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Division III  
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IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION III

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JULIE ATWOOD,

Respondent,

v.

MISSION SUPPORT ALLIANCE, LLC and STEVE YOUNG,

Appellants.

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The Honorable Douglas L. Federspiel

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**REPLY BRIEF**

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## INTRODUCTION

Erroneous hearsay rulings kept out admissible evidence, precluding MSA from straightforwardly addressing its lawful, nondiscriminatory reasons for terminating Atwood's employment. Repetitive, impermissible comments on the evidence mistakenly informed the jury that MSA's reasons for terminating Atwood were not substantive evidence. This prejudiced MSA's entire defense.

Erroneous ER 404(b) rulings let in inadmissible evidence, allowing Atwood to call MSA's former general counsel to assert her own gender discrimination claims even though they occurred long after Atwood's termination, and involved different issues, a different superior, and a different department. Still more improper 404(b) rulings allowed Atwood – through a series of supposed comparators – to claim she should have received progressive discipline she is not entitled to. Atwood admits this is how she proved her case.

Together with an erroneous jury instruction, these errors resulted in a shocking \$8.1 million verdict. But Atwood spends little time directly addressing these issues. Instead, she spends half her overlength brief telling a tale about sabotage and fabrication that is unsupported, and often contradicted, by the record. This misdirection is irrelevant. This Court should reverse and remand.

## REPLY STATEMENT OF THE CASE

Atwood's 34-page statement of facts is replete with argument and conjecture. RAP 10.3(a)(5). MSA briefly responds as needed.

Atwood's assertion that "MSA attempted to use attorney-client privilege as a sword and a shield" is not a fact, but an argument about issues not before this Court. BR 5-7. Atwood does not contest the trial court's correct rulings protecting the board meeting at issue, and granting MSA's motion precluding Atwood from eliciting testimony covered by that privilege. CP 2550-51; RP 824-25. Neither should have prevented MSA from addressing its lawful nondiscriminatory reasons for terminating Atwood, regardless of whether they were uttered by Armijo or someone else with percipient knowledge. BA 16-20; *Infra*, Arg. § A1. As addressed in the opening brief and *infra*, MSA's reasons for terminating Atwood are not hearsay. *Id.*

Atwood relatedly complains that MSA strategically prevented Armijo from testifying. BR 5-7. That is false. At the time of trial, Armijo no longer worked for MSA and had left the state. CP 2314. MSA did not oppose Atwood's efforts to depose Armijo, opposing only her unreasonable delay. *Compare* BR 5 *with* CP 2314-59.

In an overlength brief, Atwood spends five pages addressing discovery sanctions MSA elected not to appeal, despite Atwood's

and the trial court's repeat misstatements of the **Burnet** standard for willfulness.<sup>1</sup> BR 7-11; 7/20/17 RP 30, 89-90, 92; CP 11091-92, 11114-15. This is an obvious effort to prejudice this Court.

Atwood next argues that MSA was "protecting an open secret," but it was no "secret" that Young worked 40 hours a week for MSA and 16-to-20 hours a week for the City. BR 11-13; RP 2471-72. Many professionals work more than 40 hours a week.

Atwood's arguments regarding a "sexist culture" at MSA rely entirely on comparator evidence the court should have excluded. *Compare* BR 13-14 *with* BA 28-46 and *infra* Argument § B. Atwood's closing made plain her reliance on this impermissible testimony. *Id.*

Atwood's argument that MSA managers tried to damage her career is replete with unsupported assertions and misstatements. BR 16-18. Atwood cries "fake news," but she was investigated for timecard fraud, and she did violate MSA's internal time-charging policies. *Compare* BR 17 *with* RP 1809, 3840.

Without a single citation to the record, Atwood accuses Young of "secretly papering [her] record" with false allegations.<sup>2</sup> BR 17-18.

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<sup>1</sup> ***Burnet v. Spokane Ambulance***, 131 Wn.2d 848, 933 P.2d 1036 (1997).

<sup>2</sup> Atwood even resorts to name-calling, accusing Young of conspiring with his "minions" to "sabotage" Atwood. BR 17-18. The trial court admonished Atwood for similar behavior. RP 232.

These supposedly “false” allegation are entirely consistent with testimony from Atwood’s co-workers (RP 4155-56, 4273-74, 4336-38; Ex 221) and with the 2012 complaint: (1) that Atwood “created a hostile work environment through intimidation tactics, bullying, and her influence with DOE ... .”; (2) that she “openly bragged about her influence with DOE, and her ability to have people [fired]”; and (3) that she was often unaccountable, came in late and left early, and called in sick while reporting full days. Exs 10A & B; RP 1653-56. This Court should ignore these and other unsupported (and often contradicted) accusations. RAP 10.3(a)(5).

Atwood falsely claims she was “vindicated” by the 2012 investigation. BR 18 (citing RP 1709). But Robbins, upon whom Atwood exclusively relies, ended her investigation solely because HR was already handling it and would continue handling it, not because no further investigation was warranted. *Id.*

Atwood next complains that she did not receive “progressive discipline,” omitting she is not entitled to any. *Compare* BR 19 with RP 3171-72. None of Atwood’s citations indicate otherwise, nor that progressive discipline “would have been the result if any of the allegations had had merit.” BR 19. This shows the confusion Atwood

created by persuading the court to erroneously permit progressive discipline “comparators.” BA 39-46; *infra*, Argument § B3.

Also entirely without support is Atwood’s assertion that the only “real” 2013 complaint was against Young and that the 2013 complaint against her was “fabricated.” BR 20-22. There is no complaint against Young in the record, and only Moreland claims one existed. RP 1861-63. Moreland never told Young there was a complaint against him, despite insisting she informs those under investigation. RP 2060, 2561-62, 2565. MSA management and those who attended the 2013 meeting with Young denied any complaint against him. RP 3282, 3597-98, 3679-80, 3701-02, 3916.

Despite claiming she had not seen a complaint against Atwood, Moreland admitted that the “received by EEO” notation on the 2013 complaint naming Atwood looked like hers and that she was the only EEO officer at MSA. RP 2357-60. She denied knowing that the August 2013 meeting she attended was about Atwood, but acknowledged an email to her, immediately preceding the meeting, referencing “performance behaviors with this employee, Julie Atwood.” RP 2374-75; Ex 219. She admitted too that the file she was given for her investigation was labeled “Julie Atwood.” RP 2379.

Indeed, Moreland, upon whom Atwood exclusively relies for her “fabrication” theory, acknowledges that Atwood was being investigated in 2013.<sup>3</sup> RP 2075. Here too, this Court should ignore Atwood’s unsupported assertions. RAP 10.3(a)(5).

Equally without support is Atwood’s assertion that her 2010-11 performance evaluation was “fabricated.” BR 21. The so-called “fabricated” evaluation was drafted by Erich Evered, Young’s predecessor. RP 3223, 3228. After a confrontation with Evered, Atwood refused to sign it. RP 3225-29. When Young took over Portfolio Management, he re-did the evaluation. RP 3259.

Atwood relatedly refers to a “fabricated” investigation log, claiming that Robbins “tampered” with the 2013 log to “cover up the wrongful termination of Atwood.” BR 21-22 (citing RP 3637-43). Nothing was “fabricated.” Robbins openly acknowledged that she added more information to the log, as is allowed. RP 3638-39. Robbins did not remove anything, adding only that Atwood failed to obtain pre-approval for an extended absence. RP 3640-42. That was part of the 2013 complaint. Ex 215.

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<sup>3</sup> Atwood also falsely claims that MSA employees changed Moreland’s investigation of Young to an investigation of Atwood. BR 22. But again, Moreland acknowledged that her investigation continued while Robbins jointly investigated Atwood. RP 2075.

Atwood next attacks Morris Legler, who reviewed timesheets for budget-tracking. BR 22-23; RP 4344-45. Legler nowhere “admitted” he “did whatever Young told him to do.” BR 22; RP 4330-43. It is unclear why Atwood attributes exhibit 221 to Legler, or calls it a “bogus” chart of her absences. BR 22-23. Exhibit 221 is notes from a September 2013 meeting between Jensen, Beyers, Young, and Ruscitto. RP 3878-80, 3883-85, 3909, 4359-60. While a few entries are notations from Legler, many are emails or messages *from Atwood* to Legler or Young indicating unapproved absences. Ex 221. Others document communications Atwood received about her unexcused absences. *Id.* Still others document her meeting with Young after an unplanned, extended absence. *Id.* The takeaway was this: (1) consistent timecard issues; (2) numerous unauthorized absences; and (3) a pattern of going missing. *Id.* This is consistent with testimony from Young, Legler, and others, and with the 2012 complaint. RP 1696-97, 2489, 2500-05, 2549-50, 2640, 3875-86, 4330-33; Exs 10A & B, 221.

Atwood’s remaining statement of the case addresses damages and spins out her conspiracy theory of sabotage and fabrication. BR 25-34. It is unsupported.

## REPLY ARGUMENT

- A. **Repeat erroneous rulings precluded evidence of MSA's lawful, nondiscriminatory reasons for terminating Atwood's employment, preventing a fair trial.**
1. **The court erroneously excluded as hearsay MSA's lawful, nondiscriminatory reasons for terminating Atwood's employment.**

Evidence of an employer's motivation for terminating employment is not offered for its truth, so is not hearsay. ER 801(c); *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 86-87, 272 P.3d 865 (2012); *Domingo v. Boeing Employees Credit Union*, 124 Wn. App. 71, 79, 98 P.3d 1222 (2004); *Henein v. Saudi Arabian Parsons Ltd.*, 818 F.2d 1508, 1512 (9th Cir. 1987) (citation omitted). Yet many sustained hearsay objections prevented MSA's Jensen from straightforwardly addressing conversations about Atwood's performance issues, or the 2012 and 2013 complaints against her. BA 17-18. The hearsay rule cannot preclude MSA's entire defense.

Atwood attempts to distinguish *Domingo* (largely ignoring the others), arguing that the testimony at issue in *Domingo* was proffered by the person who made the decision to terminate. BR 41-42. This misses the point. A statement is hearsay only if offered to prove the truth of the matter asserted. ER 801(c). Statements not offered for the truth are not hearsay regardless of who utters them.

Atwood also misunderstands **Domingo**. There, the declarant was permitted to summarize a video she had seen, although the video had been destroyed, so could not be admitted. 124 Wn. App. at 79. The witness was not the declarant – the “person who makes a statement” – the video was. *Id.*; ER 801(c). **Domingo** is squarely on point – it allows a witness to relay out of court statements they did not utter because they are not offered for their truth.

Regarding Jensen’s testimony, Atwood argues that only Armijo or Young could testify about MSA’s reasons for terminating her, suggesting all others lacked percipient knowledge. BR 42-43. That is false. Jensen, Beyers, and Ruscitto met with Young to discuss persistent problems with Atwood, and were in the later meeting in which MSA decided to terminate her employment. RP 3878-80, 3887, 3905, 3909. They plainly had percipient knowledge of the reasons for MSA’s termination decision. *Id.*

Atwood again misses the mark in claiming that Jensen was merely attempting to recite “what others had said in violation of ER 802.” BR 42. Again, the reasons for MSA’s termination decision are not hearsay. **Domingo**, *supra*. Nor did MSA’s counsel tacitly admit anything in admonishing Jensen not to repeat what others had told him. BR 42-43 (citing RP 3842). Counsel repeatedly attempted to

explain to the court that Jensen’s testimony about Atwood’s conduct was not offered to prove the truth of the underlying conduct, but to establish MSA’s motives. RP 3839-41, 3852-53. Her direction to Jensen was simply an effort to get through testimony repeatedly disrupted with erroneous rulings. *Id.*

**2. The court’s related limiting instruction was an improper comment on the evidence.**

Following this series of incorrect rulings, MSA was finally able to convince the court that Jensen could testify about MSA’s reasons for terminating Atwood’s employment, so long as his knowledge came from sources outside the attorney-client-privileged meeting.<sup>4</sup> RP 3845, 3851-54. Atwood suggests this cured any prejudice created by the court’s initial incorrect rulings. BR 43-45. But it was this belated testimony that was met with repeat comments on the evidence. BA 19-20 (citing RP 3868-69, 3875-76, 3880-82, 3884).

When the court incorrectly stated that Jensen’s testimony about MSA’s motives “was not substantive evidence,” the jury was plainly left to infer the court’s attitude toward MSA’s case – that it

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<sup>4</sup> Atwood repeatedly asserts that anything uttered in that meeting is inadmissible. BR 3, 5-6, 7-8, 26, 41-43, 45. Although MSA strongly disagrees (CP 2360-2403, 2578-2594), this issue is not before this Court on appeal.

lacked “substantive evidence” of MSA’s reasons for terminating Atwood’s employment. BA 19-20 (citing ***Smith v. Behr Process Corp.***, 113 Wn. App. 306, 335, 54 P.3d 665 (2002)).

Atwood argues “MSA concedes the testimony was ‘not “substantive evidence” of Atwood’s behavior.” BR 44-45. That is true, but irrelevant. MSA was not trying to prove Atwood’s “behavior” but its motives for terminating her employment. RP 3851-54. Nor were the court’s comments so narrowly limited. Rather, the court expressly told the jury that Jensen’s conversations about MSA’s issues with Atwood, Young’s statements about issues with Atwood, and even meeting notes about issues with Atwood, were not substantive evidence. RP 3868, 3875-76, 3880-82, 3884; Ex 221.

It does not cure these errors that MSA stated its reasons for terminating Atwood in a letter to EEOC. BR 43. MSA is entitled to put on its defense through its key employees, not through a single letter.

### **3. These errors – and others – are prejudicial.**

Beyers could not even testify who told him to temporarily stop Moreland’s 2013 investigation. BA 21. Butler was cut off from testifying that Portfolio Management was stressed because DOE perceived poor performance. *Id.* Cherry was repeatedly prevented from addressing how MSA told Atwood she was being terminated,

an important point given Atwood's dramatic rendition. *Compare* BA 21-22, *with* BR 26-29. And multiple times, Bensussen was prevented from explaining his promotion over Fowler, necessary to counter Fowler's damaging testimony on this point. BA 22. None if this is hearsay, as none was offered for its truth. BA 20-23.

Atwood responds that this testimony was all hearsay, but she again bypasses the first inquiry – was it offered for its truth? BR 40-46; ER 801(c). No. BA 16-23. Bensussen's testimony is a useful example. Faced with an accusation that MSA discriminated against Fowler based on her gender by promoting Bensussen instead of her, MSA attempted to elicit Bensussen's testimony about why he was offered the promotion. RP 4198-99. MSA was not trying to prove the truth of that matter, but that it had lawful nondiscriminatory reasons for promoting Bensussen over Fowler. RP 4199.

#### **4. The court erred again in excluding Qualheim.**

Under 10 C.F.R. § 202.22, DOE limited John Silko's and Jon Peschong's testimony to facts – not opinions – about the "scope" of Atwood's work. CP 6623-24. But when the court allowed them to testify about Atwood's interactions with others, her job performance, attendance, and so forth (RP 1090-91), MSA sought to call Margo Qualheim to testify on rebuttal that Atwood's interactions with senior

male managers, including flirtatious behavior, were uncomfortable and “somewhat unprofessional.” BA 24-25 (citing RP 3576-78). The court erroneously excluded Qualheim under **Burnet**, which does not apply to pure rebuttal testimony. BA 25-26.

The court’s **Burnet** analysis is also erroneous. BA 25-27. Atwood invited the court to presume Qualheim would be excluded, directly contrary to **Jones v. City of Seattle**, 179 Wn.2d 322, 345, 314 P.3d 380 (2013). BA 26-27. She also misstated the law on willfulness, again leading the court into error. BA 27. The court’s analysis on prejudice and lesser sanctions is equally flawed. *Id.*

Atwood misses the point in asserting that MSA knew she would put on evidence of her work quality. BR 46. The point is that DOE witnesses were not allowed to address the quality of Atwood’s work until the court changed course at the last moment. BA 25-26. Qualheim, a DOE employee, should have been allowed to rebut.

Atwood persists in the same **Burnet** errors, relying on the wrong legal standard (“without reasonable excuse”) and a local rule that impermissibly shifts the burden to MSA. *Compare* BA 26-27, *with* BR 47. Atwood simply fails to answer MSA’s correct arguments. *Id.* And her harmless error argument fails too. BR 48. When two DOE employees speak glowingly about Atwood, it is highly relevant that a

third had a dramatically different opinion – especially one consistent with concerns at MSA that Atwood had endeared herself to DOE to MSA’s detriment. Exs 10A & B; RP 1656-57, 3576-78.

These many incorrect rulings prevented MSA from addressing its lawful reasons for terminating Atwood’s employment, fatally prejudicing its ability to put on a defense. This Court should reverse.

**B. Repeat erroneous ER 404(b) rulings tainted the trial with copious “bad-acts” testimony.**

**1. The court may admit alleged comparators only subject to an ER 403 balancing.**

Evidence of how an employer treats employees other than the plaintiff “may be admissible [under ER 404(b)] to show motive or intent for harassment or discharge.” *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 445, 191 P.3d 879 (2008). The 404(b) inquiry turns on whether the alleged comparator has: (1) a similar complaint; (2) involving the same chain of command; (3) in the same timeframe. *Brundridge*, 164 Wn.2d at 446-47. The court must balance probative value against potential prejudice. *Id.* at 444-45.

**2. The court erroneously admitted Fowler’s gender-discrimination claims.**

The court allowed former-MSA general counsel Fowler to claim gender discrimination with a single limitation: she could not claim disparate pay, but could testify that she “perceived” retaliation

after claiming disparate pay.<sup>5</sup> RP 747-50. That is, the fact of a disparate-pay claim, which Atwood did not allege, was before the jury. Dissimilarities between Fowler and Atwood were many.

Fowler and Atwood worked in different departments. RP 729; CP 4103, 4667. Fowler reported directly to Armijo, and Atwood reported to Young. *Id.* Atwood's claims center on Young, but Fowler rarely worked with Young and had no issues with him. RP 704; CP 4103, 4667. Fowler's claims center on Bensussen, whose employment post-dated Atwood's. BA 34; RP 704, 709; CP 4104.

**a. Fowler's testimony was minimally relevant, so should have been excluded.**

Fowler asserted only "later" "bad acts," which are "even less relevant" than prior bad acts, where "the logical relationship between the circumstances of the character testimony and the employer's decision to terminate is attenuated." ***Coletti v. Cudd Pressure Control***, 165 F.3d 767, 777 (10<sup>th</sup> Cir. 1999) (excluding "comparator" evidence of "bad acts" occurring after plaintiff's discharge). Again, the decision to promote Bensussen over Fowler occurred nine months after Atwood's employment was terminated. RP 4198-99; CP 4105. Fowler's complaints that Bensussen made disparaging

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<sup>5</sup> Fowler's disparate-pay claim was "unfounded." CP 5265; RP 4223.

remarks about her, or that Armijo treated her differently after her “unfounded” complaint about charitable donations, related to events over 1.5 years after Atwood was terminated. BA 31-32.

Fowler’s only accusation that occurred during Atwood’s employment is that Beyers interpreted her complaint that she was not paid enough as a gender-based complaint. BA 32-33. That is not even an adverse employment action. *Id.*

Fowler’s testimony was also minimally relevant because she and Atwood worked in different departments for different superiors. ***Brundridge***, 164 Wn.2d at 445. The only alleged commonality is Armijo. BA 35; BR 53-54. But Atwood did not even report to Armijo and complained only that he once played basketball with a male coworker during work hours. RP 3242.

Their claims are also distinct. Atwood complains about her discord with Young and about how MSA handled her termination. BA 35-36. Fowler had no issues with Young and resigned. *Id.* And unlike Fowler, Atwood did not raise issues with pay or promotions, and said nothing about Bensussen and next to nothing about Armijo. *Id.*

In short, the trial court incorrectly permitted Fowler’s testimony under its “top down” theory of corporate culture. RP 742-43; BA 36. It is insufficient that Bensussen (Fowler) and Young (Atwood)

reported to Armijo, like everyone else in management at MSA, a 2,000-person company. RP 2348, 2476, 2627, 2671, 2988-89, 3267, 3355-56, 3364-65, 3830, 4207-08, 4307. **Brundridge** requires commonality in the chain of command, timeframe, and complaints raised. 164 Wn.2d at 446-47. Fowler falls far short.

Atwood largely fails to respond. BR 53-54. In addressing Fowler, Atwood utterly ignores the **Brundridge** analysis. *Id.* The upshot of Atwood's argument is that it is enough that Fowler's claims were gender-based, regardless of the many dissimilarities between Fowler and Atwood. *Id.* That is not the law.<sup>6</sup>

**b. Prejudice outweighed probative value.**

In **Brundridge**, the court properly excluded as more prejudicial than probative comparator testimony that raised safety concerns (as had plaintiffs), but was untethered to an adverse employment action. 164 Wn. 2d. at 447. In **Coletti**, "later" "bad acts" were properly excluded as more prejudicial than probative. 165 F.3d at 777. The court should have excluded Fowler for the same reasons.

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<sup>6</sup> This Court should reject Atwood's request to affirm the admission of Fowler's testimony as a discovery sanction. BR 54. This "argument" is not even sufficient to merit consideration. **Dickson v. Kates**, 132 Wn. App. 724, 733 n.10, 133 P.3d 498 (2006). And Atwood goes far beyond asking this Court to affirm on an alternate ground, effectively asking this Court to impose a discovery sanction that was never even requested. BR 54.

Fowler's portrayal of MSA as generally "bad" for women required a trial within a trial. BA 37-38. MSA had to counter Fowler through three witnesses, though incorrect rulings rendered at least one ineffective. BA 38. And as addressed previously and below, Atwood's closing argument demonstrates how prejudicial Fowler's testimony was. BA 38-39; *infra* Argument § B4.

**3. The court erroneously permitted numerous other alleged comparators.**

**a. There was no on-record analysis.**

Although *Brundridge* plainly requires an "on the record" ER 404(b) analysis, this often never happened. 164 Wn.2d at 444-45; BA 39-41. MSA challenges the admission of exhibits 87, 140, 163, and 400. BA 40. The court did not record its ruling on exhibits 163 and 400, and ruled only that exhibit 140 was "close enough." RP 979-81, 1208-11, 3302-03; CP 6745.

Atwood's response that the court considered ER 404(b) misses the point. BR 55-56. Failing to address it on the record impermissibly precludes effective review. 164 Wn.2d at 445.

**b. Many involved vastly different times, departments, management, and circumstances.**

Atwood placed particular emphasis on exhibit 400, an investigative summary report of an accusation that MSA Vice

President of Site Infrastructure Scott Boynton was “sexually harassing” a teamster’s wife off duty at a local bar. Ex 400; BA 41-42. The alleged incident, involving a different department and a different manager, occurred 1.5 years before Atwood was terminated. Ex 400 at 2.

Atwood also focused on exhibit 87, a “last chance letter” used to discipline a male union member. Ex 87; RP 3337-39. Atwood is not a union member, so was not entitled to progressive discipline. RP 3172, 3176. Progressive-discipline incidents were supposed to come in only to show “the importance of timeliness,” “not as comparators.” RP 3179-80, 3333. Yet over numerous objections, Atwood used exhibit 87 to demonstrate that a male employee received progressive discipline, while she did not. RP 3337-39. There, the employee at issue worked in a different department, for a different chain of command, and the event took place more than two years after Atwood was terminated. Ex 87.

Exhibit 163 was a written warning issued nearly three years before Atwood was terminated, involving a different chain of command. Ex 163. The incident in exhibit 140 – a two-week suspension – occurred over three years before Atwood was

terminated, and Atwood could not even establish the department or the chain of command. Ex 140; RP 3345.

In short, none of these exhibits satisfy **Brundridge**, so none should have come in. BA 41-45. Yet Atwood completely ignores **Brundridge**. BR 56-57. Atwood does not address exhibit 87 at all. BR 55-56. As to exhibits 140 and 400, she claims only that the “allegations were similar” to her claims, but “under Armijo” neither was terminated. BR 56.<sup>7</sup> Atwood does not state the alleged similarity and there is none. Nor is there any indication Armijo was involved in the matters at issue in 140 and 400. *Id.*

Atwood’s only response to exhibit 163 is that MSA acknowledged that its purpose was to demonstrate that a non-union employee received progressive discipline. BR 57. This misses the point. Atwood used exhibit 163 and others to evade the court’s limitation on progressive-discipline evidence. RP 3179-80, 3333. Atwood’s examinations and closing made plain her impermissible comparison between herself and those who received progressive discipline. RP 3179-80, 3333, 4736, 4714-15, 4732.

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<sup>7</sup> Contrary to Atwood’s suggestion, MSA did not appeal from the admission of exhibits 68, 69, 73, 82, 84, 86, and 88-90. BA 40.

**c. Prejudice greatly outweighed any probative value.**

Atwood drew the connection, alleging that male “comparators” received lesser discipline for offenses worse than hers. RP 3327, 3337-39, 3341-42, 3344-45. She emphasized her point in closing. RP 4714-15, 4732. She does not respond.

**4. These errors were not harmless, particularly where Atwood admitted her case rested on comparators.**

This Court should reject Atwood’s harmless-error arguments, as they turn the standard on its head. BR 36-40. Evidentiary errors under ER 404(b) are grounds for reversal where, as here, “within reasonable probabilities, the error materially affected the outcome of the trial.” ***State v. Jackson***, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); ***Lutz Tile, Inc. v. Krech***, 136 Wn. App. 899, 905, 151 P.3d 219 (2007). The error is harmless only if the improper evidence is “of minor significance” in comparison to the evidence as a whole. ***State v. Bourgeois***, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). In deciding harmless error, this Court may consider how the case was argued to the jury. ***State v. Brown***, 147 Wn.2d 330, 332, 58 P.3d 889 (2002).

The risk of ER 404(b) evidence is that it will be used to show not the merits of a plaintiff's claim, but that a company is "bad" in general. **Brundridge**, 164 Wn. 2d at 447. Atwood made sure of it.

Atwood's reliance on comparators was overt (RP 4906-08):

Comparators. This is how we prove this case. We have proved it with comparators.

...

That's our case. That's our discrimination case.

Through Fowler, Atwood accused MSA of "ganging up on the women," asserted a "cultural problem under Armijo," and claimed Fowler saw a "disturbing" "corporate culture" of gender discrimination. RP 4728-29, 4905-06. Through the others, Atwood invited the jury to question why MSA did not "give[] her progressive discipline" *she was not entitled to*. RP 3171-72, 4714-15, 4732, 4736. She directly asked the jury to compare her to Boynton. RP 4907. Driving her point home, she argued Young was "setting her up to get her out ... no progressive discipline." RP 4736.

Atwood used these many harmful errors to her fullest advantage. This Court should reverse.<sup>8</sup>

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<sup>8</sup> Atwood essentially ignores MSA's cumulative error argument. BA 46-47; BR 58. See *Supra*, Argument § B4.

**C. The court erroneously instructed the jury on damages.**

It is legal error to instruct the jury to calculate front pay to retirement. **Blaney v. Int'l Ass'n of Machinists & Aerospace Workers**, 151 Wn.2d 203, 210-11, 87 P.3d 757 (2004). The error lies in denying the jury discretion to decide Atwood's employment may not have extended to retirement. **Blaney**, 151 Wn.2d at 210. The instruction misstates the law, so prejudice is presumed. *Id.* at 211.

Evidence Atwood would have left MSA before retirement need not be "conclusive," nor did the jury necessarily reject it. BR 59. The instruction prevented the jury from considering the evidence that Atwood would not have remained at MSA. BA 47-49. The presumption that the terminated employee would have remained in her former employment until retirement applies only when there is no evidence to the contrary. *Id.*; BR 60; **Brundridge**, 164 Wn.2d at 456. The error was harmless in **Blaney** only because there was no evidence the employee would have left before retirement. 151 Wn.2d at 211-12. There was considerable evidence Atwood may not have remained at MSA. BA 48-49. The question was for the jury.

It does not cure this error to have included the language "to retire or fully recover from the continuing effects of the wrongful discharge." BR 59-60. Atwood's reliance on **Brundridge** is

misplaced, where the instruction was not challenged at trial or on appeal. 164 Wn.2d at 455. The language Atwood relies on does not fix the problematic use of the word “retire” because it does not give the jury discretion to decide the duration of Atwood’s employment. **Blaney**, 151 Wn.2d at 210; See WPI 330.82 note.

**D. The court erroneously denied MSA’s motion for new trial or remittitur.**

At a minimum, the trial court should have remitted the \$8.1 million verdict. BA 49-50; **Bunch v. Dep’t of Youth Servs.**, 155 Wn.2d 165, 175, 116 P.3d 381 (2005); RCW 4.76.030. Every indication was that Atwood could have found work, eliminating wage loss. BA 49. And \$6 million for emotional distress is shocking, where Atwood’s own experts recommended therapy for one-to-four years for her “institutional betrayal and Loss of Just World Syndrome.” RP 2033; BR 49-50.

Atwood argues the verdict is within the range of the evidence, without addressing the issue. BR 62-63. Awarding Atwood her salary to age 70 is outside the range of the evidence, as nothing suggests she is incapable of working or unemployable. BA 49-50. Awarding \$6 million for emotional distress is outside the range of the evidence as Atwood acknowledges that her emotional distress damages

“began” the day her employment was terminated, and her own expert expected “she would be cured” within “several years.” BR 22-28.

This Court should remand for a new trial or remittitur.

### **CONCLUSION**

This Court should reverse and remand for a new trial. At a minimum, this Court must reverse the damages award.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of April 2019.

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