court evidentiary rulings. Because Carlson has not shown that she is entitled to appellate relief on any issue, we affirm.

FACTS

Carlson started working at Boeing in November 1996. On her preemployment questionnaire, she noted that she had three months of treatment in 1990 for posttraumatic stress disorder (PTSD) resulting from her divorce.

Carlson advanced through several different business- and engineering-related positions at Boeing.

While at Boeing, Carlson took two medical leaves related to stress-induced depression and anxiety. She first took leave from June to August 2001. On her return-to-work form, her provider noted "R/O PTSD" (rule out PTSD) as an "impression," diagnosed her with major depression, and indicated that she was ready to work but that she should continue counseling.

Carlson took a second leave from mid-April through early July 2010 for a "stress incident" at work and as medical leave for other issues. In her Department of Labor and Industries report, Carlson described the stress incident as an anxiety attack stemming from a conflict over resources for a project. She did not request any disability accommodation. Boeing did not ask if she needed help transitioning back to work. Carlson talked to her manager about the incident and, once she returned, she asked him how to proceed with work.

In 2012, Carlson accepted a position as engineering project manager on the team being assembled by senior project manager Richard Heckt to troubleshoot the 787 airliner program. Heckt and Carlson agree that they initially had a good working relationship. Heckt testified that Carlson "did really well" when she started with the new group. Carlson never told Heckt about a diagnosis of anxiety disorder or PTSD. Nor did she ever tell him that she had

taken two leaves of absence for stress-related illnesses. And Heckt did not have access to her medical files.

From March to August 2013, Carlson's and Heckt's interactions grew tenser. During this time, Carlson e-mailed higher level managers indicating that she struggled with stress and with working with Heckt. She never contacted Human Resources (HR) about accommodation.

Heckt and Carlson disagree about certain events occurring between March and August 2013. They agree that a March 2013 meeting marked the turning point in their work relationship. Carlson left the meeting early.[1] During the meeting, Heckt thought Carlson appeared upset. The anger she directed toward Heckt surprised him. Carlson testified that she left the meeting early to "decelerate" the situation and prevent a stress incident. But her departure also prematurely ended the meeting.[2]

Carlson and Heckt agree that their relationship soured after this meeting. They both point to the same e-mail exchange. Heckt asked Carlson to "please adhere to management direction and do not freelance on these charts." Carlson replied she would follow the "old way" and "not streamline, lean out or otherwise

[1] The meeting appears to have occurred in March 2013, although in her brief Carlson identifies it as occurring in April 2013. Her cited pages of the record do not indicate this as the month of the meeting.

[2] The parties differ in their testimony as to whether Carlson "packed up her computer" before leaving or slipped out, receiving her computer later from another attendee.

improve work processes in any way that is visible to anyone other than myself and my direct manager in private." She added, "Do I have to write this 100 times on the chalkboard? Have a good day, Rick." Heckt found this e-mail adversarial. Carlson described it as an effort to restore the relationship.

Carlson testified that after the March 2013 meeting she "felt threatened" by Heckt. Before her August 2013 interim performance evaluation, she wrote comments in her journal reflecting her anger toward Heckt. She planned to "stand up for herself" at the meeting despite what she felt was "mistreatment." On August 9, 2013, Carlson met with Heckt and another manager, Julius Rivers, for her interim performance evaluation.

Carlson testified that she felt tension in the meeting room as a result of the March meeting. She also said that the physical experience of being present for her interim performance evaluation differed from her other experiences with Heckt. She testified that Heckt's statements during the meeting triggered a memory of her teenage sexual abuse. She said that she stood up and imitated his mannerisms as a way to let Heckt know that she felt threatened by him. She believed, given his response, that he found this funny. So she imitated him a second time. Next, she told Heckt that he made her "feel like [she] want[ed] to get a gun or a knife" and that she felt "a need to defend" herself.[3] Carlson

[3] All three witnesses, Carlson, Heckt, and Rivers, agree she made these statements. Both Rivers in his e-mail about the meeting and Carlson in her

testified that after these statements, she told Heckt that she was not making a threat. She also told Heckt that she was a "battered woman" and he could not treat her like that. Heckt testified that both Heckt and Rivers told her that her statement was a "threat of violence which is not acceptable." The meeting continued after this exchange without any more discussion about how Heckt perceived her words. Carlson viewed the evaluation she received at the meeting as being particularly negative.

About two hours after she left the meeting, Carlson sent an e-mail to Heckt and Rivers. In her e-mail, she said that Heckt's "aggressive behaviors [made her] fearful and . . . want to defend" herself. In addition, she stated that she felt like she "need[ed] to be armed and ready to take action to do so." She noted in her e-mail that she "did not say this to threaten" Heckt but that "[i]t was a description of [her] feelings and fear of harm" which caused her to think that she needed "to be ready to combat." She ended the e-mail with a request to be moved to a different organization.

The day after the interim performance meeting, Carlson sent an e-mail to a higher level manager describing her difficulties working with Heckt. She said that if she was not reassigned, she would likely leave the company. She also e-

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statement to the internal investigator reported that she said Heckt's behavior made her want to "shoot or stab" him. However, Carlson contends that she did not actually make this statement, and Heckt does not indicate that she did.

mailed Dan Larsen of HR and asked for information for the "mitigation . . . available . . . to buffer employees from" the aggressive use by managers of overtime disciplinary processes. Larsen offered to meet with her in person. She did not follow up. She took the following week off. In none of her correspondence with Heckt, HR, or any other Boeing employee after this incident did she mention PTSD.

Heckt became increasingly concerned about Carlson's statement after the meeting because of how "direct" it was, how it "focus[ed] in on [his] behaviors" in "a way that was kind of inspiring her to violence." On Monday, August 12, he reported the statement to HR and requested an investigation by Boeing security. After Carlson returned to work, she and Heckt met twice. During one meeting, Heckt issued a disciplinary memo for unauthorized overtime. During the second, he described his expectations for her behavior going forward. She said nothing suggesting PTSD as a cause of her conduct.

Carlson's statements caused Boeing to initiate two separate procedures. The first was a threat management process through the Employee Assistance Program (EAP) that attempts to prevent the threat from becoming actual violence. This process resulted in psychologist Dr. Tyson Bailey's report. The second was the disciplinary investigation that provided information to the disciplinary board about the actual circumstances of the statements.

As a part of the threat management process, Boeing suspended Carlson and directed her to report to an EAP medical provider retained by it, Dr. Bailey. Carlson testified that she was under the impression that Boeing would have access to Bailey's report because she signed Bailey's release form and that she believed she "told Boeing through Tyson Bailey" of his diagnosis. But the release form she signed for EAP stated that only a limited amount of information would be shared with a supervisor or other authorized representative. This limited information was (1) whether or not Carlson contacted EAP, (2) whether or not EAP recommended treatment, (3) whether or not Carlson participated and complied with any treatment plan, and (4) any other information Carlson indicated. The form did not include any authorization to release information about any diagnosis. Carlson did not modify the form to authorize disclosure of any additional information to Boeing. Carlson also admitted that she never asked Boeing for an "accommodation."

On September 10, 2013, Bailey submitted his evaluation of Carlson to Boeing medical and EAP. Bailey reported that Carlson expressed "deep regret" over her statements. He found that she was at a "low risk for engaging in violence toward her coworkers" and that as a result of his analysis, he had "no significant concerns" regarding her "potential for violence toward self or others." He also found "[n]o evidence . . . that would suggest Ms. Carlson has a pattern of

making threatening statements." His "diagnostic impression" was "[a]nxiety disorder not otherwise specified." He also noted "[p]osttraumatic features that do not currently qualify for a PTSD diagnosis." Bailey's report does not say that Carlson's anxiety caused her statements about the gun and the knife, but he testified that her "frustration with her manager" might be the underlying cause of the conduct. Carlson did not tell Bailey that she thought her anxiety caused her to make these statements.

During his evaluation, Bailey asked Carlson about her family and past history. She reported sexual abuse by a guardian. Because he was only evaluating her risk as a threat, he did not focus on whether she met the criteria for a PTSD diagnosis.

Two years later, Carlson retained an expert witness, psychologist Dr. Christmas Covell, who diagnosed her, for the first time, with PTSD. Covell also concluded that during August 2013, Carlson was probably "experiencing symptoms of post traumatic stress . . . that led to her acting out . . . and making the statement she made."

After the August 2013 meeting, Boeing's disciplinary investigation under Robert LeBlanc proceeded independent from, but at the same time as, the threat management assessment. Carlson told LeBlanc that she thought abuse in her past caused her to experience a high level of defensiveness. She did not tell him

she suffered from a "mental health problem, disorder impairment or anything of the sort." And she did not describe the perceived threatening statement as the result of an out-of-body experience or a flashback. Nor did she tell LeBlanc she needed an accommodation.

LeBlanc drafted a statement for Carlson based on his interview with her. He included in the draft a statement that Carlson said she wanted to "get a gun and shoot [Heckt] or stab [him]." Carlson read and signed the statement. LeBlanc reviewed HR reports and interviewed additional witnesses, including Heckt. He concluded that Carlson had threatened violence and violated employment policy at Boeing.

Boeing's Employee Corrective Action Review Board (ECARB) decides what disciplinary actions to take for serious violations of employment policy, including threats of violence. The group includes members of management and a senior member of HR who serves as chairperson. ECARB follows Boeing's Employee Corrective Action Process Requirements (ECAPR). ECAPR defines a "threat" as "[a]ny communication, including body language, that involves a threat to harm and may cause fear or reasonable concern for the safety, health, or well-being of others." A threat generally results in a suspension but if an "aggravating factor," such as a "directed specific threat to harm," was involved, ECARB typically discharges the employee.

LeBlanc's report contributed to ECARB's review of Carlson. Because of privacy considerations, ECARB did not review Bailey's report or any other medical information. Carlson did not authorize ECARB to review Bailey's report. She did not provide information about her mental health to HR, LeBlanc, or ECARB. Boeing does not automatically release this kind of information to managers or investigators and without an authorization, medical personnel did not feel free to share the information.

ECARB met on October 2, 2013, and voted to discharge Carlson. It found her statement at the August 2013 meeting and her subsequent e-mail included threats aggravated by their specific nature. Boeing terminated her on October 14, 2013.

Carlson filed a complaint against Boeing with the Equal Employment Opportunity Commission (EEOC). She alleged employment discrimination on the basis of sex, age, and retaliation but did not claim disability discrimination.[4] In July 2014, she followed up with a narrative letter that described her grievance with Boeing. And again she did not complain about disability discrimination. Boeing advised Carlson about its in-house process for appealing her firing. She did not pursue this process.

[4] The trial court noted, "It appears to be undisputed in the record that disability discrimination [was] not brought to the EEOC's attention and would not have been considered by them." Carlson's charge of discrimination was signed on November 18, 2013.

More than a year after her termination, Carlson sued Boeing. She claimed that Boeing had violated the Washington Law Against Discrimination (WLAD)[5] by discriminating against her because of her disability. This was the first time she asserted disability discrimination. Both parties moved for summary judgment. The trial court denied the motions because of disputed issues of material fact. After a trial, the jury returned a verdict in favor of Boeing. Afterward, Carlson asked for judgment as a matter of law and for a new trial. The trial court denied both requests. Carlson appeals.

ANALYSIS

Carlson appeals the trial court's denial of her motion for summary judgment, denial of her motion for judgment as a matter of law (judgment notwithstanding the verdict), and denial of her motion for a new trial. She claims that the trial court should have decided, as a matter of law, that Boeing fired her because of a disability in violation of the WLAD. She asks this court to remand for a damages trial. Alternatively, she asks this court to grant her a new trial because, she claims, the trial court abused its discretion when making several evidentiary determinations and when instructing the jury.

Carlson fails to meet her burden on any of her claims. We affirm.

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[5] Ch. 49.60 RCW.

Motion for Summary Judgment

Carlson appeals the trial court's denial of her motion for summary judgment. An appellate court will review the denial of a summary judgment request if based upon a pure question of law.[6] But an appellate court will not review the denial of this request if the trial court denies it because it finds that a dispute about material facts exists.[7] Here, the trial court denied the summary judgment because the parties presented evidence disputing material facts.[8] So we decline to review this decision.

Motion for Judgment as a Matter of Law

Carlson claims the trial court should have granted her postverdict request for judgment as a matter of law (judgment notwithstanding the verdict) because the evidence showed that Boeing discriminated as a matter of law when it fired her. But substantial evidence presented to the jury supported a finding that Boeing did not have notice of her claimed disability. As a result, this claim fails.

When we review a trial court's decision to deny a request for judgment as a matter of law, we use the same standard as the trial court.[9] Courts grant a motion for judgment as a matter law only if "after viewing the evidence in the light

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[6] Robb v. City of Seattle, 176 Wn.2d 427, 433, 295 P.3d 212 (2013).

[7] Canfield v. Clark, 196 Wn. App. 191, 194, 385 P.3d 156 (2016).

[8] In her brief, Carlson periodically states, "That is not material" after disputed facts. This is not sufficient to demonstrate that there were no actual material facts in dispute.

[9] Hizey v. Carpenter, 119 Wn.2d 251, 271, 830 P.2d 646 (1992).

most favorable to the nonmoving party and drawing all reasonable inferences," no substantial evidence exits to sustain a verdict for the nonmoving party.[10] No substantial evidence exists when the evidence is insufficient to persuade a fair-minded person of the truth of the declared premise.[11] We do not substitute our own judgment for the jury's. A court may grant a request for judgment as a matter of law only if "there is no doubt as to the proper verdict."[12]

The WLAD provides employees with "[t]he right to obtain and hold employment without discrimination."[13] Specifically, an employer may not "discharge . . . any person from employment because of . . . the presence of any sensory, mental, or physical disability."[14] The WLAD defines a "disability" as "the presence of a sensory, mental, or physical impairment that: (i) [i]s medically cognizable or diagnosable; or (ii) [e]xists as a record or history; or (iii) [i]s perceived to exist whether or not it exists in fact."[15] And it defines "impairment" to include "[a]ny mental, developmental, traumatic, or psychological disorder, including . . . emotional or mental illness."[16] To be disabling, the impairment

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[10] Schmidt v. Coogan, 162 Wn.2d 488, 491, 173 P.3d 273 (2007) (citing Hizey, 119 Wn.2d at 271-72).

[11] Martini v. Boeing Co., 88 Wn. App. 442, 451, 945 P.2d 248 (1997), aff'd, 137 Wn.2d 357, 971 P.2d 45 (1999).

[12] Schmidt, 162 Wn.2d at 493; Burnside v. Simpson Paper Co., 123 Wn.2d 93, 108, 864 P.2d 937 (1994).

[13] RCW 49.60.030(1)(a).

[14] RCW 49.60.180(2).

[15] RCW 49.60.040(7)(a).

[16] RCW 49.60.040(7)(c)(ii).

must prevent or severely restrict the individual from engaging in a major life activity. The impairment's impact must also be permanent or long-term.[17]

A disabled employee has three potential claims against an employer who violates the WLAD: disparate impact, disparate treatment, and failure to accommodate.[18] Carlson asserted disparate treatment and failure to accommodate claims. Both claims required that she establish a disability and connect that disability to her work performance.

Both of Carlson's claims fail because she did not establish, as a matter of law, that Boeing had notice of her disability. Carlson's conduct was first linked to a PTSD diagnosis more than a year after she was terminated. Boeing's and EAP's records do not include any reported diagnosis of PTSD, do not suggest that accommodation should be made at work for Carlson's anxiety, and do not link PTSD or anxiety to the conduct that led to her firing. Even Bailey's report about her conduct did not include a PTSD diagnosis. And it did not connect her conduct to any sort of disability. More than a year after the firing, Covell provided the first claimed connection between PTSD and Carlson's conduct. Even if ECARB and Boeing's administration had access to all of Carlson's files when she was fired, they would still not have had any information connecting PTSD to the conduct for which it fired her.

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[17] Burchfiel v. Boeing Corp., 149 Wn. App. 468, 481, 205 P.3d 145 (2009).
[18] Fey v. State, 174 Wn. App. 435, 447, 300 P.3d 435 (2013).

Carlson fails to demonstrate that Boeing had notice of her disability and therefore fails to establish a basic element required to prove disability discrimination under either theory. For this reason, her request for judgment as a matter of law fails. It fails for other reasons as well.

A. Disparate Treatment

With jury instruction 11, the court told the jury what Carlson had to prove to establish her disparate treatment claim:

> To establish her "disparate treatment" claim, Ms. Carlson has the burden of proving each of the following propositions:
>
> (1) That she has a disability;
>
> (2) That she is able to perform the essential functions of her job; and
>
> (3)That her disability was a substantial factor in Boeing's decision to terminate her.
>
> If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for Ms. Carlson on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for Boeing on this claim.

Carlson has not challenged this instruction. So we review the record to see if the record includes substantial evidence supporting a conclusion that Carlson did not prove one of the three propositions stated in jury instruction 11. Substantial evidence supports a conclusion that Carlson did not prove that her disability was a substantial factor in Boeing's decision to fire her.

Carlson provided some evidence of disability since her expert testified that she had PTSD.[19] She provided some evidence linking her disability to her job performance since her two earlier leaves of absence were, at least in part, the result of stress from work. Finally, she provided some, albeit contested, evidence that her PTSD caused the conduct that led to her termination: Covell testified that Carlson's PTSD had likely been triggered at the meeting by Heckt's behavior. But Boeing presented substantial evidence sufficient to persuade a reasonable person that Carlson's conduct was the result of her ongoing anger at Heckt and not her PTSD. And this evidence supports a conclusion that Carlson did not prove a required element of her disparate treatment claim. The trial court correctly denied her request for judgment as a matter of law on this claim.

B. Failure To Accommodate

With jury instruction 12, the court told the jury what Carlson had to prove to establish her "failure to reasonably accommodate" a disability claim,

> To establish her "failure to reasonably accommodate" a disability claim, Ms. Carlson has the burden of proving each of the following propositions:
>
> (1) That she had an impairment that is medically recognizable or diagnosable or exists as a record or history; and
>
> (2) That either

[19] She received this diagnosis after she was terminated.

(a) Ms. Carlson gave Boeing notice of the impairment; or

(b) no notice was required to be given because Boeing knew about Ms. Carlson's impairment; and

(3) That the impairment had a substantially limiting effect on Ms. Carlson's ability to perform her job; and

(4) That she would have been able to perform the essential functions of the job in question with reasonable accommodation; and

(5) That Boeing failed to reasonably accommodate the impairment.

In determining whether an impairment has a substantially limiting effect, a limitation is not substantial if it has only a trivial effect.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for Ms. Carlson on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for Boeing on this claim.

Again, Carlson has not challenged this instruction. So we review the record to see if the record includes substantial evidence supporting a conclusion that Carlson did not prove one of the five propositions stated in jury instruction 12.

The record includes substantial evidence supporting the conclusion that Boeing did not have notice of her disability and the need for accommodation. Heckt did not know about her anxiety, depression, or PTSD. Nor did ECARB. Further, even EAP, whose counselors had knowledge of the stress incidents that

contributed to her need for leave time and who recommended PTSD be ruled out, did not find a need for or recommend in-house accommodation. Instead, they suggested counseling as the plan for addressing her depression and anxiety.

Carlson relies on an "imputed knowledge" theory to show that Boeing had notice as a matter of law. She cites three cases to support her argument: Goodman v. Boeing Co.,[20] Kimbro v. Atlantic Richfield Co.,[21] and Martini v. Boeing Co.[22] None supports her claim. In each case, a supervisor knew about the employee's disability and its impact on the employee's ability to work. In Goodman, Goodman provided evidence about her supervisors' awareness of the exacerbation of her arthritis caused by her job and that she had requested a transfer because of the disability.[23] In Kimbro, the plaintiff's immediate supervisor counseled him about the impact of his disability, cluster headaches and migraines, on his work.[24] In Martini, EAP knew that Martini's depression was directly related to his work, and Boeing indicated it planned to transfer him as a result of his requests.[25]

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[20] 75 Wn. App. 60, 877 P.2d 703 (1994), aff'd, 127 Wn.2d 401, 899 P.2d 1265 (1995).

[21] 889 F.2d 869 (9th Cir. 1989).

[22] 88 Wn. App. 442, 945 P.2d 248 (1997), aff'd, 137 Wn.2d 357, 971 P.2d 45 (1999).

[23] Goodman, 75 Wn. App. at 64.

[24] Kimbro, 889 F.2d at 872-73.

[25] Martini, 88 Wn. App. at 447, 455, 458-59.

In contrast, Carlson did not show that Heckt or EAP knew she had PTSD and that it affected her ability to work. Carlson never told Boeing that she made her transfer request to accommodate her PTSD. Because substantial evidence supports a conclusion that Boeing did not have direct or constructive notice of her PTSD and that it affected her work, Carlson fails to establish that Boeing failed to accommodate her disability as a matter of law.[26] The trial court correctly denied her request for judgment as a matter of law on this claim.

Motion for a New Trial

Carlson claims that the court's incorrect decisions about evidentiary issues and jury instructions sufficiently prejudiced her to require a new trial. We review the denial of a motion for a new trial for abuse of discretion.[27] For this court to find the trial court abused its discretion by not granting a new trial, an appellant must demonstrate that the court's decisions during trial prevented her from having a fair trial.[28]

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[26] Since Carlson fails to establish that Boeing knew of her disability and its relationship with her work and thus fails to show a duty to accommodate was triggered, we need not address the issue of whether she could perform essential functions of her job.

[27] Alum. Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

[28] Alum. Co. of Am., 140 Wn.2d at 537.

A. Jury Instructions

Jury instructions must allow each party to present to the jury its theory of the case.[29] The sufficiency and accuracy of jury instructions present questions of law that this court reviews de novo.[30] Misleading instruction are always insufficient.[31] If an instruction is wrong, the party challenging it must also show prejudice that affected, or presumptively affected, the trial's outcome to receive appellate relief.[32]

i. Jury Instruction 21[33]

Carlson challenges jury instruction 21, which told the jury that "an employer who obtains information regarding the medical condition or history of any employee shall . . . treat that information as a confidential medical record" unless the employee authorizes the employer to release it to a particular individual.

We do not need to decide if this instruction correctly stated the law because Carlson has not shown that this instruction prejudiced her. As discussed above, neither Heckt nor ECARB knew about Carlson's disability when

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[29] Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995); Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 165, 876 P.2d 435 (1994).

[30] State v. Becklin, 163 Wn.2d 519, 525, 182 P.3d 944 (2008); Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000), 22 P.3d 791 (2001).

[31] Hue, 127 Wn.2d at 92; Havens, 124 Wn.2d at 165.

[32] Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).

[33] Carlson appears to be referring to jury instruction 21 when she discusses jury instruction 22 in her brief.

Boeing fired her. Even if the court had not given this instruction and the jury could presume Boeing could freely share this information, undisputed evidence established that the ECARB was not aware of Dr. Bailey's diagnosis and so could not have relied on it when making its decision.

ii. Jury Instruction 20[34]

Carlson claims that the court erred by instructing the jury that "[a]n employer is not required to provide a disabled employee with an accommodation unless the accommodation is medically necessary."

Carlson confuses accommodation with diagnosis. The WLAD does not require a medical diagnosis for a worker to establish she suffers from a disability. But Washington courts do require an accommodation be "medically necessary" for an employer to have a duty to accommodate that employee's disability.[35] The instruction accurately states the legal requirement that an employee must demonstrate "a nexus between a disability and the need for accommodation."[36] Carlson does not provide any contrary authority.

Carlson further claims that jury instruction 20 conflicts with jury instruction 17. It does not. Jury instruction 17 states that an "employer must provide

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[34] Carlson appears to be referring to this instruction when she claims the court erroneously allowed jury instruction 21.

[35] Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 192-93, 23 P.3d 440 (2001).

[36] Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 148, 94 P.3d 930 (2004).

reasonable accommodation for an employee" unless it will impose an "undue hardship on the employer." It also identifies factors to consider to evaluate an undue hardship claim, states that "[t]here may be more than one reasonable accommodation of a disability," and provides examples of accommodations that can allow the "person to perform the essential functions of the job." None of this conflicts with the requirement for "medical necessity" identified in jury instruction 20. Rather, jury instruction 20 provides an additional clarification regarding exactly what type of accommodation is required.

Since jury instruction 20 is an accurate statement of Washington law, Carlson's challenge to it fails.

iii. Proposed Jury Instruction 14

Carlson claims that the trial court should have instructed the jury that "[i]t is not a defense to plaintiff's claims that Boeing would have fired an employee without an impairment for the same conduct Boeing alleges it fired plaintiff for."

Carlson fails to show that the absence of this instruction prejudiced her. This instruction addresses one defense Boeing asserted to the disparate treatment claim. As discussed above, Carlson did not demonstrate that ECARB had actual knowledge of her disability. An instruction about Boeing's defense would not assist Carlson when she failed to present evidence sufficient to prove one element of her claim.

iv. Proposed Jury Instruction 13

Carlson claims that the trial court should have instructed the jury that an "employer includes any person acting in the interest of the employer, directly or indirectly." She contends that her theory of the case required that the jury understand that "an employer [cannot] create subdivisions within itself."

Again, Carlson fails to establish prejudice. As indicated above, Carlson does not establish that Boeing or EAP had information linking her conduct to PTSD at the time Boeing fired her. This instruction would not remedy that failure.

B. Admission of Evidence

A party challenging the admission of evidence must show that the trial court abused its discretion and that this decision prejudiced that party.[37]

Evidence of ECARB's Lack of Knowledge of Carlson's Medical History

According to Carlson, the court abused its discretion by admitting Boeing's evidence and argument that ECARB did not know the content of EAP's files or Bailey's report.

Carlson failed to establish that this admission prejudiced her. As indicated above, Carlson did not show that any of the information possessed by EAP and by Boeing at the time of termination, including Bailey's report, established that Carlson had PTSD or that it caused her conduct. Even if the evidence she

[37] Farah v. Hertz Transporting, Inc., 196 Wn. App. 171, 177, 383 P.3d 552 (2016); Burnside, 123 Wn.2d at 107.

contests was not admitted and the jury assumed ECARB had access to Bailey's and EAP's files, Carlson's evidence did not prove either disparate treatment or failure to accommodate.

i. Carlson's Failure To Appeal Her Termination

Carlson also challenges the admission of evidence about her decision not to appeal her firing through Boeing's internal process. She claims the "prejudice outweighed any probative value" of the evidence. She has not shown how this decision prejudiced her. As discussed above, Carlson did not establish a prima facie case for discrimination because she did not establish that Boeing had notice. Even if the trial court excluded this evidence, Carlson could not have proved disability discrimination.

ii. Testimony by Cain and LeBlanc.

Carlson also challenges testimony from Boeing's medical officer, Dr. Laura Cain, and Boeing's security officer, Robert LeBlanc. She claims both provided "expert testimony" in the form of opinions about aspects of the case for which they did not have personal knowledge.

Carlson asserts that Cain, in discussing Bailey's report, did not testify based on personal knowledge. However, Cain relied on her personal experience working as a medical officer when she testified about Dr. Bailey's report and how Boeing officials would have understood it. So her testimony was not improperly

admitted expert testimony. Boeing's failure to identify Cain as an expert witness should not have negatively impacted Carlson's trial preparation. Cain is Boeing's medical officer, and Carlson should have fully anticipated Cain would testify regarding the medical procedures and determinations made by EAP.

Further, Carlson did not establish that she was prejudiced by Cain's testimony. The testimony did not impair Carlson's ability to prove a prima facie case. Rather, as discussed above, she failed to demonstrate that Boeing knew about her disability and its connection to her behavior.

Carlson also asserts that Boeing's security investigator, LeBlanc, offered impermissible expert testimony. LeBlanc testified about Carlson's violation of Boeing's procedures. As the primary investigator following up on reports that Carlson made threatening statements and as a security officer with Boeing, LeBlanc could testify about how his personal experience led him to conclude her statements were threats. Further, Carlson's claim that he was improperly allowed to testify regarding Heckt's change of mind is without merit since she opened the door during trial to testimony about Heckt's initial statement. Thus, the court did not improperly admit LeBlanc's testimony. Further, Carlson has not shown the admission of LeBlanc's testimony prejudiced her since her prima facie case did not turn on the jury finding that she did or did not make a threat.

iii. Stale and Irrelevant Evidence

Carlson asserts that the court improperly admitted stale and irrelevant evidence in the form of past work performance reviews and journal entries. Specifically, she challenges the admissibility of evidence Boeing offered to show that she was not always a model employee and was at times disruptive. She also challenges journal entries that support Boeing's theory that her conduct was related to her anger at Heckt.

Carlson's work performance was not the core issue here. But her theory of the case included an assertion that she was a model employee. As a defense to this assertion, Boeing could offer evidence that rebutted this claim. And her anger at Heckt is relevant to whether or not she responded in the meeting because the particular situation triggered a PTSD response or if she responded because she generally felt animus toward him.

Also, admission of this evidence did not prejudice her. As noted above, she did not establish notice. The exclusion of this evidence would not remedy this failure.

C. Cumulative Evidence of Other's Conduct

Carlson claims the court erred by excluding certain disciplinary reports for other Boeing employees accused of making threats of violence in the workplace because they were cumulative.

ER 403 provides a court with discretion to exclude evidence because it is cumulative. Here, Carlson attempted to introduce a number of reports only peripherally related to her case. While the court excluded the substance of the reports, Carlson was allowed to question Boeing about a subset of the reports and elicit responses during trial. Thus, the jury was made aware of the existence of other situations where the employee was not fired for a reported threat but not burdened by cumulative evidence.

Even if the trial court had admitted all of the reports, they would not have cured Carlson's proof problem. To show disparate treatment, Carlson needed to show that Boeing had notice of her disability and fired her because of it. As indicated above, she failed to do this. So the exclusion of these reports did not impact her case.

D. Impeachment Through Religious Affiliation

Carlson asserts that the court improperly allowed Boeing to impeach her by referring to her religious affiliation. ER 610 forbids impeachment on the basis of religious belief.

During cross-examination, respondent's attorney asked, over objections, whether Carlson was allowed to swear since she was Mormon. Counsel referenced to an entry in Carlson's journal that indicated she "was furious, swearing furious" about the interaction with Heckt. Counsel for the respondent

asked Carlson if it was "more serious to swear if you [were] a devout Mormon" than not. Carlson said that Mormons were like other people and could "say what [they] want in [their] personal journals."

This line of questioning was improper. But, as indicated above, Carlson did not establish a prima facie case for discrimination. Because these questions did not affect her failure to establish the basic elements of her WLAD claims, Carlson has not shown that this particular exchange prejudiced her.

New Judge on Remand

Since Carlson fails to establish her claim that the trial court erred or abused its discretion, we do not consider her request for a new judge on remand.

CONCLUSION

We affirm. Carlson's appeal of the denial of her motion for summary judgment is not reviewable. She fails to establish as a matter of law that Boeing discriminated on the basis of her disability and thus does not show the trial court abused its discretion in denying her motion for judgment notwithstanding the verdict. She also fails to establish that she was prejudiced by the trial court's decisions about jury instructions and the admission of evidence. As a result, she

does not establish that the trial court abused its discretion by denying her request for a new trial.

Leach, J.

WE CONCUR:

Verellen, J.

Andrus, J.

THE SUPREME COURT OF THE STATE OF WASHINGTON

SUSAN PURNELL-CARLSON, Appellant, vs. THE BOEING COMPANY, a Delaware corporation, Respondent.	No. 90788-2 DECLARATION OF FILING AND DELIVERY

I, Dan Bridges, certify under oath and the penalty of perjury of the laws of the State of Washington that on April 26, 2019 I caused to be filed with the Supreme Court, Appellant's corrected petition for discretionary review and to counsel for defendant/respondent via the same portal plus an additional email to counsel with the brief.

DATED this 26th day of April, 2019.

Dan Bridges

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