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DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

HASSAN FARAH, ILEYS OMAR, MARIAN MUMIN, DAHIR JAMA, FOUZIA M. MOHAMUD, MARIAN ALI, ABDIAZIZ ABDULLE, SAALIM ABUKAR, MOHAMED ISMAIL, SUDI HASHI, HALI ABDULLE, MURAYAD ABDULLAHI, ZAINAB AWEIS, FARDOWSA ADEN, MARYAN MUSE, ASLI MOHAMED, SAHRA GELLE (A/K/A Hani Huseen), ASHA FARAH, ALI ADAM ABDI, MUNA MOHAMED, FARAH GEEDI, AHMED HASSAN HUSSEIN, IBRAHIM SALAH, AHMED A. HIRSI, and MOHAMUD A. HASSAN,

Plaintiffs/Appellants,

v.

HERTZ TRANSPORTING, INC., MATT HOEHNE, and TODD HARRIS,

Defendants/Respondents,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Mary E. Roberts)

Case No. 11-2-41759-0

BRIEF OF APPELLANTS

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I. INTRODUCTION

The Plaintiffs/Appellants seek a new trial. They are twenty-five Somali Muslims who worked as "shuttlers" for Defendant/ Respondent Hertz Transporting, Inc. at the Seattle-Tacoma International Airport. They were denied a full and fair hearing on their claims of religious and national origin discrimination in violation of RCW 49.60, *et seq*., owing to the cumulative effect of a litany of erroneous rulings by the trial court.

The trial court repeatedly sustained improper objections by defense counsel during Plaintiffs' cross-examination of critical adverse witnesses, some called by Plaintiffs on Plaintiffs' case, including sustaining improper "argumentative," "foundation," "misleading," and "assumes facts not in evidence" objections. The net effect was to take what should have been a presentation of Plaintiffs' exploration of the credibility of Defendants' witnesses—frequently the determinative issue in cases alleging discrimination—and to turn Plaintiffs' case into a modern day news story in which the reporter simply reports what a person says without exploring whether those statements are to be believed.

The court also improperly excluded as alleged hearsay an email string between managers, which was a business record, and was

outcome determinative, showing Defendants conceived a plan to set Plaintiffs up for "insubordination" months before the events giving rise to Plaintiffs' terminations occurred. The trial court's rejection of the email string was based on the court's misunderstanding the business record exception to ER 802. When asked for clarification regarding the admission of emails, the trial judge stated, "almost none of the exhibits are business records, in my estimation."

Plaintiffs requested a jury instruction informing jurors that they may infer discrimination from their disbelief of Defendants' stated reasons for their actions. This instruction, based on the 8th Circuit's Model Instruction, was consistent with the applicable standards for determining motions for summary judgment under state and federal law, which are well-known to lawyers and judges—but are generally unknown concepts for the lay jurors asked to decide the ultimate question of discrimination. The court refused the instruction that was requested to educate the jury on inferences from "pretext."

In closing, Defendant treated hearsay evidence previously offered for purposes of "notice" as substantive evidence, which Plaintiffs objected to but were overruled. Plaintiffs' subsequent requests for mistrial or curative instruction were denied. As a result of these and other erroneous rulings, substantial justice was not done.

The jury returned a verdict in favor of Defendants.

Plaintiffs filed a motion for new trial outlining the court's erroneous rulings, including an appendix with a detailed list of more than 120 errors made by the court in sustaining a wide variety of improper objections by the Defendants. The trial court denied the motion for new trial, and Plaintiffs filed this appeal. For the reasons that follow, this Court should grant Plaintiffs a new trial.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in sustaining improper objections by defense counsel throughout Plaintiffs' cross-examination of critical adverse witnesses. (*See* Summary of Court's Rulings on Defendants' Objections, Sustaining Objections, CP 2601-55).

2. The trial court erred in excluding Exhibit 1929 (CP 2666-67, at App. 1), an email Hertz manager Jeff Wilson sent to other managers, regarding plans to discipline Plaintiffs for alleged insubordination. (12/8/14 RP 30:13-33:23; 12/9/14 RP 5-6).

3. The trial court erred in admitting hearsay testimony stating that a union manager had admitted Hertz's policy required clocking out for prayer, a fact contested by every Plaintiff. (11/17/14 RP 18:23-19:5).

4. The trial court erred in failing to take corrective action after Defendants improperly treated alleged notice evidence as substantive evidence in closing. (12/10/14 RP 125:8-18; CP 2269-71).

5. The trial court erred in refusing to give Plaintiffs' proposed Jury Instruction No. 11 (CP 1109, at App. 2).

(12/10/14 RP 21:11-22:9).

6. The trial erred in denying Plaintiffs' motion for a new trial. (CP3235-36).

B. Issues Pertaining to Assignments of Error

1. Whether Plaintiffs in a discrimination case must be afforded full and fair opportunity to cross-examine adverse witnesses to establish pretext and improper objections should not inhibit the same? Yes.

2. Whether Exhibit 1929 was written by Defendant's manager to other managers on a subject he was authorized to make statements about? Yes;
Or, whether Exhibit 1929 is a business record? Yes.

3. Whether out of court statements by union representatives to management offered for the truth of the matter asserted should have been admitted? No.

4. Whether after objection, the jury should be instructed that hearsay evidence treated as substantive evidence in closing may not be used for such purpose? Yes.

5. Whether Plaintiffs could adequately argue their theory of the case, and the jury be adequately informed on the law, absent an instruction explaining that the jury may infer discrimination from proof that Defendants' stated reasons for their actions are unworthy of belief? No.

6. Whether the cumulative effect of the court's erroneous rulings rendered the denial of Plaintiffs' motion for new trial an abuse of discretion? Yes.

III. STATEMENT OF THE CASE

A. Factual background leading to discrimination claims.

Many of the Plaintiffs in this case applied for and accepted employment at Hertz because the company permitted them to pray

during the workday.[1] Shuttler shifts varied and started as early as 4 a.m. and ended as late as 12 a.m., seven days per week. 11/12/14 RP 20; 11/13/14 RP 117. Hertz paid its Shuttlers slightly over minimum wage, and did not provide any benefits or even sick days. 11/12/14 RP 22. For years, Hertz Managers Hoehne and Harris, the individual defendants in the case, treated Plaintiffs harshly and with disrespect.[2]

1. For more than a decade, Hertz allowed its employees to pray, smoke, and drink coffee without clocking out.

For more than a decade, Hertz permitted its Somali Muslim employees to stop work to pray briefly during the workday without clocking out.[3] Likewise, Hertz permitted its employees to engage in other activities, including smoking, drinking coffee, and going to the bathroom, without clocking out.[4] Plaintiffs' prayer typically took

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[1] *See e.g.*, CP 2008-09 (acknowledging that while the Shuttler job is typically a high-turnover job, many Somali Muslims worked as Shuttlers for more than ten years because they were allowed to pray); 11/19/14 RP 119-21 (Abdulle); 11/20/14 RP 47-48 (Farah); 11/24/14 RP 113 (Hirsi); 11/25/14 RP 46-47 (Aweis); 12/1/14 RP 74-75 (Geedi)

[2] Some of their actions included: not calling Plaintiffs by name (11/18/14 RP 17-18; 11/24/14 RP 17); using a harsh tone when speaking to Plaintiffs (11/19/14 RP 87; 11/20/14 RP 30-31); not greeting Plaintiffs (11/18/14 RP 88); peering into the Women's Mosque for no reason, repeatedly, with knowledge of its impropriety (11/19/14 RP 25); entering the Women's Mosque for no reason (11/18/14 RP 86-87); publicly and falsely accusing Plaintiffs of not being clocked out for lunch without checking time cards first (id.); waiting outside the women's bathroom door to yell at one of the female Plaintiffs (12/3/14 RP 37-39); and calling Ahmed Hirsi a terrorist. (11/24/14 RP 116). Some of the Plaintiffs filed EEOC charges relating to this treatment in 2009. *See* CP 2657, 2663.

[3] *See, e.g.,* 11/12/14 RP 26-27; 11/17/14 RP 140-41; 11/17/14 RP 151; id., at 173.

[4] *See, e.g.*, 11/12/14 RP 35; 11/17/14 RP 143-44.

about three to five minutes.[5] Hertz's break policy did not instruct employees to clock out for prayer (*see* Exs. 1735, 1744, 1745, 1748[6]); specifically permitted employees to take short breaks without clocking out (*see* Ex. 1745); and specifically *excluded* clocking out when at the women's prayer area (*see* Ex. 1744).

2. In 2010, Matt Hoehne became the operations manager at SeaTac, reporting to Todd Harris.

In 2010, Matt Hoehne became Hertz's City Operations Manager. 11/12/14 RP 145. As such, Hoehne was responsible for overseeing the company's day-to-day operations at SeaTac Airport. Id. at 147; CP 1589. Hoehne reported to the Area Manager, Todd Harris, who was responsible for all of Hertz's operational aspects at SeaTac. 11/12/14 RP 146; 11/13/14 RP 87.

In about September 2010, Location Manager Jeff Wilson was made responsible for managing Hertz's "shuttlers department." 12/4/14 RP 189. In that role, Wilson was "responsible for the efficiency of the group" and "day-to-day operations[,] … making sure that scheduling was taken care of and that policies and procedures were understood and enforced." Id., at 191:4-6. Hoehne was Wilson's "direct on-site supervisor" and Harris was his "technical supervisor"

[5] *See* 11/13/14 RP 139; 11/12/14 RP 39.
[6] References to the trial exhibits are cited as "Ex.".

responsible for annual performance reviews. 12/8/14 RP 13-14.

3. In March 2011, Hertz Manager Wilson proposed a plan to go after the Somali Muslims for praying, with the goal to write them up for insubordination.

On March 26, 2011, Manager Wilson wrote an email to Hoehne, Harris and other Hertz managers with the subject line "New SHTL [Shuttler] Contract – The next step." CP 2666-67 (App. 1), Ex. 1929. In the email, Wilson organized a meeting with the other managers, scheduled for the upcoming Monday (March 28), "to discuss how we will be proceeding with enforcing the new shtl [shuttler] contract." Id. In preparation for the meeting, Wilson described a detailed plan to set up the shuttlers who pray for "insubordination" and "issue all the letters together to flood the union with paperwork." *See* id. Wilson wrote to Harris, Hoehne, and the other managers that in following the plan:

> One of three things will happen:
>
> A) Employees go to pray anyway and do not inform the dispatcher. We then write them up for INSUBORDINATION for not notifying us of an intermittent break.
>
> B) Employees notify the dispatcher, who then signs for us that the employee notified them, and we write the shuttler up for MISUSE OF COMPANY TIME on their TEN MINUTE BREAK, because they punched it and we can prove it.
>
> C) In the unlikely event that someone properly elects intermittent breaks, they will inevitably take more than 5 minutes, so then we write them up for INSUBORDINATION

> for not punching out for a break larger than 5 minutes. Or it really does take 5 minutes, and all is well.

CP 2666-67 (App. 1), Ex. 1929 (emphasis in original).

4. In September 2011, Hertz changed its practice to require its employees to clock out for religious observations only.

On September 27, 2011, the individual defendants decided to change the company's written clocking out policy to require employees who prayed during the workday to clock out. *See* Ex. 1 ("Per the CBA, all rest and meal periods must be punched, including any *religious observation* you do when you're here.") (emphasis added); Ex. 2 ("Per the CBA, ALL rest and meal periods must be punched, including ALL *religious observation*. Failure to punch for a rest period will result in progressive disciplinary action up to and including termination.") (emphasis added); 11/12/14 RP 178-83. Management's memos specifically identified only religious observation, and did not identify any other personal activity that an employee must clock out for such as smoking, talking on a cell phone, or drinking tea or coffee. Exs. 1 and 2.

Hertz contends that this policy was implemented in response to reports to managers from headquarters that "some Shuttlers" were abusing the system by "taking clocked breaks as well as unclocked breaks at time for prayer." 11/6/14 RP 146; CP 1602. Hoehne claims

he was aware of widespread break abuse in 2010 and 2011. Id. But none of his supervisors criticized him or even spoke to him for not taking action and disciplining the employees who allegedly were taking breaks without clocking out. *See* CP 1603-04. After a meeting with Hertz corporate representatives, Manager Hoehne believed that the Sea-Tac management needed to do a better job of "holding employees accountable for breaks they take." CP 1624.

Manager Todd Harris claims that he received an allegation that "prayer breaks were being abused" and Muslim employees were taking *an hour* for prayer.[7] CP 1684-85, 1687-88. He claims he believed the allegation to be true although he had never observed one single Somali Muslim employee praying without clocking out. CP 1688; 1691-92. He admitted that he assumed, without investigating, that the allegation that every Somali Muslim was engaging in some form of prayer abuse was true. CP 1693-94; 1701-02. He then implemented a plan to have Hertz managers observe prayer and suspend the Somali Muslim employees who prayed without clocking out. CP 1706-07.

So, starting on September 30, 2011, Hertz management

[7] But Mr. Hoehne testified that the decision to implement the clocking out policy and discipline starting on September 30, 2011, "had nothing to do with the length" of breaks. CP 1636.

confronted each Plaintiff as they exited the prayer rooms, after they prayed, and asked whether they had clocked out before praying. CP 1649-50.

5. Hertz did not inform its Somali Muslim employees that it expected them to clock out for prayer.

The vast majority of Hertz's Somali Muslim employees could not read or write in English and understood only the few words needed to do their jobs[8] (*e.g.* "take the dirty car").[9] Operations Manager Muhammad Babou was Hertz's only manager who spoke and wrote Somali. 11/17/14 RP 147. September 30 and October 1, 2011, were his days off. Id. at 146-47; CP 2024. Hertz did not translate its policy memos into Somali. *See* Ex. 1 and Ex. 2. Hertz managers did not communicate orally its change in policy to the Somali Muslim employees.[10] As a result, Plaintiffs were not informed

[8] Shuttlers' job responsibilities were to "move cars from Point A to Point B." CP 1587-88.

[9] *See* 12/2/14 RP 97 (A. Abdulle); 11/17/14 RP 170 (A. Abdi); 11/24/14 RP 82-83 (F. Aden); 11/18/14 RP 121-22 (S. Hashi); 12/2/14 RP 24 (A. Hussein); 11/20/14 RP 22 (D. Jama); 11/25/14 RP 13 (A. Mohamed); 12/1/14 RP 73 (F. Geedi); 12/2/14 RP 119 (F. Mohamud); 11/19/14 RP 117 (H. Abdulle); 12/1/14 RP 32 (I. Salah); 12/3/14 RP 30-31 (M. Ali); 12/3/14 RP 56 (M. Muse); 11/25/14 RP 67 (M. Abdullahi); 11/25/14 RP 111 (S. Abubakar); 11/24/14 RP 48 (H. Huseen); 12/2/14 RP 58 (M. Mumin). A few of the Plaintiffs spoke and read English at an elementary level. *See* 11/18/14 RP 63 (A. Farah); 11/24/14 RP 111 (A. Hirsi); 11/20/14 RP 46-47 (H. Farah); 11/19/14 RP 76 (M. Ismail); 12/1/14 RP 104-05 (M. Hassan); 11/13/14 RP 115-16 (M. Mohamed); 11/25/14 RP 45 (Z. Aweis). And only one of the Plaintiffs spoke English fluently. *See* 11/12/14 RP 15 (Omar).

[10] *See* 12/2/14 RP 100-01, 104 (A. Abdulle); 11/17/14 RP 173, 175 (A. Abdi); 11/24/14 RP 84, 93 (F. Aden); 11/18/14 RP 125, 133; 11/19/14 RP 67 (S. Hashi); 12/2/14 RP 26, 28, 37 (A. Hussein); 11/20/14 RP 24-25, 36-37 (D. Jama); 11/25/14 RP 15-16, 18 (A. Mohamed); 12/1/14 RP 75, 78 (F. Geedi); 12/2/14 RP 121-22;

of Hertz's decision to change its long-standing practice of allowing them to pray without clocking out. *See* id., and Exs. 1 and 2.[11]

6. Hertz abruptly suspended, and then terminated, Somali Muslim employees who prayed on September 30 through October 3, 2011, without clocking out.

After each Plaintiff prayed on September 30, 2011, and the days that followed, Hertz suspended each and every one of them.[12] During their suspensions, Plaintiffs made unconditional offers to return to work, despite their belief that Hertz had violated the anti-

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12/3/14 13 (F. Mohamud); 11/19/14 RP 120; 11/20/14 RP 14 (H. Abdulle); 12/1/14 RP 54, 57 (I. Salah); 12/3/14 RP 32, 36-37 (M. Ali); 12/3/14 RP 62, 73 (M. Muse); 11/25/14 RP 69, 94-95, 97 (M. Abdullahi); 11/25/14 RP 113-14, 116-17 (S. Abubakar); 11/24/14 RP 49-50, 62 (H. Huseen); 12/2/14 RP 59, 61, 63 (M. Mumin); 11/18/14 RP 65-66, 70 (A. Farah); 11/24/14 RP 115, 121, 123 (A. Hirsi); 11/20/14 RP 49-50, 52 (H. Farah); 11/19/14 RP 78-79, 84-85 (M. Ismail); 12/1/14 RP 107, 110, 112-13 (M. Hassan); 11/13/14 RP 117, 122 (M. Mohamed); 11/25/14 RP 47, 50 (Z. Aweis); 11/12/14 RP 26-27 (I. Omar).

[11] *See also, e.g.,* 11/18/14 RP 13, 59-60 (A. Abdi); 11/24/14 RP 105 (F. Aden); 11/19/14 RP 52 (S. Hashi); 12/2/14 RP 36-37 (A. Hussein); 11/20/14 RP 40 (D. Jama); 11/20/14 RP 12 (H. Abdulle); 12/3/14 RP 52 (M. Ali); 11/18/14 RP 113 (A. Farah); 11/24/14 RP 135 (A. Hirsi); 11/19/14 RP 102 (M. Ismail); 12/2/14 RP 9 (M. Hassan); 11/25/14 RP 59 (Z. Aweis). One of the Plaintiffs testified she saw one of the memos posted, but "assumed it was for the men clocking out to go to the off-site mosque to pray." 11/12/14 RP 36-37 (I. Omar).

[12] *See* 12/2/14 RP 106 (A. Abdulle); 11/17/14 RP 177 (A. Abdi); 11/24/14 RP 88-89 (F. Aden); 11/18/14 RP 132-34 (S. Hashi); 12/2/14 RP 29 (A. Hussein); 11/20/14 RP 28 (D. Jama); 11/25/14 RP 21 (A. Mohamed); 12/1/14 RP 78 (F. Geedi); 12/3/14 RP 12-13 (F. Mohamud); 11/19/14 RP 127 (H. Abdulle); 12/1/14 RP 39 (I. Salah); 12/3/14 RP 35-36 (M. Ali); 12/3/14 RP 63-64 (M. Muse); 11/25/14 RP 74-75 (M. Abdullahi); 11/25/14 RP 117-18 (S. Abubakar); 11/24/14 RP 53 (H. Huseen); 12/2/14 RP 63 (M. Mumin); 11/18/14 RP 74 (A. Farah); 11/24/14 RP 121-22 (A. Hirsi); 11/20/14 RP 52 (H. Farah); 11/19/14 RP 84 (M. Ismail); 12/1/14 RP 111-12 (M. Hassan); 11/13/14 RP 121-22 (M. Mohamed); 11/25/14 RP 52 (Z. Aweis); 11/12/14 RP 42 (I. Omar).

discrimination laws.[13] But instead of returning the Plaintiffs to work, Hertz terminated their employment *en masse* without citing any individual abuse of a prayer break.[14]

At the time that Hertz suspended and terminated the Plaintiffs, the Company's "Employee Rules & Regulations" stated that an employee can be subject to "progressive discipline including verbal and/or written warning, suspension or discharge" for failing to "follow established time card procedures." Ex. 1086; 11/12/14 RP 38-39. But Hertz did not follow its own policy. It did not give the Plaintiffs verbal or written warnings prior to their suspensions. *See* Sections 5 and 9 herein; 12/3/14 RP 116.

7. Hertz treated the Somali Muslims who prayed as a group, not as individuals.

Hertz's plan to observe prayer and suspend the Somali Muslim employees who prayed without clocking out, was dramatically different from the way Hertz addressed other allegations

[13] *See, e.g.,* Ex. 59 (A. Abdulle); Ex. 80 (A. Abdi); Ex. 115 (F. Aden); Ex. 233 (S. Hashi); Ex. 73 (A. Hussein); Ex. 94 (A. Mohamed); Ex. 107 (F. Geedi); Ex. 122 (H. Abdulle); Ex. 142 (I. Salah); Ex. 161 (M. Ali); Ex. 178 (M. Muse); Ex. 210 (M. Abdullahi); Ex. 217 (S. Abubakar); Ex. 226 (H. Huseen, f.k.a. S. Galle); Ex. 170 (M. Mumin); Ex. 88 (A. Farah); Ex. 66 (A. Hirsi); Ex. 130 (H. Farah); Ex. 193 (M. Hassan); Ex. 202 (M. Mohamed); Ex. 243; Ex. 152 (I. Omar).

[14] *See, e.g.,* Ex. 60 (A. Abdulle); Ex. 67 (A. Hirsi); Ex. 81 (A. Abdi); Ex. 116 (F. Aden); Ex. 234 (S. Hashi); Ex. 74 (A. Hussein); Ex. 101 (D. Jama); Ex. 95 (A. Mohamed); Ex. 108 (F. Geedi); Ex. 123 (H. Abdulle); Ex. 131 (H. Farah); Ex. 186 (M. Ismail); Ex. 171 (M. Ali); Ex. 194 (M. Hassan); Ex. 203 (M. Mohamed); Ex. 218 (S. Abubakar); Ex. 227 (H. Huseen, f.k.a. S. Galle); Ex. 244 (Z. Aweis); Ex. 153 (I. Omar).

of misconduct. *See*, *e.g.*, CP 567 (progressive discipline of Hoehne), CP 1724 (Hertz did not discipline managers as a group when one misbehaved).

Manager Harris admitted in his deposition that the application of the alleged clocking out policy starting on September 30, 2011, had nothing to do with whether an individual Somali Muslim was abusing the prayer policy before that date. CP 1725-26. And Hertz suspended every single Somali Muslim who prayed regardless of whether they were engaging in break abuse. Id.

8. Hertz did not suspend or terminate non-Somali, non-Muslim employees who engaged in non-work activities without clocking out.

Numerous Hertz employees engaged in non-work activities other than prayer, such as smoking or drinking coffee or tea without clocking out.[15] Between 2010 and September 2011, Hertz management was aware of break abuse by employees who smoked and did not clock out and for other various breaks:

[15] *See* 11/18/14 RP 12 (A. Abdi); 11/24/14 RP 91-92 (F. Aden); 11/19/14 RP 26-27 (S. Hashi); 12/2/14 RP 32-33 (A. Hussein); 11/20/14 RP 42-44 (D. Jama); 11/25/14 RP 8 (A. Mohamed); 12/1/14 RP 79-80 (F. Geedi); 11/20/14 RP 4-6 (H. Abdulle); 12/1/14 RP 48-49 (I. Salah); 12/3/14 RP 37 (M. Ali); 12/3/14 RP 64-65 (M. Muse); 11/25/14 RP 75-76, 106 (M. Abdullahi); 11/25/14 RP 121-22 (S. Abubakar); 11/24/14 RP 51 (H. Huseen); 12/2/14 RP 92 (M. Mumin); 11/18/14 RP 66, 114, 117-19 (A. Farah); 11/24/14 RP 115 (A. Hirsi); 11/24/14 RP 16 (H. Farah); 11/19/14 RP 112-13 (M. Ismail); 12/1/14 RP 113 (M. Hassan); 11/25/14 RP 53 (Z. Aweis); 11/12/14 RP 35 (Omar).

> I was aware that we had abuse. When I say abuse I mean that we had some staff that would take breaks that they wouldn't clock out for, and that wasn't just Somali Muslim shuttlers. We had people smoking and not clocking out. We had various breaks that weren't being accounted for.

11/12/14 RP 189-90 (Hoehne); CP 1606; 11/12/14 RP 185-86. But Hertz had not suspended any employees for taking a break without clocking out. *See* CP 1607-08.

At the time Hertz suspended and terminated the Plaintiffs in September and October 2011, Hertz did not enforce its clocking-out policy against its employees who smoked during the workday. CP 2015. Hertz admits all of the suspensions on September 30, and the first few days of October 2011, were related to prayer only. CP 1728.

Hertz's decision to suspend and terminate Plaintiffs garnered local and national attention in the news. *See*, *e.g.*, Ex. 20; CP 371, 381, 609. For example, on October 24, 2011, CNN interviewed Tracy Thompson, the Secretary-Treasurer of Teamsters Local 117, Plaintiffs' union. In the interview, Ms. Thompson told CNN:

> What Hertz did is implement a policy, unilaterally, and then apply it only to the workers who were exercising their religious freedom, and they weren't applying it to workers who were taking the smoke breaks and the coffee breaks, that is really what made this about religion.

CP 579; 480-81. Hertz managers learned of the publicity including the union's statement that Hertz only enforced its policy against the Somali Muslims and not against employees who smoked during the

workday. 11/12/14 RP 202-05 (Hoehne); 11/13/14 RP 78 (Harris); 11/17/14 RP 142 (Babou).

It was only after this negative publicity that Hertz decided to enforce its policy against employees who smoke without clocking out. CP 2017-18; 11/17/14 RP 143-44; *see also* Ex. 21; 11/12/14 RP 213-14 (from the time Plaintiffs were suspended on September 30, 2011, and until October 25, 2011, Hertz permitted employees to smoke without clocking out if they were smoking at certain locations); CP 381-82 (discipline of smokers followed publicity). Indeed, at his deposition, Manager Hoehne could not identify a single time on September 30, October 1, 2, or 3, 2011 (the dates that Plaintiffs were suspended after praying), that he or the other managers went to smoking areas[16] and confronted the smokers to find out if they had clocked out. CP 1653-54; *accord* 11/12/14 RP 201-02.

In fact, Manager Harris wrote to the other Hertz managers about Thompson's radio interview and her statement that employees were smoking without clocking out so Hertz must be targeting prayer

[16] Hertz employees who smoked were not permitted to do so while in the vehicles, or at the gas pump, but could smoke at a smoking area 50 feet from the pumps. CP 1653.

only. Ex. 20. He instructed management to make a record of Hertz's efforts to "police this issue" regarding smokers. Id.[17]

On October 25, 2011—the day after the CNN news story ran—Manager Hoehne wrote the following email, in which he acknowledged that he had "made a mistake" by permitting VSAs[18] to smoke while on the clock:

> Upon further review I believe I've made a mistake by letting VSA's smoke if they are walking between clean and dirty staging, or up to floor 2 to get a vehicle. Begin communicating in huddles that this isn't allowed anymore. The only time you can smoke is when you are on break. Please enforce and issue letters if employees are seen smoking while on the clock.

Ex. 21.

That same day, Manager Hoehne observed an employee, Jerome Garner, smoking while on the clock. Ex. 22. Mr. Hoehne did not suspend Mr. Garner, but instead gave him a "verbal warning" and told him that a second offense would lead to a "write up." Id. Also on October 25, 2011, Manager Tony Luchini observed another employee, Adem Huka, smoking while on the clock. 11/12/14 RP 207-08; Ex. 3. Mr. Luchini did not suspend Mr. Huka, but instead

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[17] Manager Harris acknowledged at his deposition that if his intent was not discriminatory, he would have applied the clocking out rule throughout the workforce and not just target the individuals who prayed. CP 1729.

[18] The job responsibilities of a Shuttler and a Vehicle Service Attendant (VSA) overlapped. *See* CP 1588. Hertz's purported "clocking out" rule applied to "all departments" not just the shuttler department. CP 1597-99; 11/12/14 RP 176, 193-96; 12/8/14 RP 208. And according to Hertz, break abuse was a problem in not just the shuttler department. CP 1622.

issued a written warning. Ex. 3. And later, in December 2011, Hertz disciplined Eric Chung for smoking without clocking out. *See* Ex. 265. Mr. Chung is Japanese American. Id. Hertz gave him a written warning, and did not suspend him. Ex. 265.

B. Procedural Facts.

Plaintiffs sought to prove at trial, *inter alia*, that: they were not taking excessive amounts of time away from work to pray; in response to a report that *some* Somali Muslim Shuttlers were abusing prayer time, Hertz targeted *all* Somali Muslim Shuttlers and suspended each one that prayed without clocking out on September 30, 2011, and the days thereafter, although they had prayed *every day* without clocking out for many years; and Hertz did not suspend or terminate employees who engaged in non-work activities other than prayer, without clocking out, on the days in question. *See* CP 928.

Plaintiff Ileys Omar was the first witness called on the Plaintiffs' case. 11/12/14 RP 13:10. Plaintiffs called her for the purpose of outlining the main facts of the case so the jury would have a factual framework for the upcoming cross-examination of the adverse Defendants. CP 3226, ¶ 1. Ms. Omar testified that she worked at Hertz SeaTac as a Shuttler from July 2007 to September 30, 2011. 11/12/14 RP 19:8-17. She also testified that she was a member of

Teamsters Local 17, had been a shop steward, and was "kind of a liaison between the employee and the company." Id. at 24:1-21.

Ms. Omar testified that between 2007 and her last day of work no one ever told her to clock out for prayer. Id. at 26:24-27:6. In February 2011, Manager Jeff Wilson sought to have her sign a paper saying she misused company time, because she was praying, but he would not put that explanation in writing, she would not sign it, no action was taken as a result, and it was never brought up again. Id. at 28:6-30:9. On Friday, September 30, 2011, Ms. Omar went to work at 2:00 p.m. and saw a paper posted on the wall that said to clock out for break and mentioned religious observation, but Ms. Omar thought it pertained to the men's Friday prayer. Id. at 35:20-38:4. She prayed at the 4:30 prayer without incident, but after leaving the prayer area she learned that the men were being sent home; she heard Matt Hoehne tell them, "You guys prayed and you didn't clock out. You need to clock out and go home, but he told Ms. Omar the direction did not apply to her. Id. at 39:14-41:18. At the 7:30 prayer, another manager named Derrick sent her home for praying without clocking out after she left the prayer area, though no one told her to clock out before prayer beforehand. Id., at 41:22-42:6; 49:10-50:3.[20]

[20] Later, on cross, Ms. Omar stated that Dixon asked her whether she had clocked

Owing to the court's motion in limine ruling on abandoned claims, Ms. Omar was only asked about discriminatory treatment by Hoehne, and in response she described several incidents, including one during which Hoehne drove with her and acted as though she did not understand him, even though her English is fine.[21] Id., at 52:16-55:10. She felt threatened and treated differently, and that incident prompted her to write a letter to Manager Todd Harris complaining of his discrimination. Id., at 56:22-57:18. On cross-examination, Ms. Omar was asked many transcript pages of questions pertaining to the union contract, negotiations, and the contract's relationship to prayer. Id., at 60-67. The September 30th notice, which she had seen on the wall, was admitted as Ex. 2, and she was cross-examined on that. Id., at 97:13-106:25; CP 3230. As a party, Hoehne was present in the courtroom for the testimony of Ms. Omar. 11/12/14 RP 2:21.

1. The court limited Plaintiffs' cross-examination.

Plaintiffs' second witness was Defendant and Operations Manager Matt Hoehne. Id., at 145. The purpose of calling Hoehne early in the case, although he is a party and an adverse witness, was to

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out as she walked into the prayer area—he did not tell her to clock out. Id. at 110:25-111:8.

[21] CP 1573, ¶ 2 ("No such evidence or argument about such evidence will be admitted except where the evidence is of facially discriminatory treatment of plaintiffs (*e.g.* being called a 'terrorist') by decision makers involved in the suspensions and terminations at issue in this case").

lock in his deposition testimony and to challenge his credibility. CP 3226, ¶ 4. Without objection, leading questions were utilized immediately. *See* 11/12/14 RP 145.

During Hoehne's examination, a pattern emerged of incorrect objections and rulings sustaining those objections. The first objection during Hoehne's testimony, "hypothetical," was sustained as to the question, "So if it had to do with prayer, you actually could have instructed him to write down the word 'prayer,' right?" 11/12/14 RP 151-52 (Objection No. 1[22]). The context was the February 2011 warning document by Jeff Wilson, discussed during Ms. Omar's testimony and earlier in the Hoehne testimony. *See* id., at 28:6-30:9; 151:9-18. It was established that Hoehne was in charge of the work place and "Wilson's boss." Id. at 151:22-24. Ms. Omar had testified that the February document drafted by Wilson (Hoehne's subordinate) did not contain the word "prayer," because "H.R." told Wilson "not to put that," and thus Omar did not sign it. Id., 29:8-30:2. Plaintiffs' question to Hoehne simply sought his agreement that as manager, he could have directed that the word "prayer" be inserted into the document. *See* id., at 151-52. The purpose of the question

[22] "Objection No. __" (or "Obj. No. __") refers to objections made by defendant during the trial, which were sustained for improper reasons by the trial court, and enumerated in an appendix that accompanied plaintiffs' post-trial motion for a new trial. Such listing of improperly sustained objections may be found at CP 2601-55.

was to call into question whether clocking out for prayer was being discussed openly in 2011. CP 3226, ¶ 5. It was a proper question, an improper objection, and an improper ruling by the court. The next six objections during Hoehne's cross-examination are similar in that the record contained the evidence supporting the questions, and the questions should have been allowed. 11/12/14 RP 158:3-8, 11/12/14 RP 163:6-17, 11/12/14 RP 172:10-20, 11/12/14 RP 174:3-9, 11/12/14 RP 175:18-23, 11/12/14 RP 190:5-16 (Obj. Nos. 2-7) and *discussion infra*, at 44-51. As one example, the third objection, "assumes facts not in evidence," was sustained as to the question, "We know that on September 30th there was a confrontation where managers asked employees if they prayed, and if they said 'Yes,' they were sent home, correct?" 11/12/14 RP 163:11-17. Ms. Omar testified to this fact before Hoehne was called as a witness. *See* id., at 40:11-42:8; 131:15-19. Perhaps for this reason, the same objection was overruled when Hoehne was later asked, "Isn't it true that on September 30th managers confronted people leaving the prayer area, asked them if they had prayed, and sent them home if they said yes?" Id., at 163-64.

The central issue of the case was who knew what when. CP 3226, ¶ 6. Defendants maintained that on the last day of Plaintiffs' employment they received training, one or more notices were posted,

and managers confronted them *before* they entered the prayer area. Id. Most of the Plaintiffs would testify that they did not know of the new clock-out for prayer policy on their last days of work—as they had testified in summary judgment declarations and as outlined in the trial brief and in other places. Id.

At trial, Defendant Hoehne, the highest-ranking manager on-site, challenged the sequence of events offered by Plaintiffs' counsel, stating, "That's not how it went at all." 11/12/14 RP 164-65. Hoehne testified, "I remember I was upstairs at the men's prayer area. I was there ***prior*** to them entering the prayer area. And at that time we asked each individual 'Did you clock out for prayer?'" Id. The timing of management's questioning of the Plaintiffs was critical, as they were terminated not for praying, but for "insubordination." Id. at 170.

In his deposition, Hoehne testified to the exact opposite of his trial testimony. *See* CP 1650 ("[W]e'd ask each individual that was leaving -- ***I don't recall us asking anyone that was entering the prayer area are you clocked out for break***. What I recall is as people were exiting….") This deposition testimony was put up on the screen during Hoehne's cross-examination by stipulation permitting all deposition testimony to be shown to the jury and with the court's permission. 11/12/14 RP 166-67. A copy of the slide that was

projected to the jury is provided at CP 3232. Hoehne was impeached with his deposition testimony. Id., 166-69. When Plaintiffs sought to reiterate that Hoehne previously gave contradictory testimony under oath, the court sustained Defendants' objection as "asked and answered." Id., at171:10-21. The court in an agitated tone then ordered the slide taken down "so that we don't see it again and again." Id. At the next break, the court "withdr[e]w [its] permission to put up deposition testimony on the screen." Id., at 186. After the break, Plaintiffs' counsel sought clarification, and the court entered into a colloquy, calling the cross-examination "argumentative" three times and the impeachment by deposition flawed, proposing that:

> Here's what's going on. You put it up. You read it four times. You ask that it be blown up. You ask argumentative questions and repeat it so many times that in my opinion you are doing two things: One, you are focusing too much on one portion of the testimony and being redundant. And you are being theatrical in a way that is a waste of time and is inappropriately argumentative. And so that's why I don't want it to happen. **The appropriate way to impeach a witness, which you all know, is short and sweet and includes one reading of the information that is hopefully contrary to the earlier testimony**. And that's the way to impeach a witness. And if we do the more theatrical approach, and redundant and argumentative approach, it's both inappropriate and takes about five times longer.

Id., at 187.

Defendants had not made any "argumentative" objections before this point, but being quick studies, after hearing the court's

misunderstanding of the "argumentative" objection, it became a predominant objection improperly, but successfully, utilized by the Defendants beginning only five transcript pages later, and which continued throughout the trial. *See for example,* 11/12/14 RP 192:11-21, 11/12/14 RP 226:25-227:6, 11/12/14 RP 227:7-13, 11/12/14 RP 235:15-19, 12/9/14 RP 31:8-15 (Obj. Nos. 8, 21, 22, 30, 116 pertaining to Defendant Hoehne testimony); 11/13/14 RP 31:6-12, 11/13/14 RP 33:25-34:8, 11/13/14 RP 37:16-24, 11/13/14 RP 38:1-9, 11/17/14 RP 89:22-90:3, 11/17/14 RP 90:5-10, 11/17/14 RP 90:12-17, 11/17/14 RP 100:11-101:3, 11/17/14 RP (Obj, Nos. 34, 35, 36, 37, 46, 47, 51, 52, 53, 59 pertaining to Defendant Harris testimony); 12/3/14 RP 121:23-122:8, 12/3/14 RP 125:10-25, 12/4/14 RP 10:8-22, (Objections Nos. 67, 71, 74 pertaining to Manager Babou; 12/4/14 RP 67:18-68:5, 12/4/14 RP 117:1-15 (Obj. Nos. 79, 88 pertaining to Dispatcher Richard Best testimony); 12/4/14 RP 177:7-19 (Obj. No. 92 pertaining to Senior VP Labor Relations Franzene); 12/8/14 RP 23:3-18, 12/8/14 RP 28:11-22, (Obj. Nos. 93, 98, 99 pertaining to Manager Wilson); 12/8/14 RP 97:2-18 (you need this job?) (Obj. No. 106 pertaining to Seifu); 12/8/14 RP 193:15-194:3, 12/8/14 RP 207:4-21 (Obj. Nos. 112, 113 pertaining to General Manager Abdallah); 12/9/14 RP 141:12-142:2, 12/9/14 RP 143:16-22, 12/9/14 RP 159:6-

11 (Obj. Nos. 120, 123, 128 pertaining to Manager Luchini).

The "argumentative" objection was improperly used by the defense to blunt or completely cutoff proper cross-examination. Some examples follow. As set forth above, Hoehne had testified in his deposition to the effect that the questioning of the Plaintiffs as to whether they clocked out came *after* prayer, not before they went to the prayer area. So when Hoehne changed his testimony at trial, Sheridan sought to impeach him by showing that he could not identify who he talked to before going into the prayer area to pray—because it did not happen. But the Court cutoff that cross by sustaining improper "argumentative" objections. 11/12/14 RP 226:25-227:6 (Sheridan leading Hoehne: "Q. Did you talk to any Somali Muslim employees as they walked into the prayer area at 4:30? A. I believe I did. Q. Who? They're all sitting back there [the back of the courtroom]. Which ones? Which people do you now claim – MR. HURLEY: Objection; argumentative. THE COURT: Sustained.") (Obj. No. 21); RP 227:7-227:10 (Sheridan leading Hoehne: "Q: Well, who do you now claim you spoke to? MR. HURLEY: Objection; argumentative. THE COURT: Sustained.") (Obj. No. 22); RP 227:16-19 ("Q. Well, name one person you claim to have spoken to. MR. HURLEY: Objection; argumentative. THE COURT: Sustained.")

(Obj. No. 22); 12/4/14 RP 117:1-15 (Sheridan leading Mike Dixon: Q. "Now, who did you say you remember specifically, women who you told to clock out before prayer? A. It was Ileys Omar, Murayad Abdullahi and Asli Mohamed. Q. Is Asli Mohamed in the courtroom? A. I believe so, yes. Q. Which person is she? A. She's the person with the blue head wrapping. Q. Okay. On the left or the right? A. In the middle between the – MS. SMITH: Objection; your Honor, argumentative. THE COURT: Sustain.") (Obj. No. 88).

Defendant Harris was the overall manager at SeaTac, and was in charge of discipline. Appellants sought to prove that he treated the Somali Muslim appellants as one group—not as individuals when it came to enforcing policies and discipline. The Court blunted that cross of the highest ranking on site manager by sustaining an improper "argumentative" objection. 11/13/14 RP 33:21-34:6 (Sheridan leading Harris: "But it's fair to say, is it not, that when somebody does something like [violate policy] that you treat them as an individual, correct? A. Yes. Q. And so it is your job as a manager to identify an individual who has done something wrong and then, if they have, discipline that individual if appropriate, correct? A. I would say that's correct, yes. Q. But in this case [pertaining to the plaintiffs below] you made no effort to identify individuals, did you?

MR. FILIPINI: Objection. Argumentative. THE COURT: Sustained.") (Obj. No. 35).

All of the appellants were terminated for alleged insubordination. At trial, they established that Hertz had a standing policy requiring that to terminate an employee, the employee must refuse to follow a manager's direction three times. 12/3/14 RP 137:16-19, 12/3/14 RP 121:3-8, Ex. 38 (discussed at 12/3/14 RP 121:9-22), Ex. 219 (discussed at 12/3/14 RP 5:15-6:9). The import of this fact, was that each appellant should have been directed three times to clock out for prayer, but they were not, so they should not have been terminated. Yet, the trial court repeatedly prevented Sheridan from cross-examining adverse witnesses on this subject. 11/17/14 RP 89:22-90:3 (Sheridan leading Harris: Q: "[Y]ou just told us that, oh, yes, some of the three -- some people were told three times. Which of the plaintiffs sitting here [in the court room] were told three times to clock out before prayer? MR. FILIPINI: Objection. Asked and answered and argumentative. THE COURT: Sustained.") (Obj. No. 51); 11/17/14 RP 90:5-10 (Sheridan leading Harris: "Q. Well, can you or can you not tell us the names of anybody who your investigation found was told three times to clock out? MR. FILIPINI: Object as asked and answered and argumentative. THE

COURT: Sustained.") (Obj. No. 52); 11/17/14 RP 90:12-17 (Sheridan leading Harris: "Q. Well, you would agree with me then that as you sit here today, you can't think of any situation from your investigation where somebody was told three times to clock out. MR. FILIPINI: Same objection, Your Honor. THE COURT: Sustained.") (Obj. No. 53); 12/3/14 RP 121:23-122:8 (Sheridan leading Babou: "Q. So the plan communicated to you by Mr. Harris was that you would not worry so much whether people were clocking out, because you'd have to give them progressive discipline. Instead, you were going to give them direct orders three times and then say, 'I'm firing you because you were insubordinate,' right? MR. FILIPINI: Object, Your Honor. Argumentative, testifying, and mischaracterizing testimony. THE COURT: Sustained.") (Obj. No. 67).

The trial court also excluded cross-examination of adverse witnesses concerning the "three-time rule" by sustaining objections based on other impermissible grounds. 11/17/14 RP 128:23-129:3 (Sheridan leading Harris: "Q. Because in order to be insubordinate, your manager had to say to them, to each one of them three times, you must go pray, right? MR. FILIPINI: Object as asked and answered, Your Honor. THE COURT: Sustained.") (Obj. No. 64); 12/4/14 RP 110:11-16 (Sheridan leading Dixon: "Q. Let's look at –

it's true, is it not, that the instructions that were given to Best were basically that they were told to tell the shuttlers three times to punch out before going to prayer? MS. SMITH: Objection; lack of foundation. THE COURT: Sustained.") (Obj. No. 84); 12/8/14 RP 78 (Sheridan leading Alfonso Black: Q. "And did anybody talk to you about insubordination when you got this written warning? A. No. I wasn't insubordinate. Q. Well, didn't people – didn't management tell you more than three times between September 2011 and March 2012 that you could not smoke unless you were on a clocked-out break? MR. GROSHONG: Objection; foundation. THE COURT: Sustained.") (Obj. No. 104); 12/9/14 RP 142 (Sheridan leading Luchini: Q. Well, but looking at this, you would agree with me that as of – certainly at least as of February, in order to get somebody for insubordination, you need to tell them three times that they have to clock out for prayer and failure to do so could result in a finding of insubordination up to – and termination, right? MR. HURLEY: Object as mischaracterizing the document and apparently referring to two different occasions. THE COURT: Sustained.") (Obj. No. 121).

On the issue of Defendants' claim that the workforce was notified about the change in policy requiring clocking out for prayer at meetings called "huddles," Defendants' witness Dispatcher Richard

Best testified that shuttler attendance was mandatory and, "So I believe everyone was there." 12/4/14 RP 138:5. The implication was that all of the Plaintiffs would have been in attendance at those huddles and would have received notice of the clock-out for prayer policy change. On cross, the witness clarified his earlier response, and admitted that he was guessing about attendance.

> Q. But it's true, is it not, you can't really sit here under oath and say that everybody attended every huddle?
> A. I don't believe I did say that. I said I believe everyone did.
> Q. Well, but believe means you don't know, you're guessing, right?
> A. Yes.

12/4/14 RP 67:18-68:5 (Obj. No. 79). However, the Court struck the testimony after sustaining the following objection:

> MR. FILIPINI: I would object to that. Move to strike that as argumentative and mischaracterizing.
> THE COURT: The objection is sustained and the answer is stricken.

12/4/14 RP 68:1-5 (Obj. No. 79). Striking the answer let the fact as stated by Best stand unchallenged.

As to whether the new policy applied to everyone (*i.e.*, smokers, coffee drinkers, and Muslims at prayer), the trial court also blocked cross-examination on "argumentative" grounds. 12/3/14 RP 125:10-25 (Sheridan leading Manager Babou: "Q. One [hundred] sixty [employees]. And out of that, only four or five smoked? A.

We're talking about shuttlers. Q. Oh, why are you talking about the shuttlers when the policy applied to everyone, didn't it? MR. FILIPINI: I'll object. He's simply answering the question I posed to him on direct. THE COURT: I will sustain the objection as argumentative.") (Obj. No. 71).

2. The court excluded Exhibit 1929, showing that management preconceived a plan to charge the Plaintiffs with insubordination.

Ex. 1929 was a powerful exhibit; the email Manager Jeff Wilson sent to other managers showed Defendants had conceived their plan to entrap the Plaintiffs for insubordination for praying as early as March 2011. Id. (CP 2666-67, at App. 1). The trial court excluded Ex. 1929 as hearsay, even though a proper foundation was laid for its admission. Id. (CP 2666-67); 12/8/14 RP 30:13-33:23. Plaintiffs laid the foundation for admission of the email string as a business record and statement of a party-opponent, and described the exhibit's admission as "outcome determinative" to the litigation. Id. After the court denied admission of the document, Plaintiffs provided written briefing addressing the document's admissibility. CP 2149-52. When the court maintained its ruling, denying admission of Ex. 1929, Plaintiffs asked for a mistrial, which was denied. 12/9/14 RP 4:21-6:23.

3. The trial court allowed hearsay testimony that a union manager admitted Hertz's policy required clocking out for prayer, which Plaintiffs disputed.

On direct, Todd Harris was asked to describe an April 2011 conversation he had with Cetris Tucker, his counterpart in contract negotiations with Plaintiffs' union. 11/17/14 RP 18:7-17. Harris then testified, in relevant part, to having told Tucker "that we had Muslim Shuttlers that were still taking time above and beyond that for prayer. And, certainly, Cetris responded back --" at which point Plaintiffs' counsel objected to the answer as hearsay. Id., at 18-19. Plaintiffs' objection was overruled and no reason was given for the ruling. Id. Harris continued: "Cetris responded back to me that, absolutely, that prayer was to be done, you know, during the paid rest period. That was something that was clearly discussed during negotiations." Id.

4. The court refused to give an instruction informing the jury it can infer discrimination from disbelief of Defendants' stated reasons for their actions.

Based on the 8th Circuit's Model Jury Instruction 5.20, the Plaintiffs proposed Jury Instruction No. 11, which stated, "You may find that a plaintiff's religion or national origin was a substantial factor in the defendant's decision to suspend or terminate a plaintiff if it has been proved that the defendants' stated reasons for either of the decisions are not the real reasons, but are a pretext to hide religious or national origin discrimination." CP 1109 (App. 2). The court refused

to give this instruction and Plaintiffs took formal exception to the refusal. 12/10/14 RP 21:20-22:7.

5. During closing, Defendants treated notice evidence as substantive evidence; Plaintiffs objected but were overruled, and the court denied Plaintiffs' request for a mistrial or curative instruction.

In closing Defendants told the jury, "The union explains at the ratification meeting that **prayer is part of and not in addition to break time**. Mr. Kidd … told you, 'Yes, it was explained at the ratification meeting." 12/10/14 RP 125:8-21. Plaintiffs' counsel then interjected, "I'm sorry to object, your Honor, but I think counsel is making reference to things not in the record with Kidd." Id. The objection was overruled. Id. Defense counsel continued, telling the jury that Kidd "testified that Mohamed Hassan, one of the Plaintiffs, was actually the interpreter at the ratification meeting." Id.

When James Kidd testified, Defendants repeatedly sought to obtain testimony of what Tracey Thompson said during union meetings. The court sustained Plaintiffs' hearsay objection each time, until Defendants stated that the information was offered for notice. CP 2268, ¶ 1; 12/9/14 RP 196:9-197:19; 202:15-203:21.

The jury began deliberating at 9:00 a.m. on December 11, 2014. CP 2271. At 9:12 a.m. on December 12, 2014, Plaintiffs filed a pleading to restate their oral objection, charging that "[d]uring

closing, Defendants argued the contents of [Kidd's] hearsay disclosure as substantive evidence. The hearsay testimony was prejudicial." CP 2256; 2269. For such reason, Plaintiffs requested a mistrial, or in the alternative, a curative instruction. CP 2256. Plaintiffs' counsel filed a declaration explaining the one-day delay between the oral objection and the filing of the request for mistrial or curative instruction. CP 2260 ("After the Court overruled my objection, I assumed that I was mistaken in my memory of the Kidd testimony. … I [also] recalled [that defense counsel] likely had a transcript of the witness, and I [was] sure [he] would not make an improper reference intentionally." However, after Plaintiffs' counsel emailed defense about the objection and received no response, "I began to think perhaps I was correct in my initial belief.")

The jury did not return for the second day of deliberations on December 12, 2014, until 9:30 a.m., after Plaintiffs' requests were filed. CP 2271. The jury deliberated the second day until 4:00 p.m. without reaching a verdict. Id. The court entered an order denying Plaintiffs' request for a mistrial or curative instruction at 4:27 p.m. on December 12, 2014. CP 2272. On December 15, 2014, the jury entered verdicts in all cases on behalf of Defendants. CP 2288-2387.

6. Plaintiffs' motion for new trial was denied.

Plaintiffs filed a motion for new trial with Appendix 1 outlining the court's erroneous rulings on objections. CP 2584-667, 3225-27. The court denied Plaintiffs' motion for new trial. CP 3236.

IV. ARGUMENT

A. Standard of Review

The standard of review for evidentiary rulings is abuse of discretion.[23] A trial court abuses its discretion when discretion is exercised on untenable grounds or for untenable reasons.[24] If "the trial court based its evidentiary ruling on an incomplete legal analysis or a misapprehension of legal issues, the ruling may be an abuse of discretion." State v. McComas, 186 Wn. App. 307, 312, 345 P.3d 36 (2015), *citing* City of Kennewick v. Day, 142 Wn.2d 1, 15 (2000). Similarly, excluding evidence that prevents a party from presenting a crucial element of its case constitutes reversible error. *See* Grigsby v. City of Seattle, 12 Wn. App. 453, 457, 529 P.2d 1167 (1975).

A trial court's denial of a motion for a new trial is also reviewed for abuse of discretion.[25] "The test for determining such an abuse of discretion is whether such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent [the]

[23] State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).
[24] Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 572 (1986)
[25] Hickok–Knight v. Wal–Mart Stores, Inc., 170 Wn. App. 279, 324 (2012).

litigant from having a fair trial.'"[26]

B. Cross-examination is fundamental to a fair trial.

"Courts have long recognized cross-examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of truth.'" Gourley v. Gourley, 158 Wn.2d 460, 480 (2006). "[E]vidence is tested by the adversarial process within the crucible of cross-examination…." Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 607 (2011). "On the cross-examination of any witness, … counsel are entitled to ask any questions which tend to test the accuracy, veracity, or credibility of the witness." Levine v. Barry, 114 Wash. 623, 628 (1921); State v. Darden, 145 Wn.2d 612, 620 (2002) (stating that the purpose of cross-examination is "to test the perception, memory, and credibility of witnesses").

> Due process guarantees the right to a full and fair hearing. ... [C]ross examination is an integral part of both criminal and civil judicial proceedings. ... Cross examination is, however, limited by other factors; it must pertain to matters within the scope of the direct examination and matters affecting the credibility of the witness. ER 611(b). It may be curtailed where the relevance of the evidence is outweighed by the danger of undue delay, waste of time or needless presentation of cumulative evidence. ER 403. Further, the court has discretion to exercise reasonable control over the mode and order of interrogating witnesses to avoid needless consumption of time. ER 611(a)(2). However, preclusion of all cross examination on a legitimate issue calls into question the factfinding process and requires that the competing factors

[26] Collins v. Clark Co. Fire Dist. No. 5, 155 Wn. App. 48, 81 (2010).

be more closely examined.

Baxter v. Jones, 34 Wn. App. 1, 3-4, 658 P.2d 1274 (1983) (holding in civil case court erred in terminating cross-examination of a witness at predetermined time). *See also* Falk v. Keene Corp., 53 Wn. App. 238, 249, 767 P.2d 576 (1989) (holding that "because the trial court's limits on … cross examination did not prejudice appellants' ability to impeach Dr. Demopoulos, the trial court's ruling standing alone would not require reversal.")

C. In cases alleging discrimination, Plaintiffs must be afforded a full and fair opportunity to cross-examine defense witnesses for purposes of establishing pretext.

Our courts acknowledge that proving a discrimination case is difficult. *See*, *e.g.*, Scrivener v. Clark Coll., 181 Wn.2d 439, 445, 334 P.3d 541 (2014). Frequently in these cases, the employer's motivation must be shown by circumstantial evidence, as the employer is not likely to announce discrimination as his motive. Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 179-80, 23 P.3d 440 (2001). "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." Currier v. Northland Servs., Inc., 182 Wn. App. 733, 748-49, 332 P.3d 1006 (2014), *review denied*, 182 Wn.2d 1006 (2015), *quoting* Reeves v. Sanderson

Plumbing Prods., 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt." Reeves, 530 U.S. at 147. Thus, the mendacity of Defendants' testimony is a critical part of Plaintiffs' case. *See* CP 1109 (Pls.' proposed Jury Instruction No. 11).

"Because employment discrimination cases are particularly likely to involve issues of credibility and intent, the due process protections of confrontation and cross-examination are particularly important…." *See* Cooper v. Salazar, No. 98 C 2930, 2001 WL 1351121, at *3 (N.D. Ill. Nov. 1, 2001), *citing* Alexander v. Wis. Dep't of Health and Family Servs., 263 F .3d 673, 681 (7th Cir.2001). *Accord* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) (stating that a plaintiff must have a "'full and fair opportunity to demonstrate,' through presentation of his own case and through cross-examination of the defendant's witnesses, 'that the proffered reason was not the true reason for the employment decision'"); Texas Dep't of Cmty. Affairs v. Burdine,

450 U.S. 248, 255 n. 10, 101 S.Ct. 1089, 67 L. Ed. 2d 207 (1981).

"An employee can demonstrate that the reasons given by the employer are not worthy of belief with evidence that: (1) the reasons have no basis in fact, *or* (2) even if based in fact, the employer was not motivated by these reasons, *or* (3) the reasons are insufficient to motivate an adverse employment decision." Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 619 (2002) (emphasis added).

To expose pretext, a plaintiff must be permitted to vigorously cross-examine adverse witnesses. Plaintiffs' counsel has found that the most effective means for proving discrimination is to allow the defendants to tell their version of the facts and then, through cross-examination, show the jury that the defendants' version of the facts is not to be believed—it is a pretext for discrimination. CP 3227, ¶ 8. To achieve this objective, Plaintiffs' counsel uses cross-examination to test the perception, memory, and credibility of adverse witnesses. Id. Here, the Plaintiffs were denied that right, especially regarding the cross-examination of Hertz managers, including the two named defendants—Hoehne and Harris—the two most culpable managers. *See* id., ¶ 9. "Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." State v. Roberts, 25 Wn. App. 830,

834, 611 P.2d 1297 (1980). Here, instead the court protected Hoehne and Harris from any meaningful cross-examination that would have shown pretext.

D. It was error to repeatedly sustain improper objections during Plaintiffs' cross-examination of critical witnesses.

In light of the difficulty of proving discrimination cases and the need to rely on circumstantial evidence, the prejudice from improperly sustaining objections during cross-examination of adverse witnesses, which would exist in any civil case, was magnified here. Hoehne was properly impeached when he changed his testimony, and Plaintiffs' counsel rightly sought to test "the perception, memory, and credibility of the witness" through cross-examination.[27] The colloquy at 11/12/14 RP 187 revealed the court's misunderstanding of the Rules. Nothing was "argumentative" about Plaintiffs' questioning of Hoehne. "An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even expect an answer. The question may, indeed, be unanswerable." *See* People v. Chatman, 38 Cal. 4th 344, 384, 133 P.3d 534 (2006) (holding that question whether "the safe [was] lying" is an example of an argumentative question, as an inanimate object cannot lie).

[27] *See, e.g.*, Darden, 145 Wn.2d at 620

> [I]t is important to distinguish between an argumentative question and cross-examination that has a sharp edge. An argumentative question is a question only in form. It is, in substance, an argument because it asserts facts with such a forceful tone it suggests those facts are established and the answer of the witness is of no consequence. In contrast, even a vigorous cross-examination has as its central object the extraction of answers from the witness.

Wright & Miller, 28 Fed. Prac. & Proc. Evid. § 6164 (2d ed.); *accord* 98 Corpus Juris Secundum, Witnesses § 503 ("Questions designed to explain, contradict, or discredit testimony given by the witnesses are permitted on cross-examination. Also allowed are questions attacking the credibility of the witness or the testimony, or pointed questions.")

What became evident was the court's view of impeachment and the use of pointed questions was restrictive to the point of error and prejudice, and over the course of the trial, the integrity of the fact-finding process was circumvented. In the court's view, any challenge to a defense witness's version of events was argumentative. Hoehne's dramatic change in his testimony on the first day of trial was some of the most important testimony in the case, yet the trial court's view was that such lies by key defense witnesses should only be pointed out in cross-examination once. *See* 11/12/14 RP 187.[28]

[O]ften some amount of repetition is the essence of effective

[28] While the Court stated Plaintiffs' counsel read the contradictory testimony "four times," the testimony was in fact read twice before the Court sustained Defendants' "asked and answered" objection and ordered the deposition testimony taken down from the screen. Id., at 167:20-21; 168:22-24; 171:10-21.

> cross-examination. More latitude should be granted to a cross-examiner asking the same question more than once than is permitted the direct examiner. One major purpose of cross-examination is to continue probing the same subject matter in an effort to get a witness possibly to modify his or her testimony. There is good reason, therefore, to permit the cross-examiner to ask a witness the same question more than once.

People v. Riel, 22 Cal. 4th 1153, 1197, 998 P.2d 969 (Cal. 2000).

Nor was it improper for Plaintiffs to ask witnesses to answer questions already answered on direct. *See* 12/3/14 RP 125:10-25. "For the purpose of establishing the falsity of testimony, it is proper to ask the witness to detail again the occurrence testified to on direct examination." 98 Corpus Juris Secundum, Witnesses § 488; *accord* 3 Wigmore, Evidence § 782, p. 183 (Chadbourn rev. 1970) (stating that there may be nothing "so keen and striking an efficacy, when employed by skillful hands, in extracting the truth and exposing a lie"). Plaintiffs' questions that the court sustained objections to as argumentative were proper questions, which directly addressed the issue of pretext and were structured to test the perception, memory, or credibility of the witness; completely distinct from the "speech to the jury" described in People v. Chatman. *See supra*, at pp. 23-34.

The sustaining of the "argumentative" and other improper objections not only inhibited Plaintiffs' ability to show that Defendants' explanations were unworthy of belief, but also affected

more fundamental issues, such as Plaintiffs' ability to establish the foundation, or lack of foundation, for testimony. *See e.g.*, 12/4/14 RP 10:2-7, 12/4/14 RP 10:8-22, 12/4/14 RP 72:22-73:6, 12/4/14 RP 117:1-15 (Obj. Nos. 73, 74, 81, 89); and to test witnesses' ability to identify specific Plaintiffs whom they gave adverse testimony about. The court repeatedly allowed defense witnesses to lump Plaintiffs into an undefined Somali Muslim group that all failed to clock out and all abused policies. *See* Order denying Pls.' Mot. in Limine No. 5. CP 467; CP 334-35. Such presentation violated ER 601 and allowed ER 404(a) improper bad character to be attributed to the Plaintiffs as whole, without the Defendants being required to tell the jury, which individual Plaintiffs should be included in the criticisms.

The court prohibited Plaintiffs' counsel from cross-examining Harris, Hoehne and Dixon on whether they could identify any Plaintiff in the courtroom, which would show that these managers were not close to Plaintiffs, did not know them as well as they claimed, and which would challenge each manager's credibility. *See, e.g.*, 11/17/14 RP 88:22-90:17 (sustaining objection when Harris was asked to identify who was told "three times to clock out before prayer," after he vaguely claimed "the Plaintiffs… [m]any were told three times"); 12/4/14 RP 117:1-15 (Dixon Test.); 11/12/14 RP

226:25-227:19 (sustaining objections when Hoehne was asked to identify specific Plaintiffs he spoke to, after he vaguely claimed he spoke with Somali Muslims before they entered the prayer area). The court's rulings on cross-examination also restricted Plaintiffs from showing the interest and bias of witnesses. 12/8/14 RP 97 ("Q. Is it fair to say you need this job? A. Beg your pardon? Q. You need this job? MR. GROSHONG: Objection. A. I -- THE COURT: Hang on. MR. GROSHONG: Argumentative, relevancy, your Honor. THE COURT: Sustained.") Such ruling was in error. Needing a job is motive to lie and proper cross on bias. "Facts which tend to show the bias, prejudice, or friendship of the witness for the party for whom he testifies, and to show hostility toward the party against whom he is called, may be elicited on cross-examination as a matter of right." Dods v. Harrison, 51 Wn.2d 446, 447-48 (1957); ER 607.

The Court also improperly sustained objections of "misleading" and "mischaracterizing" by defense counsel. 11/12/14 RP 193:2-12, 11/12/14 RP 194:16-24, 11/12/14 RP 197:7-22, 11/12/14 RP 231:14-19, 11/12/14 RP 233:4-25, 11/12/14 RP 235:2-14, 11/13/14 RP 27:8-28:2, 11/13/14 RP 46:19-23, 11/13/14 RP 49:2-20, 11/13/14 RP 58:1-11, 11/17/14 RP 80:24-81:4, 11/17/14 RP 86:4-13, 11/17/14 RP 96:21-97:2, 11/17/14 RP 98:23-99:6, 11/17/14 RP

99:8-11, 12/3/14 RP 109:11-24, 12/3/14 RP 121:23-122:8, 12/4/14 RP 65:6-66:6, 12/4/14 RP 112:21-113:15, 12/4/14 RP 174:2-12, 12/8/14 RP 25:1-17, 12/8/14 RP 28:1-10, 12/8/14 RP 59:1-18, 12/8/14 RP 59:19-23, 12/8/14 RP 78:14-25, 12/8/14 RP 153:25-154:7, 12/9/14 RP 29:12-17, 12/9/14 RP 133:2-19, 12/9/14 RP 138:1-20, 12/9/14 RP 142:4-143:3, 12/9/14 RP 160:18-25 (Obj. Nos. 9, 11, 12, 17, 27, 28, 29, 33, 38, 39, 42, 48, 50, 56, 57, 58, 66, 67, 77, 86, 91, 94, 97, 102, 103, 105, 109, 115, 117, 118, 121, 129). *See*, *e.g.*, 11/17/14 RP 96:21-97:2 (Q. "[A]s you had testified to in your deposition, it was basically that you had been told that some of the Somali Muslims were taking an hour to pray, right? MR. FILIPINI: Objection. Mischaracterizes the witness testimony. THE COURT: Sustained.") (Obj. No. 56), *cf.* CP1688 (Harris Dep.). The "mischaracterization" objection was sustained even when the witness *agreed* with Plaintiffs' description of prior testimony. *See* 11/12/14 RP 226:9-16 (Obj. No. 20); *cf.* id. at 169:12-13. Repeatedly and improperly sustaining this objection becomes an attack on the credibility of Plaintiffs' counsel.

The court also improperly sustained objections on other impermissible grounds such as foundation, assumes facts not in evidence, compound, and asked and answered. 11/12/14 RP 172:10-

20, 11/12/14 RP 174:3-9, 175:18-23, 11/12/14 RP 190:5-16, 11/12/14 RP 197:7-22, 11/13/14 RP 27:8-28:2, 11/13/14 RP 46:19-23, 11/13/14 RP 49:2-20, 11/17/14 RP 94:22-95:4, 11/17/14 RP 130:4-14, 12/4/14 RP 9:16-10:1, 12/4/14 RP 10:2-7, 12/4/14 RP 65:6-66:6, 12/4/14 RP 72:10-17, 12/4/14 RP 72:22-73:6, 12/4/14 RP 110:11-16, 12/4/14 RP 110:17-23, 12/4/14 RP 115:15-21, 12/4/14 RP 136:11-21, 12/4/14 RP 136:25-137:5, 12/4/14 RP 177:7-19, 12/8/14 RP 26:3-16, 12/8/14 RP 78:4-13, 12/8/14 RP 162:8-11 (Foundation: Obj. Nos. 4, 5, 6, 7, 12, 33, 38, 39, 55, 65, 72, 73, 77, 80, 81, 84, 85, 87, 89, 90, 92, 95, 104, 111). These were questions asking a witness for whatever knowledge he or she had based on job experience or involvement in the events, or the foundation had been laid previously by another witness or exhibit. In each case, the trial court erred. "Assumes facts not in evidence" is not a valid objection when the facts are already in evidence or are not contested.[29] *See, e.g.,* 11/12/14 RP 163:11-17 (Ms. Omar had testified to this fact before Hoehne was called as a witness, id., at 40:11-42:8; 131:15-19) (Obj. No. 3). "Typically, this objection is sustained when the question is along the lines of 'did you know' or 'have you heard?'" 5D K. Tegland, Courtroom Handbook

[29] *See* Wright & Miller, 28 Fed. Prac. & Proc. Evid. § 6164 (2d ed.) ("Cross-examination questions that assume facts not in evidence normally are unobjectionable on that basis so long as the cross-examiner had a good-faith belief that the assumed fact may be true.")

on Wash. Evidence, at 518-519 (2014-2015 ed.). The questions by Plaintiffs' counsel that the court sustained on this basis were not that type of question. 11/12/14 RP 158:3-8, 11/12/14 RP 163:6-17, 11/12/14 RP 202:8-15, 12/4/14 RP 72:10-17 (Obj. Nos. 2, 3, 14, 80). A number of the objections permitted by the court simply interfered with Plaintiffs' cross-examination. The Court repeatedly required Plaintiffs to re-lay foundations as though a question was being asked in a vacuum. This became an interference with Plaintiffs' cross-examination of important witnesses. The transcript shows that the context was apparent from prior questions.

In the aggregate, the court sustaining unrelenting improper objections by defense counsel during Plaintiffs' cross-examination of adverse witnesses seriously prejudiced Plaintiffs' ability to prove pretext and the ultimate fact of discrimination, requiring a new trial. Other erroneous rulings of the court further lead to such conclusion.

E. The court improperly excluded Ex. 1929.

The court did not understand the nature of a business record. At trial, most of the exhibits were communications between managers or to the work force. In the trial court's view, "almost none of the exhibits are business records, in my estimation." 12/8/14 RP 34:6-7.

Ex. 1929 clearly showed a plan to set up the Plaintiffs for

"insubordination" was created back in March 2011 and distributed by Wilson to all managers. *See* id. (CP 2666-67). Not having Ex. 1929 admitted allowed Wilson to wiggle out of his March 2011 statements and deprived the jury of being able to see for itself the text of a contemporaneous writing at the crux of Plaintiffs' proof of pretext. *See* App. at 42-46 (Objections 99-103); 12/8/14 RP 28:16-43:9.

Wilson, Hertz's location manager, was "responsible for managing the Shuttlers department," including ensuring that "policies and procedures were understood and enforced."[30] Thus, his email sent to other Hertz managers was admissible as the admission of a party opponent, "because [he] was authorized to make statements regarding the subject matter" to other managers. *See* Pannell v. Food Servs. of Am., 61 Wn. App. 418, 430, 810 P.2d 952 (1991), *review denied*, 118 Wn.2d 1008 (1992) (holding statements of manager were admissible where he was "authorized to make statements regarding the subject matter"; including statements made "from one agent to another or from an agent to the principal").

Wilson's authority to speak on the subject of the email ("Subject*: New SHTL Contract – The next step*") can be inferred from the "overall nature of his authority to act for the party." Savage v.

[30] 12/4/14 RP 189:15-16; id., at 191:4-6.

State, 72 Wn. App. 483, 497, 864 P.2d 1009 (1994) (holding memo by parole officer's supervisor asking for his caseload to be double-filled while he was on leave was admission of speaking agent, not hearsay), aff'd in part, rev'd in part on other grounds, 127 Wn.2d 434 (1995). Under Wilson's description of his duties ("managing the Shuttlers department" and ensuring policies are "enforced"), it is "entirely reasonable to infer that [his] duties encompassed"[31] writing other managers to set a meeting and agenda "to discuss how we will be proceeding with enforcing the new [shuttle] contract." CP 2666-67. Thus, under ER 801(d)(2), Ex. 1929 was not hearsay.[32] The court's exclusion of this critical proof of pretext, which was outcome determinative, substantially prejudiced Plaintiffs. The testimony taken from Wilson without admission of the record was not an adequate substitute. "[T]he written memorandum … is much more persuasive evidence of [Plaintiffs'] position than was the oral testimony… and the trial court should have admitted it." Savage, 72 Wn. App. at 497.

The underlying statements contained in the email were admissible under ER 801(d)(2), and the March 26th email from one manager to the other managers about the proposed discipline and items for discussion at the meeting set for March 28th were also

[31] Savage, 72 Wn. App. at 497.
[32] See also ER 805.

admissible under the business records exception, RCW 5.45.020.[33] Plaintiffs' counsel laid the foundation for a business record with Wilson. 12/8/14 RP 30:24-32:11. The court ruled the document was "not a routine document that indicates that a particular event has happened." Id. at 33:21-22. Yet, "[n]othing in the statute requires a showing that the kind of record in question is compiled regularly (once is enough)." 5C K. Tegland, Wash. Prac., Evidence Law and Prac. § 803.36 (5th ed.). Wilson made the record "near the time of the act, condition or event" -- two days before the "Monday" (March 28th) meeting Wilson set for managers to discuss the items outlined in the email concerning "how we will proceeding with enforcing the new [shuttle] contract." *See* Ex. 1929 (CP 2666-67). Where, as here, "the statutory requisites are met, computerized records are treated the same as any other business records." State v. Quincy, 122 Wn.App. 395, 95 P.3d 353, *review denied* 153 Wn.2d 1028 (2004). *See also* Rogers v. Oregon Trail Elec. Consumers Co-op., Inc., No. 3:10-CV-1337-AC, 2012 WL 1635127, at *8 (D. Or. May 8, 2012) (collecting cases admitting emails as business records). Thus, as the statement of

[33] "A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." Id.

a party-opponent and a business record, Ex. 1929 was admissible.

F. The court erred in refusing to give Plaintiffs' proposed Jury Instruction No. 11.

To be legally sufficient, jury instructions must "(1) permit each party to argue his theory of the case, (2) [be] not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law." Brown v. Spokane Cnty. Fire Prot. Dist. No. 1, 100 Wn.2d 188, 668 P.2d 571 (1983). Under such standard, the court should have given Plaintiffs' proposed Jury Instruction No. 11, based on the 8th Circuit Court of Appeals' Model Instruction.

Several federal circuit courts have held that under the circumstances presented here, the requested instruction is required.[34] *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002) ("hold[ing] that in cases such as this, a trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may—but need not—infer that the employer's true motive was discriminatory"; and that the refusal to give instruction identical to the 8th Circuit's Model Instruction was not harmless error); Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280 (3rd Cir. 1998) ("It is difficult to understand what end is served by reversing

[34] *See* Antonius v. King County, 153 Wn.2d 256, 266, 103 P.3d 729 (2004) (affirming that the analysis of federal discrimination cases may be adopted "where they further the purposes and mandates of state law.")

the grant of summary judgment for the employer on the ground that the jury is entitled to infer discrimination from pretext ... if the jurors are never informed that they may do so."); Cabrera v. Jakabovitz, 24 F.3d 372, 382 (2nd Cir.), *cert. denied,* 513 U.S. 876 (1994). The Iowa Supreme Court has likewise held "[i]f a plaintiff … presents evidence of pretext, failure to provide a pretext instruction will result in prejudice." Deboom v. Raining Rose, Inc., 772 N.W.2d 1, 11 (2009).

Standing alone, the trial court's refusal to give the requested pretext instruction warrants reversal; and particularly when combined with the other errors cited herein (*e.g.*, exclusion of critical evidence of pretext (Ex. 1929) and the denial of effective cross-examination). *See* Storey v. Storey, 21 Wn. App. 370, 374, 585 P.2d 183 (1978) ("The cumulative effect of many errors may sustain a motion for a new trial even if, individually, any one of them might not.")

G. The court erred when it overruled the objection to Defendants misusing hearsay evidence in closing and subsequently refused to give a limiting instruction.

Plaintiffs timely objected to Defendants' misuse of Kidd's testimony in closing, and the court erroneously overruled the objection. *See* 12/10/14 RP 125:8-21. The court's ruling cannot be justified where the court failed to instruct the jury on the limited purpose for which the evidence was admitted. *See* Thomas v. French,

99 Wn.2d 95, 104-05 (1983) (holding that admission of hearsay "is usually proper only when used for limited purposes and when accompanied by limiting instructions," and that the failure to give such instruction rendered the admission of hearsay evidence error).

No instruction was given regarding Kidd's testimony, even after Defendants misused the testimony and Plaintiffs sought an instruction. The failure to properly instruct the jury upon Plaintiffs' objection left the jury "free to accept the contents" of Kidd's damaging hearsay statements on a critical issue (*i.e.*, whether it was ever explained, and specifically explained in a language Plaintiffs understood, that prayer was part of, not in addition to, break time); resulting in prejudicial error. *See* Thomas, 99 Wn.2d at 105. If taken as true, Kidd's statements would presumptively affect the trial's outcome. "[As] there is no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." Id.

V. ATTORNEY FEES AND COSTS

Appellants request attorney fees for this appeal be awarded after any remand and re-trial, and costs in accordance with RAP 14.4.

VI. CONCLUSION

For all of the foregoing reasons, a new trial should be granted.

RESPECTFULLY SUBMITTED this 27th day of October, 2015.

THE SHERIDAN LAW FIRM, P.S.

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DECLARATION OF SERVICE

Jodie Branaman states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by the Sheridan Law Firm, P.S., and I make this declaration based on my personal knowledge and belief.

2. On October 27, 2015, I caused to be delivered via the Court of Appeals' e-service system to:

Mark S. Filipini
mark.filipini@klgates.com
Daniel P. Hurley
daniel.hurley@klgates.com
K&L Gates
925 Fourth Avenue, Suite 2900
Seattle, WA 98104

Attorneys for Defendants

a copy of the BRIEF OF APPELLANTS and APPENDICES

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of October, 2015 at Seattle, King County, Washington.

s/Jodie Branaman_____
Jodie Branaman, Legal Assistant

Appendix 1

Exhibit 1929

Farah, et al. v. Hertz Transporting, Inc., et al.;

Case No. 11-2-41759-0 KNT

From:	Emlyn Mingrone/=RAC/Hertz.	Sent:3/29/2011 3:53 PM.
To:	Jeffrey D Wilson/=RAC/Hertz@Hertz.	
Cc:	Todd C Harris/=RAC/Hertz@Hertz.	
Bcc:	.	
Subject:	Re: New SHTL Contract - The next step.	

Sorry I could not attend the meeting; can you provide Todd and myself with a recap.

Emlyn M. Mingrone
HR Business Partner
18625 Des Moines Memorial Drive
Seattle, WA 98148
Phone:206-835-4665
Fax: 866-544-7460
E-mail: emingrone@hertz.com

Todd C Harris/RAC/Hertz
Area Manager, Sea-Tac Airport
Phone: 206-835-4664
03/28/2011 05:01 PM
To Jeffrey D Wilson/RAC/Hertz
cc Anthony Luchini/RAC/Hertz@Hertz, Emlyn Mingrone/RAC/Hertz@Hertz, Matt M Hoehne/RAC/Hertz@Hertz, Mohamed K Babou/RAC/Hertz@Hertz
Subject Re: New SHTL Contract - The next step

If the meeting happened today, sorry I missed it. I would like to catch up with you Thursday regarding the meeting.

Jeffrey D Wilson/RAC/Hertz
Location Manager
Phone: 206.835.4712
03/26/2011 05:08 PM
To Matt M Hoehne/RAC/Hertz@Hertz, Mohamed K Babou/RAC/Hertz@Hertz, Anthony Luchini/RAC/Hertz@Hertz, Emlyn Mingrone/RAC/Hertz@Hertz
cc Todd C Harris/RAC/Hertz@Hertz
Subject New SHTL Contract - The next step

Hey team,

Let's meet on Monday at 1520 here at the AP to discuss how we will be proceeding with enforcing the new shtl contract.
We will have to cut the 1500 short and make sure the managers clear out so that we can have 40 minutes before the 1600 with the shuttlers.
We will have to postpone our checkin with Steve until later in the evening.

Please read the following and come prepared with comments/questions.

1) Need to complete the toolboxes with the shuttlers regarding meal and break periods.

A majority of the shuttlers have either not been toolboxed (can't find the form) or refused to sign it and I did not properly notate that so that we can use it, so we'll need to toolbox them again.

2) Need to conduct shift huddles each day and get break time commitments.
We'll need to develop a way of tracking this stuff so that it will stand up against a grievance.
We'll also need to take attendance and possibly get signatures from the employees - we can discuss.

Here's how I envision it working:
-We do a shift huddle at 800/1600 and get employees to commit to break times. We get the dispatcher AND another manager to watch and sign as employees commit to their break time.
-We inform all employees that if they are electing intermittent breaks, they MUST check in and out with the dispatcher.

One of three things will happen:
A) Employees go to pray anyway and do not inform the dispatcher. We then write them up for INSUBORDINATION for not notifying us of an intermittent break.
B) Employees notify the dispatcher, who then signs for us that the employee notified them, and we write the shuttler up for MISUSE OF COMPANY TIME on their TEN MINUTE BREAK, because they punched it and we can prove it.
C) In the unlikely event that someone properly elects intermittent breaks, they will inevitably take more than 5 minutes, so then we write them up for INSUBORDINATION for not punching out for a break larger than 5 minutes. Or it really does take 5 minutes, and all is well.

The "end game" here, is that shuttlers will be punching out for up to 15 minutes for prayer.
At first, I think that they will try and do them on the intermittent breaks, but it simply takes longer than 4 minutes to pray.

Here's a timeline:
By 3/31 complete/redo toolboxes.
ON 3/31, we do everything I said before.
On 3/31, we issue all the letters together to flood the union with paperwork. We will provide all of the supporting documentation with the write up.

Here's the thing - we DON'T need to be and really CAN'T be consistent with this every day.
We really need to get the culture change going so that it "runs itself."

I will also talk about the lack of communication from the union and our lawyer.
I will also talk about specific scenarios that are troubling, such as multiple prayer breaks in one shift when you're only entitled to 1 break.

Jeff Wilson
Location Manager
Seattle International Airport
206.835.4712

Appendix 2

Farah, et al. v. Hertz Transporting, Inc., et al.;

Case No. 11-2-41759-0 KNT

INSTRUCTION NO.____

(PROPOSED) INSTRUCTION NO. 11

You may find that a plaintiff's religion or national origin was a substantial factor in the defendant's decision to suspend or terminate a plaintiff if it has been proved that the defendants' stated reasons for either of the decisions are not the real reasons, but are a pretext to hide religious or national origin discrimination.

8th Circuit's Model Jury Instruction 5.20.
http://juryinstructions.ca8.uscourts.gov/civil_instructions.htm

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