

**FILED**  
**Court of Appeals**  
**Division II**  
**State of Washington**  
**5/13/2019 4:11 PM**  
No. 52665-4-II

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

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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.

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**RESPONDENTS' BRIEF**

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Justo G. Gonzalez (WSBA #39127)  
Lance A. Pelletier (WSBA #49030)  
STOKES LAWRENCE, P.S.  
1420 Fifth Avenue, Suite 3000  
Seattle, Washington 98101-2393  
(206) 626-6000

Attorneys for Respondents Kelly  
Marchel and Anytime Labor, LLC, dba  
LaborMax

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## **I. INTRODUCTION**

Appellant, TrueBlue, Inc., treated its employee, Kelly Marchel, with disregard when it misclassified her as exempt from overtime, unilaterally reduced her contractual pay, fired her, and then sued her and her later employer to enforce a voided contractual post-employment restraint (PER). It then treated the litigation it started, the Civil Rules, and the court's orders, with the same disregard and contempt.

## **II. STATEMENT OF THE CASE**

### **A. Identity of the Parties**

#### **1. Ms. Kelly Marchel**

Respondent, Defendant and Counterclaim Plaintiff below, is Kelly Marchel. She is a Washington resident TrueBlue hired in 2007 to work as a "Branch Manager" for its Labor Ready Northwest branded storefront in Vancouver, Washington. CP 648-49 ¶¶ 14-15. She held this position until TrueBlue abruptly fired her and replaced with a younger, far less experienced employee in November 2015. CP 464.

This dispute arises out of two documents TrueBlue required Ms. Marchel to sign: an "Employment Agreement" and an "Agreement Regarding Non-Competition, Non-Interference, Non-Solicitation, and Confidentiality." *See* CP 667-71, 697-700. The latter agreement contained post-employment restrictions and provided that the consideration for these restrictions was "the compensation and benefits described in [Ms. Marchel's] Employment Agreement." TrueBlue kept the original signed documents and did not provide Ms. Marchel with copies. CP 1340:7-12.

## **2. Appellants TrueBlue and the Labor Ready Brand**

Labor Ready and PeopleReady are service lines offered by Appellant TrueBlue, Inc (“TrueBlue”). TrueBlue is a Fortune 500 company with over \$2.7 billion in annual revenue. The Labor Ready and PeopleReady brands are temporary staffing agencies that connect workers with businesses seeking a solution to their fixed-term staffing needs. *See* [www.peopleready.com](http://www.peopleready.com) (last accessed May 13, 2019). These brands assist employers in expanding a workforce without assuming the burdens of recruitment, providing benefits, or record keeping obligations. *See id.*

TrueBlue is centrally managed. From its headquarters in Tacoma, Washington, it provides detailed policies, procedures, and corporate guidance to its operational staff. These include human resources support, pay scale and incentive structure, and organizational goals, as well as required profit margins and specific sales training for field staff, including branch managers. *See* CP 1427-28. TrueBlue organizes its employees by geographic regions under the direction of a Regional Vice-President. CP at CP 3199. These regions are subdivided into smaller geographically-based “markets.” *Id.* Each market has several branches, which are effectively the brand’s storefronts. *See* CP 1361-67.

“Market” and “District” managers lead service and sales for specific geographic regions. These managers plan, organize, direct, and monitor strategy to grow market share and improve TrueBlue’s position in specific markets. *Id.* He or she also creates sales plans for specific stores and locations within a given market. *Id.*

Under the Market and District Managers' discretion and supervision, TrueBlue's Branch Managers and Customer Service Representatives carry out TrueBlue's market strategies and sales plan. *See* CP 1350. The Branch Manager acts as the primary salesperson for the service line. *See* CP 1350-51. Customer Service Representatives are hourly employees generally responsible for matching temporary workers with job sites and ensuring customer satisfaction.

**3. Respondent Anytime Labor, LLC d/b/a LaborMax Staffing**

Respondent LaborMax Staffing is a staffing agency and occasional competitor to TrueBlue that has been servicing customers with offices in the Greater Seattle and Portland markets since 2012. CP 479-81. LaborMax hired Ms. Marchel to work out of its Tacoma branch in 2015. CP 129 ¶ 2.

**B. Procedural History**

**1. Early Proceedings**

Ms. Marchel's employment with LaborMax was no secret—TrueBlue's new Vancouver Branch Manager, Isabel Salas, knew of Ms. Marchel's new position in January 2016, immediately after Ms. Marchel began working for LaborMax. CP 1370 ¶ 3. Nonetheless, TrueBlue waited eight months—until Ms. Marchel's birthday on August 16—to seek *ex parte* a temporary restraining order against Ms. Marchel and her new employer. TrueBlue did not provide Respondents with formal or informal notice prior to the hearing, nor did TrueBlue certify why prior notice was

not feasible.<sup>1</sup> Nonetheless, the superior court granted TrueBlue's motion and allowed ordered expedited discovery. CP 90-92.

Immediately upon learning of this action, Ms. Marchel requested a copy of her employment file pursuant to RCW 49.12.240-.250, which WAC 296-126-050(3) required TrueBlue to provide within ten business days. CP 459. TrueBlue refused to do so, effectively concealing her personnel files and, specifically, her employment agreements until after the hearing on its motion for preliminary injunctive relief. CP 663-64. This made it possible for TrueBlue to make unchallenged representations in support of its motion for preliminary injunction, *compare* I VRP 12:4-17 (“if we’re talking about some mysterious employment file that’s not before you, they don’t get to make arguments about what is or what not in there”), *with* CP 697 ¶ II(B)(1) (Employment Agreement providing for binding arbitration), and it permitted TrueBlue to obtain injunctive relief: Ms. Marchel was prohibited from working within 25 miles of her home (including all of Portland and Vancouver), and LaborMax was not permitted to fairly compete. CP 635.

## **2. Summary Judgment**

The parties cross moved for summary judgment in August 2017. *See* CP 1260, 1433. At summary judgment, the superior court found that the

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<sup>1</sup> TrueBlue's counsel submitted three Declarations of Service in support of its motion, including an Amended Declaration, asserting that he personally served both LaborMax at its Vancouver office and Ms. Marchel at her residence (which was over three miles away) at the exact same time—11:20 a.m. on the date of the hearing. CP 138, 244, 246. In addition, one declaration filed in support of the TRO was not signed until 12:15 p.m.—forty-five minutes before the hearing and nearly an hour after TrueBlue's counsel certified that he personally served the defendants. CP 496, 1666-68.

2007 Agreements were bilateral contracts, such that they could not be modified without independent consideration. III VRP 273:9-11. The court also found that TrueBlue unilaterally, materially changed Ms. Marchel's pay structure to her detriment. *Id.* at 274. Thus, because TrueBlue unilaterally and materially reduced the consideration it provided in exchange for Ms. Marchel's non-compete covenant, that covenant is unenforceable. *Id.* The superior court also found that TrueBlue misclassified Ms. Marchel as overtime exempt and that this misclassification presented an alternative reason for deeming the covenant unenforceable—the consideration for the agreement was in violation of public policy. *Id.* at 271-73. The superior court found that “Plaintiffs breached their agreement with Ms. Marchel and they further misclassified her as an overtime exempt employee under RCW 49.46.130.” CP 1847.

TrueBlue moved for discretionary review and failed to support that motion with a Reply. Commissioner Bearse denied TrueBlue's motion, finding that the superior court did not commit obvious or probable error in ruling TrueBlue misclassified Ms. Marchel as overtime exempt and ruling that the non-compete covenant was unenforceable because TrueBlue's admitted, unilateral reductions to Ms. Marchel's compensation constituted a material breach of the parties' agreement. *See Slip Op.*

Only limited issues remained for trial: (1) Ms. Marchel's damages from (a) TrueBlue's willful wage withholding under chapter 49.46 RCW and (b) the wrongfully issued injunction in place from August 2016 through September 2017; (2) LaborMax's damages from that same injunction; (3)

whether TrueBlue terminated Ms. Marchel's employment in violation of public policy; and (4) TrueBlue's trade secrets misappropriation claim. Accordingly, Ms. Marchel attempted to schedule depositions of TrueBlue and the counterclaim defendants, and propounded discovery on these issues.

**3. The Superior Court Sanctions TrueBlue for Repeated, Willful, and Prejudicial Misconduct in Discovery and Enters Judgment in Favor of the Defendants**

TrueBlue failed to answer, object, or otherwise respond to Ms. Marchel's discovery requests, ignored requests for available dates to take depositions of TrueBlue personnel, then failed to produce witnesses for their properly noted depositions. CP 1809-10. Beginning in September 2017, the superior court issued a series of escalating discovery sanctions against TrueBlue, including (i) monetary sanctions, (ii) striking objections, (iii) compelling TrueBlue to fully answer discovery and certify its responses before dates certain, (iv) extending the discovery cutoff for Defendants, and (v) providing additional time for Defendants to take depositions. CP 2807-15. The superior court continued the trial date due to TrueBlue's conduct. *Id.* TrueBlue's misconduct continued.

On May 10, 2018, the superior court held a **seventh** hearing regarding TrueBlue's failure to participate in discovery and a **fourth** hearing specifically assessing CR 37 sanctions against TrueBlue.

Prior to that hearing, the superior court allowed supplemental briefing addressing the appropriate sanctions for TrueBlue's willful and prejudicial conduct. IV VRP 63. During the May 10 hearing, the superior court considered the parties supplemental briefing, *see* CP 2527, 2610, and

heard extensive oral argument from counsel, including TrueBlue's Director of Litigation. IV VRP 103-110, 123-26:19. TrueBlue admitted that its discovery misconduct to that point was both willful and prejudicial to Defendants' ability to prepare for trial. IV VRP 105:16-20; 107:18-23.

The superior court then addressed each of the *Burnett*<sup>2</sup> factors on the record. *Id.* at 118:11-123:16. In evaluating these factors and lesser sanctions, the court expressly rejected any argument or proposal that would permit TrueBlue to continue to benefit from its misconduct and/or lack of diligence. *Id.* at 122:19-20; *see also* CP 2815-21.

The superior court then entered an order striking TrueBlue's trade secrets claim and its remaining defenses, deeming Ms. Marchel's remaining claims for termination in violation of public policy and for damages admitted, and awarding double damages pursuant to the Minimum Wage Act, chapter 49.46 RCW. CP 2820-21. The superior court awarded Ms. Marchel her attorneys' fees and costs incurred in discovery under CR 37 and directed TrueBlue to pay \$93,658.50 separately from the fee award obtained in connection with the MWA, breach of contract, and WLAD claims, and in advance of any appeal. *Id.* TrueBlue agreed that the court's fee award was a proper sanction. IV VRP 107:23-108:2. However, TrueBlue has not paid Ms. Marchel any of her attorneys' fees and costs associated with discovery and has instead appealed that decision.

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<sup>2</sup> *Burnett v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

Judgment was entered against TrueBlue and in favor of Ms. Marchel on July 31, 2018 and a corrected judgment entered August 1, 2018. CP 3128-33. The superior court denied TrueBlue's request to entertain additional briefing. As it did throughout the litigation, TrueBlue ignored the superior court's orders. TrueBlue filed additional briefing, including unsupported declarations that lacked foundation and contradicted its earlier representations. *See* CP 2792-95, 3012-37, 3039-3116.

#### **4. Challenged Decisions**

TrueBlue filed a timely notice of appeal seeking review of eight separate orders. CP 3125-26. Notably, TrueBlue's notice states its intention to appeal orders that it previously stipulated to or indicated its agreement with (*Compare, e.g.*, CP 3126 ¶ 4 (appealing order granted motion to shorten time), with CP 2457 (email agreeing to shortened briefing schedule)), as well as orders not addressed in its briefing to this Court. *See* CP 3126 ¶¶ 4-6, 8.

### **III. ARGUMENT**

This case presents two straightforward issues of contract formation and employment law: (i) whether an employer may enforce post-employment restrictive covenants when (a) the employer eliminates the consideration for those agreements and (b) the employer's unilateral modification of that agreement is not supported by independent consideration; and (ii) whether Ms. Marchel qualified for the administrative exemption to Washington's overtime requirement when she was required to spend at least 75% of her time on direct sales and prohibited from exercising

meaningful discretion in her day-to-day activities. The answer to both issues is “no” under well-settled Washington law. The record below shows that TrueBlue sought to avoid answering these questions by resorting to abusive discovery tactics designed to bully and subdue a smaller competitor with crippling litigation costs.

TrueBlue’s playbook was evident from the start, when it (i) failed to provide notice to the defendants, (ii) made impossible and contradictory claims in its declarations of service, and (iii) withheld Ms. Marchel’s employee file in order to obtain injunctive relief. During discovery, TrueBlue’s practice was to select a subset of information from the documents and information requested, which comprised only the materials that it wished to produce.

This misconduct continued through two years of litigation, resulting in four sanctions hearings where the superior court attempted to mitigate the prejudicial effect of TrueBlue’s actions through lesser sanctions while marshalling the parties towards a resolution of the case on its merits.

This Court reviews the summary judgment decision *de novo* and it reviews the superior court’s discovery orders for an abuse of discretion. On this record, this Court should affirm the superior court on all issues.

**A. The Superior Court Properly Granted Partial Summary Judgment in Favor of Respondents, Dismissing TrueBlue’s Breach of Contract Claims and Finding that TrueBlue Misclassified Ms. Marchel**

Summary judgment is appropriate if the evidence, viewed in the light most favorable to the non-moving party, shows “that there is no

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c). The undisputed evidence and authority show that summary judgment should be affirmed.

First, TrueBlue’s unilateral, detrimental changes to Ms. Marchel’s duties, authority, and compensation were material and made without independent consideration, rendering her non-compete unenforceable. The consideration offered for Ms. Marchel’s non-compete agreement was “the compensation and benefits described in [her] Employment Agreement.” TrueBlue later unilaterally reduced Ms. Marchel’s compensation by more than 10% of her base salary. The parties’ agreement was a bilateral contract, yet, despite clear Washington law to the contrary, TrueBlue claimed that it could (i) reduce its obligations to Ms. Marchel without affecting her reciprocal obligations and (ii) reserve the right to modify or withdraw the consideration offered for the non-compete.

Second, the undisputed evidence presented below, supported by TrueBlue’s admissions at oral argument, reveal that TrueBlue misclassified Ms. Marchel. Her primary duty was sales, she spent more than 75% of her time on sales, and exercised little discretion in the performance of her duties. Her Employment Agreement prohibited her from binding the company in contracts of any kind. CP 698 ¶ II(D). TrueBlue failed to show Ms. Marchel fit squarely and unmistakably into a recognized exception, and the superior court’s ruling is consistent with Washington and federal decisions interpreting analogous employee classifications.

TrueBlue’s limited briefing to this Court strongly supports that the superior court’s grant of summary judgment should be affirmed.

**B. Undisputed Evidence at Summary Judgment**

**1. TrueBlue Hires Kelly Marchel at Its Labor Ready Northwest, Vancouver Storefront**

Ms. Marchel worked for TrueBlue as the Branch Manager for a Vancouver storefront from 2008 until November 24, 2015. CP 1428-29. She had over twenty-years’ experience in worker placement when TrueBlue hired her. CP 1137:22-38:21.

TrueBlue classified Ms. Marchel as salaried and exempt from overtime pay. Despite this classification, Ms. Marchel was required to spend at least “75% of her workday in the marketplace selling.” CP 1354. That is, she spent at least three quarters of her time on cold calls, emails, solicitations, and site visits. She spent her remaining time opening the store (at 5:30 a.m.), coordinating with three customer service representatives for the placement and payment of temporary workers, and keeping the branch’s budget. CP 1427-28. Ms. Marchel regularly worked between 50-70 hours per week and was expected to be on call and available to communicate with clients 24-7, though she was not compensated for this time.<sup>3</sup> *Id.*

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<sup>3</sup> The expectation that Ms. Marchel would always be available to her clients was made clear when, on one occasion, she failed to promptly respond to a client call that came in after 10:00 p.m. One of her supervisors disciplined her and threatened her with termination if she ever repeated this error—she never did. CP 465 ¶ 7.

## **2. TrueBlue Centralizes Decision Making and Operations, Eliminating its Branch Managers' Discretion and Reducing Their Compensation**

When Ms. Marchel began as a Branch Manager in 2008, TrueBlue had a recommended profit margin that Branch Managers used as a guideline in setting prices with clients. CP 1427-28 ¶ 15. In 2010, TrueBlue centralized decision making through a series of initiatives. One of these initiatives was TrueBlue's adoption of a software program called "Ellis" that prevented Branch Managers from issuing client estimates or invoices that deviated from TrueBlue's predetermined rates. CP 1430. This program alerted management if Ms. Marchel even attempted to deviate from TrueBlue's centralized programming. CP 1316.

TrueBlue incentivized Branch Managers like Ms. Marchel to achieve revenue targets; she earned almost 45% of her total pay through these incentives. *Compare* CP 1387-1423 (gross earnings), *with* CP 3209-15 (showing branch manager compensation and incentive plans by year).

These incentives pushed Ms. Marchel to excel, where her frequent 70-hour weeks turned the Vancouver office into a top performer. CP 464 ¶ 4. She met TrueBlue's ambitious revenue goals, reaching over \$2.8 million in sales with double-digit net revenue growth in 2014. CP 1347. Ms. Marchel's District Manager recognized the results of her work, observing in one evaluation that her "branch has been exceptionally successful both as a stand-alone branch and as a leader within the district." *Id.*

Between 2014 and 2015, TrueBlue unilaterally reduced Ms. Marchel's compensation package. Specifically, TrueBlue (i) cut her

incentive bonus based on revenue and (ii) imposed a new, smaller bonus tied to growth. *Compare* CP 3209, *with* 3212. The new annual growth bonus could not offset the reduction to the revenue bonus—even if she maximized this bonus, refocusing her efforts on attracting new business and achieving the extraordinary mark of 40% annual growth, she would earn less money than she did under the former compensation model. *See* CP 1451. The result of these changes was that Ms. Marchel had to work more and produce more, but for less pay.<sup>4</sup>

Ms. Marchel objected to the new bonus structure to her manager, Paul Shevchenko, explaining that she didn't understand it when it was rolled out and was afraid that she would be earning less under the new system. CP 1429 ¶ 10. He responded by stating that she was an at-will employee and “welcome to work someplace else.” *Id.*

### **3. Despite Her “Outstanding” Ratings and Performance, TrueBlue Fires Ms. Marchel**

Tatiana Reeves, another of Ms. Marchel's supervisors, consistently praised Ms. Marchel's performance. She lauded Ms. Marchel's excellent achievements, commended her for a “Fantastic Year!” and awarded Ms. Marchel with another “Outstanding” overall rating in her final performance evaluation. CP 1347. Ms. Reeves did not identify a single area of concern with Ms. Marchel's performance. *See id.*; 1347-48. Despite these accolades

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<sup>4</sup> Had Ms. Marchel repeated her “Outstanding” 2014 performance in 2015, where her branch achieved \$490,000 in annual NOI and grew total sales by 18%, she would have earned \$5,000 less than she had earned the year before. *Compare* CP 3209, *with* 3212; *see also* CP 1739 n.4; 1748.

and the strong performance of the Vancouver branch, TrueBlue fired Ms. Marchel after a bottle of wine was reportedly found in the branch's refrigerator two days before Thanksgiving. CP 1429 ¶¶ 11-12. The bottle had been a gift from Ms. Marchel to one of her Customer Service Representatives—Ms. Marchel neither intended for her colleague to open nor store the gift in the office refrigerator. *Id.* TrueBlue replaced Ms. Marchel with her younger assistant. CP 464 ¶ 6.

#### **4. Ms. Marchel Joins LaborMax Staffing**

After TrueBlue fired Ms. Marchel she immediately began her job search. She was not focused on finding a position in the same industry—she was 52, supporting her elderly father, and she just needed a job. CP 1343-44. Ms. Marchel applied for positions at Clark College, Sumner College, Adecco, and other places. *Id.* Ultimately, she applied for and accepted employment with LaborMax Staffing in Tacoma, Washington. After working at and commuting to the Tacoma branch for several weeks, Ms. Marchel transferred to the Vancouver branch to be closer to her family. CP 1341:1-9. TrueBlue knew of Ms. Marchel's new position in January 2016 but waited until her birthday (eight months later) to assert its breach of contract claims. CP 1369, 1429-30.

#### **C. The Superior Court Correctly Ruled That TrueBlue Failed to Perform Under the Parties' Contract**

As the party asserting a breach of a post-employment restraint contained in an employment agreement, TrueBlue bears two burdens. First, TrueBlue must establish the elements of a valid, enforceable contract claim

by proving (1) a valid contract exists, (2) Ms. Marchel materially breached that contract, (3) TrueBlue performed on that contract, and (4) damages due to Ms. Marchel's breach. *Lehrer v. State, Dep't of Social & Health Servs.*, 101 Wn. App. 509, 516-17, 5 P.3d 722, *review denied*, 142 Wn.2d 1014 (2000). Second, because post-employment restraints are a limited exception to Washington's profound public policy and constitutional prohibition against anti-competitive behavior, TrueBlue must also demonstrate that its post-employment restraints are both reasonable and lawful. *Sheppard v. Blackstock Lumber Co.*, 85 Wn.2d 929, 931, 540 P.2d 1373 (1975).

TrueBlue's breach of contract claim fails because TrueBlue cannot establish its own performance. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (citing *Reynolds Metals Co. v. Elec. Smith Constr. & Equip. Co.*, 4 Wn. App. 695, 483 P.2d 880 (1971)). Instead, TrueBlue materially breached its contract with Ms. Marchel, rendering the post-employment restraints in that contract void as a matter of law.

TrueBlue's contract claim also fails because it does not present argument or authority that the post-employment restraints at issue survive Washington's constitutional prohibition against restraints in trade. *See Sheppard*, 85 Wn.2d at 931. This failure alone is fatal to TrueBlue's claim.

**1. TrueBlue Cannot Unilaterally Modify a Bilateral Contract and Demand Full Performance**

TrueBlue must prove its own performance in order to claim breach by Ms. Marchel. "A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to

perform a contractual duty, discharges that duty.” *224 Westlake LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 725, 281 P.3d 693 (2012). “[A] material breach is one ‘serious enough to justify the other party in abandoning the contract . . . one that substantially defeats the purpose of the contract.’” *Id.* at 724 (citation omitted); *see also* WPI 302.03.

TrueBlue did not argue to the trial court and, amazingly, does not argue to this Court that it performed. Nor does TrueBlue contest the evidence showing that it unilaterally reduced Ms. Marchel’s contractual compensation, discretion, and authority while increasing her performance requirements.

Instead, TrueBlue argued below that its unilateral changes to Ms. Marchel’s pay only reduced it by a few thousand dollars per year, which TrueBlue—a \$2.7 billion by revenue publicly traded corporation—didn’t believe was a large enough sum for a court to find a material breach, despite comprising a difference of (at least) 10% of Ms. Marchel’s base salary. CP 1479-80. According to TrueBlue, Ms. Marchel could have earned almost as much money under the new system if she only worked harder. *Id.* TrueBlue has abandoned this argument here.

TrueBlue now asserts that this Court should enforce the 2007 PER against Ms. Marchel because it was entitled to modify the terms and conditions of her employment, including eliminating the consideration for her post-employment restraints. Br. at 16. This is not the law in Washington, which has a “long and proud history of being a pioneer in the protection of employee rights.” *Hill v. Xerox Business Services, LLC*, 191 Wn.2d 751,

760, 426 P.3d 703 (2018) (quoting *Drinkwitz v. Alliant Techsystems*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000)). The superior court properly rejected this argument and this Court must affirm.

**a. TrueBlue Materially Modified Ms. Marchel's Compensation, Paying Her Less and Demanding More**

It is undisputed that (i) the consideration for Ms. Marchel's non-competition covenant was "the compensation and benefits described in [her] Employment Agreement" and (ii) between 2014 and 2015 TrueBlue significantly cut her incentive bonuses based on NOI and provided a smaller bonus opportunity tied to annual growth that could not offset the material reduction of the revenue bonus. CP 1451. These bonuses constituted approximately 45% of Ms. Marchel's annual compensation. CP 1386-1423 (summarized at CP 1748). As a result of these changes, Ms. Marchel would have earned \$5,000 less in 2015 than in 2014 if she repeated her "Outstanding" performance from that year. *See id.* This is a significant and material decrease for an employee with a base annual salary of \$45,000.

TrueBlue imposed other changes affecting the terms of Ms. Marchel's employment. It instituted a plan to further centralize decision making, making it harder for Branch Managers to attract new business (coincidentally, attracting new business defined success under the new compensation model). *See* CP 3212. It placed additional supervisors over Ms. Marchel, stripped her of her authority to determine pricing, and deployed a software program that alerted her supervisors if she ever deviated from TrueBlue's centralized price controls. CP 1316, 1430.

**b. There Was No Independent Consideration for TrueBlue's Material Changes to the Terms and Conditions of Ms. Marchel's Employment**

TrueBlue cannot avoid the consequences of its material breach by arguing that it was entitled to unilaterally modify Ms. Marchel's agreement. The law is clear that when compensation constitutes consideration for post-employment restraints, an employer cannot reduce that compensation without affecting the employee's reciprocal obligations.

Ms. Marchel's 2007 Agreement is a bilateral contract formed by the parties' mutual exchange of promises: in exchange for Ms. Marchel's agreement not to compete, TrueBlue promised to provide the compensation described in her employment agreement. *See* CP 667. This bilateral contract cannot be modified without a subsequent meeting of the minds and exchange of new, independent consideration: In a bilateral contract, "[e]ach party is bound by his [or her] promise to the other." *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 498-99, 663 P.2d 132, *review denied*, 100 Wn.2d 1005 (1983); *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 834, 100 P.3d 791 (2004) ("[i]ndependent, additional consideration is required for the valid formation of a modification or subsequent agreement.").

"Independent consideration involves new promises or obligations previously not required of the parties." *Id.* at 834. The promise of continued employment is insufficient consideration to modify an employment agreement. *See, e.g., McKasson v. Johnson*, 178 Wn. App. 422, 427, 315 P.3d 1138 (2013). There is no independent consideration when, as here, an existing contract is modified such that either "one party is to perform some

additional obligation while the other party is simply to perform that which he promised in the original contract” or one party maintains the same duty while the other has a lesser duty. *Rosellini v. Banchemo*, 83 Wn.2d 268, 273, 517 P.2d 955 (1974); *see also Labriola*, 152 Wn.2d at 834.

The modifications to Ms. Marchel’s agreement required her to do more work for less money. TrueBlue cannot hold Ms. Marchel to her promise without keeping its own.

**c. TrueBlue’s Illusory Contract Arguments Fail**

TrueBlue’s primary contention on appeal is found in a single line of argument, which states that the parties’ employment agreement provides TrueBlue the right to unilaterally modify Ms. Marchel’s salary. *See Br.* at 16. This contention does not support TrueBlue’s argument that the non-compete agreement is enforceable.

Accepting TrueBlue’s argument that the express consideration for Ms. Marchel’s post-employment restraints could be changed at any time would undermine the parties’ agreement entirely. Such a bargain constitutes an illusory promise, which Washington courts deride as a “purported promise that actually promises nothing because it leaves to the speaker the choice of performance or nonperformance.” *Interchange Assocs. v. Interchange, Inc.*, 16 Wn. App. 359, 360, 557 P.2d 357 (1976); RESTATEMENT OF THE LAW (SECOND) OF CONTRACTS § 77 (1981). Illusory promises are “neither enforceable nor sufficient consideration to support enforcement of a return promise.” 16 Wn. App. at 360; *see also Mithen v. Bd. of Trustees of Cent. Wash. State Coll.*, 23 Wn. App. 925, 932, 599 P.2d

8 (1979) (“[a]n agreement wherein one party reserves the right to cancel at his pleasure cannot create a contract”) (quoting 1 S. Williston, *CONTRACTS*, § 105, at 418 (3d. ed. 1957)).

TrueBlue may reserve the right to change an employee’s compensation in certain circumstances, but it cannot enforce a reciprocal obligation against its employees if it exercises this “right.” A terminable-at-will employment agreement is a unilateral contract that may be amended by either party. *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 73-74, 199 P.3d 991 (2008). However, when (as here) the parties exchange promises, a bilateral contract is formed—and as discussed above, bilateral contracts may not be amended without adequate and independent consideration. *See id.*; *Labriola*, 152 Wn.2d at 834.

Washington courts, like courts around the county, recognize that an employer’s unilateral change to an employee’s compensation structure may constitute a material breach of employment agreement and bar enforcement of a non-compete. *See USI Ins. Servs. Nat’l, Inc. v. Ogden*, 2019 WL 1056544, at \*6 (W.D. Wash. Mar. 6, 2019); *Wells Fargo Ins. Servs. USA, Inc. v. Tyndell*, 2016 WL 7191692, at \*6-7 (E.D. Wash. Dec. 12, 2012); *Protégé Software Servs., Inc. v. Colameta*, 30 Mass. L. Rptr. 127, 2012 WL 3030268, at \* 7 (Mass. Sup. Ct. July 16, 2012). And, as the Commissioner noted in her ruling denying TrueBlue’s motion for interlocutory review, TrueBlue’s argument that it proffered illusory consideration does not entitle TrueBlue to assert a breach of contract claim. Slip. Op. at 12 (citing *Young v. Mastrom, Inc.*, 99 N.C. App. 120, 392 S.E.2d 446, 48-49, *review denied*,

327 N.C. 488 (1990); *In re C & H News Co.*, 133 S.W.3d 642, 647 (Tex. Ct. App. 2003)); *see also Patrick v. Altria Group Distrib. Co.*, 570 S.W.3d 138 (Mo. Ct. App. 2019) (consideration for alternative dispute resolution agreement was illusory, making the agreement unenforceable). TrueBlue does not address or distinguish these authorities in its briefing.

There are no genuine issues of material fact and the law is clear: TrueBlue breached the 2007 Agreement, thereby relieving Ms. Marchel of her post-employment obligations.

**2. TrueBlue Does Not Establish That Its Post-Employment Restraints Are Reasonable, Necessary for Its Protection, or Non-Injurious to the Public**

Incredibly, TrueBlue asks this Court to reverse the superior court's grant of summary judgment to Ms. Marchel and grant it summary judgment on its breach of contract claim but fails to address whether its post-employment restraints survive Washington's constitutional prohibition on agreements placing restraints on trade.<sup>5</sup> *See* Wash. Const. art. XII § 22; *Sheppard v. Blackstock Lumber Co.*, 85 Wn.2d 929, 931, 933, 540 P.2d 1373 (1975). Post-employment restraints on a worker's ability to obtain future employment are subject to exacting scrutiny in Washington, and TrueBlue bears the burden of establishing that its restrictions are permissible. *Emerick v. Cardiac Study Center, Inc., P.S.*, 170 Wn. App. 248, 254, 286 P.3d 689, *review denied*, 175 Wn.2d 1028 (2012). Because

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<sup>5</sup> As further evidence of Washington's strong public policy against post-employment restrictions on an employee's ability to obtain future employment, Washington passed HB 1450 on April 26, 2019. This legislation is effective January 1, 2020 and would expressly void Ms. Marchel's non-compete and penalize TrueBlue for filing this suit.

TrueBlue fails to support this request with necessary argument or authority, this Court should reject it outright.<sup>6</sup>

**D. TrueBlue Failed to Establish That Ms. Marchel Fit “Squarely and Plainly” Into any Recognized Overtime Exemption**

In a counterclaim, Ms. Marchel alleged that TrueBlue violated the Washington Minimum Wage Act, chapter 49.46 RCW, by failing to pay her overtime during the entirety of her eight-year employment. TrueBlue failed to satisfy its burden to establish an exemption to overtime and the superior court granted summary judgment in favor of Ms. Marchel.

To overcome Washington’s broad prohibition on failing to pay overtime, TrueBlue was required to show that Ms. Marchel “fit plainly and squarely” into one of the statute’s enumerated exemptions. RCW 49.46.130(2); *Mitchell v. PEMCO Mut. Ins. Co.*, 134 Wn. App. 723, 730, 142 P.3d 623 (2006), *review denied*, 160 Wn.2d 1015 (2007). TrueBlue argues that Ms. Marchel was exempt because she was “employed in a bona fide . . . administrative . . . capacity.” RCW 49.46.010(3)(c). This requires TrueBlue to prove (1) Ms. Marchel was compensated on a salary basis of not less than \$250 per week; (2) her “primary duty consist[ed] of the performance of office or nonmanual work directly related to management policies or general business operations of [her] employer or [her] employer’s customers;” and (3) her work “include[d] work requiring the exercise of discretion and independent judgment.” *Fiore v. PPG Indus.*, 169

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<sup>6</sup> Evidence and authority establishing that the restraints are unreasonable and unnecessary may be found at CP 1594-1600. Because TrueBlue does not address these elements in its briefing, these arguments are not repeated here.

Wn. App. 325, 334, 279 P.3d 972, *review denied*, 175 Wn.2d 1027 (2012) (citing WAC 296-128-520(4)(b)).

The first element is undisputed. However, TrueBlue failed to submit evidence supporting the second and third elements and admitted that her primary duty was sales, a non-exempt category. III VRP 249:7-8. The uncontested evidence supported this admission and showed that her position did not involve the exercise of discretion on matters of significance or independent judgment. This Court should affirm.

**1. TrueBlue Admitted That Ms. Marchel’s Primary Duty Was Sales, a Non-Exempt Category**

The question of an employee’s primary duty is often a question of fact. Though not dispositive, “basing the determination on that work performed by the employee for 50% of his or her time is a ‘good rule of thumb.’” *Fiore*, 169 Wn. App. at 335 (quoting Wash. Dep’t of Labor & Indus. Administrative Policy ES.A.9.4(5), at 3 (issued June 24, 2005)).

Here, TrueBlue required Ms. Marchel to “spend[ ] 75% of the day in the marketplace and selling,” TrueBlue conceded at oral argument that her primary duty was sales. CP 1354; III VRP 249:7-8 (“The primary duty of the branch manager is to take care of sales for the business”). Further, TrueBlue’s performance metrics and evaluations of Ms. Marchel were based on her achieving sales goals; it is undisputed that over 45% of her annual compensation resulted from her sales efforts. *See* CP 1748. These facts and admissions are fatal to TrueBlue’s defense; they allowed a legal determination that she was not exempt from overtime.

The remaining evidence also supports Ms. Marchel's counterclaim that she was misclassified as overtime exempt.

An employee's primary duty is 'directly related to management policies or general business operations,' WAC 296-128-520(4)(b), where the employee's work consists primarily of 'those types of activities relating to the administrative operations of a business *as distinguished from production or sales work in a retail or service establishment.*'"

*Fiore*, 169 Wn. App. at 335 (quoting Administrative Policy ES.A.9.4 (9), at 4). The exemption "applies only to persons who perform work of substantial importance to the management or operation of the business. *Id.* at 335-36 (citing Administrative Policy ES.A.9.4(9), at 4).

TrueBlue fails the "primary duty" prong of the administrative exemption because Ms. Marchel's work was not "directly related to management policies or general business operations. WAC 296-128-520(4)(b). Rather, the purpose of Ms. Marchel's position was direct sales to customers—she was required to execute (not direct or create) TrueBlue's centralized sales strategy.

There is no factual dispute regarding what Ms. Marchel's duties were—she was responsible for direct sales to individual customers and for maintaining those customers' satisfaction. These customer-facing duties are inconsistent with the administrative exemption to the MWA. She was an hourly worker entitled to overtime. This Court should affirm.

**2. TrueBlue Failed to Present Evidence Showing that Ms. Marchel Exercised the Requisite Discretion in Performing Her Duties**

TrueBlue also failed to support its argument that Ms. Marchel exercised the requisite discretion in performing any non-exempt duty. In lieu of evidence, TrueBlue offered conclusory statements regarding Ms. Marchel's duties and responsibilities, with no evidence in support.

The exercise of discretion and sound judgment "involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." *Fiore*, 169 Wn. App. at 342 (quoting Administrative Policy ES.A.9.4(9), at 5). "[I]t implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision with respect to matters of significance." *Id.* (quoting Administrative Policy ES.A.9.4(10), at 5). "Significant matters" are the kinds of decisions made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects, financially or otherwise." *Id.* (quoting Administrative Policy ES.A.9.4(11), at 8).

The record shows that TrueBlue's centralized decision making and policies expressly prevented Ms. Marchel from exercising discretion or independent judgment. To prepare an estimate, Ms. Marchel entered the client's information into TrueBlue's sales software, Ellis; it then analyzed the information against TrueBlue's centrally programmed policies to issue a quote according to the profit margin range "directed by corporate and

[TrueBlue's] sales manager." CP 1316. Ms. Marchel did not have discretion to adjust that computer-generated quote; any deviation required approval from her supervisors and any attempt to issue a lower quote would automatically alert them of a policy violation. CP 1316, 1430.

Nor could Ms. Marchel bind TrueBlue on significant matters. Her Employment Agreement expressly prohibited her from signing contracts for the company. Every customer contract obtained in discovery was executed by a higher-level manager. CP 698 ¶ II(D). Ms. Marchel did not have the authority to onboard temporary workers, or to hire or fire employees. *See* CP 1351-53. Ms. Marchel did not set TrueBlue's policies or provide input to these policies; she merely put data into a computer.

**3. TrueBlue's Anemic Briefing Fails To Offer Evidence That Ms. Marchel's Duties Fit Plainly and Unmistakably Within An Exception To The Overtime Rule**

On appeal, TrueBlue asserts that it "presented evidence on the work Marchel performed," which it argues "contradicted her claim that she was misclassified as an exempt employee." Br. at 17. TrueBlue fails to identify this 'evidence' or show how it creates a genuine issue of material fact in light of its admissions below and the undisputed evidence detailed above, dispelling any notion that Ms. Marchel "fits plainly and unmistakably" within the administrative exemption. *Drinkwitz v. Alliant Techsystems*, 140 Wn.2d 291, 301, 996 P.2d 582 (2000).

**E. The Superior Court Correctly Applied the *Burnet* Factors to TrueBlue’s Persistent, Admittedly Willful and Prejudicial Misconduct**

**1. The Trial Court Had Broad Discretion to Sanction TrueBlue**

This Court reviews a trial court’s decision to issue sanctions for an abuse of discretion. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 582, 220 P.3d 191 (2009). An appellate court will find an abuse of discretion only “on a clear showing” that the trial court’s exercise of discretion was “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006)(citation omitted).

“There is a natural tendency on the part of reviewing courts, properly enjoying the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order.” *Magana*, 167 Wn.2d at 583-84 (quoting *Nat’l Hockey League v. Metro Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976)). For this reason, and because of the strong policy interests favoring sanctions as set forth in the Advisory Comments to the Civil Rules, Washington’s appellate courts grant trial courts substantial deference in order to reduce a trial court’s reluctance to impose sanctions. *Id.* (citing *Wash. State Physicians Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). As the Washington State Supreme Court recognizes, “[m]isconduct, once tolerated, will breed more

misconduct and those who might seek relief against abuse will instead resort to it in self-defense.” *Fisons*, 122 Wn.2d at 355 (citation omitted).

## **2. Summary of Relevant Conduct**

This is an extraordinary case that involved “a pattern of intentional discovery abuse” that persisted “throughout this litigation,” where the superior court found that TrueBlue was benefiting on the merits from its refusal to participate in discovery and requiring trial to be continued twice. CP 2815. As the court found after seven hearings addressing TrueBlue’s discovery conduct and four hearings specifically addressing sanctions, TrueBlue “engaged in willful and deliberate obstruction of the discovery process” that “prejudiced Defendants’ ability to prepare for trial.” *Id.*

The following derives from the superior court’s express factual findings in its June 15, 2018 Findings of Fact and Conclusion of Law and Order Granting Defendants’ Joint Motion for Order to Show Cause. *Id.* TrueBlue has not assigned error to any of these factual findings; they are verities on appeal. *See, e.g., State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).

### **a. TrueBlue Repeatedly Fails to Answer Discovery**

Ms. Marchel propounded written discovery to TrueBlue on January 26, 2018. CP 2809-10. TrueBlue failed to respond at all and it did not produce witnesses for deposition. *Id.* TrueBlue had proper notice of every filing and discovery request in this litigation, and every deposition of

TrueBlue and its personnel was properly noted.<sup>7</sup> TrueBlue simply didn't answer or prepare its witnesses for deposition.

This was not the first time that TrueBlue failed to timely answer discovery. One year earlier, on January 18, 2017, Ms. Marchel served discovery requests with responses due on February 17, 2017. CP 2809. TrueBlue ignored that deadline. *Id.* TrueBlue then ignored several subsequent extended deadlines that Ms. Marchel offered, eventually serving responses containing boilerplate objections following a series of CR 26(i) conferences. *Id.*

On May 18, 2017, Ms. Marchel moved to compel full production. The superior court found that TrueBlue failed to properly and timely respond to discovery, granted Ms. Marchel's motion to compel discovery in part and ordered TrueBlue to supplement its discovery responses. *Id.* The superior court also awarded Ms. Marchel her attorneys' fees and costs. *Id.* Despite this Order and its own CR 26(g) certification of compliance, TrueBlue continued to withhold responsive, non-privileged documents.

**b. TrueBlue Continues to Game Discovery Through the Discovery Cutoff**

The superior court's case scheduling order provided a discovery cutoff of February 26, 2018. TrueBlue's responses and objections to Ms.

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<sup>7</sup> TrueBlue implies that Ms. Marchel acted unfairly in serving discovery on January 26, 2018, through TrueBlue's counsel of record and his assistant. Br. at 27 ("Marchel did not serve these requests on TrueBlue's new counsel until February 9"). This is a distraction without legal support. Service was in accordance with CR 5(b)(1) and 71(a), and TrueBlue's counsel acknowledged service in writing on January 26, 2018, without objection or comment. CP 2147 ¶ 2, 2152.

Marchel's second discovery requests were due that same date. CP 2810. As with Ms. Marchel's first set of written discovery, TrueBlue did not answer, respond, or object. *Id.* TrueBlue had also failed to produce three witness noticed for deposition prior to that date, and, as Respondents later discovered at a court-ordered deposition, was withholding documents responsive to Ms. Marchel's first written discovery requests, which the superior court had ordered produced five months prior. Ms. Marchel again moved to compel. *Id.*

On March 19, 2018, the superior court granted Ms. Marchel's Second Motion to Compel, ordering TrueBlue to fully respond to her discovery requests and produce responsive documents, without objection, not later than March 26, 2018. *Id.* The superior court expressly found that TrueBlue's violation of the discovery rules was willful and that its failure to participate in discovery substantially prejudiced Ms. Marchel's ability to prepare for trial. CP 2811. The superior court determined that monetary sanctions under CR 37(d) were necessary to compensate Ms. Marchel for bringing her motion to compel. Citing *Burnett v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997), the superior court reserved ruling on the harsher sanctions authorized under CR 37(b)(2). *Id.*

TrueBlue did not comply with this order. Instead, TrueBlue notified Ms. Marchel that documents and information responsive to Ms. Marchel's second set of written discovery requests would be available for inspection at their corporate headquarters in Tacoma. CP 2811. TrueBlue further stated that it would continue to withhold an unknown number of responsive

documents and information in spite of the court's order.<sup>8</sup> CP 2246. The only information that TrueBlue provided to Respondents regarding the inspection was this:

Internal storage devices containing approximately 750 terabytes<sup>[9]</sup> of data in multiple formats, accessed through various methods, and protected by multiple levels of differing security mechanisms. . .

CP 2811. TrueBlue did not respond to emails asking (1) whether TrueBlue's production was complete and (2) requesting a description of the systems and formats TrueBlue expected Respondents to inspect. *Id.*

On April 4, 2018, the superior court scheduled a hearing for April 11 to address the status of discovery. Eighteen minutes after the superior court notified the parties of this hearing TrueBlue offered to make documents available to Ms. Marchel for inspection the following morning. CP 2218. TrueBlue's invitation to review responsive records that it had allegedly gathered at its corporate headquarters was not made in good faith, it was a delay tactic. On the morning of April 5, 2018 Ms. Marchel's counsel quickly discovered that TrueBlue had not collected responsive documents and had not even asked its vendors who host some of the (unidentified) key software programs to run basic searches for responsive records. *See CP*

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<sup>8</sup> TrueBlue did not move for clarification or reconsideration of the superior court's March 19, 2018 order. To justify its continued withholding, TrueBlue instead moved for discretionary review to this Court. The motion for discretionary review was objectively frivolous—it did not cite to a single authority or to the record, and TrueBlue withdrew the motion after Ms. Marchel moved to strike and for sanctions.

<sup>9</sup> A terabyte is 1,024 gigabytes. 750 terabytes are equivalent to more than one-billion bankers' boxes worth of information.

2216-24. Ultimately, only a handful of records, including records that had been previously produced, were provided to defense counsel. *See id.*

The next day, Respondents filed a Joint Motion for Order to Show Cause on shortened time, requesting that the superior court issue the harsher sanctions provided at CR 37(b)(2). TrueBlue agreed that the motion could be heard at the hearing already set for April 11, 2018. CP 2457.

At the April 11 hearing, the superior court affirmed its March 19, 2018 findings that TrueBlue's discovery violations were willful and had substantially prejudiced Ms. Marchel's ability to prepare for trial. IV VRP 47. The court found that the April 5 inspection where TrueBlue's sought to shift the entire burden of searching through 750 terabytes of information to obtain discovery was both untimely, "objectively unreasonable," and not in compliance with the discovery rules. *Id.* The superior court further found that the CR 37(a) monetary sanctions that had been twice levied against TrueBlue were insufficient, such that "there should be additional sanctions against TrueBlue" and rejected TrueBlue's attempts to benefit from its delays by striking deposition notices that TrueBlue served well after the discovery cutoff. *Id.* at 45-57. However, citing an interest in having the case resolved on the merits, the superior court (i) continued the trial date to August 6, 2018 due to TrueBlue's desultory discovery tactics; (ii) provided TrueBlue an additional 30-days to fully answer and complete discovery that Ms. Marchel had served four months prior; (iii) directed TrueBlue to produce certain witnesses for deposition within 60-days; and (iv) ordered

the parties to submit supplemental briefing on appropriate sanctions. *Id.* at 59-68; CP 2525-26.

This did not deter TrueBlue; its misconduct continued.

On April 20, 2018, TrueBlue finally produced a witness to sit for a CR 30(b)(6) deposition. This witness was not prepared to testify to the enumerated topics and had no familiarity with the litigation: amongst other things, he did not work at TrueBlue when it employed Ms. Marchel, was unfamiliar with the policies during that time period, and he had not reviewed the documents that were the subject of the noted topics. *See* CP 2543-47, 2812. The witness did testify, however, that TrueBlue had been withholding documents and materials responsive to Ms. Marchel's first discovery requests. TrueBlue's Director of Litigation, Matthew Parman, represented that these materials were being collected in real time as they were being identified by TrueBlue's witness and that they would be provided to defense counsel. CP 2812-13. Ms. Marchel served her first discovery requests in January 2017 and TrueBlue certified that its answers and document production were complete in March 2017 and again in July 2017. CP 2813. TrueBlue's certifications were false.

On April 24, 2018, TrueBlue for the first time produced a 2010 Employee Handbook. *Id.* This was responsive to Ms. Marchel's first set of written discovery, which the superior court ordered produced on September 27, 2017. *Id.* On May 9, 2018, the day before oral argument on what additional sanctions the superior court should impose, TrueBlue produced three additional policies that were also responsive to Ms. Marchel's Request

for Production No 19, originally served on January 18, 2017 and which the court ordered produced on September 27, 2017. *Id.* The documents were not produced until after the CR 30(b)(6) deposition of TrueBlue revealed their existence. *Id.*

On May 10, 2018, the superior court held a **seventh** hearing regarding TrueBlue's failure to participate in discovery and a **fourth** hearing specifically assessing CR 37 sanctions against TrueBlue. At that hearing, the superior court found that TrueBlue failed to comply with its prior orders, that the discovery at issue was directly related to the parties claims and defenses in the litigation, and that

a pattern of intentional discovery abuse has gone on throughout this litigation. . . Plaintiffs TrueBlue, Inc. and Labor Ready Northwest, Inc. engaged in willful and deliberate obstruction of the discovery process, and this has prejudiced Defendants' ability to prepare for trial.

CP 2815.

### **3. The Superior Court Properly Exercised its Discretion**

#### **a. Summary of Applicable Rules**

“The purpose of sanctions orders are to deter, to punish, to compensate, and to educate.” *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 583-84, 220 P.3d 191 (2009). Though Washington courts have broad discretion to issue sanctions in discovery, this discretion derives from the Civil Rules, which prescribe a superior court's authority to manage discovery and sanction parties for discovery misconduct. Courts are required to work within the applicable Rule when issuing sanctions. *See*

*Fisons*, 122 Wn.2d at 340-41 (holding that CR 26(g), “rather than CR 11, CR 37, or the inherent power of the court” was applicable when addressing the conduct at issue).

Civil Rule 26(g) governs certification and authorizes a court to issue “an appropriate sanction” when certification is made in violation of that rule. Like CR 11, Rule 26(g) “is aimed at reducing delaying tactics, procedural harassment, and mounting legal costs.” *Fisons*, 122 Wn.2d at 341. This Rule is intentionally broad, as it is “designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are appropriate in a particular case and to ‘reduce the reluctance of the trial courts to impose sanctions.’” *Id.* at 339 (citations omitted). Rule 26(g) was propagated in response to “widespread recognition that there is a need for more aggressive judicial control and supervision [in discovery]. Sanctions to deter discovery abuse would be more effective if they were diligently applied . . . .” *Id.* at 342 (quoting Amendments to the Federal Rules of Civil Procedure, Advisory Committee Note, 97 F.R.D. 166, 216-19 (1983)).

Civil Rule 37 enumerates the permissible sanctions when a party (i) fails to comply with a court order compelling production and/or (ii) fails to serve answers to interrogatories or respond to requests for production. CR 37(b), (d). The Rule describes two categories of sanctions: compensatory sanctions and the “harsher” sanctions of CR 37(b)(2). The record supports entry of both tiers of Rule 37 sanctions, and the superior court correctly ruled that TrueBlue violated the Rule 26 certification requirements.

**b. The Superior Court Did Not Abuse Its Discretion in Awarding Respondents Attorneys' Fees and Costs**

This Court should reject out of hand TrueBlue's appeal of the superior court's orders awarding Ms. Marchel her reasonable attorneys' fees and costs caused by TrueBlue's failure to answer both sets of Ms. Marchel's written discovery. Compensatory sanctions are authorized for every category of discovery misconduct described under Rule 37. *See* CR 37(a)-(e) (trial court "shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorneys' fees, caused by the failure" to answer written discovery).

TrueBlue failed to answer every set of discovery Ms. Marchel submitted to it. At the superior court's direction, Ms. Marchel submitted evidence of the reasonableness of her counsel's hourly rates. CP 2182. TrueBlue did not challenge the reasonableness of these rates—in fact, TrueBlue conceded to the superior court that Ms. Marchel was entitled to her reasonable attorneys' fees and costs, as it was an appropriate sanction for TrueBlue's willful misconduct. *See* CP 2814-15; IV VRP 107:23-108:2. TrueBlue nonetheless noticed its intent to appeal these orders. CP 3126. And yet TrueBlue's opening brief does not address them. There is no reason to revisit these rulings.

**c. The Superior Court Appropriately Issued  
'Harsher' Sanctions**

The sanctions enumerated at CR 26(g) and 37(b) are warranted, consistent with the purpose of the Civil Rules, and properly ordered within the superior court's reasonable discretion.

Civil Rule 37(b)(2) authorizes a variety of sanctions, from the exclusion of evidence to default judgment. *See Smith v. Behr Process Corp.*, 113 Wn. App. 306, 324, 54 P.3d 665 (2002) (citing CR 37(b)(2)). Where a court imposes one of the "harsher" remedies under CR 37(b)(2), "the record must clearly show (1) one party willfully or deliberately violated the discovery rules and orders, (2) the opposing party was substantially prejudiced in its ability to prepare for trial, and (3) the trial court expressly considered whether lesser sanctions would have sufficed." *Magana*, 167 Wn.2d at 583-84 (citing *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)).

The superior court repeatedly found on the record, after providing opportunities for TrueBlue to explain its conduct, that TrueBlue's failure to answer discovery was willful and substantially prejudiced Ms. Marchel's ability to prepare for trial. *See, e.g.* CP 2815. The court found that, *inter alia*, (i) TrueBlue withheld an unknown number of responsive documents—some for more than a year; (ii) TrueBlue issued false certifications under CR 26(g); (iii) these violations resulted in the improper withholding of documents relevant to the parties' claims; (iv) TrueBlue's actions substantially prejudiced Ms. Marchel and LaborMax by limiting their

ability to obtain discovery, identify key witnesses, take depositions, and otherwise prepare for trial; and (v) TrueBlue's ongoing violations and failure to participate in discovery required multiple trial continuances. *Id.* Further, TrueBlue conceded that its actions were willful and prejudicial—it simply denied sanctions were justified. IV VRP 105:16-109:7.

The superior court found that monetary sanctions were insufficient, observing that (i) they had been issued three times but that TrueBlue's behavior hadn't changed and (ii) monetary sanctions were of little consequence when Ms. Marchel had already earned her attorneys' fees and costs after prevailing on her breach of contract and MWA claims at summary judgment. CP 2819. The superior court also expressly considered that it had previously applied lesser sanctions, including ordering one-way discovery, but found that still prejudiced Ms. Marchel and "rewarded" TrueBlue's misconduct because it limited her ability to take depositions and continued the trial date. IV VRP 122, CP 2820. It found that the lesser sanctions were insufficient because TrueBlue's misconduct continued. CP 2819-20.

For all TrueBlue's rhetoric regarding compliance, cooperation, and remorse, TrueBlue's conduct was otherwise. TrueBlue did not respond to counsel's repeated requests to confer about the status of discovery, it did not provide Ms. Marchel with information about its document management systems or articulate a need for clarification regarding any specific request. *See, e.g.* CP 2811. Though TrueBlue complained after responses were due about Ms. Marchel's requests for electronically stored information,

TrueBlue did not object to the requests, never proposed an e-discovery protocol, search terms, or other basic practices that parties routinely engage in regarding discovery of electronically stored information. TrueBlue's conduct contradicts its rhetoric.

**d. TrueBlue Fails To Show A Manifest Abuse of Discretion**

Throughout the litigation below, TrueBlue's approach was to flip discovery on its head, requiring Ms. Marchel to first identify specific documents in discovery that she wanted, rather than responding or objecting to Ms. Marchel's requests for categories of documents and materials under CR 34. *See, e.g.*, II VRP at 30 ("If you can ask me a specific question. . ."). This approach to discovery was roundly rejected by both *Fisons* and *Magana*. 122 Wn.2d at 354 (expressly rejecting excuse that discovery requests did not specifically identify the withheld information); 167 Wn.2d at 586 (requiring responding party to answer broad discovery request as written). TrueBlue's actions underscore the prejudice in this case: more than a year after TrueBlue certified that its answers and production were complete, Ms. Marchel was learning of specific, materially relevant documents that were responsive to her discovery requests but TrueBlue had concealed. But for Ms. Marchel's persistence, TrueBlue would have succeeded in concealing these materials. Contrary to TrueBlue's representation to this Court, these documents were not produced one day before the court had ordered their production"—they were produced 10 months after TrueBlue represented that it had produced all responsive

documents and more than seven months after the Court granted Ms. Marchel’s first motion to compel.<sup>10</sup> *Compare* Br. at 40, *with* CP 2812-13.

TrueBlue argues that its failures to answer discovery or comply with the court’s discovery orders were not willful because willfulness requires “something more” than a lack of reasonable justification or mere non-compliance. Br. at 41 (citing *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013); *Blair v. Ta-Seattle East No. 176*, 171 Wn.2d 342, 350 n.3, 254 P.3d 797 (2011)). But argument alone does not demonstrate manifest abuse of discretion. TrueBlue does not present evidence contesting the superior court’s express findings, including its finding that TrueBlue intentionally and willfully failed to answer discovery, improperly withheld responsive documents and materials, and continued to do so despite multiple court orders. And unlike in *Blair*, TrueBlue also fails to present any justification for (i) its repeated failure to respond, (ii) false certifications, and (iii) obstructionist behavior. *Compare* Br. at 41, *with* 171 Wn.2d at 350 n.3. The superior court’s thoughtful, well-supported findings and ruling satisfy the Supreme Court’s mandate that the harsher sanctions available under CR 37(b)(2) may only be applied after a finding of “a willful violation, substantial prejudice to the nonviolating party, and the

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<sup>10</sup> TrueBlue did not produce these documents at or before the May 9, 2018 hearing; it stated that it would be producing almost 16,000 new documents by the end of that day. IV VRP 77:19-78:13. That representation was also false. TrueBlue never produced 16,000 new documents, though its ultimate production in this case—after reminded by Ms. Marchel’s counsel of its obligations on May 15, 2018—comprised 16,747 Bates Labelled pages. As the superior court noted, many of these pages were duplicates. *See id.*; *see also id.* at 44-45.

insufficiency of sanctions less drastic. . . .” *Jones*, 179 Wn.2d at 343 (citing *Mayer v. Sto Indus.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006)).

TrueBlue argues the superior court’s order violates due process. The *Magana* court directly addressed this argument and rejected it:

[D]ue process is satisfied, however, if, before entering judgment or dismissing a claim or defense, the trial court concludes that there was a ‘willful or deliberate refusal to obey a discovery order [or the Civil Rules], which refusal substantially prejudices the opponent’s ability to prepare for trial.’

*Magana*, 167 Wn.2d at 591 (quoting *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 330, 54 P.3d 665 (2002)). Here, the superior court found that Ms. Marchel was prejudiced and that TrueBlue was benefiting on the merits from its misconduct, making this “the very circumstances where harsher sanctions should issue.” IV VRP 123:19-22.

Because TrueBlue’s arguments and assertions are unsupported by the record and contrary to Washington law, TrueBlue has failed to satisfy its high burden to show a manifest abuse of discretion.

**e. The Discovery Rules Are Not Merely Suggestions**

TrueBlue’s repeated, willful failure to participate in discovery and its demonstrated lack of candor undermined the core tenants of the discovery process. As the superior court stated:

I don’t think we need to wait for motions to compel. We [don’t] need to wait for a trial date to occur and be continued. We [don’t] need to have thousands and thousands—tens of thousands of dollars . . . on the requesting party’s part to obtain discovery. We don’t have to wait for those things to pass before responses can occur. And were I to allow that, I

would be lending a degree of uncertainty to litigation . . . and I would be essentially telling parties that the discovery rules are just a suggestion. You can ignore them. You can go your own way and we're not going to do much about it.

IV VRP 119:9-23. The superior court is correct.

TrueBlue's Director of Litigation repeatedly asserted to the superior court that TrueBlue is a good corporate citizen in Washington and that "this is not how we do things." IV VRP at 35:24; *see also* IV VRP 104:25-105:8. But TrueBlue's misconduct in this litigation appears completely representative of how it does things, as confirmed by the concurrent docket entries in other courts—this type of misconduct appears to be TrueBlue's regular practice in litigation:

[O]n March 31, 2017, at oral argument . . . [TrueBlue] represented to Judge Erlick . . . that no documents relating to the Reduction in Force (the purported reason why plaintiff was terminated from [TrueBlue's] workforce) existed. Judge Erlick observed that if such documents existed and were later produced, significant *Fisons*-type sanction would be imposed. [TrueBlue's] in-house counsel subsequently provided over 11,000 previously undisclosed documents, and Reduction in Force documents were found to have indeed existed. [TrueBlue] was adamant in opposing Plaintiff's January 2018 motion to compel the Hudson emails that no Hudson emails existed. After the Court entered its February 12, 2018 Order . . . and after plaintiff's expert was authorized to visit [TrueBlue's] IT Department, [TrueBlue] was forced to admit that these emails did in fact exist and over 3,000 were produced. Since March 6, 2017, [TrueBlue] has provided incomplete, evasive, and misleading responses, forcing plaintiff to incur huge expenses just to receive discovery that she is entitled to.

*Lopez v. TrueBlue, Inc.*, King County Superior Court Case No. 16-2-16538-9SEA (April 18, 2018) (granting petition for attorneys' fees); *see also id.* (February 12, 2018) (granting motion for contempt, to compel production, and for discovery sanctions in part). Washington courts do not condone such conduct.

“The purpose of sanctions orders are to deter, to punish, to compensate, and to educate.” *Magana*, 167 Wn.2d at 583-84 (quoting *Fisons*, 122 Wn.2d at 356). The Civil Rules expressly reject TrueBlue's repeated misconduct and each of these purposes are served by affirming the superior court's rulings here. This Court should affirm.

**F. Attorneys' Fees and Costs**

Finally, this Court should award Ms. Marchel her reasonable attorneys' fees and costs related to TrueBlue's appeal. RAP 18.1(a).

Ms. Marchel was awarded her attorneys' fees and costs as a prevailing party under her employment agreement with TrueBlue. *See* CP 671 ¶ II(F). She was also awarded fees and costs as a prevailing claimant under Washington's Law Against Discrimination and her misclassification claim under the Minimum Wage Act. RCW 49.60.030(2); 49.46.090(1). Further, the superior court awarded Ms. Marchel and LaborMax their fees and costs under CR 65(c), which provides for payment of costs and damages incurred or suffered from parties who are found to have been wrongfully enjoined or restrained. *See Cornell Pump Co. v. City of Bellingham*, 123 Wn. App. 226, 98 P.3d 84 (2004). Finally, and as a fifth basis for an award

of fees to Respondents, fees and costs were awarded under the Uniform Trade Secrets Act, RCW 19.108.040.

#### IV. CONCLUSION

The record at summary judgment shows that TrueBlue materially breached its agreement with Kelly Marchel, relieving her of the post-employment restraints contained in that agreement. The record also shows that TrueBlue misclassified Ms. Marchel as overtime exempt, providing an additional basis for dismissing TrueBlue's breach of contract claim. Moreover, the superior court gave TrueBlue multiple opportunities to comply with discovery and thereby avoid CR 37(b)(2) sanctions. Despite having been assessed monetary sanctions under CR 37(d), TrueBlue's conduct continued, substantially prejudicing Ms. Marchel's and LaborMax's ability to prepare for trial. This Court should not tolerate TrueBlue's documented, admittedly willful, and unrepentant misconduct, nor should Ms. Marchel be further prejudiced by TrueBlue's actions. This Court should affirm the Superior Court on all issues and award Respondents their reasonable attorneys' fees and costs on appeal.

Respectfully submitted this 13th day of May, 2019.

By: s/Lance A. Pelletier  
Justo G. Gonzalez (WSBA #39127)  
Lance A. Pelletier (WSBA #49030)  
STOKES LAWRENCE, P.S.  
1420 Fifth Avenue, Suite 3000  
Seattle, WA 98101  
(206) 626-6000

Attorneys for Respondents Kelly Marchel  
and Anytime Labor, LLC, dba LaborMax

PROOF OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the 13th day of May, 2019, I caused a true and correct copy of the foregoing document to be filed and served via appellate court web portal to the following counsel of record:

Counsel for Petitioner:

Matthew Parman,  
TrueBlue, Inc.  
1015 A. Street,  
Tacoma, WA 98402  
m.parman@gmail.com

Peter Stutheit  
Stutheit Kalin LLC  
308 SW 1st Avenue, Suite 325  
Portland, OR 97204  
peter@stutheitkalin.com

David R. Ongaro  
Ongaro, P.C.  
50 California Street, Suite 3325  
San Francisco, CA 94111  
dongaro@ongaropc.com

Kenneth W. Masters  
Masters Law Group, PLLC  
241 Madison Avenue North  
Bainbridge Island, WA 98110  
kent@appeal-law.com

Executed at Seattle, Washington this 13th day of May, 2019.

s/Lance A. Pelletier

Lance A. Pelletier (WSBA #49030)

(DRAFT) Respondent's Brief v2(2608065.3).docx

**STOKES LAWRENCE, P.S.**

**May 13, 2019 - 4:11 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  
**Superior Court Case Number:** 16-2-01556-9

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**Filing on Behalf of:** Lance Alan Pelletier - Email: Lance.Pelletier@stokeslaw.com (Alternate Email: yss@stokeslaw.com)

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Seattle, WA, 98101  
Phone: (206) 626-6000

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