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Division I
State of Washington

No. 73627-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MERCEDES PÉREZ-MELGOSA,

Plaintiff/Appellant,

v.

STATE OF WASHINGTON,

Defendants/Respondents.

APPELLANT'S *CORRECTED* OPENING BRIEF

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I. INTRODUCTION

Plaintiff Mercedes Pérez-Melgosa, Ph.D. was a research scientist in immunology at the UW School of Medicine for 20 years. She was born and raised in Spain and speaks with a thick foreign accent. After her UW manager retired, her new boss treated her differently from her peers, depriving her of tools to perform her job, denying her annual performance evaluations in violation of UW policy, denying her salary increases, yelling at her in front of her colleagues, exaggerating picayune mistakes, and firing her for committing alleged research misconduct by interpreting data generated in a quality control test—something she'd done transparently, and properly, for years at UW.

Dr. Pérez-Melgosa challenged the allegations of misconduct. National Institute of Health regulations and University Policy required the University's Office of Scholarly Integrity (OSI) to investigate, but OSI declined, asserting that the boss who had fired her had to request it—which was contrary to UW Policy and NIH regulations. UW thwarted all efforts to exonerate her of her boss's demonstrably false but damaging allegations, effectively ending her career as a scientist.

On summary judgment, the court dismissed Plaintiff's claims that she was discriminatorily denied salary increases despite substantial evidence that her boss gave demonstrably false explanations for the denials and freely gave increases to nearly everyone else in the lab. Then, the trial court granted the University's motion to exclude from trial all evidence of its discriminatory treatment of Plaintiff in wages and

promotions, including her complaints to UW about them. This deprived Dr. Pérez-Melgosa not only of her legitimate claim for relief but also of the critical evidentiary value of this evidence towards proving that UW's claimed reason for terminating her employment was pretextual and towards proving a hostile work environment.

After issuing its verdict for the defense, the jury made an unusual statement on the record: it found UW's treatment of Dr. Pérez-Melgosa deplorable but said it couldn't connect the dots to her national origin. The court's pre-trial dismissal of her wage and promotion claims and exclusion of that evidence deprived Plaintiff of the ability to connect those dots for the jury. It was for the jury to decide whether the excluded evidence helped establish illegal discrimination and proved the wage and promotion claims. A remand for a new trial is required. The trial court also made a handful of erroneous evidentiary rulings that unfairly aided UW and harmed Dr. Pérez-Melgosa, which should be corrected for remand.

II. ASSIGNMENTS OF ERROR

A. The trial court erred when it dismissed on summary judgment Dr. Pérez-Melgosa's claim that she was denied a salary increase based on her Spanish national origin.

B. The trial court erred when it excluded from trial on Dr. Pérez-Melgosa's wrongful termination and hostile work environment claims pretext and comparator evidence that the State denied Dr. Pérez-Melgosa a salary increase while giving increases to her peers who were not Spanish or not perceived as Spanish.

C. The trial court erred when it admitted the State's purported comparator evidence regarding the lab manager's treatment of two

employees who were not similarly situated to Dr. Pérez-Melgosa (Qian Yi and Catherine Igartua).

D. The trial court erred when it admitted the testimony of the State's vocational expert (Carl Gann) opining that Dr. Pérez-Melgosa failed to mitigate her damages.

E. The trial court erred when it excluded from trial the State's prior performance evaluations of Dr. Pérez-Melgosa.

F. The trial court erred when it admitted into evidence the State's misleading illustrations of scientific data that were created solely for litigation purposes.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Dr. Pérez-Melgosa is from Spain and speaks with a thick Castilian accent. The State denied Dr. Pérez-Melgosa a salary increase giving a false reason (salary freeze) while giving increases to her peers and who were not Spanish or whose Spanish origin was unknown to their supervisor. Did the trial court err when it dismissed Dr. Pérez-Melgosa's pay discrimination claim on summary judgment? (Assignment of Error A.)

2. After dismissing Dr. Pérez-Melgosa's pay discrimination claim, the trial court excluded from trial evidence of the salary increases that the State gave to other employees despite a salary freeze and who were not Spanish or not perceived as Spanish, prohibiting Dr. Pérez-Melgosa from using that evidence to prove a hostile work environment or that the State's reasons for terminating her were pretextual. Did the trial court err when it excluded this comparator evidence?(Assignment of Error B.)

3. Dr. Pérez-Melgosa speaks with a thick accent and her Spanish origin was well known to her supervisor. In defense of Dr. Pérez-Melgosa's disparate treatment claim, the State introduced evidence that the supervisor treated a Chinese employee well and wrote a letter of recommendation for an employee whose national origin the supervisor admitted she did not know, but which the State later claimed was Spanish. Did the trial court err in admitting this as comparator evidence? (Assignment of Error C.)

4. The State's vocational expert admitted that Dr. Pérez-Melgosa applied to well over 200 jobs, that he did not have the scientific expertise to determine the jobs for which she was qualified, and he did not identify a single available job for which she was qualified but to which she did not apply. Nonetheless, based on speculation, he opined that her job search was not aggressive enough so was unreasonable and as a result she had failed to mitigate her damages. Did the trial court err in admitting this speculative expert testimony? (Assignment of Error D.)

5. Before working for the supervisor who terminated her, Dr. Pérez-Melgosa worked for a different supervisor on the same scientific project at the University of Washington. Dr. Pérez-Melgosa's previous supervisor wrote performance reviews praising Dr. Pérez-Melgosa for interpreting data--the same conduct for which the State later claimed it terminated her. Did the trial court err when it excluded the previous performance evaluations on mere relevance grounds? (Assignment of Error E.)

6. A central aspect of the trial was Dr. Pérez-Melgosa's interpretation of data on a scatterplot (x-y axis chart). The State introduced charts created solely for the purpose of litigation portraying only a single data point on the x-y axis, having deleting all the dozens of data points actually plotted on the original x-y axis in the scientific experiment from which Dr. Pérez-Melgosa interpreted the data in context. Did the trial court err when it admitted the State's misleading illustrations into evidence? (Assignment of Error F.)

IV. STATEMENT OF THE CASE

A. Procedural History

Plaintiff filed her action in the Superior Court of King County alleging that her employer violated the Washington Law Against Discrimination, RCW 49.60. The court dismissed Plaintiff's retaliation claim (conceded by Plaintiff) and her request for relief from discriminatory wages and denial of promotion based on her national

origin. CP at 950-952. The court set her claims of national origin, wrongful termination and hostile work environment for trial. *Id*. The court denied Plaintiff's motion for reconsideration. CP 1022. Thereafter, by order dated May 6, 2015, the Court ruled on some of the motions in limine at issue. CP 1554-1557. On the first day of trial, based on its summary judgment ruling, the trial court granted UW's motion to exclude all evidence that UW discriminated against Plaintiff in wages and promotions for the purposes of proving her national origin disparate treatment and hostile work environment claims. RP 5-12-15 at 3:20-4:4.

After trial, the jury gave a verdict for the Defendant. Then, the jury foreperson made the following statement on the record:

> **Presiding Juror**: Is it possible for me to make a statement about the verdict to the court?
>
> **Judge Robinson**: Sure.
>
> **Presiding Juror**: We feel that it is important to explain --
>
> **Judge Robinson**: Okay.
>
> **Presiding Juror**: -- why we came to the decision that we did. Speaking for the jury, we felt hamstrung by the law. We felt that what was morally correct here was different. And I'm sorry I'm getting very emotional about this. This was hard for us, because we felt like the law was so narrow, we were not allowed to find for the plaintiff and we really wanted to.
>
> We think the University of Washington did a major screw-up on this and we tried to find any way that we could to find punitive damages for them quite frankly. We really wanted to stick it to the University of Washington. And we feel heartsick that Dr. Nickerson and some people in her

> lab are not going to be held accountable for their actions and what they've done here.
>
> And we believe in Dr. Pérez-Melgosa. We want you to know that we think that you are an amazing woman who got the shaft. And this was hard for us and we're very sorry that we had to find the way that we did.

RP 5-27-15 at 2. Plaintiff timely appealed. CP at 1594-1610.

B. Facts

Dr. Mercedes Pérez-Melgosa is of Spanish national origin; she speaks with a thick "difficult" Castilian accent. RP 5-12-15 at 3:13-19, 120:8-10; Ex. 108; RP 9-20-15 at 30:24-31:4.[1] Her education and scientific career spans over 30 years and includes 18 peer-reviewed publications. Ex. 1; RP 5-12-15 at 9:23-10:1. She earned a Ph.D. in molecular biology in 1993 from Universidad Autónoma de Madrid, Spain. RP 5-12-15 at 7:17**;** Ex. 1. In 1994, she started a postdoctoral fellowship at UW under Dr. Chris Wilson, Chair of Immunology, RP 5-12-15 at 8:8-9:1; Ex. 1, "a world famous scientist," RP 5-13-15 at 143:13-16. Until Dr. Wilson retired, in 2009, Dr. Pérez-Melgosa "managed the whole smallpox project" and designed and conducted the experiments. RP 5-12-15 at 20:8-19. Her employment record at UW was flawless. *See, e.g.*, Exs. 5, 6.

When Dr. Wilson retired, UW transferred Plaintiff to Dr. Deborah Nickerson's Lab in Genome Sciences, where she continued research on Dr. Wilson's Smallpox project, Ex. 7; RP 5-12-15 at 21:6-24; RP 5-13-15 at 143:3-12. Dr. Nickerson did not hire Plaintiff, *id*. at 148:16-18, she

[1] The Report of Proceedings is not sequentially numbered, so cites to the "RP" include date of testimony; pages designated by Respondent State are referred to as "Resp. RP".

"inherited" Plaintiff with her project, *id.* at 143:8-10**.** In both departments, Plaintiff worked as the Research Coordinator/Research Scientist Engineer 3 (RSE 3). *Id*. at 149:18-22; Ex. 2; RP 5-12-15 at 10:5-11:24, 21:9-12. She continued working independently, conducting experiments as well as tracking and coordinating DNA samples. RP 5-12-15 at 21:6-24.

UW policy requires that managers conduct *annual* performance evaluations of Professional Staff. Ex. 4; RP 5-19-15 at 80:5-18. They are used not only for feedback but also for promotions and salary increases. RP 5-13-15 at 151:6-17. Yet for more than three years Dr. Nickerson never gave Dr. Pérez-Melgosa a performance evaluation. RP 5-13-15 at 151:3-5, RP 5-21-15 at 39:9-11. In contrast, Dr. Nickerson conducted annual performance evaluations of many other employees. *Id*. at 18-20; Exs. 264, 267-271.

The State had a salary freeze from 2008 until 2013. CP 227 ¶18; RP 5-13-15 at 151:6-13; RP 5-18-15 at 5:16-6:3. Making an exception to the freeze was "rare." CP 531 (32:17-25). Dr. Nickerson's Lab had 40 employees. RP 5-13-15 at 142:22-24. Despite the freeze, she gave salary increases as high as 25-30% to at least 34 employees, including RSEs of all levels; some received as many as five increases. CP at 195, 198-202, 393, CP 35-53 (ER 904 Index); Ex. 133 (chart); Exs. 132-250 (supporting personnel documents).

Dr. Nickerson gave Plaintiff's fellow RSEs Shepard and Pijoan subpar ratings on their annual evaluations. RP 5-19-15 at 134:1-6; Ex. 119 (August 2012: "underperforming"). But only a few months later (January-

February 2013), Dr. Nickerson gave them both salary increases. Exs. 206-207, 224-225. Similarly, Dr. Nickerson gave three increases totaling 75% to her assistant Colleen Davis, despite making *no* changes to her duties, RP 5-12-15 at 119:19-22, but claiming on paper to promote her to supervise Dr. Pérez-Melgosa, which she never did. RP 5-12-15 at 124:6-10-125:21; Ex. 158. There was no evidence of any competitive promotions or that the increases were for retention.

In contrast, Dr. Nickerson refused to give Dr. Pérez-Melgosa any increase, claiming the salary freeze prevented it. RP 5-18-15 at 5:13-6:3; RP 5-21-15 at 39:3-8.

Dr. Nickerson was aware of only three Lab employees who spoke with a foreign accent: Qian Yi (Chinese), Catherine Igartua ("mild" Spanish accent, RP 5-13-15 at 118:5-7), and Plaintiff.[2] Ex. 262. Dr. Nickerson knew Dr. Pérez-Melgosa's national origin was Spanish and Dr. Yi's was Chinese, but she did not know the national origin of Ms. Igartua or any other employee. Ex. 262.

Dr. Nickerson represented to the NIH in writing that Dr. Pérez-Melgosa was "responsible for…quality control." Ex. 9 at 7. Her job description, in both labs, Ex. 2, as according to the NIH grant, labeled her Lab Coordinator, Ex. 10 at 1-3. Despite her responsibility for day-to-day management of the Smallpox project, Ex. 2 at 2, Dr. Nickerson excluded Dr. Pérez-Melgosa from conference calls and meetings with the DoD,

[2] UW listed Daniel Trujillano but admit he was an unpaid visitor, not an employee. RP 5-13-15 at 113:23:-114:30 (note misspelled "Troiano" in transcript).

NIH, and other partners, RP 5-13-15 at 152:5-12; RP 5-21-15 at 81:18-83:4. Dr. Nickerson required Plaintiff to purify samples by hand, increasing risk of error, whereas she provided Plaintiff's successor access to robots to do that. RP 5-13-15 at 153:24-155:7; RP 5-21-15 at 38:9-12.

In 2012, the Smallpox project was not going well, RP 5-13-15 at 156:15-17; Exs. 33-34. Dr. Nickerson took it out publicly on Dr. Pérez-Melgosa, repeatedly yelling in front of her peers that Dr. Pérez-Melgosa was wasting money, and refusing to listen to Dr. Pérez-Melgosa, causing her to shake and cry. RP 5-12-15 at 129:12-130:1; RP 5-13-15 at 171:3-13; RP 5-21-15 at 40:18-47:12; Exs. 35-36. Dr. Nickerson "was menacing and provoking" to Plaintiff. Ex. 396. Plaintiff reported the abuse to HR Manager Linda Loveless and Department Administrator Nancy Cameron. RP 5-21-15 at 45:25-46:2; Exs. 35, 36. Shouting violates UW Policy. RP 5-14-15 at 4:12-6:4; Ex. 263. When Plaintiff reported to HR that the abuse was continuing, she was "very upset," "shaking and crying," Ex. 44, but nothing changed, Ex. 36, 37. Feeling helpless and depressed she went to the UW ombudsman, and on advice of friends and family she saw her doctor, who put her on eight weeks of medical leave in August 2012 due to stress. RP 5-21-15 at 49:8-51:12; Ex. 38.

When Plaintiff returned from medical leave in September 2012, she received a frosty reception and was excluded from her own project. RP 5-12-15 at 133 :25-134:5; RP 5-21-15 at 38:19-23 ("I was told by Dr. Nickerson not to touch the samples.") The isolation continued as Dr.

Nickerson refused to have contact with her, communicating only through employee Colleen Davis. RP 5-21-15 at 55:17-56:7.

Colleen Davis is Dr. Nickerson's assistant. RP 5-12-15 at 117:10-118:14. On the same day Dr. Pérez-Melgosa went on medical leave, Ms. Davis looked at her data—which she admitted was unusual—and claimed that is how she discovered some errors. *Id*. at 131:3-132:15. Ms. Davis then began "looking into the errors." *Id*. at 132:20-133:5. She didn't ask Dr. Pérez-Melgosa about them. RP 5-13-15 at 26:6-20**.** Rather, Dr. Nickerson and Ms. Davis went to Ms. Cameron, who is not a scientist, to fire Dr. Pérez-Melgosa. RP 5-12-15 at 134:6-16; RP 5-18-15 at 109:21-22. Together, over the course of three months, they built a case against Dr. Pérez-Melgosa, preparing multiple drafts of a letter recommending dismissal and deciding to terminate her, *see, e.g.*, Exs. 54, 56, 63, 65, 69, 66, 59, 77, 73, 84, 86, 87, 89, 90, 91, without giving her an opportunity to respond. RP 5-13-15 at 26:6-20; RP 5-14-15 at 129:17-21; RP 5-18-15 at 141:25-142:6.

In its draft recommendations to dismiss Plaintiff after months of searching, UW came up with three alleged clerical errors. *See* Ex. 42. Dr. Nickerson and Ms. Davis initially complained that Plaintiff cross-contaminated two samples and mislabeled one wasting $3,000, but could not determine she was to blame. RP 5-12-15 at 136:4-138:23. And they alleged she misidentified ethnicities of some samples. *Id*. at 14:6-13. These allegations did not survive; the final recommendation to dismiss was solely about Dr. Pérez-Melgosa's interpretations of quality control

data generated by an instrument called the TaqMan, as discussed below. RP 5-18-15 at 123:10-17; *compare* Ex. 42 with Ex. 97. And, UW did not fire her for the alleged clerical errors. RP 5-18-15 at 123:15-24. But UW still tried to tar her with them at trial, claiming she was "incompetent" and had problems with "record-keeping." *See, e.g.*, Resp. RP 5-26-15 at 19-21 (defense expert opining Plaintiff's work "inappropriate or sloppy"); RP 5-27-15 at 4:16-5:22 (opining about Plaintiff's "errors").

Other employees have made countless errors in the Nickerson Lab. Yet the Lab spends millions of dollars in grants, so errors costing less than $50,000 are not even reported to Dr. Nickerson. RP 5-19-15 at 123:16-124:2. Errors are "common," an accepted consequence of conducting experiments. *Id*. at 119:20-120:22. The Lab absorbed a single mistake due to miscommunication costing "$75,000, $80,000" without disciplining anyone. *Id*. at 125:12-18. Among the many errors made by other employees include: they have mis-transcribed data, flipped slides, caused delays, made errors in analysis, used inadequate bar coding, mislabeled tubes, contaminated samples, broke a sample freezer, swapped genders of samples, sequenced the wrong samples, and failed to check the seals causing $100,000 in losses. *Id*. at 120:23-129:15; RP 5-12-15 at 14:23-15:1; Exs. 121, 122, 125. *Dr. Nickerson did not discipline even one employee* for these costly and time-consuming errors. RP 5-19-15 at 123:3-6, 125:16-126:12, 127:25-128:3, 129:2-17. Nor had any employee been disciplined for anything relating to the TaqMan. RP 5-13-15 at 134:7-9. Employees even joked about their errors ("I flipped a coin. Is

that not the way I'm supposed to do it?"), illustrating that mistakes were taken in stride when employees other than Dr. Pérez-Melgosa made them. RP 5-13-15 at 15:13-16:19; Ex. 122. When first asked, Dr. Nickerson claimed the last time she sought to fire any employee was 20 years ago. RP 5-14-15 at 27:12-28:14.

Ultimately, Dr. Nickerson's allegations against Plaintiff dwindled down to one, which she crafted to appear plausible and palatable to the final decision makers by transforming a disagreement over data interpretation into "changing" and "falsifying" data—classic scientific research misconduct. RP 5-20-15 at 127:16-130:23, 133:16-134:22.

UW policy and practice is to warn employees if their performance is deficient, give them time to improve, and follow progressive discipline, which includes a "professional staff warning letter," RP 5-19-15 at 78:14-81:2; RP 5-18-15 at 110:4-6; *see also* Ex. 4. Dismissal letters typically reflect that UW has taken these steps, RP 5-19-15 at 92:14-93:7. Dr. Nickerson's and her Lab's practices are the same. RP 5-19-15 at 129:18-25-133:17 (counseling, letters of expectation, evaluations, retraining, classes); RP 5-14-15 at 23:25-26:14. UW never issued Plaintiff any warning to improve, let alone standard UW notices for performance problems, Exs. 43, 44, 46, 265; RP 5-14-15 at 129:17-21, RP 5-13-15 at 23:13-19, despite Senior HR Consultant Lorease Kendrick raising that two months before dismissal: "***I did not note any instances where Ms. Pérez-Melgosa was made aware of her performance issues, and given time to improve,***" Ex. 44, and sending a model "warning letter." *Id*. Ms. Kendrick

explained the documentation was insufficient, but Ms. Cameron did not reconsider. RP 5-13-15 at 36:7-25; Ex. 47; RP 5-18-15 at 124:14-24.

In reaction to Ms. Kendrick's remarks, Dr. Nickerson replied: "outrageous!" and "We need to go around this person." Ex. 47.

Early in the dismissal process, Ms. Cameron consulted with HR Manager Mara (Fletcher) Stevens,[3] who later signed Plaintiff's dismissal; it was contrary to UW practice for Ms. Stevens to be involved in recommending to herself that she dismiss Dr. Pérez-Melgosa. RP 5-19-15 at 84:2-87:10, 89:4-13.

After the recommendation to dismiss letter was nearly finalized, but the issues had never been raised with Dr. Pérez-Melgosa, RP 5-13-15 at 132:23-133:1, Dr. Nickerson and Ms. Cameron finally accused Plaintiff of falsifying scientific data generated from a scientific instrument called the TaqMan, RP 5-18-15 at 144:7-10; RP 5-21-15 at 57:1-18; Ex. 50.

The TaqMan is the tool used by Dr. Nickerson's lab to check the quality of DNA samples by confirming that the documented gender of the sample matches the sample's DNA. RP 5-12-15 at 17:25–18:5, 108:21-109:1. The assay plots samples along an X/Y axis, and lab employees then examine the data points to confirm whether they are male, female, or have insufficient DNA, relying on the context of all plotted samples for interpreting the results. *Id.* at 19:5–24, 23:18–24:4–11, 26:7–27:11; *see also, e.g.*, Exs. 18, 20–22 (examples of complete assays). The employee

[3] Since the events of Plaintiff's employment, Ms. Fletcher became Ms. Stevens and will be referred to herein as Ms. "Stevens." RP 5-19-15 at 74:10-20.

makes "judgment calls on a case-by-case basis" whether a sample labeled by the TaqMan is close enough to call male or female, "taking into account…all the other data plots on the same chart." RP 5-12-15 at 23:23-24:11, 25:3-26:21, 60:23-61:20; Ex. 15.

Dr. Nickerson had emphasized the Lab needed as many usable samples as possible, RP 5-14-15 at 37:6-15; RP 5-21-15 at 28:21-29:4. Many were low quality, so she dramatically lowered the standard "call rate" to 85%, compared to other projects and the manufacturer's recommendation, which was 99%. RP 5-12-15 at 127:23-128:18.

Dr. Pérez-Melgosa was qualified to and had run TaqMan assays "hundreds of times," including in Dr. Nickerson's Lab. RP 5-21-15 at 24:19-25:6; Ex. 11. As she had done many times, and consistent with her training and skill, Dr. Pérez-Melgosa used her scientific judgment to interpret the data—"make my own judgment, professional calls" about the location of the plots generated by the TaqMan and whether they were properly labeled. RP 5-21-15 at 23:21-24:6, 26:8-27:2, 28:1-19 ("that was my responsibility."); Ex. 104 at 4.

The Lab did not issue instructions as to who was authorized to interpret TaqMan data; Dr. Nickerson knew that Plaintiff was interpreting quality control data and admits that she never told Plaintiff to refrain from doing so. RP 5-14-15 at 12-22; RP 5-12-15 at 55:23-56:7, RP 5-18-15 at 7:18-22, RP 5-21-15 at 26:20-27:2. Six months before these career-ending allegations, Plaintiff had reported these same data interpretations to Dr. Nickerson and others via a series of emails in May and June 2012,

referring to close calls as "male?" and concluding with: "Let me know if you have any questions" or "how you want me to proceed," RP 5-21-15 at 27:10-28:5, 30:20-31:3; Exs. 27, 28, 29, 30, 31. No one objected or raised questions, RP 5-14-15 at 34:13-39:15; RP 5-21-15 at 85:12-20. She had made similar interpretations and questioned data many times before. *See, e.g.*, Ex. 32 at 2 ("C?", "T?"). And, Dr. Nickerson knew she had experience running the TaqMan since she had been assigned to do so in both Labs—but these facts were not acknowledged in the recommendations to fire her. RP 5-13-15 at 20:16-21:18; Ex. 11.

Ms. Pijoan and the quality control (QC) group do "not specify whether [their interpretations] are [human] interpretations or the interpretations of the TaqMan." RP 5-12-15 at 33:2-34:5. And although Dr. Nickerson criticized Plaintiff for interpreting TaqMan assay samples as "Male?" Ms. Pijoan did precisely the same. *See, e.g.,* Ex. 18 (handwritten notation calling sample MC101A as "? Male" with a notation "between male and female clusters"); Ex. 17 (calling samples MC201X "Male? unknown" and MC164A "Male unknown?"); RP 5-12-15 at 31:1-25, 34:6-35:3, 38:4-21, 48:6-8.

The TaqMan is "just a QC check…a way to make sure at a quick glance that we received the samples that we expected to receive," RP 5-12-15 at 108:21-109:1. Dr. Pérez-Melgosa was shocked and upset by the accusation that she had falsified such data, RP 5-18-15 at 144:7-18, RP 5-21-15 at 62:1-7. She retrieved her lab notebooks and showed Dr. Nickerson and Ms. Cameron "this is not falsification. This is interpretation

of the data." RP 5-21-15 at 58:19-61:18; Ex. 50. But they dismissed her explanation that she performed her job as she had always done, as expected, *id*.; RP 5-18-15 at 144:19-145:11; Ex. 104 at 4, despite the fact that her interpretations did not cause any problems. RP 5-13-15 at 31:5-16.

Dr. Nickerson told HR Manager Linda Loveless at the time that Plaintiff's "falsifying" of data was sufficient to fire her. Ex. 54. In recommending dismissal of Dr. Pérez-Melgosa, Dr. Nickerson added, "This is a very serious action on Ms. Pérez-Melgosa's part. It is falsifying data on a federal grant." Ex. 27 (emphasis added). Dr. Pérez-Melgosa is the only person she has ever accused of "falsifying data in a scientific experiment." RP 5-14-15 at 51:10-52:6.

But Plaintiff never changed data, which remained in the TaqMan; she just reached her own interpretations of it. RP 5-13-15 at 50:16-22. Data is like the weight of a rat whereas interpretation is like classifying the rat as small, medium, or large. RP 5-20-15 at 131:9-132:7. Scientists may disagree over how to classify the rat—as Dr. Pérez-Melgosa disagreed with the TaqMan's label—by interpreting at the data. *Id*. at 132:10-133:7.

At a follow-up meeting, Ms. Cameron explained that she had recommended dismissal and "the process of separation has started in central HR and now it is out of my hands." RP 5-18-15 at 147:14-17; RP 5-21-15 at 63:24-64:23; Ex. 51. Ms. Cameron accused Plaintiff of "changing data," acknowledging "it could be interpreted to mean" "falsifying data." RP 5-21-15 at 63:24-64:23; Ex. 51.

Then, Ms. Cameron signed a letter recommending dismissal of Dr. Pérez-Melgosa, dated November 15, 2012, identifying "changed data (research results)" as the basis. Ex. 97 at 2. Her letter challenged Dr. Pérez-Melgosa's scientific integrity, portraying her actions as so serious as to cause severe consequences for UW on a federal grant:

> ***Dr. Pérez-Melgosa changed quality control assays results*** that are used to verify gender….***Dr. Pérez-Melgosa made changes*** to the gender from male to female, and from female to male, as well as assigned a gender to undetermined genders. . .
>
> ***she said she went back to the original (raw) data used by the quality control unit and made her own interpretation***…. ***Changing the results*** determined by the quality control unit is outside Dr. Pérez-Melgosa's job duties and area of expertise, and ***is totally unacceptable*** . . .
>
> our expectation was that she would exercise a level of independence and ***scientific integrity*** consistent with a senior researcher. Dr. Pérez-Melgosa ***irresponsibly changed data on federally funded research. Her actions described above bring in to question all of the results in this study and jeopardize both future funding for this research as well as the reputation of the university, this department and lab***.

Id. at 2-3 (emphasis added). HR Manager Stevens signed a termination letter adopting the recommendation. *Id*. at 1; RP 5-19-15 at 81:3-82:9.

Despondent and shell-shocked by the sudden destruction of her career, Dr. Pérez-Melgosa contacted UW's Office of Scholarly Integrity (OSI) and asked its Director for help resolving the misconduct allegations. RP 5-21-15 at 72:8-23. The OSI is required by UW Policy and federal law to investigate allegations of research misconduct, Ex. 107 at 2—the

process requires an assessment of the allegations' potential merit and, if potentially meritorious, a panel of independent scholars to review the evidence and make findings. RP 5-20-15 at 12:11-24, 13:3-14:19, 21:18-22:9; Exs. 107, 106. Ms. Cameron testified that Dr. Pérez-Melgosa was terminated because she "knowingly changed data," RP 5-18-15 at 123:25-124:10, which is "falsification"--a form of prohibited "research misconduct," *see* Exs. 106 at 4 (§93.103), 107 at 2.

But Dr. Nickerson never reported her allegations of falsification to the OSI, RP 5-20-15 at 35:3-10, despite signing a certification with every federal grant stating she is subject to the regulations, RP 5-14-15 at 51:1-9. UW Policy 61 exists to establish misconduct *or exonerate innocent scientists and repair their reputation*. Ex. 107 at 5 (§(A)(2)); RP 5-20-15 at 28:16-29:5. OSI was created to fulfill this regulatory obligation. RP 5-20-15 at 6:24-7:11; 11:3-14.

But OSI Director Ann Ackenhusen declined even to review the allegations, claiming she had no authority since the accused (Plaintiff), not the complainant (Dr. Nickerson), had come to the OSI. She told Dr. Pérez-Melgosa and her witness, UW Professor Dr. Andrew Farr, as well as the ombudsman: "In order for a matter to fall within UW OSI's jurisdiction, it must have received a research misconduct complaint. Since that isn't the situation here, as I said, I am not able to help Mercedes directly." Exs. 110, 109; RP 5-20-15 at 34:23-36:4. Ms. Ackenhusen later admitted she was mandated to investigate allegations *no matter how she learns of them*. RP 5-20-15 at 13:3-14:2, 37:3-21. And once she read Plaintiff's

termination letter during litigation, she admitted she would "definitely" have assessed the allegations for research misconduct, and with scholarly scientific help. *Id*. at 39:1-15, 73:17-74.10, 78:15-23. But by trial, Ms. Ackenhusen had yet to investigate the nearly three-year old allegations, *id*. at 43:16-44:3, leaving Dr. Pérez-Melgosa under a cloud of suspicion that undermines virtually any possibility of a continued scientific career. RP 5-20-15 at 107:2-113:21, 156:10-158:19; RP 5-21-15 at 81:3-17. Despite applying to well over 200 jobs, Dr. Pérez-Melgosa, who is age 55, remains unemployed. RP 5-21-15 at 85:21-91:25, 94:12-13; Exs. 131, 282.

On December 10, 2012, Plaintiff sent a rebuttal letter challenging the misconduct allegations and her termination: "I invite the NIH to review my work." Ex. 104 "I have always performed my work with the utmost professional zeal, attention to detail, and to the contrasted accuracy of my findings." *Id*. She added that she had "been subjected to such a hostile work environment and for all the reasons exposed in this letter, ***I consider this treatment to be discrimination based on my national origin***." Ex. 104 at 5. Under UW Policy 60 (Ex. 107) and CFR 42 (Ex. 106), she ***asked for "a panel of independent scientists*** to discuss my written statement." *Id*. (Emphasis added). Ms. Ackenhusen was cc'd on her letter requesting review by a panel of independent scientists, *see* Ex. 104 at 5, but took no action, just filing it away, RP 5-20-15 at 41:11-20. Plaintiff asked the Ombudsman, her Department Chair Robert Waterston, and UW's UCIRO office to investigate—but they did nothing. RP 5-19-15 at 3:14-20, 13:2-18:14; Ex. 113; RP 5-21-15 at 66:4-67:9, 79:4-11.

Two months later, Ms. Stevens replied, denying that UW had accused Dr. Pérez-Melgosa of scientific misconduct. Ex. 114; RP 5-19-15 at 98:18-99:15. She concluded, "the November 16, 2012 letter dismissing you…will be retained in your personnel file," which meant under the PRA the misconduct allegations are public record, available to prospective employers, scientists, and grantors, RP 5-19-15 at 93:22-94:6; *Cox v. Roskelley*, 359 F.3d 1105, 1112 (9th Cir. 2004); *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 215, 189 P.3d 139, 147 (2008). UW requires job applicants to identify if they have been fired, and why. PR 5-19-15 at 16:20-17:6. It receives dozens of applications for a single position and being fired is a negative factor; the Genome Sciences chair has never hired a scientist who had been fired. *Id*. at 6:11-19.

UW replaced Dr. Pérez-Melgosa with Stephanie Andover-Sombke, 5-12-5 at 52:22-53:16, whom Dr. Nickerson described as "Caucasian and English-Speaking without an accent," Ex. 262 at 9, and is not from Spain. RP 5-12-15 at 108:21-109:1. She was followed by Amber Wright, who has the same characteristics. *Id*. at 53:17-54:2 (has southern accent).

Although Dr. Pérez-Melgosa has a "difficult" to understand thick Castilian accent, Ex. 110, RP 5-12-15 at 120:8-10, Dr. Nickerson denied this obvious fact, RP 5-14-15 at 144:14-16.

V. ARGUMENT

A. The trial court erred when it dismissed on summary judgment Dr. Pérez-Melgosa's claim that she was denied a salary increase based on her Spanish national origin.

"At the summary judgment stage, a plaintiff's prima facie burden is 'not onerous.'" *Fulton v. State, Dep't of Soc. & Health Servs*., 169 Wn. App. 137, 152, 279 P.3d 500, 509 (2012). Indeed, "*summary judgment to an employer is seldom appropriate in the WLAD cases* because of the difficulty of proving a discriminatory motivation." *Scrivener v. Clark Coll.*, 181 Wn.2d. 439, 445, 334 P.3d 541, 545 (2014) (emphasis added); *Davis v. West One Automotive Group*, 140 Wn. App. 449, 456, 166 P.3d 807 (2007) (same). The court is required to view "all facts and make all reasonable, factual inferences in the light most favorable to the nonmoving party." *Scrivener*, 181 Wn.2d at 445. If *any* material fact is disputed, summary judgment is improper. *Id*.; CR 56(c).

It is undisputed that UW did not give Dr. Pérez-Melgosa a salary increase or a promotion whereas it gave the vast majority of her peers increases. The question is why? Dr. Nickerson claims it was because there was a salary freeze. But that explanation is undermined by Dr. Nickerson's practice of paying nearly everyone else in the lab a salary increase during the freeze, and multiple increases to a host of her employees. If the freeze does not explain Dr. Nickerson's denial of a salary increase to Dr. Pérez-Melgosa—the only explanation offered by UW—then what was Dr. Nickerson's real reason? Dr. Pérez-Melgosa was entitled to ask the jury to infer the real reason was her national origin.

Scrivener, 181 Wn.2d at 334 ("An employee does not need to disprove each of the employer's articulated reasons to satisfy the pretext burden of production," and can, for example, create a genuine issue of material fact of pretext if the employer's "reason has no basis in fact…")

In *McGinest v. GTE Serv. Corp*., the court held that the plaintiff's claim survived summary judgment because he countered "GTE's explanation that a hiring freeze accounted for its failure to promote him," by casting doubt on the existence of the freeze. 360 F.3d 1103, 1123 (9th Cir. 2004). Dr. Pérez-Melgosa has essentially done the same by showing that the freeze had little or no impact on Dr. Nickerson's decisions to pay increases to her employees, except for Plaintiff. "[V]ery little[ ] evidence is necessary to raise a genuine issue of fact regarding an employer's motive" and "Such uncertainty at the summary judgment stage must be resolved in favor of the plaintiff." *Id*. at 1124. The trial court erred here.

Moreover, the trial court mistakenly disregarded that the wealth of evidence showing UW's explanations for treating Dr. Pérez-Melgosa differently were pretextual was relevant to all of her claims. For example, Dr. Nickerson admitted that over the course of three years she never gave Plaintiff an *annual* performance evaluation, whereas she gave many other employees evaluations. Dr. Nickerson conceded that evaluations support salary increases and promotions. The different treatment in evaluations was evidence of pretext that supported her denial of salary increases and promotions—a fact that eluded the trial court. This is but one example of the pretext evidence the trial court erroneously disregarded.

1. Plaintiff Established Pretext Applicable to Her Allegations

"[P]retext may be demonstrated by direct or indirect evidence, including evidence presented as part of the prima facie case." *Johnson v. Dep't of Soc. & Health Servs*., 80 Wn. App. 212, 229, 907 P.2d 1223, (1996). "An employee may satisfy the pretext prong by offering sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is pretextual or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer." *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 334 P.3d 541, 546 (2014). "An employee does not need to disprove each of the employer's articulated reasons to satisfy the pretext burden of production." *Id*. For example, a Plaintiff can create an issue of material fact of pretext if the employer's "reason has no basis in fact, it was not really a motivating factor for the decision, it lacks a temporal connection to the decision or was not a motivating factor in employment decisions for other employees in the same circumstances." *Id*. at 547.

Dr. Pérez-Melgosa established pretext in myriad ways, including: (1) She was qualified and experienced in TaqMan data interpretations, was never told to refrain from making them, and she was the only employee disciplined for making such interpretations; (2) In violation of NIH and UW Policies, UW's OSI refused to investigate the allegations of misconduct; (3) Ms. Cameron, who was doing Dr. Nickerson's bidding,

altered[4] meeting minutes to read as if she had not alleged falsification because she thought litigation was looming; (4) Dr. Nickerson denied Plaintiff's accent is thick; (5) Errors in the Lab were common, widespread, and expensive, but only Dr. Pérez-Melgosa was punished; and (6) UW violated its policies and practices to Dr. Pérez-Melgosa's disadvantage (e.g. annual performance evaluations, warnings, progressive discipline).

The trial court recognized this evidence of pretext precluded summary judgment on her claim for wrongful termination, but failed to recognize it applied to her wage and promotions allegations as well.

2. Plaintiff Showed Evidence that UW's Promotion and Raise Practices Were Pretextual

Despite UW's claim that increases (and promotions to facilitate them) for nearly everyone but Plaintiff were legitimate, Plaintiff's evidence effectively challenged the claim creating a triable issue:

- HR Manager Stevens testified an exception to freeze was "rare." CP 531 ((32:17-25)).
- Dr. Nickerson admitted she rejected Plaintiff's request for a salary increase because of the salary freeze, while granting increases to nearly all other employees, some multiple times. CP 443 (56:14-18), CP at 195, 198-202, 393, CP 35-53.
- The State asserted its multiple increases and promotions could be justified as retention increases and competitive promotions,

[4] She altered minutes written by someone else (HR representative Linda Loveless) without reflecting that she made any changes. Compare Exs. 51 ¶6 (original) with 52 ¶6 (altered, adding among other things: "then that is your interpretation"). RP 5-18-15 at 163:23-166:14.

but failed to support any of its excuses with personnel documents, and the explanations were belied by increases given to RSEs Ms. Shepard and Ms. Pijoan mere months after Dr. Nickerson complained of their subpar performances. CP 484 (55:14-56:14), 775-776.

- During the salary freeze, Ms. Pijoan had been employed for barely a year when she receive a supposed "retention" increase, despite the fact that she "never gave anyone the impression, or reason to believe, that she would leave the lab," CP at 875 (102:19-103:12), CP 923-924.
- Similarly, Ms. Davis received *three* increases totaling 75%, despite no changes to her duties, no evidence of a competitive promotion, and no evidence they were needed for retention, while personnel records reflect that she was given an increase purportedly to supervised Plaintiff—which she admits she never did. CP at 505 (59:8-23), 412-425.
- Dr. Nickerson lavished increases almost across the board, on only one of whom was allegedly foreign born, CP at 407, 408, 410, as reflected in a chart showing increases for 34 members of the lab, including Research Scientist Engineers (RSEs) at all levels, as high as 25% to 30%, and multiple increases for many employees. CP at 195, 198-202, 393, CP 35-53 (ER 904 Index); Exs. 133-250.

In other words, exceptions to the University-wide freeze were supposedly "rare," and Dr. Nickerson denied Dr. Pérez-Melgosa a salary increase because of the freeze, but she repeatedly gave nearly everyone else in the Lab an increase. Awarding promotions was just one of the ways that Dr. Nickerson skirted the pay freeze, which is the basis for Dr. Pérez-Melgosa's assertion that she was denied a promotion. Those circumstances in and of themselves are pretextual.

But in addition, Dr. Nickerson claims she gave increases to two employees, Cindy Shepard and Jessica Pijoan, to retain them, despite giving them subpar performance ratings and criticizing them for deficient performance. And one of these employees—Ms. Pijoan—had barely been employed for a year and never gave reason to believe she might leave. This point is hit home further by the evidence that during this period Dr. Nickerson gave three raises to Colleen Davis, one of them in the false pretense of a promotion to supervise Dr. Pérez-Melgosa—which she never did. The purported "promotion" was a sham to give Ms. Davis an increase.

On summary judgment, from all these facts, the trial court was obligated to infer that Dr. Nickerson's asserted reason for never giving Dr. Pérez-Melgosa a salary increase (or promotion to facilitate an increase)—the pay freeze—was not the real reason, because she found a way to give increases to nearly everyone else in her Lab during the freeze, when she wanted to. This was ample evidence to establish a material factual dispute over why Dr. Nickerson denied Dr. Pérez-Melgosa a raise (or promotion

to afford her an increase). And, all reasonable inferences had to be drawn in the Plaintiff's favor. *Scrivener*, 181 Wn.2d at 444.

Even had Dr. Nickerson not mistreated all employees in Plaintiff's protected class, it would not have undermined Plaintiff's claim or provided a basis for summary judgment in the employer's favor. An employer cannot escape liability by asserting it did not discriminate against other employees in the Plaintiff's protected class: "The duty not to discriminate is owed each minority employee, and discrimination against one of them is not excused by a showing the employer did not discriminate against all of them, or there was one he did not abuse." *Graham v. Bendix Corp*., 585 F. Supp. 1036, 1047 (N.D. Ind. 1984); *Trezza v. Hartford, Inc*., 1998 WL 912101, at *6 (S.D.N.Y. Dec. 30, 1998) (same). The "'bottom line' analysis" UW wants was long ago "rejected by the Supreme Court." *Peters v. Lieuallen*, 693 F.2d 966, 970 (9th Cir. 1982) (citing *Connecticut v. Teal*, 457 U.S. 440 (1982)). "The fact that other blacks were more successful than Peters is insufficient to rebut a prima facie case of discrimination." *Id*; *Furnco Construction Co. v. Waters*, 438 U.S. 567, 579 (1978) ("The obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race…); *Diaz v. Am. Tel. & Tel*., 752 F.2d 1356, 1360 (9th Cir. 1985) ("a plaintiff is not precluded from bringing suit merely because a person of the same protected class is selected for the challenged position.").

B. The trial court erred when it excluded from trial on Dr. Pérez-Melgosa's wrongful termination and hostile work environment claims pretext and comparator evidence that the State denied Dr. Pérez-Melgosa a salary increase while giving increases to her peers who were not Spanish or not perceived as Spanish.

After granting summary judgment to the State on Dr. Pérez-Melgosa's wage/promotion discrimination claim, over the Plaintiff's objection, the trial court excluded all evidence of salaries and promotions in Dr. Nickerson's lab, RP 5-12-15 at 3:20-4:4, despite the fact that they continued to be probative of Dr. Pérez-Melgosa's wrongful discharge and hostile work environment claims. This included a ruling during trial redacting Plaintiff's rebuttal letter, Ex. 104 (WASH011380), to hide her allegations of discrimination. RP 5-19-15 at 27:9-29:20; Ex. 104.

Plaintiff's evidence—including salary increases given to employees who made similar or worse mistakes or judgment calls similar to the allegations against Dr. Pérez-Melgosa—supported her allegation that UW's stated reasons for terminating her were pretextual, and that Dr. Nickerson engaged in a pervasive practice of isolating her and treating her with less respect than other employees. The salary evidence was also relevant to the credibility of the State's witnesses, since the number of salary increases given by Dr. Nickerson during a University-wide "pay freeze" shows that Dr. Nickerson routinely ignored University policies, lied to Dr. Pérez-Melgosa about the reason she was not considered for an increase, and treated her worse than nearly all the other employees in the Lab. And she was treating Plaintiff disparately in pay at the very same time as she was engaging in the other forms of discriminatory treatment.

Similarly, when evaluating a hostile work environment claim, the jury must examine "the totality of the circumstances" in the environment. *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 163, 991 P.2d 674 (2000). Even when an "isolated" incident is not actionable on its own, it may contribute to a hostile work environment depending on the frequency and severity of the offensive conduct. *See id.*; *cf. Broyles v. Thurston Cnty.*, 147 Wn. App. 409, 432–33, 195 P.3d 985 (2008) (holding jury may consider events "as evidence of a hostile work environment claim even though they are not admissible to support a claim for discrete discriminatory acts"). The prevalence of salary increases Dr. Nickerson awarded to other employees show that she treated Dr. Pérez-Melgosa differently in yet another important way, further supporting her hostile work environment claim. But the jury was deprived of this evidence.

"Excluding evidence that reasonably could lead the ultimate finder of fact to conclude the discharge was based on discriminatory animus would thus be improper. " *E.E.O.C. v. Dillon Companies, Inc*., 839 F. Supp. 2d 1141, 1146 (D. Colo. 2011) (denying motion to exclude). "The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of his own motives." *Glass v. Philadelphia Elec. Co*., 34 F.3d 188, 195 (3d Cir. 1994).

When evidence of pretext is excluded, it likely affects the outcome of the trial. *Id*. ("preclusion of the evidence deprived Glass of a full

hearing on the issue of pretext and was, therefore, not harmless error; rather, it is highly probable that the evidentiary rulings affected the outcome of the case."). *Id.*; *see Wilson v. Olivetti N. Am., Inc.*, 85 Wn. App. 804, 814, 934 P.2d 1231, 1237 (1997) (reversing and remanding for trial where trial court abused discretion under ER 403, excluding evidence relevant to harassment under RCW 49.60).

This is especially true where, as here, the jury made an explicit statement that it was inclined to rule for Dr. Pérez-Melgosa because the employer treated her so poorly but could not connect the dots to her national origin. The court's ruling that standing alone the evidence was insufficient to show a discrete violation did not undermine its probity of hostile work environment and pretext for wrongful termination.

C. The trial court erred when it admitted the State's purported comparator evidence regarding Dr. Nickerson's treatment of two employees who were not similarly situated to Dr. Pérez-Melgosa (Qian Yi and Catherine Igartua).

At trial, over Plaintiff's objection, the State relied on evidence about Qian Yi and Catherine Igartua (current and former employees, respectively, in Dr. Nickerson's lab), to argue Dr. Nickerson is not biased against foreign-born employees and thus her treatment of Dr. Pérez-Melgosa was not motivated by national origin. Dr. Yi testified although she was born in China and Chinese is her first language, she was "treated fairly and well" by Dr. Nickerson and never "felt discriminated against," and that to the contrary Dr. Nickerson was "always willing to help" employees from other countries. RP 5-26-15 at 135:9-12, 138:17-21,

139:23-140:4. Ms. Igartua did not testify at trial, but the State introduced two letters of recommendation that Dr. Nickerson wrote for her, and contrary to UW's sworn answers to interrogatories, Ex. 262 at 10, Dr. Nickerson testified she believed Ms. Igartua was from Spain, Exs. 405, 406; RP 5-18-15 at 56:10-62:7. The trial court denied plaintiff's motion in limine to exclude testimony from Dr. Yi or Ms. Igartua, and overruled an objection to admit the letters of recommendation. CP 1555; RP 4-30-15 at 21:9–23:25; RP 5-18-15 at 58:12–24, 61:7–19. Evidentiary rulings are reviewed for abuse of discretion. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 666, 880 P.2d 988 (1994).

The trial court abused its discretion in admitting this evidence because Dr. Yi and Ms. Igartua were not similarly situated to Dr. Pérez-Melgosa and therefore Dr. Nickerson's treatment of them was irrelevant, and any potential relevance was outweighed by the danger that such evidence would mislead the jury. ER 401; ER 403; ER 404(b).

In certain circumstances, evidence of employer treatment of other employees may be admissible to show motive or intent for harassment or discharge. ER 404(b); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 445, 191 P.3d 879 (2008) (citing *Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 523–24 (3d Cir. 2003)). But before the Court can admit such evidence, it must evaluate whether the evidence is relevant and "whether the probative value of the evidence outweigh[s] its potential for prejudice." *Brundridge*, 164 Wn.2d at 446; *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008). In particular, the court must

examine "how closely related the evidence is to the plaintiff's circumstances and theory of the case." *Mendelsohn*, 552 U.S. at 388.

Here, the trial court erred in holding that the probative value of the evidence regarding Dr. Yi and Ms. Igartua outweighed the risk of undue prejudice. Dr. Yi and Ms. Igartua are not similarly situated to Dr. Pérez-Melgosa and their experience was not closely related to the circumstances of her case. Dr. Yi is from China, not Spain. Those countries have two completely different cultures subject to their own sets of common stereotypes and biases. Dr. Pérez-Melgosa has never alleged that Dr. Nickerson discriminated against all foreign-born employees in her lab, and she doesn't need to prove that to succeed on her claims. *See, e.g.*, *Graham v. Bendix Corp.*, 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) ("The duty not to discriminate is owed to each minority employee, and discrimination against one of them is not excused by a showing the employer did not discriminate against all of them, or there was one he did not abuse."). Dr. Pérez-Melgosa has to prove only that *her* national origin was a substantial factor in Dr. Nickerson's treatment of *her*. The trial court thus abused its discretion when it denied Dr. Pérez-Melgosa's motion in limine because "defining it as people born in Spain is too narrow" and "how other people who were foreign-born were treated" is relevant. RP 4-30-15 at 22:1–4, 23:19–25.

With respect to Ms. Igartua, although there was testimony at trial that she is believed to be from Spain, the State had admitted in its interrogatory answer that Dr. Nickerson *did not know* where Ms. Igartua

was from. Ex. 262 at p. 10; CP 407. Since Dr. Nickerson did not know where Ms. Igartua was from, her national origin has zero relevance to Dr. Nickerson's good treatment of her, and therefore admitting evidence of such was an abuse of discretion.

And, there was significant risk that admitting this evidence would mislead the jury to believe that Dr. Yi and Ms. Igartua were relevant comparators, and indeed there is a reasonable probability that these errors affected the outcome of the trial. *See Brundridge*, 164 Wn.2d at 446. The overarching theme of the State's closing argument was that although Dr. Nickerson might have treated Dr. Pérez-Melgosa unfairly, there was not enough evidence to conclude her national origin was a substantial factor in that treatment. *See, e.g.*, Resp. RP 5-27-15 at 117:12–25, 122:25–123:9. To support that argument, the State specifically referenced Dr. Yi and Ms. Igartua:

> Another person that you met was Dr. Yi, a really delightful woman that came in yesterday. You heard her accent for yourself. She's got a thick accent. She's never felt discriminated against. She's never seen Dr. Nickerson discriminate against anybody else.

Id. at 127:6–10.

> And what about Katie Igartua from Spain? . . . If Dr. Nickerson has a bias against people from Spain, is she going to write glowing recommendations for a scientist from Spain? . . . And what does Dr. Nickerson, who has it out for people from Spain, say about Katie Igartua? She tells the University of Colorado that Katie Igartua would greatly contribute to the quality and diversity of their program. . . . So this is now several months after Dr.

> Nickerson has supposedly fired the Plaintiff because she's from Spain and yet another glowing recommendation letter [for] Katie Igartua, saying that she never hesitated to turn toward Katie.

Id. at 127:19–128:13. There is a reasonable probability that this evidence and argument persuaded the jury to return a verdict for the State. After issuing the verdict, the jury stated that it "felt hamstrung by the law" and felt "heartsick that Dr. Nickerson and some people in her lab are not going to be held accountable for their actions." RP 5-27-15 at 2:7-20. It is reasonable to infer from the jury's statement that they believed the State's argument that although Dr. Nickerson acted unfairly, there was not enough evidence to conclude she had done so based on national origin—an argument supported primarily by the improper comparator evidence of Dr. Yi and Ms. Igartua. This likelihood is compounded by the fact that the court admitted this evidence while excluding evidence that Plaintiff was denied a salary increase compared to peers who were not Spanish or perceived as Spanish. *See supra* Section V.B. Accordingly, this court should grant a new trial and instruct the trial court on remand to exclude evidence regarding Dr. Nickerson's treatment of Dr. Yi and Ms. Igartua.

D. The trial court erred when it admitted the testimony of the State's vocational expert (Carl Gann) opining that Dr. Pérez-Melgosa failed to mitigate her damages.

The trial court denied Dr. Pérez-Melgosa's motion in limine to exclude the testimony of the State's vocational expert, Carl Gann, who opined that Dr. Pérez-Melgosa failed to mitigate her damages because, he said, she did not conduct a reasonable job search. RP 4-30-15 at 13; CP

1555. A trial court's decision to admit expert testimony is reviewed for abuse of discretion. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, 333 P.3d 388 (2014). Here, the court abused its discretion when admitting Mr. Gann's testimony for three reasons: (1) his testimony was not sufficient to meet the State's burden to prove that Dr. Pérez-Melgosa's job search was unreasonable; (2) his testimony was not based on an adequate foundation with respect to Dr. Pérez-Melgosa's qualifications; and (3) his testimony was not helpful to the trier of fact because it was based primarily on general statements about looking for a job, a topic which is not beyond the common knowledge of the average layperson.

1. A reasonable jury could not conclude from Mr. Gann's testimony that Dr. Pérez-Melgosa failed to mitigate her damages.

"The burden of proving a failure to mitigate damages is on the defendant." *Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 301, 890 P.2d 480 (1995) (internal alterations omitted). "To satisfy its burden, the employer must show that there were suitable positions available and that the plaintiff failed to use reasonable care and diligence in seeking them." *Id.* So long as the employee was "reasonably diligent," the employer cannot meet its burden. *Id.* at 302. Reasonable diligence does not require the employee to be successful, *id.* at 301, or even "to make an ongoing, concerted effort to find comparable employment," *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 846, 9 P.3d 948 (2000). If the defendant "points only to evidence of possibilities," it is error for the court to "submit[] the

mitigation issue to the jury." *Cox v. Keg Restaurants U.S., Inc.*, 86 Wn. App. 239, 246, 935 P.2d 1377 (1997).

Here, the State did not present sufficient evidence of an unreasonable job search. Mr. Gann admitted that at the time of his analysis, Dr. Pérez Melgosa had applied to over 200 jobs; had spoken with a recruiter; had networked with 6–8 colleagues whom Mr. Gann admitted were "good contacts"; had searched for jobs on the internet; had used a networking referral to obtain an interview for one job; and had actually been offered that job before the offer was withdrawn due to lack of funding. RP 5-26-15 at 85, 103-05. Mr. Gann agreed he would recommend Dr. Pérez-Melgosa continue these same methods. *Id.* at 105.

These admitted facts show that Dr. Pérez-Melgosa's job search was reasonably diligent. In *Herring v. Department of Social & Health Services*, the Court of Appeals held that DSHS could not meet its burden of proving a failure to mitigate where "evidence was presented that Herring tried to obtain work in the social work field. Herring submitted over 140 applications for employment." 81 Wn. App. 1, 19–20, 914 P.2d 67 (1996). Similarly, in *Labriola v. Pollard Group*, the Supreme Court upheld the dismissal of the employer's failure to mitigate defense. 152 Wn.2d 828, 840, 100 P.3d 791 (2004). The Court noted that the employee, who had worked in sales, "applied for a sales position with companies such as Johnson & Johnson, Solva Pharmaceuticals, Floud USA, Hubert Research, and the Tacoma News Tribune. Employee also sought help from employment recruiters as well." *Id.* at 840. The Court held that evidence

alone was reason to dismiss the defense: "The doctrine of avoidable consequences only requires the employee to act reasonably to mitigate his damages. Employee's job strategy to search for a similar position was reasonable. We hold that the trial court did not err when it dismissed Employer's failure to mitigate defense." *Id.* at 841.

Despite his admissions regarding Dr. Pérez-Melgosa's efforts, Mr. Gann opined that her job search was unreasonable for four reasons: (1) she applied for *too many* jobs with one employer, the Fred Hutchinson Cancer Research Center, RP 5-26-15 at 82:13–22; (2) he found 17 jobs in fall 2014 for which he thought Dr. Pérez-Melgosa should have applied (although he admitted he did not know whether she was qualified for any of those jobs), *id.* at 94:2–12; (3) the unemployment rate for "doctoral scientists and engineers" as a whole is lower than the national average, *id.* at 91:18–92:4; and (4) he thought Dr. Pérez-Melgosa should have networked "more aggressive[ly]," *id.* at 86:18–87:3.

Even if the jury credited Mr. Gann's testimony, none of this is sufficient to prove that Dr. Pérez-Melgosa did not act with reasonable diligence. Mr. Gann's critique of which employers Dr. Pérez-Melgosa focused on, or whether her networking skills could be better, is exactly why Washington courts have adopted a reasonableness standard and don't require success or even that a job search be "ongoing [and] concerted." *Henningsen*, 102 Wn. App. at 846. A savvy employer with an expert witness will always find a way an employee's job search could have been better. That isn't enough; the employer must prove that what the employee

actually did wasn't reasonable. Mr. Gann's reliance on broad unemployment statistics is equally insufficient. The fact that one person's job search was unsuccessful, even in a good labor market, does not show that it was unreasonable. *Kloss*, 77 Wn. App. at 301.

The seventeen job postings from fall 2014 that Mr. Gann relied on are also inadequate. First, although Mr. Gann testified that Dr. Pérez-Melgosa should have found employment within three months of her termination, RP 5-26-15 at 91:6-13, he has not provided *any* evidence of jobs available in that time period (or for almost two years after), *id.* at 107:3–6. As a matter of law, this is insufficient to satisfy the burden to prove "that there were suitable positions available and that the plaintiff failed to use reasonable care and diligence in seeking them." *Kloss*, 77 Wn. App. at 301. The existence of job openings in fall 2014 says nothing about availability of positions in fall 2012, and the two years following.

Second, as discussed more below, the substance of the postings does not show they were suitable. Mr. Gann simply picked openings that mentioned "degrees in things like molecular biology, microbiology, and so forth," RP 5-26-15 at 94:7–12, with no analysis of whether Dr. Pérez-Melgosa met the qualifications, *id.* at 105:10–14. But even if the positions were suitable, there is no authority for the proposition that an employer can meet its burden merely by showing an employee—who applied for hundreds of jobs—could have applied for a few more. This is the type of mere "evidence of possibilities" insufficient to submit an affirmative defense of failure to mitigate to the jury. *Cox*, 86 Wn. App. at 246.

Instead, "wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him." *Labriola*, 152 Wn.2d at 840. The undisputed facts are that Dr. Pérez-Melgosa applied to over two hundred jobs with at least five different employers; spoke with a recruiter; networked with colleagues; searched on the Internet; and interviewed for and was actually offered work before the funding fell through. As demonstrated by the holdings in *Herring* and *Labriola*, these efforts establish reasonable diligence as a matter of law, and the trial court should have excluded Mr. Gann's testimony on failure to mitigate.

2. Mr. Gann's opinion was not supported by an adequate foundation with respect to Dr. Pérez-Melgosa's qualifications or field of work.

"Before allowing an expert to render an opinion, the trial court must find that there is an adequate foundation so that an opinion is not mere speculation, conjecture, or misleading." *Johnston-Forbes*, 181 Wn.2d at 357; ER 702, 703. "[T]he closer the tie between an opinion and the ultimate issue of fact, the stronger the supporting factual basis must be." *State v. Farr-Lenzini*, 93 Wn. App. 453, 460, 970 P.2d 313 (1999). Mr. Gann's testimony that Plaintiff's job search was unreasonable went directly to the ultimate issue for the failure to mitigate defense; accordingly, there must be a strong factual basis for his opinions. *Id.*

But Mr. Gann's opinions were not supported by adequate facts about the types of jobs for which Dr. Pérez-Melgosa was qualified, or

about the job market in her field of research. Mr. Gann might generally be qualified as a vocational expert, and he might have expertise relevant to job searches in some career fields. But there was insufficient factual support for his claims that there were many available jobs for which Dr. Pérez-Melgosa was qualified.

First, Mr. Gann did not have an adequate foundation of knowledge about Dr. Pérez-Melgosa's career field. She is a molecular biologist. She has a Ph.D. and has focused her research for many years on immunology. In his career of 37 years, Mr. Gann has worked with or counseled only four or five scientists, and at trial he could not remember the last time he did so. App. RP 5-26-15 at 102:19–103:8. The only thing that Mr. Gann did to learn about the field of molecular biology prior to testifying was to look at Dr. Pérez-Melgosa's State job description. *Id.* at 103:11–15.

Second, Mr. Gann did not have an adequate foundation to testify about available jobs in Dr. Pérez-Melgosa's field. Mr. Gann opined that there were "a wide range of other employers . . . for which she could have applied" and that he found 17 openings "over a period of a few days." *Id.* at 83:7–10, 94: 7–10, 96:3–8. But he had no idea whether Dr. Pérez-Melgosa met the requirements for any of those openings. *Id.* at 105:10–14. His opinion was that she "should have applied," even though he didn't "really know whether she has any experience or knowledge in the particular type of work." *Id.* at 107:17–22.

Mr. Gann's own testimony reveals that his opinions were not supported by any foundation of knowledge about the hiring process for

molecular biologists or Dr. Pérez-Melgosa's qualifications, let alone the strong factual basis that is required when an expert seeks to testify about an ultimate issue of fact. *Farr-Lenzini*, 93 Wn. App. at 460. Instead, Mr. Gann's claims that jobs were available for Dr. Pérez-Melgosa were based solely on speculation and sweeping assumptions about "scientific" jobs and companies. "Such speculative testimony is not rendered less speculative or of more consequence to the jury's determination simply because it comes from an expert." *State v. Lewis*, 141 Wn. App. 367, 389, 166 P.3d 786 (2007). To the contrary, "when ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert." *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001). Since Mr. Gann's testimony about Plaintiff's job search was speculative and lacked adequate factual basis, the court should have excluded it. *Id.*

3. Mr. Gann's opinions were not helpful to the trier of fact.

Finally, the trial court should have excluded Mr. Gann's testimony because his opinions were based primarily on broad generalizations about how to conduct a job search that were within the common knowledge of the jury. Expert testimony is admissible only if it conveys "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702. "Expert testimony is helpful to the jury if it concerns matters beyond common knowledge of the average layperson and is not misleading." *State v. Groth*, 163 Wn. App. 548, 564, 261 P.3d 183 (2011). Mr. Gann's

testimony fails this test—it was platitudes and generic observations of what it takes to find a job. The following examples are representative:

- As the basis for his opinion that Dr. Pérez-Melgosa was employable, Mr. Gann testified: "She's highly educated and skilled, so she has desirable qualifications by a variety of employers in biotechnology and scientific research." RP 5-26-15 at 81:11-14.

- To explain why it was unreasonable for Dr. Pérez-Melgosa not to target more companies, Mr. Gann testified: "[S]he's very highly educated and very intelligent. . . . I can't imagine she wouldn't know other companies in the greater area that do similar kinds of scientific research." *Id.* at 78:24-79:4.

- To support his opinion that it was unreasonable for Dr. Pérez-Melgosa not to network more aggressively, he testified: "I would expect her to have numerous contacts with coworkers, former coworkers, even former supervisors." *Id.* at 79:8-10.

- In explanation for why he thought it was unreasonable for Dr. Pérez-Melgosa to apply for so many jobs with Fred Hutch, Mr. Gann testified: "[I]f you're not getting a job by doing the same thing over and over again, you need to change your methods." *Id.* at 89:11-13.

- To support his opinion that being fired for allegedly falsifying data on a federal grant should not have prevented Dr. Pérez-Melgosa, a scientist, from finding a job within 3 months, he testified that being fired "doesn't mean that everyone that has ever lost a job will never work again" and that "[s]ome employers might care a lot. Some might not care at all." *Id.* at 113:3–5, 116:22-117:3.

None of this testimony conveys scientific, technical, or other specialized knowledge. These same opinions could have been reached by any member of the jury who has ever looked for a job or known someone who has. The trial court should have excluded this testimony. *See In re Det. Of Coe*, 160 Wn. App. 809, 824, 250 P.3d 1056 (2011) ("[C]ourts should not admit expert opinions on commonly understood topics.").

Although the jury did not reach the question of damages below because it returned a verdict for the State, if this case is remanded for a new trial there is a significant danger that if Mr. Gann testifies again as a "vocational expert," the jury will trust his statement that there were numerous available jobs for Dr. Pérez-Melgosa to which she did not apply, even though in reality her job search was reasonable as a matter of law and Mr. Gann has no idea what she is qualified to do and how many jobs were available that she was qualified to perform. Accordingly, this court should instruct on remand that Mr. Gann's testimony be excluded.

E. The trial court erred when it excluded from trial the State's prior performance evaluations of Dr. Pérez-Melgosa.

Dr. Pérez-Melgosa sought to introduce at trial two of her performance evaluations prepared by her previous supervisor at UW, Dr. Chris Wilson. RP 5-21-15 at 13:9–14:9; Exs. 5, 6. The evaluations praised Dr. Pérez-Melgosa's ability to "exercise considerable initiative and independence in assuring that clinical specimens . . . are properly coded, stored, transported, and analyzed," Ex. 5, and noted that her "attention to detail and accuracy is important in assuring the quality of the data obtained," Ex. 6. These were the most recent evaluations in her UW personnel file, and they addressed her performance of the same duties on the Smallpox Project that she retained when Dr. Nickerson took over supervising her. The trial court excluded these exhibits solely on the ground that they were irrelevant because they addressed Dr. Pérez-

Melgosa's performance in 2007 and 2008, four years before Dr. Nickerson began questioning her work in 2012. RP 5-26-15 at 36:17-38:8.

This was an abuse of discretion. "An abuse of discretion occurs when the trial court's decision is based on untenable grounds or untenable reasons." *See Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). Here, it was untenable for the trial court to reason that Dr. Pérez-Melgosa's most recent performance evaluations, which addressed her work performing the same job duties for the same employer on the same federal grant, were irrelevant merely because they were written a few years before her termination. "Under our modern rules of evidence, the threshold to admit relevant evidence is low and even minimally relevant evidence is admissible." *Id.* at 9. To satisfy this threshold, evidence need only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

In this case, the State argued that it was "understandable" that Dr. Nickerson would "lose confidence" in Dr. Pérez-Melgosa and "not want to work with her anymore" because Dr. Pérez-Melgosa allegedly violated the lab's quality-control procedures when she relied on her own interpretation of the Taqman gender assay to call certain samples as male or female. *See* Resp. RP 5-27-15 at 120:15–122:14. This argument was in response to Dr. Pérez-Melgosa's claim that interpreting the Taqman data was a regular part of her job, and the reasons given for her termination were a pretext for national origin discrimination. The prior evaluations—which praised Dr.

Pérez-Melgosa for her accuracy and exercise of independent judgment in maintaining sample quality control—had at least some tendency to show that interpreting Taqman data *was* part of her normal job and that she performed it well on this very project, and thus her interpretation of the particular samples at issue was a pretextual basis for her termination.

In similar contexts, courts have held that previous evaluations are relevant and admissible. In *Merrick v. Farmers Insurance Group*, the Ninth Circuit held that earlier performance evaluations were relevant because they were part of the entire personnel file reviewed by the decisionmakers who fired the plaintiff. 892 F.2d 1434, 1439–40 (9th Cir. 1990). Like the plaintiff in *Merrick*, Plaintiff's evaluations from Dr. Wilson were part of her UW personnel file. And in *EEOC v. Boeing Co.*, the Ninth Circuit held that testimony from an employee's coworkers that the decisionmaker "unfairly ignored" the employee's "past performance evaluations" undermined the decisionmaker's credibility and were "clearly probative of pretext." 577 F.3d 1044, 1050-51 (9th Cir. 2009). Here, Dr. Wilson's evaluation of Dr. Pérez-Melgosa's performance on the same types of tasks she performed for Dr. Nickerson is similarly probative of whether her critique of Plaintiff's interpretation of data was pretextual.

There is also a reasonable probability that the exclusion of this evidence affected the outcome of the case. *See Mut. Of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 729, 315 P.3d 1143 (2013). As discussed above, the statement from the jury after returning its defense verdict shows that the case was very close, and that the jury felt they had

to find for the defense because "the law was so narrow." **RP 5-27-15** at 2:7–13. In that environment, additional evidence of pretext might very well have been enough to enable the jury to find discrimination, and follow its instinct to find for Dr. Pérez-Melgosa. Moreover, the prejudicial effect of excluding this evidence was heightened by the trial court's other errors in excluding salary data showing differential treatment of Plaintiff and admitting improper comparator evidence regarding other foreign employees. *Cf. In re Duncan*, 142 Wn. App. 97, 110, 174 P.3d 136 (2007) ("We will reverse for cumulative error when several errors that are not sufficient standing alone may be prejudicial in their cumulative effect.").

F. The trial court erred when it admitted into evidence the State's misleading illustrations of scientific data that were created solely for litigation purposes.

Over Dr. Pérez-Melgosa's objection, the trial court admitted into substantive evidence three misleading illustrations of the Taqman gender assay that the State created solely for the purpose of trial. Ex. 368, 370, 372; RP 5-12-15 at 78:16–25; 83:8–84:4; 86:21–87:14. As discussed above, the Taqman is the tool to check the quality of DNA samples by confirming that the documented gender of the sample matches the sample's DNA. *See id.* at 17:25–18:5. The assay plots the samples along an X/Y axis, and lab employees then examine the data points to confirm whether the samples are male, female, or have insufficient DNA. *See id.* at 19:5–24, 23:18–22. When interpreting the Taqman results, the lab employees look at a graph that plots *all of the samples* in a given set; Jessica Pijoan admitted in her testimony that the context of the entire

group of samples is important to interpreting the results. *Id.* at 24:4–11; 26:7–27:11; *see also, e.g.*, Exs. 18, 20–22 (examples of complete assays).

The State, however, introduced into evidence three exhibits—Exhibits 368, 370, and 372—that were not at all representative of the assays as they are viewed in the lab. Instead of showing all the samples, these three exhibits were created by Ms. Pijoan for the purpose of litigation and "tailored" to show only one sample and the controls. RP 5-12-15 at 77:1–13. The State did this to isolate the samples it claimed Dr. Pérez-Melgosa interpreted incorrectly or labeled mistakenly as "male." *See id.* at 82:20–83:7, 86:7–20, 88:1–89:9. But whether a sample can be labeled "male" depends in significant part on whether it was close to other samples labeled as male. *Id*. at 24:4–11; 26:7–27:11. Removing the samples labeled male in the assay excluded from the jury's eyes the data on which Dr. Pérez-Melgosa relied when she interpreted it in the lab.

The trial court abused its discretion by allowing the State to introduce these demonstratives as substantive evidence. "[A]n exhibit specially prepared for trial as substantive independent evidence should not be allowed unless there is preliminary testimony . . . as to the accuracy of the data upon which the exhibit is based." *Reitz v. Knight*, 62 Wn. App. 575, 584, 814 P.2d 1212 (1991) (citing *Owens v. City of Seattle*, 49 Wn.2d 187, 194, 299 P.2d 560 (1956)). Here, Ms. Pijoan's testimony showed the State's portrayal of the data was *not* accurate: the plot of each sample *must* be interpreted in context of all samples in the assay; the graphs prepared for trial did not include that context. It was thus error to admit them.

There is a reasonable probability this error affected the outcome. In its closing, the State emphasized the samples from the misleading exhibits:

> Jessica Pijoan is one of the quality control people who is responsible for running the test. And she ran through a couple of the samples for you. . . . Quality control group . . . calls this one undetermined. In the master list, for some reason, that gets changed to male. And we know it can't possibly be a male. . . . Sample 64X is another example, same thing. Males are here. Females are here. Undetermined is here. The quality control group calls it undetermined. Dr. Pérez-Melgosa again calls it a male in the master list and we know it's not a male.

Resp. RP 5-27-15 at 120:2–25. This argument went directly to whether Dr. Pérez-Melgosa's alleged "falsification" of data from the Taqman results was in fact a pretext for national origin discrimination. Although Appellant recognizes that the jury's post-verdict statement suggests that they believed Dr. Pérez-Melgosa was treated unfairly and thus perhaps did not believe the State's argument that her errors justified her termination, there is a reasonable probability that the inclusion of the State's misleading evidence, when combined with the trial court's exclusion of other evidence tending to show pretext, *see supra* Sections V.B, V.E, resulted in prejudicial error. *See Duncan*, 142 Wn. App. at 110.

And on remand, the trial court should be instructed to exclude these misleading exhibits entirely, since they are just as misleading in the form of demonstrative exhibits. "A trial court may admit demonstrative evidence when the experimental conditions are substantially similar to the facts of the case." *State v. Hultenschmidt*, 125 Wn. App. 259, 268, 102

P.3d 192, 197 (2004) (affirming exclusion of animated video purportedly showing accident would not have occurred at speed limit). But here, the conditions that the State showed in its exhibits excluded the relevant data (dozens of data points) that the Plaintiff viewed in the lab to make her interpretations, so the conditions are not substantially similar.

VI. CONCLUSION

For the forgoing reasons, this court should reverse the grant of summary judgment dismissing Dr. Pérez-Melgosa's salary and promotion claim and reverse the jury verdict reached after that claim and supporting evidence of pretext were erroneously excluded. On remand, the trial court should be instructed to admit the prior performance evaluations of Plaintiff and exclude (1) the misleading TaqMan plots created by the State for litigation purposes; (2) evidence about and testimony of Katie Igartua and Qi Yi that Dr. Nickerson purportedly treated some foreigners well; and (3) the testimony and opinions of the State's vocational expert, Dr. Carl Gann.

DATED this 30th day of December, 2015.

MacDONALD HOAGUE & BAYLESS

By: */s/Jesse Wing*
Jesse Wing, WSBA #27751
Attorney for Plaintiff

DECLARATION OF SERVICE

Esmeralda Valenzuela states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by MacDonald Hoague & Bayless, and I make this declaration based on my personal knowledge and belief.

2. On December 30, 2015 I caused to be delivered via email a copy of APPELLANTS' OPENING BRIEF addressed to:

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3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of December, 2015 at Seattle, King County, Washington.

/s/Esmeralda Valenzuela
Esmeralda Valenzuela, Legal Assistant