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Division I  
State of Washington

No. 73627-2-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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MERCEDES PEREZ-MELGOSA, Ph.D., an individual,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE PALMER ROBINSON

---

BRIEF OF RESPONDENT

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## I. INTRODUCTION

After a nine day trial, a jury rejected appellant Dr. Mercedes Perez-Melgosa's claims that respondent University of Washington discriminated against her because of her Spanish national origin under instructions that are not challenged on appeal. Dr. Perez-Melgosa instead challenges the trial court's discretionary evidentiary decisions, none of which impacted the jury's conclusion that the University did not discriminate against Dr. Perez-Melgosa.

The trial court correctly dismissed Dr. Perez-Melgosa's pay discrimination claim on summary judgment because her inability to produce *any* evidence that an employee similarly situated to her was treated differently was fatal to a prima facie case of discrimination. Moreover, her argument that the University's stated reasons for its pay decisions were pretextual is little more than a request for this Court to second-guess the University's subjective evaluation of the relative merit of its at-will employees. This Court should affirm the jury's verdict and the summary judgment order.

## II. RESTATEMENT OF THE ISSUES

1a. Does a pay discrimination claim fail as a matter of law where the plaintiff fails to present evidence of a similarly situated

employee outside her protected class that received more favorable treatment, a necessary element of a prima facie case? (§ IV.B.1)

1b. Does a trial court correctly dismiss on summary judgment a pay discrimination claim where the plaintiff disputes the *wisdom* of the defendant's personnel evaluations of its at-will employees, but not the *facts* underlying those decisions? (§ IV.B.2)

2. Is it within a trial court's discretion to exclude evidence of pay raises as irrelevant, either because the court has dismissed plaintiff's pay discrimination claim, or because the evidence would confuse the jury about plaintiff's remaining claims, which allege wrongful termination and a hostile work environment? (§ IV.C.1)

3. Does a trial court have discretion to admit evidence that the plaintiff's supervisor – who allegedly harbored discriminatory bias towards foreigners – had treated other foreigners favorably, including an employee of the same nationality as plaintiff? (§ IV.C.2)

4. Is it within a trial court's discretion to admit testimony from a vocational expert that the plaintiff's job search was ineffective because for two years she submitted hundreds of electronic applications to the same employer without success, rather than attempt to actively engage other employers? (§ IV.C.3)

5. Does a trial court have discretion to exclude as irrelevant evaluations written by the plaintiff's former supervisor where the issue at trial was whether a different supervisor, years after the evaluations were written, terminated plaintiff because of discriminatory animus? (§ IV.C.4)

6. Does a trial court have discretion to admit illustrations that help a jury understand scientific data? (§ C.5)

### III. RESTATEMENT OF THE FACTS

This Court reviews the evidence supporting the jury's finding that the University did not discriminate against Dr. Perez-Melgosa in the light most favorable to the University as the prevailing party after a trial on the merits. *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 769, ¶¶ 50-51, 260 P.3d 967 (2011), *rev. denied*, 173 Wn.2d 1029 (2012). Dr. Perez-Melgosa's Statement of the Case ignores this tenet of appellate review, portraying the evidence at trial in the light most favorable to her. This restatement sets forth the evidence supporting the jury's verdict, and, where appropriate, relies on the undisputed facts before the trial court on summary judgment.

**A. The University's Department of Genome Sciences operates a DNA sequencing and analysis lab that processes thousands of DNA samples each year.**

For more than 20 years, Dr. Deborah Nickerson has run a research lab in the University's Department of Genome Sciences. (CP 90; 5/13 RP 141-42)<sup>1</sup> At any given time, the lab employs roughly 40 employees working on 30 projects involving DNA sequencing and analysis. (CP 90; 5/13 RP 142-43) The lab has approximately \$30 million in annual contracts and grants, and it processes thousands of DNA samples per year. (CP 90, 1616, 1754; 5/13 RP 56, 71; 5/18 RP 15)

The lab is a fast-paced work environment. Its employees perform high volume, complex work, and Dr. Nickerson is a demanding boss. (CP 90, 1729; 5/13 RP 57; 5/18 RP 13; 5/19 a.m. RP 136) She has high standards for her employees, and expects them to admit and correct mistakes. (CP 1729, 1749, 1761; 5/13 RP 57, 175; 5/14 RP 15; 5/18 RP 65-66) Dr. Nickerson can be quick to temper, sometimes yelling at her employees (and even the Chair of Genome Sciences), though her outbursts are short-lived and always work related. (CP 1632, 1663, 1729, 1749, 1757; 5/12 RP 129; 5/13 RP 57-

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<sup>1</sup> Because the verbatim reports of proceedings are not sequentially paginated, they are cited by their date and page number, and where appropriate afternoon or morning. (*E.g.*, "5/26 a.m. RP 1")

59, 172; 5/18 RP 15, 133; 5/19 a.m. RP 17, 136) No employees are spared Dr. Nickerson's tough management or her outbursts. (CP 1729, 1749-50, 1761; 5/13 RP 59-60; 5/19 a.m. RP 136) Due to her busy schedule and many commitments, Dr. Nickerson never completes evaluations for all of her employees in a given year. (5/13 RP 101; 5/14 RP 98-99)

The Nickerson lab consists of three groups of employees: 1) those with managerial duties (leads); 2) bioinformatics analysts who do computer programming and analysis; and 3) a variety of non-computational scientists who do everything from organizing samples and ordering supplies to analyzing samples. (CP 55-56, 1748-49, 1758, 1761, 1803-04) The first two categories have more responsibilities and skills, and generally have higher salaries. (CP 1758, 1804)

The Washington Legislature imposed a state-wide salary freeze from February 2009 to June 2013. (CP 1758) That freeze limited salary increases to those employees who took on additional responsibilities, who received promotions, or those employees the University feared losing. (CP 1758, 1805-06)

**B. The Nickerson lab employs strict quality control protocols for processing samples to ensure the accuracy and reproducibility of its results.**

The Nickerson lab employs a quality control team to ensure the integrity of its samples. (CP 93, 1616, 1754; 5/12 RP 69-70; 5/19 a.m. RP 115-16) The team is managed by Bryan Paeper, and has three technicians, Cindy Shephard, Jessica Pijoan, and Eric Johansson. (CP 1616, 1760; 5/12 RP 14; 5/18 RP 20; 5/19 a.m. RP 115) Dr. Nickerson demands strict adherence to the lab's quality control protocols because it aids in diagnosing problems when they arise, and ensures the accuracy and reproducibility of results, fundamental tenets of experimental science. (CP 1750, 1762; 5/18 RP 22; 5/19 a.m. RP 19-20, 140, 143, 146; 5/26 p.m. RP 18-20)

One quality control test is the "TaqMan" gender assay. (CP 1616-18; 5/12 RP 17-18, 72) To run the assay, Ms. Shephard and Ms. Pijoan use an instrument to analyze DNA samples, review the instrument's analysis<sup>2</sup>, and make four possible "calls": male, female, undetermined, and between male and female. (CP 1617, 1762; 5/12 RP 21, 25, 73-74) Ms. Shephard and Ms. Pijoan are specially trained

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<sup>2</sup> The instrument makes initial calls and outputs data points on an X-Y coordinate graph, where the samples are plotted next to various controls. (CP 1616-17; 5/12 RP 19-20, 34, 73; Ex. 18) Those with male DNA cluster at the top of the graph and those with female DNA cluster at the bottom. (CP 1617; 5/12 RP 19; Ex. 14-15)

to perform the TaqMan gender assay and to ensure consistency, are the only people that run and interpret its results. (CP 93, 1731, 1750, 1755, 1762, 1769, 1774; 5/12 RP 70, 75-76; 5/14 RP 30; 5/18 RP 20; 5/19 a.m. RP 140, 148-49; 5/26 p.m. RP 18-20)

Samples that are “male” or “female” pass the TaqMan assay and are used in experiments. (CP 92, 1617; 5/14 RP 11-12) “Undetermined” or “between male and female” samples have low quality or contaminated DNA, fail the assay, and are not used in experiments. (CP 92, 1617; 5/14 RP 11-12) Additionally, if a supplier lists a sample as male or female and the assay returns the opposite result, the sample fails and is not used in experiments. (CP 1617; 5/12 RP 30; 5/13 RP 83; 5/19 a.m. RP 119)

**C. In 2009, Dr. Nickerson’s lab took on a smallpox research project and its researcher, Dr. Mercedes Perez-Melgosa.**

In 2009, Dr. Chris Wilson retired from the University’s Immunology Department before completing a research project funded by the National Institutes of Health (NIH) that investigated a link between heart inflammation and the smallpox vaccine. (CP 91; 5/13 RP 143-44) At Dr. Wilson’s request, Dr. Nickerson agreed to continue the project in her lab. (CP 91; 5/13 RP 143) Dr. Nickerson then met with the two employees working on the project, appellant

Dr. Mercedes Perez-Melgosa and Jeff Furlong, and asked whether they would be comfortable continuing their work in her lab; they said they would be. (CP 91; 5/14 RP 117; 5/18 RP 19)

Dr. Perez-Melgosa joined the Nickerson lab in August 2009 as an at-will employee. (CP 91, 1660, 1754; 5/26 a.m. RP 17; Ex. 7) Dr. Perez-Melgosa is from Spain and speaks with an accent. (5/18 RP 11; 5/21 RP 3)

Dr. Perez-Melgosa was the primary “wet bench” researcher on the smallpox project; it was the only project on which she worked. (CP 91, 1625-28; 5/13 RP 143-44, 146; 5/14 RP 122; 5/18 RP 45) Her job duties included performing the experimental analysis for the project, and managing and tracking the DNA samples. (CP 91, 1625-1627, 1754; 5/13 RP 144; 5/18 RP 16; 5/21 RP 20, 99; Ex. 97) Dr. Perez-Melgosa was responsible for all project data, including results of the quality control tests, which were given to her by technicians Pijoan and Shephard, as well as the results of any experiments. (CP 91; 5/12 RP 75; 5/21 RP 101; Ex. 97)

Dr. Perez-Melgosa’s official title was “Research Scientist III,” a University-wide title used to categorize researchers and scientists with varied jobs and responsibilities. (CP 1749, 1754; 5/13 RP 149) She fell into the lab’s non-computational scientist group of

employees, as she had no managerial responsibilities and lacked computer programming skills. (CP 1623-24, 1630-31, 1749, 1758) For all but the last month of her employment, Dr. Perez-Melgosa was the highest paid non-computational scientist in the Nickerson lab, and as of January 1, 2010, she was the twelfth highest paid of approximately forty employees in the lab. (CP 1758, 1805)<sup>3</sup>

**D. In the fall of 2012, Dr. Nickerson lost confidence in Dr. Perez-Melgosa after discovering she unilaterally changed quality control results.**

By the spring of 2012, the smallpox project was in dire straits. (CP 91; 5/13 RP 75-76, 156, 170-71; 5/18 RP 26-28; 5/21 RP 41) With NIH site visits and deadlines rapidly approaching, the lab was unable to reproduce the results of an earlier experiment, a requirement for continued NIH funding. (5/13 RP 72-73, 76; 5/18 RP 27, 33) In March 2012, Dr. Nickerson, through the lab's Program Manager/Research Coordinator Colleen Davis, asked Dr. Perez-Melgosa for a summary of the project's status. (CP 1728; 5/12 RP 117; 5/13 RP 10, 63-65, 93; Ex. 342) Dr. Perez-Melgosa did not provide the information, frustrating Dr. Nickerson. (5/13 RP 10; 5/18 RP 28, 101, 106)

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<sup>3</sup> Dr. Perez-Melgosa worked 30 hours a week; she was the highest paid non-computational scientist based on her full-time equivalent salary. (CP 1648, 1758)

Adding to Dr. Nickerson's frustration, Dr. Perez-Melgosa made several errors that reflected a disturbing lack of organization and attention to detail. For example, she needlessly sequenced two samples from the same individual. (CP 93, 1729, 1733; 5/13 RP 11, 88, 168; Ex. 303 at 1, 9) When she cross-contaminated two samples, she refused to take responsibility for the contamination, instead blaming the technicians. (5/13 RP 94-95; 5/18 RP 28-30)

At the end of June, Dr. Perez-Melgosa asked Dr. Nickerson to approve a month long vacation in August 2012, intending to visit her family in Spain. (CP 91; 5/18 RP 31; 5/21 RP 47-48; Ex. 340) Dr. Nickerson denied her request, expressing concern that the smallpox project was not going well, that Dr. Perez-Melgosa had not provided requested information summarizing the project, and that a month-long absence would further jeopardize the project. (CP 91-92; 5/18 RP 31-33; Ex. 340) Dr. Nickerson, however, told Dr. Perez-Melgosa she would approve the vacation if she summarized the current status of the project and showed other people how she managed the samples so they could assume her responsibilities for the project while she was gone. (5/18 RP 31-33; Ex. 340) Dr. Perez-Melgosa then took a leave of absence under the Family Medical Leave Act

from July 26, 2012, to September 20, 2012, taking her trip to Spain as planned. (CP 1641-1642; 5/18 RP 34; Ex. 341)

Before leaving, Dr. Perez-Melgosa provided Program Manager Davis the “master list” that summarized what tests and experiments had been run on each sample. (CP 92, 1729-30; 5/13 RP 67, 79; Ex. 303 at 5-8) One purpose of the master list is to allow others, who may not be involved with the project, to readily understand the research history of the samples. (CP 1729-30; 5/13 RP 79-80) Accuracy – and transparency – are thus paramount. (CP 91, 1730; 5/13 RP 79-80)

Upon reviewing the master list, Ms. Davis immediately noticed it contained multiple errors. (CP 1730; 5/13 RP 77-87; 5/14 RP 58; 5/18 RP 36-37) By sorting the list, Ms. Davis could see that four case samples had mismatched ethnicities with their control samples, which was an immediate red flag as they should be identical. (CP 92, 1633-34, 1730, 1738-39 (errors highlighted in red); 5/13 RP 80-82; 5/21 RP 104-05; Ex. 303 at 6-7)<sup>4</sup> Ms. Davis also noticed that the supplier listed one sample as male, but Dr. Perez-

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<sup>4</sup> The master list catalogs both the case sample and a control sample matched for gender and ethnicity. (5/13 RP 78) The case sample ends with “X,” the control with “A.” (CP 1633-34; 5/13 RP 82)

Melgosa listed it as having passed the TaqMan as female, instead of properly listing it as a fail. (5/13 RP 83-84; Ex. 303 at 6) Additionally, the master list reported several calls as “Male?,” which is not one of the four possible final calls for a sample, and does not state whether the sample passed or failed the assay. (CP 1617, 1762; 5/12 RP 60, 93; Ex. 303 at 5-8)

Prompted by these errors, Ms. Davis investigated the discrepancies. (5/13 RP 80, 84-85) Ms. Davis asked Ms. Pijoan for the results of the TaqMan gender assay that the quality control team reported to Dr. Perez-Melgosa. (5/13 RP 85; Ex. 354) Ms. Davis then discovered that Dr. Perez-Melgosa had – without telling anyone – changed sixteen calls made by the quality control team on the results of the TaqMan gender assay. (CP 92-93, 1730-31, 1742-47 (changes in yellow); 5/12 RP 77-89; 5/13 RP 86-87; 5/18 RP 42, 77, 80, 128, 140; 5/19 a.m. RP 32; 5/21 RP 106-17; Ex. 303 at 1, 10-15)

For example, Dr. Perez-Melgosa changed a sample to “male” that the quality control team reported as “undetermined” because it tested identical to a water control sample that had no DNA. (CP 92, 1618; 5/12 RP 79-83; 5/14 RP 42; 5/18 RP 37-38; Ex. 368) Dr. Perez-Melgosa changed other calls the quality control team considered indisputable. (CP 1618; 5/12 RP 84-89) Nothing in the master list,

or prior emails sent by Dr. Perez-Melgosa forwarding the quality control results, gave any indication that she had changed calls made by the quality control team. (CP 93; 5/13 RP 131; 5/18 RP 63-64; 5/21 RP 110; 5/26 a.m. RP 12)

Dr. Perez-Melgosa's decision to unilaterally change the quality control calls violated lab procedure, undermined Dr. Nickerson's expectation of transparency, and, in Dr. Nickerson's view, demonstrated an extreme lack of judgment, particularly for an experienced scientist working on a multi-million dollar project. (CP 93, 1731, 1756, 1763; 5/14 RP 56; 5/18 RP 41, 63-64; 5/19 a.m. RP 141, 143; 5/26 p.m. RP 17-18) Especially in light of her earlier errors, Dr. Perez-Melgosa's actions called into question all the work she had performed, raised concerns about whether she had made other undocumented changes, and threatened the accuracy of the smallpox project's results (and ultimately the reputations of both the lab and the University). (CP 93, 1763; 5/13 RP 91, 96; 5/14 RP 54, 56-59; 5/18 RP 37, 39-41, 120, 154; 5/19 a.m. RP 63, 66; Ex. 97) Because Dr. Nickerson could not trust Dr. Perez-Melgosa's work, Dr. Nickerson directed other lab employees to redo her most recent work, putting the project even further behind and in greater jeopardy. (5/18 RP 37, 39-41, 100, 102; 5/19 a.m. RP 63, 66)

Dr. Nickerson asked Nancy Cameron, the Director of Administration and Finance for Genome Sciences, to terminate Dr. Perez-Melgosa's at-will employment, showing her the changes that Dr. Perez-Melgosa had made to the quality control calls. (CP 93, 1756; 5/14 RP 128; 5/18 RP 38; 5/19 a.m. RP 63) Dr. Nickerson believed that Dr. Perez-Melgosa's actions warranted dismissal without a warning or progressive discipline, steps that are not required by University policy for at-will employees. (CP 1794-95; 5/14 RP 100, 109; 5/18 RP 40-41, 173; 5/19 a.m. RP 22, 102-03) After consulting with the Chair of Genome Sciences, Ms. Cameron agreed with Dr. Nickerson's assessment that Dr. Perez-Melgosa demonstrated a severe lack of judgment and that they could no longer trust her work. (CP 1756; 5/18 RP 114, 117-18, 123-24; 5/19 a.m. RP 9, 63, 66) Ms. Cameron signed a dismissal letter prepared by Dr. Nickerson, and sent it to the University's central human resources department, which approved the decision. (CP 1756; 5/18 RP 110-11, 139, 169; Ex. 58)

On November 16, 2012, Dr. Perez-Melgosa received the letter terminating her employment. (Ex. 97) The letter explained Dr. Perez-Melgosa's "totally unacceptable" decision to "[c]hang[e] the results determined by the quality control unit" eliminated "confidence in Dr. Perez Melgosa's judgment and ability to work

effectively in this lab.” (Ex. 97) Because Dr. Nickerson and Ms. Cameron believed that Dr. Perez-Melgosa showed a lack of judgment – as opposed to a purposeful effort to defraud – they did not report her dismissal to the University’s Office of Scientific Integrity (OSI), which investigates accusations of research misconduct. (CP 1779, 1786; 5/14 RP 56, 106; 5/18 RP 44, 105, 148, 153; 5/19 a.m. RP 12, 20, 33; 5/20 RP 11-12; Ex. 107) When Dr. Perez-Melgosa herself spoke with OSI, OSI’s Director Anne Ackenhusen declined to investigate because Dr. Perez-Melgosa had not asked for a formal investigation into research misconduct, but sought to reverse her termination. (5/20 RP 35, 53, 55, 60-61, 64)

**E. The trial court dismissed Dr. Perez-Melgosa’s pay discrimination claim on summary judgment and a jury rejected her remaining claims after a nine day trial.**

Dr. Perez-Melgosa sued the University under the Washington Law Against Discrimination alleging discrimination based on her national origin and retaliation. (CP 1-19) Dr. Perez-Melgosa alleged the University discriminated against her by subjecting her to a hostile work environment, failing to pay her equally, and terminating her. (CP 18) On summary judgment, King County Superior Court

Judge Dean Lum dismissed Dr. Perez-Melgosa's pay discrimination claim and her retaliation claim. (CP 950-52)<sup>5</sup>

After a nine-day trial before King County Superior Court Judge Palmer Robinson,<sup>6</sup> the jury unanimously found that Dr. Perez-Melgosa had failed to prove her discriminatory termination and hostile work environment claims. (CP 1614-15) After returning the verdict, the jury foreperson stated reaching the verdict was "hard," that they felt the University "did a major screw-up," and that they were "very sorry that we had to find the way that we did." (5/27 RP 153-54)

Dr. Perez-Melgosa appeals, but does not challenge the instructions under which the jury rejected her WLAD claims. (CP 1594-1610)

#### IV. ARGUMENT

##### A. **This Court cannot consider the jury's statement to impeach its verdict.**

This Court may not – as Dr. Perez-Melgosa repeatedly invites it to – rely on the jury's post-verdict statement to undermine its verdict. Washington law has long precluded consideration of post-

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<sup>5</sup> Dr. Perez-Melgosa does not challenge the dismissal of her retaliation claim. (App. Br. 4)

<sup>6</sup> This brief refers to both Judge Lum and Judge Robinson as "the trial court."

verdict statements regarding the jury's mental processes and motives because they inhere in the verdict:

The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict. . . . [T]o hold otherwise would be to allow nearly all verdicts to be attacked by the losing party.

*Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 205, 75 P.3d 944 (2003) (citing *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967)).<sup>7</sup>

The jury's statement, in any event, reflects nothing more than its dissatisfaction with the law it was instructed to apply under instructions that are unchallenged on appeal and therefore the law of the case. See *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001). The jury followed the court's instructions,

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<sup>7</sup> See also *State v. Ng*, 110 Wn.2d 32, 44, 750 P.2d 632 (1988) ("jurors' post-verdict statements regarding matters which inhere in the verdict cannot be used to attack the jury's verdict"); *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 768, ¶ 46, 260 P.3d 967 (2011) (trial court erroneously considered juror's post-verdict declaration concerning how other jurors "regarded the evidence, their mental processes, and how they and the other jurors considered and discussed the evidence in reaching their verdicts"); *Long v. Brusco Tug & Barge, Inc.*, No. 90976-8, at 4 (Wash. Feb. 25, 2016).

honoring the Legislature's refusal to turn the Washington Law Against Discrimination into a general civility code or to abrogate Washington's at-will employment rule. Dr. Perez-Melgosa reliance on the jury's statement, which permeates her brief, is particularly inappropriate given her acceptance of the legal principles that resulted in a defense verdict. (*E.g.*, App. Br. 2, 30, 34)

Dr. Perez-Melgosa received a full and fair trial. Neither the jury's statement, nor any other alleged error, provides any basis for this Court to remand for another.

**B. Dr. Perez-Melgosa's pay discrimination claim failed as a matter of law.**

**1. Dr. Perez-Melgosa failed to establish a prima facie claim of pay discrimination because she did not identify any comparable employees that received raises during the salary freeze.**

Dr. Perez-Melgosa failed to establish a prima facie case of pay discrimination. She apparently recognizes as much, nowhere setting forth (let alone arguing) the elements of a prima facie case. She instead asserts only that this Court should reverse if the University's reasons for denying her a raise were pretextual. She is wrong on the facts and wrong on the law. Because Dr. Perez-Melgosa did not establish a prima facie case, this Court should affirm the summary judgment dismissal of her pay discrimination claim.

The Washington Law Against Discrimination prohibits employers from discriminating against their employees because of their membership in a protected class, such as national origin. RCW 49.60.180. Washington has adopted the federal *McDonnell Douglas* burden-shifting framework for evaluating summary judgment motions where the plaintiff lacks direct evidence of discrimination. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001), *rejected on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the plaintiff must first establish a prima facie case of unlawful discrimination. Only then must the defendant offer a nondiscriminatory reason for its actions. *Hill*, 144 Wn.2d at 181. If the defendant meets that burden, the plaintiff must then present evidence that defendant's stated reason is a pretext for discrimination. *Hill*, 144 Wn.2d at 182. But if the plaintiff cannot first meet her burden to establish a prima facie case, the defendant has nothing to rebut; the analysis ends and the defendant must receive "prompt judgment as a matter of law." *Hill*, 144 Wn.2d at 181. See *Clarke v. State Attorney General's Office*, 133 Wn. App. 767, 789, ¶ 74, 138 P.3d 144 (2006), *rev. denied*, 160 Wn.2d 1006 (2007).

“To establish a prima facie disparate treatment case, an employee must show that (1) he or she belongs to a protected class, (2) he or she was treated less favorably in the terms or conditions of employment, (3) a similarly situated employee outside of the protected class received the benefit, and (4) the employees were doing substantially the same work.” *Crownover v. State ex rel. Dep’t of Transp.*, 165 Wn. App. 131, 147, ¶ 36, 265 P.3d 971 (2011), *rev. denied*, 173 Wn.2d 1030 (2012). A plaintiff asserting pay discrimination must identify “similarly situated” employees that “are directly comparable in all material respects.” *Raymond v. Ameritech Corp.*, 442 F.3d 600, 610 (7th Cir. 2006); *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006);<sup>8</sup> *see also Domingo v. Boeing Employees’ Credit Union*, 124 Wn. App. 71, 83, 98 P.3d 1222 (2004). This Court reviews summary judgment de novo, mindful that conclusory statements are not enough to avoid summary judgment. *Chen v. State*, 86 Wn. App. 183, 187, 190, 937 P.2d 612, *rev. denied*, 133 Wn.2d 1020 (1997).

Dr. Perez-Melgosa offered no direct evidence of discrimination in response to the University’s motion for summary

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<sup>8</sup> Washington courts routinely rely on federal cases when applying the WLAD. *Washington v. Boeing Co.*, 105 Wn. App. 1, 8, 19 P.3d 1041 (2000).

judgment. She instead tried to prove indirect discrimination under *McDonnell Douglas*, but ignored her burden to *first* establish a prima facie case (and does so again on appeal), focusing only on pretext. (CP 191-93; App. Br. 21-27) Dr. Perez-Melgosa made no effort to identify employees outside her protected class who were similarly situated to her “in all material respects” or to explain how they received more favorable treatment. Dr. Perez-Melgosa’s failure to identify comparators is fatal to her pay discrimination claim. *Clarke*, 133 Wn. App. at 789, ¶ 74 (plaintiff could not establish prima facie case without “evidence of disparate treatment”); *Raymond*, 442 F.3d at 611; *Moran*, 447 F.3d at 755; *Jordan v. City of Gary, Ind.*, 396 F.3d 825, 835 (7th Cir. 2005) (affirming summary judgment because plaintiff “overlooked one very important factor: she has failed to supply us with an example of a similarly situated employee outside of her protected class who was treated differently”).

Dr. Perez-Melgosa’s sweeping (and erroneous) claim that the University “lavished increases almost across the board” (App. Br. 25)<sup>9</sup> does not satisfy her burden to identify comparable employees,

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<sup>9</sup> Dr. Perez-Melgosa fails to acknowledge that 15 employees never received a raise and cites numerous raises given to employees *after the salary freeze ended in June 2013*. (Compare CP 1804, 1806, with CP 199-202).

particularly in light of the three distinct groups of employees in the Nickerson lab: leads, computational scientists, and non-computational scientists. (CP 55-56, 1748-49, 1758, 1761, 1803-04) That other employees received raises cannot be used to infer discrimination unless those employees were comparable in all material respects to Dr. Perez-Melgosa because many factors affect pay, such as differences in skills, experience, and duties. *Moultrie v. Penn Aluminum Int'l, LLC*, 766 F.3d 747, 753 (7th Cir. 2014) (“The purpose of this requirement is to eliminate other possible explanatory variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable—discriminatory animus.”) (quotation omitted). Indeed, Dr. Perez-Melgosa concedes that the treatment of other employees is irrelevant unless they are “similarly situated.” (App. Br. 31)

Other courts have rejected the same type of evidence Dr. Perez-Melgosa presents here. In *Bagwe v. Sedgwick Claims Mgmt. Servs., Inc.*, No. 14-3201, 2016 WL 304043 (7th Cir. Jan. 26, 2016), the Seventh Circuit affirmed summary judgment because “a chart comparing [plaintiff’s] salary to other” employees “provided no further information about these employees” and did “not explain[]

whether these employees were subject to the same standards, subordinate to the same supervisors, or had comparable experience and qualifications.” *Compare* 2016 WL 304043, at \*11, with CP 199-202; *see also Moultrie*, 766 F.3d at 753 (rejecting plaintiff’s attempt to establish prima facie case by alleging “he is the only one . . . who is treated this way”). That some employees and Dr. Perez-Melgosa shared the same University-wide job title, which describes a myriad of positions, does not show they are “similarly situated.” *Bagwe*, 2016 WL 304043, at \*11; *Majors v. General Elec. Co.*, 714 F.3d 527, 538 (7th Cir. 2013) (affirming summary judgment because employee “pointed to no evidence, apart from the job title, to support her contention that the employees were similarly situated to her”).

Regardless, any attempt by Dr. Perez-Melgosa to identify comparators would have been futile. Dr. Perez-Melgosa was *the highest paid* non-computational scientist in Dr. Nickerson’s lab for all but the last month of her employment. (CP 1758, 1805) Dr. Perez-Melgosa could not carry her burden to establish a prima facie case without identifying specific employees, comparable in all material respects and outside her protected class, that received better treatment. *See Fishburn v. Pierce Cty. Planning & Land Servs. Dep’t*, 161 Wn. App. 452, 468, ¶ 31, 250 P.3d 146 (“we will not comb

the record to find support for an appellant’s argument”), *rev. denied*, 172 Wn.2d 1012 (2011). Dr. Perez-Melgosa’s failure to allege, let alone establish, a prima facie case, mandated judgment for the University.<sup>10</sup>

**2. Dr. Perez-Melgosa did not establish pretext.**

**a. Dr. Perez-Melgosa cannot establish pretext by criticizing the University’s non-discriminatory personnel evaluations.**

Dr. Perez-Melgosa’s failure to establish a prima facie case makes her pretext arguments superfluous. *Hill*, 144 Wn.2d at 181; *Clarke*, 133 Wn. App. at 789, ¶ 74; *Smith v. Chicago Transit Auth.*, 806 F.3d 900, 907 (7th Cir. 2015) (“The [pretext] debate doesn’t matter. Smith hasn’t identified a similarly situated employee”). Regardless, the University’s reason for denying her a raise – a statewide salary freeze – was not pretextual.<sup>11</sup>

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<sup>10</sup> Any attempt by Dr. Perez-Melgosa to identify specific comparators in her reply brief would be unpreserved, untimely, and unfair to the University. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”).

<sup>11</sup> Dr. Perez-Melgosa confuses her two very different claims. (*See, e.g.*, App. Br. 23-24) The jury rejected her claim that her termination was discriminatory at trial. The evidence supporting that claim cannot now be cited to support her appeal of summary judgment on her distinct claim that she was denied a pay raise for discriminatory reasons. RAP 9.12.

“An employee cannot create a pretext issue without some evidence that the employer’s reasons . . . are unworthy of belief.” *Domingo*, 124 Wn. App. at 88. “An employee can demonstrate that the employer’s proffered reasons are unworthy of belief with evidence that: (1) the employer’s reasons have no basis in fact; or (2) even if the reasons are based on fact, the employer was not motivated by the reasons; or (3) the reasons are insufficient to motivate the adverse employment decision.” *Domingo*, 124 Wn. App. at 88.

Here, a legislative salary freeze constrained personnel decisions. Dr. Perez-Melgosa does not dispute that exceptions to the salary freeze could be made to help retain an employee or where an employee took on increased responsibilities. She does not argue that she qualified for either exception; she simply wanted more money for doing the same work. (CP 1645-46) Instead, Dr. Perez-Melgosa insists that the University’s refusal to make an exception for her must have been pretextual because the University granted the exceptions to other employees. Yet Dr. Perez-Melgosa does not argue that the vast majority of these raises fell outside the criteria for granting raises under the salary freeze. She asserts only her subjective estimation that raises given to three employees were undeserved and

thus must have been shams to further the University's allegedly discriminatory aims.

Dr. Perez-Melgosa ignores the undisputed evidence. For example, Dr. Perez-Melgosa's allegation that raises given to lab technicians Ms. Pijoan and Ms. Shephard were shams ignores the "personnel documents" she herself submitted (and which she now claims do not exist). (App. Br. 25) These contemporaneous documents establish that the University gave raises to its technicians "[d]ue to the increase in demand for these positions in industry, their ability to offer much higher salaries, and the fact that we have lost a number of positions over the past year to just such kinds of recruitment." (CP 433-36, 924; *see also* CP 1805-06, 1811, 1814 ("core team of technicians" had "experienced significant turnover . . . due in part to low compensation")) Dr. Perez-Melgosa presented no evidence that the justification for these raises – the loss of critical lab technicians and the need to retain the few that remained – were untrue.

Dr. Perez-Melgosa likewise erroneously characterizes the University's treatment of Colleen Davis, the lab's Program Manager/Research Coordinator. The University did not give Ms. Davis raises "despite no changes to her duties" (App. Br. 25) – it

increased her salary because of her “pivotal role” after “the loss of a key staff person.” (CP 415; *see also* CP 1807 (explaining “Ms. Davis is a lead in Dr. Nickerson’s lab, and plays a critical role overseeing the administrative aspects of the lab.”))<sup>12</sup>

This contemporaneous evidence distinguishes this case from *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103 (9th Cir. 2004) (App. Br. 22), where the Ninth Circuit reversed summary judgment for the employer because it had no “memorandum, meeting notes, or other evidence” supporting the existence of a salary freeze or the financial difficulties that allegedly caused it. *McGinest*, 360 F.3d at 1123. In contrast, the legislatively imposed salary freeze is a matter of public record and the University documented its reasons for making exceptions to the freeze. (*See, e.g.*, CP 412-25, 431-36, 924, 1805-06, 1811, 1814)

This Court should reject Dr. Perez-Melgosa’s attempt to establish pretext by disputing the *wisdom* of the University’s personnel evaluations. *Chen*, 86 Wn. App. at 190 (“Subjective

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<sup>12</sup> As explained more fully at trial, that staff person was Eric Torskey, who had been a senior administrative manager and Dr. Nickerson’s “right-hand man.” (5/13 RP 69-70; 5/18 RP 23-25) His departure in early 2012, as well as the departure of Dr. Nickerson’s co-principal investigator, magnified the stress within the Nickerson lab in the spring of 2012. (5/13 RP 69-70; 5/18 23-25, 132; 5/19 a.m. RP 58)

judgments by employers are not *per se* illegal”); *Bagwe*, 2016 WL 304043, at \*9 (courts “do not sit as a superpersonnel department that judges the wisdom of [employers’] decisions”) (quotation omitted). Dr. Perez-Melgosa makes much of an email in which Dr. Nickerson criticized the performance of Ms. Shephard and Ms. Pijoan, asserting that in light of these criticisms the University could not have believed they were worth retaining. (App. Br. 25 (citing CP 776))<sup>13</sup> But Dr. Perez-Melgosa ignores that an employer may sincerely and reasonably believe that an employee who “needs work” (CP 776) is worth retaining, particularly where that employee has important institutional knowledge, is in high-demand, and her peers have already left for higher-paying jobs. (CP 435 (Ms. Shephard had “a unique combination of technical skills and institutional knowledge”))

The salary freeze did not require the University to wait until its employees received an offer or threatened to leave before offering a retention raise, as Dr. Perez-Melgosa apparently believes. (App. Br. 25) Indeed, the University offered these raises as proactive

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<sup>13</sup> Dr. Nickerson’s email confirms the undisputed fact that she was a demanding manager with high expectations. In focusing on this one email, Dr. Perez-Melgosa exaggerates the criticisms of Ms. Shephard and Ms. Pijoan. No one believed their honest mistakes violated lab procedure or reflected anywhere near the lack of judgment shown by Dr. Perez-Melgosa in changing the quality control calls. (CP 1775; *see also* RP 5/18 RP 64-66, 76-77, 95-96)

measures *to prevent* employees from looking for alternative employment at all because the University knew it could not match offers from private industry. (CP 434-36 (“our hope is to offer a salary increase to Cindy to avoid her looking for other positions”); *see also* CP 1805-06, 1811, 1814)

It was for the University – not Dr. Perez-Melgosa – to evaluate the importance of its employees, an inherently subjective process. Dr. Perez-Melgosa’s pretext arguments impermissibly invite this Court to second-guess the University’s non-discriminatory personnel evaluations of its employees.

**b. At most, Dr. Perez-Melgosa presented a “weak issue of fact” given the abundant evidence no discrimination occurred.**

Even if this Court accepts Dr. Perez-Melgosa’s quibbling with the University’s personnel decisions, it should nonetheless affirm. Summary judgment is proper where “the plaintiff created only a weak issue of fact as to whether the employer’s reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.” *Milligan v. Thompson*, 110 Wn. App. 628, 637, 42 P.3d 418 (2002) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). In evaluating a claim of pretext, courts look at “the strength

of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case." *Reeves*, 530 U.S. at 148-49.

The University presented abundant and uncontroverted evidence no discrimination occurred. It is undisputed Dr. Nickerson never said anything discriminatory about Dr. Perez-Melgosa's accent or her national origin. (CP 1631-32) None of Dr. Nickerson's employees ever heard her, or anyone else, make a discriminatory comment. (CP 56, 88, 1729, 1749, 1761) *See Hill*, 144 Wn.2d at 190 (finding employee's age discrimination case weak where "there was no evidence or testimony that [supervisor] or anyone else . . . had made derogatory ageist comments or otherwise discriminated against older workers"). Dr. Perez-Melgosa complained about discrimination only *after* she was terminated and contemplated litigation. (CP 1757-58)

Dr. Perez-Melgosa's claim is also weakened by the fact that the same person that brought her into the lab, Dr. Nickerson, is the same person that denied her a raise.<sup>14</sup> *See Hill*, 144 Wn. 2d at 189 (adopting

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<sup>14</sup> Dr. Perez-Melgosa mistakenly implies that Dr. Nickerson had no choice but to accept Dr. Perez-Melgosa as an employee because she "inherited" the smallpox project (App. Br. 6-7), ignoring that Dr. Nickerson could have declined the project and that she met with Dr. Perez-Melgosa before agreeing to take on the smallpox project. (CP 443)

“same actor” inference under WLAD). The “same actor” inference recognizes “the evidence *rarely* is sufficient to find that the employer’s asserted justification is false when the actor who allegedly discriminated against the plaintiff had previously shown a willingness to treat the plaintiff favorably.” *Coghlan v. American Seafoods Co. LLC.*, 413 F.3d 1090, 1097 (9th Cir. 2005) (emphasis in original; quotation omitted). If Dr. Nickerson harbored animus against foreigners she would not have invited Dr. Perez-Melgosa (or numerous other foreigners) into her lab.

Ironically, Dr. Perez-Melgosa highlighted the weakness of her case when she alleged that Dr. Nickerson mistreated not just herself, but two other foreign-born employees, Catherine Igartua and Qian Yi. (CP 192) It is undisputed that Dr. Nickerson treated these employees favorably; she wrote letters of recommendation for Ms. Igartua, who is also Spanish. (CP 55-57, 87-88) Dr. Nickerson repeatedly invited researchers from other countries to work in the lab, including one from Spain. (CP 1729, 1781-82) *See Fulton v. State, Dep’t of Soc. & Health Servs.*, 169 Wn. App. 137, 162, ¶ 43, 279 P.3d 500 (2012) (rejecting employee’s assertion of pretext because employer hired another person in protected class at the same time it allegedly discriminated against plaintiff).

Finally, the jury's verdict rejecting Dr. Perez-Melgosa's assertion that her termination was motivated by discriminatory animus underscores the weakness of her claim that the denial of a raise was the result of national origin discrimination. *See Lodis v. Corbis Holdings, Inc.*, No. 72342-1-I, 2015 WL 9461603, at \*14 (Dec. 28, 2015) (jury verdict rejecting claim becomes law of the case in subsequent trials and removes any factual issues previously litigated); *Bundrick v. Stewart*, 128 Wn. App. 11, 19-20, ¶¶19-20, 114 P.3d 1204 (2005) (jury's special verdict moots challenge to partial summary judgment). This Court should reject Dr. Perez-Melgosa's request for another costly trial.

**C. The trial court properly exercised its discretion in managing the evidence at trial.**

The jury unanimously rejected at trial Dr. Perez-Melgosa's claims that the University terminated her and subjected her to a hostile work environment because of her national origin. (CP 1614-15) Dr. Perez-Melgosa raises no challenge to the court's instructions, conceding that the jury resolved her national origin claims under a correct application of the law. She instead raises a host of evidentiary arguments, all of which take issue with the trial court's broad discretion to control the evidence before the jury. *See Wuth ex rel. Kessler v. Lab. Corp. of America*, 189 Wn. App. 660, 687, ¶ 55, 359

P.3d 841 (2015). Dr. Perez-Melgosa cannot show the trial court abused its discretion by making a manifestly unreasonable decision or one based upon untenable reasons, and, regardless, none of the alleged errors would have changed the jury's verdict. *Wuth*, 189 Wn. App. at 687, ¶ 55. The jury fairly rejected Dr. Perez-Melgosa's national origin claim based on undisputed instructions and proper evidence.

**1. The trial court did not abuse its discretion in excluding evidence of raises, which was irrelevant to Dr. Perez-Melgosa's surviving claims.**

The trial court did not abuse its discretion in excluding as irrelevant evidence of raises given to other Nickerson lab employees. Those raises were relevant only to the dismissed pay discrimination claim and any probative value was substantially outweighed by the danger of confusing and misleading the jury. (5/12 RP 3-4; 5/13 RP 189) The trial court's ruling makes sense; Dr. Perez-Melgosa could not prove the University's reason for terminating her – a lack of judgment and breach of lab protocols – was pretextual by disputing its distinct reason for denying her a raise – the statewide salary freeze. Evidence concerning the *raises* other employees received would not have helped Dr. Perez-Melgosa establish that her

*termination* was pretextual, or that she was subjected to a hostile work environment.

The unchallenged jury instructions establish the elements of Dr. Perez-Melgosa's claims. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001). To prove her termination claim, Dr. Perez-Melgosa had to prove her "national origin was a substantial factor in the [University's] decision to terminate her employment." (CP 1836) (emphasis added)) To prove her hostile work environment claim she had to show there was "language or conduct concerning national origin" that she regarded "as undesirable and offensive" and that it was "so offensive or pervasive that it altered the conditions" of her employment. (CP 1837)

Trial courts have "considerable discretion" under ER 403 "to exclude minimally relevant and highly prejudicial evidence," particularly where the disputed evidence risks confusing the jury. *Lodis*, 2015 WL 9461603, at \*8-9; see also *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384, 128 S. Ct. 1140, 1145, 170 L. Ed. 2d 1 (2008) (special deference is due under ER 403 "since it requires an on-the-spot balancing of probative value and prejudice") (quotation omitted) (App. Br. 31). In *Lodis*, the trial court had entered judgment dismissing the employee's age discrimination

claim. This Court affirmed the trial court's refusal to let a former employee "present unlimited evidence of alleged discriminatory conduct" in a trial of his retaliation claim because it would have "risked significant, unfair prejudice" to the employer and "would have risked jury confusion regarding whether this was actually an age discrimination case, rather than the retaliation case that it was promoted to be." *Lodis*, 2015 WL 9461603, at \*9. This Court concluded that "[t]he trial court did not abuse its discretion by denying [the employee] carte blanche to introduce evidence of alleged discriminatory conduct, regardless of its connection to his claim." *Lodis*, 2015 WL 9461603, at \*9.

Here, as in *Lodis*, the trial court did not abuse its discretion in excluding evidence that was irrelevant, unduly prejudicial, and confusing. Evidence of raises had no bearing on the termination claim. Likewise, raises added nothing to Dr. Perez-Melgosa's hostile work environment claim, which alleged that "Dr. Nickerson was menacing and provoking" and "intimidating when she yells." (CP 1515-16 (trial brief)) The jury was well informed of Dr. Nickerson's yelling, which is the type of conduct (unlike pay decisions) typically central to a hostile work environment claim. (*E.g.*, 5/13 RP 171-72;

5/21 RP 41-47; 5/27 RP 85) *See Clarke*, 133 Wn. App. at 787, ¶ 66 (“The conduct must be . . . objectively abusive”).

Moreover, the evidence of raises was irrelevant to Dr. Perez-Melgosa’s remaining claims, because the jury could not infer discrimination from raises received by other employees given her failure to explain how those employees were comparable. (§ IV.B.1) None of the cases cited by Dr. Perez-Melgosa hold that it is reversible error for a trial court to exclude evidence that had so little bearing on the claims at trial and that would have been so confusing to the jury. (App. Br. 29-30)<sup>15</sup> The exclusion of such marginally probative evidence of pay raises was not reversible error. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169-70, 876 P.2d 435 (1994) (“The

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<sup>15</sup> *Sangster v. Albertson’s, Inc.*, 99 Wn. App. 156, 991 P.2d 674 (2000), reversed summary judgment. *Broyles v. Thurston Cty.*, 147 Wn. App. 409, 432, ¶ 48, 195 P.3d 985 (2008), affirmed an instruction allowing consideration of conduct predating the limitations period, expressly eschewing any analysis of relevance or prejudice under ER 403-04. *Wilson v. Olivetti N. American, Inc.*, 85 Wn. App. 804, 934 P.2d 1231, *rev. denied*, 133 Wn.2d 1017 (1997), contains dicta stating vulgar comments about plaintiff should have been admitted because they were “directly relevant” to her assertion that defendant failed to properly respond to her concerns. 85 Wn. App. at 808, 810, 813 (stating “[t]he dispositive issue is whether the trial court improperly struck Ms. Wilson’s demand for a jury trial” and providing “guidance” on evidentiary issue). *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188 (3d Cir. 1994), reversed because the trial court allowed the employer to present testimony concerning the employee’s poor performance while at the same time refusing to allow the employee to present evidence that his poor performance was the result of discrimination.

exclusion of evidence which is cumulative or has speculative probative value is not reversible error.”).

Dr. Perez-Melgosa’s arguments on appeal confirm that she sought to introduce evidence of pay raises as an end-run around the summary judgment ruling dismissing her disparate treatment claim alleging pay discrimination. (App. Br. 29 (arguing “[t]he prevalence of salary increases” shows Dr. Nickerson treated “Dr. Perez-Melgosa differently”)) Evidence concerning raises would have only confused the jury and invited it to consider evidence that, as a matter of law, could not be used to infer discrimination. The trial court was well within its discretion in rejecting Dr. Perez-Melgosa’s attempt to submit evidence of a claim that had already been resolved. *See Lodis*, at \*10 (affirming exclusion of evidence submitted “with the goal of relitigating” claim that had been resolved in earlier trial); *Waters v. Genesis Health Ventures, Inc.*, 400 F. Supp. 2d 808, 811-812 (E.D. Pa. 2005) (excluding evidence regarding acts of discrimination by the defendant from witness whose complaint for discrimination had already been dismissed on summary judgment).

In any event, Dr. Perez-Melgosa cannot show prejudice from the trial court’s evidentiary decision. The jury knew that Dr. Nickerson denied Dr. Perez-Melgosa a raise citing the salary freeze.

(5/18 RP 5; 5/21 RP 39) The jury also knew that Ms. Davis received a raise during the freeze, a point Dr. Perez-Melgosa raised in closing. (5/12 RP 124-25; 5/13 RP 188; 5/27 RP 85: “She’s gotten all these raises”)) The jury was also well aware of Dr. Perez-Melgosa’s contention that Dr. Nickerson treated more favorably other employees that “made similar or worse mistakes” (App. Br. 28), another point she pressed in closing argument. (5/13 RP 175-76; 5/14 RP 71; 5/18 RP 65, 88, 95; 5/19 a.m. RP 127-32; 5/27 RP 86, 96-97; Ex. 119; *see also* 5/26 a.m. RP 38) Rather than “exclude[] all evidence of salaries and promotions in Dr. Nickerson’s lab” (App. Br. 28), the trial court allowed the jury to consider the two main pieces of evidence Dr. Perez-Melgosa sought to admit.

The trial court did not abuse its discretion in excluding evidence of raises that was “[f]ar from the core” of both Dr. Perez-Melgosa’s termination and hostile work environment claims. *Lodis*, at \*9.

**2. The trial court did not abuse its discretion in admitting evidence regarding treatment of two foreign born employees, including one with a Spanish accent.**

The trial court similarly did not abuse its discretion in allowing the jury to consider Dr. Nickerson’s treatment of two other foreign employees, including one of Spanish national origin. Dr.

Perez-Melgosa's assertion that Dr. Nickerson harbored discriminatory bias against foreigners put Dr. Nickerson's treatment of foreign employees front and center.

"[E]vidence regarding an employer's treatment of other members of a protected class is especially relevant to the issue of the employer's discriminatory intent." *Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 523 (3d Cir. 2003); *Fulton*, 169 Wn. App. at 162 (employer's hiring of another person in protected class at the same time it allegedly discriminated against plaintiff demonstrated lack of discriminatory animus); *Danielson v. Yakima Cty.*, No. 10-CV-3115-TOR, 2013 WL 2639241, at \*5 (E.D. Wash. June 12, 2013) (that another member of plaintiffs' protected class received favorable treatment "severely undermines Plaintiffs' assertions that Defendants [acted] with discriminatory intent").<sup>16</sup>

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<sup>16</sup> Dr. Perez-Melgosa's authority is not to the contrary. (See App. Br. 31 (citing *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 445, ¶ 20, 191 P.3d 879 (2008) (recognizing "in the civil employment context, evidence of employer treatment of other employees" is relevant to motive and intent) (citing *Ansell*). *Graham v. Bendix Corp.*, 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) (App. Br. 32), did not hold that evidence of an employer's treatment of other employees is irrelevant, instead providing the unremarkable proposition that an employer could not escape liability for *proven* discrimination by showing it did not discriminate against all employees in plaintiff's protected class. *Graham* cites *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978), which recognizes "the employer must be allowed some latitude to introduce evidence which bears on his motive." 438 U.S. at 580.

Here, Dr. Nickerson’s treatment of other foreigners is obviously relevant. The jury could infer from Dr. Nickerson’s treatment of foreigners that she does not harbor a bias against people based upon national origin, as Dr. Perez-Melgosa has consistently alleged, including during closing argument when she argued the University “treat[ed] her like an outsider” and that she would have been treated differently if she “was from the United States and didn’t have an accent.” (5/27 RP 96, 99; *see also* CP 17 (complaint alleging Dr. Nickerson was “intolerant of anyone who is a non-native English speaker”), 192 (arguing on summary judgment University mistreated other foreign employees))

Dr. Perez-Melgosa’s arguments go to the *weight* the jury should have given this evidence, not its *admissibility*, and they are arguments she made to the jury. *Johnston-Forbes v. Matsunaga*, 177 Wn. App. 402, 412, ¶ 22, 311 P.3d 1260 (2013) (affirming trial court’s admission of expert testimony where challenges went to weight, not admissibility, and jury was aware of challenges), *aff’d*, 181 Wn.2d 346, 333 P.3d 388 (2014) (App. Br. 35). For example, she asserts that evidence concerning Ms. Igartua was unduly prejudicial because Dr. Nickerson purportedly did not know Ms. Igartua was from Spain (though Dr. Nickerson undisputedly knew she had a

Spanish accent), relying on the University's answer to interrogatories. (App. Br. 31) But the trial court admitted those answers into evidence (Ex. 262) and Dr. Perez-Melgosa confronted Ms. Davis with the discovery responses in an attempt to prove that Dr. Nickerson did not know Ms. Igartua was from Spain. (RP 5/13 RP 112-13) Likewise, the jury knew that "Dr. Yi is from China, not Spain." (*Compare* App. Br. 32, *with* 5/26 a.m. RP 135) The trial court did not abuse its discretion when it admitted evidence refuting Dr. Perez-Melgosa's contention that Dr. Nickerson harbored discriminatory bias towards foreign employees.

**3. The trial court did not abuse its discretion in allowing testimony from the state's vocational expert.**

Dr. Perez-Melgosa's challenge to the testimony of the University's vocational expert, Carl Gann, on the issue of damages is similarly without merit. Where, as here, a jury finds no liability any error concerning evidence of damages is – by definition – harmless. *Stuart v. Consol. Foods Corp.*, 6 Wn. App. 841, 845, 496 P.2d 527 ("when evidence is wrongfully admitted which is concerned solely with damages and the verdict reflects no liability, the error is harmless"), *rev. denied*, 81 Wn.2d 1002 (1972). Dr. Perez-Melgosa

concedes “the jury did not reach the question of damages.” (App. Br. 43)

Regardless, the trial court did not abuse its discretion in allowing Mr. Gann to testify. ER 702 allows expert testimony where “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence.” “Trial courts have broad discretion in determining the admissibility of expert testimony under ER 702, and a trial court’s decision should not be disturbed absent an abuse of that discretion.” *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). “As long as helpfulness is fairly debatable, a trial court does not abuse its discretion by allowing an expert to testify . . . . even where the helpfulness of expert testimony is doubtful.” *Detention of Pettis*, 188 Wn. App. 198, 205, ¶ 16, 352 P.3d 841, *rev. denied*, 184 Wn.2d 1025 (2015). “Expert testimony need not be flawless to be admissible.” *Colley v. Peacehealth*, 177 Wn. App. 717, 731, ¶ 44, 312 P.3d 989 (2013).

Mr. Gann has 37 years’ experience as a vocational rehabilitation counselor. (5/26 a.m. RP 74) He testified the most effective way to get a job is direct communication with the employer and the second most effective is networking. (5/26 a.m. RP 77-78) Though Dr. Perez-Melgosa had “applied to over 200 jobs” (App. Br.

36), she submitted all but 12 applications electronically to the same employer. (5/26 a.m. RP 82; Ex. 131) Mr. Gann testified that a reasonable jobseeker would have done “something different than the same thing that hasn’t worked for two years,” including applying to more employers, more aggressive networking, engaging with professional associations, reviewing publications, and expanding the search beyond a narrow subspecialty. (5/26 a.m. RP 82-90) Mr. Gann listed specific employers that Dr. Perez-Melgosa could have contacted and organizations she could have used. (5/26 a.m. RP 83-84, 90) Mr. Gann cited labor statistics showing that the unemployment rate for people with Dr. Perez-Melgosa’s qualifications is lower than average and her expertise is in high-demand. (5/26 a.m. RP 91-93)

Mr. Gann’s testimony met the low threshold for helpfulness under ER 702. Though laypeople may have a general sense of job search methods, they do not have Mr. Gann’s 37 years of experience confirming which methods are the most effective or why. Mr. Gann’s expertise also helped explain statistical research beyond the understanding of the average person. The trial court did not abuse its discretion in finding Mr. Gann’s testimony helpful. *Henderson v. Tyrrell*, 80 Wn. App. 592, 630, 910 P.2d 522 (1996) (vocational

expert's opinion "was helpful to the jury in determining damages"); *Philippides*, 151 Wn.2d at 393 (same); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1346 (9th Cir. 1987) (vocational expert's testimony regarding reasonableness of plaintiff's "mitigation efforts and the availability of jobs" was admissible), *cert. denied*, 484 U.S. 1047 (1988).

Mr. Gann also had an adequate foundation for his testimony under ER 703 because his testimony was based on facts "made known to the expert at or before the hearing." Mr. Gann reviewed Dr. Perez-Melgosa's job search records (including her hundreds of applications, her own job description, and the descriptions of numerous other positions), and her deposition and discovery responses, as well as statistical research, including from the U.S. Bureau of Labor Statistics and the Washington State Employment Security Department. (5/26 a.m. RP 80, 91-93, 97) Because he counsels clients with varied backgrounds and experience, Mr. Gann can familiarize himself with any field, as he did in this case, by reviewing records, and researching literature and statistical data. (5/26 a.m. RP 128-29)

Had it reached the issue, Mr. Gann's testimony would have allowed the jury to find that Dr. Perez-Melgosa had not reasonably mitigated her damages. (App. Br. 35-39) None of the cases cited by

Dr. Perez-Melgosa involve an employee that refused to meaningfully engage with employers and instead passively submit hundreds of applications to the very employer that had rejected hundreds of her applications over the course of two years. (App. Br. 35-39)<sup>17</sup>

Dr. Perez-Melgosa's criticisms of Mr. Gann again concern weight, not admissibility, and she made those arguments to the jury. (See, e.g., 5/26 a.m. RP 102-103, 105-107) The trial court did not abuse its discretion by admitting helpful testimony while allowing Dr. Perez-Melgosa to argue to the jury the criticisms she now raises on appeal. *Henderson*, 80 Wn. App. at 630 (affirming admission of vocational expert testimony where opposing party cross-examined expert and presented competing evidence); *Johnston-Forbes*, 177 Wn. App. at 412, ¶ 22; *Cassino*, 817 F.2d at 1346.<sup>18</sup>

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<sup>17</sup> Indeed, two of the cases cited by Dr. Perez-Melgosa *affirmed* a trial court's admission of competing evidence on the reasonableness of the plaintiff's job search. *Herring v. Dep't of Soc. & Health Servs.*, 81 Wn. App. 1, 12-13, 914 P.2d 67 (1996); *Henningesen v. Worldcom, Inc.*, 102 Wn. App. 828, 846, 9 P.3d 948 (2000).

<sup>18</sup> At times Dr. Perez-Melgosa appears to argue the trial court should have dismissed the University's mitigation defense as a matter of law. (E.g., App. Br. 39 (arguing her "efforts establish reasonable diligence as a matter of law")) However, Dr. Perez-Melgosa never sought judgment as a matter of law on that issue.

**4. The trial court did not abuse its discretion in excluding her former supervisor's performance evaluations of Dr. Perez-Melgosa.**

The trial court correctly reasoned that Dr. Perez-Melgosa's evaluations by her previous supervisor Dr. Wilson in 2007 and 2008 were irrelevant. (5/26 a.m. RP 36-38; Ex. 5-6) Dr. Perez-Melgosa's performance before she joined the Nickerson lab was never at issue. Evaluations written by a different person, years before the relevant time period (the spring of 2012) had no bearing on whether Dr. Nickerson disliked foreigners. (5/26 a.m. RP 37 (trial court: "there isn't any criticism of her job performance until the spring of 2012")) The evaluations make no mention of the TaqMan assay (or any other quality control test), contrary to Dr. Perez-Melgosa's assertion that they "show that interpreting the Taqman data *was* part of her normal job." (App. Br. 45 (emphasis in original))

Dr. Perez-Melgosa again fails to identify any apposite cases, instead citing a case in which the employer relied on the contested evaluation in terminating the employee, thus making it relevant, *Merrick v. Farmers Insurance Group*, 892 F.2d 1434, 1439-40 (9th Cir. 1990), and another in which the employer ignored evaluations completed within several months, not four years, *E.E.O.C. v. Boeing Co.*, 577 F.3d 1044, 1050-51 (9th Cir. 2009).

In any event, the exclusion of the evaluations was harmless. Dr. Perez-Melgosa asserts the evaluations show Dr. Wilson praised her “for her accuracy and exercise of independent judgment.” (App. Br. 45) But the jury heard that Dr. Wilson was pleased with Dr. Perez-Melgosa’s performance. (5/21 RP 13 (“I got in general very good feedback, very positive feedback [from Dr. Wilson]”); 5/26 a.m. RP 38 (“there’s ample testimony that Dr. Wilson thought she was doing a good job”)) The evaluations would have been cumulative of this testimony. The trial court did not abuse its discretion in excluding irrelevant and cumulative evidence.

**5. The trial court did not abuse its discretion by admitting illustrations that helped the jury understand the scientific evidence.**

The trial court did not err by admitting three illustrations from the TaqMan gender assay that displayed a single sample (one mistakenly called by Dr. Perez-Melgosa), as opposed to all samples in a given set. (Ex. 368, 370, 372; 5/12 RP 76-89) Far from “misleading” the jury (App. Br. 46-49), these illustrations helped the jury understand Dr. Perez-Melgosa’s errors by isolating a single data point without the clutter of other points. Ms. Pijoan explained that the illustrations did not in any way change the TaqMan data (5/12 RP 77, 113-14), refuting Dr. Perez-Melgosa’s contention there was no

testimony “as to the accuracy of the data upon which the exhibit is based.” (App. Br. 47 )(citing *Reitz v. Knight*, 62 Wn. App. 575, 584, 814 P.2d 1212 (1991)). Dr. Perez-Melgosa is also wrong that the TaqMan data “*must* be interpreted” with the “context” of other data points (App. Br. 47) (emphasis in original); as Ms. Pijoan explained, Dr. Perez-Melgosa had mistaken the “only call” for two data points that were identical to water and thus contained no DNA. (5/12 RP 79-80, 84)

Dr. Perez-Melgosa’s criticisms again concern the weight of the evidence, not its admissibility, and she raised them before the jury. The jury knew the illustrations did not display every sample, a point on which Dr. Perez-Melgosa repeatedly elicited testimony. (5/12 RP 24; 5/18 RP 10; 5/21 RP 31-32) Dr. Perez-Melgosa also submitted illustrations with all samples. (Ex. 18, 20-22) The jury even asked Dr. Perez-Melgosa how she viewed the plots, allowing her to confirm that the plots are normally viewed with all samples. (5/26 a.m. RP 67) The trial court did not abuse its discretion by admitting evidence that was helpful to the jury while also allowing Dr. Perez-Melgosa to raise her concerns about that evidence.

**V. CONCLUSION**

This Court should affirm the jury's verdict and the trial court's summary judgment order.

Dated this 29<sup>th</sup> day of February, 2016.

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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 29, 2016, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 29<sup>th</sup> day of February, 2016.

  
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Jenna L. Sanders