Supreme Court No. 92446-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DENNIS WILLHITE,

Plaintiff/Petitioner,

v.

FARMERS NEW WORLD LIFE INSURANCE COMPANY, a Washington corporation,

Defendant/Respondent,

and

ZURICH AMERICAN INSURANCE CO., a corporation,

Defendant.

RESPONDENT'S OPPOSITION TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Dennis Willhite's petition for discretionary review should be denied because none of the considerations listed in RAP 13.4(b) is present in this case. Although Willhite asserts that review should be accepted under "subdivisions (1), (3) and (4)," *see* Appellant's Petition for Supreme Court Discretionary Review ("Pet.") at 6, there is no decision of this Court that is in conflict with the Court of Appeals' decision. Nor has it been shown that any significant constitutional question is involved, or that the petition presents an issue of substantial public interest that this Court should determine.

Willhite was an employee of Farmers New World Life Insurance Company ("FNWL") in November 2010, when the company carried out a company-wide reduction in force ("RIF"), terminating approximately 10 percent of its workforce. Willhite sued, challenging the termination of his employment. FNWL obtained summary judgment on Willhite's claims that his termination was due to age discrimination and violated public policy, and on the unjust enrichment counterclaim for Willhite's improperly retained severance benefits. After a two-week trial, a unanimous 12-person jury rejected Willhite's remaining claims for disability discrimination, violation of the Washington Family Leave Act

("FLA"), and breach of an implied contract. The trial court entered a final judgment on the verdict and summary judgment rulings.

The Court of Appeals unanimously affirmed the judgment in an unpublished opinion and denied Willhite's motion for reconsideration. Using a cut-and-paste version of his appellate brief, Willhite now seeks discretionary review of the Court of Appeals' decision. Because the requirements of RAP 13.4(b) are not met, his petition should be denied.

II. STATEMENT OF THE CASE

A. Factual Background

1. Willhite joined FNWL.

Willhite began working for FNWL, in the company's marketing department in Los Angeles, in 1986. He previously had been employed by two other Farmers companies, in non-marketing positions. He transferred to FNWL's Mercer Island office in 1988, taking a position in the actuarial department and later moving to operations. He rejoined the marketing department when FNWL moved its marketing function north. A few years after Mike Keller assumed the department's top position, Willhite started reporting directly to him. According to Keller, Willhite had "some good years in the Marketing department and some mediocre years."

2. Willhite was unhappy about not being promoted.

When Keller divided the marketing department into three functions, FNWL hired Rion Groves to head the marketing function. Willhite did not like working for Groves and was disappointed that he had not been promoted into the position. He also was unhappy when his peer, Michelle Douvia, was promoted to a director-level position—another promotion he thought he deserved.

Willhite talked with Keller about his desire for promotion. Keller recommended that Willhite join the Independent Agent Simple Term ("IAST") pilot project. The pilot project was high profile and offered Willhite an opportunity to demonstrate his skills to upper management. Willhite joined the IAST team in January 2008, reporting first to Keller, then to Douvia. By mid-2009, it was clear the pilot project was a failure. FNWL ended it in June.

The marketing department struggled with where next to assign Willhite. Keller, Douvia, and Brian Fitzpatrick (an executive director in the marketing department) came up with two options: Willhite could work under Fitzpatrick either as a Life Financial Sales Specialist or on a special project helping achievement club agents increase their life insurance sales.

The options were designed to get Willhite the field experience he needed for future promotions.

Willhite rejected the offers. He lobbied for promotion to a position he proposed the company create for him, *i.e.*, "Director of Marketing & Sales, Independent Agents." When the company did not take him up on that suggestion, he eventually agreed to work with the achievement club agents.

3. Willhite was dissatisfied with his work assignment.

The new project kicked off in the fall of 2009. Willhite was not enthusiastic. He told a member of FNWL's Human Resources ("HR") department, Brian Hogan, that the project was not difficult, *i.e.*, that it "was not rocket science," but he "didn't like it." He met with Hogan to discuss (a) his belief that FNWL was not following company procedures when promoting persons to senior level positions; (b) his view that he had been passed over for promotions and that the people who had received promotions were less qualified than he; (c) his opinion that he was already prepared for a zone manager or state executive role and that one of those positions was his "next in line job;" and (d) his perception that the Achievement Club project was "busy work" and beneath him. During

those meetings, Willhite appeared to Hogan as "very confident and very matter of fact."

Although the Achievement Club project was Willhite's only assignment, Fitzpatrick saw no evidence of any progress over the first several months. By May, Fitzpatrick had become frustrated. After meeting with Willhite for a status update, he sent Willhite a written request for additional information and documentation of Willhite's activities. He also scheduled a meeting on May 18 to discuss the information.

A few days before the scheduled meeting, Fitzpatrick asked HR for guidance on disciplinary proceedings for Willhite. He was advised to give Willhite a formal warning. Based on that advice, if the meeting went as he expected, Fitzpatrick planned to initiate formal disciplinary proceedings.

4. Willhite took a leave of absence.

The meeting never took place. Willhite emailed Fitzpatrick early on May 18 to report he would not be in the office that day because he had "picked up some kind of stomach bug." During his one brief meeting in May with Matt Crook, the new head of FNWL's HR department, Willhite had not said anything about being depressed, feeling anxious, or having any kind of health problem. Nor, after a brief discussion he had with

Hogan in December 2009 when he reported feeling stressed, had he said anything to Hogan or Fitzpatrick, or anyone else at FNWL, about his mental health or asked for any help or accommodation.

Willhite took a leave of absence from May 18 through August 11, 2010. The leave was approved by Liberty Mutual, an independent, third-party service provider that administered FNWL's leave policies under the federal Family and Medical Leave Act ("FMLA") and the FLA, as well as the company's short term and long term disability benefits plans. It was Liberty Mutual, not FNWL, that determined Willhite's eligibility for FMLA/FLA leave and short-term disability benefits.

It was Liberty Mutual, not FNWL, that obtained Willhite's medical records to make the eligibility determinations. The records revealed that Willhite's treating physician, Dr. Luba Kihichak, had diagnosed depression and an anxiety disorder. After she prescribed medication and counseling, Willhite saw a mental health counselor a few times. On August 9, 2010, Dr. Kihichak wrote to Liberty Mutual reporting that Willhite had improved to such an extent that in her professional opinion, Willhite would be able to return to work on August 12. She determined that Willhite could return to work without any restrictions.

Liberty Mutual provided Willhite's medical records to its consulting physician, Dr. Don, for her to review and determine whether Willhite's condition met the requirements for short-term disability benefits. Dr. Don initially concluded that the medical records did not support a finding of significant psychiatric impairment (the benefits prerequisite), but changed her mind after receiving additional records. She also noted the records showed that "[b]y 8/8/10, there was no indication of psychiatric symptoms that precluded [Willhite's] capacity to perform his usual range of life activities, including work-related activities."[1]

Liberty Mutual did not share Willhite's medical records or Dr. Don's reports with FNWL. The only information FNWL received from Liberty Mutual was that (a) Willhite had requested FMLA leave and short-term disability benefits; (b) the request for FMLA leave was approved due to Willhite's "serious health condition;"[2] and (c) the short-term disability claim was closed due to Willhite's return to work, and his FMLA-approved leave ran from May 18, 2010 through August 8, 2010.

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[1] Willhite mischaracterizes Dr. Don's report. Pet. at 7-8. Dr. Don did not place any conditions on Willhite's return to work, nor did her report address Willhite's performance with respect to the skill sets measured in the RIF matrix. *See* discussion at 9, *infra.*

[2] FNWL was aware that the letter's reference to "serious health condition" was stock language indicating entitlement to FMLA/FLA leave, but no one at FNWL knew the nature of Willhite's health condition.

5. Willhite returned to work.

Willhite returned to work on August 12, 2010. He did not tell anyone at FNWL the reason for his leave. He did not ask for a disability accommodation and he came back without any work restrictions.

Willhite returned to work in the same position, receiving the same pay, and working on the same project he had been working on before his leave. Fitzpatrick gave Willhite a written summary of job expectations instead of the formal warning that had been in the works before he took his leave. By mid-September, however, Fitzpatrick was again frustrated because he felt that Willhite still had not made any real progress on the project.

6. Willhite's employment was terminated as part of a company-wide RIF.

By late summer 2010, FNWL's chief executive officer had concluded that the company needed to carry out a large-scale RIF. To determine whose employment would be terminated, employees with similar skill sets in a position slated to be eliminated were grouped together in a matrix and then compared. Each matrix had two components: past performance (using the employee's last three annual performance ratings) and a current skills assessment. The scores on the two components were weighted and each employee received a combined

score. As a double-check, FNWL had members of Farmers' HR department review the employee groupings and the matrix scores.

FNWL's new Chief Marketing Officer determined that the department could eliminate six positions, including one at the manager level. For the marketing managers' matrix, 60 percent of each manager's score was based on his or her performance ratings for the years 2007, 2008, and 2009. Willhite had received ratings of "3" (meets expectations) for 2007 and 2008, and a rating of "2" (partially meets expectations) for 2009. Douvia had given him the 2008 and 2009 ratings, with Keller's assent. The "2" rating for 2009 was consistent with Willhite's own acknowledgment that he had not fully met expectations that year. Based solely on the performance ratings portion of the matrix, Willhite was tied with one other employee for last place among the 15 marketing managers.

The other 40 percent of each marketing manager's matrix score was based on an assessment of his or her current skills in several areas. Supervisors were provided a grid with the descriptions associated with the 1-10 rankings for each skill set and instructed not to consider an employee's historical performance. Rather, each supervisor was to assess an employee's skill levels as they existed at that time.

Fitzpatrick and Groves completed the skills assessments for their respective direct reports among the marketing managers. Fitzpatrick gave Willhite low scores in all areas. The fact that Willhite had taken a leave of absence did not affect Fitzpatrick's assessment of his skills; rather, Fitzpatrick based his assessment on how Willhite had performed over the course of the almost nine months Willhite had been at work and reporting to him. Because his combined score was the lowest on the manager matrix, Willhite was selected for termination.

FNWL notified 84 employees that their employment would be terminated. The terminations took place in multiple offices and affected employees in every department. Willhite was one of several employees in the marketing department whose employment was terminated.

During his termination meeting, Willhite was informed that he could receive a severance package that included a cash severance payment, three months of outplacement services, and six months of paid COBRA benefits. The benefits were offered in accordance with FNWL's Severance Plan, and Willhite's notification letter told him that as a condition to receiving the benefits, he was required to sign a release.

7. Willhite complained to the EEOC.

Willhite filed a charge of employment discrimination with the Equal Employment Opportunity Commission, claiming he had been discriminated against because of his age and denying that he had any disability. Farmers investigated and responded that there had been no violation of any of Willhite's rights under any provisions of Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Washington Law Against Discrimination ("WLAD"), or any other law.

8. Willhite was mistakenly paid severance benefits.

Although Willhite never signed the release included with his termination paperwork, FNWL mistakenly paid him the cash severance benefit and paid his COBRA premiums. When FNWL learned of its error, it wrote to Willhite requesting repayment. Willhite received the letter but did not return the money.

B. Procedural Background

Willhite brought suit against FNWL for breach of implied contract, violation of the FLA, age discrimination, disability discrimination, and wrongful discharge against public policy.[3] FNWL denied all of the claims

[3] He dismissed his further claim for breach of the implied covenant of good faith and fair dealing, to avoid the preemption issue that had supported removal of his action to federal court.

and asserted counterclaims based on Willhite's refusal to return the severance benefits. On cross motions for summary judgment, the trial court ruled in FNWL's favor on the age discrimination and wrongful discharge claims and on FNWL's counterclaim for unjust enrichment. After a two-week trial, a 12-person jury unanimously rejected Willhite's contract, disability discrimination, and FLA claims. The trial court entered a final judgment, which Willhite appealed. The Court of Appeals unanimously affirmed the judgment in an unpublished opinion, *see Willhite v. Farmers New World Life Ins. Co.*, No. 71526-7-1, 2015 WL 4730137 (Wash. Ct. App. Aug. 10, 2015), and denied reconsideration.

III. ARGUMENT

A. There Is No Basis for Reversal of the Jury's Verdict on Willhite's Disability Discrimination Claim.

Willhite based his disability discrimination claim on allegations of disparate treatment. To prevail on this claim, Willhite had to convince the jury that "a discriminatory intent was a substantial factor" in FNWL's decision to terminate his employment. *See Riehl v. Foodmaker,* 152 Wn.2d 138, 149, 94 P.3d 930 (2004). "A 'substantial factor' means that the protected characteristic was a significant motivating factor bringing about the employer's decision." *Scrivener v. Clark Coll.,* 181 Wn.2d 439, 444, 34 P.3d 541 (2014).

1. Although An Agency Relationship Was the Predicate For His Imputed Notice Argument, Willhite Never Offered Evidence Sufficient to Prove That Liberty Mutual Was FNWL's Agent.

Acknowledging that "notice is inherent in the substantial factor question," Appellant's Opening Br. at 22, Willhite tried to circumvent the evidence that FNWL neither knew nor had notice of his disability (depression) when it decided to terminate his employment. He argued, and continues to argue, that FNWL had the requisite notice as a matter of law because Liberty Mutual reviewed Willhite's medical records, and Liberty Mutual's knowledge "is imputed" to FNWL "[a]s a result of the agency relationship...." Pet. at 12. The problem with this argument is that no showing of agency was made, despite the trial court's express invitation to Willhite to do so.

It is undisputed that Liberty Mutual was acting on FNWL's behalf when it administered the company's FMLA/FLA policies and short term and long term disability benefit plans, but Willhite never introduced ***any*** evidence showing that when Liberty Mutual provided those administrative services, it was acting under FNWL's control. That omission is fatal to the agency theory. *See Moss v. Vadman,* 77 Wn.2d 396, 403, 463 P.2d 159 (1969) (control is an essential element of an agency); *see also Hewson Constr., Inc. v. Reintree Corp.,* 101 Wn.2d 819, 825, 685 P.2d 1062

(1984) (mere existence of a contract does not give rise to an agency by implication). Willhite tries to avoid this conclusion by arguing that administering its own FMLA/FLA policy is an employer's non-delegable duty, Pet. at 12; *see also id.* at 4 (first issue), but he cites no authority for this proposition. This is not surprising, as the argument makes no sense. Employers hire outside contractors to administer leave polices and disability benefit plans in part because they know that employees sometimes do not want their employers to obtain information about their personal health issues. Hiring an outside contractor to perform these functions protects employees' privacy rights and is legally permissible.

Because the existence of an agency relationship was not proved, the trial court and the Court of Appeals properly refused to impute Liberty Mutual's knowledge to FNWL. There is no basis for entry of judgment in Willhite's favor "as a matter of law," as is suggested in the petition for discretionary review. *See* Pet. at 17-18.[4]

[4] Willhite also suggests that judgment be entered in his favor "as a matter of law" on the FLA claim, Pet. at 17, but the petition contains no argument about the FLA claim. There are no grounds to grant this relief.

2. Willhite Was Permitted to Argue and Did Argue That the Jurors Could Infer FNWL Had Notice of His Disability.

The elements of a disparate treatment claim were set forth in Instruction No. 14.[5] The instruction to which Willhite now objects,[6] Instruction No. 18, did not set forth any additional elements. The last sentence merely reflected the common sense proposition that when an employer has no knowledge or notice of an employee's disability, the disability cannot have been the motivation for, or a substantial factor in, the employer's action.[7] Indeed, as noted above, Willhite acknowledges that "notice is inherent in the substantial factor question." Appellant's Opening Br. at 22. In closing argument, Willhite cited several pieces of evidence to the jury and urged the jurors to infer from that evidence that FNWL *did* have notice that Willhite was disabled.

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[5] Instruction No. 14 was a combination of WPI 330.32 and 330.01.01.

[6] After handing out copies of its proposed instructions, the trial court, in accordance with CR 51(f), went through them, one by one, inviting the parties to state their objections on the record. With respect to Instruction No. 18, Willhite's counsel affirmatively stated "no objection." Counsel also responded "no objection" when invited to state any objections to the proposed special verdict form. Under CR 49(a), any objection to the form is waived.

[7] *Cf. Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 670-72, 880 P.2d 988 (1994) (affirming dismissal of plaintiff's disability discrimination claim at close of plaintiff's case, based on plaintiff's failure to produce evidence that defendant knew or had reason to know that plaintiff suffered from a serious medical condition).

3. Willhite Was Permitted to Argue and Did Argue That the Jury Could Infer His Disability Was a Substantial Factor in FNWL's Decision to Terminate His Employment.

In Part III.B., subparts 2 and 4, of his petition, Willhite asserts that he "was prevented from arguing that discrimination could be inferred" from various pieces of evidence. Pet. at 15-17. This assertion has no merit inasmuch as Willhite did argue—extensively—that the jury could and should infer that FNWL had a discriminatory motive when it terminated Willhite's employment. For example, he told the jury that the proximity in time between his FMLA/FLA leave and his termination was indicative of discrimination based on disability, and that his depression was the reason for his drop in performance and his low score on the skills assessment portion of the RIF matrix. He also told the jury that the law makes no distinction between conduct caused by a disability and the disability itself,[8] so if the conduct caused by his disability was the reason FNWL terminated his employment, "then, that is discrimination." In short, he was not precluded from arguing that his disability was a substantial factor in FNWL's termination decision.

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[8] Instruction No. 18 contained the sentence Willhite requested: "Conduct resulting from the disability is part of the disability and not a separate basis for termination."

In subpart 3, Willhite asserts that he was prevented from arguing that the jury could infer discrimination based on the letter Farmers submitted to the Human Rights Commission in response to Willhite's age discrimination complaint. Pet. at 16-17. He neglects to mention, however, that ***he never offered the letter into evidence.***[9] The trial court properly excluded argument based on a trial exhibit that was never admitted.

B. There Is No Basis For Reversal of the Summary Judgment Ruling on FNWL's Unjust Enrichment Counterclaim.

At page 18 of his Petition, Willhite repeats the argument he made to the Court of Appeals concerning FNWL's unjust enrichment counterclaim. He once again ignores the undisputed evidence that (a) FNWL's Severance Plan expressly conditioned payment of severance benefits upon an executed release, (b) he received benefits under the Severance Plan, but did not execute the required release, and (c) he was asked to return the benefits when the mistake was discovered, but did not do so. He points to no evidence supporting his argument that the severance benefits were compensation he had earned during the course of

[9] Willhite claims that the "trial court excluded the letter," Pet. at 16, but the record is abundantly clear that the court never did so. *See Willhite,* 2015 WL 4730137, at *7 ("the record reveals that the trial court did not, in actuality, exclude the letter").

his employment, and he again ignores that there is nothing wrong with conditioning payment of severance benefits (which are not required by law) upon the execution of a release. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 894, 116 S. Ct. 1783, 135 L. Ed.2d 153 (1996) (allowing an employer's offer to pay early retirement benefits to be conditioned upon an employee's waiver of employment-related claims). The Court of Appeals correctly affirmed the trial court's summary judgment on FNWL's counterclaim. *See Willhite,* 2015 WL 4730137, at *7-8.

C. The Trial Court Did Not Abuse Its Discretion In Limiting the Scope of Willhite's Damages Testimony.

Willhite's final argument is addressed to the limitations the trial court placed on Willhite's damages testimony after FNWL conducted extensive pre-testimonial voir dire. Pet. at 19. The court allowed Willhite to testify about his damages claim for back pay and front pay wages, but excluded testimony regarding other damages components.[10] The Court of Appeals did not reach Willhite's argument on this issue because it properly affirmed the judgment entered in FNWL's favor.

In any event, the trial court did not abuse its discretion when it refused to allow Willhite to testify about future payments he allegedly

[10] Willhite was never disclosed as an expert witness. The scope of his allowable testimony therefore was limited under ER 701.

would have received under the Farmers profit sharing plan,[11] after it was shown that he did not know how the plan payments were calculated and did not know if Farmers was profitable or what level of profitability it had achieved since his termination (or would achieve in the future), and admitted that the profit sharing plan had been discontinued. Nor was there any abuse of discretion in refusing to allow testimony about future short-term incentive plan payments, after Willhite admitted he had no knowledge about how the company measured its performance for purposes of determining potential plan payments, or how the company might choose to factor in regional results or the distribution of performance ratings. Finally, there also was no abuse of discretion in refusing to allow Willhite to testify regarding his claimed pension damages when he admittedly made several mistakes in his damages calculations. The many mistakes highlighted the lack of reliability in Willhite's calculations.

IV. CONCLUSION

For all of the above reasons, the Court should deny Willhite's petition for discretionary review.

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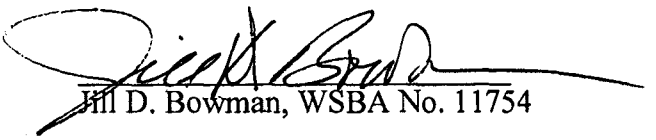
[11] The granting of a motion to exclude certain evidence " is addressed to the discretion of the trial court and should be reversed only in the event of an abuse of discretion." *Hizey v. Carpenter,* 119 Wn.2d 251, 268, 830 P.2d 646 (1992).

DATED: November 5 2015.

STOEL RIVES LLP



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington that on the date indicated below the foregoing Respondent's Opposition to Petition for Discretionary Review is being served via email (per existing agreement) and via U.S. Mail sent to the following:

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APPENDIX

Willhite v. Farmers New World Life Ins. Co.
No. 71526-7-I, 2015 WL 4730137 (Wash. Ct. App., Aug. 10, 2015)

2015 WL 4730137
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

Dennis WILLHITE, Appellant,
v.
FARMERS NEW WORLD LIFE INSURANCE COMPANY, a Washington corporation, Respondent,
Zurich American Insurance Company, a corporation, Defendant.

No. 71526–7–I. | Aug. 10, 2015.

Appeal from King County Superior Court; Hon. Kenneth L. Schubert, J.

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UNPUBLISHED OPINION

DWYER, J.

*1 After his employment was terminated, Dennis Willhite filed suit against his former employer, Farmers New World Life Insurance Company (Farmers), claiming, among other things, that he had been fired in violation of the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, and the Washington Family Leave Act (WFLA), chapter 49.78 RCW. Farmers denied all of Willhite's claims and asserted counterclaims based on Willhite's refusal to return his severance benefits, including a counterclaim of unjust enrichment. Following discovery, Farmers moved for and was granted summary judgment on its unjust enrichment counterclaim. Subsequently, Willhite's remaining claims were tried to a jury. The jury returned a defense verdict and judgment was entered against Willhite. Willhite now assigns error to the manner in which the trial court instructed the jury, certain evidentiary rulings made by the court, and the grant of summary judgment on Farmers' claim of unjust enrichment. Finding no error, we affirm.

I

Willhite began working at Farmers in 1978. He worked in the company's marketing department in Los Angeles. After several years in that position, he transferred to Farmers' Mercer Island office, where he took a position in the actuarial department. He later moved to "operations" before ultimately rejoining the marketing department.

At some point in 2008 or 2009, Willhite began experiencing symptoms of depression and anxiety. By 2010, his symptoms had grown worse and, in May of that year, Willhite was diagnosed with acute anxiety and depression by Dr. Luba Kihichak. Dr. Kihichak prescribed medication and counseling. Willhite sought counseling from Dr. Richard Wemhoff on several occasions.

Willhite requested short term disability leave from his job pursuant to both the Federal Family and Medical Leave Act (FMLA) and the WFLA. His request was approved by Liberty Mutual, a company which administered Farmers' leave policies, as well as its short and long term disability benefits plans. Liberty Mutual provided Willhite's medical records to its consulting physician, Dr. Laura Don, for review. Dr. Don initially concluded that Willhite's records did not support a finding of significant psychiatric impairment. However, after receiving additional records from Dr. Kihichak and Dr. Wemhoff, Dr. Don determined that the information available to her supported a finding of "significant psychiatric impairment from 5/18/10–8/7/10."

Liberty Mutual notified Farmers that Willhite's request for FMLA leave had been approved due to Willhite's "serious health condition ." However, Liberty Mutual did not share Willhite's medical records or Dr. Don's reports with Farmers.

Days prior to Willhite's leave request, his supervisor, Brian Fitzpatrick, had contacted Farmers' human resources (HR) department for guidance on disciplining Willhite. According to his supervisors, Willhite had not

been performing his job in a satisfactory manner. HR advised Fitzpatrick to give Willhite a formal warning. However, because Willhite went on leave, Fitzpatrick did not take action at that time.

*2 Willhite returned to work on August 12, 2010. He did not share with anyone at Farmers the reason for his leave of absence. Fitzpatrick met with Willhite shortly after he returned from leave. At that meeting, Fitzpatrick gave Willhite a written summary of job expectations; Fitzpatrick did not give Willhite a formal warning. By the middle of September, Fitzpatrick again felt that Willhite was not performing in a satisfactory manner.

In September, Farmers advised its managers of its decision to lay off 84 employees. Employee assessment scores were prepared by Farmers' managers, including Fitzpatrick, in preparation for the scheduled layoff. Willhite received low assessment scores. On November 10, 2010, Willhite's employment was terminated.

Willhite believed that his termination was age-related. He filed an age discrimination claim with the Equal Opportunity Commission, which was transferred to the Washington State Human Rights Commission (HRC) for investigation. Angie Bechtel, a Farmers HR consultant, was charged with responding to the HRC investigation. By letter, Bechtel advised the HRC that Farmers had conducted an internal investigation regarding Willhite's termination and had determined that Farmers had complied with all state and federal laws against discrimination. Bechtel explained that Willhite had been terminated due to poor performance.

On July 13, 2012, Willhite filed suit against Farmers in King County Superior Court. He pleaded claims of breach of implied contract, violation of the WFLA, age discrimination, disability discrimination, breach of the implied covenant of good faith and fair dealing, and wrongful discharge in violation of public policy. Farmers removed the case to federal court on September 5. On March 29, 2013, Willhite filed an amended complaint in which he excised the allegation that his termination was motivated in part by Farmers' desire to reduce its pension obligation. On April 18, the case was remanded to King County Superior Court.

In its answer to the amended complaint, Farmers denied all of Willhite's claims; Farmers also asserted counterclaims based on Willhite's refusal to return his severance benefits, including a counterclaim of unjust enrichment. Following discovery, Farmers moved for summary judgment on all of Willhite's claims and on its counterclaims. Willhite moved for summary judgment on his breach of implied contract claim.

The trial court granted Farmers' motion with respect to Willhite's claims of age discrimination and wrongful discharge in violation of public policy, and granted Farmers' motion with regard to its unjust enrichment counterclaim. Summary adjudication as to the remainder of the claims was denied.

Willhite's remaining claims—disability discrimination, violation of the WFLA, and breach of contract—were tried to a jury. The jury returned a verdict in favor of Farmers. On January 13, 2014, the trial court entered judgment; on February 3, the court entered an amended judgment, in which it supplemented the judgment with an award of taxable fees and costs in favor of Farmers.

*3 Willhite appeals both from the grant of summary judgment in favor of Farmers on its unjust enrichment claim, and from the jury verdict and judgment entered against him. However, his breach of contract claim is not at issue on appeal. Thus, the claims at issue are Willhite's claims of disability discrimination and violation of the WFLA, as well as Farmers' claim of unjust enrichment.

II

Willhite asks that we vacate the jury's verdict and either enter judgment in his favor or remand for a new trial. His request for relief is predicated, broadly speaking, on his position that the trial court failed to instruct the jury properly and prevented him from presenting to the jury important evidence in the form of exhibits and witness testimony. For the reasons given herein, we reject his contentions and deny him relief.

The WLAD makes "it ... an unfair practice for an employer to refuse to hire, discharge, or discriminate in compensation based on a person's sensory, mental, or physical disability."*Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 144–45, 94 P.3d 930 (2004). The WLAD supports a cause of action for at least two different types of discrimination: (1) failure to accommodate, and (2) disparate treatment. *Riehl*, 152 Wn.2d at 145. Willhite alleges only disparate treatment. Thus, his claim is that Farmers "discriminated against [him] because of [his] condition."*Riehl*, 152 Wn.2d at 145.

In order to carry his ultimate burden of persuasion, Willhite was required to prove that "a discriminatory intent was a substantial factor" in Farmers' decision to terminate his employment. *Riehl*, 152 Wn.2d at 149. "A

'substantial factor' means that the protected characteristic was a significant motivating factor bringing about the employer's decision."*Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). However, "[i]t does not mean that the protected characteristic was the sole factor in the decision."*Scrivener,* 181 Wn.2d at 444; *see also Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995) (rejecting the "determining factor" standard in favor of the "substantial factor" standard).

A

Willhite asserts that the trial court erred in instructing the jury. According to Willhite, these were errors of both commission and omission. He is incorrect.

Jury instructions are sufficient if they permit each party to argue its theory of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. *Leeper v.. Dep't of Labor & Indus.*, 123 Wn.2d 803, 809, 872 P.2d 507 (1994)."When these conditions are met, it is not error to refuse to give detailed augmenting instructions, nor to refuse to give cumulative, collateral or repetitious instructions."*Bodin v. City of Stanwood,* 130 Wn.2d 726, 732, 927 P.2d 240 (1996). Errors of law in jury instructions are reviewed de novo. *Hue v. Farmboy Spray Co .*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). A refusal to give a proposed jury instruction is reviewed for abuse of discretion. *Boeing Co. v. Key,* 101 Wn.App. 629, 632, 5 P.3d 16 (2000).

i

*4 Willhite takes issue with the following instruction given to the jury: "Where an employer did not know or had no notice of an employee's disability, the employee's disability cannot have been a substantial factor in the employment decision."Jury Instruction 18. He contends that this instruction imposed an improper element of proof regarding his disability discrimination claim, given that his burden was to show that his disability was a "substantial factor" in Farmers' decision to end his employment.[1]Yet, Willhite acknowledges that "notice is inherent in the substantial factor question."This acknowledgment reveals Willhite's true position: namely, that Farmers had notice of his disability as a matter of law.[2]

Willhite asserts that notice was established as a matter of law because the knowledge of Liberty Mutual was imputed to Farmers. Notice was imputed, he maintains, as a result of the agency relationship between Liberty Mutual and Farmers. In taking this position, Willhite assumes that which he was required to prove—that an agency relationship did, in fact, exist.

It was Willhite's burden to establish the existence of an agency relationship. *Moss v. Vadman,* 77 Wn.2d 396, 403, 463 P.2d 159 (1969). To do so, it was incumbent upon him to show a "manifestation of consent" by Farmers that Liberty Mutual would act on Farmers' behalf and subject to its control, "with a correlative manifestation of consent" by Liberty Mutual that it would act on behalf and subject to the control of Farmers. *Moss,* 77 Wn.2d at 403."Agency is generally a question of fact reserved for a jury unless the facts are undisputed or permit only one conclusion."*Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co.,* 125 Wn.App. 227, 236, 103 P.3d 1256 (2005)."To determine whether an agency relationship exists, a court must look at the spirit of the agreement between the parties."*Kelsey Lane,* 125 Wn.App. at 235–36.

Willhite never made a sufficient showing of agency in the trial court. Now, on appeal, he appears to assume that a contractual relationship is equivalent to an agency relationship. There is no basis in law for such an assumption.*Kelsey Lane,* 125 Wn.App. at 235 ("An independent contractor is generally not considered an agent because the contractor acts in his own right and is not subject to another's control."). The cases relied upon by Willhite are not to the contrary. *Goodman v. Boeing Co.,* 75 Wn.App. 60, 877 P.2d 703 (1994) (imputing knowledge where agency relationship was found to exist between contracting parties), *aff'd,* 127 Wn.2d 401, 899 P.2d 1265 (1995); *Kimbro v. Atl. Richfield Co.*, 889 F.2d 869 (1989) (imputing knowledge where agency relationship was found to exist between supervisor and subordinate); *Francom v. Costco Wholesale Corp.*, 98 Wn.App. 845, 991 P.2d 1182 (2000) (ruling that a reasonable trier of fact could find that an employee's report of sexual harassment to her supervisor gave the employer constructive knowledge of the alleged sexual harassment). Consequently, Willhite is incorrect in asserting that Farmers had notice of his disability by virtue of maintaining an agency relationship with Liberty Mutual.[3]

*5 Moreover, the knowledge of Liberty Mutual was not imputed to Farmers by operation of the WLAD. There is no indication in the WLAD that the legislature meant to prevent an employer from contracting with a third party to

administer leave policies and disability benefit plans for employees. That is to say, the legislature did not make the duty to administer leave policies and disability benefit plans for employees non-delegable.

It was incumbent upon Willhite to persuade the jury that Farmers was, in fact, on notice of his disability when it terminated his employment. As shown by the jury's response on the special verdict form, Willhite failed to do so. Consequently, the jury could not have found that Willhite's disability was a substantial factor in Farmers' termination decision.

ii

Willhite next takes issue with several proposed instructions that were not given to the jury. He contends that the trial court erred in declining to instruct the jury on (1) constructive notice, (2) disability related performance deficits and personality changes, and (3) circumstantial evidence. We disagree. The trial court did not err.

Willhite requested that the jury be instructed on constructive notice. The trial court rejected this request.

> THE COURT: What her argument is, if I understand it, is that you want to be able to argue that Farmers based its decision to terminate him on conduct resulting from his disability without notice that there was actually disability causing the conduct, and I don't think that's the law. That's the narcolepsy example, that's the guy sleeping at his desk all day. "He is asleep again. I told him not to sleep. I was going to fire him if he kept sleeping. You are fired. He never told me he had narcolepsy. If he had, we would have worked something out."
>
> ....
>
> THE COURT: That's constructive knowledge, that's—I'm not going so far as constructive knowledge, but if you can say that they actually knew that he had a disability, or that he had notice, they had notice of a disability, then, I think you are okay.

Willhite asserts that he was entitled to an instruction on constructive notice. The Washington case he cites in an effort to support his assertion is inapposite, as it involved a "failure to accommodate" claim, *see Sommer v. Dep't of Soc. & Health Servs.*, 104 Wn.App. 160, 15 P.3d 664 (2001),[4] and the federal cases he relies upon did not involve the WLAD, *see Xin Liu v. Amway Corp.*, 347 F.3d 1125 (9th Cir.2003), and *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112 (9th Cir.2001). No appellate relief is warranted.

Willhite proposed that the jury be instructed on disability related performance deficits and personality changes.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 14

> The law makes no distinction between conduct caused by a disability and the disability itself. As such, you may conclude that Willhite's disability was a "substantial factor" in Farmers' termination decision, if you find that the decision was based in part upon performance deficits, personality changes or other symptoms that were a result of Willhite's depression.

*6 The first sentence of this proposed instruction was, in fact, included in jury instruction 18. While the second sentence was not, the trial court did not abuse its discretion by refusing to instruct the jury in this manner. This is so because the second sentence suggests that the jury could find that Willhite's disability was a substantial factor in Farmers' termination decision in spite of the fact that Farmers had no notice of such disability. *Riehl* and related authority, *see, e.g., Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994), *Callahan v. Walla Walla Hous. Auth .*, 126 Wn.App. 812, 110 P.3d 782 (2005), do not support such a proposition. Instead, these decisions clarify that, where an employer is on notice of an employee's disability, the employee may not evade liability by explaining its termination decision in terms of the employee's poor performance.

Willhite, in two proposed instructions, requested that the jury be instructed that it could infer discrimination based on circumstances.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 15

> You may also consider the following when determining whether Willhite's disability was a substantial factor in Farmers' termination decision:
>
> 1) The proximity of time between the disability leave and the termination, as well as the years of employment prior to termination;
>
> 2) A prior history of satisfactory work

performance.

3) Whether the performance evaluations upon which the termination decision was based contain subjective opinions, such as those assessing an employee's "dedication," or "enthusiasm."

4) Whether there was a drop in performance evaluation scores after the onset of the disability.

(Footnotes omitted.)

PLAINTIFF'S PROPOSED INSTRUCTION NO. 16

When determining whether disability was a substantial factor in the termination decision, you may also consider whether Farmers' offered explanations for the termination decision are: 1) inconsistent; 2) unworthy of belief; 3) unsupported by facts; or 4) affirmatively false.

If you disbelieve any of Farmers' offered explanation for Willhite's termination, you are entitled to infer discrimination from this evidence alone, and conclude that Willhite's disability was a substantial factor in Farmers' termination decision.

(Footnotes omitted.)
Both of these proposed instructions were, at best, detailed augmenting instructions.[5]The trial court characterized them as more suitable for closing argument. Regardless, the court did not abuse its discretion in refusing to instruct the jury in this manner.

B

Willhite next contends that the trial court made a number of erroneous evidentiary rulings. However, the trial court did not abuse its discretion in making any of the challenged rulings.

The grant of a motion to exclude certain evidence "is addressed to the discretion of the trial court and should be reversed only in the event of abuse of discretion."*Hizey v. Carpenter,* 119 Wn.2d 251, 268, 830 P.2d 646 (1992)." 'A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons.' " *Anfinson v. FedEx Ground Package Sys., Inc.,* 174 Wn.2d 851, 860, 281 P.3d 289 (2012) (quoting *Noble v. Safe Harbor Family Pres. Trust,* 167 Wn.2d 11, 17, 216 P.3d 1007 (2009)). "An appellant bears the burden to prove an abuse of discretion." *Hernandez v. Stender,* 182 Wn.App. 52, 58, 321 P.3d 1230 (2014).

*7 Willhite asserts that the trial court abused its discretion in refusing to take judicial notice of an NIMH[6] report on depression that was offered by Willhite.[7]Yet, Willhite does not even suggest, let alone argue, that the NIMH report contains any "adjudicative fact." This alone makes his assertion untenable. *See In re Disciplinary Proceeding Against Sanai,* 177 Wn.2d 743, 753 n.3, 302 P.3d 864 (2013) ("ER 201(a) states that the 'rule governs only judicial notice of adjudicative facts,' " which are " 'controlling or operative' " facts as opposed to " 'background' " facts or, in other words, " 'a fact that concerns the parties to a judicial or administrative proceeding and that helps the court or agency determine how the law applies to those parties.' " (quoting BLACK'S LAW DICTIONARY 669 (9th ed.2009))). The trial court properly rebuffed Willhite's attempt to put on expert testimony without actually calling such an expert to testify.

Willhite next asserts that the trial court erred in limiting the scope of Dr. Kihichak's testimony. He states that "Dr. Kihichak was prepared to testify that the skills measured by the Matrix [8] were compromised by Willhite's depression and anxiety."Yet, there is no indication in the record that Willhite ever made an offer of proof so as to inform the trial court that Dr. Kihichak would present such testimony.[9]Unsurprisingly, therefore, the trial court did not rule on this issue. Consequently, there was no error.[10]*See Kysar v. Lambert,* 76 Wn.App. 470, 490–91, 887 P.2d 431 (1995); ER 103(a)(2) (error may not be predicated on ruling excluding evidence unless substance of evidence was made known to the court).

Willhite next asserts that the trial court erred in excluding the letter written by Angie Bechtel to the HRC. However, the record reveals that the trial court did not, in actuality, exclude the letter. Tellingly, Farmers did not seek to have the letter excluded. Instead, it moved to exclude "testimony and argument relating to Angie Bechtel's investigation of [Willhite's] ... charge of age discrimination."When the trial court stated, "I'm essentially granting [the motion]," it was, at most, excluding testimony and argument relating to Bechtel's investigation. Thus, Willhite's claim of error fails because, contrary to his assertion, there was no trial court ruling on the admissibility of the letter.

We affirm the decisions of the trial court and the judgment entered on the jury's verdict.[11]

III

Willhite contends that the trial court erred in granting summary judgment on Farmers' claim of unjust enrichment. Farmers brought a claim for unjust enrichment after Willhite accepted a severance package, yet failed to meet the condition for receiving the accompanying benefits: namely, agreeing to release Farmers of all claims. While Willhite's briefing on this issue is cursory and does not clearly indicate the theory upon which he relies, he appears to argue that the severance package represented compensation, meaning that he was entitled as a matter of law to receive it without needing to satisfy any preconditions. We decline to grant him appellate relief.

*8 "Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it."*Young v. Young,* 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). A claim based on unjust enrichment requires proof of the following elements: "(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment."*Young,* 164 Wn.2d at 484–85.

Willhite received a benefit from Farmers in the form of a severance package. This benefit was received at the expense of Farmers. Because receipt of the benefits was conditional and because Willhite failed to meet the condition—agreeing to release Farmers of all claims—it was unjust for Willhite to retain the benefits. Therefore, the trial court did not err in granting summary judgment in favor of Farmers.

Nevertheless, Willhite argues that the severance package represented compensation, citing to *Flower v. T.R.A. Industries, Inc.,* 127 Wn.App. 13, 34, 111 P.3d 1192 (2005). Yet, that case could only be of use to Willhite in the event that he had already established that he was entitled to the severance package as a matter of law. However, he points to no evidence that he was entitled to receive the benefits contained in the severance package. As a result, he has not shown that it was impermissible for Farmers to impose a condition on his receipt of the severance package. Because Willhite retained the benefit and did not satisfy the condition, he was unjustly enriched at the expense of Farmers. Summary judgment was properly granted in favor of Farmers.

Affirmed.[12]

We concur: SPEARMAN, C.J., and APPELWICK, J.

All Citations

Not Reported in P.3d, 2015 WL 4730137

Footnotes

1 Citing CR 51(f), Farmers maintains that Willhite failed to preserve for appellate review all but one of the objections to the jury instructions he now raises on appeal. Farmers points to the repeated response of "no objection" given by Willhite's counsel—when, prior to instructing the jury, the trial court read each proposed instruction and invited the parties to state their objections on the record—as proof that Willhite failed to preserve for review all but one objection. However, the jury instructions had been the subject of extensive debate throughout the trial and each error alleged by Willhite on appeal was considered by the trial court. Given a similar situation, our Supreme Court "reviewed the trial record, found 'extended discussions' about the jury instructions, and determined that the trial court understood the nature of [the] objection."*Washburn v. City of Federal Way,* 178 Wn.2d 732, 747, 310 P.3d 1275 (2013) (discussing *Crossen v. Skagit County,* 100 Wn.2d 355, 359, 669 P.2d 1244 (1983)). In this matter, the trial court undoubtedly understood the nature of Willhite's objections, given the extensive argument presented before and during the trial. Accordingly, the issues were preserved for review.

2 In any event, we perceive Willhite's argument that notice is not a separate element of proof to be premised on a rhetorical preference that notice remain embedded within the "substantial factor" inquiry. This rhetorical preference does not entitle Willhite to appellate relief.*Leeper,* 123 Wn.2d at 809.

3 Because of this, the trial court did not, contrary to Willhite's assertion, err in excluding the reports of Dr. Don. By Willhite's own admission, the viability of his position with regard to the trial court's ruling on these reports is premised upon the existence of agency relationship between Farmers and Liberty Mutual—a relationship that he failed to prove was in existence. Moreover, Farmers did not, contrary to Willhite's argument, waive its opportunity to object to these

reports, as shown in Farmers' April 13, 2015 motion to either strike a portion of Willhite's reply brief or, alternatively, supplement the record, which we grant as to the alternative relief requested.

4 Willhite notes that "[i]n defining disability," courts "do not distinguish between claims based on disparate treatment and those alleging failure to accommodate."*Callahan v. Walla Walla Hous. Auth.,* 126 Wn.App. 812, 820, 110 P.3d 782 (2005). This fact is irrelevant: the issue of notice is distinct from the issue of what constitutes a disability.

5 Jury Instruction 4 provided for the following:

> The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.
> The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

6 National Institute of Mental Health.

7 This report purports to explain what depression is and identifies signs, symptoms, causes, and methods of treatment.

8 This refers to the assessment score system used by Farmers in determining which employees to layoff in 2010.

9 In his disclosure of possible primary witnesses, Willhite limited his statement concerning Dr. Kihichak to this: "Responding party's treating physician and treated him for anxiety and depression and recommended medical disability leave."

10 The point of contention between counsel for Farmers and counsel for Willhite in the trial court was whether Dr. Kihichack would be allowed to testify about depression in general, as opposed to the specific depression she observed in Willhite. (Farmers' motion in limine); (Willhite's response to motion in limine).

11 Consequently, we need not and do not consider the trial court's rulings with regard to Willhite's testimony concerning damages.

12 Willhite requests an award of attorney fees and costs on appeal pursuant to RCW 49.60.030(2) and RAP 18.1. He admits that his entitlement to such an award is predicated on prevailing on his WLAD claim. He has not prevailed on his WLAD claim; thus, his request is denied.

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Good Afternoon,

Attached please find Respondent Farmers New World Life Insurance Company's Brief in Opposition to Petitioner's Petition for Discretionary Review. A copy is being e-served to opposing counsel, as per agreement with counsel. A copy is also being mailed via U.S. Mail.

Case Name: Willhite v. Farmers New World Life Insurance Company, et al.
Case No. 92446-5
Filer: Jill D. Bowman, WSBA No. 11754, 206-624-0900; email: jill.bowman@stoel.com

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Thank you,

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