No. 20-CV-14

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

SABRATHIA DRAINE ISHAKWUE,
APPELLANT,

V.

DISTRICT OF COLUMBIA,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF THE ISSUES

Sabrathia Ishakwue was terminated from her position as a nurse with the District of Columbia Department of Youth Rehabilitation Services ("DYRS"). DYRS maintains that it terminated Ishakwue because of her repeated conflicts with other employees and concerns about her work ethic. Ishakwue, however, claims that she was terminated in retaliation for her complaints about the medical treatment of youth in DYRS's custody in violation of the District's Whistleblower Protection Act ("WPA"), D.C. Code § 1-615.51 *et seq*. Following a four-day trial, the jury returned a verdict for the District, concluding that Ishakwue had not proven that she made a protected disclosure under the WPA. The jury therefore did not reach other aspects of the case, such as causation. The issues on appeal are:

1. Whether there was a sufficient evidentiary basis for a reasonable jury to conclude that Ishakwue's communications did not amount to protected disclosures under the WPA.

2. Whether the trial court properly exercised its discretion to exclude certain evidence that lacked relevance to Ishakwue's WPA claim, would have confused the jury, and would have prejudiced the District.

3. If the Court otherwise vacates the verdict and remands for further proceedings, whether Ishakwue is entitled to a directed verdict on causation when

there was ample evidence for a jury to conclude that DYRS terminated her for reasons other than her purported protected disclosures.

STATEMENT OF THE CASE

DYRS terminated Ishakwue from her position as a nurse on February 9, 2016, after less than a year of employment. On February 8, 2017, she brought this action claiming that her termination violated the WPA. Before trial, the Superior Court granted the District's motion to exclude certain evidence on the ground that it was irrelevant and prejudicial. At the close of evidence at trial, the court denied Ishakwue's motion for judgment as a matter of law. The jury returned a verdict for the District on October 31, 2019, concluding that Ishakwue had not proven that she made a protected disclosure under the WPA. On December 12, the court denied Ishakwue's post-trial motion for judgment as a matter of law or, alternatively, for a new trial. Ishakwue filed a timely appeal.

STATEMENT OF FACTS

1. Statutory Framework.

The WPA protects District employees from "retaliation or reprisal" when they, in the public interest, "report [government] waste, fraud, abuse of authority, violations of law, or threats to public health or safety." *Ukwuani v. District of Columbia*, 241 A.3d 529, 551 (D.C. 2020); *see* D.C. Code § 1-615.51. To prevail, a plaintiff must show "facts establishing that she made a protected disclosure, that a supervisor retaliated or took or threatened to take a prohibited personnel action

against her, and that her protected disclosure was a contributing factor to the retaliation or prohibited personnel action." *Wilburn v. District of Columbia*, 957 A.2d 921, 924 (D.C. 2008); *see* D.C. Code §§ 1-615.53(a), 1-615.54(b).

The WPA defines a "protected disclosure" as "any disclosure of information . . . by an employee to a supervisor or a public body that the employee reasonably believes evidences" certain enumerated types of serious government misconduct, including a "substantial and specific danger to the public health and safety." D.C. Code § 1-615.52(a)(6)(A), (E). To prevail, the plaintiff's "belief must be both sincere and objectively reasonable." *Ukwuani*, 241 A.3d at 551.

With regard to causation, the WPA sets forth shifting burdens of proof:

> [O]nce it has been demonstrated by a preponderance of the evidence that [a protected] activity . . . was a contributing factor in the alleged prohibited personnel action against an employee, the burden of proof shall be on the defendant to prove by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by this section.

D.C. Code § 1-615.54(b).

2. The Evidence At Trial.

A. DYRS's medical units and healthcare providers, and Ishakwue's employment.

DYRS operates two juvenile detention centers in the District: the New Beginnings facility and the Youth Services Center. Appendix ("App.") 234-35 (10/28 Tr. 24-25). Each facility has a medical unit that is staffed by nurses who

provide healthcare around the clock, App. 235 (10/28 Tr. 25), and overseen by a medical doctor who is the director of healthcare, App. 267-68 (10/29 Tr. 20-21). The doctor is always on call, even when not physically at the medical unit. App. 278 (10/29 Tr. 63).

Dr. Alsan Bellard was the doctor in charge of the two facilities. App. 267-68 (10/29 Tr. 20-21). He is a pediatrician who also has an MBA degree in medical services management. App. 267 (10/29 Tr. 18). Dr. Bellard did his pediatric residency at Children's Hospital in the District and then was a pediatrician in private practice for five years in a small town in Louisiana where there was a physician shortage. App. 267 (10/29 Tr. 18-20). He returned to the District to become the medical director of two health centers in Ward 8, where he provided comprehensive health care to children, most of whom were on public assistance. App. 267 (10/29 Tr. 18-20). Dr. Bellard helped build up those health centers to include social workers, a psychologist, and family support specialists. App. 267 (10/29 Tr. 20). In 2013, he became the medical director at DYRS. App. 267 (10/29 Tr. 20).

At the DYRS medical units, there was a hierarchy of clinical nurses depending on their education and training. App. 268 (10/29 Tr. 21). The most senior nurses were supervisory clinical nurses who reported directly to Dr. Bellard. App. 268 (10/29 Tr. 21). The other types of nurses took direction from the supervisory clinical nurses. App. 235 (10/28 Tr. 26), 268 (10/29 Tr. 21). Michelle Jackson was a

supervisory clinical nurse who reported directly to Dr. Bellard. App. 234 (10/28 Tr. 24).

Ishakwue started working as a non-supervisory clinical nurse at New Beginnings in June 2015. App. 235 (10/28 Tr. 27). She was a probationary employee for her first year of employment. App. 268 (10/29 Tr. 22). Nurse Jackson was Ishakwue's immediate supervisor throughout her employment. App. 235 (10/28 Tr. 27), 314 (10/30 Tr. 18). Ishakwue had previously been terminated from a position as a school nurse in Prince George's County. App. 312 (10/30 Tr. 12), 326 (10/30 Tr. 68).

B. Problems with Ishakwue leading to the decision to terminate her.

On February 9, 2016, DYRS terminated Ishakwue. App. 116, 306 (10/29 Tr. 173). At trial, Dr. Bellard and Nurse Jackson explained in detail the reasons for their decision. First, from the start of her employment, Ishakwue "had a very hard time getting along with her co-workers, as well as the direct care staff" (the correctional officers, known as youth development representatives) at New Beginnings. App. 236-37 (10/28 Tr. 32-33) (Nurse Jackson testifying that Ishakwue had "a lot of conflicts with the direct care staff" and "also didn't get along with some of her colleagues, the nurses who worked at New Beginnings"); App. 268 (10/29 Tr. 24) (Dr. Bellard testifying that there were "several issues related to her ability to get

along with her peers, her fellow nurses" and that "[t]here was a lack of trust from the advanced practice nurses who worked with her").

For example, Ishakwue refused to carry out orders from a nurse practitioner for whom English was a second language, instead complaining to Dr. Bellard about the nurse practitioner. App. 269 (10/29 Tr. 25-26). Indeed, Ishakwue suggested to Dr. Bellard that this nurse practitioner be referred to the Employee Assistance Program—a program ordinarily intended for individuals with substance abuse or mental health issues. App. 269 (10/29 Tr. 26). Dr. Bellard testified that he had never before had a DYRS employee suggest that any employee be referred to the Employee Assistance Program, and that this was "highly unusual and was a red flag." App. 269 (10/29 Tr. 27).

Similarly, in July 2015, within a month of her arrival, Ishakwue was confrontational and refused an order from the senior youth development representative (the superintendent of New Beginnings) to deliver necessary medications to youth in residential units during a lockdown that preventing them from coming to the medical unit. App. 257-58 (10/28 Tr. 116-17). She also had a "really big fight" with another youth development representative. App. 258 (10/28 Tr. 119). Nurse Jackson testified that it was the first time in her three-year tenure at DYRS that there was a conflict between a nurse and direct care staff. App. 268-69 (10/29 Tr. 24-25). Nurse Jackson facilitated a "remediation" meeting where the

youth development representative apologized, but Ishakwue refused to accept his apology. App. 258 (10/28 Tr. 119-20).

In September 2015, Ishakwue had an issue with another nurse practitioner and questioned the treatment provided to a youth with low blood sugar levels. App. 258-59 (10/28 Tr. 120-21), 421. That nurse and Ishakwue both felt that they were being bullied and belittled by the other. App. 237 (10/28 Tr. 33), 259 (10/28 Tr. 121).

In October 2015, four months after Ishakwue started working at DYRS, Nurse Jackson and Dr. Bellard transferred her to the Youth Services Center's medical unit. App. 236 (10/28 Tr. 32). The transfer decision was animated by a desire to protect the "morale of the staff" at New Beginnings, App. 259 (10/28 Tr. 122), and to give Ishakwue a chance to succeed at DYRS, App. 236-37 (10/28 Tr. 32-33), 285 (10/29 Tr. 91).

Unfortunately, although her conflicts with staff diminished, there were additional issues after Ishakwue's transfer. One instance concerned a strange complaint from Ishakwue about the counting of narcotics. App. 238 (10/28 Tr. 38). DYRS had a requirement that two nurses count controlled substances together and verify the accuracy of the count each time a nursing shift changed. App. 237 (10/28 Tr. 36), 238-39 (10/28 Tr. 39-41). On December 24, 2015, Ishakwue sent Nurse Jackson an email saying that the narcotics count was wrong, although she and

another nurse had already signed off on it before the other nurse left her shift. App. 238 (10/28 Tr. 39-40), 241 (10/28 Tr. 52).

In another incident, on January 5, 2016, Ishakwue sent Nurse Jackson an objection to her assigned caseload for that day, claiming that it was too much for her to handle. App. 250 (10/28 Tr. 85). Nurse Jackson disagreed and thought the workload was reasonable. App. 250 (10/28 Tr. 85).

The next day, January 6, 2016, Ishakwue was scheduled to work a shift that started at 3:00 p.m. App. 247 (10/28 Tr. 75), 393. At 10:00 a.m., she submitted an electronic request for the day off. App. 247 (10/28 Tr. 75), 393. Jackson promptly responded that she would "not be able to approve this leave as [she was] just receiving this request." App. 247 (10/28 Tr. 75), 393. Ishakwue nevertheless failed to report to work that day and was considered AWOL. App. 250 (10/28 Tr. 86), 394. Nurse Jackson and Dr. Bellard exchanged emails about the situation that same day. App. 393-94. Dr. Bellard wrote to Nurse Jackson, "Please play close attention to her start date before her anniversary. I do not want her renewed, and we have to separate PRIOR to her anniversary." App. 248 (10/28 Tr. 77), 393. Nurse Jackson responded, "we [are] on the same page." App. 248 (10/28 Tr. 78), 393. Later in the day, Nurse Jackson wrote to Dr. Bellard that Ishakwue was "playing games," and Nurse Jackson was "ready to move forward with her. Some stress is just not worth it." App. 249 (10/28 Tr. 83-84), 394.

Two days later, on January 8, 2016, Ishakwue emailed Nurse Jackson asking for 30 minutes of compensatory time for staying late to finish a task the previous evening. App. 422. Nurse Jackson forwarded the email to Dr. Bellard, commenting, "this is becoming excessive with her OT/Comp time request." App. 422. Dr. Bellard responded, "Get the PRF [personnel request form]; I'd rather us use [the] agency than deal with this foolishness any longer." App. 402, 422.

On January 13, 2016, Nurse Jackson began the paperwork for Human Resources to process Ishakwue's termination. App. 253 (10/28 Tr. 99), 255 (10/28 TR. 107), 402-03. Nurse Jackson cited Ishakwue's disputes with coworkers and the direct care staff, concerns about Ishakwue's "work ethics," and that Ishakwue was "not a good fit for our team." App. 403. At trial, Nurse Jackson explained that Ishakwue was terminated because of her objection to her work, her being AWOL after the denial of her same-day leave request, and her conflicts with the nursing and direct care staff. App. 254 (10/28 Tr. 103-04).

C. The disclosures regarding two youths that Ishakwue suspected had tuberculosis.

i. DYRS's tuberculosis policy.

Tuberculosis is a potentially serious bacterial infectious disease that mainly affects a person's lungs. *Tuberculosis*, Mayo Clinic.[1] At trial, Dr. Bellard explained

[1] Available at https://www.mayoclinic.org/diseases-conditions/tuberculosis/symptoms-causes/syc-20351250 (last visited Jan. 29, 2021)

that tuberculosis is extremely rare, especially among otherwise healthy young people. App. 275 (10/29 Tr. 50). Dr. Bellard had never seen a youth with active tuberculosis admitted to a DYRS facility. App. 276 (10/29 Tr. 54).

Dr. Bellard also explained that there is a difference between active tuberculosis and latent tuberculosis. App. 275 (10/29 Tr. 49). People with active tuberculosis have fevers, a cough, night sweats, and look sick. App. 275 (10/29 Tr. 49). When they walk in a room, it is "pretty evident something's wrong with them." App. 275 (10/29 Tr. 49). In contrast, people with latent tuberculosis are not contagious or infectious, appear normal, and are "perfectly fine." App. 275 (10/29 Tr. 49). Latent tuberculosis means simply that a person had a positive reaction to the skin test, reflecting possible exposure to tuberculosis. App. 275 (10/29 Tr. 49).

DYRS had an internal Policy and Procedures Manual dated 2013 that set forth procedures for handling youth with infectious diseases, including tuberculosis. App. 379, 388-89. The manual stated that youth who test positive on a skin test should have a chest X-ray within seven days. App. 388. If a youth is "symptomatic for tuberculosis," the youth "will be isolated until tuberculosis is ruled out." App. 388. "Youth with suspected or confirmed tuberculosis will be immediately referred to the Chief of Health Services for transfer to a provider with an isolation room, and "must be isolated in a negative pressure room with increased air exchange while awaiting transfer." App. 389.

Dr. Bellard explained, however, that parts of the 2013 policy were outdated, that DYRS had updated some of its procedures, and that DYRS was undertaking a several-months-long project to rewrite the policy at the time of Ishakwue's employment. App. 281 (10/29 Tr. 73-75). For example, at the time, DYRS had no negative pressure room, so it would send a youth with signs of active tuberculosis directly to a hospital. App. 281 (10/29 Tr. 75).

Finally, as relevant here, an additional possible symptom of tuberculosis is coughing up blood. App. 244 (10/28 Tr. 63). Dr. Bellard explained at trial, however, that DYRS would not isolate a youth for suspected tuberculosis simply because the youth coughed up blood. App. 245 (10/28 Tr. 67-68). Instead, a nurse practitioner would do an assessment, examine the youth, listen to his lungs, take a history, ask about night sweats and losing weight, determine whether the youth had an upper respiratory infection, and determine how the youth looked and felt before presuming that he had tuberculosis. App. 245 (10/28 Tr. 66), 275 (10/29 Tr. 50-51).

ii. The communication regarding the youth who reported he had previously coughed up blood.

On December 23, 2015, Ishakwue screened a youth brought into the facility. App. 300 (10/29 Tr. 152), 319 (10/30 Tr. 37). The youth told her that he had been coughing up blood and had been on medicine for an infection but had lost it. App. 300 (10/29 Tr. 152), 319 (10/30 Tr. 39-40). Ishakwue suspected that the youth had tuberculosis. App. 301 (10/29 Tr. 153). She brought her concerns to the attention

of the supervisory nurse on duty. App. 300 (10/29 Tr. 152), 320 (10/30 Tr. 44). That nurse spoke to the youth, called Dr. Bellard, and then placed the youth in the general population of the facility. App. 301 (10/29 Tr. 154-55).

Nurse Jackson and Dr. Bellard both testified at trial why isolation was not warranted for this particular youth. App. 244-45 (10/28 Tr. 63-66), 275 (10/29 Tr. 51). Dr. Bellard explained that the youth did not have a fever, had no recent weight loss, "sounded excellent" on the physical exam, and "all of the indicators" were that he was "normal and noncontagious." App. 278 (10/29 Tr. 61-62). Importantly, just because the youth reported coughing up blood in the past did not mean he had tuberculosis. App. 275 (10/29 Tr. 51). As Dr. Bellard testified, there are many reasons a person might cough up blood besides tuberculosis, including bronchitis, congestion, post-nasal sinus drip, an upper respiratory infection, or because the person is a heavy smoker. App. 245 (10/28 Tr. 65-66), 275 (10/29 Tr. 51). Notably, many youths arrived at DYRS with bronchitis. App. 245 (10/28 Tr. 66). Tuberculosis, Dr. Bellard explained, would be "a rare reason" for a youth at DYRS to cough up blood. App. 275 (10/29 Tr. 51).

Nonetheless, Ishakwue thought the youth had tuberculosis and needed to go to a hospital. App. 301 (10/29 Tr. 153). She complained to Nurse Jackson that he had not been isolated. App. 246-47 (10/28 Tr. 72-73), 275 (10/29 Tr. 51), 302 (10/29 Tr. 160). In response to Ishakwue's complaint, Dr. Bellard reviewed the youth's

chart and spoke to the supervisory nurse about her rationale for not isolating the youth. App. 276 (10/29 Tr. 53). Dr. Bellard again agreed with the plan of care. App. 276 (10/29 Tr. 53). It was later confirmed that the youth did not have tuberculosis. App. 276 (10/29 Tr. 53). Dr. Bellard testified that he did not understand why Ishakwue had been concerned. App. 276 (10/29 Tr. 53).[2]

iii. The communication regarding the youth with the 12-millimeter PPD reaction.

At the time relevant here, DYRS used a skin test known as a PPD for screening for tuberculosis. App. 275 (10/29 Tr. 49). The nurse placed the PPD test on a patient's arm and checked after two days to see if there was a reaction on the skin. App. 246 (10/28 Tr. 69), 278 (10/29 Tr. 63). The test could produce false positive results, meaning that a patient's arm would react despite not being exposed to tuberculosis or even having latent tuberculosis. App. 276 (10/29 Tr. 54).[3]

Dr. Bellard explained at trial that the skin reaction to a PPD test is considered positive (suggesting at least latent tuberculosis) based on the size of the reaction on the skin and the age and immune status of the child. App. 278 (10/29 Tr. 63-64).

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[2] Although an email from Dr. Bellard refers to the youth coughing up blood, App. 419, Dr. Bellard clarified that the youth was not coughing up blood at DYRS, but reported a history of coughing up blood, App. 280 (10/29 Tr. 71).

[3] According to Dr. Bellard, by the time of trial, the Centers for Disease Control had recommended replacing the PPD test with a more accurate blood test. App. 276 (10/29 Tr. 54).

For a youth who had acquired immunodeficiency syndrome (AIDS), a five-millimeter reaction would be positive; for a youth with other chronic illnesses, a ten-millimeter reaction would be positive. App. 294 (10/29 Tr. 127-28). On an otherwise healthy youth, a positive test reaction must be at least 15 millimeters wide. App. 294 (10/29 Tr. 127-28).

On January 9, 2016, Ishakwue performed a PPD test on a different youth in DYRS's custody. App. 321 (10/30 Tr. 45). Forty-eight hours later, the youth returned and Ishakwue measured that he had a 12-millimeter reaction to the test. App. 304 (10/29 Tr. 165-66), 321 (10/30 Tr. 45).[4] She did not otherwise assess the youth's health, except perhaps to take his vital signs. App. 321 (10/30 Tr. 45-46). Ishakwue referred the youth to a nurse practitioner, who ordered a QuantiFERON blood test for tuberculosis. App. 304 (10/29 Tr. 166-67), 321 (10/30 Tr. 47). The nurse practitioner meanwhile sent the youth back to his group home in the community without ordering a chest X-ray. App. 304 (10/29 Tr. 166-67).

Ishakwue thought that the nurse practitioner's conduct was not the proper protocol under DYRS policy and was concerned that DYRS had placed a youth with what she considered a positive PPD reading in the general population without a chest

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[4] Ishakwue suggested in her testimony that at some unspecified point the previous youth who had reported coughing up blood had a 15-millimeter reaction to a PPD. App. 302 (10/29 Tr. 160); 306 (10/29 Tr. 176), 326 (10/30 Tr. 66). There is no other evidence in the record confirming that observation.

X-ray. App. 321 (10/30 Tr. 47-48). She shared her concerns with Nurse Jackson and Dr. Bellard. App. 246 (10/28 Tr. 72), 321-22 (10/30 Tr. 48-50). Nurse Jackson and Dr. Bellard agreed that Ishakwue was correct to raise her concerns. App. 246 (10/28 Tr. 72), 276-77 (10/29 Tr. 56-57). Dr. Bellard sent an email to all nursing staff that "youth with positive PPDs should be treated as such," including "CXR [a chest X-ray]" and prophylactic medication, and that treatment decisions following positive PPD tests should not await a second screening like the QuantiFERON test. App. 246 (10/28 Tr. 71), 276 (10/29 Tr. 56-57), 322 (10/30 Tr. 50), 420. Dr. Bellard testified, however, that a healthy individual with a 12-millimeter PPD result does not need a chest X-ray. App. 285 (10/29 Tr. 89).

Dr. Bellard also explained at trial that blood testing was a more sensitive way to screen for tuberculosis and was used by several other facilities at the time. App. 276 (10/29 Tr. 54-55). The blood test eventually showed that the youth with the 12-millimeter PPD reaction did not, in fact, have tuberculosis. App. 276 (10/29 Tr. 55).

iv. Ishakwue's communications with the Department of Health.

In December 2015, Ishakwue contacted the tuberculosis clinic at the District's Department of Health ("DOH"), seeking help in updating the tuberculosis policy for the Youth Services Center. App. 326 (10/30 Tr. 65-66), 395, 400. On January 8, 2016, Shanica Alexander at DOH wrote an email to Ishakwue thanking her for contacting DOH and attaching the DOH tuberculosis screening form and other

materials. App. 395. On January 9, Ishakwue forwarded Alexander's email to Nurse Jackson and Dr. Bellard, and wrote that Alexander "would be happy to work with us on updating our TB policy and procedure manual." App. 395. Nurse Jackson testified that it would have been proper etiquette for Ishakwue to keep her in the loop when she first contacted DOH. App. 251 (10/28 Tr. 91).

Ishakwue also contacted DOH about the youth with the 12-millimeter PPD reaction. App. 400. A DOH supervisory nurse coordinator opined to Ishakwue that the QuantiFERON test was "not the appropriate follow-up for this youth" and that he should have had an X-ray and begun treatment for latent tuberculosis (the same conclusion that Dr. Bellard had noted in his email to nursing staff). App. 400. Ishakwue sent Nurse Jackson an email on January 12, informing her of the DOH nurse's opinion. App. 400. Nurse Jackson forwarded that email to Dr. Bellard that same day, noting, "[s]o now [Ishakwue] has made us look bad to the outside TB clinic." App. 253 (10/28 Tr. 97), 400. Dr. Bellard wrote back to Nurse Jackson, "I'm so sick of her." App. 400. Notably, however, Dr. Bellard's January 6 decision to separate Ishakwue and his January 8 directive to process the personnel request

form came before he learned on January 9 and 12 about Ishakwue's communications with DOH regarding the tuberculosis incidents. App. 393, 397, 400, 422.[5]

3. Closing Arguments And Instructions.

A. Protected disclosures .

The trial court instructed the jury that a "protected disclosure means any disclosure of information . . . made in the ordinary course of an employee's duties by an employee to a supervisor . . . that the employee reasonably believes evidences, number one, gross mismanagement or, number two, a substantial and specific danger to the public health and safety," mirroring the language of D.C. Code § 1-615.52(a)(6). App. 364 (10/31 Tr. 67).[6]

In closing arguments, both sides addressed whether Ishakwue's communications about the two youths she suspected had tuberculosis were protected disclosures under the WPA. Ishakwue argued to the jury that her communications

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[5] During her employment, Ishakwue also communicated to Nurse Jackson about the facility's glucometer. A glucometer is a device that tests blood sugar levels in diabetic patients. App. 242 (10/28 Tr. 54), 259 (10/28 Tr. 121), 297 (10/29 Tr. 138). In September 2015, Ishakwue and another nurse informed Nurse Jackson that they thought the glucometer was not being calibrated properly or often enough, and that they were out of the supplies needed for calibration. App. 243 (10/28 Tr. 57), 298 (10/29 Tr. 142-43). After that, the nurses tested and calibrated the glucometer weekly. App. 243 (10/28 Tr. 58). On appeal, Ishakwue abandons any reliance on her communication about the glucometer as a protected disclosure.

[6] Ishakwue argued below that her communications about the alleged improper narcotics count evidenced gross mismanagement, App. 351 (10/31 Tr. 15), but she abandons that claim on appeal.

were protected disclosures because she reasonably believed that placing the youths in the general population involved a substantial and specific danger to the public health and safety. She argued that coughing up blood can be a symptom of tuberculosis, and "common sense" requires that a medical provider take preventive measures and not send a youth who reports having coughed up blood into the general community. App. 352 (10/31 Tr. 18). She argued that this was so regardless of Dr. Bellard's and Nurse Jackson's testimony about the difference between treating active and latent tuberculous. App. 351 (10/31 Tr. 15-16). Similarly, she argued that her belief that the youth with the 12-millimeter PPD reaction could have had tuberculosis was reasonable despite Dr. Bellard's testimony to the contrary. App. 352 (10/31 Tr. 19-20). Ishakwue compared placing individuals with suspected tuberculosis in the general community to sending a bus with faulty brakes to transport children to school. App. 352 (10/31 Tr. 17).

In contrast, the District argued that Ishakwue's belief that the two youths posed a threat was not reasonable for a medical professional like Ishakwue. App. 358 (10/31 Tr. 44). As a trained nurse, Ishakwue should have known that just because a youth says he coughed up blood at some time in the past does not mean that he has tuberculosis or is otherwise a threat to public health. App. 358 (10/31 Tr. 43-44). The District emphasized Dr. Bellard's testimony that a youth with active contagious tuberculosis would present with a fever and would appear obviously sick.

App. 358-59 (10/31 Tr. 44-46). The two youths at issue presented none of these signs of tuberculosis. App. 358 (Tr. 10/31 44). Ishakwue's belief that there was a danger was therefore "not reasonable" and she should have "know[n] better." App. 358 (Tr. 10/31 44). The District also argued that the bus-with-faulty-brakes analogy was inapt because DYRS checked the proverbial brakes by screening and testing the two youths for tuberculosis. App. 359 (10/31 Tr. 45).

B. Causation.

The parties' closing arguments also addressed causation—that is, whether Ishakwue's purported disclosures were a contributing factor in her termination, and whether DYRS would have terminated her even if she had not made the disclosures. App. 353-57 (10/31 Tr. 22-37), 359 (10/31 Tr. 46-48). Ishakwue argued that Nurse Jackson and Dr. Bellard had terminated her because they were angry about her disclosures concerning the tuberculosis incidents, and that they made the decision to terminate on January 13 (when Nurse Jackson completed the Human Resources form). App. 355-356 (10/31 Tr. 29-34). She emphasized that neither Nurse Jackson nor Dr. Bellard directly testified that they would have fired her even if she had not made the purported protected disclosures. App. 357 (10/31 Tr. 37).

In contrast, the District argued that the reason DYRS terminated Ishakwue was co-worker conflict during her probationary one-year employment. App. 359 (10/31 Tr. 46-48). The District emphasized that Ishakwue was "new and [was] a

probationary employee" but was nonetheless "questioning the judgment of long-time senior nurse practitioners." App. 361 (10/31 Tr. 54). The decision, the District argued, was not based on Ishakwue's concerns about the two youths she suspected had tuberculosis. App. 361 (10/31 Tr. 54). Indeed, Dr. Bellard shared her concern about the youth who had a follow-up blood test instead of an X-ray and sent the staff an email clarifying the protocol. App. 359 (10/31 Tr. 47), 361 (10/31 Tr. 54).

Importantly, the District emphasized that Dr. Bellard had decided to terminate Ishakwue on January 6 ("Please play close attention to her start date before her anniversary. I do not want her renewed," App. 393) and reaffirmed that decision on January 8 ("Get the PRF; I'd rather us use [the] agency than deal with this foolishness any longer," App. 422), so her actions after January 8 (including her communications with DOH) could not have contributed to the termination decision. App. 360 (10/31 Tr. 50-51), 361 (10/31 Tr. 53-54). Additionally, the District noted that it did not matter that Dr. Bellard never specifically stated that he would have terminated Ishakwue regardless of her purported disclosures because he testified about the problems leading to her termination. App. 361 (10/31 Tr. 53-54).

4. The Jury's Verdict And Ishakwue's Rule 50 Motions.

At the close of the evidence, Ishakwue moved under Super. Ct. Civ. R. 50(a) for judgment as a matter of law on liability, claiming that she had made protected disclosures, that those disclosures were a contributing factor in her termination, and

that the District had failed to establish it would have terminated her regardless. App. 328-30 (10/30 Tr. 75-84). The District countered that these issues were for the jury to decide. App. 330-31 (10/30 Tr. 84-87). The court denied Ishakwue's motion. App. 331 (10/30 Tr. 85-87). The court also denied the District's cross-motion for judgment as a matter of law at the close of the evidence, concluding that the case was for the jury to decide. App. 331 (10/30 Tr. 87), 332 (10/30 Tr. 89), 334 (10/30 Tr. 100).

The court provided the jury a verdict form with specific questions mirroring the elements of a WPA claim. App. 367 (10/31 Tr. 80), 423. The jury answered "no" to the first question on the verdict form, which read: "Did the plaintiff prove by a preponderance of the evidence that she made a protected disclosure?" App. 367 (10/31 Tr. 80). The court accordingly entered judgment for the District. App. 14, 425.[7]

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[7] The trial court never placed the final verdict form submitted to the jury, or the one signed by the jury, in the record. App. 14-15. The form in the appendix appears to be an earlier version, listing three alleged protected disclosures in questions 2(a) through (c). App. 423. The transcript reflects that the court revised question two to include a fourth alleged protected disclosure about Ishakwue's communication with the Department of Health, listed as subpart (d), before submitting the form to the jury. App. 329 (10/30 Tr. 79), 349 (10/31 Tr. 5-7), 352 (10/31 Tr. 20), 367 (10/31 Tr. 79). Regardless, it is clear from the transcript that the jury found no protected disclosure whatever. App. 367 (10/31 Tr. 80). And, on appeal, Ishakwue challenges only the jury's finding that the "tuberculosis disclosures" were not protected, not other purported disclosures. Br. 3 n.1.

Because the jury's answer to the first question was dispositive, the jury did not answer the later questions on the verdict form about whether at least one protected disclosure was a contributing factor to her termination and whether the District would have terminated her even if she had not made a protected disclosure. App. 425-26.

After trial, Ishakwue renewed her motion for a directed verdict under Rule 50(b), and moved in the alternative for a new trial. App. 427. The trial court denied the motion, concluding that there was no reason to disturb the jury's verdict. App. 447-48.

5. Evidentiary Rulings.

Before trial, the District moved in limine to exclude certain evidence at trial. App. 109. Ishakwue opposed the motions. App. 127. As relevant to the issues on appeal, the court excluded the following evidence.

A. Ishakwue's post-termination complaint to the Office of the Inspector General and resulting DOH reports.

On February 12, 2016, three days after DYRS formally terminated Ishakwue, she complained to the District's Office of Inspector General about alleged improper medical and nursing practices at DYRS. App. 116, 306 (10/29 Tr. 173). She complained about the alleged mishandling of controlled substances and the improper administration of medications as well as the general guidelines for handling communicable diseases and the treatment of the two youths she suspected had

tuberculosis. App. 84-85, 88-96. The Inspector General referred the matter to DOH, which conducted two different investigations and issued reports about its findings in June and September 2016. App. 83, 87, 116. The June report primarily focused on DYRS's controlled substances policies, but it included one paragraph addressing the handling of communicable diseases, referencing two incidents involving testing and treatment for possible tuberculosis but not making any conclusions about DYRS's communicable disease policies. App. 85. The September report similarly focused on other issues, but it included a description of the circumstances surrounding the youth that reported coughing up blood without offering any conclusions about the propriety of the actions of Nurse Jackson or other staff. App. 95.

The trial court excluded the evidence of Ishakwue's post-termination complaint to the Inspector General and the resulting DOH reports. The court agreed with the District that Ishakwue's superiors could not have fired her in retaliation for statements she made after her termination. App. 116, 174-75, 178.[8]

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[8] Ishakwue argued in her written opposition to the motion in limine that the DOH reports substantiated the reasonableness of her disclosures, App. 130, although she did not press this argument at the hearing on the motion. The court did not expressly address this argument when it excluded the reports, although it referenced considering all the pleadings. App. 175. Ishakwue did not raise the issue of the exclusion of the DOH reports in her post-trial motion for a directed verdict or new trial, although she renewed her objection to the exclusion of other evidence. App. 438-40.

B. Evidence regarding the *Jerry M.* litigation.

The *Jerry M.* case was a class action filed in 1985 challenging conditions at the District's juvenile detention facilities. *District of Columbia v. Jerry M.*, 738 A.2d 1206, 1207 (D.C. 1999). In 1986, the District entered into a consent decree that included standards for medical services. *Id.* Many years of litigation ensued over the District's compliance with that consent decree. *Id.*; *see District of Columbia v. Jerry M.*, 571 A.2d 178, 179 (D.C. 1990). A court-appointed monitor oversaw the District's compliance and made findings and recommendations to the court. 571 A.2 at 181; *see* App. 77.

The District moved in limine to exclude any evidence about the *Jerry M.* litigation at trial, arguing that the case lacked relevance to Ishakwue's claims and that reference to it would unfairly prejudice the District and confuse the jury. App. 118. The District also argued that Ishakwue did not allege in her operative complaint or in response to discovery requests that she complained about any violation of the *Jerry M.* consent decree prior to her termination. App. 119, 143-44. The trial court agreed and excluded all evidence about *Jerry M.* App. 140-44, 156, 175, 197.

In her post-trial motion, Ishakwue renewed her objection to the exclusion of the *Jerry M.* evidence. App. 439-40. When denying the motion, the court explained that "the existence of the Jerry M. litigation was a collateral matter with minimal

relevance and speculative probative value regarding this case, but with the potential for prejudicial impact that weighed in favor of exclusion." App. 448.[9]

STANDARD OF REVIEW

1. Judgment As A Matter Of Law.

This Court is "obliged to respect the jury's prerogatives." *NCRIC, Inc. v. Columbia Hosp. for Women Med. Ctr., Inc.*, 957 A.2d 890, 902 (D.C. 2008). The Court reviews the trial court's ruling on a motion for judgment as a matter of law de novo, applying the same legal standard as the trial court. *Id.*; *see Wash. Nat'ls Stadium, LLC v. Arenas, Parks & Stadium Sols., Inc.*, 192 A.3d 581, 586 (D.C. 2018). Under Super. Ct. Civ. R. 50(a), judgment as a matter of law is proper "only upon a finding that a party has been fully heard" and "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party." *Cardenas v. Muangman*, 998 A.2d 303, 306 (D.C. 2010) (internal quotation marks omitted). "A trial court may grant a motion for judgment as a matter of law only if no reasonable juror, viewing the evidence in the light most favorable to the prevailing party, could have reached the verdict in that party's favor." *NCRIC*, 957 A.2d at 902 (internal quotation omitted). "In so viewing the evidence, the court must take care to avoid

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[9] The District also successfully sought to exclude a 2015 email that Ishakwue wrote to Dr. Bellard about an interaction she had with a *Jerry M.* monitor or investigator. App. 51, 142-43; *see* Br. 8 n.3; Ex. 1 to the District's April 4, 2019 motion in limine. On appeal, Ishakwue does not challenge the court's exclusion of this email. Br. 44-45.

weighing the evidence, passing on the credibility of witnesses, or substituting its judgment for that of the jury." *Abebe v. Benitez*, 667 A.2d 834, 836 (D.C. 1995) (internal quotation marks omitted). "As long as there is some evidence from which jurors could find that the [non-moving] party has met its burden, a trial judge must not grant a directed verdict." *Id.* Where "it is possible to derive conflicting inferences from the evidence," the jury must resolve the conflict. *Sullivan v. AboveNet Commc'ns, Inc.*, 112 A.3d 347, 354 (D.C. 2015).

2. Evidentiary Rulings.

This Court reviews a trial court's evidentiary rulings for abuse of discretion. *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 718 (D.C. 2013). This Court should "broadly defer to the trial court due to its 'familiarity with the details of the case and its greater experience in evidentiary matters.'" *Johnson v. United States*, 960 A.2d 281, 294 (D.C. 2008) (quoting *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008)). "This principle therefore applies where a trial court considers the relevance and potential prejudice of evidence," which are matters entrusted to the trial court's "sound judgment." *Id.* at 294 (quoting *Sprint/United Mgmt. Co.*, 552 U.S. at 384).

SUMMARY OF ARGUMENT

1. Ishakwue is not entitled to a directed verdict that her communications about two youths she thought might have tuberculosis were protected disclosures under

the WPA. There was ample evidence to support the jury's finding that they were not protected disclosures.

For Ishakwue to prevail, the jury had to conclude that her belief that the two youths posed a danger to the community was both subjectively and objectively reasonable. But taking the evidence in the light most favorable to the District, as required, the evidence allowed the jury to conclude that her belief was not objectively reasonable. Dr. Bellard testified that the two youths were not sick, did not have tuberculosis, were not contagious, posed no danger, and that it was not reasonable for Ishakwue to think otherwise. Further, DYRS healthcare providers carefully considered the youths' conditions before placing them in the general population to make sure they did not have active tuberculosis. It was well within the jury's prerogative to decide that Ishakwue, as a nurse, should have understood that the two youths did not have contagious tuberculous and posed no danger. In the same vein, the jury could also find that any threat was not a "substantial and specific" danger to the public, as the WPA requires.

2. The trial court properly exercised its broad discretion to exclude evidence about Ishakwue's complaint to the Inspector General and the resulting DOH reports. DYRS could not have terminated her in retaliation for that complaint because it was made after her termination. And the DOH reports are irrelevant because they

provide no conclusion about whether the two youths had tuberculosis, posed a danger, or should have been isolated.

The trial court also properly exercised its broad discretion to exclude evidence about the *Jerry M.* case. First, Ishakwue raised no issue in her complaint or in pretrial discovery that the incidents she complained about violated the *Jerry M.* consent decree, and the District would have been prejudiced by the lack of notice that it would be defending against such a claim. Second, there was no evidence that the incidents Ishakwue complained about in any way violated the terms of the consent decree. The *Jerry M.* litigation was a collateral matter with minimal relevance that would have confused and misled the jury.

3. If the Court otherwise affirms the verdict, it need not decide whether the evidence warranted a directed verdict on causation. But if the Court does reach the causation issue, Ishakwue is not entitled to a directed verdict on causation because, again viewing the evidence in the light most favorable to the District, there was ample evidence from which a jury could decide that any protected disclosure did not contribute to her termination, or that DYRS would have terminated her anyway. In the seven months Ishakwue worked at DYRS, she had conflicts with nursing and direct care staff, complained unjustifiably about other nurses, complained unjustifiably about her workload, was AWOL from a day of work, and then asked for compensatory time for an extra half hour she worked the day after she was

AWOL. In short, the testimony supported the conclusion that Ishakwue was not a good fit and did not have the work ethic DYRS wanted, and that these were the reasons for her termination.

ARGUMENT

I. The Jury's Verdict That Ishakwue Made No Protected Disclosure Under The Whistleblower Protection Act Is Amply Supported By The Evidence.

The trial court properly "respect[ed] the jury's prerogative" to weigh the conflicting evidence and decide whether Ishakwue established any protected disclosure as defined in the WPA. *NCRIC*, 957 A.2d at 902. Viewing the evidence in the light most favorable to the District, as the Court should, *id.*, there is ample evidence to support the jury's finding. This is so even if the evidence might have supported a verdict in Ishakwue's favor as well. *Sullivan*, 112 A.3d at 354.

The WPA "protect[s] employees who risk their own personal job security for the benefit of the public." *Williams v. District of Columbia*, 9 A.3d 484, 490 (D.C. 2010). Thus, to prevail under the WPA, a plaintiff must establish that she made a protected disclosure about one of the types of serious misconduct by public officials delineated in D.C. Code § 1-615.52(a)(6), like a "substantial and specific danger to the public health and safety." *Wilburn v. District of Columbia*, 957 A.2d 921, 925 (D.C. 2008); *see* D.C. Code § 1-615.52(a)(6)(E). A "protected disclosure" is one "that the employee reasonably believes evidences" the relevant misconduct. D.C. Code § 1–615.52(a)(6); *Wilburn*, 957 A.2d at 925.

The reasonable belief requirement has both subjective and objective components. *Johnson v. District of Columbia*, 225 A.3d 1269, 1276 (D.C. 2020). Under the subjective component, an employee "personally must have had . . . a belief [that she was disclosing official misconduct] at the time the disclosure was made." *Freeman v. District of Columbia*, 60 A.3d 1131, 1151 (D.C. 2012). But the employee must also "show that her belief was objectively reasonable." *Johnson*, 225 A.3d at 1276. An alleged whistleblower's "purely subjective perspective" on the propriety of a government action "is insufficient for a reasonable jury to conclude that [the person] made a protected disclosure under the WPA." *Ukwuani*, 241 A.3d at 553; *see also Rodriguez v. District of Columbia*, 124 A.3d 134, 142-43 (D.C. 2015) (affirming grant of summary judgment to employer on WPA claim where plaintiff's protected disclosures at most showed a "subjective belief" that employer's actions amounted to misconduct).

An employee's belief is objectively reasonable only if "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably [could] conclude that the actions of the government evidence" one of the categories of misconduct in D.C. Code § 1-615.52(6). *Zirkle v. District of Columbia*, 830 A.2d 1250, 1259-60 (D.C. 2003). "This analysis does not hinge upon whether" the government's action is "ultimately determined to be" a danger to public health and safety, but requires "that the employee's belief be

objectively reasonable and that the employee has not ignored essential facts, including those which detract from a 'reasonable belief.'" *Ukwuani*, 241 A.3d at 552 (internal quotation marks and brackets omitted). "In other words, the fact finder must consider whether the employee reasonably should have been aware of information that would have defeated [her] inference of official misconduct." *Id.* "An employee cannot attain whistleblower status by dispensing with due diligence and remaining unjustifiably ignorant of information that would have refuted or cast doubt on [her] charges." *Freeman*, 60 A.3d at 1152. "The WPA is not a weapon in arguments over policy or a shield for insubordinate conduct." *Zirkle*, 830 A.2d 1260.

Ishakwue contends she was entitled to a directed verdict that her communications about the youths she suspected had tuberculosis were protected disclosures under the WPA because exposing others to a risk of tuberculosis posed a "substantial and specific danger to the public health and safety" under D.C. Code § 1–615.52(6)(E).[10] She argues that the evidence leads to but one conclusion that she "acted reasonably and in good faith when she blew the whistle" on the District's "failures to test and isolate patients with classic symptoms of tuberculosis before returning them to crowded residential facilities." Br. 16. But even if the record

[10] Ishakwue bases her appeal only on her statements about the youths she suspected of having tuberculosis and affirmatively disavows reliance on other alleged disclosures. Appellant's brief ("Br.") 3 n.1.

could support a jury finding in Ishakwue's favor in this regard, there was ample evidence for the jury to conclude otherwise. It was the jury's prerogative to resolve the "conflicting inferences from the evidence." *Sullivan*, 112 A.3d at 354.

Taking the evidence in the light most favorable to the District, the jury could conclude that the two youths did not have tuberculosis, were not contagious, posed no danger, and that it was not reasonable for Ishakwue to think otherwise. Tuberculosis is rare in teenagers. As the evidence at trial showed, in the United States, tuberculosis affects small infants and the elderly, not the teenage population in the custody of DYRS. App. 275 (10/29 Tr. 50). And Dr. Bellard, who had spent many years providing medical care to underserved communities in the District and elsewhere, explained the difference between latent and active, contagious tuberculosis. A person who has contagious tuberculosis looks sick and has a fever, a cough, and night sweats—that is to say, it is immediately evident that they are ill. App. 275 (Tr. 10/29 49). To be sure, if DYRS placed a youth with symptoms of active, contagious tuberculosis in the general population, there would be a danger to public health and safety. But there was no evidence that either of the two youths that concerned Ishakwue appeared at all sick.

The evidence also supported the conclusion that DYRS healthcare providers carefully considered the condition of the youth who claimed to have previously coughed up blood before placing him in a group setting to make sure there was no

danger. In response to Ishakwue's concern, a supervisory nurse spoke to the youth, then called Dr. Bellard to discuss the matter. App. 301 (10/29 Tr. 155). Dr. Bellard agreed with the nurse practitioner's treatment plan. App. 276 (10/29 Tr. 53). These two health care practitioners, both senior to Ishakwue, concluded that the youth did not have tuberculosis and was not a threat to the general population. As Dr. Bellard and Nurse Jackson explained, the youth could have been coughing up blood because of bronchitis, congestion, post-nasal sinus drip, an upper respiratory infection, or because he was a heavy smoker. App. 245 (10/28 Tr. 65-66), 275 (10/29 Tr. 51). Dr. Bellard did not understand Ishakwue's concerns. App. 276 (10/29 Tr. 53).

Similarly, the evidence supported the conclusion that it was not objectively reasonable for Ishakwue to think the youth with the 12-millimeter PPD reaction posed a danger. Again, there was no evidence that this youth appeared sick as people with active tuberculosis do. Ishakwue acknowledged that she did not assess the youth's health other than measuring the PPD reaction, except perhaps to take his vital signs. App. 321 (10/30 Tr. 45-46), 326 (10/30 Tr. 66). And Dr. Bellard explained that a positive PPD reaction for an otherwise healthy youth is 15 millimeters or greater. App. 294 (10/29 Tr. 127-28). Further, even a positive reaction to the PPD test does not mean a person has active contagious tuberculosis, but it could be latent tuberculosis, which is not contagious. App. 275 (10/29 Tr. 49), 293 (10/29 Tr. 124). Finally, DYRS followed up with a blood test to ensure that the

youth did not have latent tuberculosis, and Dr. Bellard agreed with Ishakwue that an X-ray would have been preferable and so informed his staff. App. 246 (10/28 Tr. 71), 276 (10/29 Tr. 56-57), 322 (10/30 Tr. 50), 420.

All told, it was well within the jury's prerogative to decide that Ishakwue, as a nurse, reasonably should have known that the two youths were not contagious. *See Ukwuani*, 241 A.3d at 552; *see* App. 358 (10/31 Tr. 44) (District arguing, in closing, that Ishakwue should have "know[n] better"). Said another way, the jury could have reasonably decided that she remained "unjustifiably ignorant of information that would have refuted or cast doubt" on her claims of misconduct. *Freeman*, 60 A.3d at 1152. And contrary to Ishakwue's argument, the jury's verdict is supported by the information available at the time of her disclosures, not simply the fact that further testing revealed that neither of two youth in fact had tuberculosis. *See* Br. 23, 32-34.

Ishakwue's other arguments are unconvincing. First, Ishakwue is correct that when the trial court addressed her post-trial motions, it seemed to address the causation question rather than the question the jury decided—whether there was a protected disclosure. *See* Br. 14-15. But since review of a motion for a directed verdict or a new trial is de novo, *NCRIC*, 957 A.2d at 902, any deficiency in the trial court's analysis is irrelevant. The critical—and sole—question on appeal is whether, based on the evidence presented at trial, a jury could reasonably determine that

Ishakwue's beliefs about alleged misconduct were not objectively reasonable. Based on the foregoing analysis, the answer is unquestionably yes.[11]

Next, Ishakwue cites a Third Circuit decision, *Passaic Valley Sewerage Commissioners v. U.S. Department of Labor*, 992 F.2d 474, 475 (3d Cir. 1993), for the proposition that the District's WPA protects all "non-frivolous complaints." Br. 21. But *Passaic Valley* involved the whistleblower protections in a totally different statute: the federal Clean Water Act. Unlike the WPA, the Clean Water Act contains no objective reasonableness standard for whistleblowers, but prohibits retaliation for an employee's "good faith assertions of corporate violations of the statute" to bring corporations into compliance with the Clean Water Act's safety and quality standards. 992 F.2d at 478. In contrast, the WPA contains the specific requirement that employees must "reasonably believe[]" that they are revealing a "substantial and specific danger to the public health and safety." D.C. Code § 1-615.52(a)(6).

Finally, Ishakwue places heavy reliance on a Federal Circuit decision, *Chambers v. Department of Interior*, 602 F.3d 1370 (Fed. Cir. 2010), for the proposition that a whistleblower's belief is treated as objectively reasonable if a

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[11] Ishakwue is also wrong that *Johnston v. Merit Systems Protection Board*, 518 F.3d 905 (Fed. Cir. 2008), establishes a lower burden of proof for a plaintiff to prove the existence of protected disclosures. *See* Br. 20. That case holds that the burden of proof is lower for an initial determination of whether a tribunal has jurisdiction compared to the standard for determining the merits of a whistleblower claim. 518 F.3d at 909.

"disclosed danger, even if not realized, is more than 'negligible, remote, or ill-defined.'" Br. 16 (citing *Chambers*, 602 F.3d at 1376 n.3). But Ishakwue mischaracterizes what *Chambers* says. *Chambers* interpreted the federal whistleblower act that, much like the District's WPA, prohibits a federal agency from taking a personnel action against an employee for disclosing information that the employee reasonably believes evidences, among other things, a substantial and specific danger to public health or safety. *See* 5 U.S.C. § 2302(b)(8). Notably, *Chambers* was not addressing the objective-reasonableness question, but rather the requirement that a danger be "substantial and specific." In addressing that requirement, the court cited an earlier decision in the same case, which clarified that the provision does not protect all disclosed dangers to the public health or safety. *Chambers*, 602 F.3d at 1376 n.3 (citing *Chambers v. Dep't of Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008)). Specifically, the decision says that "[i]f the disclosed danger could only result in harm under speculative or improbable conditions, the disclosure should not enjoy protection." *Id.* (quoting *Chambers*, 515 F.3d at 1369). Thus, the provision does not protect disclosures that are "negligible, remote, or ill-defined." *Id.* (quoting *Chambers*, 515 F.3d at 1369).

As explained above, the purported danger that Ishakwue communicated was precisely the sort of speculative or improbable harm that the WPA does not cover. Indeed, tuberculosis diagnoses are basically non-existent among teenagers in the

United States, and Dr. Bellard testified at trial that he had never seen a tuberculosis case at DYRS. App. 276 (10/29 Tr. 54). Thus, to the extent that *Chambers* is applicable at all, it *supports* the jury verdict in this case.[12] In short, the jury had ample evidence to conclude that Ishakwue's purported disclosures were not objectively reasonable, and there is no basis for overturning that verdict on appeal.

II. The Trial Court Properly Exercised Its Broad Discretion To Exclude Evidence Of Minimal Relevance That Would Prejudice The District.

A. The trial court properly excluded evidence about Ishakwue's post-termination complaint to the Inspector General and the resulting DOH reports.

The trial court acted well within its discretion to exclude evidence arising from Ishakwue's complaint to the Inspector General about alleged improper medical and nursing practices at DYRS. Ishakwue filed that complaint on February 12, 2016, weeks after Dr. Bellard's decision in early January to separate her, App. 393, 422, and after Ishakwue's actual termination on February 9, 2016, App. 116, 306 (10/29 Tr. 173). The trial court reasonably concluded that DYRS could not have terminated Ishakwue in retaliation for statements made after her termination. *See* App. 116, 174-75, 178; *cf. Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (holding

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[12] Ishakwue is simply wrong that the "substantial and specific danger" requirement offers "a second reason to set aside the jury verdict." Br. 29. In fact, because Ishakwue's disclosures do not meet the "substantial and specific danger" standard in addition to the objective-reasonableness standard, this is a second reason why the jury got it right.

that protected activity that employer learns of only after contemplating adverse action "is no evidence whatever of causality" in Title VII retaliation claim). Thus, Ishakwue's complaint to the Inspector General was irrelevant to her claim that DYRS terminated her in retaliation for purported protected disclosures. *See Plummer v. United States*, 813 A.2d 182, 188 (D.C. 2002) ("Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (internal quotation marks omitted)).

The trial court also did not abuse its discretion in excluding evidence of the DOH reports from June and September 2016 about its investigation of Ishakwue's complaint to the Inspector General. *See* App. 83, 87, 116, 175. Certainly, Ishakwue could not have relied on those reports to support her subjective belief in 2015 and early 2016 that her concerns regarding tuberculosis were reasonable. *Freeman*, 60 A.3d at 1143 (explaining that the plaintiff must have a reasonable belief that the disclosure evidences serious misconduct "*at the time the whistle was blown*" to state a claim under the WPA (emphasis added)).

Nor do the reports support the objective reasonableness of Ishakwue's concern that the two youths might have had contagious tuberculosis that posed a threat to others. To begin, the reports' authors were DOH investigators, not nurses, doctors, or other trained medical personnel, and they did not have any expertise in

assessing when a person has active, contagious tuberculosis. App. 83, 87. In any event, the reports do not show that the youths were contagious or posed a public health risk. The June report contains one paragraph on communicable diseases and states that according to a DYRS nurse, a youth exhibiting tuberculosis symptoms will be sent to the tuberculosis clinic at a hospital, but a youth who is not exhibiting symptoms will not be isolated. App. 85. The report references the testing of two particular youths for tuberculosis, but it draws no conclusion whatever about whether those youths had contagious tuberculosis or posed a risk to others. App. 85. And importantly, the report does not criticize the way DYRS handled the two youths that purportedly formed the basis of Ishakwue's concerns. App. 85-86.[13]

The September report likewise does not support the conclusion that the two youths had contagious tuberculosis or should have been isolated. App. 87. That report provides details about a youth who had been coughing up blood (noting that he had fallen off his bike and that members of a gang had beaten him), but makes no medical conclusion that the youth had contagious tuberculous or should have been

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[13] Ishakwue claims that Derek Brooks, the DOH investigator who authored the June report, App. 83, agreed at his deposition that a youth with an elevated PPD reading "was improperly released to the general population," Br. 42-43 & n.27. However, the transcript of Brooks's deposition does not appear to be in the record. In the trial court, Ishakwue referenced it as Exhibit N to her opposition to the District's summary judgment motion, App. 58, but she failed to submit such an exhibit with that filing.

isolated. App. 95-96. Indeed, the report notes that Nurse Jackson explained that "there was no evidence to indicate the youth was positive [for tuberculosis] at the time." App. 96.[14]

Ishakwue does not otherwise tie any specific finding in the reports to any other purported disclosure or show how any shortcomings identified in the reports about healthcare at DYRS supported her whistleblower claim. Br. 42. Thus, this Court has no basis for overturning the trial court's considered judgment excluding the DOH reports from trial.[15]

B. The trial court properly excluded evidence about the *Jerry M.* litigation.

The trial court also properly excluded evidence about the *Jerry M.* litigation, both because it lacked relevance and was prejudicial. First, Ishakwue did not allege

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[14] The District notes that Ishakwue did not redact the names of the youths identified in the DOH reports provided in the appendix and requests that the Court place the appendix under seal.

[15] In any event, any error in excluding the DOH reports was harmless. *Wood v. Neuman*, 979 A.2d 64, 76 (D.C. 2009) (explaining that "[t]o obtain a reversal, an appellant must show that the erroneous [evidentiary] ruling resulted in substantial prejudice to her case"). Most of the facts gathered in those reports were cumulative to the testimony provided by Ishakwue, Nurse Jackson, and Dr. Bellard. And Ishakwue's counsel was able to argue to the jury in closing argument that that evidence showed that her concerns were reasonable. *Campbell-Crane & Assocs., Inc. v. Stamenkovic*, 44 A.3d 924, 943 (D.C. 2012) (holding that any error in excluding evidence was harmless where other evidence nevertheless allowed jury to infer issue in appellants' favor, "as appellants' counsel urged them to do in closing argument"). The DOH reports added no new information that would have affected the jury's verdict.

in her operative complaint or in response to discovery requests that any of the incidents she complained about to Nurse Jackson and Dr. Bellard violated the *Jerry M.* consent decree. App. 17-23, 119, 143-44. The trial court properly excluded any evidence about *Jerry M.* for this reason alone, as the District was prejudiced by having no notice that it would be defending against such a claim and no opportunity to take relevant discovery. *Cf. District of Columbia v. Sterling*, 578 A.2d 1163, 1167 (D.C. 1990) (noting that "it was well within the trial court's discretion not to permit the District to present a defense as to which [plaintiff] had received no meaningful discovery and which it had not adequately identified" pretrial); *Taylor v. Wash. Hosp. Ctr.*, 407 A.2d 585, 592-93 (D.C. 1979) (affirming trial court's denial of plaintiff's motion to modify pretrial order to raise new theory finding that defendant was surprised and would have been prejudiced).

Next, the "long, troubled history" of the *Jerry M.* litigation, Br. 44, had little relevance to whether Ishakwue reasonably believed that two particular youths had contagious tuberculous in 2015-16. Ishakwue submitted an excerpt of a 2016 report that a special master filed in the *Jerry M.* litigation noting that the original 1986 consent decree required DYRS to comply with American Public Health Association ("APHA") standards on communicable diseases. App. 80; Br. 44. But Ishakwue failed to proffer any evidence showing that, by 2015 or 2016, DYRS had failed to comply with that original *Jerry M.* requirement, or that Dr. Bellard's assessment that

the youths did not have active, infectious tuberculosis violated APHA's standards. The history of the *Jerry M.* litigation thus had no relevance.

Finally, introducing the *Jerry M.* evidence would have unfairly prejudiced the District and misled the jury from focusing on the content of Ishakwue's disclosures. *Jackson v. United States*, 210 A.3d 800, 805 (D.C. 2019) (explaining that evidence "is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice"). As the trial court aptly explained, "the existence of the Jerry M. litigation was a collateral matter with minimal relevance and speculative probative value regarding this case, but with the potential for prejudicial impact that weighed in favor of exclusion." App. 448.[16]

III. In The Event Of A Remand, Ishakwue Is Not Entitled To A Directed Verdict On Causation.

If the Court agrees that the jury properly decided that Ishakwue made no protected disclosure and upholds the trial court's evidentiary rulings, then it need not address Ishakwue's argument that she is entitled to a directed verdict on causation. If the Court does reach the argument, it should hold that Ishakwue was not entitled to a directed verdict on causation. It is a jury's prerogative to weigh the evidence and decide whether her purported disclosures were a contributing factor in her

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[16] In addition, Ishakwue fails to show that exclusion of evidence about the *Jerry M.* case resulted in substantial prejudice to her establishing the elements of her whistleblower claim.

termination and whether DYRS would have terminated her anyway. *See NCRIC*, 957 A.2d at 902.

To prevail on her whistleblower claim, Ishakwue had to establish that a protected disclosure "was a contributing factor" in her termination. D.C. Code § 1-615.54(b). A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Id.* § 1-615.52(a)(2). If so, the burden then shifted to the District "to prove by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in" any protected activity. *Id.* § 1-615.54(b). "[A] jury must find a *direct causal link* in order for there to be liability" under the WPA. *Johnson v. District of Columbia*, 935 A.2d 1113, 1119 (D.C. 2007) (internal quotation marks omitted).

There was ample evidence from which a jury could decide that any protected disclosure did not contribute to Ishakwue's termination or that DYRS would have terminated her anyway. Nurse Jackson and Dr. Bellard both testified about the many problems that led them to decide to terminate Ishakwue in January 2016, only seven months after her start with DYRS. Within weeks of starting her employment, Ishakwue had conflicts with both nursing and direct care staff at New Beginnings. App. 236-37 (10/28 Tr. 32-33), 268 (10/29 Tr. 24). She failed to carry out orders from the supervisory nurse on duty and then complained about the nurse. App. 269

(10/29 Tr. 25-26). She was confrontational and defiant when the senior youth development representative directed her to deliver medications to the residential units during a lockdown. App. 257-58 (10/28 Tr. 116-17). She had a "really big fight" with another youth development representative and then refused to accept his apology during a "remediation" meeting; it was the first time Nurse Jackson had seen a conflict between a nurse and the direct care staff. App. 258 (10/28 Tr. 119-20), 268-269 (10/29 Tr. 24-25). Ishakwue also had a conflict with another nurse practitioner about the treatment of a youth with low blood sugar. App. 258-59 (10/28 Tr. 120-21), 421. Both nurses claimed the other bullied and belittled her. App. 237 (10/28 Tr. 33), 259 (10/28 Tr. 121).

Four months into her tenure with DYRS, these problems prompted Nurse Jackson and Dr. Bellard to transfer Ishakwue from New Beginnings to the Youth Services Center for the "morale of the staff" at New Beginnings and to give Ishakwue a second chance. App. 236 (10/28 Tr. 32), 259 (10/28 Tr. 122), 285 (10/29 Tr. 91). But her problems continued. Ishakwue complained about the way other nurses counted narcotics when she herself was responsible for that count. App. 238 (10/28 Tr. 39-40), 241 (10/28 Tr. 52). She objected to her assigned caseload on January 5, 2016, when Nurse Jackson testified that the workload was manageable for the nurses on duty. App. 249-50 (10/28 Tr. 84-85). The next day, January 6, Ishakwue failed to report to work even though Nurse Jackson had denied her same-

day leave request; resulting in her being AWOL. App. 247 (10/28 Tr. 75), 250 (10/28 Tr. 86), 393-94. That is the day Dr. Bellard decided he did not want Ishakwue renewed after her probationary period expired. App. 248 (10/28 Tr. 77), 393.

On January 8, two days after she was AWOL, Ishakwue requested 30 minutes of compensatory time for staying late to finish a task the evening before, prompting Nurse Jackson to again reach out to Dr. Bellard. App. 422. Dr. Bellard then told Nurse Jackson to process the personnel request form to terminate Ishakwue because he would not "deal with this foolishness any longer." App. 402, 422. It was not until the following day, January 9—after Dr. Bellard directed Nurse Jackson to process the termination—that they learned of her communications with DOH.

The District highlighted this evidence to the jury in closing argument, emphasizing that the assorted problems with Ishakwue led to her dismissal, not any communications about the two youths. App. 359-61 (10/31 Tr. 46-54). Based on this evidence, the jury had ample evidence to find either that the purported protected disclosures were not a motivating factor in DYRS's decision to terminate Ishakwue, or that DYRS would have reached the same termination decision even with no protected conduct. The Court may not substitute its judgment for a jury's in weighing that evidence.

Ishakwue claims that the District "offered no evidence" in support of a defense that it terminated her for reasons other than her purported protected disclosures. Br.

17-18. To the contrary, the record is replete with testimony that Nurse Jackson and Dr. Bellard were concerned about Ishakwue's effect on staff morale and her work ethic, and they thus concluded she was "not a good fit." App. 259 (10/28 Tr. 122), 403. This conclusion is further supported by the evidence that Nurse Jackson and Dr. Bellard had no problem with her email about the youth with the 12-millimeter PPD reading, instead *agreeing* that the youth should have had a chest X-ray rather than a blood test. App. 246 (10/28 Tr. 72), 276-77 (10/29 Tr. 56-57). Ishakwue is also simply wrong that she was terminated "at a time when there [were] no real performance issues." Br. 17. As explained, just days before her termination, Ishakwue had been AWOL.

As evidence of pretext, Ishakwue notes that "at the time of [her] six month performance review," Nurse Jackson did not mention Ishakwue's inability to get along with staff at New Beginnings. Br. 8-9. But that review is not indicative of pretext. First, the record reflects that the December 2015 meeting between Nurse Jackson and Ishakwue was not a formal "performance review," but instead an informal check-in to determine how Ishakwue felt she was doing at the Youth Services Center. App. 248-49 (10/28 Tr. 78-82). More importantly, however, it was only *after* that meeting that Ishakwue was AWOL and then requested a half-hour of compensatory time, key acts that led to her termination. In any event, a jury could reasonably decide that it was the totality of circumstances over the seven months of

her probationary employment that led to her termination, regardless of the content of this check-in between Nurse Jackson and Ishakwue.

Next, Ishakwue cites *Raphael v. Okyiri*, 740 A.2d 935 (D.C. 1999), *see* Br. 35-38, but that case does not support her position. There, a trial judge (sitting as the finder of fact) ruled in the *plaintiff's* favor on causation in a whistleblower case, and this Court affirmed. 740 A.2d at 937, 954. The Court properly applied the standard that it "must view the record in the light most favorable to . . . the party that prevailed in the trial court, and . . . take into account the [fact-finder's] superior opportunity to assess credibility and to draw reasonable inferences from the evidence." *Id.*

Ishakwue argues that the evidence here resembles that in *Raphael* and so was "more than enough to establish causation as a matter of law." Br. 37. But the Court in *Raphael* made no determination of what evidence might establish causation *as a matter of law*. It simply affirmed the fact-finder's determination on the matter. The question before this Court is not whether the evidence would have supported a verdict in Ishakwue's favor if the jury had so found, but whether there was evidence from which jurors could find in the *District's* favor. *See Abebe*, 667 A.2d at 836. As described above, there plainly was.

In any event, the facts of *Raphael* are distinguishable. The plaintiff there claimed that a District agency fired her in retaliation for her disclosures of allegedly improper financial practices. Key to the trial court's decision was the fact that the

adverse action against the plaintiff came "close on the heels of her collaboration with" auditors from the Inspector General. 740 A.2d at 954. Here, by contrast, the decision to terminate was "close on the heels" of Ishakwue being AWOL and then seeking compensatory time the next day, and was made *before* she informed her supervisors that she had contacted DOH.

Ishakwue is also incorrect in claiming that the District needed to show evidence of similar personnel actions or a policy that mandated her termination. *See* Br. 39-40. In *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999), the court set forth factors to determine whether an agency has met its burden of showing that it would have taken the adverse action regardless of protected disclosures, including "the strength of the agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated." *Id.* at 1323. But as the court later explained in *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012), which Ishakwue cites, *see* Br. 39, "*Carr* does not impose an affirmative burden on the agency to produce evidence with respect to each and every one of the three *Carr* factors." *Whitmore*, 680 F.3d at 1374. Instead, the "factors are merely appropriate and pertinent considerations for determining whether the agency carries its burden of

proving by clear and convincing evidence that the same action would have been taken absent the whistleblowing." *Id.*

As Ishakwue acknowledges, the District may prevail by showing "unusual circumstances that leave little doubt of the [purported] whistleblower's probable fate." Br. 39. There was ample evidence of the unusual circumstances leading to her termination here: she had conflicts with nursing and direct care staff, complained unjustifiably about other nurses, complained unjustifiably about her work load, was AWOL from work, and then asked for compensatory time for an extra half hour she worked the day after she was AWOL.

Nor does it matter that Dr. Bellard did not explicitly testify that he would have terminated her even in the absence of her purported protected disclosures. *See* Br. 40. As the District argued to the jury, Dr. Bellard testified about the problems leading to Ishakwue's termination, showing that her purported disclosures did not influence his decision. App. 361 (10/31 Tr. 53-54). And the language Ishakwue quotes from *Watkins v. District of Columbia*, 944 A.2d 1077 (D.C. 2008), Br. 40, does not require the sort of explicit testimony that Ishakwue proposes. The Court in *Watkins* addressed the entitlement to front pay after an illegal termination where there is after-acquired evidence that would have prompted the plaintiff's termination on legitimate grounds. 944 A.2d at 1085 (citing *Frazier Indus. Co., Inc. v. NLRB*, 213 F.3d 750, 760 (D.C. Cir. 2000)). That standard is not relevant here.

* * *

This Court should affirm because the jury properly concluded that Ishakwue did not make any protected disclosures and the trial court did not abuse its discretion in excluding certain evidence. If this Court disagrees, Ishakwue is not entitled to judgment as a matter of law on the causation issue. A jury should decide that issue because there is ample evidence to support a verdict in the District's favor.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 1, 2021, this brief was served through this Court's electronic filing system to:

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