

FILED
Court of Appeals
Division II
State of Washington
7/19/2019 12:11 PM
No. 52665-4

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

TRUEBLUE, INC., a Washington corporation; and its wholly owned
subsidiary, LABOR READY NORTHWEST, INC.,

Appellants,

v.

KELLY MARCHEL a/k/a KELLY LANGLOIS; and ANYTIME
LABOR-SEATTLE, LLC d/b/a LABORMAX,

Respondents.

KELLY MARCHEL a/k/a KELLY LANGLOIS,

Counterclaim Plaintiff,

v.

TRUEBLUE, INC., a Washington corporation; and its wholly owned
subsidiary, LABOR READY NORTHWEST, INC.; PAUL
SHEVCHENKO, an individual; TATIANA REEVES, an individual;
and MARLINDA NEWMYER, an individual,

Counterclaim Defendants.

REPLY BRIEF

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INTRODUCTION

Marchel chooses not to counter TrueBlue's constitutional right to a jury trial. Her tacit concession invites this Court to reverse and remand for a damages trial – at least. It should do so.

Marchel argues TrueBlue breached her employment contract. But TrueBlue obviously “performed” it for **seven years**. Nor did TrueBlue modify *the contract*. As Marchel also concedes, the contract properly reserved TrueBlue's right to modify the terms and conditions of her employment. TrueBlue merely exercised its express contractual right to alter her compensation structure. That does not breach the Employment Agreement or render it “illusory.”

Marchel claims the trial court correctly found she was misclassified as a matter of law. But whether her primary duty was as a Branch Manager (rather than as a sales clerk) is a genuine issue of material fact precluding summary judgment. Ample evidence contradicts the trial court's improper findings on summary judgment.

Marchel deploys the heated rhetoric with which she provoked the trial court to not only grant monetary sanctions, but also to dismiss all TrueBlue's claims and defenses, grant all her claims, and even grant her noneconomic damages without a trial. This was error.

This Court should reverse and remand for trial on all issues.

REPLY STATEMENT OF THE CASE

Marchel's Statement of the Case is highly argumentative. *But see* RAP 10.3(a)(5) ("A fair statement of the facts and procedure . . . without argument"). Indeed, throughout the *Argument* in her Brief of Respondent (BR) Marchel heatedly *argues* the facts. *See* BR 11-14, 14-21, 22-26, 28-34. This is revealing on an appeal from summary judgment: factual disputes are for a jury to decide, without passion or prejudice. The facts are fairly stated and cited in the Brief of Appellant (BA) 4-9. But two key points bear emphasis here.

A. Whether Marchel's primary duty was Branch Manager (or sales clerk) is a genuine issue of material fact precluding summary judgment.

First, Marchel indisputably was a Branch Manager, not a sales clerk. *See, e.g.*, CP 1351-59 (Marchel's Job Descriptions, attached as Appendix A). Her primary duties were thus managerial:

The Branch Manager is responsible for providing leadership in assigned branch to plan and organize operational activities and execute the sales strategy to ensure operational and financial performance is maintained, profit margins and revenue goals are achieved and other company goals are met or exceeded. This position has full sales and profit and loss responsibility for the branch operation. To be successful in this role, the Branch Manager must have an entrepreneurial spirit.

The Branch Manager supports, motivates, trains, retains and holds accountable the staff that ultimately delivers net operating income, impacting shareholder value. This position reports directly to the District Manager.

App. A (CP 1351). Her specific job description includes this (*id.*):

Sales and Customer Service - Identifies trends and competition in the market and takes action to maximize opportunities and minimize risks. Creates, coordinates and implements sales plans to meet or exceed net operating income and sales budget goals. Fosters and maintains the CSP Sales Culture and ensures team is aware of sales message and goals. Acts as the primary salesperson and spends 75% of workday in the marketplace selling. Responsible for auditing, measuring customer satisfaction, including resolving any complaints, and developing strategies to address gap areas. Properly assigns bill rates and workers' compensation codes. Performs job site visits as needed.

She also does this (App. A, CP 1351-52):

- *Ensures the Success of Branch Staff . . .*
- *Mentors, Trains and Coaches . . .* branch staff
- *Best Match Worker Assignment Training . . .*
- *Strategic Planning . . .*
- *Cultural Sponsorship . . .*
- *Operations/Regulatory Compliance . . .*
- *Safety . . .*
- Other duties may be assigned.

Despite all this – and a great deal more evidence cited and discussed in the opening brief and *infra* – the trial court determined that Marchel was a sales clerk, as a matter of law. Supp RP 248-54; 271-72. As further discussed *infra*, this is a question of fact.

B. Marchel's overdramatic discovery rhetoric is unhelpful.

Second, Marchel's allegations regarding the discovery process are, to put it mildly, overly dramatic. As TrueBlue has repeatedly stated, it did not live up to the high standards

appropriately required of a litigant in Washington, for which it is sorry. But it is equally true that hamming it up is unhelpful.

For example, Marchel anguishes over TrueBlue missing Marchel's proposed February 28, 2017 deadline for responses to her first discovery requests. BR 28-30; CP 871. TrueBlue notified Marchel its responses would be done by March 1 – **the next day** – and they were in fact served that day. CP 871-72, 874-99.

Marchel resorts to hot rhetoric regarding TrueBlue's discovery responses. BR 28-34. The cold record, however, confirms that the parties engaged in multiple communications between March and May 2017, before agreeing that the trial court would have to resolve certain discovery disputes. CP 901-13, 915-22, 923. The court indeed spent **two hearing days** working with the parties to narrow and clarify Marchel's discovery as appropriate to her claims. See Supp RP 81-212. Even after all this, the parties still could not agree on the proper scope of Marchel's discovery, so both sides filed supplemental briefing in June and July 2017 (CP 1110-76), leading to the court's discovery order on September 27, 2017 – which granted relief to **both** parties. CP 1686-692.

Marchel has now admitted that after the order granting summary judgment on her Wage & Hour claims, limited issues

remained for trial. BR 5. Marchel issued a second set of discovery in January 2018. CP 1918. While there was some delay in response due to TrueBlue's change in counsel, TrueBlue attempted to confer with Marchel, but the success of those efforts is unclear. CP 1859-60, 1967-68, 1978, 1981, 1983, 2148. Rather than cooperate, Marchel filed a second motion to compel on March 2, 2018 – **during** the parties' meet-and-confer conference. CP 1916-22.

This goes on and on. The court ultimately ordered TrueBlue to complete discovery in 30 days and to produce four witnesses for deposition in 60 days. CP 2526; RP 60. It found that it could not impose full **Magaña** sanctions, instead continuing the trial date and considering monetary penalties for the continuance. RP 48-49, 55, 62, 67. The court also awarded Marchel fees and costs associated with the discovery motions. CP 2526; RP 60.

Yet the trial court then finally gave in to all the heated rhetoric, ordering – despite the limited issues remaining for trial – that all the alleged prior noncompliance suddenly provided a basis to award terminating sanctions. RP 118-23. It made no effort to address TrueBlue's significant attempts to comply with its prior orders, nor did it evaluate lesser sanctions. *Id.* The trial court accepted Marchel's wrathful rhetoric, overstepping its discretion. BA 38-45, and *infra*.

ARGUMENT

A. The trial court violated TrueBlue's constitutional right to a trial on noneconomic damages – as Marchel tacitly concedes – so remand for trial is required.

TrueBlue explained that the trial court violated TrueBlue's constitutional right to a jury trial on noneconomic damages by skipping the trial and awarding alleged emotional distress damages. BA 45-48 (citing, *inter alia*, WASH. CONST. ART I, § 21; ***Magaña v. Hyundai Motor Am.***, 167 Wn.2d 570, 220 P.3d 191 (2009); ***Sofie v. Fibreboard Corp.***, 112 Wn.2d 636, 656, 771 P.2d 711 (1989); ***Sitton v. State Farm Mut. Auto. Ins. Co.***, 116 Wn. App. 245, 258, 63 P.3d 198 (2003)). TrueBlue explained in detail what it sought to prove at trial. BA 48. No case – anywhere in the country – permits a trial court to simply ignore the right to a jury trial on damages, which must remain inviolate. This is particularly true where, as here, the trial court applied the wrong legal standards under ***Burnet*** and reached untenable conclusions, as explained at BA 10-45, and *infra*.

Marchel literally has no response to this argument. See BR.

This Court must reverse and remand for trial on this independently sufficient ground – at least as to noneconomic damages. But as further discussed *infra*, it should reverse and remand for trial on all disputed issues.

B. The trial court erred in granting partial summary judgment on Marchel's wage claim and in ruling its decision precluded TrueBlue's non-compete claim.

TrueBlue explained that the trial court erred as a matter of law in granting partial summary judgment to Marchel on her wage claim, in determining that this rendered her breach of the non-compete agreement moot, and in denying TrueBlue summary judgment that Marchel's competing employment violated her Noncompete Agreement. BA 10-18. Specifically, the court erred in ruling that TrueBlue breached the Employment Agreement by misclassifying her as exempt, where it unambiguously permitted TrueBlue to change Marchel's bonus and compensation structure, and where disputed issues of material fact precluded summary judgment. BA 14-17. The trial court further erred in ruling that the alleged misclassification precluded TrueBlue from enforcing the Noncompete, which Marchel admittedly violated. BA 17-18. This Court should also reverse and remand for trial on these issues.

Instead of responding directly, Marchel attempts to reconfigure the issues, arguing (1) that TrueBlue "unilaterally" changed her job and compensation without "independent consideration"; and (2) that TrueBlue "admitted" misclassifying her. BR 10. Neither assertion is correct.

1. TrueBlue did not breach the Employment Agreement, but followed its terms in changing Marchel's compensation structure.

As explained in the opening brief, it is indisputable that Marchel unequivocally agreed in her Employment Agreement that TrueBlue may change her compensation, including her bonus structure (BA 14-16):

B. Position and Compensation. Employee's position and compensation will be set forth on the most recent Personnel Action Notice (PAN) on file with Labor Ready's Employee Services Department. This PAN may be modified by Labor Ready from time to time. . . . If employee is eligible for a bonus under any such plan, Employee understands and agrees that Labor Ready has the right to change or discontinue any bonus plan at any time . . . [Emphases altered.]

CP 697, 1469-70. It also remains undisputed that Marchel's compensation comprised salary plus a bonus throughout her seven years with TrueBlue. CP 1472-73, 1501-02, 1507-43.

Washington holds parties to their contracts. BA 15 (*citing, inter alia, Nye v. Univ. of Wash.*, 163 Wn. App. 875, 882-83, 260 P.3d 1000 (2011)). Indeed, the "whole panoply of contract law rests on the principle that one is bound by the contract which he [or she] voluntarily and knowingly signs." *Wash. Fed. Sav. & Loan Ass'n v. Alsager*, 165 Wn. App. 10, 14, 266 P.3d 905 (2011). This Court should reverse on this independently sufficient ground.

a. TrueBlue obviously “performed” the employment contract for seven years. (BR 15-17)

Oddly, Marchel claims that TrueBlue failed to prove that it “performed” the employment contract. BR 14-17.¹ But Marchel expressly concedes that TrueBlue employed her from 2008 until November 2015. See, e.g., BR 11 (citing CP 1428-29). She has never argued to the contrary. Her claim that TrueBlue did not perform the employment contract is patently baseless.²

b. TrueBlue did not modify the contract – unilaterally or otherwise – rather, it exercised its contractual right to alter Marchel’s compensation structure.

Marchel claims that, contrary to the express terms of the contract she signed, TrueBlue could not “unilaterally modify” the terms and conditions of her employment. BR 15-17. But a contract is a contract. See, e.g., **Nye**, 163 Wn. App. at 882-83 (employment agreements are interpreted like other contracts).³

Marchel apparently argues that TrueBlue could not do as she agreed it could do in her Employment Agreement (*i.e.*, that the

¹ Marchel cites **Lehrer v. State Dep’t of Soc. & Health Servs.**, 101 Wn. App. 509, 16-17, 5 P.3d 722 (2000), which *affirmed* summary judgment dismissing an employment contract claim. It does not support Marchel.

² Marchel cites **Willener v. Sweeting**, 107 Wn.2d 388, 394, 730 P.2d 45 (1986), involving an escrow for a purchase and sale contract. It does not support to Marchel.

³ Marchel cites **Hill v. Xerox Bus. Servs., LLC**, 191 Wn.2d 751, 760, 426 P.3d 703 (2018), which involved piecework. It has no application here.

agreement may be “modified . . . from time to time,” and, “If Employee is eligible for a bonus under any such plan, Employee understands and agrees that Labor Ready has the right to change or discontinue any bonus plan at any time” (CP 697)). BR 17. She is incorrect, as explained *supra* and *infra*. Marchel also appears to believe that TrueBlue could not change the *nature* of her job duties, yet she cites no cases saying that employers are somehow prevented from changing their employees’ duties to meet the necessities of a changing business environment. *Id.* No law says that.

Marchel claims that “independent consideration” is required to “modify” an employment agreement. BR 18-19. Yet where, as here, the contract expressly says that TrueBlue may so modify *the terms and conditions of her employment, no modification of the contract is necessary*. TrueBlue simply *followed* the terms of the existing agreement. It did not modify the contract.

Marchel relies on inapposite cases where employees *did not agree* their employers could modify specific terms and conditions of their employment. *Id.* (citing ***Ebling v. Gove’s Cove, Inc.***, 34 Wn. App. 495, 498-99, 663 P.2d 132 (1983) (employer promised 35% commission, but paid 15% commission; no agreement to modify); ***Labriola v. Pollard Grp., Inc.***, 152 Wn.2d 828, 834, 100 P.3d 791

(2004) (noncompete entered *after* employment commenced required separate consideration; no agreement to modify); **McKasson v. Johnson**, 178 Wn. App. 422, 427, 315 P.3d 1138 (2013) (same); **Rosellini v. Banchemo**, 83 Wn.2d 268, 273, 517 P.2d 955 (1974) (subsequent modification agreement requires consideration)). These cases did not involve an agreement like Marchel's, in which she agreed that TrueBlue could modify her compensation and bonus structure. They do not support Marchel's argument.

Marchel almost reaches the issue at BR 19-21, but still misses the point (by misplacing her focus onto the Noncompete Agreement). The point is that the *employment* contract permits TrueBlue to modify the terms and conditions of Marchel's compensation, so TrueBlue did not breach – or even modify – that agreement by doing so. This point responds to Marchel's breach of contract argument in the trial court, which the trial court rejected. See BA 14-16. It has nothing to do with the Noncompete Agreement. *Id.*

c. The Employment Agreement is not illusory.

Marchel raises the new argument that her Employment Agreement is somehow “illusory” because she agreed to permit TrueBlue to change the terms and conditions of her *compensation*. BR 19-20. While it is true that a promise of “nothing” is illusory,

Marchel worked for and was paid by TrueBlue for seven years under the Employment Agreement. It is preposterous to suggest that she received “nothing” in return. The contract is not illusory.

Indeed, Marchel is forced to concede that “TrueBlue may reserve the right to change an employee’s compensation in certain circumstances.” BR 20. She then claims that TrueBlue “cannot enforce a reciprocal obligation against its employees if it exercises this ‘right’.” *Id.* Marchel again cites no authority supporting this claim. And all that TrueBlue “enforced” were the terms and conditions of her employment, not some new “reciprocal obligation.” Again, the Noncompete was signed years before the contractually-authorized changes in her compensation structure. They are unrelated.

Moreover, a case that Marchel cites – but fails to discuss – actually holds against her claims:

“An employer may unilaterally amend or revoke previously established policies and procedures as long as the employee receives reasonable notice of the change.” A change in the employer’s policy is effective upon “reasonable notice” to affected employees. “Actual notice is reasonable notice.” [Emphasis added.]

Duncan v. Alaska USA Fed. Credit Union, Inc., 148 Wn. App. 52, 70, 199 P.3d 991, 1000 (2008) (quoting ***Cole v. Red Lion***, 92 Wn. App. 743, 751, 969 P.2d 481 (1998) (citing

Rests., Inc., 117 Wn.2d 426, 434, 815 P.2d 1362 (1991)); **Govier v. N. Sound Bank**, 91 Wn. App. 493, 502, 957 P.2d 811 (1998)). Marchel never claimed she was denied actual notice of the provisions of her employment contract. Nor has she claimed that she was denied proper notice of the annual compensation structures. It is undisputed that, as **Branch Manager**, she received the notices regarding the Branch Manager Incentive Plans. See CP 3206-23. Controlling Washington law is contrary to her claims.

Duncan leaves Marchel to rely on nonbinding district and superior court cases, and the Commissioner's nonbinding, unpublished ruling *denying* review. BR 20-21 (citing, *inter alia*, **USI Ins. Servs. Nat'l, Inc. v. Ogden**, 371 F. Supp. 3d 886 (W.D. Wash. March 6, 2019); **Wells Fargo Ins. Servs. USA, Inc. v. Tyndell**, No. 2:16-CV-89-SMJ, 2016 U.S. Dist. LEXIS (E.D. Wash. Dec. 12, 2016); **Protégé Software Servs., Inc. v. Colameta**, 30 Mass. L. Rep. 127, 2012 Mass. Super. LEXIS 190 (July 16, 2012)). None of these cases deals with **Duncan**. Nor did the Commissioner, who mistakenly – and *sua sponte* – determined that the Employment Agreement was “illusory” simply because TrueBlue reserved the right to alter Marchel's compensation structure in order to incentivize her to do a good job.

There is nothing “illusory” about an employment contract in which the employer reserves the right to *change* an employee’s compensation structure – not eliminate it – over seven years. But the trial court failed to reach this issue. Remand is necessary.

2. TrueBlue did not misclassify Marchel, which raises genuine issues of material fact in any event.

TrueBlue explained the trial court erred in making unprecedented rulings (a) that TrueBlue misclassified her as a matter of law, despite numerous genuine issues of material fact; and (b) that alleged misclassification under Wage & Hour laws somehow “breaches” an employment contract that permits the employer to modify the employee’s compensation structure. BA 16-17. Remand is again required.

While Marchel cites the appropriate test (BR 22-23, citing ***Fiore v. PPG Indus., Inc.***, 169 Wn. App. 325, 334, 279 P.3d 972 (2012); WAC 296-128-520(4)(b)), she ignores disputed material facts on whether (1) her primary duty was office or nonmanual work directly related to management policies or general business operations; and (2) her work required the exercise of discretion and independent judgment. The evidence that Marchel was properly classified as an exempt employee because she was employed in a

bona fide administrative capacity is strong. See, e.g., CP 1351-59 (Marchel's Job Descriptions, App. A), 1495, 1501, 1570-73.

Specifically, as a Branch Manager, Marchel was primarily responsible for day-to-day management and administration, including planning long-term business and marketing strategies, serving as company representative to clients and employees, maintaining existing client relationships, researching new business contacts, and deciding on strategies for growing the business. CP 1495, 1501, 1570-73. She had discretion to run the branches as she thought best, setting short and long-term goals, and deciding how to achieve them. CP 1495, 1570. She was responsible for basic recruiting, training, disciplining, and generally managing branch staff. CP 1495, 1501, 1572-73. She also had discretion to negotiate agreements and set prices for new and existing clients, within the company's basic guidelines for profit margins. CP 1495, 1570. Her decisions were to be based on what was best for the branch. CP 1495. She could even deviate from company guidelines. CP 1495, 1570. Indeed, TrueBlue granted roughly 90 percent of Marchel's requests to deviate from standard profit margins. CP 1571.

Yet Marchel claims that TrueBlue "admitted that her primary duty was sales, a non-exempt category." BR 23 (citing Supp RP

249). This misrepresents the record. The trial court *asserted* that there was no evidence that Marchel’s primary duty – 75% of her time – was not “sales.” Supp RP 249. But there, counsel corrected the trial court, explaining that Marchel *managed* sales for the business, and distinguishing a non-exempt sales clerk, who would be covered by the regulation (*id.*, emphasis added):

[COUNSEL]: The primary duty of the branch manager is to take care of sales **for the business**. All right. **The business of that branch**. But what the distinction is here, this rule, **this hourly wage rule is designed for the retail clerk**. That somebody walks into a store, says, “I’ve got this shirt, it’s [\$]10.99, they hand it to the person at the front desk, and they say, “Please ring me up” –

THE COURT: The end – the end – I suppose we’d call it the “line salesperson” –

[COUNSEL]: Right.

This colloquy continues for several pages. Supp RP 249-54. Based on the evidence cited in the opening brief and *supra*, counsel explained: Marchel does much more than retail sales, she “builds relationships”; she visits customers’ businesses to determine their needs; she sets up entire programs for sales; she also ensures the success of branch staff, mentoring, training, and coaching them, continually providing support and strategies; not just sales, but sales support. Supp RP 249-52.

That is, Marchel was her branch's highest-ranking manager, whose primary duty was sales; but she also provided customer service, identified market trends, maximized business opportunities, and minimized risks; she created and implemented entire sales *plans* to meet or exceed her Branch's net operating income and sales budget goals. Supp RP 252. She audited customer satisfaction, including resolving complaints and developing strategies to address gap areas and other strategic planning. Supp RP 252-53. As Branch Manager, her goal – her entire reason for being there – was sales. Supp RP 253. But that does not mean she was a sales clerk. *Id.*

The trial court also asked about her authority to exercise discretion. Supp RP 254; BR 25-26. It was apparently troubled that a Branch Manager had to answer to a boss, who approved her requests to go outside standards **90 percent of the time**. *Id.*; CP 1571. Everyone answers to someone. That does not mean that they have no discretion. This is again a question of fact.

The trial court also seemed to think that **Fiore** controls the outcome here, but it is easily distinguished. There, the employee performed principally manual labor at hardware stores, maintaining displays and stocking shelves, and individual retail sales to the hardware stores' customers, none of which constituted

administrative operations. *Fiore*, 169 Wn. App. at 330-31. As noted above, the evidence here is quite to the contrary: Marchel performed *no* manual labor, but rather *managed sales* for the entire branch. Yes, she *did* sales. But she was also *the* Branch Manager.⁴

The trial-court colloquy discussed *supra* speaks volumes about the trial court's determination to resolve disputed issues of material fact on whether Marchel was the Branch Manager – in charge of all Branch operations – or a sales clerk. Summary judgment was improper. This Court should remand for trial.

3. Marchel breached her Noncompete Agreement, which is reasonable and enforceable.

As for the Noncompete Agreement, the trial court *refused to reach it* because it said that the alleged misclassification rendered the issue moot. See BA 12-13. This was incorrect for the reasons explained at BA 17-18. Simply put, Marchel signed the Noncompete as part of her *original* employment in 2007, rendering the cases about *subsequent* noncompetes irrelevant. *Id.* “The general rule in

⁴ Even where managerial employees do not spend most of their time managing, this does not render them non-exempt. Rather, the court looks to the *importance* of the employee's managerial duties *vis a vis* her other duties. See *Reed v. City of Asotin*, 917 F. Supp. 2d 1156, 1159, 1164 (E.D. Wash. 2013) (police chief who spent more than 60% of his time as a “glorified patrol officer” was still exempt under executive exemption due to the relative importance of his managing the small department).

Washington is that consideration exists if the employee enters into a noncompete agreement when he or she is first hired.” **Labriola**, 152 Wn.2d at 834 (citing **Wood v. May**, 73 Wn.2d 307, 310-11, 438 P.2d 587 (1968); **Racine v. Bender**, 141 Wash. 606, 609, 252 P. 115 (1927); **Knight, Vale & Gregory v. McDaniel**, 37 Wn. App. 366, 368, 680 P.2d 448 (1984)). The Noncompete was fair, reasonable, and for valid consideration. BA 17-18.

Marchel raises an argument that the trial court never reached regarding “[p]ost-employment restraints on a worker’s ability to obtain future employment.” BR 21-22 (citing **Emerick v. Cardiac Study Center, Inc. P.S.**, 170 Wn. App. 248, 254, 286 P.3d 689 (2012)). In **Emerick**, a doctor sought a declaration that his covenant not to compete with his former medical practice was unreasonable and unenforceable. 170 Wn.2d at 250. While the trial court granted summary judgment in his favor, this Court **reversed**.

Emerick repeats that our courts enforce noncompetes that are reasonable and lawful. 170 Wn. App. at 254 (citing **Wood**, 73 Wn.2d at 312). Courts determine reasonableness by examining:

- (1) whether the restraint is necessary to protect the employer’s business or goodwill,

(2) whether it imposes on the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill, and

(3) whether enforcing the covenant would injure the public through loss of the employee's service and skill to the extent that the court should not enforce the covenant, *i.e.*, whether it violates public policy.

Id. (citing **Perry v. Moran**, 109 Wn.2d 691, 698, 748 P.2d 224 (1987), *judgment modified on recon.*, 111 Wn.2d 885, 766 P.2d 1096 (1989)). "An employee who joins an established business gains access to his employer's customers and 'acquire[s] valuable information as to the nature and character of the business.'" *Id.* at 255 (quoting **Wood**, 73 Wn.2d at 310). This allows employees to compete with their employers after leaving their employment. *Id.* (citing **Wood**, 73 Wn.2d at 310). Equity therefore "allows the employer to require the employee to sign a noncompetition agreement." *Id.* (citing **Wood**, 73 Wn.2d at 310).

An employer has a "legitimate interest in protecting its existing client base" and prohibiting employees from taking clients. *Id.* (quoting **Perry**, 109 Wn.2d at 700). The **Emerick** employer provided its doctor "with an immediate client base and established referral sources when he moved to the area." *Id.* at 256. "Emerick had access to Cardiac's business model and goodwill." *Id.* "These

are all protectable business interests that the trial court should have considered in assessing the covenant's enforceability." *Id.*

Here too, it is undisputed that TrueBlue (1) employed Marchel; (2) trained her; (3) gave her access to its proprietary client lists and marketing techniques; (4) allowed her to access its trade secrets, including its contracts and manuals; and (5) gave her access to its clients – over her **seven years** of employment. Even after modifying her compensation structure, TrueBlue never paid her less than she previously made. See CP 1501, 1507-43 (Marchel's yearly earnings for 2013, 2014, and 2015). TrueBlue had protectable interests.

Moreover, the trial court was required to *examine* the scope of the Noncompete, not simply rule it "moot." In **Emrik**, the trial court engaged in a similarly cursory analysis, "without balancing [the employer's] actual protectable business interest against the time and geographic restrictions on [the employee's] ability to earn a living," so this Court reversed. 170 Wn. App. at 257, 259. A 25-mile noncompete radius *for one year* is eminently reasonable. CP 1178.

And in any event, our Supreme Court holds that courts must modify and enforce even unreasonable noncompetes. **Wood**, 73 Wn.2d at 312; **Emerick**, 170 Wn. App. at 254. The "court should still seek to enforce the covenant to the extent reasonably possible to

accomplish the contract's purpose." *Id.* (citing **Wood**, 73 Wn.2d at 312-13). The court specifically considers "whether partial enforcement is possible without injury to the public and without injustice to the parties." *Id.* (quoting **Wood**, 73 Wn.2d at 313).

The trial court failed to address any of these issues. Marchel's fact arguments simply emphasize the impropriety of summary judgment. This Court should reverse and remand for trial.

C. The trial court abused its discretion in failing to make appropriate *Burnet* findings and in sanctioning TrueBlue.

The trial court abused its discretion by applying a legal standard of willfulness expressly rejected in ***Jones v. City of Seattle***, 179 Wn.2d 322, 314 P.3d 380 (2013). BA 38-45. It further erred in finding prejudice, despite TrueBlue's production of 16,000 pages, 29 days after the trial court said it could *not* order full ***Burnet*** sanctions, one day before the court ordered them produced, and three months before trial, all without making specific findings about why Marchel could not prepare for trial in the remaining three months. *Id.* This Court should reverse and remand for trial.

It is striking that Marchel fails to respond to TrueBlue's key point (BA 41-42): the trial court *expressly applied* a standard of willfulness that ***Jones*** expressly rejected. Compare CP 2818 with

Jones, 179 Wn.2d at 345 (“**Burnet**’s willfulness prong would serve no purpose ‘if willfulness follows necessarily from the violation of a discovery order.’ Something more is needed”). Marchel’s only comment on **Jones** comes at BR 40-41, seemingly attempting to *apply* the **Jones** “something more” standard, despite the trial court’s express failure to do so, and claiming that the trial court did not abuse its discretion. Applying the wrong legal standard is *always* an abuse of discretion. BA 42 (citing **Council House v. Hawk**, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006) (citing **Estate of Treadwell v. Wright**, 115 Wn. App. 238, 251, 61 P.3d 1214 (2003); **Marriage of Lawrence**, 105 Wn. App. 683, 686, 20 P.3d 972 (2001))). And this Court “may not supply a willfulness finding that the trial court omitted.” **Jones**, 179 Wn.2d at 348 (citation omitted).⁵

It is also odd that Marchel claims TrueBlue presented no evidence on this issue. BR 40. TrueBlue presented *16 pages* of briefing on the relevant facts and procedure, with citations. BA 22-37. Marchel’s attempt to shift the burden to TrueBlue to disprove the **Burnet** standards is improper: a moving party seeking sanctions

⁵ Marchel tries to defend the trial court’s willfulness finding by grossly overstating the finding. *Compare* BR 37-38 *with* CP 2815. The trial court applied the wrong legal standard. CP 2818. It thus abused its discretion.

bears the burden of proof. See, e.g., **Biggs v. Vail**, 124 Wn.2d 193, 202, 876 P.2d 448 (1994). The trial court's incorrect willfulness finding requires reversal and remand for trial.⁶

Marchel purports to proffer a "summary of applicable rules," but relies on federal rule comments and **Fisons**. BR 34-35 (citing, *inter alia*, **Wash. State Phys. Exch. & Ass'n v. Fisons Corp.**, 122 Wn.2d 299, 858 P.2d 1054 (1993)). A great deal of law has intervened since **Fisons**, most importantly here, **Jones**. Marchel's omission of so much controlling law is misleading.

Marchel mentions monetary sanctions. BR 36. TrueBlue did not assign error to those. BA 2. TrueBlue again accepts responsibility for its discovery failures and accepts that monetary sanctions are justified in these circumstances.

Marchel discusses lesser sanctions. BR 38. But lesser sanctions *worked*, and the court went harsher. BA 38-40. TrueBlue appeared in court with roughly 16,000 pages of documents one day before they were due, and three months before trial. RP 78, 104.⁷

⁶ As noted at Reply Statement of the Case § B, Marchel's "Summary of Relevant Conduct" (BR 28-34) is overstated and argumentative.

⁷ Marchel claims TrueBlue did not produce these documents. BR 40 n.10. Her cites say no such thing – they were produced at the hearing, one day before they were due. RP 78. The trial court simply did not look at them.

Marchel fails to address TrueBlue's argument on prejudice. Compare BA 42-45 with BR 37-43. She has no defense for the harshest conceivable sanctions, where lesser sanctions worked, and three months remained to trial. The complete absence of findings or other justification for this ruling renders it untenable.

D. Marchel is not entitled to attorney fees or costs.

To recover fees and costs under any of her theories, Marchel must substantially prevail. She should not. And the fees awarded due to the improper summary judgment fall with that judgment.

CONCLUSION

For the reasons stated, this Court should reverse and remand for trial. TrueBlue regrets its prior errors and omissions. Thankfully, we still try cases here in Washington.

RESPECTFULLY SUBMITTED this 19th day of July 2019.

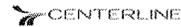
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APPENDIX

Marchel's Job Descriptions
CP 1351-59



the TRUEBLUE companies

Job Description

Job Title: Branch Manager (BM)
Department: Operations
Division: Labor Ready
Reports To: District Manager (DM)
FLSA Status: Exempt - Salaried

SUMMARY

The Branch Manager is responsible for providing leadership in assigned branch to plan and organize operational activities and execute the sales strategy to ensure operational and financial performance is maintained, profit margins and revenue goals are achieved and other company goals are met or exceeded. This position has full sales and profit and loss responsibility for the branch operation. To be successful in this role, the Branch Manager must have an entrepreneurial spirit.

The Branch Manager supports, motivates, trains, retains and holds accountable the staff that ultimately delivers net operating income, impacting shareholder value. This position reports directly to the District Manager.

ESSENTIAL DUTIES and RESPONSIBILITIES include the following.

- *Sales and Customer Service* – Identifies trends and competition in the market and takes action to maximize opportunities and minimize risks. Creates, coordinates and implements sales plans to meet or exceed net operating income and sales budget goals. Fosters and maintains the CSP Sales Culture and ensures team is aware of sales message and goals. Acts as the primary salesperson and spends 75% of workday in the marketplace selling. Responsible for auditing, measuring customer satisfaction, including resolving any complaints, and developing strategies to address gap areas. Properly assigns bill rates and workers' compensation codes. Performs job site visits as needed.
- *Ensures the Success of Branch Staff* – Ensures branch employees are a highly competent and professional customer service and sales team. Establishes personal credibility with the team by setting the example for aligning actions with company values. Provides the support and strategy to team to continually increase sales and improve customer service.
- *Mentors, Trains and Coaches* – Provides coaching and mentoring to branch staff. Assists in setting organizational and personal goals and provides support in achieving them. Ensures Customer Service Representatives are properly on-boarded after hire, including appropriate training. Partner with the Human Resources Department when needed to work through challenging conflict.
- *Best Match Worker Assignment Training* – Trains Customer Service Representatives to know how to analyze the requests and requirements of the customer and provides the best fit regarding on-demand temporary labor.
- *Strategic Planning* – Plans, directs and monitors branch activities to ensure profitability and value for Labor Ready and its shareholders. Searches for opportunities to be creative and grow and improve branch business.
- *Cultural Sponsorship* – Creates and reinforces a passionate, responsible, creative and respectful "we" culture by encouraging the heart, fostering collaboration and strengthening

others. Ensures branch team is modeling the way and living the values of TrueBlue. Works in partnership with other TrueBlue Brands in the market to achieve and/or maintain a dominant position in the market place. Recognizes that teamwork, trust and empowerment are essential to strengthen team capacity to deliver on promises and exceed expectations.

- *Operations/Regulatory Compliance* – Processes payroll for temporary workers from a completed work ticket and collects borrowed equipment. Verifies proper documentation before distributing voucher. Ensures customers understand the relationship between federal and state regulatory laws as it relates to best match worker assignments, workers compensation and wage and hour law. Follows Labor Ready processes and policies as represented in the operations manual, employee handbook or the @work site.
- *Safety* – Creates and reinforces a culture in the branch that places an emphasis on worker safety being #1. Responsible for overseeing the completion of job site visits and taking a proactive stance in the prevention of worker accidents. Plans annually to achieve worker safety ratio reductions.
- Other duties may be assigned.

ESSENTIAL VALUES

True - Demonstrate honest, direct and ethical behavior that represents the TrueBlue value of “Be True.” Communicate vertically the importance of “integrity in everything we do.” Ensure compliance with Code of Business Conduct and Ethics. Establish personal credibility and stand for something by doing what you say you will do.

Passionate - Demonstrate passion, an attitude of gratitude and build strong working relationships that encourage the heart and inspire a shared vision.

Responsible – Demonstrate a commitment to individual accountability. Measure internal customer satisfaction and develop strategic plans to address gap areas.

Creative - Be a resourceful thinker who explores all opportunities. Provide customer service with creativity and resourcefulness.

Respectful – Establish and maintain positive and productive work relationships. Respect others and their diversity as an essential component of the way we conduct business. Enlist others to share a common vision by appealing to their aspirations. Encourage the heart by recognizing key contributions and showing appreciation for individual and team excellence.

SUPERVISORY RESPONSIBILITIES

Span of control includes all employees within assigned branch, including temporary workers.

SCOPE AND ACCOUNTABILITY

Budget: This position is responsible for managing a budget. (Amount varies per location)

Customer: Temporary workers, current and prospective clients.

Accountability: Without this position there would be no branch supervision, causing turnover to increase and sales to drop.

QUALIFICATIONS

To perform this job successfully, an individual must be able to perform each essential duty. The requirements listed below are representative of the knowledge, skill, and/or ability required. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

EXPERIENCE

Three to five years of outside business-to-business sales experience along with experience in staff management and operations.

COMPUTER and SOFTWARE REQUIREMENTS

Proficient in Microsoft Office (Word, Excel, Outlook). Ability to learn and work with new programs.

OTHER QUALIFICATIONS

- Strong team leadership skills, including coaching and mentoring.
- Ability to manage multiple complex projects independently, and meet deadlines under pressure.
- Excellent communications skills; written, verbal and presentation. Ability to persuade an audience.
- Ability to effectively interact and build relationships with a diverse employee population.
- Desire to work in a collaborative team environment.
- Valid driver's license and a car that can be used for work.

LANGUAGE SKILLS

Ability to read, analyze, and interpret general business periodicals, professional journals, technical procedures, or governmental regulations. Ability to write reports and business correspondence. Ability to effectively present information and respond to questions from groups of managers, clients, customers, and the general public.

MATHEMATICAL SKILLS

Ability to calculate figures and amounts such as discounts, interest, commissions, proportions and percentages.

REASONING ABILITY

Ability to define problems, collect data, establish facts and draw valid conclusions.

CERTIFICATES, LICENSES/REGISTRATIONS, or TRAINING

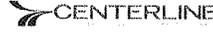
Valid driver's license.

External Sales Training Certification preferred.

WORK ENVIRONMENT and PHYSICAL DEMANDS

Employee is frequently required to stand, walk, sit, talk, and/or hear for long periods of time. The employee must regularly lift and/or move up to 10 pounds, frequently lift and/or move 25 pounds and occasionally more than 50 pounds.

This job description in no way states or implies that these are the only duties to be performed by the employee(s) incumbent in this position. Employee(s) will be required to follow any other job related instructions and to perform any other job-related duties requested by any person authorized to give instructions or assignments. A review of this position has excluded the marginal functions of the position that are incidental to the performance of fundamental job duties. The requirements listed in this document are the minimum levels of knowledge, skills, or abilities. This document does not create an employment contract, implied or otherwise, other than an "at will" relationship.



Job Description

Job Title: Branch Manager (BM)
Department: Operations
Division: Labor Ready
Reports To: District Manager (DM)
FLSA Status: Exempt - Salaried

SUMMARY

The Branch Manager is responsible for providing leadership in assigned branch to plan and organize operational activities and execute the sales strategy to ensure operational and financial performance is maintained, profit margins and revenue goals are achieved and other company goals are met or exceeded. This position has full sales, profit and loss responsibility for their branch operation. The BM supports, motivates, trains, retains and holds accountable the staff that ultimately delivers net operating income, impacting shareholder value. The Branch Manager reports directly to the District Manager.

ESSENTIAL DUTIES and RESPONSIBILITIES include the following.

- *Ensures the Success of Branch Staff* – Ensures branch employees are a highly competent and professional customer service and sales team. Establishes personal credibility with the team by setting the example for aligning actions with company values. Provides the support and strategy to team to continually increase sales and improve customer service.
- *Mentors, Trains and Coaches* – Provides coaching and mentoring to branch staff. Assists in setting organizational and personal goals and provides support in achieving them. Ensures Customer Service Representatives are properly on-boarded after hire, including appropriate training. Partner with the Human Resources Department when needed to work through challenging conflict.
- *Cultural Sponsorship* – Creates and reinforces a passionate, responsible, creative and respectful “we” culture by encouraging the heart, fostering collaboration and strengthening others. Ensures branch team is modeling the way and living the values of TrueBlue. Works in partnership with other TrueBlue Brands in the market to achieve and/or maintain a dominant position in the market place. Recognizes that teamwork, trust and empowerment are essential to strengthen team capacity to deliver on promises and exceed expectations.
- *Sales and Customer Service* – Identifies trends and competition in the market and takes action to maximize opportunities and minimize risks. Creates, coordinates and implements sales plans to meet or exceed net operating income and sales budget goals. Fosters and maintains the CSP Sales Culture and ensures team is aware of sales message and goals. Acts as the primary salesperson and spends 75% of workday in the marketplace selling. Responsible for auditing, measuring customer satisfaction, including resolving any complaints, and developing strategies to address gap areas. Properly assigns bill rates and workers’ compensation codes. Performs job site visits as needed.
- *Strategic Planning* – Plans, directs and monitors branch activities to ensure profitability and value for Labor Ready and its shareholders. Searches for opportunities to be creative, grow and improve branch business.

- *Entrepreneurial Oriented* –Self-starting and resourceful; turns problems into opportunities. Seeks new assignments and additional duties from District Manager. Demonstrates an interest in the temporary staffing industry and the overall strategy and objectives of the company.
- *Best Match Dispatch Training* – Trains dispatchers to know how to analyze the requests and requirements of the customer and provides the best fit when dispatching. Makes sure dispatch decisions do not adversely affect individuals in a protected class.
- *Operations/Regulatory Compliance* – Processes payroll for temporary workers from a completed work ticket and collects borrowed equipment. Verifies proper documentation before distributing voucher. Ensures customers understand the relationship between federal and state regulatory laws as it relates to best match dispatch, workers compensation and wage and hour law. Follows Labor Ready processes and policies as represented in the operations manual, employee handbook or the @work site.
- *Safety* – Creates and reinforces a culture in the branch that places an emphasis on worker safety being #1. Responsible for overseeing the completion of job site visits and taking a proactive stance in the prevention of worker accidents. Plans annually to achieve worker safety ratio reductions.
- Other duties may be assigned.

ESSENTIAL VALUES

True - Demonstrate honest, direct and ethical behavior that represents the TrueBlue value of "Be True." Communicate vertically the importance of "integrity in everything we do." Ensure compliance with Code of Business Conduct and Ethics. Establish personal credibility and stand for something by doing what you say you will do.

Passionate - Demonstrate passion, an attitude of gratitude and build strong working relationships that encourage the heart and inspire a shared vision.

Responsible – Demonstrate a commitment to individual accountability. Measure internal customer satisfaction and develop strategic plans to address gap areas.

Creative - Be a resourceful thinker who explores all opportunities. Provide customer service with creativity and resourcefulness.

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Span of control includes all employees within assigned branch, including temporary workers.

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QUALIFICATIONS

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EDUCATION and/or EXPERIENCE

Bachelor's Degree; or 5 years sales and management experience and/or training; or equivalent combination of education and experience.

COMPUTER and SOFTWARE REQUIREMENTS

Proficient in Microsoft Office (Word, Excel, Outlook). Ability to learn and work with new programs.

OTHER QUALIFICATIONS

- 5 years sales and management experience.
- Strong team leadership skills, including coaching and mentoring.
- Ability to manage multiple complex projects independently, and meet deadlines under pressure.
- Excellent communications skills, both written and verbal, and ability to persuade an audience.
- Ability to effectively interact and build relationships with a diverse employee population.
- Desire to work in a collaborative team environment.
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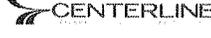
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Employee is frequently required to stand, walk, sit, talk, and/or hear for long periods of time. The employee must regularly lift and/or move up to 10 pounds, frequently lift and/or move 25 pounds and occasionally more than 50 pounds.

This job description in no way states or implies that these are the only duties to be performed by the employee(s) incumbent in this position. Employee(s) will be required to follow any other job related instructions and to perform any other job-related duties requested by any person authorized to give instructions or assignments. A review of this position has excluded the marginal functions of the position that are incidental to the performance of fundamental job duties. The requirements listed in this document are the minimum levels of knowledge, skills, or abilities. This document does not create an employment contract, implied or otherwise, other than an "at will" relationship.



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EXPERIENCE

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COMPUTER and SOFTWARE REQUIREMENTS

Proficient in Microsoft Office (Word, Excel, Outlook). Ability to learn and work with new programs.

OTHER QUALIFICATIONS

- Strong team leadership skills, including coaching and mentoring.
- Ability to manage multiple complex projects independently, and meet deadlines under pressure.
- Excellent communications skills; written, verbal and presentation. Ability to persuade an audience.
- Ability to effectively interact and build relationships with a diverse employee population.
- Desire to work in a collaborative team environment.
- Valid driver's license and a car that can be used for work.

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MATHEMATICAL SKILLS

Ability to calculate figures and amounts such as discounts, interest, commissions, proportions and percentages.

REASONING ABILITY

Ability to define problems, collect data, establish facts and draw valid conclusions.

CERTIFICATES, LICENSES/REGISTRATIONS, or TRAINING

Valid driver's license.

External Sales Training Certification preferred.

WORK ENVIRONMENT and PHYSICAL DEMANDS

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CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **REPLY BRIEF** on the 19th day of July 2019 as follows:

Co-counsel for Appellants

TrueBlue, Inc.	<input type="checkbox"/>	U.S. Mail
Matthew M. Parman	<input checked="" type="checkbox"/>	E-Service
1015 A Street	<input type="checkbox"/>	Facsimile
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July 19, 2019 - 12:11 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52665-4
Appellate Court Case Title: Trueblue, Inc., et al., Appellants v. Kelly Marchell, Respondents
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