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Division I  
State of Washington

No. 73627-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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MERCEDES PÉREZ-MELGOSA,

Plaintiff/Appellant,

v.

STATE OF WASHINGTON,

Defendants/Respondents.

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APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
I. ARGUMENT .....	1
A. This Court Properly Considers the Jury’s In-Court Statement Accompanying its Verdict, Not to Impeach the Verdict But to Conclude that the Trial Court’s Errors Warrant a New Trial.....	1
B. The Trial Court Erred When it Dismissed Dr. Perez-Melgosa’s Pay and Promotion Claim on Summary Judgment .....	2
C. On Summary Judgment, Dr. Perez-Melgosa Established Genuine Issues of Material Fact of Pretext .....	7
D. The Trial Court Abused its Discretion in Evidentiary Rulings .....	17
1. Exclusion of Evidence of Pretext—Disparate Treatment of Salary Increases—was wrong and harmful.....	17
2. The Trial Court’s Admission of how Dr. Nickerson Treated “Foreigners” was an Abuse of Discretion .....	20
E. Mr. Gann Should be Excluded from Trial on Remand .....	22
F. Excluding Dr. Wilson’s Evaluations was Error .....	24
G. The Trial Court Abused its Discretion by Admitting into Evidence the State’s Misleading “Illustrations” .....	24
II. CONCLUSION.....	25

TABLE OF AUTHORITIES

Page

**Federal Cases**

*Atonio v. Wards Cove Packing Co.*,  
810 F.2d 1477 (9th Cir.1987) ..... 11

*Bartlett v. United States*,  
835 F. Supp. 1246 (E.D. Wa. 1993) ..... 11

*Earl v. Nielsen Media Research, Inc.*,  
658 F.3d 1108 (9th Cir. 2011) ..... 8

*Royal v. Missouri Highway & Transp. Comm'n*,  
655 F.2d 159 (8th Cir. 1981) ..... 11

*United States v. Hadfield*,  
918 F.2d 987 (1st Cir. 1990) ..... 19

**State Cases**

*Brownfield v. City of Yakima*,  
178 Wn. App. 850, 316 P.3d 520 (2014) ..... 2

*Bundrick v. Stewart*,  
128 Wn. App. 11, 114 P.3d 1204 (2005) ..... 16

*Callahan v. Walla Walla Hous. Auth.*,  
126 Wn. App. 812, 110 P.3d 782 (2005) ..... 2, 5

*Grimwood v. Univ. of Puget Sound, Inc.*,  
110 Wn.2d 355, 753 P.2d 517 (1988) ..... 3

*Hill v. BCTI Income Fund-I*,  
144 Wn. 2d 172, 23 P.3d 440 (2001) ..... 12

*Johnson v. Dep't of Soc. & Health Servs.*,  
80 Wn. App. 212, 907 P.2d 1223 (1996) ..... 4

*Jones v. Kitsap Cty. Sanitary Landfill, Inc.*,  
60 Wn. App. 369, 803 P.2d 841 (1991) ..... 7

*Kloss v. Honeywell, Inc.*,  
77 Wn. App. 294, 890 P.2d 480 (1995) ..... 23

<i>Lodis v. Corbis Holdings, Inc.</i> , No. 72342-1-I 2015 WL 9461603 (Wash. Ct. App. Dec. 28, 2015) .....	16
<i>Renz v. Spokane Eye Clinic, P.S.</i> , 114 Wn. App. 611, 60 P.3d 106 (2002).....	7, 8
<i>Scrivener v. Clark Coll.</i> , 181 Wn.2d 439, 334 P.3d 541 (2014) .....	8, 9
<i>Stork v. International Bazaar, Inc.</i> , 54 Wn. App. 274, 774 P.2d 22 (1989).....	2

**State Rules**

ER 401 .....	22
ER 403 .....	22
ER 404 .....	21
ER 1006 .....	6
RAP 9.12.....	17

## I. ARGUMENT

The State premises its opposition on viewing the facts and inferences in its favor on summary judgment, and on a trial at which the jury was deprived of hearing substantial evidence that showed its decisions were a pretext for discrimination. The State's positions are legally wrong. The jury's rare statement on the record revealed this was a close case, showing the trial court's errors likely made the difference in the outcome and requiring reversal and a new trial.

### A. **This Court Properly Considers the Jury's In-Court Statement Accompanying its Verdict, Not to Impeach the Verdict But to Conclude that the Trial Court's Errors Warrant a New Trial**

The State misconstrues the relevancy of the Jury's statement that accompanied its verdict. Dr. Perez-Melgosa does not challenge the jury's verdict as contrary to the evidence it heard nor does she assert it resulted from misconduct. Washington courts have rejected as irrelevant juror statements under those circumstances. Rather, the Jury's statement is properly considered here because it shows that the trial court's legal and evidentiary errors likely made a difference in the outcome of the case.

Since Plaintiff is not seeking to impeach the Jury's verdict with its statement, the precedent cited by the State is inapposite. If this Court finds the trial court wrongfully granted summary judgment on her salary increase/promotion claim or erred in excluding the evidence of pretext that shows denial of increase/promotion then this Court properly considers the Jury's statement in requiring reversal and a new trial on all claims.<sup>1</sup>

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<sup>1</sup> Plaintiff conceded dismissal of her retaliation claim on summary judgment.

**B. The Trial Court Erred When it Dismissed Dr. Perez-Melgosa's Pay and Promotion Claim on Summary Judgment**

The State is simply wrong when it contends that the Plaintiff did not satisfy a prima facie case. *See* Op. Br. at 21-27; CP at 179-80. This court has repeatedly held that the elements of a prima facie case are flexible and do not even require identification of a comparator. The plaintiff can satisfy her burden by showing adverse treatment through “circumstances that raise a reasonable inference of unlawful discrimination.” *Callahan v. Walla Walla Hous. Auth.*, 126 Wn. App. 812, 819–20, 110 P.3d 782 (2005). For example, over a decade ago, this court held that an employee could satisfy a prima facie case by showing that she was: “[1] disabled, [2] subject to an adverse employment action, [3] doing satisfactory work, and [4] discharged under circumstances that raise a reasonable inference of unlawful discrimination.” *Id.*; *see also Brownfield v. City of Yakima*, 178 Wn. App. 850, 873, 316 P.3d 520, 533 (2014) (citing this formulation). Although this is “a common way of satisfying the burden of production, it is not ‘a format into which all cases of discrimination must somehow fit.’” *Stork v. International Bazaar, Inc.*, 54 Wn. App. 274, 279 n. 1, 774 P.2d 22 (1989) (citation omitted). “Above all, it should not be viewed as providing a format into which all cases of discrimination must somehow fit.... McDonnell Douglas was intended to be neither ‘rigid, mechanized, or ritualistic,’ ... nor the exclusive method for proving a claim of discrimination....” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 363, 753 P.2d 517 (1988) (citations omitted).

Here, Dr. Perez-Melgosa met her prima facie case on her wrongful termination and harassment claims and a trial was held. The State has not challenged that she met her prima facie cases on those claims. On summary judgment, she indisputably proved her protected class based on national origin, *see* CP 172, 225 (§2), equally applicable to her denial of salary increase/promotion claim. Likewise Dr. Perez-Melgosa established that she suffered an adverse action—denial of salary increase/promotion. CP 443 (56:14-18) (“Dr. Nickerson admitted she rejected Plaintiff’s request for a salary increase because of the salary freeze...”).

The particular facts of a case drive the applicable formulation of the prima facie case. *See Grimwood, supra*. Here, as she explained on summary judgment, “UW misapprehends Plaintiff’s claim. She does not allege she was denied a specific promotion, rather that UW promoted and gave retention increases to others as a work-around to a UW-wide freeze, while refusing to do so for her.” CP at 192. Plaintiff showed that the State treated similarly-situated employees better than it treated her, and that it’s asserted justifications were pretextual. *See, e.g.,* Op. Br. at 24-25 and supporting citations in the record (“Dr. Nickerson admitted she rejected Plaintiff’s request for a salary increase because of the salary freeze, while granting increases to nearly all other employees, some multiple times”; “The State asserted its multiple increases and promotions could be justified as retention increases and competitive promotions, but failed to support any of its excuses with personnel documents, and the explanations were belied by increases given to RSEs Ms. Shepard and Ms.

Pi Joan mere months after Dr. Nickerson complained of their subpar performances”;<sup>2</sup> “Similarly, Ms. Davis received three increases totaling 75%, despite no changes to her duties, no evidence of a competitive promotion, and no evidence they were needed for retention.”).

Dr. Perez-Melgosa likewise showed that out of 40 employees in her Lab, CP 90 (¶2), “Dr. Nickerson lavished increases almost across the board, on only one of whom was allegedly foreign born, CP at 407, 408, 410, as reflected in a chart showing increases for 34 members of the Lab, including Research Scientist Engineers (RSEs) at all levels, as high as 25% to 30%, and multiple increases for many employees. CP at 195, 198-202, 393, CP 35-53 (ER 904 Index); Exs. 133-250,” Op. Br. at 25.

The same comparator evidence (about Americans without foreign accents Cindy Shepard and Jessica Pi Joan) that Plaintiff presented establishing her prima facie case for dismissal also supported her salary increase denial claim. Plaintiff showed that Dr. Nickerson failed to discipline RSEs Shepard and Pi Joan for making the same judgment calls on the TaqMan for which she fired Plaintiff, for committing multiple errors, and for subpar performance—and that Dr. Nickerson gave them

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<sup>2</sup> In pointing to these RSEs in the Nickerson Lab who received increases, Plaintiff easily satisfied yet another formulation of a prima facie case by showing: “(1) he belongs to a protected class, (2) he was treated less favorably in the terms or conditions of his employment (3) than a similarly situated, nonprotected employee, and (4) he and the nonprotected “comparator” were doing substantially the same work.” *Johnson v. Dep’t of Soc. & Health Servs.*, 80 Wn. App. 212, 227, 907 P.2d 1223, 1231-32 (1996). The State never met its burden of coming forward with evidence disputing these employees were doing substantially the same work; it is telling that it resorted to a Seventh Circuit articulation of a prima facie case to assert that comparators must be “directly comparable in all material respects,” Resp. Br. at 20, which is not found in Washington law.

salary increases *during the University-wide freeze*. See Op. Br. at 24-26 citing the record; 15 (“And although Dr. Nickerson criticized Plaintiff for interpreting TaqMan assay samples as “Male?” Ms. Pijoan did precisely the same.”); 11 (“Nor had any employee been disciplined for anything relating to the TaqMan.”); CP 182 (citing to record showing many errors committed by RSE Shepard, including “major mistakes” and Taqman calls, and that she was never disciplined and received salary increase).

On summary judgment, the trial court and this court must accept as true all of these facts and draw reasonable inferences in favor of Plaintiff. Dr. Perez-Melgosa argued and easily met her prima facie case, having shown she was in a protected class, suffered an adverse action, and showed pretextual “circumstances that raise a reasonable inference of unlawful discrimination” on both her wrongful termination and her denial of salary increase/promotion claims. *Callahan v. Walla Walla Hous. Auth.*, 126 Wn. App. 812, 819–20, 110 P.3d 782 (2005).

Moreover, the University-wide freeze is the defining criteria for who is a comparator on summary judgment. All employees were subject to it regardless of their job, performance histories, or who was the decision-maker. As the State concedes, “Here, a legislative salary freeze constrained personnel decisions.” Resp. Br. at 25. So, the State’s attempt to skirt this inconvenient fact by arguing that “variables” may explain different treatment, rather than discrimination, simply cannot be countenanced on summary judgment. See *id.* at 22 (citing possible “differing roles, performance histories, or decision-making personnel....”).

In the face of a universal mandate, Dr. Nickerson's awarding of salary increases to nearly all of her employees except Plaintiff proves the point: in finding a way around the freeze to award them salary increases, Dr. Nickerson treated her employees the same regardless of their roles, performance histories, and performances. So, on summary judgment, the court must infer that any variables claimed by the State were not material.

Plaintiff showed that *during* the University-wide freeze, Dr. Nickerson gave multiple RSEs in her lab salary increases. *See* CP 199-202; ER 1006. In addition to RSEs Pijoan and Shepard, the evidence showed that Dr. Nickerson gave increases to RSEs Sharon Austin, Mallory Beightol, Jennifer Chin, Lindsay Felker, Christian Frazer, Joseph Gasper, Alicia Gracien, Eric Johanson, Daniel Luksic, and Patrick O'Reilly. *Id.* Dr. Nickerson did not believe that any these employees had the same national origin or foreign accent as that of the Plaintiff. *See* CP 404-410 (State's answer to Interrogatory No. 1). Dr. Perez-Melgosa supplied the underlying personnel records showing all the increases; the State made no virtually no objections. *See* CP 199-202 ("Source" column); CP 39-46 (State's ER 904 admissions); CP 48-57 (ER 904); CP 1845-2765.

The State offered no evidence distinguishing Plaintiff from her RSE peers who got these increases. The closest it came was asserting that she was "the highest paid non-computational scientist in Dr. Nickerson's lab...." Resp. Br. at 23 (emphasis removed). But this rhetorical argument is meaningless on summary judgment. Dr. Nickerson did not claim to deny her a salary increase on this ground. On summary judgment, the

court was required to accept the reasonable inference that her salary set by the State in Dr. Wilson’s Lab had been justified by her 20 years employed there and by her doctorate, and that this had no impact on her entitlement to a salary increase over the subsequent three-year period while most of her peers received multiples increases. Finally, by pitting her salary against that of all of the other non-computational scientists in the Lab, the State effectively conceded they are Dr. Perez-Melgosa’s comparators.

The evidence presented on summary judgment showed that Dr. Nickerson gave comparators Pijoan, Shepard, and many others—34 of the 40 employees in her Lab— none of whom she believed were from Spain or spoke with a Castilian accent, salary increases directly (or through promotions) that she denied to Dr. Perez-Melgosa. Plaintiff established a prima facie case of her claim for denial of a salary increase/promotion.

**C. On Summary Judgment, Dr. Perez-Melgosa Established Genuine Issues of Material Fact of Pretext**

“Nothing [] places a burden of persuasion on a plaintiff on summary judgment. At that stage, the plaintiff’s burden remains as always, one of production.” *Jones v. Kitsap Cty. Sanitary Landfill, Inc.*, 60 Wn. App. 369, 372-73, 803 P.2d 841 (1991). Rather “Conflicting reasons or evidence rebutting their accuracy or believability are sufficient to create competing inferences.” *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 624, 60 P.3d 106 (2002) (citation omitted). “Such inconsistencies cannot be resolved at the summary judgment stage.” *Id.* (citation omitted).

To meet *its* burden of production in response to the prima facie

case, the State claimed administrative and “computational” employees are not comparators. Resp. Br. at 21-22. But as explained, Plaintiff identified numerous specific comparators, including Pijoan and Shepard and other RSEs who conduct scientific experiments on Dr. Nickerson’s genome projects together in the same Lab. In contrast, the State has failed to point to any material ways in which they are not similarly situated for salary increases during a University-wide freeze. Instead, the State asserted its multiple increases can be justified as retention increases and competitive promotions. But the State offered nothing to support these alleged excuses, and they are belied by raises to RSEs Shepard and Pijoan mere months after Dr. Nickerson complained of their subpar performances.

“An employee does not *need* to disprove each of the employer’s articulated reasons to satisfy the pretext burden of production.” *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 447, 334 P.3d 541, 546 (2014) (emphasis in original). “[E]vidence that an employer’s deviation from established policy or practice worked to her disadvantage” is evidence of pretext. *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1117 (9th Cir. 2011). That is true here.

The State contends that Dr. Perez-Melgosa did not show that Dr. Nickerson’s salary practices were pretextual. But she self-evidently did show this. Medical School Dean’s HR Director Mara Fletcher Stevens testified that exemptions from the freeze were “rare.” CP 531 (32:17-25). In the face of the University’s freeze and practice of allowing only rare exceptions, Dr. Nickerson’s repeated and widespread giving of increases

to nearly all other employees except Dr. Perez-Melgosa shows a repeated deviation from a University-wide rule to the disadvantage of the Plaintiff. This is pretextual. The true reason for her decisions is for the jury to decide. The trial erred in deciding the issue against Dr. Perez-Melgosa.

Contrary to the State's suggestion, Dr. Perez-Melgosa need not be entitled to a retention raise or have taken on other responsibilities to deserve a salary increase during this three-year period. Instead, she has shown evidence that Dr. Nickerson gave increases to RSEs who did not warrant a retention increase, such as Cindy Shepard and Jessica Pijoan, or who did not take on additional responsibilities, such as Colleen Davis. Dr. Nickerson pretended otherwise to justify these increases. *See Op. Br.* at 7-8. By putting the lie to these justifications, Plaintiff created a genuine issue of fact as to whether Dr. Nickerson's denial of a salary increase for her allegedly since the salary freeze was a pretext for discrimination.

The State claims its increases are explainable. But that doesn't matter. On summary judgment, the trial court had to accept the Plaintiff's facts—not the State's. And, the court had to accept all reasonable inferences in Dr. Perez-Melgosa's favor, not those in favor of the State. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541, 545 (2014). The State's entire argument ignores these fundamentals, encouraging this court to see the facts improperly only through the eyes of the defense. That is not allowed on appeal any more than it was in the trial court.

The State asserts that the generic language used to justify the increases at the time could be true. *Resp. Br.* at 26. It could, but the

matter is disputed so must be presented to the jury. Plaintiff presented undisputed testimony from Ms. Pijoan that she was new to her job when she got her “retention” increase, that she wasn’t considering leaving, and that she never gave anyone reason to believe otherwise. Op. Br. at 25. And, in Ms. Pijoan’s short time there, Dr. Nickerson had already complained that her work was “subpar.” *Id.* at 7-8, 24-25. These facts easily show that Dr. Nickerson’s purported reason for giving an increase to Ms. Pijoan but denying one to Dr. Perez-Melgosa was pretextual.

Similarly, Dr. Nickerson’s decision to give RSE Cindy Shepard a supposed “retention” increase despite grave frustration and anger at her subpar performance is highly pretextual. *See* CP 776 (2012: “CS need significant improvement...she has made major mistakes this year”); 484 (55:14-56:14). Dr. Nickerson should have had to explain at trial why she made a “rare” exception to give a retention increase to this poorly performing employee while repeatedly denying one to Plaintiff—who received no subpar evaluations and who until shortly before she was fired was not alleged to have made any mistakes let alone “major” ones.

Finally, the State is not entitled to pick among the competing facts to justify Dr. Nickerson’s awarding of an illegitimate increase to Colleen Davis. The defense asserts that she received an increase because of her “pivotal role” after “the loss of a key staff person.” Resp. Br. at 26-27. This purported explanation (that she was important) fails to articulate any additional responsibilities that Ms. Davis assumed (a predicate conceded by the defense a few pages earlier) to obtaining an increase. The State’s

pitch ignores Ms. Davis’s testimony admitting that her job did not change at all, which contradicts Dr. Nickerson’s claimed assertion that she gave Ms. Davis an increase in part to supervisor Dr. Perez-Melgosa—which likewise contradicts Dr. Nickerson’s testimony that she was Plaintiff’s supervisor. Op. Br. at 25; CP 443 (54:4-8, 57:3-57:9), 226 (¶10), 227 (¶¶16, 18), 439 (16:14-17:2), 505 (59:8-23), 412 (“I added Mercedes and Dana supervised by this new position”) 419 (listing Plaintiff).

In the light most favorable to Dr. Perez-Melgosa, these facts smack of dishonesty; they suggest Dr. Nickerson gave a false basis for giving Ms. Davis an increase paid by taxpayer funds, and disrespectfully making Dr. Perez-Melgosa subservient to a nonscientist assistant. A jury can infer Dr. Nickerson’s explanations for why she gave salary increases to many employees but not to Plaintiff is unworthy of belief; that is classic pretext.<sup>3</sup>

The State nevertheless attempts to wish away the Plaintiff’s evidence of pretext, casting it as only “a weak issue of fact as to whether the employer’s reason was untrue....” Resp. Br. at 29. This plainly is not

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<sup>3</sup> The State pretends Plaintiff is merely questioning “the *wisdom* of the University’s personnel evaluations.” Resp. Br. at 27. But the reasonable inference is that Dr. Nickerson was gaming the system, sneaking salary increases through. The State urges, “It was for the University—not Dr. Perez-Melgosa—to evaluate the importance of its employees, an inherently subjective process.” Resp. Br. at 29. But it is for the jury to decide why Dr. Nickerson used her inherently subjective process to deviate from the University’s freeze to benefit most employees, just not Plaintiff: “[S]ubjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized.” *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1481 (9th Cir.1987) (en banc)); *Royal v. Missouri Highway & Transp. Comm’n*, 655 F.2d 159, 164 (8th Cir. 1981) (same). “When the evaluation is in any degree subjective and when the evaluators themselves are not members of the protected minority, the legitimacy and nondiscriminatory basis of the articulated reason for the decision should be subject to particularly close scrutiny by the trial judge.” *Bartlett v. United States*, 835 F. Supp. 1246, 1259 (E.D. Wa. 1993).

such a case. And the State ignores the wealth of other evidence of pretext that required a trial on the wrongful termination claim and hostile work environment claim based on national origin that likewise supports the inference of pretext for denial of a salary increase.

Indeed, all of the State's arguments for why the plaintiff allegedly has a "weak" denial of increase claim apply no more to that claim than to her claims that went to trial: lack of discriminatory comments, plaintiff alleged discrimination after termination, and Dr. Nickerson "brought her into the lab..." Resp. Br. at 30. These defense arguments do not make a "weak" case. "Direct, 'smoking gun' evidence of discriminatory animus is rare...and "employers infrequently announce their bad motives orally or in writing," so "[c]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden." *Hill v. BCTI Income Fund-I*, 144 Wn. 2d 172, 179, 23 P.3d 440, 445 (2001) (citation omitted). "Indeed, in discrimination cases it will seldom be otherwise ...." *Id.* (citation omitted).

And, the State cites no precedent for the novel argument that alleging discrimination as a result of being fired suggests a claim is weak; that is an illogical leap. Finally, Dr. Nickerson admitted that she "did not hire" Dr. Perez-Melgosa; she "inherited" her as a long-term UW scientist along with a multi-million dollar grant from the federal government over which Plaintiff was *the* scientific researcher. CP 190, 443 (57:3-9). So, the State is not entitled to a same actor defense, which it concedes by merely implying, erroneously, the facts indicate a "weak" claim. But on summary judgment, where the plaintiff's facts are to be accepted and all

inferences are to be drawn in her favor, this simply is not allowed.

Nor is it tenable for the State to imply that Dr. Perez-Melgosa must prove that Dr. Nickerson “harbored racial animus” against all “foreigners.” Resp. Br. at 31. Her claim is one of national origin—*her* national origin—via the unique characteristic of her thick Castilian accent. She need not prove that Dr. Nickerson dislikes people of every foreign country or every foreign accent. For this reason alone, the State’s attempt to rely on a vague declaration from a Chinese employee that she never felt discriminated against by Dr. Nickerson, is simply irrelevant. She is from Asia, and her declaration does not refute the Plaintiff’s pretext evidence.

The State also suggests that asserting “Dr. Nickerson repeatedly invited researchers from other countries to work in the lab, including one from Spain,” Resp. Br. at 31, was sufficient to undermine Plaintiff’s denial of salary increase/promotion on summary judgment. It wasn’t. Allowing colleagues to visit is irrelevant to whether she mistreated a subordinate who she supervised and paid, and whose foreign accent she confronted on a daily basis. The State’s assertion has almost no probative value and on summary judgment was overwhelmed by Plaintiff’s evidence of pretext and disputes of fact so was insufficient to undermine her wrongful termination claim; it has no more probative value against her salary increase claim. Notably, in the excerpt of her deposition cited by the State, Dr. Nickerson mocked Plaintiff’s argument about accents: “David Crosslin has a southern accent sometimes, and I could have a New York accent when I say something.... I mean there are a lot of accents out

there.” CP 1782. On summary judgment, this just reinforces pretext.

Similarly, the State tries to make relevant a declaration that Dr. Nickerson wrote a letter of recommendation for Ms. Igartua because, the State asserts, Ms. Igartua “is also Spanish.” Resp. Br. at 31. Apart from the mere fact that writing a recommendation is the slimmest of evidence to undermine the pretext evidence presented,<sup>4</sup> the State omits the crucial, undermining fact: on summary judgment, the evidence established that Dr. Nickerson admitted *she did not know Ms. Igartua’s national origin*. See CP 407. Since there was no evidence that Dr. Nickerson believed Ms. Igartua was from Spain, and the State cites none, there was zero evidence on summary judgment that Dr. Nickerson could have taken into account Ms. Igartua’s supposed national origin. Ms. Igartua was an irrelevancy. Because “At oral argument, the Plaintiff was not afforded the opportunity to correct the State’s mischaracterization in its rebuttal oral argument and the Court’s mistaken impression of [its] assertions as ‘fact,’ let alone ‘undisputed’ fact,” Plaintiff moved for reconsideration, CP 1010-1012, but the trial court erroneously denied it, CP 1022.

The State likewise tries to support summary judgment by contending that Ms. Igartua had a Spanish accent. See Resp. Br. 40-41. But again, the State fails to acknowledge the salient facts before the trial

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<sup>4</sup> When viewed in the context of all the evidence, which must be seen in Dr. Perez-Melgosa’s favor, the fact is insignificant. On summary judgment, the reasonable inferences to draw are that Dr. Nickerson was unaware of Ms. Igartua’s national origin so was happy to write the recommendation, or did so because Ms. Igartua lacked a thick Castilian accent. Or that Dr. Nickerson had her assistant, Colleen Davis, prepare the recommendation so gave the whole matter little thought and attention.

court that command a contrary outcome: A sworn declaration from a former supervisor in Dr. Nickerson's Lab, Robert Livingston, stated that *Ms. Igartua has no foreign accent.*<sup>5</sup> CP 192, 1010-1011, 1119-1121 (Livingston Dec. ¶6). The trial court was obligated to accept Plaintiff's facts, not resolve them in Defendant's favor. Since the defense mischaracterized this evidence in its rebuttal at oral argument, Plaintiff was deprived of the opportunity to respond. She had to correct the State's misrepresentation through a motion for reconsideration, *see* CP 1010-1011, which the trial court nevertheless denied. On summary judgment, the Plaintiff's evidence showed Ms. Igartua *lacked* an accent (at most for the State there was a dispute over whether she had one) and that Dr. Nickerson did not know Ms. Igartua's national origin. So, Ms. Igartua was entirely irrelevant to how Dr. Nickerson treated employees in Plaintiff's protected class. Dr. Perez-Melgosa needed to show only that her national origin, or Castilian accent associated with her national origin, was a substantial factor in how Dr. Nickerson treated her, wittingly or not.

Finally, the State's reliance on the jury's verdict to discount all of the evidence before the trial judge on summary judgment is disingenuous: the combination of the evidence presented by the Plaintiff at trial together with the evidence that the the jury never heard because the trial court excluded it would have resulted in a different outcome at trial. Nothing says that better than the jury's own comments delivered with the verdict.

The State does little to advance its argument by misrepresenting

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<sup>5</sup> The State offered no evidence Ms. Igartua has an accent.

precedent to suggest this court is barred from considering the pretext evidence presented at trial. The State portrays the holding of *Lodis v. Corbis Holdings, Inc.*, No. 72342-1-I, 2015 WL 9461603 (Wash. Ct. App. Dec. 28, 2015), as: a “jury verdict rejecting claim becomes law of the case in subsequent trials and removes any factual issues previously litigated.” Resp. Br. at 32. But the *Lodis* court’s opinion rejected the plaintiff’s request for a *fourth* trial and his assertion that he was not bound by previous rulings of the *appellate court*: “Importantly, Lodis had already challenged that verdict in *his first appeal to this court*. At that time, we rejected Lodis’s claims of error and affirmed the verdict,” which “*thus became the law of the case*.” *Id.* at \*13-14 (emphasis added). Appellate affirmance, rather than the verdict, was not susceptible to challenge.

The State fares no better citing *Bundrick v. Stewart*, 128 Wn. App. 11, 20, 114 P.3d 1204, 1210 (2005), which held merely that collateral estoppel precluded relitigating a “special verdict” common to another claim. Here there is no special verdict, and more importantly the jury was deprived of evidence of pretext that Plaintiff had presented on summary judgment. Allowing the excluded pretext evidence would have strengthened Plaintiff’s case at trial; that’s why the State argued against it. Since it is circular to rely on the jury’s verdict as indicating evidence it never heard would not matter, on appeal, the State tries a different tact: “The jury rejected her claim that her termination was discriminatory at trial. The evidence supporting that claim cannot now be cited to support her appeal of summary judgment on her distinct claim that she was denied

a pay raise for discriminatory reasons. RAP 9.12.” Opp. Br. at 24 n. 11. But RAP 9.12 undermines rather than supports the State’s argument. The Rule limits appellate review to *all* of the evidence at summary judgment, which is precisely what the Plaintiff requests and what the State opposes.

At summary judgment, the trial court heard evidence that supported all claims together, not broken up by claim. This Court is required to view the evidence in support of the Plaintiff’s claims together, as it existed in combination, accepting her facts and drawing all reasonable inferences in her favor. The State’s suggestion that any evidence presented at trial must be viewed against the Plaintiff because of the outcome of the trial would violate the basic tenets of summary judgment. Unsurprisingly, the State offers no precedent to support its position.

**D. The Trial Court Abused its Discretion in Evidentiary Rulings**

**1. Exclusion of Evidence of Pretext—Disparate Treatment of Salary Increases—was wrong and harmful**

The trial court wrongfully dismissed Dr. Perez-Melgosa’s salary increase/promotion claim, so it was error to exclude the evidence supporting that claim. But even if she had not brought that claim, the evidence probative to show pretext as to her wrongful discharge and hostile work environment claims.

The State tries to evade this conclusion by claiming the evidence was “substantially outweighed by the danger of confusing and misleading the jury.” Resp. Br. at 33. But evidence of pretext is not confusing and misleading—it goes directly to the decision-maker’s intent. Even a

cursory review shows the court weighed any risk improperly, unfairly harming the Plaintiff. The evidence showed pretextual decision-making by Dr. Nickerson in setting the terms and conditions of employment: she lied, making up false or exaggerated justifications for awarding salary increases during a salary freeze for many employees but not for Plaintiff. Evidence that Dr. Nickerson made a practice of lying on employment documents is highly probative of her credibility. More importantly, it was highly relevant to show her pattern of doing so to benefit most employees while misrepresenting to Plaintiff the freeze precluded giving an increase.

The evidence would have revealed to the jury pretextual decision-making harming the Plaintiff and helping her peers not in her protected class. The State has failed to show the evidence would confuse or mislead the jury, claiming just that it is irrelevant. But this defies commonsense and common experience. A jury is more likely to believe that a manager caught lying about why she denied a salary increase also lied about why she terminated the same employee—especially when the alleged motivation for both decisions is identical (discriminatory bias). Likewise, that proof lends support to Plaintiff’s contention that Dr. Nickerson lied about the reasons she was yelling at and publically humiliating Dr. Perez-Melgosa and then investigating her while she was on FMLA leave. There is nothing confusing or misleading about evidence that makes logical, reasonable connections from which the jury can infer discrimination.

The State also asserts that admitting the evidence would have been “unduly prejudicial.” Resp. Br. at 35. As with all damaging evidence, it

likely would have been prejudicial to show that Dr. Nickerson was not truthful or trustworthy and that her behavior was pretextual; that makes it highly relevant, and admissible. “[A]ll evidence is meant to be prejudicial; Rule 403 is designed to screen out only unfair prejudice.” *United States v. Hadfield*, 918 F.2d 987, 995 (1st Cir. 1990).

To defend against relevance, the State cites *Lodis* because the trial court in a *retaliation* case did not allow plaintiff “carte blanche to introduce evidence of alleged discriminatory conduct regardless of its connection to his claim.” Resp. Br. at 35. *Lodis* is not analogous. Dismissal of his discrimination claim was affirmed on appeal, and he sought to prove it anew in his retaliation case. In contrast, at her first trial, the court precluded Dr. Perez-Melgosa from presenting substantial evidence of pretext in support of her discrimination and harassment claims based on national origin, not a related retaliation claim.

The excluded evidence was not marginal. To a jury that took the extraordinary step of announcing on the record it was angry at the State for mistreating the Plaintiff but struggled to connect it to discrimination, the excluded evidence may well have tipped the scales. The State tries to minimize the harm by noting the jury heard that “Dr. Nickerson denied Dr. Perez-Melgosa a raise citing the salary freeze” whereas “Ms. Davis received a raise during the freeze.” Resp. Br. at 37. But by unfairly limiting the evidence that one comparator (and therefore the argument as well), the court’s ruling had the opposite effect: it allowed the State to pretend that the increase Dr. Nickerson gave to Ms. Davis was a “rare”

exception—as Ms. Fletcher Stevens put it—when instead it was the rule, as Plaintiff tried to argue. This burnished rather than tarnished the State’s credibility and badly deprived the Plaintiff of the ability to show the sheer breadth of Dr. Nickerson’s repeated violation pay many employees, including comparator RSEs Shepard and Pijoan who had subpar performance records, had made the same judgments about TaqMan data for which Plaintiff was allegedly fired, and one of whom was nearly brand new and the other had made “big mistakes.” Preventing these powerful comparisons showing pretext was unfairly prejudicial to Plaintiff.

It was not an adequate substitute, as the State suggests, for the trial judge to allow the Plaintiff to present other evidence of pretext (“Dr. Nickerson treated more favorably other employees that ‘made similar or worse mistakes.’”). Resp. Br. at 38. The combination of pretextual evidence shows a pattern of deviating from the rules, adversely impacting the Plaintiff and showing unjustified differential treatment of her. That’s core evidence for a Plaintiff in a discrimination lawsuit.

**2. The Trial Court’s Admission of how Dr. Nickerson Treated “Foreigners” was an Abuse of Discretion**

The State contends that Plaintiff alleged “Dr. Nickerson harbored discriminatory bias against foreigners” thereby making relevant her treatment of all foreign employees. Resp. Br. at 38-39. That is simply wrong. As Plaintiff argued on the motions in limine: “Plaintiff does not have to prove that the University of Washington [sic] discriminate[s] against people who are from foreign countries. There are hundreds of

foreign countries and people with accents.... It would be unfair and misleading to the jury to let the State trot in anybody from a foreign country and say, ‘I wasn’t discriminated against.’” RP 4-30-15 at 14:4-11. Plaintiff’s protected class was not “all foreigners,” and the State fails to cite any precedent for conglomerating the world’s population together.

But the trial court allowed the State to introduce evidence that Dr. Nickerson did not mistreat a Chinese employee, Qian Yi. Admitting such evidence served to unfairly burnish Dr. Nickerson’s character as a nice person whose character is not to discriminate, in violation of ER 404. Such evidence had a propensity to mislead the jury to believe that Dr. Nickerson was less likely to discriminate against or harass any foreigner, giving the false impression that the Plaintiff had to prove Dr. Nickerson mistreated all people not born in this country. And that is how the State exploited it in closing argument. RP 5-27-15 at 127:6-12.

Likewise, the trial court allowed the State to introduce a recommendation letter Dr. Nickerson signed for Ms. Igartua, who never testified at trial, as evidence Dr. Nickerson would not discriminate against someone from Spain—which the defense played up in closing argument. RP 5-27-15 at 127:19-128:13. But the State offered *no* evidence that Dr. Nickerson believed Ms. Igartua was from Spain, so admission of the recommendation and other witness’s belief that Ms. Igartua was from Spain were not only irrelevant, they were misleading and unduly prejudicial—helpful to the defense in closing. Since Dr. Nickerson had no knowledge of Ms. Igartua’s national origin, her purportedly positive

treatment of Ms. Igartua only served, again, as improper character evidence for Dr. Nickerson, permitting the State to cloak her behavior in a positive, non-discriminatory light when in fact it meant nothing of the kind. On remand, this court should prohibit the State from introducing evidence about Ms. Yi's and Ms. Igartua's national origins, accents, and their treatment by Dr. Nickerson under ER 401 and ER 403.<sup>6</sup>

**E. Mr. Gann Should be Excluded from Trial on Remand**

The State fails to show that Mr. Gann offered the jury anything it would not already know from common experience: (1) Plaintiff “applied to over 200 jobs” but mostly to the same employer; (2) a reasonable job seeker would change tacks if her efforts weren't working (apply to more employers, network, engage with professional associations, read publications, and expand beyond a specialty); (3) he “listed specific employers that Dr. Perez-Melgosa could have contacted and organizations she could have used; and (4) he listed statistics showing the unemployment rate purportedly applicable to her. Resp. Br. at 42-43.

The first three categories of opinions require zero expertise, as the State essentially concedes (“lay people may have a general sense of job search methods....”). Resp. Br. at 43. The information is easily within the common knowledge and experience of jurors to evaluate. The Plaintiff

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<sup>6</sup> The State concedes, as it must, that Dr. Nickerson did not know Ms. Igartua's national origin. See Resp. Br. at 40. But it clings to Dr. Nickerson's belief that Ms. Igartua had an accent that could be associated with any one of dozens of countries. *Id.* at 40-41. In the face of Dr. Perez-Melgosa's thick Castilian accent that the jury could judge for itself the trial judge should not have allowed others to characterize whether Ms. Igartua has an accent, and instead required that she testify. On remand, her purported national origin, any accent, and any recommendation written for her should be excluded.

testified as to which employers she applied and which she didn't, and the extent to which she networked or expanded her search. Defense counsel was free to argue that her efforts were not reasonable; the jury didn't need the opinion of an "expert" as to whether she tried hard enough. And for statistics, Mr. Gann merely reported an article that states a lower unemployment rate for people with a Ph.D., RP 5-26-15 at 91:14-92:1, from which he extropolated that Plaintiff should already have gotten a job, despite a public record of her firing for falsifying scientific data.

Mr. Gann's testimony established he lacked experience and knowledge about jobs for scientists, about Plaintiff's field, and about her qualifications. He was unaware of even a single job available for which she was qualified and he conceded he looked for available jobs beginning only two years after her dismissal. He revealed he did not know that when she applied to the Fred Hutchinson Cancer Research Center repeatedly it was actually to more than 50 independent labs. *Compare* RP 5-21-15 at 39:11-40:5 *with id.* at 227:14-23.

Mr. Gann failed to offer *any* evidence that an employer must offer to prove its affirmative defense: a job she was qualified for but to which she did not apply. *Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 301, 890 P.2d 480 (1995). His opinions were just vague, conclusory criticisms declaring Plaintiff's efforts unreasonable. They were misleading and unduly prejudicial since, wearing his "expert" hat, he pronounced Dr. Perez-Melgosa's job search unreasonable without a legally and factually adequate basis. On remand, his testimony should be excluded.

**F. Excluding Dr. Wilson’s Evaluations was Error**

Although the State allowed Dr. Perez-Melgosa to testify that “I got in general very good feedback, very positive feedback [from Dr. Wilson],” Resp. Br. at 46, the trial court inexplicably excluded the evaluations that he, as her former UW supervisor, wrote about her performance--which confirmed her testimony in his own words. At trial, the court held his evaluations were irrelevant and cumulative, despite denying the State’s motion in limine on the topic. *See* CP 1556 (Order on State’s MIL H.).

But the evaluations, contained in her UW personnel file, were obviously relevant, as illustrated by the trial court allowing Dr. Perez-Melgosa to testify to Dr. Wilson’s feedback. The opinion of her prior supervisor at UW on the same project about her performing the same tasks, affirming that she performed as UW expected is surely relevant. This was especially so because she testified that she performed the same for Dr. Nickerson, who never told her to perform differently. It likewise was an abuse of discretion to hold the evaluations were cumulative since a jury would give more weight to his evaluations than to her interpretation.

**G. The Trial Court Abused its Discretion by Admitting into Evidence the State’s Misleading “Illustrations”**

On remand, the State’s misleading illustrations should be excluded. The State suggests “the illustrations helped the jury understand Dr. Perez-Melgosa’s errors by isolating a single data point without the clutter of other points.” Resp. Br. at 47. Calling them “illustrations” proves the fallacy. It is undisputed that the “clutter of other points” was essential to

determining the proper label of any data point. *See Op. Br.* at 13-14 (“taking into account...all the other data plots on the same chart.”). Removing “the clutter” removes the context. Altered evidence for the purpose of trial is not admissible. The Plaintiff was entitled to have the jury examine only the full plots that she interpreted with all data points present. The State could have shown the jury which data point it believed Dr. Perez-Melgosa has improperly labeled with a laser pointer.

## II. CONCLUSION

Respectfully, this Court should reverse the summary judgment dismissal of Dr. Perez-Melgosa’s denial of salary/promotion claim and remand for trial. The Court should likewise reverse the jury verdict since she was denied the right to present all evidence of pretext together in support of her three claims. On remand, this Court should instruct: (1) treatment of all “foreigners” including Qian Yi and Kathy Igartua is excluded; (2) Mr. Gann’s testimony is excluded; (3) Dr. Wilson’s evaluations of Plaintiff are to be admitted; and (4) the State’s illustrations of TaqMan plots are excluded and not proper demonstrative exhibits.

DATED this 14th day of April, 2016.

MacDONALD HOAGUE & BAYLESS

By: *s/Jesse Wing*  
Jesse Wing, WSBA #27751

## DECLARATION OF SERVICE

Esmeralda Valenzuela states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by MacDonald Hoague & Bayless, and I make this declaration based on my personal knowledge and belief.

2. I certify that on April 14, 2016 I electronically filed this document entitled APPELLANT'S REPLY BRIEF with the Clerk of the Court of Appeals, Division I, using the CM/ECF system which will send notification of such filing via email to the following persons:

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

DATED this 14th day of April, 2016 at Seattle, King County, Washington.

*s/ Esmeralda Valenzuela*

Esmeralda Valenzuela, Legal Assistant