

67215-1

67215-1

67215-1  
No. 65511-61

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

---

STEVEN LODIS and DEBORAH LODIS, a marital community,  
Plaintiffs/Appellants/Cross-Respondents,

v.

CORBIS HOLDINGS, INC., CORBIS CORPORATION, and GARY  
SHENK,

Defendants/Respondents/Cross-Appellants,

---

ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. Michael Hayden and Hon. Bruce Heller)

Case No. 08-2-20301-8 SEA

---

BRIEF OF APPELLANT

---

John P. Sheridan, WSBA #21473  
The Sheridan Law Firm, P.S.  
Hoge Building, Suite 1200  
705 Second Avenue  
Seattle, WA 98104  
(206) 381-5949  
jack@sheridanlawfirm.com  
Attorneys for Appellants

FILED  
COURT OF APPEALS  
DIVISION I  
2011 OCT 14 PM 5:07

ORIGINAL

## TABLE OF CONTENTS

|      |  |    |
|------|--|----|
| I.   | INTRODUCTION .....   | 1  |
| II.  | ASSIGNMENTS OF ERROR.....  | 2  |
|      | A. Assignments of Error .....  | 2  |
|      | B. Issues Pertaining to Assignments of Error.....  | 3  |
| III. | STATEMENT OF THE CASE .....  | 3  |
|      | A. Overview of Lodis' Employment With Corbis .....   | 3  |
|      | B. The Direct Reports Under Shenk Became<br>Younger As Shenk Replaced Older Workers with<br>Younger Ones .....   | 5  |
|      | C. Shenk and Corporate Counsel Mitchell Made<br>Ageist Comments.....   | 5  |
|      | D. When Required by the Work, Shenk Kept Older<br>Workers He Inherited and Hired Older Workers<br>So Long as They Were Critical to One of Shenk's<br>Special Projects, Then Replaced Them With<br>Younger Workers As Soon As He Could..... | 8  |
|      | E. Although Shenk Would Have Eventually<br>Replaced Lodis With a Younger Worker, the<br>Timing of the Lodis Termination Was in Retaliation<br>for Lodis' Opposition to Shenk's Discriminatory<br>Comments .....                            | 9  |
|      | F. The January 2008 360 Evaluation Was a Setup<br>That Violated Usual Procedures and Focused<br>on Lodis.....  | 12 |
|      | G. The March 2008 Lodis PIP Was a Setup That<br>Involved His Litigation Counsel.....   | 13 |

|     |   |    |
|-----|---|----|
| H.  | The Trial Court Granted Summary Judgment Dismissal of Lodis’ Retaliation Claim .....  | 14 |
| I.  | Discovery of Lodis’ Medical Records.....  | 15 |
| J.  | Lodis’ March 2006 Short Term Incentive (“STP”) Bonus.....   | 16 |
| K.  | Lodis’ Vacation Time Recording .....  | 18 |
| IV. | ARGUMENT .....  | 20 |
| A.  | The Retaliation Claim Should Not Have Been Dismissed.....   | 20 |
| 1.  | The Summary Judgment Standard of Review is <i>De Novo</i> .....   | 20 |
| 2.  | The WLAD Has No Requirement that the Employee “Step Outside” His Role and Take a Position Adverse to the Company, Such as Has Developed Under the Fair Labor Standards Act.....   | 21 |
| 3.  | Viewing the Evidence in the Light Most Favorable to Lodis, Genuine Issues of Material Fact Remain for Trial on the Retaliation Claim .....  | 26 |
| B.  | Lodis Did Not Waive His Physician-Patient or Psychologist-Patient Privilege by Asserting a Claim for Emotional Distress Damages .....   | 30 |
| C.  | The Trial Court Should Have Dismissed the Breach of Fiduciary Duty Counterclaims Because the Alleged Misconduct Does Not Equate with a Breach of One’s Duty and Corbis Presented No Evidence that Lodis Was an Officer of the Company ..... | 39 |

|   |    |
|---|----|
| D. The Trial Court Erred When It Improperly<br>Admitted Evidence During the Second Trial and<br>Denied Lodis’ Motion for a New Trial.....   | 43 |
| 1. The Trial Court Abused Its Discretion When<br>It Allowed Tomblinson to Testify as an<br>Expert, Admitted Her Summary into<br>Evidence, and Admitted Lodis’ Outlook<br>Calendar ..... | 43 |
| 2. There Was No Evidence or Reasonable<br>Inference to Support the Jury’s Verdict and<br>the Trial Court Erred When It Denied Lodis’<br>Motion for New Trial.....                       | 46 |
| V. CONCLUSION.....  | 49 |

## TABLE OF AUTHORITIES

### Washington Cases

|  |        |
|--|--------|
| <u>Allison v. Housing Auth.</u> ,<br>118 Wn.2d 79, 821 P.2d 34 (1991).....                       | 23     |
| <u>Aubin v. Barton</u> ,<br>123 Wn. App. 592, 98 P.3d 126 (2004).....                            | 43     |
| <u>Brundridge v. Fluor Fed. Servs., Inc.</u> ,<br>164 Wn.2d 432, 191 P.3d 879 (2008).....        | 46, 47 |
| <u>Bunch v. King County Dept. of Youth Services</u> ,<br>155 Wn.2d 165, 116 P.3d 381 (2005)..... | 32     |
| <u>Campbell v. State</u> ,<br>129 Wn. App. 10, 118 P.3d 888 (2008).....                          | 27     |
| <u>Davis v. West One Automotive Group</u> ,<br>140 Wn. App. 449, 166 P.3d 807 (2007).....        | 20     |
| <u>Deschamps v. Mason County Sheriff's Office</u> ,<br>123 Wn. App. 551, 96 P.3d 413 (2004)..... | 40     |
| <u>Dietz v. Doe</u> ,<br>80 Wn. App. 785, 911 P.2d 1025 (1996).....                              | 31     |
| <u>Estevez v. Faculty Club of Univ. of Wash.</u> ,<br>129 Wn. App. 774, 120 P.3d 579 (2005)..... | 28     |
| <u>Frisino v. Seattle Sch. Dist. No. 1</u> ,<br>160 Wn. App. 765, 249 P.3d 1044 (2011).....      | 30     |
| <u>Gillett v. Conner</u> ,<br>132 Wn. App. 818, 133 P.3d 960 (2006).....                         | 30, 31 |
| <u>Grimwood v. Univ. of Puget Sound, Inc.</u> ,<br>110 Wn.2d 35, 753 P.2d 517 (1988).....        | 26     |
| <u>Hansen v. Friend</u> ,<br>118 Wn.2d 476, 824 P.2d 483 (1992).....                             | 40     |

|  |            |
|--|------------|
| <u>Heilig Trust v. First Interstate Bank of Washington,</u><br>93 Wn. App. 514, 969 P.2d 1082 (1999) ..... | 40         |
| <u>Hill v. BCTI Income Fund-I,</u><br>144 Wn.2d 172, 23 P.3d 440 (2001) .....                              | 26         |
| <u>Interlake Porsche &amp; Audi, Inc. v. Bucholz,</u><br>45 Wn. App. 502, 728 P.2d 597 (1986) .....        | 41         |
| <u>Kahn v. Salerno,</u><br>90 Wn. App. 110, 129, 951 P.2d 321 (1998) .....                                 | 27, 29, 30 |
| <u>King v. Rice,</u> 146 Wn. App. 662, 191 P.3d 946 (2008) .....   | 20         |
| <u>Lang v. Hougan,</u><br>136 Wn. App. 708, 150 P.3d 622 (2007) .....                                      | 41         |
| <u>Marquis v. City of Spokane,</u><br>130 Wn.2d 97, 922 P.2d 43 (1996) .....                               | 20, 21     |
| <u>Martini v. Boeing Co.,</u><br>137 Wn.2d 357, 971 P.2d 45 (1999) .....                                   | 21, 23, 24 |
| <u>Miller v. U.S. Bank of Washington, N.A.,</u><br>72 Wn. App. 416, 865 P.2d 536 (1994) .....              | 40         |
| <u>Milligan v. Thompson,</u><br>110 Wn. App. 628, 42 P.3d 418 (2002) .....                                 | 26         |
| <u>Phipps v. Sasser,</u> 74 Wn.2d 439, 445 P.2d 624 (1968) .....   | 31         |
| <u>Pollock v. Pollock,</u><br>7 Wn. App. 394, 499 P.2d 231 (1972) .....                                    | 46         |
| <u>Qualcomm, Inc. v. Dep't of Revenue,</u><br>171 Wn.2d 125, 249 P.3d 167 (2011) .....                     | 39         |
| <u>Renz v. Spokane Eye Clinic, P.S.,</u><br>114 Wn. App. 611, 60 P.3d 106 (2002) .....                     | 28         |

|   |               |
|---|---------------|
| <u>S.H.C. v. Lu</u> , 113 Wn. App. 511, 54 P.3d 174 (2002).....   | 40            |
| <u>Senn v. Northwest Underwriters, Inc.</u> ,<br>74 Wn. App. 408, 875 P.2d 637 (1994).....                      | 40            |
| <u>Smith v. Orthopedics International, Ltd., PS</u> ,<br>170 Wn.2d 659, 244 P.3d 939 (2010).....                | 33, 34        |
| <u>State v. Smith</u> ,<br>30 Wn. App. 251, 633 P.2d 137 (1981).....  | 43            |
| <u>State v. Ziegler</u> , 114 Wn.2d 533, 789 P.2d 79 (1990) .....   | 45            |
| <u>Xieng v. Peoples Nat’l Bank</u> ,<br>120 Wn.2d 512, 844 P.2d 389 (1993).....                                 | 23            |
| <br><b>Federal Cases</b>  |               |
| <u>Chuang v. Univ. of Cal. Davis</u> ,<br>225 F.3d 1115, 1124 (9th Cir. Cal. 2000).....                         | 21            |
| <u>Crawford v. Metro. Gov’t of Nashville &amp; Davidson County</u> ,<br>555 U.S. 271, 129 S.Ct. 846 (2009)..... | 24, 25        |
| <u>Davis v. Team Elec. Co.</u> ,<br>520 F.3d 1080, 1089 (9th Cir. Or. 2008).....                                | 21            |
| <u>EEOC v. Wyndham Worldwide Corp.</u> ,<br>2008 U.S. Dist. LEXIS 83558,<br>(W.D. Wash., Oct. 3, 2008) .....    | 39            |
| <u>Fitzgerald v. Cassil</u> , 216 F.R.D. 632 (N.D. CA. 2003).....   | 32, 35-37, 39 |
| <u>Jaffee v. Redmond</u> ,<br>518 U.S. 1 , 116 S.Ct. 1923,<br>135 L.Ed.2d 337 (1996).....                       | 34, 35        |
| <u>McDonnell-Douglas v. Green</u> ,<br>411 U.S. 792, 93 S.Ct. 1817 (1973).....                                  | 26            |

|   |        |
|---|--------|
| <u>McKenzie v. Renberg’s, Inc.</u> ,<br>94 F.3d 1478 (10th Cir. Okla. 1996) .....                   | 22-24  |
| <u>Sims v. Lakeside Sch.</u> ,<br>2007 U.S. Dist. LEXIS 18675<br>(W.D. Wash., Sept. 20, 2007) ..... | 38, 39 |
| <u>St. John v. Napolitano</u> , 274 F.R.D. 12 (D.D.C. 2011) .....                                   | 36, 37 |
| <u>Stewart v. Masters Builders Ass’n of King</u> ,<br>736 F. Supp. 2d 1291 (W.D. Wash. 2010) .....  | 23     |
| <b>Washington Statutes</b>  |        |
| RCW 18.19.180 .....   | 32     |
| RCW 18.83.110 .....   | 32     |
| RCW 23B.08.400 .....  | 42     |
| RCW 49.60.010 .....   | 23     |
| RCW 49.60.210 .....   | passim |
| RCW 5.45 .....  | 44     |
| RCW 5.45.020 .....  | 45     |
| RCW 5.60.060 .....  | 31, 34 |
| RCW 5.60.060 (4) .....  | 31     |
| <b>Federal Statutes</b>   |        |
| 29 U.S.C. § 215(a)(3) .....   | 22     |
| 42 U.S.C. § 1983 .....  | 34     |
| 42 U.S.C. § 2000e-3(a) .....  | 25     |

**Washington Rules**

CR 26(b)(1).....31

CR 56(c).....20

ER 401 .....44, 45

ER 402 .....44, 45

ER 403 .....44, 45

ER 501 .....34

ER 602 .....42

ER 702 .....44

ER 801(d)(2).....46

ER 802 .....42, 46

ER 803(a)(6) .....44, 45

ER 901 .....42, 46

ER 1006 .....44

**Federal Rules**

ER 501 .....34

**Treatises**

Black's Law Dictionary, 282 (Pocket 2d ed. 2001) ..... 41

Karl B. Tegland, Courtroom Handbook on Washington Evidence  
(2010-2011 ed.)..... 44

## I. INTRODUCTION

In this appeal, first, Plaintiff/Appellant Steve Lodis seeks reversal of the trial court's summary judgment dismissal of his RCW 49.60.210 retaliation claim. The court concluded that because Lodis was the Vice President of Human Resources, who had a duty to oppose discrimination, he could not be protected from retaliation under the Washington Law Against Discrimination ("WLAD"), essentially because he was just doing his job. Second, Lodis seeks a new trial on his age discrimination claim since the trial of that claim was tainted by the improper presentation of the breach of fiduciary duty counterclaims, which should have been dismissed at summary judgment, because the alleged breaches, failure to record vacation and unknowing receipt of a double bonus payment, are not the types of wrongs which are subject to breach of fiduciary duty claims as a matter of law. Third, Lodis appeals the trial court's decision to strike his emotional harm damages after, owing to privilege, he would not release his medical records when seeking "garden variety" emotional harm damages.<sup>1</sup> Fourth, Lodis asks this Court to overturn the jury's verdict on breach of fiduciary duty for

---

<sup>1</sup> Appellant notes that this issue is substantially similar to another issue currently on appeal in this Court in Woodbury v. City of Seattle, Case No. 66408-5, which also involves Appellant's counsel. The same trial judge, the Hon. Judge Hayden, presided during pre-trial motions in both cases and ruled the same regarding the emotional harm damages issue. The main difference is that Woodbury asserted claims under the Local Government Whistleblower Act, RCW 42.41, and Seattle Municipal Code 4.20, whereas Lodis brings his age discrimination and retaliation claims under the Washington Law Against Discrimination, RCW 49.60.

failing to record vacation since no reasonable jury could have reached that verdict based on the inadmissible evidence presented.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred in granting Corbis' motion for summary judgment on Lodis' RCW 49.60.210(1) retaliation claim, in denying Lodis' motion for reconsideration, in refusing to allow Lodis to reinstate the claim at trial, and in denying Lodis' post-trial CR 59 motion, when it found that Lodis did not engage in a statutorily protected activity because his job duties included advising Shenk on discrimination laws and policies. (CP 4383-86, CP 4434, RP 3/18/10 at 67:15-74:6, CP 9280).
2. The trial court abused its discretion when it dismissed Lodis' emotional harm damages claim after Lodis refused to waive his psychologist-patient privilege, finding that a plaintiff waives the privilege by asserting a tort claim for emotional harm damages. (CP 3226, CP 4000, CP 4391).
3. The trial court erred when it failed to decide as a matter of law whether a fiduciary duty existed, thus allowing the jury to determine the existence of a duty, and when it denied Lodis' motions for judgment as a matter of law on the breach of fiduciary duty counterclaims. (RP 3/22/10 at 12-13, CP 9000-01, CP 9093).
4. During summary judgment before the second trial, the trial court erred when it found as a matter of law that Lodis was an officer of Corbis because Corbis failed to produce admissible evidence that Lodis was an officer. (CP 9992).
5. The trial court erred when, during the second trial, it designated a Corbis HR employee as an expert, admitted her summary into evidence, admitted Lodis' Outlook calendar into evidence as substantive evidence of Lodis' absences since there was no evidence that Corbis used Outlook calendars for that purpose, and in denying Lodis' motion for a new trial because the jury's

verdict was contrary to the evidence. (CP 10536-37, CP 10615-16, RP Vol. I at 113-31).

## **B. Issues Pertaining to Assignments of Error**

1. Whether the trial court erred in finding that Lodis was not entitled to pursue a retaliation claim because his opposition activities occurred within the scope of his employment since Lodis made out a *prima facie* case of retaliation under the WLAD?
2. Whether the filing of a discrimination case under the WLAD automatically waives the psychologist-patient privilege when the plaintiff seeks generalized emotional harm damages, similar to those sought in Bunch v. King County, without seeking the admission of medical records or medical testimony, without asserting that a diagnosable mental condition was caused by the employer's discriminatory misconduct, and without seeking medical expenses as damages?
3. Whether the trial court erred when it failed to rule as a matter of law that no fiduciary duty was owed, and submitted the issue to the jury?
4. Whether the trial court erred in finding as a matter of law that Lodis was an officer of Corbis when Corbis failed to submit admissible evidence on the issue?
5. Whether, during the second trial, the trial court erred in designating Corbis HR employee Mary Tomblinson as an expert witness, admitting her summary into evidence, admitting Lodis' Outlook calendar into evidence, and denying Lodis' motion for a new trial?

## **III. STATEMENT OF THE CASE**

### **A. Overview of Lodis' Employment With Corbis**

Lodis began working for Corbis effective July 27, 2005 as the Vice President of Worldwide Human Resources at age 53. CP 2412, CP 2607,

CP 3366-67. Defendant/Respondent Corbis Corporation is a stock photography and imaging company founded and owned by Bill Gates in 1989, which is headquartered in Seattle, with offices around the world.<sup>2</sup>

Lodis was brought in to help fix a broken and demoralized HR department. CP 2411, CP 2624. He had previously held positions at the level of Human Resources Director or Vice President of Human Resources at major corporations since 1992, and had over 34 years experience working in the field of human resources. CP 3366-67. As a condition of his employment, Lodis was told that he could work from his home in Arizona when practical. Id. Lodis received a signing bonus and relocation expenses. CP 2412, CP 2619. He purchased a condo in Seattle. CP 2412.

Lodis initially reported directly to Chief Operating Officer/Chief Financial Officer Sue McDonald. CP 3367. In July 2007, Defendant/Respondent Gary Shenk was appointed as CEO of Corbis at the age of 37, though the announcement appointing Shenk and his new executive team was made in April 2007. CP 3472, CP 3477, CP 3833-34. Lodis was a member of the Executive Team lead by CEO Shenk. CP 2413. Shenk conducted a mid-year performance evaluation of Lodis in the summer of 2007. CP

---

<sup>2</sup> Plaintiff/Appellant Deborah Lodis does not assert any personal claims against Defendants/Respondents and is a party to the lawsuit to represent the marital community. Defendants/Respondents Corbis Corporation, Corbis Holdings, Inc., and Gary Shenk are hereinafter referred to collectively as “Corbis” unless otherwise indicated.

3372. Shenk's review of Lodis referred to Lodis as a "trusted advisor," and a "beacon of 'calm' and 'normalcy.'" CP 3599. Around the same time Shenk issued this glowing report of Lodis, Corbis acquired Veer, a "hip" stock photography company based in Calgary. Veer had its own head of human resources: Vivian Farris – a person under age 40. CP 3821. She would later become Lodis' replacement.

**B. The Direct Reports Under Shenk Became Younger As Shenk Replaced Older Workers With Younger Ones**

When Steve Davis was CEO, the average age of his direct reports was 52. At the time that Shenk terminated Lodis, the average age of Shenk's direct reports was 40. CP 3326-27.

**C. Shenk And Corporate Counsel Mitchell Made Ageist Comments**

After becoming CEO, Shenk repeatedly expressed his preference for younger workers over older workers. On three occasions, Shenk told Vice President Ross Sutherland, who was Shenk's direct report, to terminate Patrick Donahue, an older worker reporting to Sutherland. CP 3350-51. Shenk told Sutherland that Donahue was "old school" and "out of touch." Id. Sutherland refused, but Corbis did finally terminate Donahue and had to later bring him back as a consultant owing to his value. Id.

In July 2008, Sherk fired Sutherland, who was 57 years old at the time. CP 3349. Sutherland explained: Sherk “said I was a luxury he couldn’t afford. We met for a beer later that night. He said I would love the guy who was taking over from me, Jens de Gruyter from Veer in Germany. He described Jens as ‘a young, good looking movie star type.’” CP 3351.

After Sherk became CEO, he made numerous age-related comments at meetings. In Executive Team meetings, at least 10 to 15 times he talked about his young E-Team. CP 3369, CP 3350. At Global Operating Team meetings Sherk made reference again to the age of the executive team. CP 3369-70. He made reference to age at the all-employee meetings at either the end of 2007 or early 2008. Id. Sherk would state how “excited and pumped up [he was] about the young team, the energy. Look around the table. Look at Stephen Gillett, barely 30. Look at Ivan Purdie. Look at the people here that we have. It’s a young, exciting new time and new team.” Id.

During 2007, Sherk repeatedly referred to Tim Sprake, the Director of Compensation and Benefits who was a Lodis direct report, as “the old man on your staff” or words to that effect; Sprake was over 40 years old. CP 3372.

Shenk referred to Vice President Rick Wysocki, who is over-40, as “an old-timer.” CP 3606. Shenk made the statement to Sutherland and Donahue, a Vice President at Corbis, who told Lodis that Shenk stated, “We are not running a retirement home,” or words to that effect, when speaking of Wysocki. CP 3372. Wysocki was terminated in July 2007. Id.

When Shenk made reference to his former executive coach, Glo Harris, Shenk made reference to her age and said that she was “grandmotherly” as an explanation for why he was not going to use her anymore. CP 3373.

In the 2007/January 2008 time frame, Shenk told Lodis that he wanted to replace Senior Vice President and Shenk direct report Mark Sherman with a “young Hollywood type” and further stated that “he knew of a few” such persons. CP 3373-74, CP 3647. Lodis had just been promoted to Senior Vice President; he reminded Shenk that age should not be a factor in such a decision. Id. In early January 2008, Shenk told Lodis he had spoken to his “young Hollywood” candidate and that Lodis should call him and set up an interview in Seattle as soon as possible. Id. Lodis again mentioned his concern with Shenk’s age-related comments. Id.

During the January 2008 360 evaluation, which led to Lodis’ termination, Corbis General Counsel Jim Mitchell told Contractor Dawn MacNab that “Steve [is an] old world HR guy, Corbis is [a] New Age

company.” CP 3608-11, CP 3618-19. Mitchell also referred to VP Sutherland as “old man.” CP 3350.

**D. When Required by the Work, Shenk Kept Older Workers He Inherited and Hired Other Older Workers So Long as They Were Critical to One of Shenk’s Special Projects, Then Replaced Them With Younger Workers As Soon As He Could**

The evidence shows that Shenk was willing to retain and even hire older workers so long as they were engaged in special projects that required their special talents. Upon completion of those projects, Shenk rid himself of the older workers and replaced them with younger workers.

Lodis had numerous time-sensitive projects to complete by the end of 2007, which he did. CP 3372-73. Once completed, his value to Shenk ended.

Wil Merritt is an example of Shenk’s quick action when an older executive has no special project. Shenk terminated Merritt, head of Sales, in April 2007 during his transition to CEO because he received a complaint from under 40 manager, Ivan Purdie, indicating that Merritt’s team lost confidence in him and he was not making his quotas. CP 7567-72, CP 3869-73. It was Purdie who complained and Purdie who replaced Merritt. CP 7573.

COO/CFO Sue McDonald (over 40) had important time sensitive work to do and she was kept around until that work was substantially

completed. CP 3370-72. Shenk then sought to hire a young woman. CP 3372.

Sutherland was brought into Corbis owing to his unparalleled experience in the creative side of the business. CP 3346-49. Having accomplished that objective, Shenk terminated Sutherland. Apparently, Sutherland's duties were set to be taken over by Jens de Gruyter from Veer in Germany – the “a young, good looking movie star type.” CP 3351. Gruyter was one level below Sutherland, as Purdie was one level below Merritt. CP 7583-84. Shenk ultimately hired other persons to perform Sutherland's duties. Id.

**E. Although Shenk Would Have Eventually Replaced Lodis With a Younger Worker, the Timing of the Lodis Termination Was in Retaliation for Lodis' Opposition to Shenk's Discriminatory Comments**

There were at least five occasions where Lodis admonished Shenk regarding Shenk's age discriminatory comments, which included informing Shenk that he believed Shenk's actions were illegal. CP 2560, CP 3633, CP 3366, CP 3639. Lodis also went to Corbis General Counsel Jim Mitchell to report his concerns over Shenk's age discrimination. CP 3640.

First, Lodis testified at his deposition that in 2007 New York HR Manager Kate O'Brien (Bracciante) came to him and expressed “dire

concerns” over Shenk’s age-related comments at a New York meeting. CP 3635, CP 3370. O’Brien told Lodis the following:

She reported to me that Gary Shenk made reference in the all-employee meeting, inappropriately in her mind, to age and to the age of the team, of the new management team and the new direction and the new team that Gary was assembling. So much so that she thought it was inappropriate and was concerned about the reaction by employees, and had employees come to her with that same concern, that they were very upset and they were very concerned about their continued employment because they were over 40.

CP 786. Lodis reported O’Brien’s statements to Shenk, who said nothing and simply stared at Lodis. CP 3637, CP 3370.

Lodis admonished Shenk regarding his age discriminatory comments a second time when Lodis reported the concerns of himself and McDonald to Shenk in August or September 2007. CP 2566, CP 3370, CP 3638-40. Lodis testified (CP 3639):

I reminded Gary about my earlier conversation about my concerns about the executive team comments, and told him that members of the executive team had come to me and expressed their concerns as well.

And I believe in the conversation I mentioned that it was Sue, and that this was a growing concern amongst not only myself, Sue and others, but it seemed to be growing with regard to perception and feelings of employees within the organization, and I was concerned. It was illegal, and it was just bad -- I was trying to protect Gary.

Lodis testified that a third admonishment of Shenk came during layoff discussions related to an employee in Los Angeles who reported to

Beate Chelette. CP 2567-69. Chelette had stated publicly that the employee, who was over age 40, was being laid off because of her age. Id. When Lodis reported these concerns to Shenk, Shenk stated: “Well, she is old and old in her thinking. We should get rid of her.” CP 2568. Lodis testified that he responded to Shenk, stating: “I told him I was surprised and I was disappointed and that age shouldn’t be a factor.” CP 2569.

A fourth admonishment of Shenk by Lodis related to Tim Sprake, an over-40 employee in the HR department. During 2007, Shenk repeatedly referred to Sprake as “the old guy on your team,” or words to that effect. CP 3647-51. Lodis offered to set up a meeting between Sprake and Shenk so that Shenk could learn what Sprake did within the organization and understand his value, but Shenk stated he was not interested in meeting with Sprake. Id.

A fifth admonishment of Shenk related to Shenk’s age discriminatory comments in the December 2007/January 2008 time frame when Shenk told Lodis that he wanted to replace Sherman with a “young Hollywood type.” CP 3647-51. Shenk further stated that he knew one such person and asked Lodis to set up an interview with this individual. CP 3373-74, CP 3647-48. Lodis testified that he told Shenk that “age should not be a factor” in the decision to terminate Sherman. CP 3648.

Shortly after Shenk's comments in December 2007/January 2008 related to Sherman, Lodis went to Corporate Counsel Mitchell to report what Lodis perceived to be Shenk's age bias and desire to replace older workers with younger workers. CP 3640. Lodis believed Shenk's age-related comments, and planned actions, to be illegal. CP 3640.

**F. The January 2008 360 Evaluation Was a Setup That Violated Usual Procedures and Focused on Lodis**

Through 2008, Shenk needed Lodis even though Lodis was an older worker. CP 3372-73. Lodis was crucial to the implementation of a company-wide layoff and consolidation, which occurred in the fall of 2007. Id.

In January 2008, in a break with procedure, Shenk selected which members of his executive team would be interviewed on the Lodis 360 evaluation. CP 3749. Shenk picked Kirsten Lawlor and Mitchell, both of whom were Lodis detractors. CP 3366-3413, CP 3749, CP 3753. Shenk contracted with Dawn MacNab to do the 360, but again, in a violation of convention, he said he wanted to do it as data for a performance review. CP 3615-16, CP 3749. MacNab opposed this idea because a 360 is supposed to provide a safe environment for constructive input. CP 3617. Shenk focused on Lodis and Sherman. CP 3771. Waldron and Company, for whom MacNab worked as a consultant, later disavowed her work on

this 360. CP 3773. Shenk ignored the positive evaluations. Shenk then asked MacNab to make a list of Lodis' "weaknesses," which she did, and which again was not a part of a normal practice. CP 3620-24. Again, in a departure of usual procedures, Shenk asked for and obtained MacNab's notes, which are not usually shared with management, of her interviews with Kirsten Lawlor and others. CP 3625-31. Although Shenk formulated a theory based on the notes that some employees thought Lodis was hard to reach, Shenk admitted he never had difficulties reaching Lodis. CP 3491-93. Allegedly based on the 360 evaluation results, Shenk put Lodis on a Performance Improvement Plan ("PIP"). CP 3375-77, CP 3620.

**G. The March 2008 Lodis PIP Was a Setup That Involved His Litigation Counsel**

The Lodis PIP, and Shenk's recordation of his statements with executive team members, including Stephen Gillette, to support Shenk's termination decision were created with the assistance of litigation counsel. CP 423, CP 425-26, CP 3453-56. This is not consistent with a routine internal employee corrective action.

At his deposition, Shenk explained the bulleted items he listed in the Lodis PIP and established the time frame of each as being before the promotion of Lodis to Senior Vice President. CP 3500-08. Lodis systematically rebutted all of the allegations in the PIP. CP 3377-89. The

PIP contained numerous inaccurate statements and findings with which Lodis disagreed. CP 3377-3413. One could conclude that the requested meetings with Gillette and others were a set up by Shenk so that Lodis would fail. Shenk never told Lodis the procedures for the meetings, so Lodis spent a few minutes with each peer and reported what happened. CP 3376-77. On March 26, 2008, Shenk terminated Lodis for-cause, allegedly for lying about the content of the meetings with Lodis' direct reports. CP 402, CP 3376-77.

#### **H. The Trial Court Granted Summary Judgment Dismissal of Lodis' Retaliation Claim**

On November 10, 2009, the Hon. Judge Hayden granted Corbis' motion for summary judgment on Lodis' RCW 49.60.210 retaliation claim. CP 4383-86. Judge Hayden indicated that Lodis was not entitled to pursue a retaliation claim because, as Vice President of HR at Corbis, Lodis was simply performing his job duties when he opposed Shenk's discriminatory comments and actions.<sup>3</sup> CP 2532-55, CP 2553. The court denied Lodis' motion for reconsideration. CP 4394-4404, CP 4434.

At trial, Lodis sought to amend his complaint under CR 15(b) to conform to the evidence and reinstate his WLAD retaliation claim. RP 3/18/10 at 67:15-74:6. In the alternative, Lodis sought to amend the

---

<sup>3</sup> The court's reasoning was documented in plaintiff's motion for reconsideration. CP 4394-4395.

complaint to assert a wrongful discharge in violation of public policy claim alleging retaliation. Id. The trial court, Hon. Judge Heller presiding, denied the requests. Id. Judge Heller found that Lodis was simply doing his job when he complained to Shenk and Mitchell about Shenk's age discriminatory comments. Id.

#### **I. Discovery of Lodis' Medical Records**

Lodis objected to the discovery of his medical records and statements made by and to his health care providers based on the physician-patient and psychologist-patient privileges. CP 3076-90. Corbis did not further move to compel discovery of the medical information and Lodis did not move for a protective order. CP 3169.

Lodis did not assert any claims for bodily injury or claim any psychological disorder as a result of Corbis' actions. CP 3169, CP 3077, CP 3080-81. Lodis repeatedly stated that he does not allege that any mental disease or defect was caused by the actions of Corbis, and indicated that he would not call medical providers as trial witnesses, nor use medical records at trial. CP 3080-81, CP 3169.

After the close of discovery, Corbis filed a motion in limine to exclude all evidence related to Lodis' emotional distress claim, which was initially granted and then modified on reconsideration to provide time to produce the records or face the striking of the damage claim. CP 3065, CP

3168, CP 3221, CP 3226, CP 4000, CP 4005, CP 4391. The trial court found that “when a plaintiff seeks emotional harm damages under Washington law in a discrimination case brought under RCW 49.60.180, et seq., the plaintiff waives his right to assert the psychologist-patient privilege.” CP 4392. Lodis refused to waive this privilege and filed a Notice for Discretionary Review to the Washington State Supreme Court on November 13, 2009, which was denied. CP 4373.

**J. Lodis’ March 2006 Short Term Incentive (“STI”) Bonus**

The facts related to Lodis’ \$35,000 March 2006 STI bonus payment are largely undisputed. Lodis’ offer letter, dated July 21, 2005, indicates his eligibility for the STI and LTI bonus programs. CP 447, First Trial Ex. 311. It is undisputed that on August 5, 2005, Lodis received a \$35,000 bonus payment. First Trial Ex. 327.

Then, in early 2006, Lodis was informed by Corbis employee Becky Masters (Harris) that he was to receive an STI payment of \$5,546 in the March 2006 payout. RP Vol. III at 576-78. Lodis asked Masters to check the terms of his offer letter to verify that this amount was correct. RP Vol. III at 578-79. Masters then contacted Corbis employee Mary Tomblinson on February 24, 2006 and instructed her to change Lodis’ March 2006 STI payment from \$5,546 to \$35,000. First Trial Ex. 338. Lodis received a gross STI direct deposit payment of \$35,000 on March 3,

2006. First Trial Ex. 329. Lodis believed the payment to be accurate at this time and continued to work for Corbis for two more years. CP 1005.

Subsequent to his termination, and during the course of this litigation, Corbis first alleged that the March 2006 STI payment was in error when it was raised by defense counsel at Lodis' deposition. CP 1005, CP 2413. Later, counterclaims were asserted for breach of fiduciary duty, unjust enrichment, and fraudulent misrepresentation. CP 718. During discovery, Lodis was able to review his offer letter, his pay stubs from Corbis, his bank statements, and other documentation received in discovery. CP 2413. Lodis came to the conclusion that the March 2006 STI payment was likely in error. Id.

Lodis filed a Motion for Leave to Deposit Monies in Court on July 10, 2009. CP 1019. Lodis never received a ruling on this motion. On August 17, 2009, Judge Hayden granted Lodis' motion for summary judgment with respect to the fraudulent misrepresentation counterclaim concerning the bonus. CP 1785.

Lodis then attempted to return the overpayment to Corbis on September 10, 2009. First Trial Ex. 165. On October 19, 2009, Corbis returned the payment. First Trial Ex. 437.

In the first trial, over objection, the court treated the existence of a fiduciary duty as a jury question. RP 3/22/10 at 12-13. The jury found in

favor of Lodis on the unjust enrichment counterclaim related to the bonus. CP 9014-17. The jury also found that Lodis had breached his fiduciary duty to Corbis in receiving the bonus, but awarded Corbis no damages. Id. A new trial was granted on the breach of fiduciary duty claim and the jury for the second trial found that Lodis had not breached his fiduciary duty to Corbis by receiving the bonus. CP 9415, CP 10528.

#### **K. Lodis' Vacation Time Recording**

Based solely on entries in Lodis' Outlook calendar, which was maintained almost exclusively by Lodis' executive assistant, Corbis alleges that Lodis failed to record this vacation time in the payroll system. CP 442-43, CP 726, CP 1715, First Trial Exs. 427 and 428. Corbis alleges that this excessive vacation resulted in the overpayment of unused vacation time upon termination. CP 726. During the course of this litigation, Corbis amended its answer to add counterclaims for breach of fiduciary duty, unjust enrichment, and fraudulent misrepresentation related to the vacation payout. CP 727.

It is undisputed that Lodis received a gross vacation time payout of \$41,555 on April 11, 2008. CP 2422, First Trial Ex. 330. It is also undisputed that Corbis reviewed Lodis' vacation recordation, and his Outlook calendar, before issuing him the payment. First Trial Ex. 108.

There is no evidence that Lois took excessive vacation while employed by Corbis. RP Vol. IV at 626, 643. Lodis took approximately 17 days of vacation during the course of his employment with Corbis. CP 2413-20, RP Vol. IV at 626.

The court during the first trial left to the jury to determine if a fiduciary duty existed. CP 9000, RP 3/22/10 at 12-13. The jury during the first trial found in favor of Lodis on the unjust enrichment and fraud counterclaims related to vacation time recording. CP 9014-17. The jury also found that Lodis had breached his fiduciary duty to Corbis, but awarded Corbis no damages. Id. A new trial was granted on the breach of fiduciary duty claim and the jury for the second trial found that Lodis had breached his fiduciary duty to Corbis by not recording his vacation time and awarded Corbis the full damages sought. CP 9415, CP 10528.

During summary judgment before the second trial, Judge Heller found as a matter of law that Lodis was an officer of Corbis. CP 9992-93. The only evidence Corbis presented at any time to show that Lodis was an officer was inadmissible hearsay documents, which Lodis moved to strike under ER 402, 403, 602, 802, and 901. CP 9880-89, CP 9974.

At the second trial, Judge Heller denied Lodis' motion in limine to exclude Corbis HR employee Mary Tomblinson as an expert witness as to Lodis' vacation time recording. CP 10536-37. The court allowed

Tomblinson to testify as an expert and admitted a summary she prepared into evidence, which was based on Lodis' Outlook calendar, and admitted the Outlook calendar into evidence. RP Vol. I at 113-31.

#### **IV. ARGUMENT**

##### **A. The Retaliation Claim Should Not Have Been Dismissed**

###### **1. The Summary Judgment Standard of Review is *De Novo***

An appellate court reviews “a summary judgment order de novo, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party.”

King v. Rice, 146 Wn. App. 662, 668, 191 P.3d 946 (2008).

Summary judgment is only appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law.” CR 56(c) (emphasis added). If there is a dispute as to any material fact, summary judgment is improper. Marquis v. City of Spokane, 130 Wn.2d 97, 105, 922 P.2d 43 (1996).

In Davis v. West One Automotive Group, 140 Wn. App. 449, 456, 166 P.3d 807 (2007), the court found that “[s]ummary judgment in favor of the employer in a discrimination case is often inappropriate because the evidence will generally contain reasonable but competing inferences of

both discrimination and nondiscrimination.” A “plaintiff alleging employment discrimination ‘need produce very little evidence in order to overcome an employer’s motion for summary judgment. This is because the ultimate question is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by a factfinder, upon a full record.’” Davis v. Team Elec. Co., 520 F.3d 1080, 1089 (9th Cir. Or. 2008) (quoting Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1124 (9th Cir. Cal. 2000)).

The WLAD “mandates liberal construction.” Martini v. Boeing Co., 137 Wn.2d 357, 364, 971 P.2d 45 (1999), RCW 49.60.020 (“The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof.”). Thus, the protections afforded by the WLAD are broader than those provided by the federal employment discrimination statute, Title VII, which includes no mandate for liberal construction. See Martini, 137 Wn.2d at 372-73, Marquis v. City of Spokane, 130 Wn.2d 97, 108-10, 922 P.2d 43 (1996).

**2. The WLAD Has No Requirement that the Employee “Step Outside” His Role and Take a Position Adverse to the Company, Such as Has Developed Under the Fair Labor Standards Act**

In dismissing the retaliation claim, the court appears to have adopted Corbis’ summary judgment argument relying on the standard announced in

the Tenth Circuit Fair Labor Standards Act (“FLSA”) case of McKenzie v. Renberg’s, Inc., 94 F.3d 1478 (10th Cir. Okla. 1996). CP 2532-55, RP 3/18/10 at 67:15-74:6. There is no authority to suggest that the standard articulated by the federal courts applicable to the FLSA anti-retaliation provision, 29 U.S.C. § 215(a)(3), applies to the WLAD retaliation provision, RCW 49.60.210. The language of the WLAD retaliation provision is substantially broader than the FLSA and the WLAD contains a mandate for liberal construction. It was error for the trial court to apply the newly developing FLSA standard to Lodis’ WLAD retaliation claim.

RCW 49.60.210(1) states:

It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

The anti-retaliation provision of the FLSA, 29 U.S.C. § 215(a)(3), states that it shall be unlawful for any person:

to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

The language in RCW 49.60.210(1) applicable to the instant case is the “opposition” clause – whether Lodis opposed any practices forbidden by the

WLAD. The FLSA contains language that the employee filed a complaint related to the FLSA. The court need only look to the language of the statute. Martini v. Boeing Co., 137 Wn.2d 357, 367-70, 971 P.2d 45 (1999). The plain language of the statute applies to “any person” and the clear purpose behind the WLAD is to protect the citizens of Washington from discrimination, which the legislature has found “threatens not only the rights and proper privileges of [Washington’s] inhabitants but menaces the institutions and foundation of a free democratic state.” RCW 49.60.010. The WLAD has been deemed “a public policy of ‘the highest priority.’” Xieng v. Peoples Nat’l Bank, 120 Wn.2d 512, 521, 844 P.2d 389 (1993) (quoting Allison v. Housing Auth., 118 Wn.2d 79, 821 P.2d 34 (1991)). The WLAD does not exclude HR managers from protection.

On the other hand, the purpose of the FLSA anti-retaliation provision has been articulated as “to provide an incentive for employees to report wage and hour violations by their employers and to ensure that employees are not compelled to risk their jobs in order to assert their wage and hour rights under the Act.” Stewart v. Masters Builders Ass’n of King, 736 F. Supp. 2d 1291, 1295 (W.D. Wash. 2010) (internal citations omitted).

McKenzie v. Renberg’s, Inc., 94 F.3d 1478 (10th Cir. Okla. 1996), does not apply to retaliation claims brought under the WLAD. McKenzie

concerned a personnel director who reported what she perceived to be possible wage and hour violations by the company. Id. at 1481. McKenzie first made the complaints to the company attorney, and later that same day, to the company president, Renberg. Id. Sixteen days later, Renberg terminated McKenzie. Id. At trial, the jury ruled in favor of McKenzie on her FLSA retaliation claim, but the district court later granted judgment as a matter of law for the defendants. Id. On appeal, the Tenth Circuit affirmed the district court and held “that McKenzie did not engage in protected activity under § 215(a)(3) when, in her capacity as personnel director, she undertook to advise Renberg’s that its wage and hour policies were in violation of the FLSA.” Id.

The WLAD does not define what it means to engage in “statutorily protected activity,” or what it means to “oppose any practices forbidden by this chapter.” However, Washington courts have established a *prima facie* case for proving a RCW 49.60.210 claim at summary judgment, discussed below. This is the standard that should be applied by the Court.

In Crawford v. Metro. Gov’t of Nashville & Davidson County, 555 U.S. 271, 129 S.Ct. 846 (2009), the United States Supreme Court addressed the meaning of the term “oppose” in the anti-retaliation provision in Title VII. Title VII makes it “an unlawful employment practice for an employer to discriminate against any of his employees...[1]

because he has opposed any practice made an unlawful employment practice by this subchapter.” Id. at 850 (citing 42 U.S.C. § 2000e-3(a)). The Supreme Court found that “the term ‘oppose,’ being left undefined by the statute, carries its ordinary meaning,” and looked to the Webster’s and Random House dictionary definitions of the term. Id. (finding that “oppose” means “to resist or antagonize...; to contend against; to confront; resist; withstand” and “to be hostile or adverse to, as in opinion.”).

Lodis “opposed” Shenk’s age discrimination when he repeatedly complained to, and admonished, Shenk for using age discriminatory terms and taking age discriminatory actions. Lodis stated that he told Shenk that he feared Shenk was violating the law when Shenk expressed his bias toward age. Lodis also opposed Shenk’s conduct when he complained to Corbis General Counsel about Shenk’s age discrimination.

There is no threshold requirement under the WLAD that in order to “oppose” discrimination, the employee must step outside his professional role. The WLAD does not subscribe different rights based on the role of the speaker. If the Court were to adopt the FLSA standard, employees like Lodis would be discouraged from handling problems internally. As head of HR, Lodis would have had to file a complaint with the Human Rights Commission or speak to the media in order to gain rights under that

standard. Even if Lodis had reported Shenk's age discrimination to Corbis shareholder Bill Gates, it could have been arguably within the scope of his job duties.

In dismissing Lodis' RCW 49.60.210(1) retaliation claim, the trial court improperly applied a newly developing threshold requirement of the FLSA to the WLAD. This is not the law in Washington. The WLAD's mandate for liberal construction, the plain meaning of the statute, the recognized *prima facie* case, and the high public policy importance of the WLAD counsel against limiting the rights of the employees to seek redress for retaliation when opposing discrimination.

### **3. Viewing the Evidence in the Light Most Favorable to Lodis, Genuine Issues of Material Fact Remain for Trial on the Retaliation Claim**

In the absence of direct evidence, Washington courts often employ the McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), burden shifting scheme at summary judgment. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988), Milligan v. Thompson, 110 Wn. App. 628, 42 P.3d 418 (2002) (burden shifting scheme is the same for retaliation and discrimination claims), Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 179-80, 23 P.3d 440 (2001) ("Washington courts have largely adopted the federal protocol announced in *McDonnell Douglas* for evaluating motions for judgment as a matter of

law in discrimination cases brought under state and common law, where the plaintiff lacks *direct* evidence of discriminatory animus”).

Once the plaintiff establishes a *prima facie* case of retaliation, a rebuttable presumption of discrimination is created. Campbell v. State, 129 Wn. App. 10, 22, 118 P.3d 888 (2008). The burden then shifts to the employer to produce admissible evidence of a legitimate reason for the adverse employment action. Id. If the employer is able to produce such evidence, the burden shifts back to the employee to show a genuine issue of fact that the proffered reason is merely a pretext. Id.

In order to establish a *prima facie* case of retaliation, the employee must show 1) that he engaged in a statutorily protected activity; 2) that the employer took some adverse employment action against the employee; and 3) that retaliation was a substantial factor behind the adverse action. Kahn v. Salerno, 90 Wn. App. 110, 129, 951 P.2d 321 (1998), rev. denied, 136 Wn.2d 1016, 821 P.2d 18 (1998). “Proximity in time between the adverse action and the protected activity, coupled with evidence of satisfactory work performance and supervisory evaluations suggest an improper motive...Moreover, if the employee establishes that he or she participated in an opposition activity, the employer knew of the opposition activity, and he or she was discharged, then a rebuttable presumption is

created in favor of the employee that precludes [the court] from dismissing the employee's case." Id. at 130-31.

In opposing a discriminatory practice, the employee need only have a reasonable belief that the practice is discriminatory, whether or not it actually is. Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 619, 60 P.3d 106 (2002). In Estevez v. Faculty Club of Univ. of Wash., 129 Wn. App. 774, 798, 120 P.3d 579 (2005), the court stated that the plaintiff "need only prove that her complaints went to conduct that was at least arguably a violation of the law, not that her opposition activity was to behavior that would actually violate the law against discrimination."

In the instant case, Lodis' *numerous* complaints to Shenk regarding Shenk's age discriminatory comments, and Lodis' complaint to Mitchell about Shenk's age discrimination, were sufficient, viewing the evidence in the light most favorable to Lodis, to show that Lodis engaged in a statutorily protected activity. Lodis reasonably believed that Shenk was engaged in a discriminatory practice – age discrimination. Not only did Lodis hear Shenk make repeated ageist comments, but he witnessed Shenk removing, or seeking to remove, older employees and replace them with younger employees.

Additionally, Lodis is able to establish that he engaged in an opposition activity when he repeatedly admonished Shenk for his age

discriminatory comments and actions, that Shenk, as the CEO, and Mitchell, as the General Counsel, knew of Lodis' opposition activity, and Lodis was terminated shortly after the opposition activity. Therefore, under the standard set forth in Kahn, at 90 Wn. App. at 130-31, a rebuttable presumption is created in favor of Lodis that precludes the court from dismissing Lodis' retaliation claim at summary judgment.

Lodis is able to establish the second element of his *prima facie* case, that Corbis took some adverse employment action against him, because Lodis was placed on a PIP and terminated shortly thereafter.

Lastly, Lodis can show the third element of the *prima facie* case, that his repeated admonishments to Shenk were a substantial factor in his termination. The close proximity in time between Lodis' promotion in December 2007 to Senior Vice President of HR, the opposition activity in late 2007/early 2008, and the 360 evaluation, the PIP, and termination in March 2008 suggests retaliation. Shortly after Lodis reported his concerns to Mitchell, and opposed Shenk's plan of replacing Sherman with a "young Hollywood type," Shenk decided to conduct the 360 evaluation and Lodis was placed on the PIP.

The circumstances surrounding Shenk's decision to conduct the 360 evaluation, to place Lodis on the PIP, the content of the PIP, and Shenk's decision to fire Lodis for-cause for lying, which is Corbis'

articulated reason for Lodis' termination, in the light most favorable to Lodis, suggest that the reason given is pretext. Sherk employed atypical procedures in conducting the 360 evaluation by requesting MacNab's personal notes, choosing who would be interviewed in the 360, asking MacNab to make a list of Lodis' weaknesses, and using the 360 as a disciplinary tool. Sherk gave Lodis vague directives about meeting with Lodis' direct reports to discuss his alleged performance deficiencies and then terminated Lodis for-cause for allegedly lying about his conversations with his direct reports. Lodis did have the conversations with his direct reports as Sherk requested and Lodis honestly reported the content of his conversations and summarized them in writing. CP 3375-3413. Lodis attempted to dispute the inaccuracies in his PIP. Id. Lodis was terminated with no notice and escorted off the property immediately. Id. In a RCW 49.60.210(1) retaliation claim, whether the employer has put forth a legitimate nondiscriminatory reason is a question of fact for trial when the record supports competing inferences. Frisino v. Seattle Sch. Dist. No. 1, 160 Wn. App. 765, 785, 249 P.3d 1044 (2011).

**B. Lodis Did Not Waive His Physician-Patient or Psychologist-Patient Privilege by Asserting a Claim for Emotional Distress Damages**

The standard of review for pretrial discovery orders is abuse of discretion. Gillett v. Conner, 132 Wn. App. 818, 822, 133 P.3d 960

(2006). “A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.” Gillett, 132 Wn. App. at 822. However, the standard of review for determining whether a privilege exists or has been waived is *de novo* and should be applied here. Dietz v. Doe, 80 Wn. App. 785, 788, 911 P.2d 1025 (1996), rev’d on other grounds, 131 Wn.2d 835, 935 P.2d 611 (1997).

CR 26 (b)(1) allows a party to “obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action....” RCW 5.60.060 creates the statutory physician-patient privilege. Phipps v. Sasser, 74 Wn.2d 439, 444, 445 P.2d 624 (1968) (noting the statutory origin of the privilege). RCW 5.60.060 (4) states, in relevant part: “a physician or surgeon or osteopathic physician or surgeon or podiatric physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient.”

The Washington legislature has stated its intent that communications between a mental health care provider and a patient are to be held as privileged as those between attorney and client. RCW 18.83.110 pertains to privileged communications and states:

Confidential communications between a client and a psychologist shall be privileged against compulsory disclosure to the same extent and subject to the same conditions as confidential communications between attorney and client, but this exception is subject to the limitations under RCW 70.96A.140 [involuntary commitment] and 71.05.360 (8) and (9) [rights of involuntarily detained persons].

The legislature also gives confidential protections to other mental health care providers. See RCW 18.19.180.

Lodis did not make any claims for bodily injury or claim any psychological disorder as a result of Corbis' actions. At trial, Lodis planned to seek emotional distress damages such as those identified in Fitzgerald v. Cassil, 216 F.R.D. 632 (N.D. CA. 2003) where the plaintiffs did not intend to rely on the testimony of a treating physician or expert to establish their claims for emotional harm damages, did not allege that the defendant caused any specific disabilities or mental abnormalities, and did not claim that any pre-existing conditions were exacerbated by the defendants' conduct. Lodis makes no separate claim for intentional infliction of emotional distress, did not plan to use his medical records at trial to establish his emotional distress damage claim, and did not intend to call on medical providers as trial witnesses.

In Bunch v. King County Dept. of Youth Services, 155 Wn.2d 165, 180-81, 116 P.3d 381 (2005), the Court held that emotional distress

damages were properly awarded to a plaintiff in a discrimination case brought under state law, even though the plaintiff did not have medical testimony supporting the award. The Court stated:

The county argues that Bunch never consulted a healthcare professional, and no one close to him testified about his anxiety. That is true, but such evidence is not strictly required; our cases require evidence of anguish and distress, and this can be provided by the plaintiff's own testimony.

Bunch, 155 Wn.2d at 181. Like Bunch, Lodis intends to prove his emotional distress damages without the use of medical records or medical testimony. Corbis has previously suggested that Lodis is unlike Bunch in that Bunch did not seek treatment by a health care provider. However, given that the Court found medical records or testimony were not necessary to prove his emotional distress damages claim, this appears to be a distinction without a difference. The fact that mental health records exist in this case may be relevant, but the records are privileged. Allowing for discovery of privileged mental health records discourages victims of discrimination from seeking treatment for fear that private discussions with their health care provider will become public.

In Smith v. Orthopedics International, Ltd., PS, 170 Wn.2d 659, 244 P.3d 939 (2010), the Supreme Court recently discussed the purpose behind the physician-patient privilege in RCW 5.60.060(4). The Court

stated that the purpose was twofold: “(1) to ‘surround patient-physician communications with a ‘cloak of confidentiality’ to promote proper treatment by facilitating full disclosure of information’ and (2) ‘to protect the patient from embarrassment or scandal which may result from revelation of intimate details of medical treatment.’” Smith, 170 Wn.2d at 667 (internal citations omitted). The purpose behind the privilege would be lost if the mere assertion of a claim for emotional distress damages, without affirmative reliance on medical records, expert testimony, or some type of extreme emotional distress, waived the privilege.

In Washington, Evidence Rule 501 acknowledges the existence of various privileges, but does not guide the courts on how to address the psychologist-patient privilege. Our appellate courts have not addressed this issue. The United States Supreme Court has held that the psychotherapist-patient privilege protected a police officer from having to disclose the content of therapy sessions with a licensed clinical social worker under Federal Rule of Evidence 501 in a 42 U.S.C. §1983 claim by the estate of a police-shooting victim. Jaffee v. Redmond, 518 U.S. 1, 3-4, 18, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996). In Jaffee, the Court reasoned:

The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its

physical health, is a public good of transcendent importance.

Jaffee, 518 U.S. at 11. Significantly, the Jaffee Court refused to balance the interests of the plaintiff against those of the police officer. The Court stated, “[m]aking the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.” Id. at 17.

Jaffee recognizes the need to protect communications during therapy because, “[t]he entire community may suffer if police officers are not able to receive *effective* counseling and treatment after traumatic incidents, either because trained officers leave the profession prematurely or because those in need of treatment remain on the job.” Id. at 11 n.10. This Court should recognize the parallel need in the employment discrimination and retaliation context because providing for automatic waiver of the privilege based on a claim for emotional harm damages would force plaintiffs to reveal private and sensitive counseling information or force them to forego treatment during litigation for fear that their therapy session will be made public.

This Court should adopt the analysis of Fitzgerald v. Cassil, 216 F.R.D. 632 (N.D. CA. 2003), which outlines the three approaches taken by

federal courts since Jaffee, and which adopted the narrow approach to waiver in a housing discrimination case involving emotional harm claims similar to those asserted in this case.

In Fitzgerald, the plaintiffs sought damages for emotional harm, based on lay testimony, for depression, anger/irritability, discouragement, nervousness, sleep loss, withdrawal, relived experience, low self-esteem, and arguing with his partner. 216 F.R.D. at 633. The Fitzgerald court examined federal cases in which courts had adopted a broad approach (mere allegation of emotional distress waives privilege), a middle ground approach (allegations of non-garden-variety emotional distress waives privilege), and a narrow approach (need affirmative reliance on the psychotherapist-patient communications before the privilege will be deemed waived). Id. at 636-639. The Court ruled that since Jaffee does not permit a balancing of interests, the narrow approach is the most consistent with Jaffee's intent. Id. at 638.

Similarly, in St. John v. Napolitano, 274 F.R.D. 12 (D.D.C. 2011), after considering the different approaches taken by federal courts concerning the issue of waiver, the court found no waiver when the plaintiff alleges "garden variety" emotional distress damages. The court stated: "In this case, there are no factors showing that the plaintiff has alleged more than 'garden variety' emotional distress of the kind an

ordinary person might experience following an episode of discrimination. The plaintiff has not alleged that a specific mental or psychiatric injury or disorder resulted from the defendant's actions." St. John, 274 F.R.D. at 20.

The narrow approach holds that general medical records are not relevant; psychological records are *relevant*, but protected by the psychotherapist-patient privilege. Fitzgerald, 216 F.R.D. at 634-635. The Fitzgerald court quashed the subpoenas that had been served on plaintiffs' doctors because, like Lodis, those plaintiffs did not intend to use medical records or medical testimony at trial. Id. at 636. The court held that given the need to protect the privileged conversations between a patient and his doctor, in order to encourage an unrestrained exchange of information to facilitate treatment, this privilege outweighs the defendants' need for medical records, "particularly in civil rights cases where Congress has placed much importance on litigants' access to the courts and the remedial nature of such suits." Id. at 639. Just like in Fitzgerald, here, waiver should be narrowly construed so that Lodis may continue to receive mental health counseling, as needed, without the need to compromise the effectiveness of that counseling by bringing it into the litigation.

The narrow approach will not disarm defendants. While the privilege may bar access to medical records, the defendant may cross-examine the plaintiff, as was done in the instant case, about other stressors or contributing factors that may explain or have contributed to the alleged

emotional distress. The occurrence and dates of any psychotherapy including that which occurred before the incident is not privileged and subject to discovery. The defendant can examine percipient witnesses or find other evidence to show, for example, that plaintiff's description of his or her distress is exaggerated. It may elicit from the plaintiff the fact that the plaintiff did not seek and obtain treatment or therapy for the alleged distress. These examples illustrate that the defendant has numerous avenues through which it can make its case without delving into the plaintiff's confidential communication with his or her therapist.

Fitzgerald, 216 F.R.D at 638 (citations omitted). Without violating the privilege, Corbis may, and did, pursue other avenues of proof. During his deposition, Lodis openly responded to questions asking the names of treating psychologists, the dates of treatment, previous treatment, and planned future treatment. CP 3086-88.

Under circumstances similar to the instant case, the United States District Court for the Western District of Washington in Sims v. Lakeside Sch., 2007 U.S. Dist. LEXIS 18675 (W.D. Wash., Sept. 20, 2007) adopted the narrow approach discussed in Fitzgerald. The court stated:

This Court is persuaded that the narrow approach discussed in Fitzgerald v. Cassil, 216 F.R.D. 632, 636-40 (N.D. Cal. 2003) should be applied here. Mr. Sims has asserted "garden variety" emotional distress symptoms, including depression, anger, irritability, sleep loss, discouragement, withdrawal, relived experience and low self esteem. He has not asserted a bodily injury claim, he is not relying on any provider or other expert to prove emotional distress symptoms, and he has not pled a cause of action for intentional or negligent infliction of emotional distress.

Sims, 2007 U.S. Dist. Lexis.18675 at \*3. See also EEOC v. Wyndham Worldwide Corp., 2008 U.S. Dist. LEXIS 83558, \*15-16 (W.D. Wash., Oct. 3, 2008) (adopting the reasoning of Fitzgerald v. Cassil, 216 F.R.D. 632 (N.D. CA. 2003)).

Washington courts have yet to determine the issue of whether a plaintiff automatically waives the physician-patient privilege, thus allowing for discovery of his or her medical records, simply by asserting a tort claim seeking emotional harm damages. Lodis urges this Court to adopt the narrow approach (requiring affirmative reliance on the psychotherapist-patient communications before the privilege will be deemed waived), or at least the middle ground approach (allegations of non-garden-variety emotional distress waives privilege), and find that he did not waive the privilege in the instant case.

**C. The Trial Court Should Have Dismissed the Breach of Fiduciary Duty Counterclaims Because the Alleged Misconduct Does Not Equate with a Breach of One's Duty and Corbis Presented No Evidence that Lodis Was an Officer of the Company**

Questions of law are reviewed *de novo*. Qualcomm, Inc. v. Dep't of Revenue, 171 Wn.2d 125, 131, 249 P.3d 167 (2011). On the other hand, an appellate court applies an abuse of discretion standard of review to the

trial court's refusal to strike evidence. Deschamps v. Mason County Sheriff's Office, 123 Wn. App. 551, 563-64, 96 P.3d 413 (2004).

The issue of whether a fiduciary duty existed should have been decided by the trial court, not the jury, because it is a question of law. Miller v. U.S. Bank of Washington, N.A., 72 Wn. App. 416, 426, 865 P.2d 536 (1994), Heilig Trust v. First Interstate Bank of Washington, 93 Wn. App. 514, 969 P.2d 1082 (1999), Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992), S.H.C. v. Lu, 113 Wn. App. 511, 524, 54 P.3d 174 (2002). It was error to allow the issue of duty to go the jury. CP 8999-9001. Lodis repeatedly requested that the trial court rule on the existence of a fiduciary duty as a matter of law and argued that the breach of fiduciary duty claims should have been dismissed because vacation time recording and the mistaken receipt of double bonus are not the type of duties that rise to the level of legal fiduciary duties. CP 1518-22, CP 2433-36, CP 4020-23, CP 9097-9104, CP 9244-48, CP 9832-56, CP 9973-89, CP 10571-80, CP 10598-10602, RP 3/22/10 at 12-13.

The breach of fiduciary duty cases in Washington generally do not concern regular job duties such as recording vacation time or mistakes such as the overpayment of a bonus. See Senn v. Northwest Underwriters, Inc., 74 Wn. App. 408, 875 P.2d 637 (1994) (director of insurance company breached fiduciary duty by failing to act when another director,

her husband, converted \$12 million of company funds), Interlake Porsche & Audi, Inc. v. Bucholz, 45 Wn. App. 502, 728 P.2d 597 (1986) (appeal from trial court's ruling in shareholder derivative lawsuit that director breached his fiduciary duties to corporation by using approximately \$500,000 of corporate funds for personal benefit), Lang v. Hougan, 136 Wn. App. 708, 150 P.3d 622 (2007) (co-owner's solicitation of corporation's clients during breakup of the corporation was a breach of fiduciary duty). "Fiduciary" is defined as: "One who owes to another the duties of good faith, trust, confidence, and candor (the corporate officer is a fiduciary to the shareholders)." Black's Law Dictionary, 282 (Pocket 2d ed. 2001).

During the first trial, Corbis successfully fought to keep out all mention of the fact that Corbis is owned solely by Bill Gates. CP 5221-22, CP 6564. Corbis also submitted no admissible evidence to establish that Lodi was an officer of Corbis pursuant to RCW 23B.08.400, which was the basis for Corbis' breach of fiduciary duty claims. Without evidence that Lodi was an officer of Corbis, the breach of fiduciary duty claims should have been dismissed. Even if Lodi were an officer of Corbis, the claims should have been dismissed because vacation time recording and accidentally receiving a mistaken bonus are not fiduciary duties. Then, during summary judgment before the second trial, in its reply brief, Corbis

for the first time submitted documents signed by Gates an effort to prove that Lodis was an officer of Corbis. CP 9880-89. These documents were inadmissible hearsay documents supposedly authored by Bill Gates, which Lodis moved to strike under ER 402, 403, 602, 802, and 901. CP 9974. The only evidence presented by Corbis to establish that Lodis was an officer should have been stricken. It was error for the court to conclude as a matter of law that Lodis was an officer of Corbis based on the solely on the inadmissible evidence. CP 9992. Corbis never corrected this omission at trial or otherwise.

The first trial was tainted by the admission of the breach of fiduciary duty claims, which should have been dismissed at summary judgment. Clearly the jury was confused by the claims because they returned a verdict finding breach, but awarding no damages, when damages/resulting injury was an element of the claim in the jury instructions. CP 9000-01, CP 9014. This confusing verdict was the basis for the new trial. CP 9415. The evidence related to Lodis' alleged breach of fiduciary duty materially prejudiced his age discrimination claim during the first trial. The jury heard endless character attacks of Lodis related to his failure to record his vacation time and accidental receipt of a bonus, and the fact that it was alleged that this was a breach of his fiduciary duties as an officer of Corbis. Lodis should be entitled to a new trial on the age discrimination claim once this Court has

ruled on the breach of fiduciary duty claims because the breach of fiduciary duty allegations permeated the trial to the point of causing significant prejudice to Lodis' age claim.

In a new trial, Corbis' after-acquired evidence defense should be stricken because the only evidence presented to support the fact that Lodis would have been fired if Shenk had known he did not record his vacation time or accidentally received an overpayment, was Shenk's own inadmissible opinion contained in his own declaration to that effect, which was stated for the first time after he became a named defendant. CP 2445. No policies, procedures, or prior practices were offered by Corbis. In contrast, current HR Director Farris testified that failing to record vacation time is not a terminable offense. RP Vol. I at 198.

**D. The Trial Court Erred When It Improperly Admitted Evidence During the Second Trial and Denied Lodis' Motion for A New Trial**

**1. The Trial Court Abused Its Discretion When It Allowed Tomblinson to Testify as an Expert, Admitted Her Summary into Evidence, and Admitted Lodis' Outlook Calendar**

The standard of review for the admission or exclusion of evidence at trial, and the admission or exclusion of expert testimony, is abuse of discretion. State v. Smith, 30 Wn. App. 251, 257-58, 633 P.2d 137 (1981), Aubin v. Barton, 123 Wn. App. 592, 608, 98 P.3d 126 (2004).

At trial, over Lodis' objections, the court admitted into evidence, pursuant to ER 801(d)(2) and ER 803(a)(6)[RCW 5.45], Exhibit 48, which were daily view printouts of Lodis' Outlook calendar for the days in which Corbis alleged Lodis was on vacation during his employment with Corbis, and Exhibit 49, which were weekly view printouts of Lodis' Outlook calendar while he was employed by Corbis. RP Vol. I at 113-25, RP Vol. III at 293-94. Also over Lodis' objections, the court allowed Corbis HR employee Mary Tomblinson to testify as an expert witness under ER 702, and admitted Exhibit 50 under ER 1006, which was a summary of Tomblinson's review of Lodis' Outlook calendar. RP Vol. I at 113-25, RP Vol. III at 294-96, CP 10536-37. Based solely on this improperly admitted evidence, the jury awarded Corbis the full damages of \$42,389.65 with regard to the vacation time claim. CP 10528-29. The jury found that Lodis had not breached his fiduciary duty to Corbis as to the bonus. Id.

ER 803(a)(6), Records of Regularly Conducted Activity, refers to RCW 5.45, the codified business records hearsay exception. Courts generally have broad discretion to admit or exclude records that seem to be based on reliable information. Karl B. Tegland, Courtroom Handbook on Washington Evidence, Ch. 5, ER 803(a)(6), Cmt. 5 (2010-2011 ed.). Business records "are records that are the 'routine product of an efficient clerical system' – records that are such that cross-examination would be

pointless.” Id. at Cmt. 7. One of the elements in establishing the foundation of a business record is that “the surrounding circumstances suggest that the record is reliable.” Id. at Cmt. 10. “To be admissible in evidence a business record must (1) be in record form, (2) be of an act, condition or event, (3) be made in the regular course of business, (4) be made at or near the time of the act, condition or event, and (5) *the court must be satisfied that the sources of information, method, and time of preparation justify the admittance of the evidence.*” State v. Ziegler, 114 Wn.2d 533, 538, 789 P.2d 79 (1990) (emphasis added). See also RCW 5.45.020.

It was error to admit Exhibits 48 and 49 because the Outlook calendar was not a reliable business record, it was inaccurate and prejudicial to Lodis, and Corbis failed to lay a proper foundation as to its accuracy. ER 401, 402, 403, 803. As testified to by CEO Shenk, President Barry Allen, Corporate Counsel Mitchell as to the Gillett and McDonald calendars, the calendars were never intended to be an accurate record of vacation taken. RP Vol. III at 419, 513-25, 675.

No Corbis witness testified as to any particular date on the Outlook calendar that Lodis was on vacation on that date. Even if Lodis’ Outlook calendar was a business record, it was not properly admitted for the purpose sought, which was that Corbis intended the calendar to be

reliable, substantive evidence of when Lodis was on vacation, and the jury relied on it in this way.

Because the underlying documents used to create the summary were not reliable, the Tomblinson summary, Exhibit 50, also should not have been admitted into evidence. The summary, based on executive assistant Teri Chihara's calendar entries, is also not admissible because the calendar does not satisfy a hearsay exception, ER 802, ER 901, Pollock v. Pollock, 7 Wn. App. 394, 405, 499 P.2d 231 (1972) (summary of inadmissible hearsay evidence is as inadmissible over objection as is the underlying inadmissible hearsay data it summarizes). Tomblinson had no personal knowledge as to specific days Lodis was on vacation during his employment with Corbis. The Outlook calendar was not an admission by a party opponent under ER 801(d)(2) because it was maintained by Chihara, not Lodis, and Lodis disagreed with the accuracy of her vacation time entries. RP Vol. IV at 631-32, 639, 645, CP 2409-10, CP 7005-06.

**2. There Was No Evidence or Reasonable Inference to Support the Jury's Verdict and the Trial Court Erred When It Denied Lodis' Motion for a New Trial**

An abuse of discretion standard of review applies to the denial of a motion for new trial. Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 454, 191 P.3d 879 (2008). "A trial court abuses its discretion when it fails to grant a new trial or amend a judgment where the damage award is

contrary to the evidence. The court examines the record to determine whether the award is contrary to the evidence.” Id. (internal citations omitted). In the instant case, the trial court abused its discretion when it denied Lodis’ motion for a new trial because the jury’s verdict was contrary to the evidence.

Lodis testified at trial that he believed he took approximately 17 vacation days during the two years and eight months he worked for Corbis. RP Vol. IV at 626, CP 2411-20. Lodis admitted that he did not record his vacation time in the time reporting system, though Chihara testified that she had recorded Lodis’ vacation time at the beginning of Lodis’ employment. RP Vol. IV at 626, RP Vol. II at 387-88. According to his employment contract, Lodis was to receive four weeks, or 20 days, paid vacation per year. Second Trial Ex. 5. Lodis testified that, at the time of hire, McDonald verbally granted him an additional two weeks of vacation time per year. RP Vol. III at 598-600. This testimony was uncontradicted by any Corbis witness.

Corbis’ witness, Thea Barrett, who was formerly Tomblinson’s supervisor, testified that vacation time recording was a problem at Corbis for all exempt employees, and that most executives did not record their vacation time. RP Vol. III at 550-52. She testified that over half of the 800-1200 employees at Corbis were exempt employees. Id. Barrett

testified that she did not perceive fixing the vacation time recording, so that more employees properly recorded their vacation time, to be a high priority among Corbis' leadership and that Shenk never indicated it was a priority. RP Vol. III at 563. Corbis' time reporting policy referred all question to the Payroll Department, which was responsible for tracking employee vacation time. Second Trial Ex. 20.

CEO Gary Shenk testified that, as Lodis' supervisor, it was Shenk's responsibility to review Lodis' vacation time reporting for accuracy and that he failed to do so. RP Vol. III at 408, 426. Shenk never counseled Lodis on recording his vacation time. RP Vol. IV at 642. Additionally, Shenk testified that it would not be a breach of fiduciary duty of an officer if his or her assistant did not accurately maintain the calendar. RP Vol. III at 428-29.

Mitchell testified that after reviewing Barrett's summary of Lodis' vacation time taken, which was based solely on Lodis' Outlook calendar, Mitchell did not withhold Lodis' vacation time payout because it was just one person's assessment of Lodis' vacation time. RP Vol. III at 460-63, 545. In other words, there was no guarantee of accuracy. Mitchell testified that the Outlook calendars were not intended to be accurate representations of vacation time usage. RP Vol. III at 514-15, 525. Trial testimony showed that Gillett, McDonald, and Allen, all current or former

Corbis officers, failed to accurately record their vacation time with no consequences. RP Vol. III at 419, 513-25, 675.

Corbis failed to show that Lodis took more vacation than he earned because of the vacation accrual system. Additionally, Corbis has no policy requiring the Outlook calendar to be maintained as a record of the employee's vacation or to maintain an accurate calendar. Since the Outlook calendar is Corbis' only evidence that Lodis was on vacation on a particular date, and there are no policies at Corbis with regarding to maintaining an Outlook calendar, Corbis cannot show that Lodis took excessive vacation or that Lodis' failure to record 17 vacation days resulted in an injury to the corporations.

Even if this Court were to find that the jury properly concluded that Lodis breached his fiduciary duty by not recording 17 vacation days, the amount of damages awarded was excessive, not based on evidence proved at trial, and the result of passion or prejudice and the trial court erred in not granted Lodis' request for remittitur. CP 10571, CP 10598, CP 10615.

## **V. CONCLUSION**

Lodis respectfully requests that this Court grant him a new trial as to his age discrimination and retaliation claims, find that he did not breach his

fiduciary duty with regard to his vacation time recording, and order that the  
after acquired evidence defense should be stricken.

Respectfully submitted this 14th day of October, 2011.

The Sheridan Law Firm, P.S.

By:

  
\_\_\_\_\_  
John P. Sheridan, WSBA # 21473  
Attorneys for Plaintiffs/Appellants/Cross-  
Respondents

**DECLARATION OF SERVICE**

Brandon Rich 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 Sheridan Law Firm, P.S., and I make this declaration based on my personal knowledge and belief.

2. On October 14, 2011, I caused to be delivered via email addressed to:

Jeffrey James  
Sebris Busto James  
14205 SE 36th Street, Suite 325  
Bellevue, WA 98006

Howard M. Goodfriend  
Edwards, Sieh, Smith and Goodfriend, P.S.  
1109 First Avenue, Suite 500  
Seattle, WA 98101

a copy of the BRIEF OF APPELLANT.

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

DATED October 14, 2011 at Seattle, King County, Washington.

  
\_\_\_\_\_  
Brandon Rich

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 OCT 14 PM 6:07