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No. 24565-9-III Consolidated with No. 25187-0-III

DIVISION III, COURT OF APPEALS
OF THE STATE OF WASHINGTON

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAYMES, CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND RICHARDSON, JAMES STULL, RANDALL WALLI, DAVID FAUBION, and CHARLES CABLE,

Plaintiffs-Respondents

v.

FLUOR FEDERAL SERVICES, INC.,
a Washington corporation,

Defendant-Appellant

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Carrie L. Runge)

APPELLANT'S OPENING BRIEF

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1B James Wm. Moore, Moore's Federal Practice ¶ 0.404[1], at II-6 to II-7 (2d ed. 1996) 28

5 Karl B. Tegland, Evidence Law and Practice § 404.33 at 490 (1999) 57

4 Karl B. Tegland, Washington Practice: Rules Practice at 466 (5th ed. 2006) 69

ASSIGNMENTS OF ERROR

Defendant and Appellant Fluor Federal Services, Inc. ("FFS") makes the following assignments of error:

1. The trial court erred when it admitted Exhibit 21. See VRP (July 8, 2005) 66:3-10 (court's ruling).

2. The trial court erred when it permitted witness Laurie Lee Johns-Andersen (Laurie Marquardt) to testify to certain "bad acts"/"other wrongs." See VRP (Aug. 4, 2005) 1933:12-16 (court's ruling).

3. The trial court erred when it permitted witness Ivan Sampson to testify to certain "bad acts"/"other wrongs" subject to exclusion under ER 404(b). See VRP (July 22, 2005) 506:25-507:24 (Sampson/FFS objections).

4. The trial court erred when it refused to admit the DOE report about 1994 "hotline" allegation. See VRP (Aug. 22, 2005) 3640:20-3641:11 (court's ruling).

5. The trial court erred when it entered judgments on the jury verdicts in favor of plaintiffs. See Eleven Individual Judgments (CP 465-97).

6. The trial court erred when it denied FFS's CR 59 Motion for a New Trial. See (CP 9617-18).

7. The trial court erred when it denied FFS's CR 60(b) Motion for Relief From Judgments. See (CP 9612-16) (order).

8. The trial court erred when it made Findings of Fact Nos. 1 through 12, in denying FFS's CR 60(b) Motion for Relief From Judgments. See (CP 9612-16) (order).[1]

9. The trial court erred when it granted plaintiffs' prevailing party attorney fees and costs petition. See (CP 9608-11) (judgment).

STATEMENT OF ISSUES

The following issues pertain to the assignments of error:

1. Change in Controlling Law. Whether judgments on jury verdicts in favor of plaintiffs on tort claims (in particular, wrongful discharge in violation of public policy) should be reversed and the claims dismissed with prejudice, when the Washington Supreme Court issues a decision after entry of the judgments that changes the controlling law and eliminates the basis for the plaintiffs' claims. (Assignments of Error Nos. 5, 7, 8 & 9.)

2. Prejudicial Evidentiary Rulings. Whether judgments on jury verdicts in favor of plaintiffs should be vacated, and a new trial ordered, when: (1) the trial court abused its discretion by admitting certain evidence; and (2) there is a substantial probability that this evidence affected the outcome of the jury's decision on the issue of liability. (Assignments of Error Nos. 1-5 & 9.)

3. Damages. Whether a trial court abuses its discretion in denying a defendant's motion for new trial, particularly on the issue of

[1]FFS elects to comply with the requirements of RAP 10.4(d) by attaching a copy of the trial court's order, containing the challenged findings as Ex. B of the Appendix to this Brief.

"front pay" in a wrongful discharge case, when the jury's front pay awards are not supported by the evidence or reasonable inferences from the evidence. (Assignments of Error Nos. 5, 6 & 9.)

I.

SUMMARY INTRODUCTION

This wrongful discharge dispute should be terminated by the dismissal of the plaintiffs' claims with prejudice, because the Washington Supreme Court's decision in Korslund v. Dyncorp Tri-Cities Services, Inc., 156 Wn.2d 168, 125 P.3d 119 (2005), eliminates the legal basis for those claims. And even if this Court concludes the Supreme Court's Korslund decision does not abrogate the plaintiffs' causes of action, this Court should vacate the plaintiffs' judgments and remand for a new trial, because of prejudicial error fatally tainting the jury's liability and damages determinations.

This case is familiar to this Court, having been before it twice before. See Brundridge v. Fluor Federal Services, Inc., 109 Wn. App. 347, 35 P.3d 389 (2001), rev. denied, 146 Wn.2d 1022, 92 P.3d 120 (2002); Brundridge v. Fluor Hanford, Inc., Cause No. 22058-3-III (Apr. 27, 2004) (unpublished opinion dismissing plaintiffs' interlocutory appeal as improvidently granted). To summarize: The 11 plaintiffs were employed as pipefitters, working at the Hanford nuclear reservation for defendant Fluor Federal Services and its predecessor, Fluor Daniel Northwest. In 1997, five of the plaintiffs were laid off. They claimed to have been the victims of retaliatory discharge for "blowing the whistle" on

supposedly unsafe work practices -- particularly a pipe pressure test that plaintiffs believed should have been conducted with a different valve. They sought relief under the administrative remedies provided for by the federal Energy Reorganization Act of 1974, and in February 1998 were reinstated pursuant to a settlement of their administrative complaint. Unfortunately, pipefitting work at Hanford had been declining for several years, and the plaintiffs were laid off again a few months later -- part of some 29 layoffs carried out by FFS between October 1996 and March 2003, a period which saw the level of pipefitter employment drop from 73 to 23 and the number of pipefitter hours drop from over 10,000 per month to under 6,000 per month.

The five 1997 complainants, however, refused to believe that their second layoff was anything more than continued retaliation for their "whistle blowing." They initiated a second administrative complaint, as did yet another group of pipefitters, who claimed their layoffs (in March and April 1998) were in retaliation for the support they had lent the original "whistleblowers." But before these administrative proceedings could be completed, all complainants quit the administrative process in favor of a state court "wrongful discharge in violation of public policy" tort action -- to be joined by yet one more plaintiff, making 11 claimants, in all.

Filed in 1999, the action came to trial in the Summer of 2005. The jury returned verdicts in favor of all plaintiffs, awarding damages (for economic and nonpecuniary losses) totaling $4,802,600. FFS sought

postjudgment relief under CR 59 from a portion of the damages awarded, and appealed the overall liability determinations to this Court.

While that appeal was being perfected, the Washington Supreme Court issued its decision in Korslund v. Dyncorp Tri-Cities Services, Inc., 156 Wn.2d 168, 125 P.3d 119 (2005). Reversing this Court's decision in Korslund v. Dyncorp Tri-Cities Services, Inc., 121 Wn. App. 295, 88 P.3d 966 (2004), the Supreme Court held the administrative remedies of the ERA were sufficiently adequate to protect public policy, and therefore foreclosed wrongful discharge tort claims. FFS promptly filed a motion under CR 60(b), to vacate the plaintiffs' judgments based on Korslund. The trial court (Hon. Carrie Runge) heard the motion, as well as FFS's CR 59 motion and plaintiffs' prevailing party attorney fees and costs application, in May 2006. The court denied FFS's motions and granted plaintiffs their fees and costs. FFS promptly appealed those rulings. As soon as the supplemental record was perfected, FFS moved for early consideration of a Motion on the Merits to Reverse, based on the Supreme Court's Korslund decision. Commissioner Joyce McKown denied that request, triggering preparation and submission of this Opening Brief on the merits.

- Reversal and Dismissal Based on KORSLUND. Although FFS has identified several errors warranting a new trial on liability and the damages element of "front pay," this Court need not reach those issues. Instead, this Court should reverse the plaintiffs' judgments and remand with directions for the dismissal of their action with prejudice, based on

the Supreme Court's Korslund decision. The safety and environmental policies at stake in the conduct of the "whistleblowing" plaintiffs and their plaintiff "supporters" are adequately protected by the ERA's administrative remedies. Accordingly, under Korslund, the plaintiffs can -- no longer -- state a valid cause of action for wrongful discharge. And as the Supreme Court's Korslund decision controls the disposition of this case, even though it was issued after the entry of the judgments on the jury verdict in favor of plaintiffs on their wrongful discharge claims, this Court should resolve this appeal on this threshold issue of law.

- Prejudicial Error Mandating a New Trial. The alternative to dismissal is vacation of the judgments and a remand for a new trial. To begin, the trial court erred in admitting evidence highly prejudicial to FFS. The outcome of the trial, as plaintiffs effectively acknowledged in their closing argument, and as the record amply confirms, turned on whether the jury believed a number of FFS witnesses, who described in detail why plaintiffs' suspicions about the reasons for their layoffs were, quite simply, groundless. The evidence at issue was admitted in violation of the rules of evidence, as well as equitable considerations created by prior rulings of the trial court, and these errors cannot be deemed harmless because of the substantial probability that they influenced the jury's resolution of the central question of witness credibility. In addition, the jury's "front pay" damage awards (totaling $1,395,450) should be vacated and the issue remanded for retrial, because the awards are not supported by the evidence.

II.

STATEMENT OF THE CASE

A. The Parties.

Plaintiffs and Respondents Scott Brundridge et al.,[2] sued their employer, Defendant and Appellant Fluor Federal Services, Inc. for the tort of wrongful discharge.[3] As described more fully below, plaintiffs worked as pipefitters on various projects at the Hanford nuclear reservation, and claimed FFS terminated their employment in retaliation either for "whistleblowing" or support for others' "whistleblowing."

B. Protections Against Retaliatory Discharge Provided by the Federal Energy Reorganization Act of 1974.

The United States Department of Labor ("DOL") and the Occupation Safety and Health Administration ("OSHA") have in place a comprehensive process for handling complaints brought under various statutes, including the Energy Reorganization Act of 1974 ("ERA"). See Department of Labor and Industries, OSHA Instruction, Whistleblower Investigations Manual, Effective Date August 22, 2003, pp. Abstract-1, 1-2,

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[2]The initial plaintiffs were nine individuals: (1) Brundridge himself, (2) Donald Hodgin, (3) Jessie Jaymes, (4) Clyde Killen, (5) Pedro Nicacio, (6) Shane O'Leary, (7) Raymond Richardson, (8) James Stull, and (9) Randall Walli. See Complaint for Damages (CP 9566-73). David Faubion was added by an amendment as a matter of right under CR 15(b). See First Amended Complaint at 3 (¶ 1.17) (CP 9541). Charles Cable was added later by stipulation. See Stipulation and Order (CP 7186-87).

[3]Plaintiffs originally sued a number of corporations and individuals. See Complaint at 2-3 (¶¶ 1.10-1.15) (CP 9567-68). FFS was later substituted for its predecessor in interest by amendment, see Order at 2 (¶ 2) (CP 7216), and plaintiffs ultimately went to the jury seeking damages solely from FFS.

available at http:/www.osha.gov/OshDoc/Directive_pdf/DIS_0-0_9.pdf. The Whistleblower Investigations Manual (the "Manual") is a 190 page document that "sets forth policy procedures and other information relative to the handling of discrimination complaints." Manual, p. Abstract-1. By the manual's terms, the remedies provided to those seeking relief under the various whistleblower statutes are designed to be expansive:

> Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the [Occupational Safety and Health] Act. Moreover, effective implementation of the Act and achievement of its goals depend in large measure upon the active but orderly participation of employees, individually and through their representatives, at every level of safety and health activity. It is essential that such participation and employee rights be preserved if the fundamental purposes of the Act are to be realized.

Manual, p. 1-1 (emphasis added).

Complaints brought pursuant to the ERA are investigated in the same fashion as OSHA complaints. Manual, p. 12-2. Thus, employees engaging in the administrative process pursuant to the ERA enjoy the same "wide range" of rights as under OSHA. Manual, pp. 1-1 to 1-2. The "minimum complaint information" a complainant must provide includes general contact information for both employee and employer, the date of the alleged adverse employment action, and a brief summary of the action (including prima facie elements of a violation). Manual, p. 2-1. To establish a prima facie case sufficient to trigger an investigation, the employee need only show that the alleged protected activities were a "contributing factor" in the adverse employment decision. 42 U.S.C. § 5851(b)(3)(A). The burden then shifts to the employer to proffer a

legitimate, nondiscriminatory reason for the adverse employment decision. While this burden-shifting paradigm is similar to the McDonnell Douglas[4] burden-shifting scheme applied in employment discrimination cases brought under statutes such as Title VII of the Civil Rights Act of 1964, under the federal system governing complaints brought under the ERA the employer must prove by "clear and convincing evidence" that it would have taken the same adverse employment action absent the protected acts. 42 U.S.C. § 5851(b)(3)(B).

If the DOL is not satisfied with the conclusiveness of the employer's showing, the DOL conducts a field investigation, obtaining information through such informal means as interviewing other employees, reviewing available documents, and talking to representatives of the employer. Manual, pp. 3-1 to 3-8; see 42 U.S.C. § 5851(b)(3)(B). Investigators are encouraged to check whether the employer had prior or current discrimination or other safety issues related to the complainant or employer. Manual, p. 3-1. There is no formal "discovery," and information obtained is not subject to evidence rules such as being provided under oath, requiring a foundation be established for statements given, or proving the authenticity of documents obtained. The information gathered in the investigation is subject to the same burden-shifting paradigm as with the original complaint. Based on the information the complainant provides and the investigator obtains, the employee again

[4]McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 1824-25, 36 L. Ed. 2d 668 (1973).

need only establish that a violation was a contributing factor. 42 U.S.C. § 5851(b)(3)(C). In turn, the employer again is subject to the "clear and convincing evidence" standard to prove that a violation did not occur. 42 U.S.C. § 5851(b)(3)(D).

Once the investigation is complete, the investigator issues a Final Investigation Report. Manual, p. 4-1. The investigator prepares the report and submits it to his or her supervisor, so that the supervisor can "ensure technical accuracy, thoroughness of the investigation, applicability of law, completeness of the report, and merits of the case." Manual, p. 4-1.

If the Regional Administrator makes a no-merit determination, the complainant can object to the determination. Manual, p. 4-3. If the Regional Administrator determines that a violation has occurred, the employer must take affirmative action to abate the violation and reinstate the complainant to his former position with compensation, including back pay; the employer may also be ordered to pay compensatory damages. 42 U.S.C. § 5851(b)(2)(B).[5] The complainant is also entitled to all costs reasonably incurred in connection with bringing the complaint, including attorney fees and expert witness fees. Id.[6]

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[5]Compensatory damages can include nonpecuniary losses (e.g., emotional distress), as well as financial loss. See, e.g., Blackburn v. Martin, 982 F.2d 125, 131-32 (9th Cir. 1992) (reversing refusal of Secretary of Labor to award damages for emotional distress for retaliatory discharge, in administrative proceeding brought under ERA).

[6]Objections to determinations involving ERA claims are heard de novo by a DOL Administrative Law Judge. Manual, p. 4-3. Parties who seek review are entitled to discovery (e.g., to take depositions). 5 U.S.C. § 556(c)(4).

C. Plaintiffs' Decision to Forego Federal Administrative Protections, in Favor of a State Court Wrongful Discharge Lawsuit.

There is no dispute that all plaintiffs were eligible for relief from retaliatory discharge, through the administrative remedies afforded by the ERA. Five plaintiffs -- Clyde Killen, Pedro Nicacio, Shane O'Leary, James Stull, and Randall Walli -- did pursue such relief after being laid off in 1997, alleging the layoffs were in retaliation for whistleblowing pertaining to a pipe pressure test earlier that year.[7] They accepted reinstatement of employment as part of a settlement in what has come to be known as the "Pipefitters I" proceeding. See Trial Ex. 2 (settlement agreement, February 23, 2004); see VRP (8/09/05) 2363:11-19 (Killen); VRP (8/02/05) 1750:24-1751:1-2 & 10-15, 1757:6-12 (Nicacio); VRP (8/03/05) 1834:25-1835:20 (O'Leary); VRP (8/09/05) 2314:17-21 (Stull); VRP (8/04/05) 2092:23-2093:11 (Walli) (all describing circumstances of reinstatement). For the subsequent discharges from employment, which form the basis for the present lawsuit, some plaintiffs initially sought relief through the ERA, but all abandoned those requests in favor of this lawsuit.[8]

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[7]See Trial Ex. 21 (redacted narrative of investigation conducted by the Federal Occupational Safety & Health Administration, of the allegations made by the five discharged plaintiffs, October 6, 1997) (copy attached as Ex. C of the Appendix to this Brief); Trial Ex. 2 (settlement agreement resolving the five plaintiffs' administrative relief proceeding, under which plaintiffs were offered reinstatement, February 23,1998) (copy attached as Ex. D of the Appendix to this Brief). FFS's challenge to the admission of Exhibit 21 is set forth at § IV.B.1, infra, at 40-57.

[8]Plaintiffs Brundridge, Hodgin, Jaymes, and Richardson, the self-described "supporters" of the original group of "whistleblowers," received (continued . . .)

D. Contending Theories of the Case.

That plaintiffs' employment with FFS was terminated by layoff is not in dispute.[9] The parties differ in their explanations for why plaintiffs were laid off. Following is a summary of each side's respective theory of the case, based on the opening statements and closing arguments of counsel. FFS does not dispute that, given the evidence admitted by the trial court, the jury's findings of wrongful discharge could be upheld under a substantial evidence standard of review.

1. Plaintiffs' Theory. During the late 1990's, FFS management was working to earn a "gold star" safety rating from the federal government's "Voluntary Protection" (or "VPP") safety program, because that rating would make the company eligible for additional federal contracts. See VRP (July 21, 2005) 302:10-18 (plaintiffs' opening

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(. . . continued)
an unfavorable investigative determination from the Occupational Safety & Health Administration in what has come to be known as the "Pipefitters II" proceeding. See (CP 10021-22) (letter from OSHA Acting Regional Administrator, Aug. 11, 1998). Plaintiffs Killen, Nicacio, O'Leary, Stull, and Walli (the original "Pipefitters I" complainants) received a favorable investigative determination report from OSHA in what has come to be known as the "Pipefitters III" proceeding. See (CP 10024-31) (letter from OSHA Regional Administrator, May 6, 1999). All withdrew their administrative relief requests in favor of pursuing their claims in the present action, which has come to be known as "Pipefitters IV." See (CP 10159-60) (withdrawal of relief request by Brundridge, Hodgin, Jaymes, and Richardson, March 13, 2000); (CP 10161-62) (withdrawal of relief request by Walli, Killen, Nicacio, O'Leary, and Stull, Mar. 13, 2000). Plaintiff Faubion did not initiate administrative proceedings.

[9]FFS has produced a chart, attached as Ex. E of the Appendix to this Brief, showing for each plaintiff the date of the layoff giving rise to his or her claim of wrongful discharge.

statement); VRP (Aug. 24, 2005) 3742:15-22 (plaintiffs' closing argument); see also VRP (Aug. 11, 2005) 2772:13-2773:7 (testimony of David Foucault, describing the VPP program). Management sought to discourage complaints about unsafe conditions, because those complaints could jeopardize the ability to maintain a clean paper safety record and (in turn) the company's ability to qualify for a VPP gold star. See VRP (July 21, 2005) 302:1-5 (plaintiffs' opening statement); VRP (Aug. 24, 2005) 3762:5-9 & 3763:14-20 (plaintiffs' closing argument). Of particular concern was the VPP benchmark of 1,000,000 man-hours without an accident, and management wanted to discourage any complaints that would jeopardize achieving that benchmark. VRP (Aug. 24, 2005) 3763:14-20 (plaintiffs' closing argument).

In the Spring of 1997, plaintiffs Killen, Nicacio, O'Leary, Stull, and Walli objected to carrying out a pressure test on a length of a pipe, because the test was to be conducted at a level exceeding the pressure rating of the valves to be used in the test. VRP (Aug. 24, 2005) 3746:23-3748:22 (plaintiffs' closing argument) (reading from Exhibit 21, the Oct. 1997 OSHA investigation report). Management decided to make an example of the group (the "Pipefitters I" group) to discourage other complaints, and therefore laid them off soon after the pressure test complaints were made. See VRP (Aug. 24, 2005) 3743:12-3753:11 (plaintiffs' closing argument) (reviewing the findings set forth in Exhibit 21, the October 1997 OSHA investigative report of the Pipefitter I complaints of retaliatory discharge). The group sought relief under the

ERA's administrative procedures, and in February 1998 were reinstated under a settlement entered into with FFS. See VRP (Aug. 24, 2005) 3764:20-3765:15 (plaintiffs' closing argument).

Management did not want to take back employees who "were making themselves pains in the butt on safety," and putting the VPP gold star rating at risk. See VRP (Aug. 24, 2005) 3765:3-12 (plaintiffs' closing argument). Management decided to manipulate the criteria for staffing projects to again get rid of the Pipefitter I group, as well as those pipefitters who had openly supported the group's reinstatement fight. See VRP (Aug. 24, 2005) 3773:2-10, 3774:9-3775:1 & 3782:3-20 (plaintiffs' closing argument). The "supporters" were laid off first, in March and April of 1998; the original complainants were laid off some six months later, in the Fall of 1998. See Ex. E of the Appendix to this Brief (showing layoff dates giving rise to each plaintiff's wrongful discharge claim). (The eleventh plaintiff, Charles Cable, would not be laid off until March of 2000, when he disclosed facts damaging to FFS in his deposition taken in this case. VRP (Aug. 24, 2005) 3795:17-3796:19 (plaintiffs' closing argument).)

FFS managers deny they dictated that plaintiffs be laid off; the many foremen involved all insist they made the layoff decisions for reasons of their own, consistent with sound staffing principles. In fact, all the layoff decisions conflicted with FFS's own criteria for staffing projects. VRP (Aug. 24, 2005) 3731:3-5 & 3732:9-24 (plaintiffs' closing argument). The managers lied to cover up their retaliation against those

making safety complaints, and those who supported making such complaints. See VRP (Aug. 24, 2005) 3769:11-16 (plaintiffs' closing argument). The foremen went along with management's lies to protect their own jobs. VRP (Aug. 24, 2005) 3771:16-19 (plaintiffs' closing argument).

2. FFS's Theory. FFS has no performance issues with any plaintiff; they are good people and would be welcome back at work tomorrow, if FFS had work for them to do. VRP (Aug. 24, 2005) 3845:1-7 (FFS closing argument). Plaintiffs have a sincere belief they have been mistreated. VRP (Aug. 24, 2005) 3812:1-3 (FFS closing argument). But they do not understand the Hanford contracting structure, FFS's organization structure, or construction budgeting, staffing or cost control. VRP (Aug. 24, 2005) 3811:14-20 (FFS closing argument).

Since FFS took over project work at Hanford, FFS has faced a declining need for pipefitters, because the amount of work to be done has declined. VRP (Aug. 24, 2005) 3826:17-19 (FFS closing argument). Pipefitter hours have declined from over 10,000 in October 1996 to under 6,000 by April 2003. See VRP (Aug. 24, 2005) 3826:17-22 (FFS closing argument); Closing Argument Illustrative Exhibit entitled "Pipefitter Hours: October 1996-March 2003" (copy attached as Ex. F-1 of the Appendix to this Brief).[10] Pipefitter employment declined from a peak of

[10]During closing argument, FFS counsel displayed via PowerPoint three color charts addressing: (1) pipefitter hours, (2) pipefitter hire and termination trends, and (3) reductions in pipefitter workforce during the period 1996-2003. See VRP (Aug. 24, 2005) 3826:17-3828:20. The (continued . . .)

73 in March 1997 to 23 in September 2003. VRP (Aug. 24, 2005) 3827:10-16 (FFS closing argument); see Closing Argument Illustrative Exhibit entitled "Pipefitter Hire & Termination Trends: October 1996-August 2005" (copy attached as Ex. F-2 of the Appendix to this Brief). As major projects were being completed, new projects were not coming in at a comparable rate, and that meant the total capability of the company had to get smaller, year by year. VRP (Aug. 24, 2005) 3827:22-25 (FFS closing argument).

The decline in pipefitter employment was reflected in the number of layoffs. VRP (Aug. 24, 2005) 3828:4-5. From October 1996 through March 2003, there were 29 layoffs involving 118 pipefitters. VRP (Aug. 24, 2005) 3828:5-20; see Closing Argument Illustrative Exhibit entitled "1996-2003 Reductions of Workforce" (copy attached as Ex. F-3 of the Appendix to this Brief).[11] Plaintiffs were laid off because their supervising foremen, confronted with the need to let someone go, made judgment calls that it was the plaintiffs in question who should go:

- Scott Brundridge was laid off at the direction of Robert Hickman, who chose to keep Dale Jones ("one of the best welders [Hickman] . . . had ever seen, and . . . the best guy available for

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(. . . continued)
exhibits were not objected to by plaintiffs, and there is no dispute that they were shown to the jury during FFS's closing argument. For the Court's convenience, color reproductions of the exhibits are attached as Exs. F-1 through F-3 of the Appendix to this Brief.

[11]Layoffs of plaintiffs are indicated by yellow boxing around the hardhat symbol, representing the layoff of an individual pipefitter. As the chart indicates, the dates were taken from Trial Exhibit 47.

[Hickman's] . . . crew"). VRP (Aug. 24, 2005) 3846:22-3847:12 (FFS closing argument).

- Donald Hodgin was laid off at the direction of Roger Tool, who chose to keep Norm Derrick, because his field work experience would be needed on the remaining work. VRP (Aug. 24, 2005) 3847:21-3848:9 (FFS closing argument).

- Jessie Jaymes was laid off at the direction of Ron Kirkpatrick, because she was among the least experienced members of his work team (having joined as a journeyman pipefitter only one year before). VRP (Aug. 24, 2005) 3848:12-22 (FFS closing argument).

- Ray Richardson was laid off at the direction of Mr. Kirkpatrick, who chose to keep David Faubion, because he was the better welder of the two. VRP (Aug. 24, 2005) 3848:23-3849:4 (FFS closing argument).

- David Faubion was later laid off at the direction of Mr. Kirkpatrick, because the project on which Faubion had worked was ending and there was no place to put him. VRP (Aug. 24, 2005) 3849:9-17 (FFS closing argument).

- Randall Walli was laid off at the direction of Mr. Kirkpatrick, because the project on which he was working was finished. VRP (Aug. 24, 2005) 3852:12-16 (FFS closing argument).

- Clyde Killen also was laid off at the direction of Mr. Kirkpatrick, because the project on which he was working was finished. VRP (Aug. 24, 2005) 3850:17-21 (FFS closing argument).

- Pedro Nicacio was laid off at the direction of Brad Desgroseillier, who kept on his crew the two people he believed would do the best job. VRP (Aug. 24, 2005) 3850:25-3851:5 (FFS closing argument).

- James Stull was laid off at the direction of Chuck Willoughby, because Stull was comparatively inexperienced at the Hanford site work. VRP (Aug. 24, 2005) 3851:11-12 & 3852:2-11 (FFS closing argument).

- Shane O'Leary was laid off at the direction of John Luchi, because O'Leary was comparatively inexperienced at the Hanford site work. VRP (Aug. 24, 2005) 3853:4-14 (FFS closing argument).

- Charles Cable was laid off at the direction of Mr. Tool, who chose Cable instead of Daniel Phillips (out of concern that Phillips, who had been a member of the 1997 layoff complainant group reinstated under the February 1998 settlement, would sue if he were laid off). VRP (Aug. 24, 2005) 3853:16-20 (FFS closing argument).

The layoffs were not governed by strict procedures, but were the result of a practice under which the craft leaders decide who goes and who stays. VRP (Aug. 24, 2005) 3841:10-15 (FFS closing argument). Plaintiffs insist FFS management retaliated against them because safety complaints supposedly could jeopardize VPP gold star status, but that assertion ignores that injuries could jeopardize meeting the one million ("no lost time") worked hours target necessary to earn gold star status. VRP (Aug. 24, 2005) 3862:5-14 (FFS closing argument). Plaintiffs'

theory also ignores FFS's multilayered safety infrastructure (weekly safety meetings, monthly craft safety meetings, employee safety representatives, collective bargaining agreement safety provisions, system testing, occurrence reports, critiques), which makes it well nigh impossible for a group of FFS managers to mount a campaign to discourage reporting of safety concerns. VRP (Aug. 24, 2005) 3862:23-3863:18 (FFS closing argument). Finally, for plaintiffs to prevail, one must find an enormous conspiracy of liars willing to facilitate the discharge of plaintiffs from their jobs, in retaliation for reporting safety violations or supporting those who make such reports; the existence of such a conspiracy simply defies common sense. VRP (Aug. 24, 2005) 3857:1-3858:24 (FFS closing argument).

E. The Verdict and the Judgments.

After a 27 day trial during July and August 2005, a Benton County Superior Court jury returned a verdict in favor of all plaintiffs, finding FFS had discharged each of them in violation of public policy. See (CP 498-507) (Jury Verdict Form) (copy attached as Ex. A of the Appendix to this Brief).[12] On September 2, 2005, separate judgments for each plaintiff were entered on the jury's verdict. See (CP 465-67) (Cable Judgment); (CP 468-70) (Faubion Judgment); (CP 471-73) (Walli Judgment); (CP 474-76) (Stull Judgment); (CP 477-79) (Richardson Judgment); (CP 480-82) (O'Leary Judgment); (CP 483-85) (Nicacio

[12]Damages for each plaintiff were awarded for back pay, front pay, and emotional distress. Those damages are summarized on a chart prepared by FFS, and attached as Ex. G of the Appendix to this Brief.

Judgment); (CP 486-88) (Killen Judgment); (CP 489-91) (Jaymes Judgment); (CP 492-94) (Hodgin Judgment); (CP 495-97) (Brundridge Judgment).

F. The Appeal.

FFS timely moved for relief under CR 59. See (CP 463-64) (motion); (CP 448-62) (memorandum in support); (CP 62-447) (supporting declaration of William R. Squires, with exhibits). On September 29, 2005, FFS filed its notice of appeal from the judgments on jury verdicts. See (CP 24-59) (notice of appeal).

FFS proceeded to timely perfect the record, filing a comprehensive designation of clerk's papers and arranging for transcription of the jury trial and several earlier proceedings. Then on December 22, 2005, the Washington Supreme Court issued its decision in Korslund v. Dyncorp Tri-Cities Services, Inc., 156 Wn.2d 168, 178, 125 P.3d 119 (2005). On January 11, 2006, FFS filed a motion under CR 60(b), asking the trial court to vacate plaintiffs' judgments and dismiss their case, with prejudice, based on the Supreme Court's Korslund decision. See (CP 11204-11307) (motion). That motion, along with FFS's posttrial CR 59 motion filed the previous September, and plaintiffs' petition for attorney fees and costs (filed Apr. 18, 2006), was heard by the trial court on May 5, 2006. See VRP (May 5, 2005). The court denied FFS's CR 60(b) and CR 59(b) relief requests, and awarded plaintiffs fees and costs totaling $1,451,516.20. See (CP 9612-16) (order denying CR 60(b) motion) (copy attached as Ex. B of the Appendix to this Brief); (CP 9617-18) (order

denying CR 59(b) motion); (CP 9608-11) (supplemental judgment on attorney fees, attaching related findings and conclusions). FFS appealed those rulings on May 9. See (CP 9577-9607) (supplemental notice of appeal). FFS filed its supplemental record designations on May 12, 2006, and moved to consolidate the two appeals. See Motion to Consolidate (filed May 16, 2006).

This Court granted consolidation. See Ruling (June 14, 2006). The trial court completed the supplemental clerk's papers on June 24, 2006, and the court reporter completed the transcript of the May 5 hearing on May 24, 2006. FFS then filed a Motion on the Merits to Reverse (based on the Supreme Court's decision in Korslund), and asked this Court to consider that motion prior to principal briefing. See Motion on the Merits to Reverse; Appellant's Motion for Consideration of a Motion on the Merits to Reverse Prior to Principal Briefing (both filed July 10, 2006). Commissioner Joyce McKown denied consideration of FFS's Motion on the Merits to Reverse prior to completion of principal briefing. FFS now submits its Opening Brief on the merits.

III.

STANDARD OF REVIEW

Evidentiary rulings are reviewed for abuse of discretion. E.g., Industrial Indem. Co. of the Northwest, Inc. v. Kallevig, 114 Wn.2d 907, 926, 792 P.2d 520 (1990). A trial court abuses its discretion when its discretionary decision is manifestly unreasonable or based upon untenable grounds or reasons. Id. (citations omitted).

Evidentiary error is grounds for reversal if the error results in prejudice. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Washington courts have repeatedly stated that "[e]rror will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial." E.g., Brown v. Spokane County Fire Protection Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983) (emphasis added). While Washington courts have not definitively determined if there is a presumption of prejudice for evidentiary errors, Washington courts have applied this presumption of prejudice to erroneous jury instructions. See, e.g., Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 211, 87 P.3d 757 (2004). A searching examination of the record is then made to determine if the error substantially affected the outcome. Id.

Confronting inconsistent case law within the Ninth Circuit on the review of evidentiary errors, the Ninth Circuit recently resolved the contradiction by adopting the rule that the court presumes prejudice once evidentiary error is proven. See Obrey v. Johnson, 400 F.3d 691, 700 (9th Cir. 2005). The Ninth Circuit cited three ways in which its decision to adopt the "presumption rule" was correct on the merits. Id. First, this presumption rule followed "'the original common-law harmless-error rule [that] put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.'" Id. (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). Second, each of the three possible

standards of appellate review (harmless beyond a reasonable doubt; high probability of harmlessness; and more probably than not harmless) implied a presumption of prejudice. Id. Third, under United States Supreme Court case law, the harmless error standard for civil cases must be consistent with the standard for nonconstitutional errors in criminal law, which puts the burden of persuasion on the party benefiting from the error. Id. at 701 (citing O'Neal v. McAninch, 513 U.S. 432, 441-42, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995) and Kotteakos v. United States, 328 U.S. 750, 764-65, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)).

FFS urges this Court to adopt the Obrey and Blaney harmless error standard for evidentiary errors, and apply a presumption of prejudice in evaluating errors found in this case. This standard complies with the common law rule and aligns the review of errors in civil suits for jury instructions and evidentiary errors. Fairness is at stake when an evidentiary error is challenged, and appellate courts "must determine whether the evidentiary error of which appellant complains has deprived him of the degree of certainty to which he is entitled." Obrey, 400 F.3d at 701.

Moreover, a presumption of error rule is consistent with the long established rule in Washington that harmless error only exists when the error is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." See, e.g., State v. Townsend, 142 Wn.2d 838, 848, 15 P.3d 145 (2001) (An erroneous jury instruction is harmless if it "is

trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.") (citations omitted). At the very least, prejudice should be found where there is a substantial probability that the error affected the outcome. See, e.g., State v. Bourgeois (supra), 133 Wn.2d at 403 (citations omitted) (nonconstitutional error is prejudicial if the outcome of the trial was affected "within reasonable probabilities"); see also Magana v. Hyundai Motor America, 123 Wn. App. 306, 319, 94 P.3d 987 (2004) (finding failure to instruct jury that certain evidence had been stricken to be prejudicial and warranting new trial, because of "the substantial possibility that the error affected the verdict").

The denial of a CR 59 motion for a new trial is also reviewed for abuse of discretion. E.g., Palmer v. Jensen, 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997). Review is less deferential when the trial court denies rather than grants a CR 59 motion, as the denial terminates the moving party's rights. Id. A court abuses its discretion by denying a motion for a new trial where the verdict is contrary to the evidence. Id.

IV.

ARGUMENT

A. The Washington Supreme Court's Decision in KORSLUND v. DYNCORP TRI-CITIES SERVICES Bars Plaintiffs' Wrongful Discharge Causes of Action, and Mandates Reversal of the Judgments and Dismissal of Plaintiffs' Claims With Prejudice.

Although FFS will demonstrate later in this Brief that a series of trial court errors warrants a new trial on plaintiffs' wrongful discharge claims, this Court need not reach and decide those issues because a

postjudgment change in controlling law -- the issuance of the Washington Supreme Court's decision in Korslund v. Dyncorp Tri-Cities Services, Inc., 156 Wn.2d 168, 178, 125 P.3d 119 (2005) -- mandates reversal of plaintiffs' judgments, and dismissal of their claims with prejudice.

1. The Supreme Court in KORSLUND Held That Persons Covered by the Energy Reorganization Act's Administrative Remedies May Not Bring Tort Claims for Wrongful Discharge. Washington's tort of wrongful discharge in violation of public policy is an exception to the general rule of "at will" employment. Korslund v. Dyncorp Tri-Cities Services, Inc., 156 Wn.2d 168, 178, 125 P.3d 119 (2005) ("Korslund II") (internal citations omitted). To prevail on this tort theory, a plaintiff must prove each of the following four elements:

> (1) the existence of a clear public policy (clarity element); (2) that discouraging the conduct in which he or she engaged would jeopardize the public policy (jeopardy element); and (3) that the public-policy-linked conduct caused the dismissal (causation element). Then, (4) the defendant must not be able to offer an overriding justification for the dismissal (absence of justification element).

Id. at 178 (internal citations, quotations, and italics omitted). To establish the "jeopardy element," a plaintiff must show two things: (1) "discouraging the conduct that he or she engaged in would jeopardize the public policy"; and (2) "other means of promoting the public policy are inadequate." Id. at 181-82.

In 2004, this Court issued its decision in Korslund v. Dyncorp Tri-Cities Services, Inc., 121 Wn. App. 295, 88 P.3d 966 (2004) ("Korslund I"). This Court held that the ERA's administrative remedies

did not "preempt" wrongful discharge tort claims for retaliation against whistleblowers. See 121 Wn. App. at 321. In December 2005, the Washington Supreme Court reversed this Court, holding that the ERA's remedies do preclude such claims, because they constitute an "other means" that adequately protects public policy. See Korslund II, 156 Wn.2d at 181-82.

The Supreme Court observed that the Energy Reorganization Act "provides that '[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . notified his employer of an alleged violation of [the ERA] . . . or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.).'" Korslund II, 156 Wn.2d at 181 (quoting 42 U.S.C. § 5851(a)(1)(A)). The court went on to state that (as more fully described in Section II.B of this Brief) the ERA "provides an administrative process for adjudicating whistleblower complaints and provides for orders to the violator to 'take affirmative action to abate the violation;' reinstatement of the complainant to his or her former position with the same compensation, terms and conditions of employment; back pay; compensatory damages; and attorney and expert witness fees." Id. at 182 (quoting 42 U.S.C. § 5851(b)(2)(B)). The Supreme Court concluded that this process constitutes a "comprehensive remedies" for employees who blow the whistle on conduct they believe threatens public policies protected by the ERA. Id.

The Supreme Court held that the availability of that remedy compelled dismissal of the Korslund plaintiffs' wrongful discharge claims as a matter of law, because the availability of that remedy meant the plaintiffs could not satisfy the second part of the "jeopardy" element. Id. The court observed that, "[w]hile the question whether the jeopardy element is satisfied generally involves a question of fact, the question whether adequate alternative means for promoting the public policy exist may present a question of law, i.e., where the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting the public policy." Id. (internal citation omitted). The Supreme Court concluded that the Korslund plaintiffs' wrongful discharge claims failed as a matter of law, because the public policies at issue were adequately protected by the ERA's administrative remedies.

2. The Supreme Court's Decision in KORSLUND Governs This Case and Mandates Dismissal of Plaintiffs' Wrongful Discharge Claims, Even Though the Supreme Court Did Not Issue Its Decision Until After the Entry of Judgments on the Jury Verdicts in Favor of Plaintiffs on Those Claims. The policies protected by the ERA expressly include "restoring, protecting, and enhancing environmental quality, and assur[ing] . . . public health and safety." 42 U.S.C. § 5801(a). There is no dispute that the plaintiffs in this case claim their whistleblowing and support of whistleblowing was done to protect public health and safety, and to protect the environment. Plaintiffs therefore were eligible to seek

relief under the ERA for FFS's alleged retaliatory conduct, and the adequacy of those remedies as determined by the Supreme Court in Korslund II mandates the reversal of their judgments and the dismissal of their claims, because -- like the plaintiffs in Korslund -- the plaintiffs in this case cannot satisfy the second part of the "jeopardy" element.

This result is compelled even though the Supreme Court's decision in Korslund II was not issued until entry of the judgments on the jury verdicts in favor of plaintiffs on their wrongful discharge claims. The principle mandating that result is so widely accepted that the applicability of new case law even trumps the law of the case doctrine. See RAP 2.5(c)(2) ("The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review"); Roberson v. Perez, 156 Wn.2d 33, 42, 123 P.3d 844 (2005) (citing RAP 2.5(c)(2), and noting that "application of the doctrine may be avoided where there has been an intervening change in controlling precedent between trial and appeal"); 1B James Wm. Moore, Moore's Federal Practice ¶ 0.404[1], at II-6 to II-7 (2d ed. 1996) ("It is clear, for example, that a decision of the Supreme Court directly in point, irreconcilable with the decision on the first appeal, and rendered in the interim, must be followed on the second appeal, despite the doctrine of the law of the case") (quoted in Roberson, 156 Wn.2d at 42). Accordingly, this Court should apply Korslund II, reverse the judgments on the jury's verdicts, and remand with directions that plaintiffs' action be dismissed with prejudice.

3. FFS Has Not Waived Its Entitlement to Relief Based on the Supreme Court's Decision in KORSLUND. Plaintiffs claim that FFS waived its right to argue that Korslund II has eliminated their causes of action. First, in their written opposition to FFS's CR 60 motion, plaintiffs argued that FFS waived any possible argument based on Korslund II by an admission supposedly made in the parties' "Pre-Trial Management Report." See Plaintiffs' Response to Defendant's CR 60 Motion ("Response") at 6-7 & 13 (CP 9681-82 & 9688). Specifically, plaintiffs rely on a portion of the report in which plaintiffs asked the following question, and FFS gave the following answer:

> Would discouraging the Plaintiffs from raising safety concerns jeopardize that public policy?
>
> Yes. Fluor will not dispute this issue.

Trial Management Report at 6 (CP 3092); see also Response at 6-7 (CP 9681-82) (citing and quoting the report).

That statement addresses only the first portion of the jeopardy element, not the second portion at issue in Korslund II. As discussed, a wrongful discharge plaintiff must establish both the first and second portions of the jeopardy element. See § IV.A.1, supra, at 25. In the Trial Management Report, FFS acknowledged that "discouraging the plaintiffs from raising safety concerns" could jeopardize the public policy, but FFS did not acknowledge that "other means of promoting the public policy are inadequate." At the time the Trial Management Report was submitted and the trial took place, this Court's decision in Korslund I precluded any argument by FFS based on the second portion of the jeopardy element.

jeopardy element. FFS could not by its silence have "waived" its right to argue that "other means of promoting the public policy are inadequate," given this Court's decision in Korslund I established that the only possible "other means" -- the ERA's administrative remedies -- did not preclude a wrongful discharge tort claim.[13]

Moreover, FFS was not silent as to the potential effect of the Supreme Court's review of this Court's decision in Korslund I. During the August 11, 2005 hearing on FFS's directed verdict motion, FFS cautioned that the Supreme Court's upcoming decision in Korslund II could negate all of plaintiffs' claims:

> There's arguments [on Korslund I] in front of the Court right now, Supreme Court, and they are considering the issue of, one, whether the ERA fully provides a public policy for the tort of wrongful discharge. . . . So whether or not that is or is not gonna be good law in two months doesn't really -- is still up at issue. If it turns out that the ERA is not a basis for a tort of public policy for the tort of wrongful discharge, not only will the supporter claims be killed, all eleven of the plaintiffs' claims will be killed. But take [Korslund I] for what it is. It's law out there and it's out there now.

VRP (Aug. 11, 2005) 2673, ll. 13-25.[14]

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[13]That FFS's silence cannot be deemed a waiver is underscored by the basic rules of waiver law, which require proof of "the intentional relinquishment of a known right." E.g., Vehicle/Vessel LLC v. Whitman County, 122 Wn. App. 770, 778, 95 P.3d 394 (Div. III 2004) (citing Jones v. Best, 134 Wn.2d 232, 241, 950 P.2d 1 (1998)). Here, going into trial, FFS knew it had no right to urge the ERA's administrative remedies as a bar to plaintiffs' wrongful discharge claims, under the (then) controlling authority of this Court's decision in Korslund I.

[14]FFS had previously informed the trial court that Korslund was pending before the Supreme Court at the time of trial. See FFS's Trial Brief at 9 n.15 (CP 2766).

Had Korslund II been decided before this case went to trial, FFS could have brought a motion for summary judgment on the basis of that change in the governing law. FFS did promptly bring a motion under CR 60(b) following the Supreme Court's decision in Korslund II, to give the trial court a first opportunity to address the effect of Korslund II and thereby achieve a cost-saving realignment of the parties on appeal. In short, FFS's conduct during the course of this case has been the antithesis of a party who can fairly be charged with seeking appellate relief on a ground waived by conduct before the trial court. The Washington Supreme Court has held it will "not fault petitioners for having omitted arguments that were essentially unavailable at the time." In re Domingo, 155 Wn.2d 356, 366, 119 P.3d 816 (2005) (internal quotations omitted) (emphasis the court's). As the court observed, "[W]here an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a significant change in the law for purposes of exemption from procedural bars." Id. At most, FFS omitted making an argument before the trial court that was unavailable at the time owing to the (then) controlling authority of this Court's decision in Korslund I, and that omission cannot support a valid finding of waiver.

Plaintiffs also argued, during the hearing on FFS's CR 60(b) motion, that FFS waived its ability to raise Korslund II on appeal, because FFS supposedly could have raised the "alternative remedies" issue under the authority of Hubbard v. Spokane County, 146 Wn.2d 699, 50 P.3d 602

(2002). See VRP (May 5, 2006) 22. Hubbard held that the sufficiency of the alternative remedy at issue in that particular case could not be determined on summary judgment, and therefore should be left to the finder of fact. See Hubbard, 146 Wn.2d at 717-18. This fact-specific holding plainly did not allow FFS to litigate the adequacy of the ERA's administrative remedies, in the face of this Court's unqualified holding in Korslund I that the ERA's administrative remedies did not preclude bringing a state law claim for wrongful discharge. Had Korslund I not been the law at the time of the trial, FFS might have been able to raise the issue of the ERA's remedies. But Korslund I was the law at that time, and nothing in Hubbard licensed FFS to argue a legal theory foreclosed by that law.

4. Plaintiffs' Factual Submissions Regarding Supposed Deficiencies in the ERA's Administrative Remedies Are Irrelevant Under the Supreme Court's Decision in KORSLUND. Plaintiffs also attempt to challenge the adequacy of the ERA's administrative remedies as applied to their claims. See Response to CR 60 Motion at 10 (CP 9685).[15] That is

[15]Their evidence consisted of the assertion of plaintiffs' counsel that his clients withdrew their ERA relief requests because of supposed procedural deficiencies unfavorable to claimants. See Declaration of John P. Sheridan in Support of Plaintiffs' Opposition to Defendants' [sic] CR 60 Motion at 2, ¶ 3 (CP 9693). But as FFS has shown (see § II.B, supra, at 7-10), the structure of the ERA's administrative remedies favors complainants in several respects. Congress wanted to encourage reports of violations to discourage unsafe and environmentally hazardous practices, and therefore made the administrative relief provisions as "pro claimant" as practicable. See Stone & Webster Engineering Corp. v. Herman, 115 F.3d 1568, 1572 (11th Cir. 1997) (discussing the "clear and convincing" burden placed on employers) ("For employers, this is a tough (continued . . .)

irrelevant under Korslund II. While the Supreme Court noted that "the question whether the jeopardy element is satisfied generally involves a question of fact," Korslund II held that availability of the public policy tort could be determined as a matter of law, "where the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting the public policy." Korslund II, 156 Wn.2d at 182-83 (internal citations omitted) (emphasis added).

Plaintiffs assert that "Korslund [II] contains no facts as to the adequacy of the ERA forum, because the parties presented no evidence on that issue," citing Justice Chambers' dissent in Korslund II. See Response at 4, n.6 (CP 9679). More precisely, Justice Chambers said that, in his view, the majority did not have an "appropriate factual basis" for making its adequacy determination. See Korslund II, 156 Wn.2d at 192 (Chambers, J., dissenting). The problem for plaintiffs, of course, is that Justice Chambers failed to persuade a majority of his colleagues to adopt his individualized, case-by-case, fact-based, "as applied" approach to determining the adequacy of the ERA's administrative remedies. Justice Madsen's opinion for the Court, joined by six of her colleagues, analyzed the structure of the ERA's administrative remedies, and concluded that those remedies provided an adequate means for safeguarding the public

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(. . . continued)
standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves").

policy interests at issue in that case (worker safety and preventing fraud), precluding a wrongful discharge claim. See Korslund, 156 Wn.2d at 183.

Indeed, the Supreme Court majority made clear that the ERA remedy's adequacy for a particular plaintiff was irrelevant -- the only issue that mattered was that "the public policy is adequately protected." Korslund II, 156 Wn.2d at 183 n.2. The court noted that "[o]ther jurisdictions addressing the adequacy of remedies under the ERA split on the issue whether they are adequate, but they tend to consider the adequacy of redress for the employee rather than whether the public policy is adequately protected." Id. (citing Masters v. Daniel Int'l Corp., 917 F.2d 455 (10th Cir. 1990), and Norris v. Lumbermen's Mutual Casualty Co., 881 F.2d 1144 (1st Cir. 1989), which take divergent views on the availability of a common law remedy). Ultimately, our Supreme Court declined to follow either case's line of reasoning -- even Norris's, which held the common law remedy unavailable because the administrative remedies "are indeed adequate to compensate an aggrieved employee." Under the approach adopted in Korslund, whether the "other means of promoting the public policy . . . be available" to the particular person seeking to bring the tort claim does not matter, "so long as the other means are adequate to safeguard the public policy." Id. at 183 (quoting Hubbard, 146 Wn.2d at 717).[16]

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[16]The inquiry to be made under the second portion of the jeopardy element closely resembles standing analysis under the antitrust laws. The antitrust laws were enacted for "the protection of competition, not competitors." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S.
(continued . . .)

Moreover, plaintiffs all but admitted before the trial court that they would have to persuade the Supreme Court itself to overrule Korslund II, based on the evidence plaintiffs offered to show the supposed inadequacy of the ERA's administrative remedies when applied to their claims. See Response at 15, n.15 (CP 9690). This Court, of course, should apply the law as it is now, leaving the task of reconsideration of Supreme Court decisions to the Supreme Court. See, e.g., State v. Hairston, 133 Wn.2d 534, 539, 946 P.2d 394 (1997) (citing State v. Gore, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984)) (noting that the Court of Appeals is bound by decisions of the state Supreme Court).[17]

5. KORSLUND Requires That Plaintiffs' Case Be Dismissed Regardless of What Sources of Public Policy They Claim. In their Response to FFS's CR 60(b) motion, plaintiffs attempted to distinguish Korslund II by asserting they have pointed to other sources for the public

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(. . . continued)
477, 485, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed, 2d 510 (1962)). In Brunswick, the plaintiff could not recover antitrust damages because the injury from the acquisition of failing bowling centers was not to competition but to plaintiff itself, who was deprived of the benefits of increased concentration in the bowling center market from failing bowling centers closing. See 429 U.S. at 488; see also United States v. Syufy Enters., 903 F.2d 659, 668 (9th Cir. 1990) (denying an antitrust claim because the defendant deterred competition by supplying a better product at lower prices and benefited consumers, although the company's competitors suffered losses).

[17]Although this principle should apply with equal force to a trial court, here the trial court apparently felt free to anticipate a decision by the Supreme Court abrogating its holding in Korslund II. See VRP (May 5, 2006) 37 (court's oral ruling); Order Denying CR 60(b) Motion at 3-4 (CP 9614-15).

policies at issue in this case in addition to the ERA, specifically noting that they raised environmental protection issues under state law, in addition to safety issues. See Response at 13-15 (CP 9688-90). Those distinctions are patently makeweight.

First, the ERA explicitly states that, in addition to "assur[ing] public health and safety," one of its core purposes is "to advance the goals of restoring, protecting, and enhancing environmental quality[.]" 42 U.S.C. § 5801(a). Second, it should not matter how many other statutes or regulations plaintiffs can point to as putative sources of the public policies they sought to vindicate by their actions. A lengthy list of sources for the public policy at issue only serves to establish the public policy tort's "clarity element" with the greatest possible force and emphasis. Korslund II, however, reaffirms that failure to satisfy the second part of the jeopardy element bars parties from bringing a cause of action for wrongful discharge in violation of public policy, however clear the commitment to that policy may be. Here, all plaintiffs had an alternative adequate remedy under the ERA, and Korslund II establishes that availability of that remedy eliminates their causes of action.[18]

[18]Although plaintiffs made much of the well known disputes between federal and state authorities over the ongoing Hanford cleanup, see Response at 9-10 (CP 9684-85), plaintiffs offered no evidence to show either that their environmental concerns were factually distinct from the circumstances giving rise to their safety concerns, or that the ERA administrative remedies process somehow discounts state environmental concerns.

6. There Is No "Imminent Harm" Exception to the Rule Laid Down by the Supreme Court in KORSLUND, nor Would Such an Exception Apply in This Case. Plaintiffs claim that Ellis v. City of Seattle, 142 Wn.2d 450, 13 P.3d 1065 (2001), provides them with a separate public policy cause of action. See Response at 15 (CP 9690). Ellis states that, "[i]n the context of concerns regarding public safety where imminent harm is present, we hold the jeopardy prong . . . may be established if an employee has an objectively reasonable belief the law may be violated in the absence of his or her action." Ellis, 142 Wn.2d at 461. Plaintiffs argue that Ellis should apply here, because they "reasonably believed the installation of the underrated valves would cause serious harm to the environment and the workers nearby." Response at 15 (CP 9690).

Once again plaintiffs attempt to reargue a point Justice Chambers raised in his Korslund II dissent. See Korslund II 156 Wn.2d at 194-95 (Chambers, J., dissenting). That dissent plainly did not persuade the Supreme Court's majority that Ellis should somehow create a separate "public policy" cause of action, exempt from the jeopardy element's second prong. Moreover, even if the "imminent harm" theory were not foreclosed as a matter of law by Korslund II, plaintiffs cannot satisfy their own "imminence" standard as a matter of law. Plaintiffs' claims of wrongful discharge arise out of what they claim to be retaliatory discharges occurring long after the valve dispute, which took place in 1997. See Plaintiffs' Trial Brief at 11-12 (CP 2616-17). Those plaintiffs

who might have laid some claim to a threat of "imminent harm" initially took their claims to the administrative forum established under the ERA, and it was there they did find relief. See Trial Brief at 13-14 & 17-18 (CP 2618-19 & 2622-23). None of the discharges at issue here occurred in response to similar "imminent" circumstances. In sum, "imminence" clearly cannot avoid dismissal of plaintiffs' case, both as a matter of the rule laid down by Korslund and as a matter of the undisputed facts of this case.

7. The ERA's Administrative Remedies Govern All Legitimate Claims Plaintiffs Could Make Based on Both Federal and State Public Policies. Finally, plaintiffs claim that the ERA's administrative remedies are not available to protect state environmental policies, which they contend constitute an element of their wrongful discharge claim independent of the worker safety policies they admit are protected by the ERA's remedies. See Response at 8-10 (CP 9683-85). Plaintiffs' claims rest on a patently implausible reading of the ERA.

As plaintiffs note, the Tri-Party Agreement ("TPA") outlines how authority over hazardous waste disposal at Hanford is shared among the federal Department of Energy, federal Environmental Protection Agency, and state Department of Ecology. See id. at 8 (CP 9683); (CP 9822-9903) (copy of the TPA). The purpose of the TPA and its federal enabling legislation is to relieve tension and resolve conflicts between federal and state authority and standards designed to achieve the ERA's policies and goals. See, e.g., United States v. Manning, 434 F. Supp. 2d 988, 998,

1023 (E.D. Wash. 2006). As FFS has pointed out, the public policies the ERA protects expressly include "restoring, protecting, and enhancing environmental quality" as well as "assur[ing] public health and safety." 42 U.S.C. § 5801(a); see § IV.A.5, supra, at 36. In turn, the ERA's whistleblower protection provisions are intended to protect those policies. See 42 U.S.C. § 5851(b)(2)(B). Nothing in the ERA so much as hints that its protections for whistleblowers are to be limited to claims involving violations only of "federal" standards designed to achieve the ERA's policies and goals.[19] That the state and the federal governments have had their own disputes over the proper course for disposing of hazardous waste at Hanford, see Response at 8-11 (CP 9683-85), is simply irrelevant -- the ERA's remedies protect complaints regarding "environmental quality" as well as "assur[ing] public health and safety," and by plaintiffs' own lights, their complaints most assuredly concerned both.

8. This Court Need Not Review the Trial Court's CR 60(b) Findings in Order to Reach and Decide Whether the Supreme Court's Decision in KORSLUND Compels Dismissal of Plaintiffs' Claims. Although FFS has appealed from the trial court's denial of FFS's CR 60(b) motion, and has assigned error to that ruling and the trial court's findings

[19]Plaintiffs' crabbed reading of the ERA, which would deprive whistleblowers of the statute's remedies by the happenstance of whether a standard reported to have been violated was "state" or "federal" in origin under the Tri-Party Agreement, conflicts with their own statement to the trial court, urging that the ERA's whistleblower remedies provisions are, and should be "interpreted broadly[.]" VRP (Aug. 11, 2006) 2690, ll. 11-17 (plaintiffs' argument in opposition to FFS's motion for a directed verdict).

included in that ruling, this Court need not review the trial court's findings to resolve whether Korslund II mandates dismissal of plaintiffs' claims. FFS moved under CR 60(b) to give the trial court the opportunity to change its decision; the parties then could have been realigned and FFS would have been spared the expense of a continuing supersedeas obligation. At this stage of the proceedings, realignment is a moot point, while supersedeas expenses can be handled through the prevailing party provisions of RAP 14.3(a). Whether Korslund II governs resolution of this appeal is an issue for this Court to decide based on principles identified earlier in this Brief (Section IV.A.1, supra at 25-27), and plaintiffs cannot use the trial court's denial of FFS's CR 60(b) motion to shield themselves from the controlling authority of Korslund II.[20]

B. The Trial Court Erred in Admitting Certain Evidence, and Those Errors Warrant a New Trial on Plaintiffs' Wrongful Discharge Claims.

In the event this Court should decline to dismiss plaintiffs' claims on the authority of the Supreme Court's Korslund decision, the Court should order a new trial on plaintiffs' wrongful discharge claims. In this case, the jury's view of credibility of key witnesses was central to the

[20]Nor does it make any difference that the trial court's denial of FFS's CR 60(b) motion includes several matters denominated "findings of fact." Out of an abundance of caution, FFS has assigned error to those findings, to avoid any technical "verity on appeal" claim by plaintiffs. See, e.g., Rivers v. Washington State Conference of Mason Contractors, 135 Wn.2d 674, 692, 41 P.3d 1175 (2002). In any event, the trial court's findings either are legally irrelevant, or conclusions of law dressed up as findings and entitled to no deference. See, e.g., City of Tacoma v. William Rogers Co., Inc., 148 Wn.2d 169, 181, 60 P.3d 79 (2002).

outcome[21] and the trial court hopelessly prejudiced that outcome, by admitting documentary and testimonial evidence of a kind likely to contaminate the jury's resolution of the central issue of credibility.

1. The October 1997 OSHA Report. As previously described by FFS in Section II.C of this Brief (at page 11), plaintiffs Killen, Nicacio, O'Leary, Stull, and Walli initiated an administrative challenge to their 1997 layoffs. The federal Occupational Safety and Health Administration conducted an investigation, and in October 1997 issued a report (signed by Mr. Richard S. Terrill, OSHA's Acting Regional Administrator, whose office is located in Seattle). See Ex. 21 (redacted version of report); (CP 2113-18) (unredacted version of report) (copies of each version

[21]Fluor introduced testimony to support all elements of its case. All foremen testified to the underlying reasons for the layoffs at issue. See VRP (July 29, 2005) (Hickman on Brundridge's layoff) 1356:2-11; VRP (Aug. 16, 2005) (Tool on Hodgin's layoff) 3356:2-15; VRP (Aug. 18, 2005) (Kirkpatrick on layoffs) 3545:8-14 (Jaymes), 3545:22-3546:5 (Richardson), 3554:5-17 (Faubion); 3556:20-3557:8 (Walli and Killen); VRP (Aug. 16, 2005) (Desgroseillier on Nicacio's layoff) 3287:20-3288:2; VRP (Aug. 2, 2005) (Willoughby on Stull's layoff) 1718:19-25, 1740:2-4; VRP (July 25, 2006) (Nichols on O'Leary's layoff) 812:5-16; VRP (Aug. 16, 2005) (Tool on Cable's layoff) 3364:13-22. Management testified to the financial situation, including the decrease in construction funding levels, which decreased the number of work hours available. See e.g., VRP (Aug. 11, 2005) (Foucault) 2776:12-2779:17 (reduction in hours); VRP (Aug. 12, 2005) (Holladay) 2964:7-22 (fluctuation in funding levels precipitated layoffs); VRP (Aug. 16, 2005) (Nichols) 3279:11-23 (budget and material problems); VRP (Aug. 17, 2005) (Maki) 3490:9-24 (not enough work to go around); see also Trial Exhibits 47, 83, 85. Further, there was extensive testimony regarding the multilayered safety structure in place at the site. See, e.g., VRP (July 29, 2005) (Hickman) 1386:8-12 (weekly safety meetings); VRP (Aug. 22, 2005) (Arslanian) 3608:12-14 (quality assurance); VRP (Aug. 22, 2005) (Stair) 3658:25-3659:17 (safety hold points and occurrence reports); VRP (Aug. 11, 2005) (Foucault) 2773:8-2774:14 (Voluntary Protection Program); VRP (Aug. 11, 2005) (Foucault) 2774:15-2775:7 (stop work cards).

attached as Exs. C & H, respectively, of the Appendix to this Brief). The report found that the complainants had "engaged in protected activity" by voicing "safety and health concerns to management" (most notably, objecting to the Spring 1997 pipe pressure test because of the proposed use of an "underrated valve"), and that FFS (then known as Fluor Daniel Northwest) failed to "demonstrate . . . by clear and convincing evidence that the complainants would have been laid off in the absence of their protected activity." (CP 2115 & 2117) (unredacted version of the report at 3 & 5).

When this case was set to be tried in the Spring of 2003 before the Hon. Carolyn Brown, FFS had moved in limine to exclude the OSHA report, and to bar plaintiffs from attempting to litigate the facts underlying their 1997 ERA complaint (particularly those concerning the pressure test controversy).[22] In turn, plaintiffs had "cross-moved" for admission of all three OSHA reports (generated during Pipefitters I, II, and III), redacting what plaintiffs referred to as "monetary references." See (CP 6555-56) (plaintiffs' motion in limine Nos. 1 & 2); (CP 6530-36) (supporting

[22]FFS originally moved in April 2001, see (CP 6799-6800) (motion); (CP 6774-83) (supporting memorandum at 7-16), but the trial court never ruled on, the motions, because of an intervening dismissal based on federal preemption, which this Court reversed in a published decision issued that December. See Brundridge v. Fluor Federal Services, Inc., 109 Wn. App. 347, 35 P.3d 389 (2001), rev. denied, 146 Wn.2d 1022, 92 P.3d 120 (2002) ("Brundridge I"). When the case returned to the trial court, FFS renewed the motions (and also brought several additional motions, in light of developments after the initial 2001 trial date). See (CP 5599-5601) (FFS's second set of motions in limine at 1-3) (noting pendency of the prior motions, and describing the scope of the new relief requests).

memorandum at 6-12).[23] FFS objected to the admissibility of the reports on several grounds, including hearsay and undue prejudice. See (CP 6781-83) (memorandum discussion of hearsay and ER 403 grounds for excluding the reports). FFS's counsel succinctly summarized the problem to Judge Carolyn Brown, during the May 2003 hearing on the parties' in limine motions:

> . . . these materials are pure hearsay, put together by a person whose qualifications we know nothing about, who [sic] the plaintiffs have told us, helpfully, that they have no intention of putting on the stand, so that the author of these materials can be cross-examined to determine what in these reports has some actual relevance or factual background. These are materials that should not be admitted, to the obvious prejudice of everyone concerned.

VRP (May 2, 2003) 4:25-5:18 (CP 4709-10). Judge Brown agreed:

> I do not believe that this is material the jury needs to consider. I think that there are other ways of getting what you need to get at[.]

VRP (May 2, 2003) 5:15-17 (CP 4710).

Regarding the facts underlying the 1997 complaint (the "Pipefitter I" dispute), FFS pointed out that the parties had agreed to the admission of a redacted form of the 1998 settlement agreement, thereby establishing for the jury the existence of the earlier dispute and its resolution, as well as the rights of the Pipefitter I complainants to

[23]Although plaintiffs stated they could accept an instruction that the reports should not be used to "make determinations of liability," VRP (May 2, 2003) 4:8-11 (CP 4709), plaintiffs insisted that the reports were relevant for the "facts" contained in the reports. (CP 6107) (plaintiffs' reply memorandum at 3).

reinstatement. See (CP 6744) (Memorandum at 7).[24] Noting that plaintiffs proposed to introduce a "large volume of documents" relating solely to the facts of the underlying dispute in Pipefitter I,[25] FFS objected to those documents as both irrelevant ("[n]one . . . relate to how the defendants selected people for layoff when the initial group of claimants returned to work under the settlement agreement, nor do they supply any necessary information to determine how Messrs. Cable, Faubion, Nicacio, Walli, Stull, O'Leary, and Killen were selected for layoff between six and eighteen months later"), and unduly prejudicial ("they do include . . . argumentative and highly charged materials that relate to Hanford, its efforts to clean up wastes held on the site, and the now settled claims of four [sic] of the plaintiffs that related to their initial layoff"). See (CP 6775) (Memorandum at 8).

When plaintiffs insisted they would come across to the jury as "just a bunch of silly men and women coming to court on a theory that makes no sense," if they were not allowed to show that the original group of complainants had reasonably refused to carry out the pressure test in 1997, see VRP (May 2, 2003) 36:17-37:5 (CP 4741-42), Judge Brown expressed her concern that exploring the underlying facts of Pipefitter I in the fashion plaintiffs proposed would unduly prolong the trial. See VRP

[24]Ultimately, the redacted form of the settlement agreement would be admitted during the 2005 trial, as Trial Exhibit 2. (A copy of this exhibit is attached as Ex. D of the Appendix to this Brief.)

[25]FFS observed that these documents included "at a minimum" a total of 40 of plaintiffs' proposed exhibits. See (CP 6775) (memorandum at 8) (identifying specific exhibit numbers).

(May 2, 2003) 37:8-14 (CP 4742). And when plaintiffs' response confirmed that they did intend to explore the details of the underlying pressure test incident ("introducing testimony about the nature of the valve[,] about what an expert would do in their situation[,] [a]bout what the normal practice is in the business"), Judge Brown responded by granting FFS's motion:

> It's going to be like opening a can of worms and starting with the atomic bomb all over again. I'm not going to allow it.

Compare VRP (May 2, 2005) 37:15-25 (CP 4742) (plaintiffs' explanation for and description of proposed testimony) with VRP (May 2, 2005) 39:2-5 (CP 4744) (court's ruling) (emphasis added).

Plaintiffs sought discretionary review of this (and another, unrelated) ruling. See (CP 5370-86) (Notice for Discretionary Review); (CP 4769-4701) (Motion for Discretionary Review). Commissioner McKown granted discretionary review, see (CP 5161-62) (Commissioner's Ruling), but the panel on the merits concluded following oral argument that interlocutory review was not appropriate, and dismissed plaintiffs' appeal as improvidently granted. See Unpublished Opinion in Brundridge v. Fluor Hanford, Inc., Cause No. 22058-3-III (Apr. 27, 2004) (opinion per Kato, J., joined by Kurtz and Schultheis, JJ.) (CP 4703-04) ("Brundridge II"). By that time, Judge Brown had retired from the bench, and upon restoration of trial court jurisdiction the case was reassigned to Judge Cameron Mitchell, who set a trial date of October 25, 2004. See (CP 5136) (Notice of Trial Date, issued Aug. 9, 2004).

That September, Judge Mitchell learned that plaintiff Pedro Nicacio was "Pete" Nicacio, with whom Judge Mitchell had maintained a social relationship since high school. See VRP (Sept. 29, 2004) 4:8-16 (statement of Judge Mitchell). The judge notified counsel,[26] and expressed his willingness to recuse himself if either side requested he do so. VRP (Sept. 29, 2004) 5:3-5 (statement of Judge Mitchell). After consultation with his client, counsel for FFS requested that Judge Mitchell recuse himself, which he did on October 1, 2004. See VRP (Sept. 29, 2004) 5:6-13 (statement of counsel for FFS); (CP 4546) (recusal letter from Judge Mitchell). On October 8, 2004, the case was reassigned to Judge Carrie Runge. (CP 4547) (notice of reassignment, dated Oct. 8, 2004); see VRP (Oct. 7, 2004) (special telephonic hearing before Judge Runge, to address any issues pertaining to her possible assignment of the case).

Several weeks before, FFS had moved to strike witnesses and exhibits listed by plaintiffs on their disclosure statements, because those witnesses and documents violated Judge Brown's in limine ruling barring litigation of the facts underlying the Pipefitters I dispute. See (CP 5134-35) (Motion); (CP 4656-71) (Memorandum in Support). Judge Runge stated her intention to honor Judge Brown's in limine rulings, but

[26]During the hearing when Judge Mitchell disclosed his realization that Pedro Nicacio was "Pete" Nicacio, plaintiffs' counsel revealed that plaintiffs had made the same connection some time before. See VRP (Sept. 29, 2004) 5:25-6:5. Plaintiffs apparently had no intention of disclosing that information, and it was only the judge's realization of the connection that brought the matter to FFS's attention.

declined to rule on FFS's motion, expressing the need to study the record in order to determine the intended scope of Judge Brown's ruling. See VRP (Oct. 8, 2004) 18:3-20 & 29:4-30:7. Then, having "taken the opportunity to review the transcript of the May 2003 [in limine] proceedings before Judge Brown[,]" Judge Runge expressly reaffirmed the scope of Judge Brown's ruling on litigation of the facts of Pipefitter I, as urged by FFS:

> With regards to Judge Brown's ruling reference [sic] *Pipefitters I*, the only evidence that will be admissible is the settlement agreement with the amount of the actual settlement redacted from the document. As indicated by Judge Brown, the plaintiffs will not be allowed to relitigate *Pipefitters I*.

(CP 4543) (letter from the court dated Nov. 15, 2004, at 1) (emphasis added). But Judge Runge took no specific action on FFS's motion to strike.

Judge Runge struck the October trial setting, and set a new trial commencement date of July 11, 2005. See VRP (Oct. 8, 2004) 25:17-25 & 30:17; (CP 4543-45) (letter from the court dated Nov. 15, 2004, enclosing "tentative" civil case schedule order but stating that July 11, 2005 is anticipated to be "the date" for commencement of trial (emphasis the court's)). When plaintiffs continued to ignore the limitation on the scope of the issues to be tried set by Judge Brown and reaffirmed by Judge Runge, FFS renewed its motion to strike.[27] That (and several

[27]FFS filed separate motions, the first to strike witnesses (filed March 31, 2005), and the second to strike exhibits (on April 15, 2005). See (CP 4365) (motion to strike witnesses); (CP 4363-64) (supporting memorandum); (CP 4179-4352) (supporting declaration of counsel); (continued . . .)

other matters) were heard on April 22, 2005. See VRP (April 22, 2005). At one point, Judge Runge frankly acknowledged her lack of experience with complex civil actions, and offered that she "may . . . ha[ve] been lax in taking control and trying to assist counsel in managing th[e] case[.]" VRP (Apr. 22, 2005) 16:21-24 (comments by the court). But still hesitant about doing anything that would prevent plaintiffs from "present[ing] what they feel they need to present for their case," as well a what they might "need to be able to make a record[,]" VRP (Apr. 22, 2005) 19:5-9 (comments by the court), the court took no action on the motions to strike, deferring the matters to the pretrial status conference.[28]

One week before the pretrial conference, plaintiffs moved to "define [the] scope" of admissible Pipefitter I evidence. See (CP 2578) (motion); (CP 2566-77) (supporting memorandum). Seizing on Judge Brown's May 2003 statement that "I didn't say that [the Pipefitter I group] . . . couldn't talk about . . . their reasonable apprehension [of] whatever might have been wrong[,]" plaintiffs asked that plaintiff Randy Walli be "designated to outline the events of Pipefitter I" to "provide the jury with the outline of events necessary to understand the later retaliation without

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(. . . continued)
(CP 4046-47) (motion to strike exhibits excluded by previous in limine rulings, and to preclude certain expert testimony and rebuttal witnesses); (CP 3623-32) (supporting memorandum); (CP 3633-4045 (supporting declaration of counsel).

[28]The court did enter an order vacating an amended scheduling order, following a motion for relief from the amendment based on a scheduling mix-up that plaintiffs' counsel represented prevented him from appearing at a hearing on March 11, when the amendment was entered. See (CP 4164-74) (motion for relief); (CP 3134-35) (order).

litigating the case." See (CP 2565-67) (plaintiffs' memorandum at 1-2); see also VRP (May 2, 2003) 47:25-48:1-3; (CP 4752-53) (comments of Judge Brown). In response, FFS pointed out that, besides taking Judge Brown out of context, plaintiffs' motion contradicted their prior representation to the Court of Appeals that Judge Brown's ruling barred the very evidence plaintiffs now claimed Judge Brown intended to allow them to introduce. See (CP 2398) (FFS memorandum in opposition at 5, n.2, citing both the May 2, 2003 transcript and plaintiffs' Motion for Discretionary Review); see also VRP (May 2, 2003) 48:12-49:7 (further argument by FFS counsel and Judge Brown's ruling) (CP 4753-54); (CP 4689) (Motion for Discretionary Review at 6) (characterizing Judge Brown's ruling as "exclud[ing] all evidence concerning the refusing pipefitters' opposition and objection to Defendant's 1997 directive to use a certain valve"). FFS also cautioned that granting plaintiffs' motion would result in precisely the unfair prejudicial effects (e.g., encouraging the jury to find against FFS because its 1997 conduct demonstrates the company is by nature a "retaliator") that underlay Judge Brown's original decision to bar litigating the Pipefitter I controversy. See (CP 2399-2400) (memorandum at 6-7) (addressing why Judge Brown was right to exclude evidence of the underlying controversy).

During the pretrial conference, the parties addressed plaintiffs' "scope" motion at some length. See VRP (June 28, 2005) 33:22-72:14 (arguments of counsel, and comments by the court). Judge Runge expressed her belief that the jury needed "some sort of context" within

which to place the fact of the 1998 Pipefitters I settlement; because the settlement agreement "in and of itself" does not say "plaintiffs raised a safety concern," Judge Runge had concluded that the jury needed some "very limited background information" concerning the circumstances giving rise to the settlement agreement. VRP (June 28, 2005) 53:8-23 (comments of the court). In response, FFS proposed that the jury be given a "brief objective statement that provides th[at] context[.]" VRP (June 28, 2005) 54:13-16 (comments of FFS counsel). FFS also cautioned that if agreement on such a statement could not be reached, the only alternative would be "to try Pipefitter I" -- which FFS was not prepared to do, and for which FFS would need a continuance:

> We can't agree to do this through witnesses. If they're gonna put up witnesses, then we have to put up witnesses. That's the way this process works. And we can't have the jury listening to their witnesses and then not be able to offer our side. . . . If this change is made, it is a major change. We're going to require time in order to prepare for it. . . . Mr. Sheridan can try to do it in two hours with one witness. That's not the way we're gonna be able to do it. We're gonna have to offer the full monte.

VRP (June 28, 2005) 57:10-23 (comments of counsel). Plaintiffs disagreed that a continuance would be necessary if testimony were received, claiming FFS was prepared to try Pipefitter I -- a claim FFS categorically denied. VRP (June 28, 2005) 58:3-15 (exchange between counsel). After an extended discussion, the court directed the parties to "try to propose a neutral statement to be provided to the jury that gives the jury a background or a context with which to consider" the settlement agreement, declining ("at this point") to find testimony to be necessary to achieve this goal. VRP (June 28, 2005) 71:3-17 (ruling of the court).

The parties and the court again took up the issue on July 8. Plaintiffs had filed a collection of 30 "statement[s] of fact . . .," which plaintiffs proposed FFS should either admit or "counter." See (CP 2104-08) (plaintiffs' "Statement of Relevant Facts Regarding 1997 Time Frame") (copy attached as Ex. I of the Appendix to this Brief). In fact, plaintiffs had determined early on not to participate in formulating any sort of agreed statement, and instead would propose admission of the 1997 OSHA investigation report -- which Judge Brown had excluded in May 2003. See (CP 2140-41) (e-mail exchange between counsel dated June 29, 2005). Just two days after the June 8 pretrial conference, plaintiffs filed their motion papers urging the report's admission, see (CP 2229) (motion); (CP 2224-28) (supporting memorandum), (CP 2210-23) (supporting declaration), proposing to redact only the formal conclusions and remedial recommendations. Compare (CP 2212-17) (unredacted copy) with (CP 2218-23) (redacted copy).[29] FFS opposed plaintiffs' motion, see (CP 2157-64) (opposition memorandum), and submitted two proposed neutral statements of its own -- one based on the OSHA report narrative but modified to make it a neutral background statement, and an alternative based on plaintiffs' statement of the same facts while including a counterstatement of FFS's contentions. See (CP 2148-53) (statement based on OSHA narrative); (CP 2155-56)

[29]A few days later, plaintiffs submitted a certified copy of the report. See (CP 2112-18) (copy with attestation of authenticity). FFS has attached that version of the unredacted report as Ex. H of the Appendix to this Brief.

(alternative statement) (copies attached as Exs. J & K, respectively, of the Appendix to this Brief).

Initially, Judge Runge ruled she would adhere to Judge Brown's ruling and not admit the OSHA report, recognizing that "a letter by this investigator signed by the acting regional administrator, somehow from this Court's perspective looks like it bolsters or lends credibility to the facts that are contained therein." VRP (July 8, 2005) 30:25-31:4 & 31:9-10 (court's rationale and ruling) (emphasis added). But Judge Runge also rejected both of FFS's proposed statements, reasoning that "from this Court's perspective jury instructions are instructions on the law" and "[s]o we need to come to some sort of agreement." VRP (July 8, 2005) 31:5-9.

The problem, of course, was the parties could not reach agreement on (in the court's words) "some stipulated facts that can be either read to the jury by the court or introduced to the jury, put in written form, [and] admitted itself as an exhibit in conjunction with the settlement agreement." VRP (July 8, 2005) 31:18-22 (comments of the court). Plaintiffs had taken their position, and were not budging from that position: They "need[ed] evidence, not statements[,]" and the OSHA report introduced into evidence would give them precisely what they wanted -- evidence supporting their version of the events underlying Pipefitters I. See, e.g., VRP (July 8, 20 05) 60:22-25) ("I could make a statement in argument but I still lose in front of the jury unless there's evidence. So it can't just be somebody's contentions"). Ultimately, Judge Runge resolved the impasse by reversing course and admitting the OSHA report (in the redacted form),

describing the outcome as "as good as this Court can come up with" and "something between what both of you are suggesting." VRP (July 8, 2005) 66:3-10 (court's ruling).[30]

Admitting the OSHA report was error. To begin, the report did not have to be admitted to achieve Judge Runge's goal of providing the jury some "context" for the 1998 settlement of the Pipefitters I dispute. Contrary to Judge Runge's stated "perspective" on the proper scope of jury instructions, a Washington trial court is free both to instruct the jury as to the parties' contentions, as well as to facts that are not in genuine dispute.[31] Judge Runge thus was free to adopt one of FFS's proposed statements, either of which

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[30]Although that ruling settled the admission of the OSHA report, an ensuing attempt by plaintiffs to supplement the report with testimony from several witnesses prolonged the controversy. See VRP (July 8, 2005) 68:7-69:25 (statement of plaintiffs' counsel concerning desire to call witnesses on certain "areas of inquiry"). FFS responded with an oral motion for a continuance, see VRP (July 8, 2005) 70:1-6 (statement of FFS counsel), and followed up with a written submission seeking the exclusion of all Pipefitter I testimony and evidence, or a continuance. See (CP 1337-38) (motion); (CP 1323-36) (supporting memorandum); (CP 1278-1322) (supporting declaration of William Squires); (CP 1276-77 (supporting declaration of Charles MacLeod). FFS's position was clear: While admitting the OSHA report was error, at least the existing trial date could be saved if the introduction of Pipefitter I evidence was limited to the report. See VRP (July 12, 2005) 2:15-3:7 & 25:11-19) (statements of FFS counsel). Ultimately, the trial court rejected further evidence beyond the OSHA report, see VRP (July 12, 2005) 43:3-44:12 (court's ruling), and the trial proceeded as scheduled.

[31]It has long been established that an "orientation" instruction, given for the purpose of stating the nature of the action, is not an improper comment on the evidence. See, e.g., Hill v. Cox, 110 Wn. App. 394, 409, 41 P.3d 495 (2002) (citing Munson v. Johnson, 80 Wash. 628, 142 P. 18 (1914)). Nor do courts violate the comment prohibition when they instruct the jury on undisputed facts. See, e.g., Thornton v. Eneroth, 180 Wash. 250, 253-54, 39 P.2d 379 (1934) ("recitals of undisputed facts . . . are not an unlawful comment upon the evidence").

would have fully informed the jury about the "context" of the Pipefitter I settlement. The trial court's failure to correctly apprehend the scope of its prerogatives thus drove the court to admit a document in disregard of several constraints, any one of which mandated the report's continuing exclusion consistent with Judge Brown's ruling of two years before.

To begin, the report is classic hearsay, and does not qualify for the public records exception to the hearsay rule set forth at RCW 5.44.040. That statute does not automatically admit every public record. To be admissible, the document must: (1) contain facts rather than conclusions that involve independent judgment, discretion, or the expression of opinion; (2) relate to facts that are of a public nature; (3) be retained for public benefit; and (4) be authorized by statute. E.g., State v. Monson, 113 Wn.2d 833, 839, 784 P.2d 485 (1989) (citing Steel v. Johnson, 9 Wn.2d 347, 358, 115 P.2d 145 (1941)). Moreover, the facts must be "neutral facts." State v. Chapman, 98 Wn. App. 888, 892, 991 P.2d 126 (2000). Documents admitted under the statute have included driving records, fingerprint records of the war department, a routine criminal booking sheet, and administrative hearing decisions. State v. Phillips, 94 Wn. App. 829, 834, 974 P.2d 1245 (1999) (citations omitted); Goodman v. Boeing, 75 Wn. App. 60, 877 P.2d 703 (1994), aff'd, 127 Wn.2d 401, 899 P.2d 1265 (1995). In telling contrast, "[e]valuative and investigative reports . . . are not included within RCW 5.44.040's designated exceptions to the hearsay rule." Bierlein v. Byrne, 103 Wn. App. 865, 871 n.9, 14 P.3d 823 (2000) (reversing admission of EEOC determination letter because, contrary to some federal

decisions, the consideration of the EEOC's letter would substitute the judgment of the EEOC's directors for that of the court's); see also Cantu v. City of Seattle, 51 Wn. App. 95, 99-100, 752 P.2d 390 (1988).

The OSHA report's findings were the product of the exercise of judgment and discretion on the part of the OSHA investigator, based on the investigator's interview of witnesses and review of documents -- hardly the equivalent of a routine government product like a driving record. The facts found by the investigator also were not of a public nature, but concerned a private employment dispute between FFS and plaintiffs. Finally, the opportunity for cross-examination was especially important, as the foundation for the investigator's findings were his or her evaluation of the statements of witnesses and the interpretation of documents. See State v. Hines, 87 Wn. App. 98, 101, 941 P.2d 9 (1997) (error to admit a patrolman's report setting for the results of an investigation, when the defendant had no opportunity to test the accuracy of the patrolman's statements by cross-examination). Moreover, even if the report should be deemed technically admissible as a public record, the report should still have been excluded because its probative value was outweighed by its unduly prejudicial impact on FFS, and therefore excluded under ER 403, as Judge Runge herself recognized when she initially ruled to reaffirm Judge Brown and keep the report out. See (July 8, 2005) 30:25-31:4 (court's rationale).[32]

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[32]Incredibly, the court's later rationale for admitting the report -- its "independent" provenance -- only underscored why the initial ruling to (continued . . .)

The court's erroneous admission of the OSHA report prejudiced FFS. As previously discussed in the Standard of Review section of this Brief (supra, at 22-23), Washington's approach to determining the harmlessness of evidentiary error is somewhat unsettled. Even so, at the very least an error in admission of evidence cannot be deemed harmless if there is a substantial possibility of prejudice. Here, that possibility is amply confirmed by the record. During plaintiffs' opening statement and closing argument, the OSHA report received pride of place: Plaintiffs' counsel read virtually the entire document to the jury, both times. See VRP (July 21, 2005) 304:2-316:23 (plaintiffs' opening); VRP (Aug. 24, 2005) 3743:21-3753:14 (plaintiffs' closing argument). Moreover, plaintiffs made very clear how the jury should treat the "facts" set forth in the report: as evidence of "similar behavior by similar players." VRP (Aug. 24, 2005) 3743:16-20 (plaintiffs' closing argument). And plaintiffs' clarion call was particularly damaging to FFS under the specific circumstances of this case, because the report's admission came too close to the trial for FFS to muster a rebuttal to the report's factual conclusions. Allowing plaintiffs to introduce a government report seemingly at odds with the actions of FFS's management team can only have had a powerful, damaging impact on FFS's defense. In short, the court's error in admitting

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(. . . continued)
exclude was correct. See VRP (July 8, 2005) 66:13-14 (court's rationale) ("This was apparently an independent investigator"). Nor did the court even attempt to explain why the demands of providing "context" for the 1998 Pipefitters I settlement should be met by admitting a document that did not merely establish "context," but went well beyond that to validate plaintiffs' claims about the true content of that "context."

Exhibit 21 warrants the vacation of plaintiffs' judgments and remand for a new trial.

2. The Marquardt "Other Wrongs" Evidence. Over FFS's objection, the trial court admitted the testimony of Lauri Marquardt (now Laurie Lee Johns-Anderson) to prove a plan or scheme, because the acts described by Marquardt occurred in the same time frame as the layoffs, involved the same management, and concerned safety warnings. See VRP (Aug. 4, 2005) 1939:7-10 (ruling of the court) (permitting Marquardt testimony on one prior act because was in the same time frame and involved the same chain of command). Admission of that evidence ran counter to both case law requirements and the purposes of ER 404(b).

To meet the substantial burden of proving a common scheme or plan, (1) the proponent must prove by a preponderance of the evidence that the misconduct actually occurred, and those acts must be (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the claim(s) or to rebut a defense, and (4) more probative than prejudicial. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Moreover, a trial court should resolve doubts as to admissibility in favor of exclusion. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Here, while all four elements were at issue, the core problem is that the second element was never met.[33]

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[33]The first element was not met, either; plaintiffs never presented evidence sufficient to establish by a preponderance of the evidence that the alleged "bad acts" even occurred, never mind that they were connected to FFS. 5 Karl B. Tegland, Evidence Law and Practice § 404.33 at 490 (continued . . .)

To prove a common plan or scheme, there must be "substantial similarity" between the other act and the act at issue in the case. DeVincentis, 150 Wn.2d at 21. In particular:

> To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.

Id. at 19 (citing Lough v. State, 125 Wn.2d 847, 860, 889 P.2d 487). Moreover, the common scheme or plan cannot rely on any propensity inferences to draw the link between the acts. Becker v. ARCO Chemical Co., 207 F.3d 176, 191 (3d Cir. 2000). In Becker, an age discrimination suit, the trial court permitted the plaintiff to introduce evidence surrounding termination of another older employee to show a plan of fabricating reasons for terminating older employees Id. at 186. Since the chain of logical inferences from the initial factual position that the employer fabricated the prior employee's termination to the ultimate

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(. . . continued)
(1999). Moreover, the trial court never made a finding that the acts were established by a preponderance of the evidence. Without that check, a party may present its version of the past "bad act," whether or not it occurred, to bolster its claim of plan or scheme of malfeasance -- bypassing the purpose of ER 404(b) to avoid propensity evidence and denying the opposing party a fair trial. This is particularly troubling in the employment law context, where other wrongs have from time to time been found to be probative, and where "other wrongs" evidence therefore is only admitted after the truth of the alleged other wrongs has been established by a preponderance of the evidence. See, e.g., Tudor v. Charleston Area Medical Center, Inc., 203 W. Va. 111, 506 S.E.2d 554 (1997) (admitting evidence to show motive or intent because of large number of specific similarities between the prior nurse layoff and the nurse layoff at issue in the case, including voicing the same complaint, forced termination, and difficulties in finding other employment).

conclusion that defendant discriminated against Becker required the inferential link that if the employer fabricated the earlier poor performance, it is more likely that it fabricated customer complaints to terminate Becker, neither Rule 404(b)'s intent theory or common plan or scheme theory was met. Id. at 193, 197.

Under the DeVincentis substantial similarity test, the "other acts" presented by Marquardt are not naturally explained as individual manifestations of a general plan. According to plaintiffs, this case involves (1) craftspeople who (2) blew the whistle (or supported those who blew the whistle) on (3) unsafe practices and (4) were subsequently laid off, in retaliation for their whistleblowing (or support of whistleblowers). Yet the other "bad" acts supplied by Marquardt's testimony do not follow that "pattern." See Becker, 207 F.3d at 200 (reversing trial court because admitting evidence of one alleged similar instance of prior conduct by the employer's supervisory employee to establish the "plan" and the subsequent commission of a similar subsequent act by a different employee at a different time violated Rule 404(b)'s ban on propensity evidence); see also Kelly v. Boeing Petroleum Svcs., Inc., 61 F.3d 350, 358 (5th Cir. 1995) (finding that testimony regarding the Site Manager's random acts and remarks concerning race and sex did not have any tendency to prove the manager discriminated against the plaintiff on the basis of handicap).

The first "other act" involved an employee safety concern Marquardt filed in January 1998, regarding issues from fumes spread

throughout a building under negative pressure. VRP (Aug. 4, 2005) 1937:25-1938:1, 1939:13-1940:3 (Marquardt). This matter focused upon ironworkers, involved the concerns of an industrial hygienist (Marquardt herself) about the health of the workers and of the qualifications of the other industrial hygienists, and ultimately led to meetings involving Marquardt and management about the incident, her safety concerns, and her motivations for lodging the complaint. VRP (Aug. 4, 2005) 1939:5, 1940:6-12, 1941:12-19 (Marquardt). Although Marquardt described the process as "patronizing" and minimizing her concerns, the event plainly lacks substantial similarity to the pipefitters' layoff, because the fume incident lacked the fundamental similar facts of craftspeople blowing the whistle, and subsequently being laid off. VRP (Aug. 4, 2005) 1943:24, 1944:25-1945:1 (Marquardt). Even though Marquardt connected her subsequent resignation to this event, and alleged retaliation in her resignation letter (despite not mentioning the incident and the reaction in her resignation letter), substantial similarity is still not met, as it is not alleged that Marquardt or anyone else was laid off because of the fumes incident. VRP (Aug. 4, 2005) 2050:4-10, 2051:1-8, 2056:22-23.[34]

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[34]Moreover, Marquardt had admitted in a deposition for another case that she left FFS for a job with better pay and benefits. VRP (Aug. 4, 2005) 2054:9-15. That testimony contradicted the trial testimony in which she claimed retaliation for being passed over for a promotion in retaliation for her safety violation reports. See VRP (Aug. 4, 2005) at 2001:1-24. Such deficiencies in plaintiffs' proof underscores plaintiffs' failure to satisfy the first requirement for admissibility -- proof of the truth of the alleged other wrong by a preponderance of the evidence.

The second incident Marquardt testified about also lacks substantial similarity to the facts of this case. In the Summer of 1998, Marquardt performed testing in a pit and discovered an explosively high concentration of hydrogen, an asphyxiant. VRP (Aug. 4, 2005) 1993:20-25 (Marquardt). A few days later, performing additional testing, she discovered ammonia and had everyone evacuate the pit. VRP (Aug. 4, 2005) 1998:13-1999:2. Her follow-up "curative efforts" were not impeded and she considered others "very supportive" in her efforts. VRP (Aug. 4, 2005) 2035:5-8. She testified that she contacted Mr. Foucault, a manager in her chain of command, but she did not provide his reaction to her safety issues. VRP (Aug. 4, 2005) 1996:11. She then claimed an FFS manager warned her to not "put your ethics ahead of your career." VRP (Aug. 4, 2005) 2003:17-2004:25. In her later resignation letter, she did not mention the pit incident. VRP (Aug. 4, 2005) 2051:17-20. Once again, the other wrong incident lacks the key facts to establish substantial similarity: whistleblowing by craftspeople who are subsequently laid off in retaliation for their whistleblowing.

The trial court's reason for admission of the evidence -- three "similarities" of same time, same managers, and acts involving safety concerns -- was too generalized to satisfy the requirements of the test for substantial similarity. See Jankins v. TDC Mgmt. Corp., 21 F.3d 436, 440-41 (D.D.C. 1994) (denying a "similarity" for a common plan or scheme because it required reformulating the claimed dispute at a high level of generality and "[a]ny formulation that equates [defendant's]

treatment of [others] with his treatment of [plaintiff] -- greed, a tendency to strategic behavior, etc. -- can be only a shade less general than a claim that [defendant] was a bad man."). Admitting evidence simply because a contemporaneous complaint went up the same chain of command (or ended at the same person), would allow virtually any "other wrong" to be admitted under the exception, and would effectively gut the protections of ER 404(b) in employment cases

Evidence of prior bad acts is presumptively inadmissible. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). ER 404(b) prohibits evidence of other acts (unless an exception applies), because "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny [the defendant] a fair opportunity to defend against a particular charge." State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648, rev. denied, 124 Wn.2d 1022, 881 P.2d 255 (1994) (citing Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948)). Although the evidence may have probative value, ER 404(b)'s exclusion policy is based upon the "practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." Id. The rule is intended to prevent application by jurors of the common assumption that "since he did it once, he did it again." State v. Bactogarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990), rev. denied, 116 Wn.2d 1020, 811 P.2d 219 (1991). And there is a growing concern that courts are often too lax in admitting the evidence under the common scheme or plan rubric when it only has the effect of showing

propensity. "[O]nly too often this leads to a lack of analysis and reliance on the exceptions as 'magic pass words whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.'" State v. Harris, 36 Wn. App. 746, 751, 677 P.2d 202 (1984) (quoting State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982), and United States v. Goodwin, 492 F.2d 1141, 1155 (5th Cir. 1974)). The trial court's admission of Ms. Marquardt's "other wrongs" evidence is a classic illustration of the kind of approach to 404(b) determinations which appellate courts must be ready to rebuke, if the rule's protections are to retain any real vitality.

Nor was admission of Marquardt's evidence harmless. In his closing argument, plaintiffs' counsel repeatedly referred to Marquardt's testimony, describing her as credible and honest. VRP (Aug. 24, 2005) 3873:22-3874:1 (closing argument). Moreover, he specifically mentioned the February incident with the fumes and the explosive incident in the summer. VRP (Aug. 24, 2005) 3781:16-23 & 3790:10-23. And in his rebuttal, counsel emphasized that FFS "is a company where Lauri Marquardt looked to go outside the chain of command to find some kind of resolution for the fact that nobody would listen to her . . . [and was told] don't put your ethics ahead of your career. That's the kind of company you're dealing with." VRP (Aug. 24, 2005) 3873:8-11 (emphasis added). In short, the jury was invited to reject the credibility of FFS's witnesses, and to embrace plaintiffs' dark view of the reasons for the termination of their employment, based on a supposed pattern that, in reality, was nothing

more than the kind of character evidence ER 404(b) forbids. This error warrants granting a new trial.

3. The "Hotline" Evidence. Judge Runge permitted plaintiffs to introduce testimony from Mr. Ivan Sampson, during which he described overhearing several managers allegedly listening to a tape of a call to the Department of Energy's safety hotline, trying to determine the identity of the person who made the call. VRP (July 22, 2005) (Sampson) 507:4-18. Sampson claimed that Walt Ray, Bill Stewart, and Dave Foucault were all present in the room where the tape was being played. VRP (July 22, 2005) (Sampson) 508:7-10.[35] The inference the plaintiffs would have had the jury draw was that Ray, Stewart, and Foucault were trying to learn the anonymous caller's identity to retaliate against him or her for calling the hotline, and evidence of FFS's "common scheme or plan" to retaliate against the plaintiffs as well as whistleblowers and their supporters.

As discussed, to be admitted as evidence of a common scheme or plan, the proponent (here, plaintiffs) carry the burden of proving beyond a preponderance of the evidence that the alleged misconduct actually occurred. See, e.g., Devincentis, 150 Wn.2d at 17. Sampson's own

[35]FFS had moved in limine to exclude all "bad acts" by contractors who operated the Hanford site prior to FFS coming on in late 1996, pursuant to ER 403 and ER 404(b). See VRP (May 2, 2003) 42:16-21 (CP 4747); (CP 5560, 5604-06) (motion to exclude) Judge Brown granted FFS' motion. VRP (May 2, 2003) 42:16-43:11 (CP 4747-48). The DOE incident Sampson complained of happened sometime in 1994, and was properly subject to Judge Brown's ruling. See Fluor Federal Services, Inc.'s Motion to Admit DOE Hotline Tape Investigation, Ex. C (CP 828) (report at unnumbered page 1). FFS's counsel also objected to the introduction of this testimony at trial, on separate hearsay grounds. VRP (July 22, 2005) (FFS's objections) 506:25-507:1 & 507:20-22.

testimony demonstrates that plaintiffs fail to meet their burden. Sampson testified only that an unknown "someone" answered the door during a meeting and told Sampson that they were listening to a tape to determine who the caller was. VRP (July 22, 2005) (Sampson) 507:10-18. Sampson went on to testify that he never entered the room where the meeting occurred and never heard the DOE tape. VRP (July 22, 2005) (Sampson) 533:15-16; 535:10-13. Sampson never heard any DOE hotline tape and, therefore, cannot confirm if the call was even a complaint or any other act that would amount to "whistleblowing." VRP (July 22, 2005) (Sampson) 535:12-13. Sampson had no idea what the caller may have said, and only knew that the call was regarding "some of the work that was going on," VRP (July 22, 2005) (Sampson) 507:14-16.

In sum, this evidence plainly was insufficient to establish the truth of the alleged bad act. As for the requirements for establishing substantial similarity of a bad act; as laid down by the Supreme Court in DeVincentis: The plaintiffs utterly failed to establish a connection to the work of pipefitters, any of their safety concerns, or any adverse employment actions taken as a result of any hotline complaint. Indeed, and unlike with Marquardt, the plaintiffs could not even show the incident involved the same chain of command or its proximity in time to their layoffs, since the alleged episode took place four years before, and while Kaiser (FFS's predecessor) was on site.

In light of Judge Runge's admission of the Sampson testimony, FFS moved for admission of a report issued by the DOE, in which the

Department concluded that it "could not find any evidence that the security of any DOE tape recording had been breached, nor could it substantiate that any hotline recording had been listened to by Kaiser supervisors." See Fluor Federal Services, Inc.'s Motion to Admit DOE Hotline Tape Investigation, Ex. C (CP 828-29) (copy of the report attached as Ex. L of the Appendix to this Brief). The DOE found that the tape recording machine was secured by a locked office door, and all messages received are logged and the tape was recorded each day. (CP 829.) FFS argued that admission of the DOE report was necessary to allow FFS a fair opportunity to impeach Sampson's claims, yet Judge Runge denied FFS' motion to admit the DOE report. See VRP (Aug. 22, 2005) 3640:20-3641:11 (court's ruling).

Once again, prejudice ensued. In discussing the DOE hotline incident in his closing argument, plaintiffs' counsel stated:

> Why is [the DOE hotline incident] important? Well, because it's real important to understand what type of person Dave Foucault is, because Dave Foucault is the chain of command that these people are responding to. Dave Foucault is a person who --
>
> I think, Mr. Sampson can be totally believed. I think Mr. Sampson came off as a very honest man. I don't think Mr. Foucault did. But one of the jury instructions tells you it's your job to be lie detectors. It's your job to look at these people, listen to them, see what they have to say, and decide their credibility. If [the DOE hotline incident] happened the way Mr. Sampson said, that tells a lot about who Mr. Foucault is.

VRP (Aug. 24, 2005) (Plaintiffs' Closing) 3742:1-12 (emphasis added). In short, under the thin veneer of proving a plan or scheme, plaintiffs argued for the rejection of FFS's version of events, based on the "bad character" of their witnesses -- in this case, FFS's principal on-site manager. As with

Marquardt's other "bad acts," the admission of Sampson's "hotline" tale prejudiced FFS, and warrants a new trial.

C. The Trial Court Abused Its Discretion by Denying Defendant's Motion for a New Trial or Amendment of Judgment. There Is No Evidence or Reasonable Inference From the Evidence to Support the Jury's Award of Front Pay.

The jury returned a $4,802,600 verdict in this matter, which included an award of $1,395,450 in front pay. (CP 142-50.) The award included front pay awards to plaintiffs Charles Cable ($230,000), Donald Hodgin ($89,250), and Pedro Nicacio ($58,000), despite testimony from each of those individuals that unmistakably demonstrates they are not entitled to front pay. Nonetheless, the jury ignored the plain evidence and awarded the three individuals alone $377,250. Moreover, the jury awarded the remaining plaintiffs collectively more than $1 million, although all of the plaintiffs obtained comparable employment well before the time of the trial, and the evidence established they were not guaranteed lifetime employment.

FFS timely filed a Motion for New Trial or Amendment of Judgment and subsequent reply to redress this clear error by the jury, citing CR 59(a)(5), (7) and (9). (CP 448.) FFS highlighted the sworn testimony Cable, Hodgin, and Nicacio had given at trial, which confirmed that the three were not entitled to front pay or only limited front pay. See Fluor Federal Services, Inc.'s Memorandum in Support of Motion for New Trial or Amendment of Judgment ("Motion for New Trial") at 3 & 5-9 (CP 453, 455-59). Plaintiffs opposed the motion; however, plaintiff Nicacio, presumably recognizing that his own testimony did not support

the jury's front pay award, moved separately to eliminate his front pay award. See Plaintiffs' Response to Defendants' CR 59 Motion at 2 (CP 9671). Plaintiffs Cable and Hodgin cited only their vague references to how long they may have worked, and ignored their specific testimony about when they would have retired -- in 2003 and 2006, respectively. Id. at 5-6 (CP 9674-75). As for the plaintiffs as a class, plaintiffs make the unsupported assertion -- based on a case regarding back pay, not the evidence provided at trial -- that they all would have continued working for FFS until each retired. Id. at 3-4 (CP 9672-73).

Despite these patent deficiencies in the evidence supporting the front pay award, the trial court denied FFS's CR 59 motion. Should this Court decline to dismiss based on the Supreme Court's Korslund decision, this Court should vacate the front pay awards and remand for a new trial on that issue.

1. A New Trial Should Be Awarded on the Issue of Damages Where Neither the Evidence nor Reasonable Inferences From the Evidence Support the Award. The trial court should vacate a damage award if (1) it is so excessive as to unmistakably indicate that the amount must have resulted from the jury's passion or prejudice; (2) no evidence or no reasonable inference from the evidence justifies the verdict; or (3) substantial justice has not been done. CR 59(a)(5), (7) and (9); see also Wash. State Physicians Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 334, 858 P.2d 1053 (1993); Bingaman v. Grays Harbor Comm. Hosp., 103 Wn.2d 831, 835-36, 699 P.2d 1230 (1985); Morse v.

Antonellis, 112 Wn. App. 941, 944-45, 51 P.3d 199 (2002). The basis for the grounds of granting a new trial "is the inherent power of the court to correct any errors in its proceedings that have had any material effect on the outcome of the trial." 4 K. Tegland, Washington Practice: Rules Practice at 466 (5th ed. 2006). "Where the proponent of a new trial argues the verdict was not based upon the evidence, appellate courts will look to the record to determine whether there was sufficient evidence to support the verdict." Palmer v. Jensen, 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997).

2. Plaintiff Nicacio Concedes the Jury Award Is Improper and Has Abandoned His Claim for Front Pay. Here, the record, comprising in part the plaintiffs' own sworn testimony, conclusively demonstrates there was not sufficient evidence to support the jury's front pay award. Indeed, the jury's front pay award is in direct contravention of the evidence, and the trial court abused its discretion by denying FFS's Motion for New Trial.

The most glaring indication that the jury's front pay award was demonstrably grounded in something other than the evidence before it is the award to plaintiff Pedro Nicacio. Mr. Nicacio testified that his economic damages were limited to the time he was traveling for his job, but that he no longer had to travel by the time of trial. VRP (Aug. 2, 2005) 1781:11-13, 1782:18-20 & 1784:13-15. Mr. Nicacio provided further testimony, which would undoubtedly foreclose the possibility of a front pay award:

Q. All right. So from 2000 from 2001 on, you're making no claims at all?

A. No, none.

Q. And do I understand that you're not making any claim for emotional distress?

A. No.

Q. So all of that is off the table, too?

A. Take it off the table.

VRP (Aug. 2, 2005) 1787:11-18 (emphasis added). Even plaintiffs' expert, Robert Moss, testified that Mr. Nicacio was "not making any claim for damages beyond 2000." VRP (Aug. 2, 2005) 2208:15-16. Moss opined that Mr. Nicacio was entitled to "zero for front pay." VRP (Aug. 2, 2005) 2170:25.

Yet, inexplicably, the jury awarded Mr. Nicacio $58,000 in front pay. (CP 484.) In light of the clear and undisputed evidence, the jury must have been acting out of passion or prejudice. CR 59(a)(5). Indeed, this is the quintessential circumstance where the damages award is so excessive as to unmistakably indicate that the verdict was the result of passion or prejudice. See, e.g., Conrad v. Alderwood Manor, 119 Wn. App. 275, 293, 78 P.3d 177 (2003) (citing Lian v. Stalick, 106 Wn. App. 811, 823-24, 25 P.3d 467 (2001)); see also Miller v. Yates, 67 Wn. App. 120, 124, 834 P.2d 36 (1992) (where jury's passion or prejudice is of such "manifest clarity as to make it unmistakable[,]" reduction in the jury award is justified) (quoting Jacobs v. Calvary Cemetery & Mausoleum, 53 Wn. App. 45, 49, 765 P.2d 334 (1988)). Moreover, Mr. Nicacio's front pay

award also reveals the distorted lens through which the jury viewed the record before it, and this Court should be mindful of how that same lens must have skewed the jury's view of the remaining evidence and all of the plaintiffs' front pay awards. In short, FFS's rights were materially affected by the jury's erroneous award, and substantial justice was not done.[36]

3. The Trial Court Abused Its Discretion by Denying FFS's Motion for a New Trial as to Plaintiffs Hodgin and Cable: As Was the Case With Mr. Nicacio, the Jury Ignored Evidence That Should Have Foreclosed or Limited Plaintiffs Hodgin's and Cable's Front Pay Awards. Front pay should be limited to only a reasonable period of time that does not exceed the likely duration of the terminated employment. Hayes v. Trulock, 51 Wn. App. 795, 802, 755 P.2d 830 (1988) (citations omitted). Although the court will presume that an employee will work until he or she reaches retirement age, the employer can overcome that presumption by providing evidence to the contrary. Xieng v. Peoples National Bank of Washington, 120 Wn.2d 512, 532, 844 P.2d 389 (1993).[37] The trial court instructed the jury accordingly:

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[36]As previously stated, Mr. Nicacio moved to amend his judgment. See Plaintiffs' Response to Defendant's CR 59 Motion at 2 (CP 9671). The trial court never specifically ruled on Mr. Nicacio's motion, but simply ruled that the award, as reduced for the deleted front pay, was satisfied. See Partial Satisfaction of Judgment. (CP 9668-69.)

[37]The court in Xieng was dealing specifically with a question regarding back pay, not front pay. Xieng's reference to the federal case of MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1060 (8th Cir. 1988), therefore is dicta. When considering claims for front pay, Washington courts require that the plaintiff provide evidence of duration of employment. See, e.g., Hayes, 51 Wn. App. at 803 (affirming award of

(continued . . .)

> In calculating damages for future wage loss or front pay, you should determine the present cash value of salary, pension, or other fringe benefits from today [the day of trial] until the time the plaintiff may be reasonably expected to retire or fully recover from the continuing effects of the wrongful discharge, decreased by any future earnings from another employer.

Jury Instruction No. 14 (CP 530) (emphasis added). In addition to disregarding Mr. Nicacio's testimony on the issue of front pay, the jury also ignored the relevant testimony regarding Mr. Hodgin's and Mr. Cable's front pay awards, including specific testimony as to when they would retire, and plaintiffs' own expert's testimony.

a. Plaintiff Hodgin Testified That Under Any Circumstances, He Would Have Retired Prior to the Trial. In the briefing on FFS's Motion for New Trial, both parties submitted testimony from Donald Hodgin regarding when he would retire. Plaintiffs' counsel questioned Mr. Hodgin generally about how long he thought he would have worked at Hanford but for the layoff, and Hodgin gave the following vague responses:

> A . . . I don't know how long I would have stayed at Hanford. . . . Who knows how many years I would have worked there?
>
> . . . .
>
> Q. Okay, Mr. Hodgin, you were saying your wife is nine years younger than you and she actually retired in 2000. Let's

---

(. . . continued)
shorter period of front pay where plaintiffs failed to introduce any evidence that their employment would have continued for two years; plaintiffs did not provide any evidence of the average length of employment in plaintiffs' line of business). In any event, the record contains ample evidence to overcome the burden set forth in Xieng.

say she would have continued past 2000. Would you have continued working?

A. I'm sure I would have.

. . . .

Q. All right, so from your perspective, how did you feel about continuing where you were working past 65?

A. I would probably have done it. I felt good.

VRP (Aug. 1, 2005) 1498:12-15, 1502:21-25, 1503:5-7. But when plaintiffs' counsel asked Hodgin for a specific date Hodgin thought he might retire, it was well before the trial:

Q. Can you tell me -- can you give us a date that you think you would have retired, had you not been laid off?

A. Well if my wife hadn't have [sic] retired -- and she loved her job -- I would have maybe worked for four or five more years.

Q. So from '98 to --

A. '03.

Q. '03 or '04?

A. Yeah.

VRP (Aug. 1, 2005) 1537:9-16 (emphasis added).[38]

In sum: After his earlier, speculative testimony, Hodgin clarified his claim by acknowledging he would have retired in 2003 or 2004 at the absolute latest. Yet despite that clear response, the jury awarded Mr. Hodgin $89,250 in front pay. (CP 493.) Like Mr. Nicacio's

[38]Plaintiffs omitted this testimony from their response to FFS's Motion for New Trial when arguing that Mr. Hodgin would have continued to work long after the trial.

testimony, Mr. Hodgin's testimony plainly contradicts the jury's finding that Hodgin was entitled to any front pay whatsoever. Further, although inconsistent with Hodgin's testimony regarding retiring in 2003 or 2004, even plaintiffs' expert determined Mr. Hodgin's retirement date was 2000, and did not calculate any front pay award for 2001 forward. VRP (Aug. 5, 2005) 2165:10-17. The evidence supports only one conclusion: Mr. Hodgin was retired -- and would have been regardless of FFS's conduct -- by the time of trial in August 2005. The jury's award to the contrary completely lacks any support in the record, and the trial court abused its discretion by denying FFS a new trial on Mr. Hodgin's front pay award.

b. Plaintiff Cable Specifically Testified He Would Have Retired by the End of 2006. Like Mr. Nicacio and Mr. Hodgin, Charles Cable's own sworn testimony unquestionably demonstrates that the jury's award of front pay was not based on evidence adduced at the trial. Mr. Cable testified as follows:

> Q. All right. Let me ask you this: Let's say you had not been laid off and were still working at Hanford. Would you have retired, assuming you could remain a foreman?
>
> A. You mean at that time?
>
> Q. Yeah.
>
> A. I probably wouldn't. I would have gone -- my wife is working out there and I would probably have gone until at least [age] 62.
>
> Q. So how old are you now?
>
> A. I'm 61. I'll be 62.

Q. So you would have gone through 2006?

A. The end of 2006.

VRP (Aug. 2, 2005) 1675:7-18 (emphasis added). Mr. Cable's testimony thus conclusively demonstrates he would not have worked past the end of 2006. While Mr. Cable first stated he would have worked until at least age 62, he clarified that answer by saying he would stop working by the end of 2006.[39] Id. FFS provided the evidence of Mr. Cable's actual retirement date, pursuant to Xieng and for purposes of Jury Instruction No. 14, and yet the jury still awarded Mr. Cable $230,000 in front pay -- the largest amount awarded to any plaintiff.[40] (CP 466.)

Plaintiffs' expert calculated Mr. Cable's annual average loss for front pay to Mr. Cable as $76,665. VRP (Aug. 5, 2005) 2175:21-24. As discussed below, Mr. Cable is not entitled to front pay at all. Even if he were entitled, by the terms of his own testimony, he is entitled to no more than one year of salary, and the jury's front pay award to Mr. Cable should be reduced to $76,665. Yet the trial court denied FFS's motion in its entirety, and Mr. Cable's unwarranted and certainly excessive front pay

---

[39]In plaintiffs' opposition to FFS's Motion for New Trial, plaintiffs seized upon the "at least" language and ignored, just as the jury must have, Mr. Cable's clarifying response that he would have retired at the end of 2006.

[40]Cf. (CP 466) (Cable Award for $230,000 in front pay) with (CP 469) (Faubion: $93,700); (CP 472) (Walli: $112,000); (CP 475) (Stull: $182,750); (CP 478) ($189,350); (CP 481) (O'Leary: $109,200); (CP 484) (Nicacio: $58,000); (CP 486) (Killen: $160,000); (CP 490) (Jaymes: $91,200); (CP 496) (Brundridge: $80,000).

award stands. The trial court clearly abused its discretion as to Mr. Cable's claim.

4. The Trial Court Abused Its Discretion by Denying FFS's Motion for a New Trial as to All of the Plaintiffs on the Issue of Front Pay. In its Motion for New Trial, FFS supplied the trial court with two reasons the plaintiffs as a group were not entitled to front pay: (1) each of the plaintiffs obtained comparable employment prior to trial; and (2) the evidence did not support a finding that plaintiffs would continue to work at FFS until they retired. See Motion for New Trial at 10-12 (CP 460-62). Specifically as to the former point, FFS cited to evidence in the record that each of the plaintiffs had in fact obtained comparable employment prior to trial, demonstrating they were not entitled to front pay. As to the latter point, FFS referred to specific and substantial evidence in the record that, because of the volatile nature of FFS's pipefitter workload in the years following the plaintiffs' layoffs, there was no certainty whatsoever that the plaintiffs would continue to work for FFS. Id. at 11-12 (CP 461-62). Between 1998 and the time of trial, FFS had laid off 135 pipefitters. See id.

FFS also provided detailed evidence of the number of pipefitters laid off between 1998 and the time of trial. See Motion for New Trial at 11-12 (CP 460-62), Ex. G to Motion for New Trial (CP 262) (chart detailing the number of pipefitters laid off between 1998 and May of 2003). FFS further provided to the trial court evidence that only six pipefitters could have retained their jobs, which meant at least five of the

plaintiffs would have lost their positions regardless of FFS's allegedly bad conduct. Id. at 6 (CP 9654). Finally, FFS cited testimony that, under the pipefitters' collective bargaining agreement, it is unlikely plaintiffs would have been hired back into their old positions after the admittedly nonretaliatory layoffs. Id. Yet the jury still awarded the plaintiffs $1,395,450 in front pay. Such an award is so excessive as to unmistakably indicate that the verdict was the result of passion or prejudice, and substantial justice therefore was not done. Accordingly, the trial court abused its discretion by denying FFS's Motion for a New Trial, and this Court should reverse and remand with direction for a new trial on the issue of front pay.

V.

CONCLUSION

The Supreme Court's Korslund decision mandates reversal of the plaintiffs' judgments, and dismissal of their claims with prejudice. Alternatively, the trial court's errors warrant a new trial on the issues of liability and back pay.

RESPECTFULLY SUBMITTED this 20th day of December, 2006.

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EXHIBIT A

FILED
BENTON COUNTY CLERK
2005 SEP -2 A 10:31
E. KAY STAPLES

Hon. Carrie L. Runge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR BENTON COUNTY

SCOTT BRUNDRIDGE, et al., Plaintiffs, vs. FLUOR FEDERAL SERVICES, INC., a Washington corporation; Defendant.	Case No. 99-2-01250-7 **VERDICT FORM**

We, the jury in the above-captioned case, make the following answers to the questions submitted by the Court:

Scott Brundridge

QUESTION NO. 1: Has Plaintiff Scott Brundridge proven that he was wrongfully discharged in violation of public policy by a preponderance of the evidence?

ANSWER: __X__ Yes _____ No

If you check "Yes," then answer Question No. 2. If you check "No," do not answer Questions Nos. 2 and 3 and proceed to Question No. 4.

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QUESTION NO. 2: Has Scott Brundridge proved by a preponderance of the evidence that Fluor's layoff proximately caused him damage?

ANSWER: X Yes _____ No

If you check "Yes," then answer Question No. 3. If you check "No," do not answer Question No. 3 and proceed to Question No. 4.

QUESTION NO. 3: What do you find to be Scott Brundridge's amount of damages?

Back Pay: $ 79,700

Front Pay: $ 80,000

Emotional distress, humiliation, embarrassment, anxiety, mental anguish, and/or personal indignity experienced by Scott Brundridge to the present time, and with reasonable probability to be experienced by Scott Brundridge in the future. $ 195,000

Charles Cable:

QUESTION NO. 4: Has Plaintiff Charles Cable proven that he was wrongfully discharged in violation of public policy by a preponderance of the evidence?

ANSWER: X Yes _____ No

If you check "Yes," then answer Question No. 5. If you check "No," do not answer Questions Nos. 5 or 6 and proceed to Question No. 7.

QUESTION NO. 5: Has Charles Cable proved by a preponderance of the evidence that Fluor's layoff proximately caused him damage?

ANSWER: X Yes _____ No

If you check "Yes," then answer Question No. 6. If you check "No," do not answer Question No. 6 and proceed to Question No. 7.

QUESTION NO. 6: What do you find to be Charles Cable's amount of damages?

Back Pay: $ 135,000

Front Pay: $ 230,000

Emotional distress, humiliation, embarrassment, anxiety, mental anguish, and/or personal indignity experienced by Charles Cable to the present time, and with reasonable probability to be experienced by Charles Cable in the future. $ 130,000

David Faubion

QUESTION NO. 7: Has Plaintiff David Faubion proven that he was wrongfully discharged in violation of public policy by a preponderance of the evidence?

ANSWER: X Yes _____ No

If you check "Yes," then answer Question No. 8. If you check "No," do not answer Questions Nos. 8 or 9 and proceed to Question No. 10.

QUESTION NO. 8: Has David Faubion proved by a preponderance of the evidence that Fluor's layoff proximately caused him damage?

ANSWER: X Yes _____ No

If you check "Yes," then answer Question No. 9. If you check "No," do not answer Question No. 9 and proceed to Question No. 10.

QUESTION NO. 9: What do you find to be David Faubion's amount of damages?

Back Pay: $ 89,000

Front Pay: $ 93,700

Emotional distress, humiliation, embarrassment, anxiety, mental anguish, and/or personal indignity experienced by David Faubion to the present time, and with reasonable probability to be experienced by David Faubion in the future. $ 237,500

Donald Hodgin

QUESTION NO. 10: Has Plaintiff Donald Hodgin proven that he was wrongfully discharged in violation of public policy by a preponderance of the evidence?

ANSWER: __X__ Yes _____ No

If you check "Yes," then answer Question No. 11. If you check "No," do not answer Questions Nos. 11 or 12 and proceed to Question No. 13.

QUESTION NO. 11: Has Donald Hodgin proved by a preponderance of the evidence Fluor's layoff proximately caused him damages?

ANSWER: __X__ Yes _____ No

If you check "Yes," then answer Question No. 12. If you check "No," do not answer Question No. 12 and proceed to Question No. 13.

QUESTION NO. 12: What do you find to be Donald Hodgin's amount of damages?

Back Pay: $ 91,250

Front Pay: $ 89,250

Emotional distress, humiliation, embarrassment, anxiety, mental anguish, and/or personal indignity experienced by Donald Hodgin to the present time, and with reasonable probability to be experienced by Donald Hodgin in the future. $ 236,700

Jessie Jaymes

QUESTION NO. 13: Has Plaintiff Jessie Jaymes proven that she was wrongfully discharged in violation of public policy by a preponderance of the evidence?

ANSWER: __X__ Yes _____ No

If you check "Yes," then answer Question No. 14. If you check "No," do not answer Questions Nos. 14 or 15 and proceed to Question No. 16.

QUESTION NO. 14: Has Jessie Jaymes proved by a preponderance of the evidence that Fluor's layoff proximately caused her damage?

ANSWER: X Yes _____ No

If you check "Yes," then answer Question No. 15. If you check "No," do not answer Question No. 15 and proceed to Question No. 16.

QUESTION NO. 15: What do you find to be Jessie Jayme's amount of damages?

Back Pay: $ 129,300

Front Pay: $ 91,200

Emotional distress, humiliation, embarrassment, anxiety, mental anguish, and/or personal indignity experienced by Jessie Jaymes to the present time, and with reasonable probability to be experienced by Jessie Jaymes in the future. $ 242,700

Clyde Killen

QUESTION NO. 16: Has Plaintiff Clyde Killen proven that he was wrongfully discharged in violation of public policy by a preponderance of the evidence?

ANSWER: X Yes _____ No

If you check "Yes," then answer Question No. 17. If you check "No," do not answer Questions No. 17 or 18 and proceed to Question No. 19.

QUESTION NO. 17: Has Clyde Killen proved by a preponderance of the evidence that Fluor's layoff proximately caused him damage?

ANSWER: X Yes _____ No

If you check "Yes," then answer Question No. 18. If you check "No," do not answer Question No. 18 and proceed to Question No. 19.

QUESTION NO. 18: What do you find to be Clyde Killen's amount of damages?

Back Pay: $ 175,000

Front Pay: $ 160,000

Emotional distress, humiliation, embarrassment, anxiety, mental anguish, and/or personal indignity experienced by Clyde Killen to the present time, and with reasonable probability to be experienced by Clyde Killen in the future. $ ~~218,200~~ 218,000

Pedro Nicacio

QUESTION NO. 19: Has Plaintiff Pedro Nicacio proven that he was wrongfully discharged in violation of public policy by a preponderance of the evidence?

ANSWER: X Yes _____ No

If you check "Yes," then answer Question No. 20. If you check "No," do not answer Questions No. 20 or 21 and proceed to Question No. 22.

QUESTION NO. 20: Has Pedro Nicacio proved by a preponderance of the evidence that Fluor's layoff proximately caused him damage?

ANSWER: X Yes _____ No

If you check "Yes," then answer Question No. 21. If you check "No," do not answer Question No. 21 and proceed to Question No. 22.

QUESTION NO. 21: What do you find to be Pedro Nicacio's amount of damages?

Back Pay: $ 31,700

Front Pay: $ 58,000

Shane O'Leary

QUESTION NO. 22: Has Plaintiff Shane O'Leary proven that he was wrongfully discharged in violation of public policy by a preponderance of the evidence?

ANSWER: __X__ Yes _____ No

If you check "Yes," then answer Question No. 23. If you check "No," do not answer Questions No. 23 or 24 and proceed to Question No. 25.

QUESTION NO. 23: Has Shane O'Leary proved by a preponderance of the evidence that Fluor's layoff proximately caused him damage?

ANSWER: __X__ Yes _____ No

If you check "Yes," then answer Question No. 24. If you check "No," do not answer Question No. 24 and proceed to Question No. 25.

QUESTION NO. 24: What do you find to be Shane O'Leary's amount of damages?

Back Pay: $ 120,600

Front Pay: $ 109,200

Emotional distress, humiliation, embarrassment, anxiety, mental anguish, and/or personal indignity experienced by Shane O'Leary to the present time, and with reasonable probability to be experienced by Shane O'Leary in the future. $ 260,300

Raymond Richardson

QUESTION NO. 25: Has Plaintiff Raymond Richardson proven that he was wrongfully discharged in violation of public policy by a preponderance of the evidence?

ANSWER: __X__ Yes _____ No

If you check "Yes," then answer Question No. 26. If you check "No," do not answer Questions Nos. 26 or 27 and proceed to Question No. 28.

QUESTION NO. 26: Has Raymond Richardson proved by a preponderance of the evidence that Fluor's layoff proximately caused him damage?

ANSWER: X Yes _____ No

If you check "Yes," then answer Question No. 27. If you check "No," do not answer Question No. 27 and proceed to Question No. 28.

QUESTION NO. 27: What do you find to be Raymond Richardson's amount of damages?

Back Pay: $ 204,700

Front Pay: $ 189,350

Emotional distress, humiliation, embarrassment, anxiety, mental anguish, and/or personal indignity experienced by Raymond Richardson to the present time, and with reasonable probability to be experienced by Raymond Richardson in the future.
$ 160,000

James Stull

QUESTION NO. 28: Has Plaintiff James Stull proven that he was wrongfully discharged in violation of public policy by a preponderance of the evidence?

ANSWER: X Yes _____ No

If you check "Yes," then answer Question No. 29. If you check "No," do not answer Questions No. 29 or 30 and proceed to Question No. 31.

QUESTION NO. 29: Has James Stull proved by a preponderance of the evidence that Fluor's layoff proximately caused him damage?

ANSWER: X Yes _____ No

If you check "Yes," then answer Question No. 30. If you check "No," do not answer Question No. 30 and proceed to Question No. 31.

QUESTION NO. 30: What do you find to be James Stull's amount of damages?

Back Pay: $ 152,000

Front Pay: $ 182,750

Emotional distress, humiliation, embarrassment, anxiety, mental anguish, and/or personal indignity experienced by James Stull to the present time, and with reasonable probability to be experienced by James Stull in the future. $ 173,800

Randall Walli

QUESTION NO. 31: Has Plaintiff Randall Walli proven that he was wrongfully discharged in violation of public policy by a preponderance of the evidence?

ANSWER: X Yes _____ No

If you check "Yes," then answer Question No. 32. If you check "No," do not answer Questions No. 31 or 32 and sign and return this verdict form.

QUESTION NO. 32: Has Randall Walli proved by a preponderance of the evidence that Fluor's layoff proximately caused him damage?

ANSWER: X Yes _____ No

If you check "Yes," then answer Question No. 33. If you check "No," do not answer Question No. 33 and sign and return this verdict form.

QUESTION NO. 33: What do you find to be Randall Walli's amount of damages?

Back Pay: $ 92,700

Front Pay: $ 112,000

Emotional distress, humiliation, embarrassment, anxiety, mental anguish, and/or personal indignity experienced by Randall Walli to the present time, and with reasonable probability to be experienced by Randall Walli in the future. $ 252,200

When you have completed the special verdict form, you should sign and return the

form.

Dated this 1 day of ~~August~~ Sept, 2005.

Presiding Juror

EXHIBIT B

JOSIE DELVIN
BENTON COUNTY CLERK
MAY - 5 2006
FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAYMES, CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND RICHARDSON, JAMES STULL, RANDALL WALLI, DAVID FAUBION, and CHUCK CABLE, Plaintiffs, v. FLUOR HANFORD, INC., a Washington corporation; FLUOR FEDERAL SERVICES, a Washington corporation Defendants.	Case No. 99-2-01250-7 Hon. Carrie Runge [PROPOSED] ORDER DENYING DEFENDANT'S CR 60 MOTION FOR RELIEF FROM JUDGMENTS Trial Date: July 18, 2005

Defendant Fluor Federal Services, Inc.'s CR 60 Motion for Relief from Judgments came before this Court for hearing on May 5, 2006. Defendant was represented at the hearing by William R. Squires III of Summit Law Group PLLC, Michael King of Lane Powell PC, Ralph Pond of Benedict Garratt, PLLC, and the plaintiffs by John P. Sheridan of The Law Office of

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John P. Sheridan, P.S. The Court has reviewed the parties' motion papers, including the declarations and accompanying exhibits, and considered the arguments of counsel,

AND HEREBY FINDS AS FOLLOWS:

1. The defendant's CR 60 motion improperly seeks to have the Court review issues of law which were not timely raised during the trial, and are not properly raised in a CR 60 motion.

2. The plaintiffs brought successful claims of wrongful discharge in violation of public policy.

3. The claim of wrongful discharge in violation of public policy contains four elements as follows:

   a) The existence of a clear public policy (*clarity* element);

   b) That discouraging the conduct in which [he or she] engaged would jeopardize the public policy (*jeopardy* element);

   c) That the public-policy-linked conduct caused the dismissal (*causation* element);

   d) The defendant must not be able to offer an overriding justification for the dismissal' (*absence of justification* element).

Korslund v. Dycorp Tri-Cities Services, Inc., 156 Wash.2d 168, 178, 125 P.3d 119 (2005) (citation omitted) ("*Korslund* II).

4. In the trial management report, defendant admitted to the existence of the first two elements of the claim namely the clarity and jeopardy elements.

5. The defendant now seeks to challenge whether plaintiffs met their burden of proving the jeopardy element after having waived it in the trial management report by arguing in the CR 60 motion that the defendant was "unable to argue the point" that "other means of promoting the public policy are were adequate until the Supreme Court decided *Korslund* II because the

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decision created new law and that the defendant was bound by the conflicting law of *Korslund* I.[1] Defendant's reply at 3, n.2. I reject defendant's argument.

6. Defendant offers no case on point to support its claims that this Court should consider this legal issue under CR 60 as "new law." Defendant fails to distinguish cases cited by the plaintiffs' for the proposition that CR 60 "is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen." *In re Marriage of Alder*, __ Wn.App. __, 129 P.3d 293, 297 (2006). Errors of law "must be raised on appeal." *In re Marriage of Thurston*, 92 Wn.App. 494, 500, 963 P.2d 947 (1998) (errors of law may not be corrected by CR 60). But even if defendant could produce legal authority to support its proposition that a trial court may consider "new law" under CR 60, a review of the case law in existence at the time of this trial shows that *Korslund* II contains no significant new law.

7. This case was brought to trial in July 2005. At that time, adequate case law existed to provide defendant notice of its potential defenses. First, in *Korslund* I, which was a summary judgment dismissal, the Court of Appeals held that "[w]hether a plaintiff has satisfied the jeopardy element is a question of fact. *Korslund* I at 320. Thus, Defendant Fluor was on notice that it too could have challenged the jeopardy element as a question of fact under

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[1] *Korslund v. Dycorp Tri-Cities Services, Inc.*, 121 Wash.App. 295, 88 P.3d 966); *affirmed in part*, 156 Wash.2d 168, 178, 125 P.3d 119 (2005)

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Korslund I, but it chose instead to waive that element. Second, *Hubbard v. Spokane County*, 146 Wash.2d 699, 717, 50 P.3d 602 (2002) put the defendant on notice that a defendant could challenge the jeopardy element as a matter of law when no other facts are presented. In *Hubbard*, the Court examined the statute in question and analyzed, again at summary judgment, whether other means already existed that adequately protected the public policy in question." *Hubbard* at 716-717. Instead of pursuing that argument at trial after the submission of relevant facts, the defendant here chose to admit the jeopardy element for the purposes of this trial.

8. *Korslund* II is a new decision but is not significantly new law as defendant contends. It simply applied the 2002 *Hubbard* holding to a fact pattern that is similar to, but not identical to, the fact pattern in this case. The *Korslund* II Court cited directly to *Hubbard* at 716-717 for the proposition that the ERA, under the facts presented at summary judgment, was adequate as a matter of law to protect the policies cited by the plaintiff. *Korslund* II at 182. As noted by the dissent, there were no facts in the record regarding the adequacy of the ERA other than the statutory provisions. *Korslund* II at 192-193.

9. *Korlund* II does not mandate that trial courts in the future only consider the jeopardy element as a question of law. The Court specifically held that "the question whether adequate alternative means for promoting the public policy exist ***may*** [not shall] present a question of law." *Id.* at 182.

10. Owing to defendant's admission of elements one and two of wrongful discharge, plaintiff was for the most part unable to present evidence addressing those issues.

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11. The defendant's failure to challenge the jeopardy element at trial now would prejudice the plaintiffs' ability to obtain proper review of the issue after trial or on appeal because little or no evidence was presented at trial on the clarity or jeopardy elements, in part, owing to successful motions in limine filed by the defendant to exclude such evidence.

12. In summary, the defendant could have chosen to challenge the clarity and jeopardy elements of wrongful discharge at trial, but instead, chose to admit those elements. Defendant will not now be permitted to challenge those elements post-trial in a CR 60 motion.

THEREFORE, based on the argument of counsel and the evidence presented, defendant's motion is DENIED.

IT IS SO ORDERED.

DATED this 5 day of May, 2006.

Carrie Runge

CARRIE L. RUNGE
JUDGE
BENTON COUNTY SUPERIOR COURT

Presented by:

THE LAW OFFICE OF
JOHN P. SHERIDAN, P.S.

By: JPS

John P. Sheridan, WSBA # 21473
Greg Wolk, WSBA #28946
Attorneys for Plaintiffs

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EXHIBIT C

U. S. DEPARTMENT OF LABOR

Occupational Safety & Health Administration
1111 Third Avenue, Suite 715
Seattle, Washington 98101-3212

Telephone: (206) 553-5930
FAX: (206) 553-6499

Reply to the Attention of: FSO/jrs

October 6, 1997

Mr. Stew Heaton, General Manager
Fluor Daniel Northwest, Inc.
B3-66, P.O. Box 1050
Richland, WA 99352-1050

Dear Mr. Heaton:

This is to advise that we have completed our investigation of the above-referenced complaint filed by Messrs. Terry Holbrook, Clyde Killen, Pedro Nicacio, Shane O'Leary, Daniel Phillips, James Stull, and Randall Walli, against Fluor Daniel Northwest, Inc. under the provisions of the Energy Reorganization Act, 42 U.S.C. Section 5851, as amended. The investigation revealed the following:

The workplace involved is the Replacement of the Cross-site Transfer System Project (also known as the W058 project) located within the Hanford tank farm area. The complainants, all pipe fitters, were employed at all times material herein by respondent, Fluor Daniel Northwest (FDNW), a so-called "enterprise company" subcontractor of Fluor Daniel Hanford, Inc., the Department of Energy's prime contractor for the Hanford site. All complainants are members of Local 598 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. The complainants and respondent are thus covered under the provisions of the Energy Reorganization Act of 1974, as amended.

Complainants assert that their employment was terminated in the form of a reduction in force in retaliation for having voiced numerous safety and health complaints to their employer. The complainants were all part of a pipe fitters crew which was working on the construction of a pipe six and a half miles long, designed to convey nuclear waste products. Work was being performed on both ends of the pipe, with the west end called "200 West" and the east end "200 East." Complainants worked at 200 West. The project began in November 1995, and by May 1997, the pipe was ready to be hydrostatically pressure tested to ensure the integrity of the pipe's welding. The project was scheduled to be fully completed by August 1997.

From the beginning of the project the complainants were involved in a number of safety and health related incidents. Several individuals on the crew complained of not having the proper respirators for "cad" welding. Some crew members experienced adverse symptoms from the fumes, and the crew foreman, complainant Walli, was hospitalized. An independent investigation revealed that the workers had been exposed to excessive levels of carbon monoxide and hydrofluorocarbons.

SUPERIOR COURT
BENTON COUNTY, WASHINGTON
CASE NO. 99-2-01250-7

Brundridge, et al VS. Fluor Fed Services Inc

PLAINTIFF'S ☑ IDENT 21

DEFENDANT'S ☐ EXHIBIT 21
ADMITTED 7-28-05
REJECTED

EXHIBIT 2

In the Spring of 1996, complainant Walli brought up safety concerns regarding a confined space issue. In the course of resolving the issue Mr. Walli was sarcastically referred to as "Mr. Safety" by a FDNW representative.

In March 1997, complainants Walli and Nicacio (who is also the local union president) met with the FDNW construction manager to express continuing concerns about the adverse relationship which had developed between the crew and their superintendent regarding safety issues.

In April 1997, complainants brought up several safety and health issues at the monthly safety meeting. Complainant Killen complained of possible X-ray overexposure due to the crew's proximity to X-ray testing of the pipe's welds. Complainant Walli expressed concern over the safety department personnel turning off their cellular phones during working hours, thus not being immediately available. Complainant Nicacio brought up an issue in which the safety department had classified an area as not being a confined space based on a telephone description by the construction superintendent rather than by performing an on-site determination. The following week the general foreman held a meeting with the pipe fitters crew to discuss the concerns. In that meeting the general foreman, Jerry Nichols, stated that the area manager, Dave Miller, had referred to the complainants as "grufling employees" and that Miller had asked Nichols to meet with them to resolve the issues.

On May 27, 1997, at a pre-job meeting the crew was informed that they were to install two test caps and two valves on the pipe in preparation for a hydrostatic test. Upon receiving the valves, the crew noticed that the valves were rated for 1975 psi, and the test was to be conducted at a pressure of 2235 psi. They were concerned that any failure of the valves could result in serious injury to themselves and anyone else who may be present in the relatively confined area of the pit and that accidental release of water would cause nuclear contamination of the area since some of the surrounding ground was known to be contaminated. The crew advised Foreman Walli of the under-rated valves, and Walli advised Assistant Superintendent Doug Holbrook. The crew was advised to hold off on installing the valves. The pipe fitters also learned that the company providing the valves, Apollo, Inc., also had two other valves available at the site, which were rated at 3500 psi.

During the next two days Area Manager Miller and others sought assurance from the valve supplier that the valves were safe for use. Respondent provided a letter dated May 28, 1997, from the supplier stating that the valves are, themselves, tested at a pressure 50% greater than the rated working pressure. Area Manager Miller did not feel comfortable with the response and requested further clarification which was provided and which stated more directly that the valves were acceptable for hydrostatic testing at 2235 psi. The complainants remained unconvinced, and in response, General Foreman Nichols arranged for the test to be conducted by employees of Apollo, Inc. The complainants agreed to install the valves on the condition that they would not be involved in the test. General Foreman Nichols thus thought that the issue had been resolved and so advised Area Manager Miller.

However, on the day of the test, May 30, 1997, the Apollo crew who was to perform the test did not possess the proper clearances to gain access to the tank farm. The complainants' crew was again

asked to conduct the test. Foreman Walli and complainants Killen, O'Leary and Stull remained on the job after normal work hours to conduct the test. Complainants again raised the issue of the under-rated valves. Foreman Walli advised the Apollo foreman that they would only perform the test if the properly rated valves, which Apollo had available, were used. After the Apollo foreman made some phone calls to secure permission to use the other valves, Area Manager Miller showed up on the job site. According to all witnesses, Miller was upset that the test was not progressing and used profanity toward the complainants. When he was told that the proper valves were, in fact, available, he ordered their use. The proper valves were then installed, and the test was successfully conducted without further incident.

REDACTION

The following Tuesday, June 3, 1997, General Foreman Nichols advised Foreman Walli that there would be a layoff of pipe fitters. Nichols advised Walli of the names of employees initially selected for layoff which included complainants O'Leary, Stull, Killen, Holbrook, and Nicacio. Nichols further advised that Area Manager Miller also wanted Walli laid off but that he (Walli) would be removed as foreman and returned to the crew on a different project. Assistant Superintendent Doug Holbrook, who was also a pipe fitter, would be returned to foreman, replacing Walli. By Wednesday, June 4, complainant Nicacio was removed from the list and replaced by a T. Morgan. Area Manager Miller states that he decided to remove Nicacio from the list to avoid the appearance of discrimination because Nicacio had been vocal about safety issues during a safety meeting in March 1997. However, the general foreman also states that he substituted T. Morgan for Nicacio based on his consulting with Morgan's foreman, Charles Willoughby, who wanted to retain Nicacio.

On Thursday, June 5, complainants met with General Foreman Nichols and Union Steward Hank Tonning to express their concerns that they felt they had been selected for layoff as a result of their bringing up safety issues, particularly the incident involving the under-rated valves. Although the witnesses' testimony varies somewhat, it is consistent to the extent that General Foreman Nichols told the crew that the layoff was due to the job winding down, that the decisions of who to lay off had been made, and there was nothing further he could do about it. When pressed about why complainant Walli (crew foreman) was being removed and transferred, Nichols refused to answer. This response heightened complainants' concerns, and complainant Nicacio (who is also the union president) stated that he did not think that he could work under the conditions and "just let the whole thing go." Nichols then asked Nicacio if he was quitting. Nicacio responded by saying that under the circumstances Nichols could lay him off with the rest of the group. Walli and Phillips then also elected to be laid off, stating to Nichols that they did not want to quit, but could not continue working under the circumstances. General Foreman Nichols then asked the remaining two pipe fitters present if they wanted to leave, and they said they did not. On June 6, 1997, the complainants and an apprentice pipe fitter were laid off from their employment.

The timing of the layoff and the selection of all six of the core crew members, including the foreman, and the expressed displeasure of Area Manager Miller toward complainants' safety concerns and his participation in the layoff selection process is sufficient nexus to demonstrate a prima facie case.

Respondent asserts that the layoff was a normal reduction in force mandated by business necessity as the W058 project came to a conclusion. Respondent further asserts that complainants O'Leary, Stull, Killen, and Holbrook were selected for layoff by means of the regularly established procedure and that complainants Nicacio, Phillips and Walli terminated their employment voluntarily by requesting to be part of the layoff.

According to respondent, on June 4, 1997, upper management gave General Foreman Nichols the number of pipe fitters that were to be laid off on Friday, June 6, 1997. The need for a layoff of pipe fitters as the project wound down had been discussed for weeks beforehand. Other than Foreman Walli, the individuals to be selected for layoff was done by General Foreman Nichols according to past practice. The collective bargaining agreement is silent on the issue of layoffs and says only that "continuing employment is contingent upon the skill productivity and qualification of the employee." It is undisputed that the usual procedure involves the general foreman and the crew foremen (both of whom are union members) selecting individuals for layoff based on the needs of the work assigned and the qualifications of the workers.

According to respondent, General Foreman Nichols prepared a preliminary list of employees to be laid off and presented it to the ten crew foremen, including Foreman Walli. The list consisted of complainants O'Leary, Stull, Killen and Holbrook plus apprentice Torres, T. Morgan, and B. Van Wechel, a total of seven individuals. None of the foremen expressed dissatisfaction with the list nor recommended that any other employee be laid off instead. According to respondent, when Walli, Nicacio and Phillips volunteered for layoff, they were substituted for Morgan and Van Wechel, who remained employed.

REDACTION

Although respondent speaks extensively about "the layoff list" and changes in the list, no actual list was ever produced other than "Attachment 6" of the "Employee Concerns Investigation Report" prepared by Fluor Daniel employees Dora Valero and Mike Dickinson signed July 7, 1997, well after the fact. Further, respondent emphasizes the legitimate business need for the layoff of a number of employees, yet no actual number is ever specified other than stating that the 200 West job needed only 3 or 4 workers to complete. The lists presented in "Attachment 6" varied in size, and by General Foreman Nichols' own admission, during the June 5 meeting he asked for additional volunteers for layoff after he already had laid off one more employee than planned.

Again, although respondent witnesses maintain that only 3 or 4 crew were needed, time card records indicate that two days after the layoff the 200 West crew consisted of 6 workers who frequently worked overtime. The "Employee Concerns Investigation Report" provided and supported by respondent states that Valdez and Barcello were removed from the original list because they were

needed on the Facility Stabilization Project W-087; however, time card records indicate Valdez helped complete the 200W project.

Assistant Superintendent Doug Holbrook's position was purportedly eliminated, and he replaced complainant Walli as crew foreman. However, witness testimony and time records indicate that Holbrook only worked as crew foreman for 2½ weeks, at which time he was rehired as superintendent on a permanent basis. Holbrook was immediately replaced by Joe Herrin, who had been a welder's fire guard on the project.

REDACTION

REDACTION

REDACTION

It should be made clear to all parties that the U.S. Department of Labor does not represent any of the parties in a hearing. The hearing is an adversarial proceeding in which the parties will be allowed an opportunity to present their evidence for the record. The Administrative Law Judge who conducts the hearing will issue a recommended decision to the Secretary based on the evidence, testimony, and arguments presented by the parties at the hearing. The Final Order of the Secretary will then be issued after consideration of the Administrative Law Judge's recommended decision and the record developed at the hearing, and will either provide for appropriate relief or dismiss the complaint.

Sincerely,

Richard S. Terrill
Acting Regional Administrator

cc: Chief Administrative Law Judge
John D. Wagoner, Manager, DOE Hanford
Tom Carpenter, Esq.
Charles MacLeod, Chief Counsel

EXHIBIT D

FLUOR DANIEL
Fluor Daniel Hanford, Inc.
P.O. Box 1000
Richland, WA 99352

Settlement Agreement Between Employers
Fluor Daniel Northwest, Inc. and
Terry Holbrook, Clyde Killen, Pete Nicacio,
Shane O'Leary, Dan Phillips,
James D. Stull, Randall J. Walli
DOL Case No. 98-ERA-4

Fluor Daniel Northwest, Inc. (FDNW) and the above named seven Complainants agree to the following:

1. FDNW agrees to pay each of the Complainants [redacted]

2. This $[redacted]per Complainant is not a "make whole" amount or based on any wage formula, rather it is for case settlement.

3. FDNW agrees to offer reinstatement of employment to each of the Complainants within two weeks of the signing of this Settlement Agreement.

4. FDNW agrees to pay Complainants' attorneys, the Government Accountability Project and Project on Liberty and the Workplace, a total of [redacted]in legal expenses.

5. FDNW and Complainants agree to work for U.S. Department of Labor (DOL) approval of this Settlement Agreement and FDNW will pay the designated amounts within two weeks of final DOL approval.

6. FDNW admits no wrongdoing of any kind by signing this Settlement Agreement.

7. Complainants agree DOL Case No. 98-ERA-4 is settled by the signing of this Settlement Agreement.

SUPERIOR COURT
BENTON COUNTY, WASHINGTON
CASE NO. 99-2-01250-7

Brundridge, et al VS. Fluor Fed Services Inc

PLAINTIFF'S ☑ IDENT 2

DEFENDANT'S ☐ EXHIBIT 2
ADMITTED 7-21-05
REJECTED

12007

EXHIBIT 34

8. Complainants agree that all disputes arising out of their employment with FDNW are settled by this Agreement as the purpose of this agreement is to dispose of all disputes between Complainants and FDNW. This Agreement constitutes a full and complete release of all claims made, or which could have been made, against FDNW, its officers, employees, or representatives with respect to the subject matter of DOL Case No. 98-ERA-4.

9. FDNW and Complainants agree that this Settlement Agreement is to be interpreted by federal law governing these DOL proceedings and as appropriate with the laws of the State of Washington.

Signed by FDNW and Complainants this 23rd day of February, 1998.

Complainants:

Terry Holbrook

Clyde Killen

Pete Nicacio

Shane O'Leary

Dan Phillips

James D. Stull

Randall J. Walli

For the Employer:

Joe D. Davis, President
Fluor Daniel Northwest, Inc.

EXHIBIT E

Fluor Federal Services Opening Brief

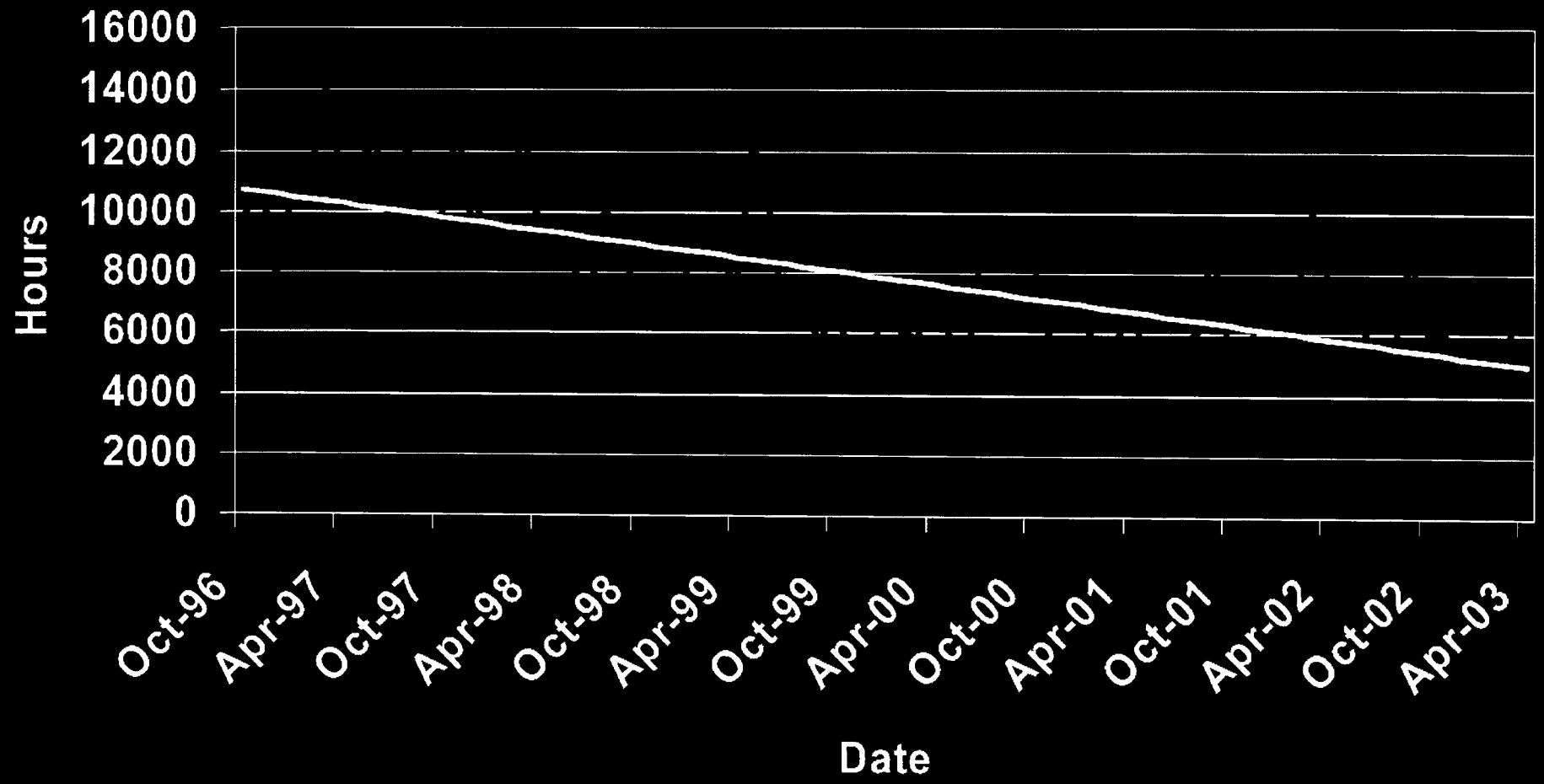
Exhibit E to Appendix

Layoff Dates

Layoff Date	Name
03/10/1998	Brundridge, Scott
03/10/1998	Hodgin, Donald
03/10/1998	Jaymes, Jessie
03/10/1998	Richardson, Raymond
04/29/1998	Faubion, David
10/02/1998	Killen, Clyde
10/02/1998	Nicacio, Pedro
10/02/1998	Stull, James
10/02/1998	Walli, Randall
11/25/1998	O'Leary, Shane
05/02/2000	Cable, Charles

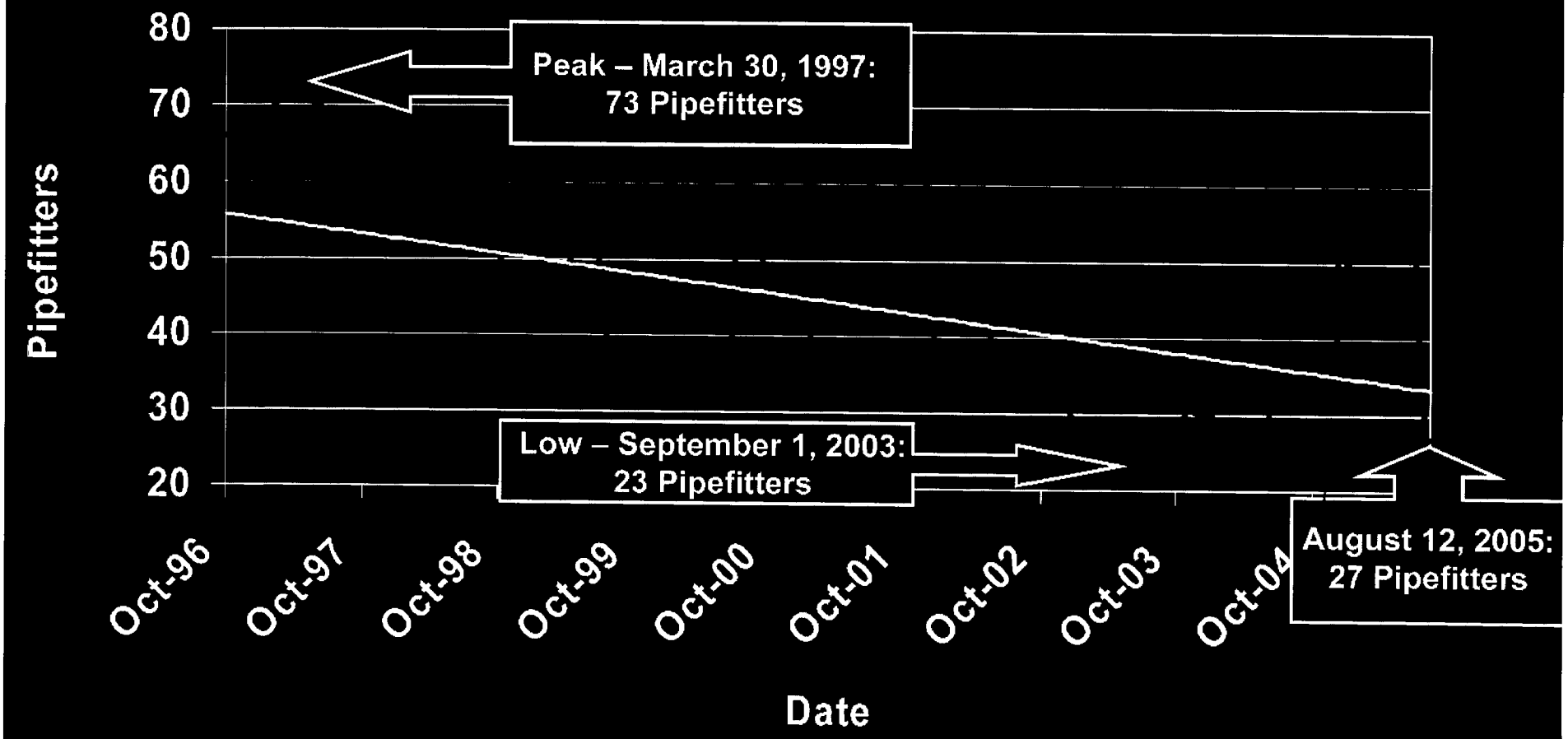
EXHIBIT F

Pipefitter Hours: October 1996 – March 2003



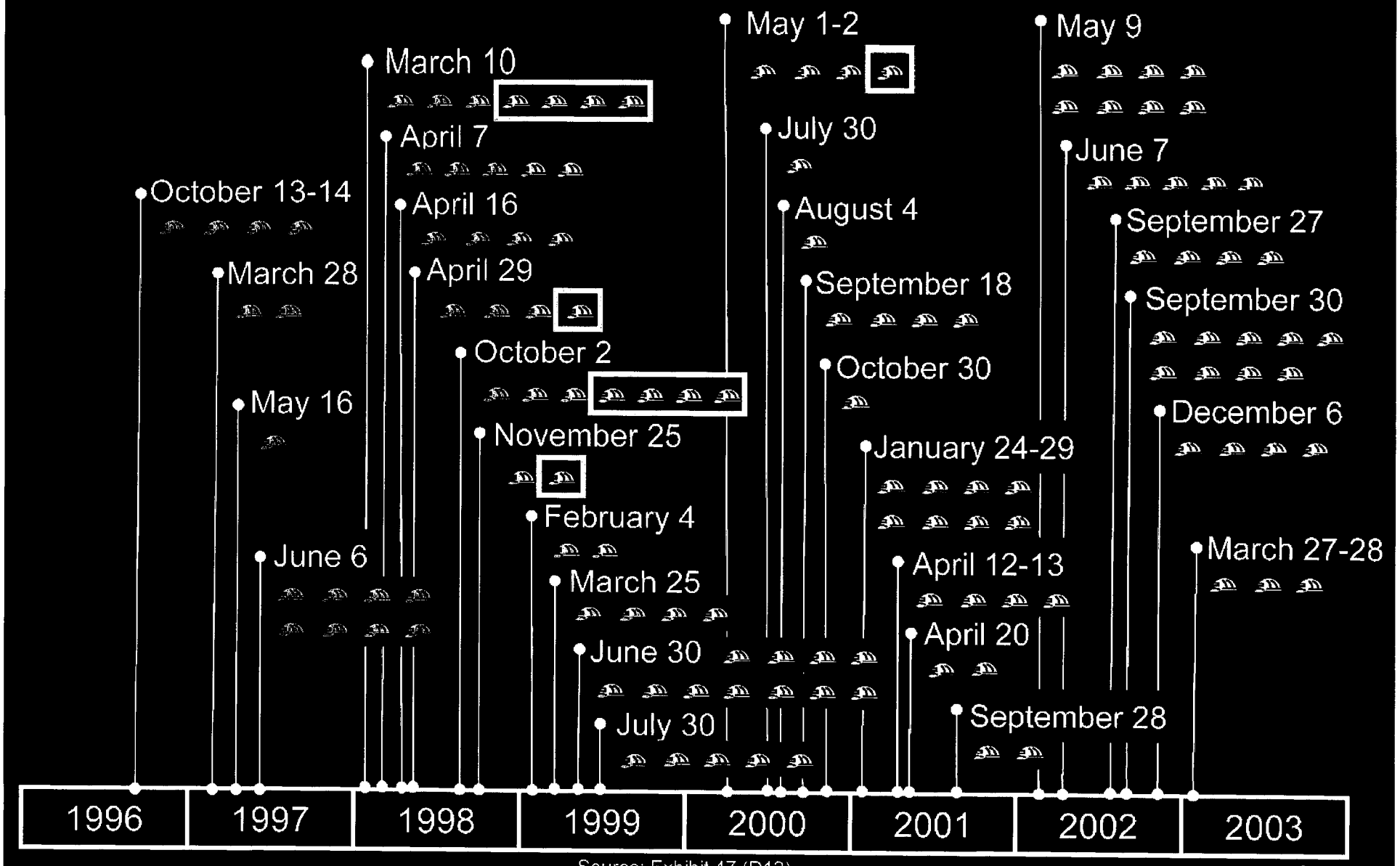
Source: Exhibit 85 (D3)

Pipefitter Hire & Termination Trends: October 1996 - August 2005



Source: Exhibit 89

1996-2003 Reductions of Workforce



Source: Exhibit 47 (D12)

EXHIBIT G

FLUOR FEDERAL SERVICES, INC.
OPENING BRIEF

Exhibit G to Appendix

Plaintiffs' Damages

Plaintiff	*Back Pay*	*Front Pay*	*Emotional Distress*
Brundridge, Scott	$ 79,700	$ 80,000	$ 195,000
Cable, Charles	$ 135,000	$ 230,000	$ 130,000
Faubion, David	$ 89,000	$ 93,000	$ 237,500
Hodgin, Donald	$ 91,250	$ 89,250	$ 236,700
Jaymes, Jessie	$ 129,300	$ 91,200	$ 242,700
Killen, Clyde	$ 175,000	$ 160,000	$ 218,000
Nicacio, Pedro	$ 31,700	$ 58,000 [This Amount Satisfied]	$ 0 [None claimed]
O'Leary, Shane	$ 120,600	$ 109,200	$ 260,300
Richardson, Raymond	$ 204,700	$ 189,350	$ 160,000
Stull, James	$ 152,000	$ 182,750	$ 173,800
Walli, Randall	$ 92,700	$ 112,000	$ 252,200

Taken from Verdict Form, CP 0498 – 0507.

EXHIBIT H

U. S. DEPARTMENT OF LABOR

Occupational Safety & Health Administration
1111 Third Avenue, Suite 715
Seattle, Washington 98101-3212

Telephone: (206) 553-5930
FAX: (206) 553-6499

Reply to the Attention of: FSO/jrs

October 6, 1997

Mr. Stew Heaton, General Manager
Fluor Daniel Northwest, Inc.
B3-66, P.O. Box 1050
Richland, WA 99352-1050

Dear Mr. Heaton:

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In the Spring of 1996, complainant Walli brought up safety concerns regarding a confined space issue. In the course of resolving the issue Mr. Walli was sarcastically referred to as "Mr. Safety" by a FDNW representative.

In March 1997, complainants Walli and Nicacio (who is also the local union president) met with the FDNW construction manager to express continuing concerns about the adverse relationship which had developed between the crew and their superintendent regarding safety issues.

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On May 27, 1997, at a pre-job meeting the crew was informed that they were to install two test caps and two valves on the pipe in preparation for a hydrostatic test. Upon receiving the valves, the crew noticed that the valves were rated for 1975 psi, and the test was to be conducted at a pressure of 2235 psi. They were concerned that any failure of the valves could result in serious injury to themselves and anyone else who may be present in the relatively confined area of the pit and that accidental release of water would cause nuclear contamination of the area since some of the surrounding ground was known to be contaminated. The crew advised Foreman Walli of the under-rated valves, and Walli advised Assistant Superintendent Doug Holbrook. The crew was advised to hold off on installing the valves. The pipe fitters also learned that the company providing the valves, Apollo, Inc., also had two other valves available at the site, which were rated at 3500 psi.

During the next two days Area Manager Miller and others sought assurance from the valve supplier that the valves were safe for use. Respondent provided a letter dated May 28, 1997, from the supplier stating that the valves are, themselves, tested at a pressure 50% greater than the rated working pressure. Area Manager Miller did not feel comfortable with the response and requested further clarification which was provided and which stated more directly that the valves were acceptable for hydrostatic testing at 2235 psi. The complainants remained unconvinced, and in response, General Foreman Nichols arranged for the test to be conducted by employees of Apollo, Inc. The complainants agreed to install the valves on the condition that they would not be involved in the test. General Foreman Nichols thus thought that the issue had been resolved and so advised Area Manager Miller.

However, on the day of the test, May 30, 1997, the Apollo crew who was to perform the test did not possess the proper clearances to gain access to the tank farm. The complainants' crew was again

asked to conduct the test. Foreman Walli and complainants Killen, O'Leary and Stull remained on the job after normal work hours to conduct the test. Complainants again raised the issue of the under-rated valves. Foreman Walli advised the Apollo foreman that they would only perform the test if the properly rated valves, which Apollo had available, were used. After the Apollo foreman made some phone calls to secure permission to use the other valves, Area Manager Miller showed up on the job site. According to all witnesses, Miller was upset that the test was not progressing and used profanity toward the complainants. When he was told that the proper valves were, in fact, available, he ordered their use. The proper valves were then installed, and the test was successfully conducted without further incident.

It is, therefore, established that complainants engaged in protected activity in that they voiced safety and health concerns to management regarding working conditions involving the DOE facilities. Further, it is undisputed that respondent had knowledge of the safety and health concerns raised by complainants.

The following Tuesday, June 3, 1997, General Foreman Nichols advised Foreman Walli that there would be a layoff of pipe fitters. Nichols advised Walli of the names of employees initially selected for layoff which included complainants O'Leary, Stull, Killen, Holbrook, and Nicacio. Nichols further advised that Area Manager Miller also wanted Walli laid off but that he (Walli) would be removed as foreman and returned to the crew on a different project. Assistant Superintendent Doug Holbrook, who was also a pipe fitter, would be returned to foreman, replacing Walli. By Wednesday, June 4, complainant Nicacio was removed from the list and replaced by a T. Morgan. Area Manager Miller states that he decided to remove Nicacio from the list to avoid the appearance of discrimination because Nicacio had been vocal about safety issues during a safety meeting in March 1997. However, the general foreman also states that he substituted T. Morgan for Nicacio based on his consulting with Morgan's foreman, Charles Willoughby, who wanted to retain Nicacio.

On Thursday, June 5, complainants met with General Foreman Nichols and Union Steward Hank Tonning to express their concerns that they felt they had been selected for layoff as a result of their bringing up safety issues, particularly the incident involving the under-rated valves. Although the witnesses' testimony varies somewhat, it is consistent to the extent that General Foreman Nichols told the crew that the layoff was due to the job winding down, that the decisions of who to lay off had been made, and there was nothing further he could do about it. When pressed about why complainant Walli (crew foreman) was being removed and transferred, Nichols refused to answer. This response heightened complainants' concerns, and complainant Nicacio (who is also the union president) stated that he did not think that he could work under the conditions and "just let the whole thing go." Nichols then asked Nicacio if he was quitting. Nicacio responded by saying that under the circumstances Nichols could lay him off with the rest of the group. Walli and Phillips then also elected to be laid off, stating to Nichols that they did not want to quit, but could not continue working under the circumstances. General Foreman Nichols then asked the remaining two pipe fitters present if they wanted to leave, and they said they did not. On June 6, 1997, the complainants and an apprentice pipe fitter were laid off from their employment.

The timing of the layoff and the selection of all six of the core crew members, including the foreman, and the expressed displeasure of Area Manager Miller toward complainants' safety concerns and his participation in the layoff selection process is sufficient nexus to demonstrate a prima facie case.

Respondent asserts that the layoff was a normal reduction in force mandated by business necessity as the W058 project came to a conclusion. Respondent further asserts that complainants O'Leary, Stull, Killen, and Holbrook were selected for layoff by means of the regularly established procedure and that complainants Nicacio, Phillips and Walli terminated their employment voluntarily by requesting to be part of the layoff.

According to respondent, on June 4, 1997, upper management gave General Foreman Nichols the number of pipe fitters that were to be laid off on Friday, June 6, 1997. The need for a layoff of pipe fitters as the project wound down had been discussed for weeks beforehand. Other than Foreman Walli, the individuals to be selected for layoff was done by General Foreman Nichols according to past practice. The collective bargaining agreement is silent on the issue of layoffs and says only that "continuing employment is contingent upon the skill productivity and qualification of the employee." It is undisputed that the usual procedure involves the general foreman and the crew foremen (both of whom are union members) selecting individuals for layoff based on the needs of the work assigned and the qualifications of the workers.

According to respondent, General Foreman Nichols prepared a preliminary list of employees to be laid off and presented it to the ten crew foremen, including Foreman Walli. The list consisted of complainants O'Leary, Stull, Killen and Holbrook plus apprentice Torres, T. Morgan, and B. Van Wechel, a total of seven individuals. None of the foremen expressed dissatisfaction with the list nor recommended that any other employee be laid off instead. According to respondent, when Walli, Nicacio and Phillips volunteered for layoff, they were substituted for Morgan and Van Wechel, who remained employed.

Respondent's stated position, however, is inconsistent with the testimony provided by various management officials and in some cases not supported by available documentation. Although respondent speaks extensively about "the layoff list" and changes in the list, no actual list was ever produced other than "Attachment 6" of the "Employee Concerns Investigation Report" prepared by Fluor Daniel employees Dora Valero and Mike Dickinson signed July 7, 1997, well after the fact. Further, respondent emphasizes the legitimate business need for the layoff of a number of employees, yet no actual number is ever specified other than stating that the 200 West job needed only 3 or 4 workers to complete. The lists presented in "Attachment 6" varied in size, and by General Foreman Nichols' own admission, during the June 5 meeting he asked for additional volunteers for layoff after he already had laid off one more employee than planned.

Again, although respondent witnesses maintain that only 3 or 4 crew were needed, time card records indicate that two days after the layoff the 200 West crew consisted of 6 workers who frequently worked overtime. The "Employee Concerns Investigation Report" provided and supported by respondent states that Valdez and Barcello were removed from the original list because they were

needed on the Facility Stabilization Project W-087; however, time card records indicate Valdez helped complete the 200W project.

Assistant Superintendent Doug Holbrook's position was purportedly eliminated, and he replaced complainant Walli as crew foreman. However, witness testimony and time records indicate that Holbrook only worked as crew foreman for 2½ weeks, at which time he was rehired as superintendent on a permanent basis. Holbrook was immediately replaced by Joe Herrin, who had been a welder's fire guard on the project. Documented evidence supports a finding that respondent had planned as early as May 14, 1997, to hire Holbrook as a superintendent.

Based on the investigation, it is concluded that there is insufficient evidence to demonstrate respondent's burden of showing by clear and convincing evidence that the complainants would have been laid off in the absence of their protected activity. Further, the fact that complainant Walli was specifically advised that he was not wanted on the project and was demoted from foreman and transferred to another project created working conditions sufficiently onerous as to constitute a constructive discharge. It is concluded, therefore, that complainants O'Leary, Stull, Killen and Holbrook were discharged and complainant Walli was constructively discharged in violation of 42 U.S.C. Section 5851, as amended. Complainants Nicacio and Phillips voluntarily terminated their employment in protest of the actions taken against the rest of the crew but were not faced with a constructive discharge.

The following actions are required to remedy the violations:

1. Immediate reinstatement of complainants Walli, O'Leary, Stull, Killen and Holbrook to their former positions with FDNW in a safety-committed environment.

2. Award of back pay in the amount the following individuals would have earned from the effective date of their layoff to the date of reinstatement had they not been laid off from their employment through September 30, 1997. This amount includes consideration of interim earnings and expenses incurred during this period:

Name	Back pay	Interest	Total
Terry Holbrook	$11,295.20	$225.91	$11,521.11
Clyde Killen	$15,126.66	$302.53	$15,429.19
Shane O'Leary	$17,853.70	$357.08	$18,210.78
James Stull	$19,193.20	$383.87	$19,577.07
Randall Walli	$18,927.27	$378.55	$19,305.82

3. Award of compensatory damages for emotional pain and suffering incurred in filing this complaint in the amount of $10,000 for each complainant.

4. Payment of complainants' attorney's fees in the amount of $ 11,875.

5. Declaratory relief that the complainants' safety concerns were protected, that they utilized the proper authority to stop work, and that upon reinstatement they may exercise that authority in the future if any one of them deems any activity unsafe or potentially unsafe. Such relief may be in the form of an insert in all of the FDNW employees' paychecks or other mailings or posting of a notice for 60 days in all places where regular notices to employees are customarily posted.

6. Immediate and continuing cessation of harassment and intimidation and all acts of reprisal against complainants, or any one of them, or any one who acknowledges their support of the complainants.

If you wish to appeal this finding you may file, within five (5) calendar days of receipt of this notice, with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or overnight/next day delivery service a request for a hearing on the complaint. Copies of the request for a hearing shall be served on the employer(s) and the Administrator on the same day the hearing is requested by facsimile (fax), telegram, hand delivery, or overnight/next day delivery service. A copy of this letter, along with a copy of your complaint, has been sent to the Chief Administrative Law Judge.

Beverly Queen, Chief Docket Clerk
Office of Administrative Law Judges
U.S. Department of Labor
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002
(202) 565-5330

It should be made clear to all parties that the U.S. Department of Labor does not represent any of the parties in a hearing. The hearing is an adversarial proceeding in which the parties will be allowed an opportunity to present their evidence for the record. The Administrative Law Judge who conducts the hearing will issue a recommended decision to the Secretary based on the evidence, testimony, and arguments presented by the parties at the hearing. The Final Order of the Secretary will then be issued after consideration of the Administrative Law Judge's recommended decision and the record developed at the hearing, and will either provide for appropriate relief or dismiss the complaint.

Sincerely,

Richard S. Terrill
Acting Regional Administrator

cc: Chief Administrative Law Judge
John D. Wagoner, Manager, DOE Hanford
Tom Carpenter, Esq.
Charles MacLeod, Chief Counsel

EXHIBIT I

E. KAY STAPLES
BENTON COUNTY CLERK
JUL - 7 2005
FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR BENTON COUNTY

SCOTT BRUNDRIDGE, et al., Plaintiffs, vs. FLUOR FEDERAL SERVICES, INC., a Washington corporation; Defendant.	Case No.: 99-2-01250-7 **Hon. Carrie L. Runge** **PLAINTIFFS' STATEMENT OF RELEVANT FACTS REGARDING 1997 TIME FRAME** Hearing Date: July 8, 2005 Time: 9:00 A.m. Oral Argument Scheduled

Plaintiffs hereby submit their statement of undisputed facts regarding the 1997 timeframe which are relevant to the present claim. The purpose of this evidence is to show that the intent to retaliate against the plaintiffs was formed in 1997 as a result of safety issues raised by the plaintiffs. The evidence also shows that Fluor made the same claims to justify the layoff of Pipe fitter One in 1997 as they made in 1998—reduction in work. Additionally, the evidence demonstrates that Fluor was willing to delay an important job simply to create a justification for the 1997 layoff. This is relevant evidence to show they were also willing to take the same action in 1998 to create a justification for the layoffs.

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Plaintiffs have provided a space for the defendant either admit the fact or to enter its counter-statement of facts.

1997 Plaintiffs' Statement of Facts	Defendant's Admissions or Counter Statement of Facts
At safety meeting Walli and Nicacio raise safety concerns to Manger Foucault about safety practices of Manager Neville.	
At safety meeting, Walli raises concern that Miller and safety manager turn off cell phones when in meetings, and crews can't reach if safety issue. Miller agrees to leave phones on.	
After working under confined space safety procedures for 6 months at SY farm, safety manager says work area no longer confined space. After meeting with Manager Miller and others, management changed back to confined space designation.	
Walli raises safety issue to General Foreman Nichols and Superintendent Holbrook re: two plaintiffs walked into Apollo hydro-test while pipe was pressurized because Apollo didn't follow procedures to barricade and post area in accordance with procedures.	
Four of Walli's crew were exposed to x-rays from test while exiting work area.	
Safety Department Manager Silvi called Walli Mr. Safety, because he kept bringing up safety issues in 1997.	
Company conducts "safety audit" but only reviews pipe fitter tool boxes—not electrician's tool boxes even though they are working at same location.	
Walli and crew assigned to work on W-058 cross site transfer line. Manager said job was high priority which caused lots of overtime. Other personnel were transferred to work on the job under Walli.	
Monday: Superintendent Holbrook tells Walli to pick up valves for hydro test. Walli takes valves back to Holbrook once noticed they were not rated for the test pressure.	

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Superintendent Holbrook says he will check into issue of valve rating.	
Based on investigation, Walli learns Apollo has correct valves, and tells Holbrook	
Tuesday through Thursday: Walli meets with Nichols who says he is calling around Fluor for valves. Nichols says he has paperwork that says valve okay.	
Days or weeks earlier, Walli's crew had done hydro test on another part of same pipeline and used correct valves. DOE checked and approved.	
Friday Morning: In pre-job meeting, Holbrook says, "make no mistake about it, these valves will be installed today one way or another. Plaintiffs took that to mean they would be fired if test did not go forward. In an effort to compromise, Walli tells Holbrook that if he takes responsibility for environmental consequences, Walli will take responsibility for personnel, and he will not object to pipeline being charged with underrated valves so long as no personnel nearby. Holbrook agrees. Killen asks to have plug put in drain of pit in case valve fails, so water and mud will not get in tank 101 sy. Holbrook says valves won't blow so won't do. Holbrook agrees that no one will be within 200 feet of valve during test; they will pressurize on other end of pipe and release pressure there too.	
Test was scheduled for Friday afternoon. Test delayed. Owing to start delay, another pre-job required. At evening pre-job, Holbrook says Apollo can't bleed off pressure so pipe fitters will have to release pressure from the valves and drain. Walli's crew refuses and stops work according to safety procedures.	

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Manger Miller arrives at test site and screams to Killen and O'Leary, "What the fuck seems to be the problem?" They direct Miller to Foreman Walli. Miller is agitated and discusses issues with Walli. Walli explains job scope of work changed from prior pre-job, since now being asked to operate with full pressure. Walli tells Miller that Ron Williams at Apollo, who was standing there, has the right valves in his truck. Miller talks to Williams and new valves obtained and installed. Test conducted without incident.	
Monday: Walli briefs Nichols on Friday incident. Nichols says he will have to apologize to Miller.	
Tuesday: Nichols tells Walli that there will be layoff of Walli's crew. Nichols tells Walli that Miller wanted Walli laid off too but not Nichol's practice to layoff foremen.	
Wednesday: Decision changed to retain Nicacio who is union president. Nichols tells Walli he will be retained, but demoted and transferred to another crew.	
Thursday: meeting with crew, Nichols, and Steward Hank Tonning. Nichols says layoff because job needs to come down to 2-3 pipe fitters. Nichols says upper management chose names on list, but when pressured, he indicated was Miller. Nichols says layoff decision is a "done deal. I'm not going back there; they could replace me."	
Friday: Layoff of Walli and his crew.	
Pipe fitter I files OSHA complaint.	
During litigation, defendant contends layoff owing to downsizing of work at Walli's work site. Crew actually manned up after layoff.	
OSHA issues findings on Pipe fitter One. Redacted letter. Company appeals.	

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Company next contends that man-up of work where layoff occurred caused by accelerated schedule. Witness Van Katwijk will testify that there was no accelerated schedule. Also, Fluor missed its July DOE milestone for completion of work on W-058 cross site transfer line.	
Late January: Foucault seeks assurances that if Fluor settles PI litigation, DOE will reimburse	
Early February: Nichols meets with Miller to discuss how to justify layoffs in February. Notes there will be layoff in September too. (During litigation in 1999, Nichols withholds calendar entry documenting meeting and does not produce page until ordered by Court.)	
Company settles in February 1998.	
PII terminated in March 1998.	
PIII terminated in September and October 1998	

DATED this 7th day of June, 2005.

THE LAW OFFICE OF
JOHN P. SHERIDAN, P.S.

By: _____
John P. Sheridan, WSBA # 21473
Greg Wolk, WSBA #28946
Attorneys for Plaintiffs

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EXHIBIT J

JURY INSTRUCTION NO. _____

This statement describes an earlier dispute between some of the plaintiffs and the defendant that was resolved in the settlement agreement that provided that, among others, plaintiffs Killen, Nicacio, O'Leary, Stull, and Walli would be reinstated by Defendant.

This statement contains the contentions of both parties regarding the incidents that it describes. No determination has been made as to the truth or falsity of these contentions.

The workplace involved is the Replacement of the Cross-site Transfer System Project (also known as the W-58 project) located within the Hanford tank farm area. Plaintiffs Killen, Nicacio, O'Leary, Stull and Walli, among others, all pipefitters, were employed at all times material there by Fluor Daniel Northwest ("FDNW"). All are members of Local 598 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

Plaintiffs assert that their employment was terminated in the form of a reduction in force in retaliation for having voiced safety and health complaints to their employer. Their pipefitters crew was working on the construction of a very small section of pipe six and a half miles long, designed to convey nuclear waste products. Work was being performed on both ends of the pipe, with the west end called "200 West" and the east end "200 East." Plaintiffs worked at 200 West. The project began in November 1995, and by May 1997, the pipe was ready to be hydrostatically pressure tested (*i.e.,* tested with water) to ensure the integrity of the pipe's welding. The project was scheduled to be fully completed by August 1997.

According to Plaintiffs, on May 27, 1997, at a pre-job meeting the crew was informed that they were to install two test caps and two valves on the pipe in preparation for a hydrostatic test. Upon receiving the valves, the crew noticed that the valves were rated for 1975 psi, and the

test was to be conducted at a pressure of 2235 psi. They were concerned that any failure of the valves could result in serious injury to themselves and anyone else who may be present in the relatively confined area of the pit and that accidental release of water would cause nuclear contamination of the area since some of the surrounding ground was known to be contaminated. The crew advised Foreman Walli of their concerns, and Walli advised Assistant Superintendent Doug Holbrook. The crew was advised to hold off on installing the valves. The pipefitters also learned that the company providing the valves, Apollo, Inc., also had two other valves available at the site, which were rated at 3500 psi.

During the next two days the Area Manager and others sought assurance from the valve supplier that the valves were safe for use. Defendant provided a letter dated May 28, 1997, from the supplier stating that the valves are, themselves, tested at a pressure 50% greater than the stated working pressure. Area Manager Miller did not feel comfortable with the response and requested further clarification which was provided and which stated more directly that the valves were acceptable for hydrostatic testing at 2235 psi. The Plaintiffs claim that they remained unconvinced, and that in response, General Foreman Nichols arranged for the test to be conducted by employees of Apollo, Inc. The complainants agreed to install the valves on the condition that they would not be involved in the test. General Foreman Nichols thus thought that the issue had been resolved and so advised Area Manager Miller.

However, on the day of the test, May 30, 1997, the Apollo crew who was to perform the test did not possess the proper clearances to gain access to the tank farm. The Plaintiffs' crew was again asked to conduct the test. Plaintiffs Walli, Killen, O'Leary and Stull remained on the job after normal work hours to conduct the test, and again raised the issue of the allegedly underrated valves. Foreman Walli advised the Apollo foreman that they would only perform the

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test if the highly-rated valves, which Apollo had available, were used. After the Apollo foreman made some phone calls to secure permission to use the other valves, Area Manager Miller showed up on the job site. According to all witnesses, Miller was upset that the test was not progressing and used profanity toward the complainants. When he was told that the highly-rated valves were, in fact, available, he ordered their use. The highly-rated valves were then installed, and the test was successfully conducted without further incident.

The following Tuesday, June 3, 1997, General Foreman Nichols advised Foreman Walli that there would be a layoff of pipe fitters. Nichols advised Walli of the names of employees initially selected for layoff which included Plaintiffs O'Leary, Stull, Killen, and Nicacio. Plaintiff Walli would be removed as foreman and returned to the crew on a different project. Assistant Superintendent Doug Holbrook, who was also a pipefitter, would be returned to foreman, replacing Walli. By Wednesday, June 4, Plaintiff Nicacio was removed from the list and replaced by T. Morgan. Area Manager Miller states that he decided to remove Nicacio from the list to avoid the appearance of discrimination because Nicacio had been vocal about safety issues during a safety meeting in March 1997. However, the general foreman also states that he substituted T. Morgan for Nicacio based on his consulting with Morgan's foreman, Charles Willoughby, who wanted to retain Nicacio.

On Thursday, June 5, Plaintiffs met with General Foreman Nichols and Union Steward Hank Tonning to express their concerns that they felt they had been selected for layoff as a result of their bringing up safety issues, particularly the incident involving the underrated valves. General Foreman Nichols told the crew that the layoff was due to the job winding down, that the decisions of who to lay off had been made, and there was nothing further he could do about it. Plaintiffs contend that when pressed about why Plaintiff Walli (crew foreman) was being

removed and transferred, Nichols refused to answer. They claim that this response heightened their concerns, and Plaintiff Nicacio (who is also the union president) stated that he did not think that he could work under the conditions and "just let the whole thing go." Nichols then asked Nicacio if he was quitting. Nicacio responded by saying that under the circumstances Nichols could lay him off with the rest of the group. Walli then also elected to be laid off, stating to Nichols that he did not want to quit, but could not continue working under the circumstances. General Foreman Nichols then asked the remaining two pipe fitters present if they wanted to leave, and they said they did not. On June 6, 1997, the complainants and an apprentice pipe fitter were laid off from their employment.

Plaintiffs claim that the timing of the layoff and the selection of all six of the core crew members, including the foreman, and the expressed displeasure of Area Manager Miller toward complainants' safety concerns and his participation in the layoff selection process is sufficient nexus to demonstrate an improper motive.

Defendant asserts that Miller shared the information on the valve test pressure rating with Jerry Nichols, Randy Walli and Grant Brazil. Walli voiced no objections to using the 1975 psi rated valve after receiving this information. General Foreman Nichols asked Walli to share this information with his crew, and to inform him if there were any remaining objections. Walli informed Nichols that the crew would proceed to install the 1975 psi rated valves. Nichols relayed that information to Miller. Miller's later remarks were not directed to the complainants alone, but to everyone present, and resulted at least in part from his understanding that the situation had been previously resolved. Miller's remarks were also influenced by his preoccupation with a crane that had tipped over immediately before he was called out to address the valve incident. Miller has not worked at the Hanford site since June 13, 1998.

The reduction in force on this W058 project was discussed among management, the General Foremen, and the Foremen, including foreman Walli, weeks before the incident in question. Indeed, one such discussion was attended by Rick Bergland, the assistant business manager for Local 598, the Plaintiffs' union. The layoffs were driven by anticipated reductions in work, including the anticipated completion of the affected portion of W058 project. Four of the seven members of the W058 crew were initially selected for layoff (O'Leary, Stull, Killen and Terry Holbrook), and the remaining three members (Nicacio, Walli and Phillips) were to be transferred to other crews as part of the normal trading process. Nicacio, Walli and Phillips, however, asked to be laid off, thereby replacing three other persons (T. Morgan, T. Torres and B. Van Wenchel) on the layoff list.

The layoff selections were made by General Foreman Nichols and the returning foreman for the W058 project, Doug Holbrook. Holbrook had been the foreman on the project before Walli, and Walli had been informed in March of 1997 that Holbrook would retake his old position as project foreman when his current position as assistant Superintendent ended. The transfer of a foreman back to journeyman status under these circumstances is customary at Hanford (referred to as going "back to the tools"), and it is not viewed as a demotion.

Plaintiffs claim that Defendant's stated position is inconsistent with the testimony provided by various management officials and in some cases not supported by available documentation.

Plaintiffs further claim that although Defendant maintains that only 3 or 4 crew were needed, timecard records indicate that two days after the layoff the 200 West crew consisted of 6 workers who frequently worked overtime, and that while Defendant states that Valdez and

Barcello were removed from the original list because they were needed on the Facility Stabilization Project W087; timecard records indicate Valdez helped complete the 200W project.

Plaintiffs also claim that while Assistant Superintendent Doug Holbrook's position was purportedly eliminated, and he replaced Plaintiff Walli as crew foreman, Holbrook only worked as crew foreman for 2½ weeks, at which time he was rehired as superintendent on a permanent basis. Holbrook was immediately replaced by Joe Herrin, who had been a welder's fire guard on the project. Plaintiffs claim that the evidence supports a finding that Defendant had planned as early as May 14, 1997, to hire Holbrook as a superintendent.

EXHIBIT K

JURY INSTRUCTION NO. _____

This statement describes an earlier dispute between some of the plaintiffs and the defendant that was resolved in the settlement agreement that provided that, among others, plaintiffs Killen, Nicacio, O'Leary, Stull, and Walli would be reinstated by Defendant.

This statement contains the contentions of both parties regarding the incidents that it describes. No determination has been made as to the truth or falsity of these contentions.

The Plaintiffs alleged the following: Plaintiffs Killen, Nicacio, O'Leary, Stull, and Walli were working as pipefitters on a crew at the Hanford Nuclear Facility in May 1997 when they were asked to install underrated valves on a pipe that was scheduled to run water during a test at a pressure of 2235 pounds/square inch ("psi"), more than 250 psi beyond the rating of the ordered valves. The crew refused to install the valves because of their safety and environmental concerns about running the test with a potential for valve failure. After much dispute, the correctly rated valves were installed. The entire crew, which included two other pipe fitters in addition to Plaintiffs Killen, Nicacio, O'Leary, Stull, and Walli, were laid off less than one week after reporting the safety problems associated with the valves. The crew filed an administrative claim with the Department of Labor's ("DOL") Occupational Safety and Health Administration ("OSHA") under the whistleblower protection provisions of the Energy Reorganization Act, 42 U.S.C. 5851, an action deemed "Pipe fitter I." The parties later settled this dispute.

Fluor disputed the Plaintiffs' allegations, asserting as follows: Plaintiffs Killen, Nicacio, O'Leary, Stull, and Walli were pipefitters working on a crew at Hanford Nuclear Facility in May 1997 when they objected to the installation of valves on a pipe alleging that they were underrated. Based on the Plaintiffs' concerns, Fluor management stopped all work on the project, investigated the crew's complaints, and eventually used the valve that the Plaintiffs'

requested. The investigation established that valves in question were not underrated, in fact they fit within the test pressure parameter, which, as confirmed by the manufacturer, was 150% of the operating pressure. The investigation and testing of the valve, came at the end of the project that the crew was slotted for and four of the seven members of the crew were laid off. Three others on the crew – including plaintiffs Nicacio and Walli, were not placed on Fluor's layoff list but instead asked to be laid off with the remainder of the crew. Following their layoff, the crew filed an administrative claim with the Department of Labor's ("DOL") Occupational Safety and Health Administration ("OSHA") under the whistleblower protection provisions of the Energy Reorganization Act, 42 U.S.C. 5851, an action deemed "Pipe fitter I." The parties later settled the dispute.

EXHIBIT L

The Honorable Carrie L. Runge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAYMES, CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND RICHARDSON, JAMES STULL, RANDALL WALLI, DAVID FAUBION, and CHARLES CABLE, Plaintiffs, v. FLUOR FEDERAL SERVICES, INC., a Washington corporation, Defendant.	CASE NO. 99-2-01250-7 DECLARATION OF RECORDS' CUSTODIAN

1. I am the Freedom of Information Act (FOIA) Officer for the Department of Energy's Richland Office ("DOE-RL") and the designated records custodian for the FOIA files maintained by DOE-RL. I have personal knowledge of the matters asserted herein and I am competent to testify thereto.

SUMMIT LAW GROUP PLLC
315 FIFTH AVENUE SOUTH, SUITE 1000
SEATTLE, WASHINGTON 98104-2682

2. DOE-RL was served with a Freedom of Information Act ("FOIA") request regarding documents addressing the allegation concerning a potential loss of confidentiality of a DOE hotline tape recording.

3. I provided a copy of the January 26, 2000 letter response to the Freedom of Information Request and the documents released to the FOIA requestor with that response, for purposes of review and copying by Mark Beller of Fluor Hanford's Legal Department.

4. The documents produced in response to the FOIA request are records of DOE-RL generated and/or received in the regular course of its business and kept in the regular course of its business. The documents are from the original DOE Employee Concerns file and have been redacted for release in response to the FOIA request.

I declare under penalty of perjury under the laws of the State of Washington that to the best of my knowledge the foregoing is true and correct.

DATED this 15 day of August, 2005.

Dorothy Riehle
Freedom of Information Officer
Richland Operation Office
United States Department of Energy

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RL-F-1325 (02/98)

United States Government

Department of Energy

memorandum

Richland Operations Office

DATE: September 30, 1990

REPLY TO ATTN OF: PAD:GMB GMB

SUBJECT: DOE HOTLINE TAPE INVESTIGATION

TO: RICHLAND OPERATIONS OFFICE - EMPLOYEE CONCERNS OFFICE

At the request of the Richland Operations Office's Manager, a Team was assembled to investigate an allegation concerning the potential loss of confidentiality of a DOE hotline tape recording. This investigation was conducted during the month of August 1999, by Gerry Bell, Lead Investigator, and Jennifer Sands, Investigator.

The results of the investigation can be found in the attached report.

INVESTIGATION INTO THE ALLEGED COMPROMISE OF A DOE TAPE RECORDING

I. **CONCERN:** A Concerned Individual (CI) alleged that when he sought to speak with an individual who was in a meeting, he was told that a DOE tape recording had been obtained by Kaiser Engineering Hanford (KEH) Supervison, and was being listened to by a group of KEH personnel in an attempt to identify the caller. The message's content was alleged to be associated with concerns raised by KEH Carpenter craft personnel in regards to conditions at the Hanford Trench 94, the Submarine Reactor Compartment burial ground. The issue was alleged to have occurred in the 1994 time period.

II. **PURPOSE:** A Richland Operations Office (RL) Investigation Team was assembled to investigate the allegation. The goal of the Team's investigation was to determine if a DOE Hotline tape's security had been compromised, thus allowing Hanford contractor personnel to compromise the confidentially of the call in system.

III. **INVESTIGATORS:** The RL Investigation Team was comprised of Gerry Bell, Team Lead, and Jennifer Sands, Investigator.

IV. **INVESTIGATION DATE:** The Investigation was conducted in August 1999.

V. **SCOPE AND METHODOLGY:** The parties contacted during the investigation included the CI who made the allegation, the former KEH supervisors who reportedly analyzed the tape, and the managers of the DOE and KEH organizations who had a tape recording capability that could have been the source of the tape.

Methodology for conducting the Investigation was limited mainly to personnel interviews. A review of the RL log of taped messages in the RL Employee Concerns office that were received in the time period in question was also conducted.

VI. **RESULTS:**

CI: The concern about the tape issue was identified in a deposition given by the CI in unrelated litigation. When interviewed by the RL Team, the CI provided his recollection of the tape issue. He testified that three KEH supervisors in a room and one of the participants told the CI that they were "listening" to the recording, trying to figure out who made the call. During the RL interview with the CI, one additional person was added to the list of supervisors in the room listening to the tape. The CI stated that he never heard a voice on the recording, but was rather repeating what he had been told by a participant in the room. The CI stated that

he thinks that this practice is still occurring, but only based on rumor, not by actual observation.

SUPERVISORS: The three supervisors identified in the deposition, plus the one added by the CI during his interview, were interviewed. All four of the interviewees stated that this particular incident did not occur. One supervisor did state that it was common for management to discuss concerns when received through proper channels, but that it would not be acceptable to review tape recordings to identify the caller.. No one could remember any incident as described by the CI.

CONTROL OF DOE HOTLINE TAPES: During the period in question the DOE RL Office that took safety concerns calls was the Employee Safety Concerns Office (EC). [1] The manager of the EC during the related time period was interviewed. He indicated that the RL tape system consisted of a telephone answering machine. The normal EC practice was to only use the machine when no one was in the office. When no one was in the EC office, the tape machine was secured by a locked office door. The former RL EC Manager also had no recollection of any incident that would indicate the tape machine had been compromised in that time period.

Two other potential DOE offices that could have received a call were also addressed. The local Inspector General's office was contacted and indicated it has no hotline recording system. The DOE Headquarters-IG has a recording system, however, all messages received are logged and the tape is recorded over each day.

EMPLOYEE CONCERS LOG REVIEW: The RL EC logs of concerns were reviewed for evidence that KEH carpenters had called in regard to concerns pertaining to Trench 94. The log reviewed had no entries associated with either carpenters or Trench 94.

VII. **CONCLUSION:** The RL investigation could not find any evidence that the security of any DOE tape recording had been breached, nor could it substantiate that any hotline recording had been listened to by KEH supervisors.

VIII. **SIGNATURES:**

Gerry Bell _____

Jennifer Sands _____

[1] While the concern expressed was that a tape from DOE was being listened to by a group of KEH Managers, the RL team also interviewed the Manager of the KEH Employee Concerns Office to determine if they had a tape that could have been obtained by these Managers. The result of this interview was that there was no evidence of a tape being obtained by KEH supervisors from this office.