No. 86522-6-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

SHAHROOZ JAHANBIN,

Appellant,

v.

THE BOEING COMPANY, et al.,

Respondent.

BRIEF OF APPELLANT

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A. INTRODUCTION

Courts must rarely grant summary judgment in employment discrimination cases, because proving discriminatory motivation is often difficult and relies on circumstantial evidence and witness credibility that must be evaluated by a jury. At the very least, individual plaintiffs must be allowed their constitutional right to access the civil justice system and conduct discovery to prove their case. A trial court should not permit deep-pocketed, corporate defendants to resist turning over valuable discovery and then reward those defendants with summary judgment dismissal.

Here, Iranian-born Shahrooz Jahanbin sued The Boeing Company ("Boeing") after it terminated him for misusing his company computer. The record establishes that Boeing treated him differently from other similarly situated employees because it knew that he downloaded applications like Zoom to his company laptop and accessed personal email as early as April 2020. But rather than issue a written or verbal warning, as

company policy prescribed and other employees received, Boeing surreptitiously monitored him over the next seven months, culminating in a fruitless, midnight raid on his home where he and his family were detained by gun-brandishing FBI agents.

The trial court should not have granted summary judgment because a jury could find that Boeing's disparate treatment and decision to discharge Jahanbin were substantially motivated by Jahanbin's Middle Eastern/Iranian race and national origin. A jury could also find that Boeing's decision to wrongfully discharge Jahanbin was substantially motivated by his whistleblowing activity, given his documented history of speaking out against Boeing's well-publicized, cost-cutting decisions to remove key safety inspections from its production lines.

At the very least, summary judgment was premature because discovery was ongoing, key depositions were outstanding, and Boeing refused to turn over important

comparator data regarding similarly situated, non-Iranian-born employees who received less severe discipline than Jahanbin. The Court should reverse so Jahanbin can enjoy his right to access civil discovery and have his day in court.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its order granting defendants' motion for summary judgment on November 3, 2023. CP 1827-29.

2. The trial court erred in denying reconsideration in its order entered March 5, 2024. CP 3208-09.

(2) Issues Related to Assignments of Error

1. Did the trial court err in dismissing Jahanbin's claim for disparate treatment and discriminatory discharge in violation of the Washington Law Against Discrimination (Assignments of Error Numbers 1 and 2).

2. Did the trial court err in dismissing Jahanbin's claim for wrongful termination in violation of public policy? (Assignments of Error Numbers 1 and 2).

3. Alternatively, did the trial court err in

refusing to grant a CR 56(f) continuance so Jahanbin could complete discovery after Boeing resisted fully answering his written discovery and turning over highly relevant comparator data he had been seeking for six months before the summary judgment hearing? Assignments of Error Numbers 1 and 2).

C. STATEMENT OF THE CASE

(1) Jahanbin, a Person of Iranian National Origin, Worked at Boeing for Years, Largely on Safety Projects

Jahanbin has worked for Boeing since 2009, when he accepted a job as an entry level aircraft mechanic. CP 1654. He later accepted multiple promotions, working as a structural analysis engineer and later a safety officer. CP 1655. Historically, he worked on defense and military-based space projects. CP 1656. In 2014, he joined the commercial aviation team at Boeing. *Id.*

Jahanbin testified that he experienced discrimination because of his Iranian national origin early in his career. CP 1654-55. Security would not let him into a pre-appointment processing meeting because of his national origin. CP 1655.

Jahanbin testified that he "was not permitted to access certain areas that my co-workers did owing to my national origin," while working on military and space projects. CP 1656. In 2018, he changed his first name from "Mohammadreza" to "Shahrooz" and added a middle name "Mark," believing that a less-religious sounding name would help his career advancement. CP 1661.

Despite this background, Jahanbin passed all required background checks, and obtained promotions while working at Boeing. CP 1654. And he performed satisfactory work, receiving positive employment reviews throughout his tenure at Boeing. CP 2700-2959. Boeing also recognized Jahanbin's work at various times by awarding him several intellectual properties registered with the United States Patent and Trademark Office. CP 1661, 1674.

Jahanbin's work in the commercial aviation team largely involved airplane safety. His employment coincided with a very turbulent time for Boeing from a safety perspective that has garnered national attention. CP 2604-61. In 2015, Boeing

executed "a civil FAA settlement agreement…related to safety and quality issues concerning the Company's Boeing Commercial Airplanes business unit. CP 2609. And in 2020 it entered into a deferred criminal prosecution agreement with the FAA, admitting its employees engaged in criminal fraud for skirting federal safety regulators in an effort to save costs. CP 2604-2661.[1] Concerns over Boeing safety cost-cutting persist to this day, receiving significant press and regulatory attention. *See*, *e.g.*, Press Release, Federal Aviation Administration, *Updates on Boeing 737-9 MAX Aircraft* (Aug. 7, 2024) (available at https://www.faa.gov/newsroom/updates-boeing-737-9-max-aircraft) (last visited Dec. 30, 2024) ("We will continue our aggressive oversight of the company and ensure it fixes its systemic production-quality issues."). As discussed

[1] *See also, e.g.*, Press Release, U.S. Department of Justice Office of Public Affairs, *Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion* (Jan. 7, 2021) (available at https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion) (last visited Dec. 30, 2024).

below, Jahanbin witnessed Boeing's "systemic production-quality issues" and safety concerns firsthand, and he raised his concerns to his supervisors. CP 1654-77.

In 2017, Jahanbin was invited to interview for the Next Generation Quality team as an experienced structural analysis engineer for the 777X program. CP 1656. The manager who invited Jahanbin told him it was a "no-post requisition" and explained if an employee does not accept the offer, they resign from the company. CP 1656-57. The interview was not structured, deviating from the standard Boeing interview format, and Boeing did not explain the job description and expectations. CP 1657. Only after Jahanbin received a spot on the team was he told that part of his job was to "streamline efficiency" and "remove inspection steps" from the installation plans for structures of the 777X. CP 1657. His Boeing instructors told him this was "a critical project for breaking the cost curve to compete with Airbus planes in commercial markets." CP 1657.

Jahanbin was assigned to a team that was responsible for

the backbone of the fuselage and side of body portions of the airplane. CP 1658. Per Boeing's mandate, he and his colleagues removed hundreds of inspections that were in place to assure the structural integrity of the 777X planes. CP 1658. Removing those inspections was a cost savings to Boeing. CP 1658. But removing those inspections could also lead to premature defects and detrimental catastrophic failures of major primary structural elements, jeopardizing the integrity and safety of a completed aircraft. CP 1658.

(2) Jahanbin Began Speaking Out About His Concerns Over Boeing's Safety Lapses Designed to Cut Costs

Jahanbin and his colleagues began speaking out about Boeing's decision to remove safety inspections as a cost-cutting matter. CP 1658-59. He raised concerns first to low level engineers, then to quality insurance staff, and later further up the chain of command during staff meetings. CP 1658-59. He presented a formal presentation on his concerns in December 2017 and authored four technical memoranda in 2017 and 2018

that disclosed the removal of the 777X inspections. CP 1658-61. His declaration identifies, by name, many Boeing employees and managers with which he raised his concerns. CP 1658-61. At various points Boeing employees told Jahanbin and his colleagues "not to worry" about safety issues and "follow [company] instruction" and refrain from discussing their concerns. CP 1658-59.

Jahanbin eventually left the Next Generation Quality team, and it was dismantled shortly afterward. CP 1660. Around that time, Boeing also eliminated around 2,000 quality inspection jobs to try to save money. CP 1648-49. Jahanbin objected to that decision because it meant that the mechanics who did the work inspected their own work, rather than having trained quality assurance employees checking the mechanic's work. CP 1653, 1658. A mechanic checking their own work is like having no inspection at all. Jahanbin believed that eliminating inspections from the process would lead to Federal Aviation Administration ("FAA") and production quality violations. CP 1653.

Jahanbin took a new position in 2019 overseeing preflight and delivery of 777X airplanes. CP 1662. He testified that in that position, he spoke openly about the production flaws in 777X and assigned many "traveled works" from factory floor to flight line to verify and validate incomplete manufacturing processes before airplane releases to commercial and military customers. CP 1662.

Again, this was during a time when Boeing received severe public scrutiny due to highly publicized plane crashes. Lion Air Flight 610 crashed on October 29, 2018, and Ethiopian Airlines Flight 302 crashed on March 10, 2019, resulting in 346 fatalities between the two incidents. CP 1663. Boeing's best seller, the 737 MAX was grounded worldwide in many aviation jurisdictions. *Id.*

A third crash occurred on January 8, 2020, when Ukraine International Airlines Flight 752 was shot down by Iran. CP 1620.

In May 2020 Jahanbin became a senior safety engineer.

CP 1663. This role required Jahanbin to speak regularly with the FAA. In the interview for this position, he openly discussed his experience with the Next Generation Quality team in 2017-2018, *i.e.*, Boeing's instance on removing safety inspections. CP 1663.

In his new role, Jahanbin's senior manager, Rich Kawaguchi, warned him that he should not report problems to the FAA until he "knew what the fix is." CP 1664. Kawaguchi told him that "Boeing doesn't like us to go to the FAA" or words to that effect. CP 1635. Jahanbin challenged the lack of transparency in several instances and warned about damage to Boeing's reputation due to improper communication with regulators and operators. CP 1664. Boeing senior safety leadership justified the approach by saying that FAA tends to overreact and use speculations as concerted facts to punish Boeing for different reasons. CP 1664.

(3) After Receiving a Tip that Jahanbin Misused His Company Computer, Boeing Covertly Monitored Him and Reported Him to the FBI so the FBI Could Conduct a Fruitless Nighttime Raid of His Home, And Terminated Him, Rather than Provide Him a Written Warning as Company Policy Prescribed

Around this time, Boeing alleged the FBI informed two Boeing investigators that it received an anonymous tip claiming that Jahanbin had been communicating "aviation information" to an "Iranian team against OPEC sanctions via Telegram." CP 1612, 2207. According to Boeing Investigator Erin Kelly, Boeing opened an investigation:

> to see if there [were] any facts that either proved or disproved any support of that allegation, and -- and you know, from there, that's either a -- something that The Boeing company's concerned with from a Title 18 U.S. crimes perspective or sanctioned perspective because Boeing company has a responsibility to protect aviation and Boeing information from, you know, release and responsibility from -- from -- Boeing has a responsibility to make sure that there is no sanctioned information that is provided to sanctioned entities.

CP 1612, 2210. Allegedly, to that end, Boeing installed a program on Jahanbin's computer that allowed it to

surreptitiously record a screenshot every three seconds to monitor his activity. CP 1220. Boeing noted in its report that it continued an investigation after its initial "analysis of Jahanbin's forensic email identified multiple documents written in Farsi script as well as evidence that Jahanbin was emailing professors located in Iran." CP 1612.

Despite later terminating Jahanbin for his computer violations, Boeing did not stop his activities while it investigated him from April 29, 2020, to December 13, 2020. CP 1614. Despite company policy that it should have issued a written warning, Boeing covertly monitored Jahanbin's activity, later reporting him to the FBI, which Jahanbin alleged amounted to disparate treatment on account of his race/national origin. *See* CP 1612-21 (timeline of Jahanbin's activities that occurred over seven months and could have been stopped with a written warning).

Boeing found that Jahanbin installed Telegram, WhatsApp, Microsoft Teams, and Zoom in the early months of

the COVID pandemic to his Boeing-issued laptop, in violation of company policy. CP 1612-21. Boeing alleged that Jahanbin saved some information in a draft folder of his personal Gmail that Boeing alleged was protected proprietary information, although much of it was publicly available safety manuals. CP 1612-21. Boeing was concerned that Jahanbin added "Farsi script" to these emails that were left in his draft folder. CP 1612. Again, Boeing did not stop Jahanbin or issue a written warning, despite investigating these alleged violations in real time. CP 1612-21.

Jahanbin admitted that he downloaded communication applications like Zoom in spring 2020 during the COVID pandemic, and that he used his Boeing-issued computer for some personal business, including working on his dissertation for his P.H.D. program. CP 1653. Jahanbin also admitted that he communicated some information, like cockpit recordings, to the families of victims who perished in Ukraine International Airlines Flight 752, but he believed the information was publicly

available (or at the very least available elsewhere). CP 1620. He explained that he felt an obligation as a member of the International Society of Air Safety Investigators to help these victims of a horrible aviation tragedy. CP 1620.

Boeing's investigation also uncovered that Jahanbin recorded a few official meetings he had with the FAA in his role as senior safety engineer, without the knowledge of all those participating, to make a record for notetaking purposes. CP 1612. Jahanbin testified that he did not know that such recordings were prohibited by law in Washington. CP 1635. He testified that in his personal experience at Boeing, people record meetings all the time, and he specifically cited that happening in St. Louis and Philadelphia. CP 1635. This was cited as another violation of policy in Boeing's investigative report, along with Jahanbin's alleged failure to be fully truthful throughout the investigation. CP 844-45, 853-54.

Neither Boeing nor the FBI's investigation uncovered evidence that Jahanbin released or disseminated protected

information to any competitor, foreign government, "sanctioned entity," or illegal/terrorist operation of any kind. CP 1610-21. Boeing admitted that "nothing that happened regarding the FBI's investigation of Mr. Jahanbin became a basis for terminating him from the Boeing Company." CR 2278. He has never been arrested or charged with a crime. CP 1651, 1666. He has never been sued for misuse of Boeing trade secrets. CP 1669.

As mentioned above, Boeing has a policy of progressive discipline providing for employee corrective action, which lists the suggested discipline for the specific violations it found Jahanbin committed. CP 2975-3011. His infractions typically resulted in discipline no greater than a written warning, according to company policy:

- "Any unapproved use or misuse of company property, resources, or computer resources for purposes not related to the business of the company; includes internet and email…Usually results in a verbal warning."

- "Failure to protect; damage; unapproved access, unapproved possession, disclosure, distribution, or misuse of information or other intellectual property of the company, its employees, customers, suppliers,

competitors, or others…Usually results in a written warning." CP 2987.

- "*Unauthorized* use of a personal electronic device or a device that has captured an image or audio recording… Usually results in a written warning." CP 2998 (emphasis in original).

- "The failure to cooperate during an investigation" and "Making false statements or omitting pertinent information" both "[u]sually result[] in a written warning." CP 2990.

But rather than issue a warning or otherwise try to stop Jahanbin's activities after it learned what he was doing, Boeing allowed him to keep working while it gathered information on his activities to turn over to the FBI. CP 1612-21. Even though Jahanbin had passed several background checks, Boeing covertly monitored him, conducting what it called an "active insider threat investigation," and it fed this information to the FBI. CP 2972.

Jahanbin continued to work for Boeing as this "threat investigation" continued, but his managers' behavior at work changed. In October 2020, Jahanbin's manager was reassigned to Nathan Thomas. CP 1664. Jahanbin testified that when he

and Thomas first met, Thomas was acting strange and never spoke to Jahanbin about his work or workload. CP 1664. Instead, Thomas asked Jahanbin questions about, "what kind of food [he] eats back home in middle east" and other questions about his national origin that made Jahanbin uncomfortable. CP 1664.

In December 2020, the FBI raided Jahanbin's house, acting on information it learned through Boeing. CP 1665. The raid was very traumatic. CP 1665. It occurred in the middle of the night after his wife, his children and Jahanbin were all in bed. CP 1665. The officers knocked on the door until they woke up Jahanbin and his family. CP 1665. His wife called the Mukilteo police because she was disoriented and believed someone was trying to enter the home illegally. CP 1665. Jahanbin let the agents in after they attempted to break the door and his older daughter saw agents pointing guns at the windows. CP 1665.

They handcuffed Jahanbin and his wife outside of their home. CP 1665. They questioned him and his wife for nine

hours while separating them from their children. CP 1665. Federal officers woke up and traumatized his younger daughter, who was four years old at the time. CP 1665. The officers searched his house and asked about his Farsi language books. CP 1665. They asked about his connections to Iran, the last time Jahanbin visited Iran, and other questions related to his national origin. CP 1665. The FBI agents asked him if he had any enemies in Iran or Boeing. CP 1665.

The officers took all the electronic devices in the house, including his daughter's school laptop and his and his wife's work-related documents. CP 1665. FBI agents were particularly interested in his Farsi textbooks and notes. CP 1665. They used big boxes to collect all the books, papers such as work related to Boeing, education, financial and identifications from the property. CP 1665.

FBI agents initially said nothing about Boeing. CP 1665. But the documents FBI agents showed Jahanbin as they entered his house had the name of Boeing's chief investigator, Erin

Kelly, on the top. CP 1665. The warrant specified that the officers were looking for evidence related to allegations of trade secret theft from Boeing. CP 1665. Officers confronted Jahanbin with over a thousand screen shots from his work computer, related to his work as safety engineer. CP 1665.

Again, Jahanbin was not arrested, nor has he ever been charged with any crime. CP 1665. Nor has he ever been sued or otherwise found liable for misappropriating any trade secrets. CP 1669.[2]

Jahanbin was placed on leave without pay in December 2020, CP 1666. He immediately began raising his concerns with HR. CP 1666-68. And he reported Boeing's conduct to the Washington Human Rights Commission and the Equal Employment Opportunity Commission. CP 1667-70. Boeing terminated his employment at the end of January 2021. CP 1669.

[2] Jahanbin currently works as a senior staff employee at SpaceX and Adjunct Professor at Embry Riddle Aeronautical University. CP 2109.

(4) Procedural History

Jahanbin sued Boeing and several named Boeing employees, Erin Kelly, Nathan Thomas, and Rich Kawaguchi, in King County Superior Court in October 2022. CP 1-31. He asserted claims for wrongful discharge in violation of public policy, discrimination based on race and nationality, retaliation, and for creating a hostile work environment under the Washington Law Against Discrimination, RCW 49.60, et seq., and claims against the individual defendants for aiding and abetting Boeing's wrongful employment practices, as prohibited by RCW 49.60.220.[3]

Boeing moved for 12(b)(6) dismissal, which the trial court denied. CP 189-91. The parties began discovery, but much of it was outstanding when Boeing moved for summary judgment. Jahanbin responded by opposing summary judgment or in the

[3] For purposes of focusing the issues on this appeal, Jahanbin does not assign error to dismissal of his hostile work environment claim or the individual defendants. This is not a concession those claims lacked factual or legal merit.

alternative asking for a CR 56(f) continuance. CP 1630-86. His attorney noted that the following discovery was outstanding:

- Finish Defendant Erin Kelly deposition;
- Finish CR 30(b)(6) deposition;
- Meet and confer regarding Defendants' failure to provide responses to question set out in Plaintiffs third set of interrogatories and [requests for production];
- Depose Defendant Rich Kawaguchi;
- 26,000 documents produced that are unreadable.

CP 1632.

As to the third item, Jahanbin documented that Boeing had not yet answered written discovery he served, seeking comparator data of employees who had committed similar violations of company policy and the level of discipline they received. CP 793-992, 1524-30. During the litigation, Boeing provided a list of persons who were *terminated* for some similar infractions. *See* CP 961-66 (answering request for productions "Defendant Boeing has provided discovery about employees it has *terminated* for mishandling and/or failing to protect Boeing information and intellectual property over the last ten years")

(emphasis added); CP 1749, 1752-72. Even though a protective order was in place, Boeing redacted that list, removing identifying information in a way to prevent Jahanbin from conducting further discovery. CP 1752-72.

But Jahanbin sought more than just terminated employees, he sought discipline records of all comparators, including those who received discipline *less than* discharge. *Id.* He vigorously argued that such evidence is relevant and admissible in employment cases to prove disparate treatment. CP 1630-32. And the record reveals that at least 157 employees received discipline for misuse of information or unauthorized use of a recording device over the past two years, with *only three employees being discharged.* CP 1491. But as of summary judgment, Boeing refused to provide comparator information to Jahanbin for employees the many employees who received less severe punishment for similar behavior. CP 1631, 1680-86, 1952-2570.

Jahanbin offered to meet and confer to address the

outstanding discovery issues, which Boeing refused, CP 970-92, so he brought a motion to compel. CP 793-99. The trial court denied the motion, not as a matter of substance, but because the meet and confer requirement did not occur. CP 1626-29. Jahanbin explained that the comparator data he sought was key to prove pretext in a discrimination case. CP 793-98, 1630-32. And he argued that trial was still seven months away, and he should be given more time to compel production from Boeing, given his previous motion was denied on procedural grounds. CP 797; *see also*, CP 480-92 (earlier motion asking to delay summary judgment and documenting Boeing's obtrusive discovery practices).

The trial court, the Honorable Coreen Wilson, refused to allow Jahanbin a CR 56(f) continuance and granted Boeing's summary judgment motion in total. CP 1827-29. The court denied a timely reconsideration motion, CP 3198-99, and this

timely appeal follows. CP 3200-09.[4]

D. SUMMARY OF ARGUMENT

Genuine issues of material fact should have prevented summary judgment on Jahanbin's claims for disparate treatment, discriminatory discharge, and wrongful discharge in violation of public policy. A jury could find that Boeing treated Jahanbin differently than non-Iranian employees by covertly monitoring him for seven months and reporting him to the FBI, rather than simply providing him a written warning when it first learned he downloaded applications like Zoom and began using his personal email on the company laptop, early during the COVID pandemic. A jury could find that its reasons for discharging him were pretext and motivated either by his race/national origin and use of Farsi or as retaliation for his well-documented whistleblowing

[4] The appeal was temporarily stayed due to Jahanbin's counsel's, John P. Sheridan's, unexpected diagnosis with Alzheimer's disease. *See* appellant's mot. to stay and declaration of John P. Sheridan in support (both submitted Sept. 9, 2024). Undersigned counsel substituted for Mr. Sheridan in November 2024.

activity, speaking out against Boeing's safety lapses. These facts establish potential claims under the Washington Law Against Discrimination and the common-law tort of wrongful discharge in violation of public policy. A jury must evaluate competing evidence of Boeing's motivations that rest on disputed questions of fact and witness credibility.

At the very least, summary judgment was premature. Significant discovery was ongoing in a case that was less than one year old when Boeing moved for summary judgment, seven months before the trial date. CP 797. Jahanbin had actively fought with Boeing for months trying to acquire comparator information on similarly situated non-Iranian employees who were not discharged, but Boeing refused to turn it over. In denying a CR 56(f) continuance request, the trial court deprived Jahanbin of his constitutional right to access the civil justice system and obtain valuable, discoverable information that would illuminate Boeing's disparate, discriminatory, and retaliatory motivations.

This Court should reverse.

E. ARGUMENT

(1) The Trial Court Erred in Dismissing Jahanbin's Employment Claims on Summary Judgment

(a) Standard of Review

As for review of a decision on summary judgment, it is well-understood that summary judgment is a *drastic* remedy "appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Kittitas County v. Allphin*, 190 Wn.2d 691, 700, 416 P.3d 1232 (2018); CR 56(c).

In addressing whether a genuine issue of material fact is present under CR 56(e), a court must construe the facts, and reasonable inferences from the facts *in a light most favorable to the non-moving party*, here, Jahanbin. *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). This Court reviews the trial court's decision *de novo*. *Dowler v. Clover Park Sch. Dist. No. 409*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

It is also important to note the lens through which this Court must review an employment discrimination case. The Washington Law Against Discrimination ("WLAD"), chapter 49.60 RCW, states that "[t]he right to be free from discrimination because of race, creed, color, [or] national origin…is recognized as and declared to be a civil right." RCW 49.60.030(1). This right includes "[t]he right to obtain and hold employment without discrimination." RCW 49.60.030(1)(a).

"WLAD expresses a public policy of the highest priority" and seeks "to deter and to eradicate discrimination in Washington." *Int'l Union of Operating Engineers, Local 286 v. Port of Seattle*, 176 Wn.2d 712, 722, 295 P.3d 736 (2013) (quotations omitted). Our Legislature has commanded that WLAD's protections "shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020. And our Supreme Court has recognized the role the justice system plays in perpetuating racism, discrimination, and injustice, and it has called upon all actors in the justice system to work toward a

more just system. *Letter from the Wash. State Supreme Court to Members of Judiciary & Legal Cmty.* (June 4, 2020), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf [https://perma.cc/QNT4-H5P7] (last visited Dec. 30, 2024).

Importantly, "[s]ummary judgment for an employer is seldom appropriate in employment discrimination cases because of the difficulty of proving discriminatory motivation." *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County*, 189 Wn.2d 516, 527, 404 P.3d 464 (2017). "When the record contains reasonable but competing inferences of both discrimination and nondiscrimination, the trier of fact must determine the true motivation." *Id.* (quoting *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 445, 334 P.3d 541 (2014)). Modern appellate courts reverse summary judgment dismissals of employment discrimination claims often. *See, e.g.*, *Specialty Asphalt & Constr., LLC v. Lincoln County*, 191 Wn.2d 182, 201, 421 P.3d 925 (2018);

Scrivner, *supra*; *Mikkelsen*, *supra* (all reversing Court of Appeals' decisions that affirmed summary judgment dismissal); *see also*, *e.g.*, *Litvack v. Univ. of Washington*, 30 Wn. App. 2d 825, 855, 546 P.3d 1068 (2024); *Crabtree v. Jefferson County Pub. Hosp. Dist. No. 2*, 20 Wn. App. 2d 493, 500 P.3d 203 (2021) (also reversing summary judgment dismissal).[5]

(b) Courts Apply the *McDonnell Douglas* Shifting Framework to Employment Claims to Prevent Summary Judgment Dismissals in These Cases Where Discrimination Is Often Hard to Prove

Courts apply the *McDonnell Douglas*[6] burden shifting framework when evaluating an employment discrimination claim in Washington. *Mikkelsen*, 189 Wn.2d at 526. This framework is "designed to assure that the plaintiff has his or her

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[5] This brief contains cites to many other appellate cases where appellate courts have reversed the dismissal of employment claims. These few are provided at the outset as just a sample of very recent cases.

[6] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)

day in court despite the unavailability of direct evidence" which is so often the case in these lawsuits. *Id.* (cleaned up).

First, the plaintiff must establish a *prima facie* case. *Id.* at 527. This establishes a rebuttable presumption of discrimination. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 618, 60 P.3d 106 (2002). Courts articulate this burden in different ways, depending on the particular facts of the case, but generally a plaintiff must show they are within a protected class or engaged in a protected activity and suffered some adverse employment action or disparate treatment. *See Mikkelsen*, 189 Wn.2d at 527; *Davis v. W. One Auto. Grp.*, 140 Wn. App. 449, 458-59, 166 P.3d 807 (2007).

Second, the burden shifts to the defendant, who must "articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Mikkelsen*, 189 Wn.2d at 527.

If the defendant meets this burden, to overcome summary judgment, the burden shifts back to the plaintiff to produce sufficient evidence that the employer's alleged

nondiscriminatory reason for the adverse employment action was pretext. *Mikkelsen*, 189 Wn.2d at 527-28. An employee may create a genuine issue of material fact with evidence "(1) that the defendant's reason is pretextual or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer." *Scrivener*, 181 Wn.2d at 446-47.

An employee can prove pretext with evidence showing: (1) the employer's reasons have no basis in fact, (2) the employer was not actually motivated by the reasons, or (3) the reasons are insufficient to prompt the adverse employment decision. *Becker v. Washington State Univ.*, 165 Wn. App. 235, 252, 266 P.3d 893 (2011). To meet this burden, the employee "is not required to produce evidence beyond that already offered to establish a prima facie case" or "direct ('smoking gun') evidence." *Id.* "Circumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden" of proof. *Sellsted v. Washington Mut. Sav. Bank*, 69 Wn. App. 852, 860, 851 P.2d

716 (1993) (overruled on other grounds by *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 306, 898 P.2d 284 (1995)). This is because "employers infrequently announce their bad motives orally or in writing." *Id.* (quotation omitted).

"Timing," "severity" of the discipline imposed, and "disparate treatment" are all evidence of pretext. *Renz*, 114 Wn. App. 611, 624, 60 P.3d 106 (2002) (disparate treatment evidenced gender-based motivation); *see also*, *e.g.*, *Calmat Co. v. U.S. Dep't of Lab.*, 364 F.3d 1117, 1123 (9th Cir. 2004) (even though disciplined employee used profane language and an "ethnic slur" to harass another employee in the workplace, it was pretext for discipline where the company "treated similar complaints involving racial slurs or sexual harassment less seriously").

(c) Jahanbin Established Genuine Issues of Fact to Support His Cause of Action for Disparate Treatment

"Disparate treatment is the most easily understood type of discrimination. The employer simply treats some people less

favorably than others because of their race, color, religion, sex, or national origin." *Blackburn v. State*, 186 Wn.2d 250, 258, 375 P.3d 1076 (2016) (cleaned up). "When an employee makes out a claim of disparate treatment under the WLAD…the employer's action is unlawful unless the employer has a valid justification." *Id.*

"A plaintiff may establish a prima facie case either by offering direct evidence of an employer's discriminatory intent, or by satisfying the *McDonnell Douglas* burden shifting test that gives rise to an inference of discrimination." *Alonso v. Qwest Commc'ns Co.*, 178 Wn. App. 734, 743-44, 315 P.3d 610 (2013).

"Under the direct evidence test, a plaintiff can establish a prima facie case by providing direct evidence that (1) the defendant employer acted with a discriminatory motive and (2) the discriminatory motivation was a significant or substantial factor in an employment decision." *Alonso*, 178 Wn. App. at 744. Absent direct evidence, a plaintiff can establish a *prima facie* case by showing that "(1) the employee belongs to a

protected class and that (2) the employer treated the employee less favorably in the terms or conditions of employment (3) than a similarly situated, nonprotected employee, (4) who does substantially the same work." *Davis*, 140 Wn. App. at 458-59. Again, even if an employer then provides a legitimate reason for treating the employee differently, the employee can still survive summary judgment by showing that the reasons are pretextual or discrimination still played a substantial motivating factor in the employer's conduct. *Scrivener*, 181 Wn.2d at 446-47.

Quite simply, Jahanbin established a case of disparate treatment because Boeing treated him differently due to his race/national origin. Even without the comparator data Boeing refused to turn over in discovery, the record establishes that Jahanbin should have received a written warning (or some discipline less severe than discharge) when Boeing first learned from an "anonymous tip" that he might have been misusing his computer. CP 2987-90. One hundred and fifty-seven such warnings have been given to similarly situated Boeing

employees in the last two years. CP 1491. Boeing gave Jahanbin no such warnings, treating him differently because he was communicating in "Farsi script" with professors "located in Iran." CP 1612.

Instead, Boeing covertly monitored him for over seven months, as it built a case against him to present to the FBI. CP 1612-21. Despite later terminating him for computer infractions that it claimed exposed Boeing to "unacceptable liability," Boeing watched in real time as those infractions occurred *over seven months*. CP 1612-21. Then it sent materials to the FBI so Jahanbin's house could be raided in the middle of the night, by gun-brandishing FBI agents. CP 1665-66.

Even though he had passed many background checks and had been a valuable, well-regarded employee at Boeing for over a decade, CP 1654, 2700-2959, a jury could find that Boeing's disparate treatment was direct evidence that it treated him less favorably due to his race and Iranian national origin. Boeing and its lead investigator, Erin Kelly, a former military intelligence

officer, tried to build a case against Jahanbin, because he was Iranian and made notations in Farsi, rather than simply addressing the fact that he downloaded applications like Zoom early in the pandemic and began accessing his personal email on a work laptop. *See* CP 1612-21 (timeline of Jahanbin's activities that occurred over seven months and could have been stopped with a written warning). She admitted Boeing felt a need to investigate him for fear he was communicating with "sanctioned entities," CP 2210, and a jury could find Boeing would have treated a non-Iranian employee more favorably. Boeing also assigned him a new manager during its investigation, who directly confronted Jahanbin about his national origin asking him uncomfortable questions like "what kind of food [he] eats back home in middle east," further evidence of national origin bias. CP 1664.

A jury could find direct and circumstantial evidence that Boeing treated him differently than similarly situated nonprotected employees, deeming him an "active insider threat,"

due to his race, national origin, and use of Farsi. CP 2972. On this point alone, summary judgment should be reversed.

(d) Jahanbin Established Genuine Issues of Fact to Support His Cause of Action for Discriminatory Discharge Under WLAD

Relatedly, discrimination substantially motivated Boeing's decision to ultimately discharge Jahanbin, rather than the lesser discipline it imposed on other employees.[7] A jury could find that rather than discipline Jahanbin at the lowest level when it first found out he began installing applications like Zoom and accessing personal email on his Boeing laptop, Boeing stayed silent and covertly monitored him for months due to his race, national origin, and use of Farsi in the emails it uncovered. It later claimed that his behavior was "egregious" and created

[7] Generally, a plaintiff makes a *prima facie* case of discriminatory discrimination by showing that "(1) she was within a statutorily protected class, (2) she was discharged by the defendant, (3) she was doing satisfactory work." *Mikkelsen*, 189 Wn.2d at 527. Jahanbin met this burden. He was always performing satisfactory work, CP 2700-2959, and certainly was at the time Boeing first learned he might be misusing his computer but failed to correct him with a written warning.

"unacceptable liability" that justified termination, but it did nothing to stop it *for months*, despite actively monitoring Jahanbin's behavior *as it was occurring*. A jury could therefore find that the ultimate reasons it gave for his termination were pretext.

Again, the timing, severity, and disparate treatment of Boeing's actions are all hallmark indicators of pretext. *E.g.*, *Calmat*, 364 F.3d at 1123. The timing of Boeing's most severe discipline shows pretext because Boeing could have stopped Jahanbin months before with a written warning as prescribed by company policy. CP 2987-90.

Exaggerating concerns over workplace misconduct is also evidence of pretext, showing that the exaggerated concerns were not the real reason the employee was fired. *See City of Pullman*, Decision 11148 (PECB, 2011) (exaggeration is evidence of pretext); *see also*, *Vaughn v. Woodforest Bank*, 665 F.3d 632, 639 (5th Cir. 2011); *Plotke v. White*, 405 F.3d 1092, 1106 (10th Cir. 2005). If Jahanbin's activities created "unacceptable"

liability, then why did Boeing do nothing to stop him until it provided enough information to the FBI to have his home raided? Why did Boeing fail to provide him a written warning, like it did for non-Iranian employees? The record has enough circumstantial evidence, as is, to survive summary judgment.

Again, despite Boeing's exaggerated concerns that he was "disclosing…Boeing proprietary data to Iran" or other "sanctioned entities" potentially violating "the Iranian Transactions and Sanctions Regulation" (CP 1611, 2210), he has never been arrested. He has never been charged with a crime, espionage, or some other infraction for some wrongful communications with the Iranian government (which never occurred). He has never been pursued in any fashion for misappropriation of trade secrets.

A jury could find that Boeing was substantially motivated by Jahanbin's race, national origin, and use of Farsi, when it conducted an "active insider threat investigation" and discharged Jahanbin in January 2021, rather than give him a written warning

when it learned he downloaded applications like Zoom and began using his personal email in April 2020. Summary judgment should be reversed.

(e) The Trial Court Erred in Dismissing Jahanbin's Wrongful Discharge in Violation of Public Policy Claim

Jahanbin also alleged that Boeing was substantially motivated to terminate his employment due to his protected whistleblowing activity, speaking out for years against Boeing's decisions to strip safety protections from its manufacturing process. CP 1641-43. He alleged a claim for wrongful discharge in violation of public policy and supported it with enough circumstantial evidence to survive summary judgment.

Our Supreme Court held in *Thompson v. St. Regis Paper Company*, 102 Wn.2d 219, 232-33, 685 P.2d 1081 (1984), an employee states a cause of action in tort if they can show that their "discharge may have been motivated by reasons that contravene a clear mandate of public policy." If a plaintiff makes that *prima facie* case, "the burden shifts to the employer to prove

that the dismissal was for reasons other than those alleged by the employee." *Id.* The plaintiff may then respond to the employer's articulated reason either by showing that the reason is pretext, or by showing that even if the employer's stated reason is legitimate, the worker's pursuit of or intent to pursue some protected activity was nevertheless a substantial factor motivating the employer to discharge the worker. *Wilmot v. Kaiser Aluminum & Chemical Corporation*, 118 Wn.2d 46, 73, 821 P.2d 18 (1991); *see also*, *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 425 P.3d 837 (2018).

> Tort has typically arisen in four situations:
>
> > (1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligations, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistle-blowing.

Gardner v. Loomis Armored Inc., 128 Wn.2d 931, 936, 913 P.2d

377 (1996).[8]

But our Supreme Court has also said some cases do not fall "neatly" within these four classic situations identified by the *Gardner* court, requiring a more "refined" analysis. *Becker v. Community Health Sys., Inc.*, 184 Wn.2d 252, 259, 359 P.3d 746 (2015). In those scenarios, courts will apply four elements derived from a treatise written by Henry Perritt:

> (1) The plaintiffs must prove the existence of a clear public policy (the *clarity* element).
> (2) The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the *jeopardy* element).
> (3) The plaintiffs must prove that the public policy-linked conduct caused the dismissal (the *causation* element).
> (4) The defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element).

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[8] In *Gardner*, the court found that Washington recognized a clear "public policy encouraging citizens to rescue persons from life threatening situations," and held that an armored car driver could not be fired for leaving his vehicle to render aid to another person. 913 P.2d at 386. Although this was a matter of first impression, the Washington Supreme Court held that this public policy was clearly established in Washington by analogous cases and statutes.

Henry H. Perritt, Jr., *Workplace Torts: Rights and Liabilities* (1991); *Rose v. Anderson Hay and Grain Co.*, 184 Wn.2d 268, 277, 358 P.3d 1139 (2015). This analysis is unnecessary if one of the four classic scenarios, identified in *Gardner* are present. *Martin*, 191 Wn.2d at 724.

Here, Jahanbin alleged that he engaged in protected activities, akin to whistleblowing for years, by openly complaining to many supervisors within Boeing that the company's cost-cutting decisions to systematically remove safety inspections, violated federal aviation safety standards. If Boeing was not impermissibly motivated by his race and national origin, then a jury could find that it was motivated to rid itself of a problem employee who spoke out against Boeing's safety lapses, during a time when it faced intense public scrutiny. Or a jury could find that Jahanbin's race/national origin and protected whistleblowing activities were *both* substantial motivating factors in Boeing's wrongful discharge.

Because he engaged in protected whistleblowing

activities, reporting safety concerns and potential FAA violations to Boeing supervisors, a Perritt analysis is arguably not necessary. *Martin*, 191 Wn.2d at 724 (basketball coach was fired after he reported a lack of safety equipment in school's gym). That said, the analysis is illuminating to show that his discharge contravened a clear mandate of public policy and Boeing could not show a non-pretextual reason for his discharge. *See Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 358 P.3d 1153 (2015) (post-*Martin* case applying Perritt analysis where whistleblowing employee was fired after she reported concerns to her supervisors that their plans potentially violated federal HIPAA laws). The Perritt elements further show that Jahanbin produced sufficient evidence related to his claim for wrongful discharge to create a jury question.

On the clarity element, federal aviation safety is highly regulated, evidencing a clear mandate of public policy. To determine whether there is a public policy sufficient for a wrongful discharge cause of action, courts look to constitutional,

statutory, regulatory schemes, and past judicial decisions. *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 207-08, 193 P.3d 128 (2008). Here, public policy is well-established in legislation like 42 U.S.C. 7572, and regulations like 14 CFR 21, that heavily regulate air safety. Likewise, courts have recognized an "overriding public policy" in "promoting aviation safety." *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 707-08 (3d Cir. 2016).

Given this clear public policy, it is no wonder that Boeing's safety lapses have received such significant media and regulatory attention in recent years. *See, e.g.*, Michael Whitaker, Administrator FAA, *FAA Oversight of Boeing's Broken Safety Culture*, United States Department of Transportation, (Sept 25 2024) (available at https://www.transportation.gov/faa-oversight-boeings-broken-safety-culture-0) (last visited Dec. 30, 2024) (noting "There must be a shift in the company's safety culture to holistically address its systemic quality assurance and production issues."); Press Release, U.S. Department of Justice

Office of Public Affairs, *Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion* (Jan. 7, 2021) (available at https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion) (last visited Dec. 30, 2024). The public is obviously motivated to regulate air travel as a matter of public policy.

As for jeopardy, a plaintiff establishes this element "by demonstrating either of the following: "his or her conduct was (1) directly related to the public policy or (2) necessary for effective enforcement." *Rickman*, 184 Wn.2d at 310 (cleaned up). In *Rickman*, the Supreme Court held that a health care employee satisfied this element when the facts showed that she was terminated after raising concerns with her supervisors that a planned company practice might violate federal HIPAA laws.[9]

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[9] Rickman also held that an employee does not have to show that its employer *actually* violated any underlying law or public policy. There is no "requirement that the plaintiff confirm the validity of his or her concerns before taking action." *Id.* at 312.

Jahanbin had a well-documented history of raising safety concerns to Boeing leadership. Raising concerns that Boeing might be violating federal aviation safety laws or regulations was directly related to that established public policy. His actions of raising concerns with his supervisors is the same behavior as the employee in *Rickman*, who also warned supervisors that the company might be violating federal law. Jahanbin met this element.

As for causation, a jury could find that Boeing was motivated by Jahanbin's whistleblowing behaviors when it retaliated against him by discharging him. "If an employee establishes that he or she participated in statutorily protected [] activity, the employer knew about the [] activity, and the employee was then discharged, a rebuttable presumption of retaliation arises that precludes summary dismissal of the case. *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 747, 332 P.3d 1006 (2014). "Proximity in time between the protected activity and the discharge, as well as satisfactory work

performance and evaluations before the discharge, are both factors suggesting retaliation." Causation in a wrongful discharge claim is not an all or nothing proposition. *Rickman*, 184 Wn.2d at 314. The employee "need not attempt to prove the employer's sole motivation was retaliation." *Wilmot*, 118 Wn.2d at 70.

Here, the rebuttable presumption exists, where Boeing knew though Jahanbin's many supervisors and managers that he was outspoken in opposing Boeing's decision to remove safety protections. He had a history of satisfactory performance evaluations. CP 2700-2959. And Boeing even recognized Jahanbin's work by awarding him several intellectual properties registered with the United States Patent and Trademark Office between 2020 to 2023. CP 1661, 1674. But a jury could conclude that Boeing was motivated in part by his outspokenness, given his supervisors' warnings to refrain from reporting problems to the FAA, "not to worry" about safety issues, and "follow [company] instruction" and refrain from

discussing his safety concerns. CP 1658-59, 1664. Boeing was under strict scrutiny from federal regulators in the wake of the 737 MAX groundings, scrutiny that continues to this day with its ongoing safety issues. *Whitaker*, *supra*. A jury could find that it was substantially motivated to rid itself of a whistleblowing employee who had shown a willingness to potentially speak outside the company.

Finally, for all the reasons discussed above, Boeing could not provide an overriding, non-pretextual explanation for discharging Jahanbin. *Wilmot*, 118 Wn.2d at 70. It knew about the alleged behavior that it offered as justification for terminating him for seven months, but it failed to take *any* action. Instead, it monitored and reported him to the FBI leading to an invasion and fruitless search of his home and family by federal agents. Jahanbin presented a material question of fact over Boeing's motivations that must be resolved by a jury. Again, the difficulty of proving motivation based on a cold record, is precisely why courts should rarely grant summary judgment in employment

cases. *Mikkelsen*, 189 Wn.2d at 527.

Jahanbin met his burden to resist summary judgment, and this Court should reverse. A jury should decide the many questions of fact and witness credibility at the forefront of this case. This is especially true given the highly relevant evidence Boeing refused to provide, related to comparator data. As discussed below, that outstanding discovery should have delayed a summary judgment hearing, at the very least, so Jahanbin could complete the record on Boeing's wrongful employment practices.

(2) The Trial Court Abused Its Discretion in Refusing to Grant a CR 56(f) Continuance

At the very least, summary judgment was premature. Jahanbin sought to complete ongoing discovery and obtain relevant comparator data would have further illuminated Boeing's disparate treatment and pretextual justifications for discharging Jahanbin. The trial court should have granted Jahanbin's request for a CR 56(f) continuance, and this Court

should reverse so Jahanbin can have full access to the civil justice system, as is his constitutional right.

(a) Standard of Review

Decisions of trial courts on CR 56(f) are discretionary and reviewed for an abuse of discretion. *Wood v. Milionis Construction, Inc.* 198 Wn.2d 105, 133, 492 P.3d 813 (2021). That discretion is abused where its CR 56(f) decision is manifestly unreasonable or exercised on untenable grounds or reasons. *Id.* But such an exercise of discretion must keep in mind key principles. "[T]he trend of modern law is to interpret court rules and statutes to allow decision on the merits of cases." *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990) (citing *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982)). Thus, when reviewing a motion to continue under CR 56(f), the "primary consideration" of the court must be "justice." *Id.* at 508; *Modumetal, Inc. v. Xtalic Corp.*, 4 Wn. App. 2d 810, 831-34, 425 P.3d 871 (2018), *review denied*, 192 Wn.2d 1011 (2019) (reversing summary judgment

as trial court abused its discretion in failing to grant CR 56(f) motion as needed discovery documents in trade secrets case).

(b) Jahanbin Should Have Been Permitted Time to Resolve Outstanding Discovery Issues, Including Accessing Key Comparator Data Boeing Withheld

Discovery in Washington civil litigation is important, having a constitutional dimension under *Lowy v. Peacehealth*, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012) (recognizing discovery as an aspect of Wash. Const. art. I, § 10 access to courts).

Consequently, it has long been the rule in Washington that a trial court may order a continuance of a motion for summary judgment "to permit affidavits to be obtained or depositions to be taken or discovery to be had." CR 56(f). Under this rule, the party seeking a continuance should outline the evidence sought if the continuance is granted, and to demonstrate how the new evidence would support the party's position in the case. *Coggle*, 56 Wn. App. at 507; *Butler v. Joy*, 116 Wn. App. 291, 299, 65

P.3d 671, *review denied*, 150 Wn.2d 1017 (2003).

In *Coggle,* this Court held that the trial court abused its discretion by refusing to grant a continuance requested by the plaintiff, stating: "Where a party knows of the existence of a material witness and shows good reasons why the witness' affidavit cannot be obtained in time for the summary judgment proceeding, the court has a duty to give the party a reasonable opportunity to complete the record before the ruling on the case." *Id.* at 507.

In *Butler*, the defendant in a malpractice action shortly after the plaintiff's attorney withdrew. 116 Wn. App. at 294. The day before the hearing, the plaintiff's new attorney filed a notice of appearance and asked for a continuance at the hearing so that he could have more time to prepare a response. *Id.* Even though the dispositive issue was a legal question, and declarations were therefore unnecessary, Division III held it was a reversible error to deny the continuance because the plaintiff's attorney "deserved an opportunity to prepare a response on the

issues of law." *Id.* at 299. The court explained that "it is hard to see 'how justice is served by a draconian application of time limitations' when a party is hobbled by legal representation that has had no time to prepare a response to a motion that cuts off any decision on the true merits of a case." *Id.* at 300 (quoting *Coggle,* 56 Wn. App. at 508).

Here, there were many outstanding discovery issues, including finishing the depositions of the named defendants, including Boeing's 30(b)(6) deponent. CP 1632. Boeing had also heavily redacted and withheld comparator data that Jahanbin sought to prove his case of unlawful employment conduct. CP 1752-72. He asked for a CR 26(i) conference, which Boeing refused to attend, before moving to compel. CP 1696-1719. And the trial court denied his motion to compel on the *procedural* grounds that a CR 26(i) did not happen. CP 1626-29.

Even assuming the trial court was correct that Jahanbin's lawyer was at fault for failing to ensure a CR 26(i) conference took place, it does not serve the ends of justice that Jahanbin

should face summary judgment dismissal for his attorney's failure. Such a draconian approach is antithetical to the commands of *Butler* and *Coggle*, that a litigant should be given a chance to complete the record and not suffer for an attorney's procedural mistakes. *See also, e.g., Ha v. Signal Elec., Inc.* 182 Wn. App. 436, 453, 332 P.3d 991 (2014), *review denied*, 182 Wn.2d 1006 (2015) (recognizing that a client should not be punished for the "sins of the lawyer" with a drastic penalty, in that case default judgment).

This is not a case that was pending for particularly long or where Jahanbin or his attorney merely sat on his hands. Boeing moved for summary judgment one year (nearly to the day) after Jahanbin filed his case. CP 1-31, 993-1021. The parties spent that time litigating 12(b)(6) dismissal, litigating protective orders (due to the potentially sensitive information involved in the case) exchanging written discovery, and conducting multiple depositions. Again, Jahanbin had moved to compel answers to written discovery that he served on Boeing in April 2023, *six*

months before Boeing moved for summary judgment. CP 793-992. He just needed time to cure a *procedural* error to have the motion heard as a matter of substance. And trial was still months away when Boeing moved for summary judgment. CP 480-92, 797. There was no reason to rush this case to the finish line, especially where employment cases can be so "difficult[]" to prove without sufficient discovery. *Mikkelsen*, 189 Wn.2d at 516.

Under these circumstances, it was an abuse of discretion to deny Jahanbin his constitutional right to fully access the civil justice system through discovery.

(c) Jahanbin Sought Identifiable, Relevant Information Necessary to Support Otherwise Hard to Prove Employment Claims

The trial court abused its discretion in particular because Jahanbin identified specific, material discovery to which he had been denied. On top of the ongoing depositions of key Boeing agents, including its CR 30(b)(6) deponent, Jahanbin sought comparator information that Boeing refused – information

related to individuals who received punishment less than discharge for similar infractions. Boeing had so far only disclosed heavily redacted information on employees who were *terminated*. CP 1752-72. It did so even though the scant record reveals that 157 employees had received discipline for misuse of information or unauthorized use of a recording device over the past two years, with *only three such employees being discharged*. CP 1491.

This information was key because, as courts have explained, "[o]ne test for pretext is whether (1) an employee outside the protected class (2) committed acts of comparable seriousness (3) but was not demoted or similarly disciplined." *Johnson v. Dep't of Soc. & Health Servs.*, 80 Wn. App. 212, 227, 907 P.2d 1223, 1232 (1996); *see also, e.g., Hiatt v. Rockwell Int'l Corp.*, 26 F.3d 761, 770 (7th Cir.1994). Though not strictly *required*, proof "of different treatment by way of comparator evidence is relevant and admissible." *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 33, 244 P.3d 438 (2010). It can

be key evidence that should not be denied to a plaintiff. *See, e.g.*, *Renz*, 114 Wn. App. at 624 (disparate treatment evidenced gender-based motivation) (reversing summary judgment due to "cumulative" evidence of pretext that included comparator data).

Again, the trial court had a duty to view this case through the lens of employment law, where our Supreme Court has recognized that employment claims are "difficult[]" to prove. *Mikkelsen*, 189 Wn.2d at 516. "Smoking gun" evidence is exceedingly rare, and Washington employees must have access to relevant circumstantial evidence, like comparator data, to prove their claims. *See Becker*, 165 Wn. App. at 252; *Sellsted*, 69 Wn. App. at 860.

The trial court was wrong to reward Boeing for resisting and litigating discovery issues to the mat, rather than simply turning over the relevant comparator data Jahanbin sought with timely discovery requests.

It is particularly ironic that the trial court rewarded Boeing's tactics, when Boeing has admitted to "impairing,

obstructing, defeating, and interfering with" oversight efforts of its corporate activities, including making "misleading statements, half-truths, and omissions to the FAA." CP 2635, 2643. This lawsuit was more of the same behavior. The trial court was wrong to give Boeing a pass for refusing to turn over comparator data Jahanbin sought for months leading up to summary judgment.

As in *Coggle*, Jahanbin pointed to identifiable, discoverable information that was key to complete the record before summary judgment occurred. Justice was not done, and the trial court abused its discretion by denying a CR 56(f) continuance and granting summary judgment, which only rewarded Boeing for refusing Jahanbin access to this information.

F. CONCLUSION

The Court should revere because Jahanbin provided enough direct and circumstantial evidence of disparate treatment and wrongful discharge in violation of public policy to survive

summary judgment, which rarely should be granted in an employment case. Alternatively, the trial court erred in refusing to grant a CR 56(f) continuance, so Jahanbin could seek additional discovery to prove his case, most critically comparator data that is highly relevant to prove workplace discrimination.

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Respectfully submitted,

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DECLARATION OF SERVICE

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

DATED: December 31, 2024 at Seattle, Washington.

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