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IN THE WASHINGTON COURT OF APPEALS
DIVISION THREE

JENNIFER TYLER, an individual

Appellant,

v.

CHELAN COUNTY, by and through its agency the CHELAN COUNTY
SHERIFF'S OFFICE, a Washington municipal corporation.

Respondent,

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred by denying Plaintiff's Motion Requesting Award on Court's Decision on Sanctions Entered 12/29/17. CP 990.

Assignment of Error No. 2: The trial court erred by denying Plaintiff's Motion for Supplemental Award for Adverse Tax Consequences. CP 989.

Assignment of Error No. 3: The trial court erred by denying Plaintiff's Motion for Award of Post-trial Fees and Costs and Entry of Supplemental Judgment. CP 1032.

II. ISSUES RAISED

Issue No. 1: Whether the trial court abused its discretion under CR 26 when it refused to impose sanctions after finding that Chelan County Sheriff's Office violated its discovery obligations and sanctions were appropriate.

Issue No. 2: Whether Appellant Tyler is entitled to a supplemental award for adverse tax consequences under Blaney v. Ass'n of Workers, 151 Wn.2d 203, 87 P.3d 757 (2003) for all the economic damages she suffered as a result of Chelan County Sheriff's Office's discriminatory acts.

Issue No. 3: Whether the trial court abused its discretion when it denied all attorney fees and costs expended after the date of the jury verdict, including post-trial motions where Tyler was statutorily entitled to fees and costs as the prevailing party.

Issue No. 4: Whether Appellant is entitled to attorney fees on appeal.

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

Jennifer Tyler (Tyler) began her law enforcement career as a fully commissioned deputy in 2002 in Oklahoma. RP 297. She was employed at Custer County Sheriff's Office from 2003-2006. RP 300. During her employment there, she and nearly a dozen other women were sexually assaulted by the elected Sheriff Mike Burgess (Burgess). RP 303-304; 368-369. In 2006, before any criminal case was initiated against Burgess, Tyler moved to Washington to accept a job with the Chelan County Sheriff's Office (CCSO). RP 310. As a lateral hire, Deputy Tyler completed a short field training (FTO) before being released to work as a solo patrol deputy. RP 312, 319-323. During this time in her employment at CCSO, Tyler felt like "a new family member." RP 312. She described the things that made her feel welcome: "the camaraderie, the kindness, the smiles," talking with deputies about their families, and social events. RP

331-333. She also received excellent performance reviews and it was reflected in her evaluations, which emphasized that she was a “team player.” RP 319, 321-323, 334-340, 342-346, 349-353.

In April 2008, Burgess was charged in Texas County, Oklahoma with 36 criminal counts of second-degree rape, sodomy, bribery, and sexual battery against Tyler and more than 11 women, including defendant participants in a Cutler County Drug Diversion Court Program. RP 354-356. In August 2008, Tyler flew to Oklahoma under subpoena and testified in pre-trial criminal hearings against Burgess. RP 362.

After her testimony, Tyler returned to a work environment that had changed drastically overnight. RP 365-366. She described the environment at CCSO as “cold and distant . . . There was a definite wall. It got worse over time, but there was a definite, notable division.” Id. When Tyler asked her partner, Mike McLeod, what was going on, he told her “They’re afraid you’ll take their houses.” RP 367, 731, 733. McLeod was making the point that “being a female officer, she had more power than regular male officers, in that if she claimed sexual harassment or an officer said the wrong thing, they could potentially be sued.” RP 733. He described it as “an ongoing theme of law enforcement.” Id. Tyler later returned to Oklahoma to testify at Burgess’s criminal trial and in the months following her testimony, her CCSO colleagues and superiors

began refusing to work with her and her direct supervisors began scrutinizing her and holding her to a different standard than her male colleagues. RP 371; 372-378; 386-387. This heightened scrutiny was evident in the performance evaluations that followed her testimony, which were starkly negative in comparison to her previous evaluations. RP 379-381, 384-385; 393-399. When Tyler contested her 2009 negative evaluation and meeting was arranged, her supervisor refused to meet with her, concerned she “was trying to set him up.” RP 406-409, 413-414. During a discussion about rescheduling the meeting, Lieutenant Kent Sisson (Sisson) told her that “[n]o one wants to work with you.” RP 411-412. When Tyler became upset at this statement, she was immediately placed on administrative leave and reprimanded for displaying disrespect to a superior and insubordination. RP 414-417.

After this incident, Tyler’s new supervisor, Sgt. Andy Zimmerman (Zimmerman), approached her and asked her to submit a complaint about Sisson. RP 421-423. According to Zimmerman, Sisson had disciplined him unfairly because of his sexual orientation, but human resources told Zimmerman there was nothing they could do because he was not a woman. RP 422. Tyler believed that Zimmerman asked her to complain because she had had been willing to testify against Burgess so “maybe [she’d] be willing to do it here for him.” CP 423. Deputy Tyler told him

no. Id. From that point forward, Tyler's relationship with Zimmerman changed. RP 426. He began scrutinizing her work, holding her to higher standards than were required of other deputies under his command, and he refused to assist her as a sergeant normally would. RP 426-427; 444-448. In July 2010, Tyler complained to two superiors about the adverse treatment. RP 430, 437-439; 442-443. She also complained directly to Zimmerman that he was treating her differently than the men on the squad. RP 430; 439-442. Tyler complained that she was being isolated from her squad, which created safety issues:

I don't really care that I wasn't invited along. But I'd like to have known how far out they [her entire squad] were. . . . Because if I had trouble in Leavenworth, my backup was coming from fricking East Wenatchee." RP 449.

Tyler's complaints were not investigated and she was told she "needed proof" of discrimination. RP 449-550. Finally in August 2010, Tyler obtained an email showing that Zimmerman was singling her out and subjecting her to stricter deadlines than others on her squad. RP 450-456. She forwarded the email to Zimmerman and his superiors as proof of discriminatory treatment. RP 456-457. Within days of her complaint, CCSO initiated a series of internal investigations against Deputy Tyler and placed her on administrative leave. RP 461-466. As a result of these investigations, CCSO terminated Tyler's employment on November 1,

2010. RP 467-468.

Tyler challenged her termination through her union's grievance process. Arbitration proceedings were held on November 15-16, 2013 with arbitrator Martin Henner. RP 470. The issues before the arbitrator did not include claims of discrimination. RP 472. Arbitrator Henner concluded that Tyler's termination did not meet the standards of just cause under her union's Collective Bargaining Agreement (CBA), and he ordered her reinstated to her position with retroactive pay and benefits. RP 471-483. CCSO paid Tyler \$154,603 for back-pay in one lump sum. CP 401, 434.

Tyler returned to work on May 1, 2013 under Sheriff Brian Burnett (Burnett). RP 486. During her first week, she was not provided a car, uniform, or office keys, and she was ordered to sit in the lunchroom and read policy. RP 498-499. She was told to report the Sheriff's secretary. RP 496. Despite the fact that CCSO knew that a number of officers had previously and were still refusing to work with Tyler, Burnett took no action to remedy the work environment that led to Tyler's unlawful termination. RP 759-762; 1175. In addition, Burnett told Tyler she would not be permitted to return to her position as a solo deputy until she completed a 40-shift FTO program, the same program required of rookie officers. RP 491-492. During the FTO, Tyler was treated like a rookie

and called a rookie. RP 519-520. The second week after reinstatement, Tyler was subjected to brutal defensive tactics training that she described as “humiliating” and “more like a punishment. RP 501-05. The training left her with bloody wrists and severe bruising. RP 506-507; 558-559. The bruising was not from repetition, but from a forceful strike applied by instructor Dan McCue during a control maneuver that should not involve force. RP 506-510; 561-563. At trial, Tyler testified that she had never before or since suffered these types of injuries from a DT training. RP 510. When shown a photo of the injuries, Deputy Scott Moen, who went through the 40-shift FTO at the same time as Tyler in 2013, testified that he had never suffered this type of bruising or bloody wrists in a DT training. RP 828-829. Tyler completed the FTO program, and she was released as a solo deputy on July 31, 2013. RP 520-521.

After the FTO, CCSO refused to reinstate Tyler to the night shift—a shift that not only paid more, but one that Tyler had exclusively worked prior to her termination so she could care for her disabled daughter during the day. RP 521-523. After she was denied this shift, her day-shift supervisor, Bruce Long, arranged for her to switch shifts with a colleague, Deputy Moody, who wanted to work days. RP 523-524. After this was arranged, CCSO suddenly and inexplicably prevented the switch. RP 524-527.

After her reinstatement, Tyler was the subject of numerous complaints. RP 528. These complaints led to several informal reprimands of Tyler, called Notable Action Forms (NAFs). RP 528. In addition to the NAFs, Tyler's fellow deputies were refusing to work with her and refusing to back her up on calls where CCSO policy required that two officers respond for safety reasons. RP 538-542. Even Rivercom operators noticed that deputies were refusing to back Tyler up. RP 1248-1258. They often had to ask several times for back-up, and there were instances when Tyler was forced to respond to calls without proper back up. RP 1255-1258. As a result of these events, Tyler filed this lawsuit.¹ CP 1-7.

B. PROCEDURAL FACTS LEADING UP TO TRIAL

1. CCSO Receives Notice of Claims

On October 28, 2013, Tyler submitted a state-required Claim for Damages form to Chelan County, alleging gender discrimination², wrongful termination, and retaliation under the Washington Law Against Discrimination. CP 24, 32-36; CP 49. The tort form provided express notice that Tyler was alleging that CCSO retaliated against her for testifying against Burgess and complaining about discrimination when (1)

¹ Tyler continued to be employed at CCSO up to and including trial. RP 285. Incidents of retaliation continued to occur up to the discovery cutoff (30 days before trial), and some of these incidents were presented to the jury at trial. RP 172-191.

² This claim was dismissed at summary judgment.

it terminated her employment in 2010, and (2) “subject[ed her] to a steady onslaught of reprimands and other discipline” after she was reinstated in 2013. *Id.*; CP 35, 49. She named a number of individuals involved in the retaliation, including direct supervisors. CP 35. Tyler filed a legal complaint on December 30, 2013 and served the complaint on CCSO. CP 1-7.

2. Tyler Issues Discovery Requests, including Requests for Personnel and Managerial “Drop Files”

On November 17, 2014, Tyler served two separate discovery requests for production of her complete personnel file and her supervisory files (a.k.a “drop files.”). CP 9, 38-67; 170. It is undisputed that a supervisor file or “drop file” “consists of material relevant to the preparation of the employment evaluation and/or documentation of oral counseling sessions, commendations, training records, or other records pertaining to an employee’s performance.” CP 170. CCSO did not object to production of personnel or supervisory files and stated in its response that “[a]ll managerial files are contained in the personnel [f]ile.” CP 62-63. The relevant requests and responses are as follows:

REQUEST FOR PRODUCTION NO. 5: Provide the personnel files of Plaintiff.

RESPONSE: See the personnel files for Jennifer Tyler attached hereto as Request for Production number 5.

REQUEST FOR PRODUCTION NO. 6: Provide the supervisory and/or managerial files of Plaintiff.

RESPONSE: See Request for Production number 5 documents. All managerial files are contained in the personnel File. Any files separate from the personnel file and maintained by a supervisor are destroyed on an annual basis and only to be used for evaluation purposes.

CP 62-63 (emphasis added). Defendant stated that it conducted a diligent search and a diligent inquiry for all requested documents:

INTERROGATORY NO. 2.: Prior to answering these interrogatories, have you made due and diligent search of the Defendant's books, records, and papers and due and diligent inquiry of the Defendant's agents and employees?

ANSWER:
Yes.

CP 41. At no time in this litigation, even after supervisor “drop files” were specifically requested in written discovery, did CCSO instruct Tyler’s supervisors or any other Chelan County Employee that they had an obligation to preserve documents that were requested in discovery. CP 100-101; CP 26. The relevant request and response is as follows:

REQUEST FOR PRODUCTION NO. 3: Provide any and all documents reflecting any and all instructions provided to any Chelan County employee regarding retention of documents in anticipation of this litigation.

RESPONSE: Chelan County does not have any such policy and does not send anything in writing or otherwise, asking employees not to destroy or purge documents that relate to litigation. In reference to any documents/files held

by the Sheriffs Office Chelan County does run the Sheriffs Office so they do not advise on any file retention schedules or policies they may/may not have unless asked by them. The Sheriff's office did not send anything out in writing, nor has a policy doing so.

CP 100-102. These responses are dated March 29, 2016—more than a year after Tyler requested personnel records, including “drop files,” in discovery. CP 63,102. In addition to supervisory and personnel files, Tyler also requested correspondence about the decision to deny Tyler the night shift:

REQUEST FOR PRODUCTION NO. 2: Produce any and all emails between Scott Lawrence, Ryan Moody, Bruce Long, Mike Harris, and/or Jennifer Tyler regarding Jennifer Tyler's possible move to the night shift as referenced in Bruce Long's deposition at pg 38-42.

RESPONSE: Objection, this request is unduly burdensome and vague as no time frames are indicated. Notwithstanding said objection, see the documents attached as Request for Production Number 2.

CP 100.

3. Tyler Requests CCSO Supplement Discovery and Correct Deficiencies

As the initial trial date approached, Tyler requested that CCSO supplement its discovery responses and noted deficiencies in the production to date. CP 105-109. In an effort to facilitate discovery with a quickly approaching trial date (and at the request of CCSO's attorney), Tyler's counsel provided a list of documents that she knew were missing

from production. CP 105. In doing so, she expressly stated that by providing the list, she was not relieving CCSO of its obligation to supplement all responses. Id. Included in the list were three categories of documents that each pertained to a specific retaliatory act alleged by Tyler: (1) emails relating to the decision to not reinstate Tyler to her night shift position; (2) emails relating to CCSO's refusal to allow Tyler to switch shifts with another deputy; and (3) harassing and frivolous complaints made against Tyler by other deputies, including a written complaint that Zimmerman made against her in 2015 ("Zimmerman complaint"). CP 62-63, 100, 105.

Despite detailed instructions about what Tyler was requesting and how to find it, Defendant still failed to produce the documents. With regard to category (1) emails relating to the decision to not reinstate her to her night shift position, CCSO produced nearly one thousand pages of non-responsive emails and only 6 pages (3 emails) that related to Long's role supervising Tyler. CP 25, 231. With regard to category (2) emails relating to CCSO's refusal to allow Plaintiff to switch shifts with another deputy, no emails were produced. CP 25-26. With regard to category (3) complaints made against Plaintiff by coworkers, none were produced—not even the Zimmerman complaint, which Zimmerman testified at deposition that he had made in writing. CP 26, 235.

4. CCSO Finally Produces a “Drop File.”

On February 3, 2017, 26 months after Tyler requested them, Defendant finally produced a single “drop file” that had been compiled in 2016. CP 12, 26. This “drop file” contained documents that were highly relevant to Tyler’s employment from October 15, 2015 to January 28, 2017, including emails relating to her performance, internal complaints against her, third party complaints against her, requests for time off, email correspondence with fellow deputies and superiors that were forwarded to her supervisor as reflection on her performance (including emails regarding her Brady designation—another alleged retaliatory action), complaints Tyler made, shift swaps, and internal investigation notifications and related documents. CP 26. None of Tyler’s other “drop files,” including those compiled during the most crucial time periods after she was reinstated, were ever produced. CCSO claims to have destroyed them several weeks after this lawsuit was filed and then two more times after they had been requested in discovery. CP 12, 26, 30, 131.

5. Tyler is provided withheld documents by a “Good Samaritan”

Shortly before the first scheduled trial date in 2017, a CCSO employee who was senior in rank to Tyler, in private and without invitation, provided her copies of some of the documents she had

requested in discovery. CP 236. One of the documents she was provided was the “Zimmerman complaint” and an accompanying email from another harassing individual, Adam Musgrove, about the same incident. CP 236-239. The complaint was addressed to then Patrol Chief Jason Mathews. CP 238. This particular complaint was specifically referenced in Zimmerman’s deposition and requested by name in discovery; however, CCSO never produced it. CP 105.

6. Tyler Provides Notice to CCSO that Documents are Being Withheld.

Tyler’s counsel immediately notified CCSO that she had been provided a number of documents by a third party, including documents that CCSO should have produced in response to written discovery but did not. CP 111-113. The letter informed counsel that these documents were either being willfully withheld or the search conducted by CCSO was inadequate. Id. Tyler provided CCSO an opportunity to correct the deficiencies, but warned if they were not corrected, she would seek sanctions or note a documents deposition. CP 111. Defendant did not supplement discovery any further. CP 25, 111-112.

7. Tyler conducts a Discovery Deposition

On July 12, 2017, Plaintiff noted a 30(b)(6) deposition for the purpose of exploring the location of these missing key documents and what type of search CCSO conducted in response to discovery requests.

CP 114-119. The deposition occurred on September 26, 2017. CP 69. In the deposition, CCSO made a number of admissions.

First, with regard to “drop files,” CCSO admitted the files were likely destroyed but admitted it had no method by which to check, except to ask the supervisor directly—something it failed to do. CP 80-84. CCSO testified that “drop files” are kept by individual managers and CCSO’s unwritten policy is to destroy the “drop file” after an employee’s annual evaluation is completed. CP 74-75; 81. It also admitted that it could not recall whether it requested “drop file” documents in response to Tyler’s first discovery requests in November 2014. CP 79-80. It also admitted that it never confirmed whether Tyler’s supervisory files were actually destroyed because it never asked her supervisors. CP 75, 80-82. Defendant did recall sending out an email in response to Tyler’s 2017 supplemental request for “drop files” and it received only a response from her then supervisors Jeff Middleton and Jeremy Mathena. CP 76. It did nothing else to search for the files and at no time did they follow up with Plaintiff’s former supervisors about whether any “drop file” documents existed for the period prior to October 28, 2015. CP 81-82.

Second, with regard to missing emails and written complaints, CCSO admitted that while it conducted some IT searches using keywords, it failed to request the location or copies of the requested documents from

the individuals who wrote the emails and/or complaints, individuals who were involved in the decisions reflected in the requested emails, or the individuals who testified in deposition that these documents existed. CP 92-93; 129-130.

8. Tyler files a Motion for Sanctions

As a result of CCSO's admissions, Tyler filed a Motion for Sanctions on October 26, 2017, alleging that CCSO violated CR 26(g) by failing to preserve and produce, and then destroying her supervisory files. CP 8-28. She also alleged that CCSO violated discovery by failing to perform an adequate search for the "drop files" and other key documents requested in discovery, including the "Zimmerman complaint." CP 8-157. She requested that the Court award attorney fees and impose additional monetary sanctions to "deter and punish" CCSO. CP 227-228.

In its response to the Motion for Sanctions, CCSO conceded that the "drop files" existed, but claimed the "unusual nature of the request for temporary documents" rendered the destruction "excusable." CP 165-166. It denied "nefarious intent," claiming it had no obligation to preserve the "drop files," and argued Tyler could not show she "has somehow been damaged by these missing documents." CP 161-162. It further claimed, "[t]here are no documents that are 'all of a sudden' going to show up at

the time of trial.”³ CP 162. In response to Tyler’s specific allegation that CCSO did not conduct a proper search for the “Zimmerman complaint,” it now claimed that the complaint was only “verbal” and so there was “no written record.” CP 159, 214. In support, it attached a declaration from (now undersheriff) Jason Mathews declaring under penalty of perjury that “Sgt. Zimmerman did not complete a written complaint” and “no written documentation would be in any files” with regard to this complaint. CP 214-215. CCSO did not submit a declaration from Zimmerman. CP 158-216.

In her reply, Tyler produced the “Zimmerman complaint,” which was addressed to Jason Mathews. Tyler argued that Mathews’ declaration denying this complaint existed showed that CCSO was not only willfully withholding discovery, but also willfully or recklessly providing false information to the court.⁴ CP 220-231; 236-239.

On December 29, 2017, the trial court granted Tyler’s Motion for Sanctions, but it delayed a decision on the amount of sanctions, inviting the parties to argue the motion “some other time when all of the parties are

³ Despite these claims, that is exactly what happened. See infra pp. 18-21.

⁴ At trial, Sgt. Jeff Middleton (Tyler’s supervisor when the complaint was made) testified that Jason Mathews handed him a copy of the complaint in his office and told him “they had to something with it as it was a written complaint.” RP 253-255.

here in either the most recent motion for summary judgment or any other motions *in limine* or otherwise.” CP 240-243.

C. PROCEDURAL FACTS RELATING TO TRIAL

During motions *in limine*, the parties raised and argued two issues relevant to this appeal. First, Tyler presented evidence of more discovery violations. RP 25-27. Days before trial, Tyler discovered that CCSO failed to produce or omitted key sections of her 2007 performance evaluation for the period of time prior to her testimony in Oklahoma, as well as an employment evaluation completed by Bruce Long after she was reinstated—both crucial time periods related to her retaliation claims. RP 25-26. In response to Tyler’s concerns, CCSO argued as follows:

I can tell you that consistently throughout this I have said to plaintiff's counsel, if you have a document that you don't think I've provided tell me what it is, so that I can go and try and have them find it. There's nothing nefarious about this. Bad record keeping, maybe that's a different story. 2007 employee personnel, I'm pretty sure that under their contract those would be out anyway. So if she got a partial one from I don't know where, I'm going to submit -- I don't know because I need to go talk to my sheriff and the administrator -- I'm going to submit that those were probably -- that was in some other document file, don't know, went to the arbitration. But a 2007 personnel evaluation probably isn't even supposed to be in any of their files anymore because they don't stay there forever. So, I don't know what to say about the missing documents.

RP 27-28.

Tyler responded as follows:

[T]he problem with what counsel is suggesting . . . is when we discover a document or when a good Samaritan at the sheriff's office produces a document we've asked for that they haven't produced . . . it puts plaintiff at a terrible disadvantage, because we are asking for documents that we know exist. [And] They aren't producing them and when we receive evidence that they are being nefarious and holding it back, for me to just go hand it to them is not an appropriate remedy for us, because then they'll say, "Oh, yeah. Sorry. We should have produced that. But we don't have anything else." And the problem is we keep discovering things that they have not produced. And I -- I think that we made it clear in our motion for sanctions how inappropriate that behavior is. However, I guess we either need to fully argue the motion for sanctions or just wait and see how the evidence pans out with respect to what documents existed, what's actually being withheld, because we only know part of it.

RP 29. The trial court stated it would not hear argument on the issue of sanctions until trial was concluded. RP 29.

Second, CCSO moved to limit Tyler's right to present evidence of all of her alleged economic damages to the jury. Specifically, CCSO brought a motion *in limine* seeking to prevent Tyler from presenting evidence about any "incorrect pay," including the back-pay amount she was paid after her arbitration, her sick time, vacation time, and comp time, as well as evidence that CCSO paid her at a lower pay scale when she was reinstated—a problem they only corrected after she filed this lawsuit. Id. In response, Tyler argued that CCSO's decision to pay her at the wrong pay scale and its refusal to correct the problem until she filed this lawsuit

was itself evidence of retaliation. CP 281. She also argued that because she brought this lawsuit under WLAD, she was entitled to seek the full extent of the remedies provided by the statute to “make her whole,” including all back pay, sick time, vacation time, and comp time to which she was entitled. CP 281-282; RP 182-187; CP 529-534. In other words, if the jury found that discrimination occurred, then Tyler should not be limited by her CBA and instead would be entitled to be “made whole.” CP 281. She argued that to avoid double recovery, the back-pay amount and benefits CCSO paid her after the arbitration should be set off, but the total amount of damages she was entitled to under WLAD should be decided by a jury. CP 281-282. The trial court disagreed and granted CCSO’s motion *in limine*. CP 322. Accordingly, all evidence about economic damages that occurred prior to Tyler’s reinstatement was excluded at trial. CP 282. Tyler brought a Motion for Reconsideration on February 28, 2018. RP 182-185. The Court denied the motion. RP 186-187.

During trial, Tyler continued to receive leaked documents from a “Good Samaritan”. CP 707-710. Nearly a dozen of the missing, withheld and/or destroyed documents were offered as evidence. CP 707-709. Tyler prevailed on both of her retaliation claims after a 7-day trial. On March 7, 2018, a Douglas County jury found CCSO liable for violating WLAD when it terminated her employment in 2010, and it awarded her \$300,000

in emotional distress damages. RP 1673-1674. It also found CCSO violated WLAD by retaliating against Tyler after her reinstatement in 2013, and it awarded her \$200,000 in emotional distress damages. Id. It also award Tyler \$6,500 in economic damages for lost wages. RP 1674.

D. PROCEDURAL FACTS AFTER TRIAL

After the trial, the parties filed a number of post-trial motions: CCSO filed a Motion for a New Trial and Remittitur. CP 337-367. Tyler responded. CP 368-400. The Court denied the Motion. CP 555-559.

Tyler filed the following post-trial motions: (1) Motion to Continue; (2) Motion for Supplemental Award and Injunctive Relief, CP 401-413; (3) Motion for Supplemental Award for Adverse Tax Consequences, CP 704-706; (4) Petition for Attorney's Fees and Costs, CP 560-577 and (5) a Motion Requesting Award on Court's Decision on Sanctions Entered 12/29/17. CP 701-703; 707-748. In her proposed order on sanctions, Tyler requested that the sanctions imposed by the court be donated to charity. On June 14, 2018, the trial court denied the Motion for Supplemental Award and Injunctive Relief and the Motion for Supplemental Award for Adverse Tax Consequences. CP 558-559. It granted the Petition for Attorney's Fees and Costs. CP 987-989. And it issued a ruling on the sanctions motion, stating, "As the Court has already

awarded attorney fees, the Court does not feel any further sanctions are necessary or appropriate.” CP 990.

After all post-trial motions had been addressed by the trial court, including its decision on reasonable attorney rates, Tyler filed a supplemental fee petition for post-trial fees and costs. CP 991-995. In supporting declarations, Tyler’s attorneys submitted detailed time records, and they expressly stated they had specifically removed all time spent on the unsuccessful post-trial motions, including (1) Plaintiff’s Motion for Supplemental Awards, (b) Plaintiff’s Motion for Tax Consequences, and (c) Request for Award on Sanctions. CP 997, 1003. In a letter denying the motion, the trial court stated it “was unable to determine how much time and effort was spent on motions concerning the arbitration, which were denied on several occasions, including the motion submitted post-trial.” CP 1032. Pursuant to this order, Tyler was denied all attorney fees and costs expended after the verdict, including those associated with successful post-trial motions. CP 1030-1032. Tyler appeals.

IV. ARGUMENT

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO SANCTION CCSO OR ITS ATTORNEYS FOR DISCOVERY VIOLATIONS UNDER CR 26(G).

Washington courts have recognized the need for aggressive judicial control to curb discovery abuses. Wash. State Physicians Ins.

Exch. Ass'n v. Fisons Corp., 122 Wn.2d 299, 342, 858 P.3d 1054 (1993) Imposition of sanctions to curb abuses is appropriate. Johnson v. Jones, 91 Wn. App. 127, 135, 955 P.2d 826 (1998) (affirming sanctions imposed for failure to fully answer written discovery requests)(citing Fisons, 122 Wn.2d at 342). Once a violation of CR 26(g) is found, a trial court must impose a sanction. CR 26(g). “CR 26 is to be liberally construed ‘to eliminate the hide and seek trial practices encouraged by earlier procedures.’ ” Cook v. King County, 9 Wn. App. 50, 51, 510 P.2d 659 (1973). A trial court's decision on discovery sanctions is reviewed for abuse of discretion. Wash. Motorsports Ltd. P'ship v. Spokane Raceway Park, Inc., 168 Wn. App. 710, 714, 282 P.3d 1107, 1109 (2012). “A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.” Id. at 1109-1110. A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law. Fisons, 122 Wn.2d at 339.

In this case, the trial court abused its discretion in three ways: First, the court erred when it refused to impose sanctions after finding that discovery violations occurred and sanctions were appropriate. Second, the court based its decision not to award sanctions on untenable grounds when it personally “vouched” for CCSO’s counsel and held Tyler to an

erroneous legal standard. Third, the court's decision is manifestly unreasonable given the facts in the record.

1. The Trial Court was Obligated by CR 26(g) to Impose Sanctions but It Failed to Do So.

“Like CR 11, CR 26(g) makes the imposition of sanctions mandatory, if a violation of the rule is found.” CR 26 (g); Fisons, 122 Wn.2d at 355. In this case, there is no dispute that the trial court found a violation of CR 26(g): It stated, “This Court believes that the Defendants are in violation [of] their discovery obligations and sanctions are appropriate.” CP 242. Despite this finding, the Court ultimately did not impose any sanctions, claiming that because “the Court has already awarded attorney fees, the Court does not feel any further sanctions are necessary or appropriate.” CP 990. This is an abuse of discretion because CR 26(g) requires a court to impose sanctions once a violation has been found. CR 26(g).

This Court should reject the trial court's implication that because it imposed attorney fees and costs anything further would be an “additional” sanction. This finding is erroneous for two reasons. First, the record shows that the court did not impose attorney fees as a discovery sanction. Tyler requested attorney fees under RCW 49.60.030 and RCW 49.48.030 in her fee petition. CP 560-577. In the petition, she argued she was

entitled to fees and costs because she proved at trial that CCSO violated WLAD, which entitles a prevailing plaintiff to attorney fees and costs. RCW 49.60.030. She was also entitled to attorney fees and costs because the jury awarded her economic damages in the form of wages. RCW 49.48.030. Tyler’s right to attorney fees arose the moment she prevailed on her WLAD claims at trial—an accomplishment achieved in spite of CCSO’s abuses—and independently of any award of sanctions.

Second, by imposing a “sanction” that CCSO was already obligated to pay, the trial court did not satisfy its obligation under CR 26(g). Once a discovery violation is found, the trial court must impose sanctions. CR 26(g); See Fisons, 122 Wn. 2d at 342 (the “shall” language was designed to curb discovery abuses). Even if this Court were to conclude that 26(g) was satisfied, it should conclude that the trial court’s refusal to order monetary sanctions is erroneous because it severely undermines the purpose of discovery. The discovery rules are supposed to

“make a trial less a game of blindman's b[1]uff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. . . . The availability of liberal discovery means that civil trials ‘no longer need be carried on in the dark. The way is now clear ... for the parties to obtain the fullest possible knowledge of the issues and facts before trial.’”

Fisons, 122 Wn.2d at 342.

There is no question that Tyler was forced to prove her case without the fullest knowledge of the facts contained within destroyed and withheld documents, and the sanction imposed by the court is so de minimus that it undermines this purpose. Gammon v. Clark Equip. Co., 38 Wn. App. 274, 282, 686 P.2d 1102 (A sanction must not be so minimal that it undermines the purpose of discovery).

Third, the trial court's order does not does not satisfy the well-settled purpose of discovery sanctions, which is "to deter, to punish, to compensate, and to educate." Miller v. Badgley, 51 Wn.App. 285, 303, 753 P.2d 530, review denied, 111 Wn.2d 1007 (1988); Fisons, 122 Wn.2d at 356. The court's decision in this case does not deter or punish CCSO or its attorneys for their discovery abuses. In fact, the trial court's order leaves CCSO and its attorneys in the exact same position they would have been in had they fully complied with discovery. The decision also fails to compensate Tyler for the risks associated with taking a case to trial at an unfair disadvantage. Because of CCSO's abuses, Tyler was forced to go trial "in the dark" about the facts surrounding many of CCSO's retaliatory actions. Furthermore, had all the documents been properly produced in discovery, she may have had the opportunity to present more evidence that was favorable to her, and increased the damages awarded at trial. CCSO and its attorneys should not profit by depriving her of this opportunity.

See Gammon, 38 Wn. App. at 282 (sanctions should insure that the wrongdoer does not profit from the wrong). Finally, the trial court's order does nothing to educate CCSO or its attorneys as to their discovery obligations in the future, except to the extent it reinforces that discovery abuses will be tolerated and go unpunished.

For these reasons, this Court should conclude that the trial court abused its discretion under CR 26 by failing to impose monetary sanctions for CCSO's and its attorney's discovery abuses.

2. The Trial Court Applied an Erroneous Legal Standard

The trial court also applied an erroneous legal standard when it refused to sanction CCSO and/or its attorneys for violating discovery obligations. In Fisons, the Washington Supreme Court outlined what a trial court should consider in determining what sanctions are appropriate.

It stated,

The sanction must not be so minimal . . . that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions. The purposes of sanctions orders are to deter, to punish, to compensate and to educate. Where compensation to litigants is appropriate, then sanctions should include a compensation award.

Fisons, 122 Wn. 2d at 355–56 (internal citations omitted).

In this case, The trial court provided two reasons for denying Tyler's request to impose sanctions: (1) his familiarity with the attorneys representing Chelan County for whom he "has never found . . . to have any ethical issues in the past" and (2) the violations "[did] not appear to have hurt the Plaintiff's case." CP 990. The reasons provided by the trial court are both legally and factually erroneous.

First, the trial court erred by personally "vouching" for CCSO's attorney based on his experience with them "in the past," which is improper and an erroneous basis upon which to refuse to impose sanctions. Furthermore, CCSO's conduct and its attorney's conduct in this case is the issue before the court, not conduct in other cases.⁵ To the extent that the trial court's reasoning reflects that he believed the "intent" of CCSO's counsel in committing the discovery violations was a defense to sanctions, that is also an error. As both Fisons and later cases make clear: "intent need not be shown before sanctions are mandated." Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 689, 132 P.3d 115, 121 (2006). Furthermore, by relying on his personal opinion of CCSO's counsel, the

⁵ What makes this "vouching" particularly troubling is that, unbeknownst to Tyler's counsel until after post-trial motions in this case were filed, CCSO's counsel Heather Yakely represented Judge Hotchkiss in his individual capacity while this case was pending. Marlow v. Hotchkiss et. al., No. 2:15-CV-01310-TOR. This case is presumably among "past" experience to which Judge Hotchkiss refers in his order. Neither the trial court nor Heather Yakely disclosed this potential conflict to Tyler's counsel.

trial court failed to consider the discovery abuses of the attorney's client, Chelan County Sheriff's Office—a public agency that should already have document production procedures in place to adhere to the high standards required under the Public Records Act. See Chapter 42.56 RCW. The record shows that CCSO failed to conduct an adequate search for documents, destroyed documents even after they were requested in discovery, and either willfully or recklessly testified under the penalty of perjury that the requested documents did not exist when they in fact did exist—a fact only known to Tyler because they were leaked by a “Good Samaritan.” See pp. 13-18. In addition to improperly vouching for CCSO's counsel, the trial court ignored and thereby excused CCSO's flagrant violation of its discovery obligations. This was an abuse of discretion.

Second, the trial court placed an erroneous burden on Tyler when it suggested she needed to show the discovery abuses “hurt her case” before sanctions are imposed. No such showing is required. Magana v. Hyundai Motor Am., 167 Wn.2d 570, 589, 220 P.3d 191, 200 (2009) (one need only show prejudice in preparing for trial, not in obtaining a fair trial); U.S. ex rel. Berglund v. Boeing Co., 835 F. Supp. 2d 1020, 1055 (D. Or. 2011) (finding that when evidence was destroyed, neither the court nor the victimized party can know the extent and relevance of all the missing or

altered information, but in light of conduct in destroying evidence, it is reasonable to presume that evidence was relevant to either the claims or defenses); Leon v. IDX Sys. Corp., 464 F.3d 951, 959 (9th Cir. 2006) (prejudice occurs when a party's refusal to provide certain documents forced the other party to rely on incomplete and spotty evidence at trial); Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1205 (8th Cir.1982) (A party's destruction of evidence qualifies as willful spoliation if the party has “some notice that the documents were *potentially* relevant to the litigation before they were destroyed. . . . Moreover, because “the relevance of ... [destroyed] documents cannot be clearly ascertained because the documents no longer exist,” a party “can hardly assert any presumption of irrelevance as to the destroyed documents.”).

3. The Trial Court Failed to Consider Facts in the Record that Support an Award for Sanctions

Given the facts and circumstances in the record, the court's decision is manifestly unreasonable in two ways.

First, the court's decision is manifestly unreasonable in light of CCSO's 30(b)(6) admissions regarding its failure to conduct a reasonable search for documents that were requested in discovery. CCSO's 30(b)(6) testimony shows that it failed to conduct reasonable inquiries or reasonable searches for requested documents. CP 69-95; infra pp. 13-18.

CCSO conceded that its production was deficient and sought to avoid sanctions by claiming “it [was] working on improving its process” of document production. CP 173. This is a puzzling claim from an agency that has an affirmative obligation to preserve and keep track of documents it generates under the strict standards of the Public Records Act. CP 173. In essence, CCSO argued that its discovery abuses should be excused because it did not have nefarious intent. That is not the standard. Whether an attorney has made a reasonable inquiry is to be judged by an objective standard. Fisons Corp., 122 Wn.2d at 343-44. Subjective belief or good faith alone does not shield an attorney and/or Defendant from sanctions under the rules. Id.

Second, the trial court’s decision is manifestly unreasonable given the vital role the destroyed and withheld documents played at trial. It is well-settled that an employee’s ability to prove discrimination and retaliation claims is integrally tied to Defendants’ employment records, including personnel files of Plaintiff, which play a vital role in proving that discrimination or retaliation occurred. See Lauer v. Longevity Med. Clinic PLLC, No. C13-0860-JCC, 2014 WL 5471983, at *4 (W.D. Wash. Oct. 29, 2014)(Recognizing “there is a strong tradition among federal district courts recognizing the relevancy and thus discoverability of personnel files in employment discrimination suits.”); Wilmot v. Kaiser

Aluminum & Chem. Corp., 118 Wn. 2d 46, 69, 821 P.2d 18 (1991) (stating that proof of an employer's motivation may be difficult for the employee to obtain because the employer is not apt to announce retaliation as his motive; accordingly, it is often shown by circumstantial evidence.); Vázquez-Fernández v. Cambridge Coll., Inc., 269 F.R.D. 150, 155 (D.P.R. 2000) (quoting Hollander v. Am. Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990)) (“In employment discrimination cases, the discovery allowed is even more broad, ‘[b]ecause employers rarely leave a paper trail—or “smoking gun”—attesting to a discriminatory intent, [therefore] disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence.”). The reality of this well-settled principle was borne out in this case, where each of the withheld/destroyed exhibits were instrumental in proving Tyler’s claims:

Exhibit 3: This document—a portion of Tyler’s 2007 evaluation—was omitted from CCSO’s production and discovered the day before trial. CP 707, 713-715. Tyler’s 2007 evaluation was the last employment evaluation she received prior to testifying against Sheriff Mike Burgess in August 2008—the protected activity that led to CCSO’s unlawful retaliation. RP 362, 371. The resoundingly positive narrative section of this evaluation was read aloud to the jury:

Jennifer has been a real pleasure to work with. With her

ability to talk to anyone, she's able to complete tasks that some others would not even attempt. She brought with her a vast knowledge of investigation and she's very open to share that information with others. She the TE [sic] in TEAM. I have not seen very many people that can get along with nearly anyone they come into contact with and turn them into a friend if they were not to begin with. She is extremely helpful in working with a fellow deputy when numerous others said they would not. She helped bring that officer out of being as one and only to being part of the team.

Jennifer is one of the easiest officers I have worked with that was making big changes not only in her line of work but in her life as well. She was very open to this change and accepting to help and also criticism from others. She took the good with the bad and changed for the better. She takes pride in her uniform and has been heard to say I just love my job. Her positive attitude spills over and makes it a fun place to work. Jennifer was very active in maintaining local patrols in Cashmere area which resulted in lower crimes being done. She shares her knowledge with others during shift change making the switch-over flow more smoothly.

RP 346-347 (emphasis added).

At trial, this positive evaluation was compared to Tyler's 2008 evaluation, which was completed after she testified in Oklahoma.⁶ The jury was presented with evidence that the 2008 evaluation was starkly different in tone and she received lower scores in some areas of her work.

RP 378-385. Her lower scores in the area of "Teamwork" was in stark

⁶ There is what appears to be an error in the transcript suggesting this evaluation was prior to Tyler's testimony in Oklahoma. RP 378. There is no dispute and it was clear to the jury that Tyler testified in Oklahoma in August 2008 and again in January 2009. RP 362, 371. The evaluation offered as Exhibit 7 was completed in February 2009. RP 382.

contrast with the 2007 narrative and was reinforced by evidence that deputies refused to work with her because of her testimony in Oklahoma. RP 362, 365-367. The jury also heard evidence that in Tyler's 2008 evaluation, her supervisor criticized her for being "distracted" and "losing her focus" because she testified in Oklahoma. RP 381. Without the glowing narrative focusing on Tyler being "the 'T' in team," she would have had a much more difficult time—and may have failed—to convince the jury that she was being retaliated against for her testimony against Burgess.

Exhibit 65: This email was provided by a Good Samaritan during trial and it showed that CCSO provided shifting testimony about who made the decision to refuse Tyler her night shift position and why. CP 708, 728.

In a 30(b)(6) deposition prior to trial, Sheriff Burnett testified that Sgt. Mike Harris (Harris) made the ultimate decision to deny Tyler the night shift position upon reinstatement and refused to allow her to switch shifts with Deputy Moody. RP 1332-1334; RP 791-792. However, at trial, Harris testified that he did not make the final decision. RP 857. Exhibit 65 showed the jury that the final decision could not have been made by Harris, who received word in that email that the decision was made without him. CP 708, 728. The email was inconsistent with

Burnett's 30(b)(6) testimony prior to trial, and it undermined his trial testimony. RP 1326-1337. Notably, Exhibit 65 did not mention anything about "the potential for a union grievance," which was CCSO's stated reason for denying Tyler the night shift. RP 1331-1332, 1336. This served as circumstantial evidence that the stated reasons were pretext for retaliation. It was an invaluable exhibit.

Exhibit 29, 30, 32, and 68: These three exhibits were NAFs (provided to CCSO from Tyler) that CCSO claims were destroyed in 2013. CP 708. Exhibit 68 consists of two emails that were requested but never produced by CCSO. CP 733-734. Tyler learned that Exhibit 68 document existed through a "Good Samaritan" prior to trial and they were ultimately obtained through a public records request. CP 709.

At trial, Tyler argued that CCSO retaliated against her with frivolous and targeted informal discipline upon reinstatement. RP 216-217. Notable Action Forms (NAFs) are an informal method that CCSO supervisors use to "verbally counsel" deputies. RP 348, RP 528; RP 1054. After Tyler was reinstated in 2013, she received numerous negative NAFs disciplining her for various frivolous issues. RP 528-539; CP 717-718, 722-723, 725-726. At trial, the fact Tyler received a high number of NAFs in short succession shortly after her reinstatement was a significant fact. Her supervisor Bruce Long testified that he issued three NAFs to Tyler

during the few months he supervised her, but he had only issued approximately a dozen NAFs—both positive and negative—in the last ten years. RP 1056-1057. Long testifies that one of these NAFs—a complaint that Tyler was acting too “gregarious[ly]” at a training— was rescinded, because the “complaint” was proven to be untrue after the NAF was issued. RP 529-535. Tyler testified that she was forced to contact the training instructor herself to prove the complaint was false. RP 534.

Long claimed he issued a second NAF—for failing to obtain a supervisor’s initials on a report—because he “had been directed to at a Sergeant’s meeting. . . [to] issue NAFs to deputies who didn’t indicate that the report had been approved.” RP 1064. With Exhibit 31 and Exhibit 68, the credibility of Long’s testimony was called into question. RP 1085-1093. Based on the information and dates contained in Exhibit 68 and Exhibit 31, the jury was presented with evidence that despite his testimony to the contrary, Long did not issue the NAF because of a new directive he learned about in a sergeant’s meeting; rather, he was encouraged to do so by Zimmerman who had even offered to draft the NAF himself, even though he was not Tyler’s supervisor. Id. This is the same Andy Zimmerman who was responsible for Tyler’s wrongful termination, against whom she filed written complaints for gender discrimination, and who was now, upon her reinstatement, continuing unabated to

discriminate and retaliate against Tyler even though he was no longer her supervisor and refused to work with her. Id.; CP 722-723; 733-734; RP 1174, 1177. Without copies of the NAFs and the emails underlying them, Tyler would not have been able to effectively show to the jury that the same individuals who were discriminating and retaliating against her before she was fired and reinstated, continued to harass her after she was reinstated. They were simply doing so behind the scenes.

In sum, these exhibits were used to show that the complaints contained in them were frivolous, NAFs were used to retaliate against Tyler, and those responsible for Tyler's retaliatory termination were still harassing her. They were crucial to proving Tyler's second claim of retaliation upon reinstatement.

Exhibits 67 & 74: Exhibit 74 was the "Zimmerman complaint" and a supporting email by another deputy, which was requested but never produced by CCSO. CP 733-734. It claimed these complaints did not exist in writing. CP 709, CP 736-737. Tyler was given copies of these documents outside of discovery by a "Good Samaritan" deputy prior to trial. CP 709. It was used at trial to prove that Zimmerman was continuing to retaliate against Tyler "behind the scenes" upon her reinstatement.

In support of Tyler's claim that Zimmerman was continuing to

retaliate against her upon her reinstatement, Tyler offered the “Zimmerman complaint” at trial. The jury was presented with testimony from Sgt. Jeff Middleton that this complaint was handed to him by then Patrol Chief Jason Mathews who told him “they had to do something with it because it was a written complaint.” RP 252-255. While the “Zimmerman complaint” itself was helpful in showing the jury how petty some of these complaints against Tyler were, the most significant part of the complaint was the underlying email from Adam Musgrove. Despite Tyler’s oral and written requests for the identity of deputies who complained about her, CCSO would not release that information to her. RP 535-536; CP 720. What Tyler and the jury learned from Exhibit 74 (provided by a “Good Samaritan”) is that Adam Musgrove was a major source of the complaints against her. RP 1183; RP 579-583. Musgrove never worked with Tyler, but Zimmerman was his superior and direct supervisor during relevant periods of Tyler’s employment. RP 583-584; RP 1179-1180. In other words, Zimmerman was directing Musgrove to complain and therefore continuing to retaliate against Tyler after her reinstatement. This was not an isolated incident. Tyler also learned from another “Good Samaritan” provided document (Exhibit 67) that Musgrove was also involved in the complaint that led to the NAF about “gregariousness” reflected in (destroyed) Exhibit 29. CP 708, 717-718; RP

578; CP 730-731. Musgrove also made complaints against Tyler in 2018, which led to her 7th internal investigation.⁷

Without these “Good Samaritan” documents, Tyler would not have been able to show that Zimmerman was using Musgrove to continue retaliating against her. By showing that Musgrove was complaining at Zimmerman’s direction, Tyler was able to make the crucial connection between the events leading up to her wrongful termination in 2010 and the retaliation that occurred upon her return in 2013. Had she not had the “Zimmerman complaint,” Musgrove’s supporting email, and Exhibit 67, she may not have been able to prove her second retaliation claim at trial.

Exhibit 75: This exhibit was an email that was requested in discovery but not produced by CCSO. A “Good Samaritan” gave Tyler a copy of this email during trial. CP 709. It was used to show that CCSO was encouraging unsubstantiated rumors about Tyler and treating less favorably than her colleagues.

In support of her second retaliation claim, Tyler argued that Sheriff

⁷ This complaint involved an allegation that Tyler made “defamatory statements” about Musgrove when she allegedly told another female deputy that the Search and Rescue Team was having “secret barbeques” and that Musgrove would try to make her cry. RP 604-606. This investigation was pending at the time of trial and presented as evidence of ongoing retaliation. Id.; RP 902. The jury was presented with evidence that Tyler was investigated pursuant to “petty” complaints and for trivial matters and subject to an uncommonly high number of internal investigations, while other deputies were subject to internal investigations for issues like vehicle collisions [and] police shootings. RP 255, 275-276; RP 953-954.

Burnett failed to remedy the environment that led to her termination, and he allowed unsubstantiated rumors about her termination to run amok. RP 973; RP 759-762. The jury heard several deputies testify about what they had heard about why Tyler was fired. Dan McCue testified that he was told she was fired because she pushed a hot flashlight to a suspect's cheek during an arrest and general concerns that she had an overreliance on her firearm: "Like basically, pulling her gun out at suspects when it wasn't justified." RP 993. Deputy Aaron Seabright heard rumors that she was terminated due to a missing Tazer. RP 972-973. Exhibit 75 showed the jury that prior to her arbitration, even higher ups in the administration, specifically Undersheriff Wisemore, were spreading these unsubstantiated rumors and seeking to gather facts about them for use in her arbitration, including a rumors of "a possible gun incident where she had her gun drawn and pressed into the side of the suspect's head while he was on the ground in handcuffs. . . .[and] an incident involving her pressing her lit Maglite into the skin of a suspect in an apparent attempt to burn the suspect." RP 1166-1167. The jury was presented with evidence that even the neutral arbitrator who reinstated Tyler's employment concluded that she was the subject of rumors, and that these rumors led to her termination. RP 482-483. Despite this statement from the arbitrator, Sheriff Burnett did nothing to dispel these inaccurate rumors when Tyler

was reinstated. RP 1165-1168. In contrast, when rumors were rampant at CCSO about other employees, the administration was quick to dispel them and remind employees to exercise CCSO's core values. RP 1166-1168.

Exhibit 84: Exhibit 84 was a string of emails about Tyler's Brady designation, which was requested in discovery and never produced by CCSO. CP 741-743. A "Good Samaritan" gave Tyler copies of these emails during trial. CP 709. They were used to show that her Brady designation was retaliatory.

Tyler argued at trial that CCSO retaliated against her when it named her on the county's first Brady list in 2014. RP 1233. The jury heard testimony that Prosecutor Doug Shae relies solely upon information forwarded by CCSO, and if they withheld information about some deputies and forwarded information about others, he would have no way of knowing. RP 1233. In this case, CCSO forwarded Shae the arbitrator's decision,⁸ which was used as a basis to place her on the Brady list. Although the arbitration occurred in March 2013, Tyler was not placed on the Brady list until almost a year later, after she filed this lawsuit against the county. RP 547-550. In an email to Tyler's attorney in 2014, Doug Shae claimed that the delay was due to a change in Brady policy with the

⁸ In its decision, the arbitrator found that Tyler told her supervisor that she checked her computer for information about who was on duty, when she had actually called Rivercom and had them check the computer. RP 477, 548-549.

Police Chiefs' Association. RP 1233-1234.

Using Exhibit 84 at trial, Tyler was able to show that the “change in Brady policy” did not affect Tyler’s situation, and therefore could not be a legitimate reason for the delay in making her a “Brady” officer. RP 1233-1242. Accordingly, this reason for the delay was pretext for retaliation, e.g., Tyler’s decision to file this lawsuit (a protected activity) was likely a factor in the county’s decision to list her as a Brady officer. RP 1243-1245. Exhibit 84 also showed that Sheriff Burnett was actively encouraging Shae to “Brady” Jennifer Tyler in August 2016, even though no Brady list existed at that time. RP 1225, 1234. Exhibit 84 was a crucial piece of evidence showing that Tyler’s Brady designation was retaliatory in nature.

In sum, the foregoing withheld, missing, and/or destroyed documents played a crucial role in proving Tyler’s retaliation claims; Accordingly, the court’s decision not to sanction CCSO for its discovery abuses is untenable and must be reversed.

E. THE TRIAL COURT ERRED WHEN IT REFUSED TO AWARD TAX CONSEQUENCES FOR DAMAGES ARISING FROM TYLER’S RETALIATORY TERMINATION THAT WERE PAID IN A LUMP SUM

The trial court erred when it failed to award Tyler tax consequences under Blaney v. Int’l Ass’n of Machinists & Aerospace

Workers, 151 Wn.2d 203, 216, 87 P.3d 757 (2004). When a plaintiff is awarded back pay or front pay and receives those damages in a lump sum, the plaintiff must pay additional taxes she would not have paid had she received these wages in the normal course of employment. See Pham v. Seattle City Light, 159 Wn.2d 527, 533, 151 P.3d 976 (2007). The Washington Supreme Court has approved tax adjustments made to back and front pay to compensate for these adverse consequences under the Washington Law Against Discrimination. Id.; Blaney, 151 Wn.2d at 203. The tax offset is an equitable remedy consistent with the remedial purpose of making the victim whole. Id. Tax offset awards in Washington State courts are routine.

In this case, the trial court erroneously denied tax consequences because it claimed Tyler was “request[ing] some sort of compensation for the arbitration that occurred.” CP 989. The trial court was referring to Tyler’s arbitration hearing of her union grievances that occurred in 2013 and led to her reinstatement. The court’s decision appears to stem from its earlier decision to grant a CCSO motion *in limine* prohibiting Tyler from presenting any evidence on pre-reinstatement damages to the jury and denying her post-trial motion for supplemental award and injunctive relief. CP 255-256, 322; RP 182-186; See infra pp. 18-21. The court’s reasoning is erroneous.

First, its finding is not supported by the record. Tyler was not asking the court to revisit the damages calculated by her union attorney in her Motion for Supplemental Award for Tax Consequences. In fact, for purposes of her motion, she conceded that the amount awarded was correct. CP 704-706. Tyler was merely seeking to avail herself of a WLAD “make whole” remedy that only became available to her on March 7, 2018 when she prevailed at trial on her WLAD claims. RP 1673-1674. This remedy was not available to her in 2013 because she did not bring any WLAD claims in arbitration. The only claims considered by the arbitrator were whether CCSO had “just cause” to terminate Tyler and if not, what was the remedy. RP 472. Her right to adverse tax consequences did not exist until March 7, 2018, when the jury found CCSO violated WLAD by terminating Tyler in 2010. With this finding, it is indisputable that all damages arising from her termination, including the back-pay CCSO paid her after her arbitration in 2013, were proximately caused by unlawful discrimination.

Second, the court’s refusal to award tax consequences undermines the general principle affirmed in Blaney of making whole those who suffer from unlawful discrimination. Among other reasons, the Blaney court explained why tax consequences should be awarded in discrimination cases:

The broad scope of the term “actual damages,” the analysis of that term in Martini [v. Boeing], the above legislative statements of policy to “deter and eradicate discrimination” and to make that objective a matter of public policy of the “highest priority,” the policy of construing the WLAD liberally to effectuate its purpose, and the grant of this type of relief in federal cases construing similar discrimination laws, all support the conclusion that adverse federal income tax consequences triggered by payment of a judgment for violation of the WLAD are within the scope of the term “actual damages.”

Blaney, 114 Wn. App. at 98. To deny Tyler tax consequences for the lump sum she received as back-pay after her wrongful termination is contrary to the reasoning in Blaney and an abuse of discretion.

B. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED ALL POST VERDICT ATTORNEY FEES

The trial court erred when it denied all attorney fees and costs expended on post-trial motions. A victorious plaintiff is entitled to recover reasonable attorney fees incurred litigating a variety of post-trial motions, including the attorney’s fees and costs expended to acquire the fees to which she was entitled under Chapters 49.60 and 49.48 RCW. RCW 49.60.030(2); RCW 49.48.030; Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 599, 675 P.2d 193, 204 (1983)(recognizing that attorney fees are properly awarded for post-trial attorney hours under WLAD and concluding that a multiplier for this work would not be appropriate given that recovery is assured); Martinez v. City of Tacoma, 81 Wn. App. 228,

235, 914 P.2d 86 (1996) (To encourage private enforcement of WLAD, the reasonable attorney fee remedy must be construed liberally); Bright v. Frank Russell Investments, 191 Wn. App. 73, 86, 361 P.3d 245, 251 (2015) (Extending the reach of RCW 49.60.030(2) to a successful plaintiff who prevails post-trial on appeal). Federal courts have routinely incorporated such post-trial litigation fees in the award. Torres-Rivera v. O'Neill-Cancel, 524 F.3d 331, 340-41 (1st Cir. 2008); Manhart v. City of Los Angeles, 652 F.2d 904, 909 (9th Cir. 1980); Prandini v. National Tea Co., 585 F.2d 47, 54 (3rd Cir. 1978); Swicker v. Armstrong, 484 F.Supp. 762, 768 (E.D. Pa. 1980).

In this case, the trial court denied all fees and costs expended on post-trial motions. It stated,

The Court denies any further costs and fees for post-trial motion for a number of reasons, one of which is because of the block billing submitted by Plaintiff's counsel, the Court was unable to determine how much time and effort was spent on motions concerning the arbitration, which were denied on several occasions, including the motion submitted post trial. The Plaintiff lost all of these motions, no matter how many times they submitted them, and as such, should not receive attorney fees and costs for submitting motions for which they did not prevail.

CP 1032.

The court's order constitutes an abuse of discretion for three reasons. First, the court failed to enter findings and conclusions. CP

1032. Washington Courts have made it clear that findings and conclusion on fees is mandatory. Mayer v. City of Seattle, 102 Wn. App. 66, 79, 10 P.3d 408, 415 (2000) (Trial courts must create an adequate record for review of fee award decisions). Failure to do so was an abuse of discretion.

Second, the court's *sua sponte*⁹ conclusion that no post-trial fees should be awarded because "the Court was unable to determine how much time was spent on [unsuccessful motions] concerning the arbitration" is erroneous because it is not supported by the record. In her motion for post-trial fees and costs, Tyler's attorneys specifically listed the motions for which they were seeking fees. CP 996-997, CP 1002-1003. Each of the motions listed were successful motions for Tyler. CP 993-994, 996-997. Plaintiff's counsel even went on to expressly state that they had

"specifically removed all time spent on (a) Plaintiff's Motion for Supplemental Awards, (b) Plaintiff's Motion for Adverse Tax Consequences, and (c) Plaintiff's Request for Award on Motion for Sanctions."

CP 997, CP 1003. These statements and those in the trial court's order cannot be reconciled, rendering the trial court's order arbitrary and capricious. Even if Tyler's counsel had not been so explicit in their

⁹ CCSO did not object to an award for post-trial fees on this basis. It argued that Tyler was not entitled to post-trial fees under Washington law. CP 1011-1014.

declarations, they submitted time records that were sufficiently detailed to allow a court to remove any time entries that it believed were improperly billed for unsuccessful motions. CP 1000-1001, 1006-1007. The time entries provided by Plaintiff's counsel are not only detailed, but they are also broken down by date and in reasonable increments of time, both by date and then again within the task entries. CP 1000-1001, 1006-1007. This level of detail is more than sufficient to allow a court to determine whether the time spent was reasonable, and the trial court was obligated to review the entries and make that determination. See Berryman v. Metcalf, 177 Wn. App. 644, 677, 312 P.3d 745, 763 (2013) (a trial court must "actively and independently" review a petition for fees and enter meaningful findings and conclusions to explain an award of attorney fees); Mahler v. Szucs, 135 Wn.2d 398, 434-35, 957 P.2d 632, 966 P.2d 305 (1998) (courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought). By failing to actively review the petition for supplemental fees, the court abused its discretion.

Third, the trial court's decision is based on untenable grounds. The court denied all post-trial fees and costs by its order, including costs associated with motions where it was clear Plaintiff was the prevailing party. By way of example, on March 21-23, 2018, Tyler's attorney's time

entries show that she is responding to CCSO's Motion for a New Trial. CP 1000-1001. Consistent with these time entries, Tyler's 32-page response was filed on March 23, 2018. CP 368-400. Tyler successfully defeated this motion, but she was denied all of her fees. CP 555-558. Another example involves costs. Tyler detailed the costs associated with her fee petition, including expert declarations, in the amount of \$5,290. CP 1004. There is no question that these costs are associated with a successful motion; nonetheless, they were also denied without a reasonable basis by the court's order. CP 1004. This is an abuse of discretion.

F. ATTORNEY FEES ON APPEAL

A plaintiff who prevails on a discrimination suit under the Washington Law Against Discrimination is entitled to reasonable attorney fees at the trial court and on appeal. RCW 49.60.030(2); RAP 18.1; Blaney, 151 Wn.2d at 217. Should Appellant Tyler substantially prevail on this appeal, she respectfully requests that the Court award attorney fees and costs associated with this appeal to be calculated by a Commissioner under RAP 18.1(f).

V. CONCLUSION

For the above stated reasons, this Court should reverse the trial court's Order on Sanctions and remand to determine the amount of sanctions that should be imposed.

With regard to tax consequences, Tyler requests that this Court award Tyler \$19,084 in damages on appeal without remanding to the trial court because CCSO did not contest Tyler's calculation of the tax consequences for her back-pay at the trial court level. CP 787-792, 805-806, 809.

Finally, with regard to attorney fees, Tyler requests that this Court award the entire amount of \$38,561 requested based on the record before it. CP 991-1001, 1025-1029; See Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 222, 829 P.2d 1099, 1106 (1992) (When no findings exist, an appellate court may independently review evidence consisting of written documents and make the required findings).

Dated this 17th day of December 2018.

ANNETTE MESSITT, ESQ.



By: _____
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Certificate of Service

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