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Court of Appeals No. 35872-1-III
(Consolidated with Court of Appeals No. 35911-5-III)

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

JULIE M. ATWOOD,

Petitioner,

v.

MISSION SUPPORT ALLIANCE, LLC and STEVE YOUNG,

Respondents.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Plaintiff Julie Atwood, an at-will employee, admitted that her gender discrimination and retaliation claims against her former employer Mission Support Alliance, LLC ("MSA") depended on alleged comparators. But they were MSA employees from a different time, in different departments, with different rights and managers, involving different conduct and discipline. Atwood's case depended too on another former employee's gender-discrimination allegations regarding different acts, occurring after Atwood had left MSA, and involving a different superior in a different department. The appellate court correctly held that these were not legitimate comparators and that the prior-bad-acts evidence was, in part, erroneously admitted. These errors were not harmless: Atwood admitted this was her case.

Atwood makes only passing reference to the grounds for review, none of which are satisfied. No conflicting decisions exist: the appellate court followed the applicable law. No substantial public interest exists: Atwood claims nothing more than being a "victim" in a WLAD case. All WLAD cases are important, but they do not all merit this Court's review.

The appellate decision is clear, careful, and correct. This Court should deny review.

FACTS RELEVANT TO ANSWER

Atwood fails to provide a meaningful statement of facts, instead relying on excerpts of her closing argument to the jury. Pet. at 4-11. To assist this Court, MSA summarizes the facts as set forth in the appellate decision. The facts are also detailed in MSA's opening brief at pages 5-10.

MSA, a federal contractor, supports the United States Department of Energy (DOE) and other federal contractors tasked with cleaning up the Hanford Site in Richland, Washington. ***Atwood v. Mission Support Alliance, LLC***, No. 35872-1-III (Consolidated with No. 35911-5-III) at 2-3 (July 14, 2020) ("Unpub. Op.). MSA hired Atwood in February 2010 to serve as a project manager in MSA's Portfolio Management Division ("PFM"). *Id*. at 3. Atwood understood she was an "at will" employee who could be terminated "'at any time for any reason, with or without cause or advance notice.'" *Id*. (quoting Ex. 41 at 2 (Atwood's offer letter)).

In September 2012, MSA received an anonymous complaint about Atwood through its Employee Concern ("EC") Program, a "whistleblower protection-type program that DOE requires of all of its contractors." Unpub. Op. at 7. The complaint noted that Atwood "created a hostile work environment through intimidation tactics,

bullying, and her influence with Jon Peschong of DOE," which she bragged about, along with her ability to have people fired. *Id.* (quoting Ex. 10A at 2). The complaint continued that Atwood was often "unaccountable," lied about her whereabouts, charged full days despite calling in sick, and openly used her influence with Peschong "to retaliate against MSA Senior Management …." *Id* at 7-8. The author chose to remain anonymous, fearing Atwood would retaliate. *Id* at 8.

MSA's EC Program manager Wendy Robbins interviewed Atwood's immediate supervisor, Steve Young, who corroborated the complaint but gave Atwood a positive review based on her quality work product. *Id.* at 2, 8. Young added that it was difficult to act given Atwood's relationships at DOE, particularly with Peschong. *Id* at 8. Robbins discontinued her investigation, where management already knew about the issues with Atwood and was working to address them. *Id.* at 9.

On August 12, MSA received another complaint mentioning Atwood, identifying a problem in "'Portfolio Management that is getting close to Hostile Work Environment or is already there.'" *Id.* at 12 (quoting Ex 215). That complaint noted that Atwood was gone without warning, that other staff were required to work harder to

cover for her, and that her relationships with DOE resulted in favorable treatment – an obvious "double standard." *Id.*

The parties dispute much of what happened next (*id.* at 18-29) but largely agree on the following (*id.* at 13-18):

- August 22: Young met with several HR staff and MSA's EEOC officer, Christine DeVere, joined and announced she was investigating an anonymous hostile work environment complaint.
- August 27: Young met with Atwood advising that her recent behavior violated his directives and followed up with an email reiterating PFM policies.
- August 28: DeVere conducted her first interview in the hostile work environment investigation.
- September 5: Young told DeVere and HR that he intended to resign. MSA's then-President Frank Armijo refused Young's resignation. Later that afternoon, DeVere's boss notified her that Young thought she was threatening him and told her to stop all interviews. Also that afternoon, Young assembled lead PFM members, aside from Atwood who could not be found, telling them he was being investigated and expected them to cooperate.

- September 6: Young told Atwood a complaint had been filed against him and to cooperate with the investigation.
- September 9: Atwood heard through her DOE relationships that she was being investigated for timecard fraud. When she asked Young whether the investigation was about her, he told her it was about him.
- September 12: Young and other MSA management met to address the ongoing problems with Atwood, agreeing there were consistent time-charging issues, numerous unauthorized absences, and a consistent pattern of being unaccounted for. They made no employment decision as the anonymous complaint naming Atwood was still under investigation. That afternoon, MSA instructed DeVere and Robbins to jointly investigate, tasking DeVere with continuing her hostile work environment investigation and Robbins with investigating claims regarding special treatment and time-charging. They concluded there was no evidence of time charging violations, special treatment, or hostile work environment.
- September 19: Atwood resigned in lieu of termination.

Atwood sued MSA and Young in August 2015, asserting at trial: (1) constructive discharge in violation of public policy; (2) retaliation for opposing discrimination; and (3) constructive termination substantially motivated by gender. *Id* at 5. Atwood claimed too that Young aided and abetted the statutory violations. *Id*.

MSA and Young denied liability, asserting legitimate, non-discriminatory reasons for terminating Atwood's employment. These included Atwood's disregarding Young's requests and instructions, failing to provide notice of planned absences, and repeatedly using her relationship with DOE to avoid and circumvent Young's directives. *Id*. at 3-5. The jury returned a verdict for Atwood.

MSA timely appealed and won. Atwood now seeks this Court's review.

APPELLATE DECISION

In a 60-page decision authored by Judge Laurel Siddoway, the appellate court reversed, holding that numerous errors at trial conducted by Judge Douglas Federspiel, including the admission of irrelevant and prejudicial "comparator" evidence affected the verdict. In short, in a 1,200-1,350 person company, discipline for a handful of employees – some union members – from other departments with other managers, at different points in time, did not make Atwood's

claims more probable, but likely did confuse and prejudice the jury. *Infra* § B. Atwood draws attention to the dissent, omitting that Judge Robert Lawrence-Berrey expressly stated his agreement with "most of the majority's conclusions, including the need for a new trial on the question of future damages." Pet. at 1, 4, 17; Unpub. Op. Dissent at 1. Judge Lawrence-Berrey agreed too that the trial court erroneously admitted the supposed comparator evidence and that this error required reversal of Atwood's discrimination claim. Dissent at 2-4. He only disagreed that this error required reversal of Atwood's retaliation claims too. *Id.* at 3-4. Judge Kevin Korsmo joined the majority. Unpub. Op. at 61.

Atwood's Petition relies heavily on MSA's "Standards of Conduct," mentioning it nine times. Pet. at 2, 11-16. She begins by faulting the appellate court for alluding to the Standards of Conduct but failing to discuss them. *Id.* at 2. Atwood never once mentioned the Standards of Conduct in her 64-page Amended Response Brief.[1] This is not basis for "review."

[1] Atwood's first Response Brief was 85 pages and also did not mention the Standards of Conduct. The appellate court rejected it, ordering her to shorten it.

REASONS THIS COURT SHOULD DENY REVIEW

Atwood presents six separate issues for review. Pet. at 1. MSA addresses each below. This Court should deny review.

A. The appellate court correctly declined to review the evidence in Atwood's favor where MSA did not challenge the sufficiency of the evidence to support the jury's verdict. Pet. at 3-11.

Atwood's lead argument is that the appellate court erred in failing to review the evidence in her favor and in concluding her case was "not strong." Pet. at 4-11 (quoting Unpub. Op. at 2). Since MSA did not challenge the sufficiency of the evidence to support the jury's verdict, the appellate court correctly held there was "no need" to review the evidence in Atwood's favor:

> [MSA] does not contend on appeal that [Atwood's] evidence, if believed by the jury, was insufficient to support the verdict on liability. Liability is the controlling basis on which we reverse. Absent a sufficiency challenge, there is no need to conduct a review of the evidence in the light most favorable to Atwood.

Unpub. Op at 2, 39; *see* ***Holland v. Columbia Irrigation Dist.***, 75 Wn.2d 302, 304, 450 P.2d 488 (1969) (quoting ***Hellriegel v. Tholl***, 69 Wn.2d 97, 98, 417 P.2d 362 (1966)) (both holding that a sufficiency of the evidence challenge requires the court to review the evidence in the light most favorable to the non-moving party).

Atwood takes out of context the court's statement that her case was not "strong." Pet. at 4-11. This statement comes after a lengthy discussion about the improper admission of alleged comparator evidence in the context of determining whether those errors were harmless. Unpub. Op. at 35-40. After finding that the alleged comparator evidence was irrelevant, that Atwood "misused" it, and that it had a "clear capacity to confuse the jury," the court stated that while Atwood's case was "sufficient," it "was not strong." *Id*. at 37-39. Thus, "the improper comparator evidence alone had a clear potential to affect the outcome of the trial." *Id*. at 40.

Atwood's remaining argument is nothing more than a recitation of her closing argument to the jury. Pet. at 4-11. This ignores that counsel's statements are not evidence, so they say nothing about the strength of her case. *Id*. And Atwood's closing was largely based on the very evidence the appellate court held inadmissible. *See* Unpub. Op. at 39. Atwood's reliance on this inadmissible evidence proves the appellate court's point: its erroneous admission was not harmless error.

B. The appellate court correctly reversed the trial court's decision allowing evidence of numerous "comparators" who are not comparators at all. Pet. at 11-16.

Atwood argues the appellate court applied an overly "stringent" comparator "test" in holding that a "proper comparator in this case would be a male at-will employee in a position similar to that of a PFM project manager, against whom action was taken for failing to be on site, available and locatable during working hours." Pet. at 11 (citing Unpub. Op. at 31). This is not a "test," but an illustration of the correct legal standard that "comparators" must be *similarly situated* to the plaintiff. Pet. at 11-12. The appellate court relied on ***Johnson v. DSHS***, with which Atwood feigns a conflict. *Compare* Unpub. Op. at 31 *with* Pet. At 11 (both citing 80 Wn. App. 212, 227, 907 P.2d 1223 (1996)). There is no conflict – all agree that "[d]isparate treatment of *similarly situated employees* constitutes circumstantial evidence supporting a finding of discrimination or retaliation." *Id.* (emphasis supplied).

Atwood argues that her alleged comparators were "proper" without addressing the appellate court's decision. Pet. at 14-16. Atwood argues Lowell M.[2] was a proper comparator where he was

[2] The appellate court used first names and last initial. MSA follows suit.

accused of "'late for work'" misconduct, during the "relevant time frame," which she defines as "when Armijo was at MSA." Pet at 14-15. Lowell was a union member and "metal trades worker supervised by the manager of Electrical Utilities." Unpub. Op. at 31-32. He was given a last chance letter – progressive discipline bargained for by the union – two years *after* Atwood resigned in lieu of termination. *Id.*; RP 3171-72. He is not a proper comparator because he was a union member entitled to progressive discipline, had a dissimilar position, different decisionmaker, and remote time frame. *See* Unpub. Op. at 32.

Atwood claims Michael T. was a proper comparator because "he committed extremely serious misconduct." Pet. at 14. Michael was disciplined three years *before* Atwood resigned in lieu of termination. Unpub. Op. at 32. Atwood did not present evidence of Michael's position, department, or who wrote the disciplinary memo. *Id.* at 32-33. Indeed, even Michael's gender was unknown. *Id* at 33. He – or she – was not a proper comparator. *Id* at 32-33.

Atwood claims Scott B. was a proper comparator because he was a male vice president, reporting directly to Armijo, who engaged in serious misconduct. Pet. at 14. Scott was accused of off-site sexual advances toward a male employee's wife and retaliatory

discharge of that male employee. Unpub. Op. at 33-34. Atwood did not ask about the discharge claim, asking only about the claimed sexual misconduct. *Id.* at 34. "Scott came nowhere near being a proper comparator" – his conduct was off-site, a "third party objection resolved it," he worked in a different division, and no one involved in his discipline was involved in the decision to terminate Atwood's employment. *Id.* at 34-35. "The transparent reason Atwood offered the evidence was to present offensive sexual conduct committed by a management employee of a different MSA division." *Id.* at 35.

Finally, Atwood concedes that Mary R. was "not so much a comparator as a barometer." Pet. at 15. Mary, a woman, committed less serious "misconduct" and received less serious discipline. *Id.* Mary is not a proper comparator, where she is a woman, and where there was no evidence of her position, or whether any person disciplining Mary's "dissimilar workplace violation" was involved in the decision to terminate Atwood's employment. Unpub. Op. at 35.

As the appellate court correctly stated it, the "jury could not infer discrimination or retaliation from the fact that over a five year period, four of MSA's almost 1,200 to over 1,350 employees received discipline for unrelated workplace violations that was less harsh than

termination of employment." Unpub. Op. at 36. The court did not err, nor does Atwood even attempt to meet one of the grounds for review.

C. The appellate court correctly held that erroneously admitting comparator evidence was not harmless under the proper standard. Pet. at 16-19.

Atwood argues that the appellate court erroneously applied the harmless error analysis applicable in criminal cases, rather than the standard that an evidentiary error requires reversal "'only if the error, within reasonable probability, materially affected the outcome of the trial.'" Pet. at 17 (quoting ***State v. Halstien***, 122 Wn.2d 109, 127, 857 P.2d 270 (1993)). The appellate court correctly held that an "error is prejudicial if it affects, or presumptively affects, the outcome of the trial." Unpub. Op. at 35 (citing ***Diaz v. State***, 175 Wn.2d 457, 472, 285 P.3d 873 (2012)). Atwood does not point to any meaningful distinction in these standards. There is none.

Atwood does not actually make a harmless error argument regarding her discrimination claim, arguing only that the inadmissible comparator evidence "was not, within reasonable probability, material to the outcome of [her] retaliation claims." Pet. at 18. Citing other evidence that could arguably support the verdict does not address the question whether admitting the comparator evidence likely affected the jury's verdict. *Id.* Nor does Atwood answer the

appellate court's correct holding that she "relied on the comparators for *all* her claims," suggesting that the jury should infer an unlawful motive from the failure to give Atwood progressive discipline that others received. Unpub. Op. at 37-38.[3] Indeed, Atwood's witness examinations and closings closely tied the inadmissible comparator evidence to her retaliation claims, even asking the jury to "'take out'" the discrimination claim and consider progressive discipline in relation to her retaliation claims. *Id.* (quoting RP 4892-97). Where Atwood made the comparator evidence a key feature of her entire case, she is wrong to claim that it was immaterial to the outcome.

D. The appellate court correctly reversed in part the trial court's decision admitting testimony in contravention of ER 404(b). Pet. at 19-20

Without providing any factual background or much of an argument, Atwood seeks review of the appellate court's decision that the trial court abused its discretion in allowing MSA's former in-house counsel Sandra Fowler to testify to "'her complaints about [Stan] Bensussen and her claim that she suffered retaliation by Armijo after he no longer worked for MSA.'" Pet. at 19 (quoting Unpub. Op. at

[3] This also answers the Dissent's incorrect assertion that the inadmissible "comparator" evidence was unrelated to Atwood's retaliation claims. Dissent at 2-4.

46). This argument is so negligible that responding is nearly impossible. Simply stated, the appellate court correctly applied this Court's controlling decision in ***Brundridge v. Fluor Fed. Servs., Inc.***, and Atwood does not claim otherwise. 164 Wn.2d 432, 444-45, 191 P.3d 879 (2008). There is no conflict and no basis for review.

In any event, the appellate court is correct. The appellate court affirmed most of the trial court's decision regarding Fowler's testimony. Unpub. Op. at 42-46. It reversed regarding her complaints about Bensussen, where: (1) they were determined unsubstantiated; (2) he was not employed by MSA when it terminated Atwood's employment, but was hired after her resignation; and (3) the complained-of conduct "took place in a different corporate department, well after Atwood was gone." *Id.* at 46. As far as Armijo, the appellate court reversed only as to Fowler's testimony alleging Armijo refused to acknowledge her *after* Fowler alleged an ethical violation determined to be "unfounded," and *after* Armijo left MSA's employment. *Id* at 46-47. The court correctly held that this testimony was offered for the exact purpose this Court rejected in ***Brundridge***: "prejudicing the jury by leading it to believe that MSA 'was a 'bad company' in general'." *Id.* (quoting 164 Wn.2d at 447).

Again, the appellate court followed ***Brundridge***. Its correct decision provides no basis for review.

E. The appellate court correctly followed this Court's precedent in holding that the front pay instruction was legally incorrect. Pet. at 20.

In a single paragraph, Atwood argues only that the front-pay instruction was not misleading or prejudicial, where it allowed MSA to argue Atwood would not have stayed at MSA and could have found new employment. Pet. at 20. Atwood ignores that the instruction is legally incorrect under this Court's decision in ***Blaney v. Int'l Ass'n of Machinists & Aerospace***, holding that it is error to instruct "the jury to calculate future earnings 'from today until the time [plaintiff] may reasonably be expected to retire.'" 151 Wn.2d 203, 210, 87 P.3d 757 (2004) (quoting ***Lords v. Northern Automotive Corp.***, 75 Wn. App. 589, 605, 881 P.2d 256 (1994)). Simply stated, Atwood's future employment "is a question of fact" and "may not necessarily extend until retirement." *Id.*

Atwood does not even mention ***Blaney*** or seriously address the appellate court's decision on this point. *Compare* Pet. at 20 *with* Unpub. Op. at 56-60. The appellate court's correct decision is consistent with ***Blaney***. There is no basis for review.

F. Where MSA, the prevailing party, is entitled to statutory costs, the appellate court had discretion to reject Atwood's attempt to challenge them for the first time in a motion for reconsideration. Pet. at 20.

Here too, Atwood's argument is woefully incomplete, asserting only that "other divisions allow cost challenges on reconsideration." Pet. at 20. Since MSA prevailed on appeal, the appellate court awarded costs recoverable under RAP 14.3. Neither on appeal nor here does Atwood contend any cost claimed or awarded is not recoverable. Her "argument" is unintelligible. There is no basis for review.

CONCLUSION

This Court should deny review.

RESPECTFULLY SUBMITTED this 30th day of December 2020.

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