RECORD NO. 20-CV-14

In The
District of Columbia
Court of Appeals

SABRATHIA DRAINE ISHAKWUE,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

ON APPEAL FROM NO. 2017 CA 000788 B IN THE DISTRICT OF COLUMBIA SUPERIOR COURT, CIVIL DIVISION, THE HONORABLE HIRAM E. PUIG-LUGO, JUDGE PRESIDING

BRIEF OF APPELLANT

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RULE 28(a)(5) ASSERTION

Appellant Sabrathia Draine Ishakwue asserts that her appeal is from a final order, dated December 12, 2019, disposing of her claims in their entirety.

I. STATEMENT OF ISSUES PRESENTED

A. Whether Ishakwue Was Entitled To Judgment As A Matter of Law On The Issue Of "Protected Disclosures" Based Upon A Good Faith, Objectively Reasonable Belief, Communicated To Her Supervisors, That Public Health Was Substantially Endangered By Allowing DYRS Residents Suspected Of Tuberculosis To Return To Crowded Residential Facilities Without Testing Or Isolation

B. Whether, In The Alternative, The District's Evidence That Tuberculosis Is Essentially A Disease Of The Past Was Legally Sufficient To Support The Jury's Verdict of "No Protected Disclosures"

C. Whether Undisputed Evidence Of The Very Close Temporal Proximity Between Ishakwue's Protected Activities And Her Firing, And Of Her Satisfactory Job Performance, Required Entry Of Judgment In Her Favor As A Matter Of Law On The Issue Of "Contributing Factor"

D. Whether The District's Conspicuous Failure To Offer Evidence That Ishakwue Would Have Been Fired Even If She Had Not Blown The Whistle Required Entry Of Judgment As A Matter Of Law In Her Favor On The District's Affirmative Defense

E. Whether The Trial Court Unfairly Prejudiced Ishakwue By Excluding Evidence That Government Investigators Agreed With Her Tuberculosis Disclosures

II. STATEMENT OF THE CASE

At the end of December, 2015, and again in early January, 2016, Sabrathia Ishakwue, a registered nurse employed by the District of Columbia at its Department of Youth Rehabilitation Services (DYRS), disclosed to her medical managers that DYRS residents suspected of tuberculosis, were returned to crowded residential facilities without required testing and isolation. (below, pp. 9-11).

Several days later, Ishakwue was fired assertedly because she was not a team player. (below, p. 13).

Ishakwue challenged her firing under the District of Columbia Whistleblower Protection Act (DCWPA), D.C. Code §1-615.51 et seq. She alleged that her tuberculosis disclosures (among other disclosures) qualified for statutory protection and that they were at least among the reasons she was fired. (J.A. 17-24).

After the close of discovery, the District moved for summary judgment, arguing that "most" of Ishakwue's disclosures did not qualify for statutory protection. (J.A. 27-46). The District did not, however, dispute that Ishakwue's tuberculosis disclosures were protected under the DCWPA. Id.

On January 31, 2019, the trial court denied the District's motion. (J.A. 101-08). The trial court expressly noted that Ishakwue had produced "significant probative" evidence that the District's stated reason for the firing was pretextual. (J.A. 107).

At the April 25, 2019, pretrial conference, the lower court granted the District's motion to exclude evidence of government findings that supported Ishakwue's tuberculosis disclosures on the ground that the investigations were conducted only after Ishakwue left government service. (below, pp. 41-43).

The trial judge also barred important evidence of the troubled history of DYRS's medical services program. (below, pp. 43-44, describing Jerry M. litigation).

On October 28, the parties proceeded to trial by jury. At the close of the evidence on October 30, Ishakwue moved under Rule 50(a) for judgment as a matter of law on the issues of protected disclosures, contributing factor, and the District's affirmative defense. (J.A. 328). The lower court denied the motion. (J.A. 331). Accordingly, the three issues were submitted to the jury for its consideration.

On October 31, the jury returned a verdict in the District's favor. (J.A. 367). The jury decided the first issue (protected disclosures) against Ishakwue and, accordingly, did not reach the remaining two issues.[1]

On November 24, Ishakwue timely filed a Rule 50(b) motion to set aside the jury verdict; enter judgment in her favor as a matter of law; or, alternatively, order a new trial. Ishakwue raised the issues she had raised in her Rule 50(a) motion, and also renewed her challenge to the trial judge's evidentiary rulings described above. (J.A. 427-44).

[1] The verdict form identified three disclosures potentially eligible for statutory protection. The disclosures considered by the jury included the two tuberculosis disclosures and a disclosure regarding controlled substances. Id. (J.A. 423-24). On appeal, Ishakwue challenges only the jury's adverse determinations on the tuberculosis disclosures.

On December 12, the trial court, in a strangely written order, denied Ishakwue's motion. (below, pp. 14-15). On January 6, 2020, Ishakwue timely noted her appeal. (J.A. 450-51).

III. STATEMENT OF FACTS

A. Background

The Department of Youth Rehabilitation Services, the District's juvenile justice agency, operates two residential facilities, New Beginnings and Youth Services Center, for detained and committed youth under its care. (J.A. 234-35). At each facility, DYRS maintains a medical unit serving DYRS residents. The District employs nurse practitioners, registered nurses, and a licensed practical nurse to provide DYRS residents health care services under the direction of medical managers, who, at relevant times, included Dr. Alsan J. Bellard, Jr., Chief of Health Services, the highest-ranking medical officer at DYRS, and Michelle Jackson, a registered nurse who served as Clinical Nurse Supervisor. (J.A. 234, 267).

The District recruited Dr. Bellard in 2013 to "help rebuild the medical services program" at DYRS.[2] Bellard's mission was to address "concerns about the quality of the health conditions that the kids were experiencing." (J.A. 267).

[2] DYRS's medical services program had been under court supervision for nearly three decades before Dr. Bellard's arrival. See below in text at pp. 43-44 and J.A. 77-83.

Clinical Nurse Supervisor Jackson reported directly to Bellard. (J.A. 234). So too did the nurse practitioners. (J.A. 268). Registered nurses, including Ishakwue, reported directly to Jackson.

Jackson did not have the authority to fire, but she could recommend to Bellard the firing of the nurses who reported to her. During her three year supervisory tenure (May, 2015-April, 2018), Jackson recommended the firing of only a single nurse, Sabrathia Ishakwue. (J.A. 234, 265).

B. DYRS Policy On Containing Tuberculosis Outbreaks

DYRS's infection control policy addresses the treatment and containment of tuberculosis in considerable detail. (J.A. 244, 379-392). The policy requires that DYRS staff members with symptoms "suggestive" of tuberculosis, including "coughing up blood," immediately leave the workplace and return to work only "after infectious tuberculosis has been ruled out." (J.A. 383, § 15(c)).

Similarly, the policy requires that DYRS residents with "suspected or confirmed" tuberculosis be immediately transferred to a provider "with an isolation room." (J.A. 389, § 18(f)). The policy further requires that patients suspected of tuberculosis be isolated "in a negative pressure room with increased air exchange…" pending transfer to a better equipped facility. Id.

Finally, DYRS residents testing positive on a tuberculosis skin test must be scheduled for a chest x-ray within seven days. (J.A. 388, §18(e)). Symptomatic patients must be isolated "until tuberculosis is ruled out." Id.

DYRS nurses are expected "to follow nursing standards of practice…, nursing policies…, and regulations governing the practice of nursing in the District of Columbia." (J.A. 236, 373). DYRS nurses also are expected "to keep medical management informed of any problems in the provision of medical care." (J.A. 236, 372).

C. June, 2015-December, 2015: The Friction Between Nurse Ishakwue and Nurse Gorantla; The Transfer Of Ishakwue To YSC; And Her Favorable Six Month Performance Review

On June 1, 2015, Sabrathia Ishakwue began working as a Clinical Nurse II at DYRS. (J.A. 295). Ishakwue reported directly to Jackson and indirectly to Bellard. (J.A. 234-35).

Ishakwue came to DYRS with wide-ranging nursing experience. She served as a RN at Virginia Hospital Center's cardiac stepdown unit. (J.A. 295). She worked at Inova Fairfax Hospital in several different departments, including post-anesthesia care as a recovery room nurse. Id. And, after receiving a public health nursing degree, Ishakwue worked at Children's Hospital in the District for nearly three years as a school health nurse. Id. According to Jackson, Ishakwue was a

"conscientious" nurse who "advocated for her patients" and who informed management "if best nursing practices were not being followed." (J.A. 236).

In August, 2015, Ishakwue came across a medical record that showed a patient's blood sugar level at 48, which is "very low." (J.A. 296, 298). Ishakwue, alarmed by the low reading, alerted the nurse practitioner on duty, Surekha Gorantla, who insisted that she had "taken care" of the matter. (J.A. 296).

Two days later, however, Ishakwue discovered that Gorantla had not in fact taken care of the matter because no follow-up test of the patient's blood sugar level had been administered. Id. Ishakwue contacted the patient herself; explained to him that his blood sugar level had tested very low; and encouraged him to take a second test. (J.A. 296-97). Ishakwue also attempted unsuccessfully to discuss the patient's treatment with Gorantla, who warned her to "mind [her] own business." (J.A. 296).

In September, 2015, Ishakwue and a co-worker raised with Jackson concerns that DYRS's glucometer, a device used to measure blood sugar levels, was not providing accurate readings. As a result, medical care providers could not determine "the appropriate course of treatment for the patient." (J.A. 242). In the wake of Ishakwue's glucometer disclosures, DYRS began testing the glucometer "more regularly." (J.A. 243).

In Jackson's view, the source of the friction between Ishakwue and Gorantla was the "medical treatment that Ms. Gorantla had given the DYRS resident with low blood sugar levels" and the "accuracy" of DYRS's glucometer. (J.A. 258-59). Jackson also noted that Ishakwue and Gorantla believed that they were the victims of "bullying" by the other. (JA. 259).

On October 2, Jackson notified Ishakwue of her transfer from New Beginnings to Youth Services Center. (J.A. 407). Jackson described Ishakwue's transfer, which followed her glucometer disclosures by only a few weeks, as a "corrective action" that was designed to address allegedly declining staff morale at New Beginnings. (J.A. 403, 405).[3]

At trial, Jackson acknowledged that Ishakwue was never written up during her four months at New Beginnings. Jackson also acknowledged that employees have "different attitudes" and that they "have to learn to work" with their colleagues; accordingly, she did not blame Ishakwue for the purported incidents with her co-workers. (J.A. 259).

Evidently, the transfer was successful from management's perspective because Ishakwue admittedly "didn't have that many issues at YSC like she did at

[3] The "corrective action" also came a day or two after Ishakwue informed Bellard and Jackson that she (Ishakwue) had cooperated with investigators in the Jerry M. litigation. (J.A. 51). The trial court, however, prevented Ishakwue from introducing at trial evidence of her role in Jerry M., and of Bellard's hostility to Jerry M. investigators, who "have a way of distorting reality." (J.A. 131).

New Beginnings." (J.A. 248). Accordingly, at their six month performance review at the end of December, 2015,[4] Jackson did not even raise with Ishakwue the issue of peer relationships - - an issue that evidently was behind her after the transfer to YSC in October, 2015.

Jackson was asked at trial whether she was thinking of firing Ishakwue at the time of the six month performance review. Jackson's response was an unequivocal "no":

> Q. …[D]id you tell Sabrathia at the meeting that, [if] her performance did not improve, she could lose her job?
>
> A. No. I just asked her how did she feel she was doing and it's already been six months since she was into her job. I just wanted to get a feel for how she was feeling.

(J.A. 249).

D. December 23, 2015-January 13, 2016: Ishakwue's Protected Tuberculosis Disclosures Prompted Bellard And Jackson To Recommend To Human Resources That Ishakwue Be Fired

1. December, 2015: The first tuberculosis disclosure

On December 23, 2015, a DYRS resident reported to Ishakwue, the nurse on duty, that he had been coughing blood; that he was prescribed medication for an "infection," the name of which he could not remember; and that he then misplaced his medicine before completing the course of treatment. (J.A. 300). The patient's

[4] Jackson was unable to recall the precise date of her meeting with Ishakwue, but believed that the meeting was "[p]robably" the last week of December. Id.

elevated PPD reading (15 mm induration) similarly raised suspicions of tuberculosis. (J.A. 252-53, 302).

As described by Jackson, health care providers administer "PPD" (Purefied Protein Derivative) tubercular skin tests to determine whether patients are potential carriers of tuberculosis. (J.A. 245-46). Bellard and Jackson agreed that PPD readings in the 10-15 mm range "would be indicative of tuberculosis." (J.A. 252-53, 278).

Rather than isolate and test the patient, as required by DYRS policy, the medical unit released him to the community. Ishakwue disclosed to Jackson that the patient had been discharged and that, accordingly, he presented a significant health risk to DYRS residents and staff. (J.A. 302 at 160).[5]

On December 29, Bellard responded to Ishakwue's protected disclosure in an email to nursing staff with the Subject Line: "Youth with **Likely Tuberculosis**," and with an "Importance" level of "High." (J.A. 419 (emphasis added)). Bellard pointedly asked: "Is there any reason that our index of suspicion for TB was not raised when the youth reportedly was coughing up blood?" Id.

[5] Following up on her disclosures to Jackson, Ishakwue contacted DOH's tuberculosis unit at the end of December, 2015, to enlist its assistance in training DYRS medical staff in the appropriate treatment of patients suspected of tuberculosis. (J.A. 303 at 162). Ishakwue's overtures to DOH angered and embarrassed DYRS medical management. (below in text, pp. 11 and 13 n.10).

2. January, 2016: The second tuberculosis disclosure

In early January, 2016, within two weeks or so of the first tuberculosis disclosure, Ishakwue emailed Jackson and Bellard that a second DYRS resident, suspected of tuberculosis because of an elevated PPD reading of 12 mm induration, was released to the community without a required chest x-ray. (J.A. 303-04). On January 9, Ishakwue again emailed Jackson and Bellard, noting that she had solicited the help of DOH's tuberculosis unit in "updating [DYRS's] TB policy and procedure manual." (J.A. 395).

On January 12, Ishakwue emailed Jackson and Bellard yet again, noting that DOH's tuberculosis unit was critical of DYRS's follow-up on the second DYRS resident suspected of tuberculosis. Based upon DOH recommendations, Ishakwue described in her email the "appropriate" steps that DYRS should have taken to protect the public health. (J.A. 400).[6]

Jackson forwarded Ishakwue's email to Bellard, remarking: "**So now she [Ishakwue] has made us look bad to the outside TB clinic.**" Id. Bellard responded: "**I'm so sick of her**," referring, of course, to Ishakwue. Id.

[6]A few hours later, Bellard instructed the DYRS nursing team that patients who have "positive PPDs" should be "treated" as if they were infected with tuberculosis without awaiting results of confirmatory tests. (J.A. 420).

3. The events leading to the Jackson/Bellard January 13 recommendation to HR that Ishakwue be fired

On January 6, Jackson denied a leave request that she received from Ishakwue on January 6 at approximately 10 am, five hours before the scheduled 3 pm start of Ishakwue's shift. (J.A. 247).[7] Jackson advised Bellard that she had denied Ishakwue's request. Bellard then urged Jackson to "pay close attention to [Ishakwue's] start date before her anniversary," which was June 1, 2016. (J.A. 393).

On the night of January 6, Jackson emailed Bellard that she was "ready to move forward" - - **not** with Ishakwue's firing, but with counseling. (J.A. 249, 251, 394).[8] On January 8, Jackson expressed to Bellard her frustration with Ishakwue's alleged excessive use of compensatory time. Bellard responded to Jackson that he would no longer tolerate Ishakwue's "foolishness,"' i.e., her excessive use of compensatory time, and instead would use "agency" to meet DYRS's personnel needs. (J.A. 422). Accordingly, he instructed Jackson to "[g]et the PRF." Id.

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[7] Jackson could not recall whether, before January 6, Ishakwue also had submitted requests for leave on January 6. Id.

[8] Q. …[L]et me again ask you to look at the email in which you indicated that you're ready to move forward with Sabrathia. You did not mean… that you were ready to move forward with her termination, isn't that correct?
A. Correct. The word "termination" is nowhere in that email.
(J.A. 251).

"PRF" refers to a "personnel request form" that the District uses for many purposes, including recruitment (competitive and non-competitive), reassignments, temporary promotions, and discipline, ranging from admonition to separation. (J.A. 402). Whether Bellard in his January 8 email was instructing Jackson to hire temporary staff in lieu of giving Ishakwue more overtime, as the email itself indicates, or whether, as the District spins the email, he was instructing Jackson to fire Ishakwue, was (and remains) a sharply contested issue, but one the jury did not reach.[9]

On January 13, when managers had reached their breaking point with Ishakwue's protected activities,[10] Jackson submitted to Human Resources a recommendation that Ishakwue be fired allegedly because she "is not a good fit for our team." (J.A. 403). Jackson "justified" the January 13 firing recommendation solely on the basis of alleged incidents at New Beginnings where Ishakwue had not worked since October 1, 2015 - - incidents for which, Jackson acknowledged,

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[9] The District's spin on the email contradicts testimony of Jackson, which Bellard did not dispute, that **she recommended to Bellard** that Ishakwue be fired and that, accordingly, **she**, **not Bellard**, set the termination process in motion. The District's interpretation of the email also contradicts testimony that Jackson did not submit her recommendation to Bellard either on January 6 or January 8. (J.A. 264). Accordingly, the recommendation to HR to fire Ishakwue fell somewhere between January 8 and January 13 when Jackson submitted the PRF to Human Resources.

[10] See Jackson's January 12 email (Ishakwue "has made us look bad to the outside TB clinic") and Bellard's response ("I'm so sick of [Ishakwue]") (J.A. 400).

Ishakwue was no more at fault than the co-workers who escaped discipline for their role in the incidents. (above, p. 8).

Ishakwue's last day of work was February 9, 2016. (J.A. 306).

IV. SUPERIOR COURT DECISION

Unfortunately, the trial court did not address in its December 12, 2019, order the issue of protected disclosures, which was the only issue the jury decided. The court instead addressed the issue of "contributing factor," which the jury did not reach. (above, p. 3).

The trial judge cited the District's evidence that decisionmakers learned of Ishakwue's second tuberculosis disclosure only after "they had decided not to extend [her] contract." (J.A. 446-47). The trial judge then noted that the jury "appears to have credited" the District's evidence that the second disclosure post-dated the firing decision. The lower court could find no reason to disturb the jury's credibility determination. (J.A. 447).

The judge's analysis would have been understandable had the issue decided by the jury been whether the second tuberculosis disclosure was a "contributing factor" in the firing decision. Obviously, the timing of a disclosure, whether before or after an adverse action, is critical to the issue of "contributing factor."

Timing, however, has nothing to do with whether or not a disclosure qualifies for statutory protection - - the only issue decided by the jury. In short, the trial court simply missed the boat on protected disclosures.

In any event, the trial court disregarded or overlooked undisputed evidence that the **first** tuberculosis disclosure, in the last week of December, 2015, predated the firing decision. Accordingly, the court's misguided rationale applies, if at all, only to the second tuberculosis disclosure.[11]

V. SUMMARY OF ARGUMENT

A. Jury Verdict Of "No Protected Disclosures" Cannot Be Reconciled With The Statute And Was Not Supported By Legally Sufficient Evidence

The DCWPA defines "protected disclosure" to include disclosures of information to a supervisor that the employee "**reasonably believes**" evidences a "substantial and specific danger to the public health and safety." D.C. Code §1-615.52(a)(6)(E) (emphasis added). The principal issue before the Court is whether public health whistleblowers who reasonably believe that a significant public health danger exists, and who disclose information of the danger to their managers in good faith, lose the protections of the whistleblower statute if subsequent developments prove them wrong, and the disclosed danger does not materialize.

[11] Even a single protected disclosure, if causally connected to an adverse action, triggers statutory protection. See D.C. Code §1-615.53(a) (prohibiting retaliation "because of the employee's protected **disclosure**…," in the singular (emphasis added)).

Ishakwue maintains that the DCWPA was intended to encourage **early reporting** of potential public health dangers. Accordingly, public health whistleblowers may prove their protected status through evidence of good faith and reasonableness, or through evidence that the disclosed danger, even if not realized, is more than "negligible, remote, or ill-defined." Chambers v. Department of Interior, 602 F.3d 1370, 1376 n. 3 (Fed. Cir. 2010).

Ishakwue unquestionably acted reasonably and in good faith when she blew the whistle on the government's policy failures to test and isolate patients with classic symptoms of tuberculosis before returning them to crowed residential facilities. Ishakwue acted to avert a real potential of catastrophic harm to public health in the event of a tuberculosis outbreak.

In addition, Ishakwue's tuberculosis disclosures easily satisfy the Chambers standard. They were detailed; they were based upon first-hand knowledge of the facts, rather than upon unsupported conjecture; and they warned of public health dangers that were neither remote nor negligible.

The District responds that tuberculosis is essentially a disease of the past; that no public health danger existed; and that, absent a showing that the two DYRS residents were infected with tuberculosis, Ishakwue could not reasonably have believed otherwise. (J.A. 358). As explained below, the District's proposed "no harm, no foul" standard, cannot be reconciled with the statutory definition of

protected disclosure; is at odds with the leading decision on public health disclosures (Chambers, 602 F.3d 1370); and would discourage employees from **timely** disclosing significant public health threats out of a fear that if they guess wrong, and the disclosed danger does not materialize, they will lose both their jobs and the protections of the statute. As also explained below, the District's evidence was legally insufficient to support the jury's verdict of "no protected disclosures."

B. The Trial Court's Legally Erroneous Rulings On Contributing Factor And The District's Affirmative Defense

The DCWPA defines "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." D.C. Code §1-615.52(a)(20). Plaintiff need only prove that whistleblowing was "relevant" to an adverse action, rather than a driving force or even motivating factor. Raphael v. Okyiri, 740 A.2d 935, 957 (D.C. 1999).

Ishakwue's whistleblowing activities unquestionably were "relevant" to her firing. Indeed, a firing decided upon in the very midst of high-profile protected disclosures, at a time when there are no real performance issues, can scarcely be deemed a pure coincidence entirely unconnected to the protected activity.

Plaintiffs who prove the relevance of a protected disclosure to an adverse action are entitled to judgment in their favor unless the District proves, clearly and convincingly, that the adverse action would have taken pace for "legitimate, independent reasons," even in the absence of protected activity.

D.C. Code §1-615.54(b). At trial, the District offered no evidence at all in support of its affirmative defense. (below, pp. 38-41).

In light of the foregoing, including, in particular, the conspicuous absence of disputed material facts, the trial court plainly erred in denying Ishakwue Rule 50 relief.

C. The Trial Court's Prejudicial Evidentiary Rulings

In accordance with FRE 803(8), Ishakwue sought to introduce at trial two government reports that included findings by DOH investigators supporting her tuberculosis disclosures. The District challenged admissibility solely on the ground that Ishakwue did not file her complaint with OIG until after she left government service in February, 2016. (J.A. 116-18). The trial court excluded the evidence without explanation. (J.A. 175).

Ishakwue also sought to introduce evidence of the long, troubled history of DYRS's medical services program. (below, pp. 43-44, describing Jerry M. litigation). The District challenged admissibility on the ground that the jury would be hopelessly confused by Jerry M., and that the confusion would seriously prejudice the District. (J.A.109, 118). The trial court excluded the evidence, again without explanation. (J.A.156, 175, 197).

Ishakwue offered the foregoing evidence to counter the false impression created by the District that her tuberculosis disclosures were so far off base that

either her motivation or her competence must be questioned. The excluded evidence would have given jurors a more balanced view, informing them that government investigators agreed with Ishakwue's tuberculosis disclosures.

Context matters. Exclusion of the foregoing evidence warrants a new trial if this Court determines that the jury's verdict was otherwise rationally tethered to the evidence presented.

VI. STANDARD OF REVIEW

De novo. Although a jury verdict should not be lightly disturbed, judgment as a matter of law "is proper if 'the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for' the nonmoving party." Breeden v. Novartis Pharm. Corp., 646 F.3d 43, 53 (D.C. Cir. 2011) (quoting Fed. R. Civ. P. 50(a)(1)).

A trial court's decision to exclude evidence is generally reviewed for abuse of discretion, "but where the evidentiary ruling is based on the trial court's determination of a question of law, appellate review of that determination is de novo." Edwards v. Safeway, Inc., 216 A.3d 17, 20 (D.C. 2019). Accordingly, the trial judge's exclusion of the DOH reports, which was based upon a mistake of law (below, pp. 42-43), is subject to de novo review.[12]

[12] The judge's decision to exclude evidence of the Jerry M. litigation, in contrast, is reviewed under an "abuse of discretion" standard.

VII. ARGUMENT

A. An Honestly Held And Objectively Reasonable Belief In A Disclosed Danger Imperiling Public Health And Safety Confers Whistleblower Status Even If The Likelihood Of Actual Harm Cannot Be Precisely Determined

1. The governing principles

The DCWPA defines "protected disclosure" to include

> any disclosure of information, not specifically prohibited by statute, without restriction to time, place, form, motive, context, forum, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties by an employee to a supervisor or a public body that the employee **reasonably believes** evidences… (E) A substantial and specific danger to the public health and safety.

D.C. Code §1-615.52(a)(6) (emphasis added).

More simply, the statute protects an employee's disclosure of information to a supervisor that the employee "reasonably believes" evidences a "substantial" and "specific" danger to public health. Id. The statute sweeps broadly, protecting public health disclosures that warn of potential dangers that may never materialize. See generally Johnston v. Merit Systems Protection Board, 518 F.3d 905, 909 (Fed. Cir. 2008) (whistleblowers' burden of proof on "protected disclosures" is "significantly lower" than their burden of proof on the merits).

The statute expressly conditions protection only on the substantiality and specificity of a public health danger, not on its likelihood. Under the plain meaning of the statute, then, an employee who proves a "reasonable belief" in the disclosed

danger is entitled to whistleblower protection, whether the likelihood of actual harm is high or low, or whether likelihood can even be accurately determined.

The DCWPA does not define "reasonable belief," but courts and administrative agencies interpreting whistleblower protection provisions of federal statutes, which the DCWPA mirrors, have uniformly concluded that "reasonable belief" is not a demanding standard. See, e.g., Passaic Valley Sewerage Commrs. v. U.S. Dept. of Labor, 992 F.2d 474, 478, 480 (3d Cir. 1993) (Clean Water Act's whistleblower provision "fully" protects "non-frivolous" complaints even though the whistleblower may have been "profoundly misguided or insufficiently informed in his assessment").[13] Public health whistleblowers gain statutory protection if they in fact believed a serious public health danger existed (subjective component)[14] and if their beliefs were objectively reasonable (objective component).[15]

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[13] See also Special Counsel v. Spears, 75 M.S.P.R. 639, 659 (1997) (the protected status of disclosures depends, not on whether they "in fact disclose[] wrongdoing covered by the statute," but on whether a reasonable employee would believe that the disclosed information evidences wrongdoing); Carter-Obayuwana v. Howard University, 764 A.3d 779, 790 (D.C. 2001) (an employee opposing conduct that she "reasonably believed" to violate Title VII was engaged in protected activity even if her belief was mistaken).

[14] Harp v. Charter Communications, 558 F.3d 722, 723 (7th Cir. 2009) (employee must actually have believed that complained of conduct violated relevant law); Welch v. Chao, 536 F.3d 269, 277 n. 4 (4th Cir. 2008) (accord).

[15] Objective reasonableness presents a mixed question of law and fact that may be resolved as a matter of law "if the facts cannot support a verdict for the non-moving party." Welch v. Chao, 536 F.3d at 278; Allen v. Administrative Review Board, 514 F.3d 468, 477 (5th Cir. 2008) (accord).

The subjective component is essentially a good faith standard. And, good faith should be presumed absent "specific evidence" rebutting the presumption. Van Asdale v. Int'l Game Tech., 577 F.3d 989, 1002 (9th Cir. 2009) (SOX protections were "intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise" (internal citations omitted)); Sylvester v. Parexel International LLC, ARB Case No. 07-123 (May 25, 2011), slip op. at 33 (Brown, J., concurring in part and dissenting in part) ("protected activity" under SOX liberally construed).[16]

As to the objective component, courts determine "reasonableness," first, by considering the evidentiary basis for the belief, and then by considering the evidence, if any, that "detracts from" reasonableness. LaChance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (internal citations omitted); see also Braga v. Department of Army, 54 M.S.P.R. 392, 398 (1992) (employee's articulated safety concerns that protective gear might be insufficient to meet "real-world threat levels," thereby placing soldiers "in grave danger" from anti-personnel mines, established reasonable belief), aff'd., 6 F.3d 787 (Fed. Cir. 1993); Gady v. Department of the Navy, 38 M.S.P.R. 118, 121 (1988) (employee who complained of agency policy allowing smoking in the library was entitled to whistleblower

[16] As Judge Brown noted, the liberal construction "arises out of recognition of the significant public interest in preventing the channels of information from being dried up by employer intimidation of prospective whistleblowers." Id.

protection on ground that he reasonably believed his disclosure evidenced a substantial danger to public health and safety).

Objective reasonableness is determined in light of the information known to, or reasonably available to, plaintiff **at the time of the disclosure** - - not in light of subsequent developments that may prove plaintiff wrong. Zirkle v. District of Columbia, 830 A.2d at 1260 (determination of whether disclosure was protected hinged on whether plaintiff "reasonably believed" that an order of his supervisor, with which he refused to comply, was illegal, not whether the order was "ultimately determined to be illegal").[17] In Zirkle, the Court of Appeals concluded that the challenged order was "so clearly a proper exercise of discretion" that a "disinterested observer," with plaintiff's "background and expertise," could not reasonably have believed otherwise. Mr. Zirkle failed the "disinterested observer" test because he had helped to develop the policy on which the allegedly illegal order was based; accordingly, his subsequent challenge of its legitimacy did not ring true, and raised questions of his good faith and integrity. Id.

As shown below, Ishakwue passes the "disinterested observer" test with flying colors.

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[17] See also Yellow Freight Systems, Inc. v. Reich, 38 F.3d 76, 82 (2d Cir. 1994) (under the Surface Transportation Assistance Act of 1982, 49 U.S.C. §2305, "Congress mandated that the objective reasonableness of the employee's perception that an unsafe condition existed be evaluated in light of the situation that confronted the employee at the time"; court declined to "requir[e] proof of an actual safety defect…")

2. Application of Zirkle's reasonable belief standard confirms Ishakwue's entitlement to whistleblower status as a matter of law

Nothing in the record even remotely suggests that the tuberculosis disclosures were in bad faith or that Ishakwue, a "conscientious" nurse, did not honestly believe in the disclosed dangers. The District does not contend otherwise.

The objective reasonableness of Ishakwue's beliefs was established most clearly by the text of DYRS's policy on infectious diseases. Ishakwue essentially disclosed DYRS's repeated failure to adhere to its own policy, which mandates that residents suspected of tuberculosis be tested and isolated before returning to their residential facilities. An employee's belief that is grounded in her employer's own policies can scarcely be deemed unreasonable. (above, pp. 5-6). E.g., Eidmann v. Merit Systems Protection Bd., 876 F.2d 1400, 1407 (Fed. Cir. 1992) ("reasonable belief" of employee that his disclosures uncovered violations of agency regulations prohibiting indoor smoking established by "[t]he text of the smoking regulations").

Second, Ishakwue's managers **shared** her beliefs. Chambers, 602 F.3d at 1379 (reasonableness of Chambers's belief in public health danger was supported by supervisor's confirmation of her disclosures). Bellard, for example, insisted that patients reporting classic symptoms of tuberculosis, e.g., coughing blood or an elevated PPD level, must be deemed infected, at least until testing rules out tuberculosis. (J.A. 278, 379-392, 419). At the time of the disclosures, Bellard,

Jackson and Ishakwue were **united** in their views that threats of a tuberculosis outbreak must be taken seriously. Even at trial, Bellard, while claiming that tuberculosis is essentially a disease of the past and that Ishakwue's concerns were overblown, testified that a DYRS resident who reported coughing blood "could have had active tuberculosis," and should "absolutely" be given a "full" examination to rule tuberculosis in or out. (J.A. 276-284).

Third, coughing blood, perhaps the most classic symptom of tuberculosis,[18] by itself would lead a "disinterested observer," with the medical training of a registered nurse, to reasonably believe that inaction could potentially result in catastrophic public health consequences. No nurse worth her salt would have responded differently than Ishakwue to the reported coughing of blood.[19]

Fourth, Ishakwue treated one of the DYRS residents suspected of tuberculosis and helped in the care of the other. (above, pp. 9-11).

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[18] E.g., Wojcicki v. Department of the Air Force, 72 M.S.P.R. 628, 634-35 (1996) (whistleblower statute protected employee who complained to managers that a dysfunctional sandblasting protection device exposed him (and co-workers) to toxic dust, which, he believed, was causing him to cough up blood; the Board concluded that the disclosure merited statutory protection because "by almost any standard," coughing blood "would be considered abnormal, serious, and substantial").

[19] Coughing blood is a universal, telltale sign of tuberculosis, a disease dreaded throughout recorded history. In the 2019 South Korean film "Parasite," winner of the Academy Award for Best Picture, there is a classic scene in which the matriarch of a family immediately accepts, as confirmation that a domestic employee is infected with tuberculosis, a bloodstained tissue cast aside by the employee after a coughing fit.

Accordingly, her beliefs were based upon first-hand knowledge of the relevant facts - - and upon her broad nursing experience. Chambers, 602 F.3d at 1379 (Chambers's expertise in public safety "supports the reasonableness of her belief"); Coleman v. District of Columbia, 794 F.3d 49, 59 (D.C. Cir. 2015) (plaintiff's expertise in containing fires supported reasonableness of belief that D.C. Fire Department's inattention to established firefighting procedures "posed a substantial threat to public safety," citing Chambers, 602 F.3d at 1379).

The District's evidence "detracting from" reasonableness is thin and largely irrelevant.[20] Thus, Bellard testified that tuberculosis is a rare disease; that coughing blood can indicate diseases (e.g., bronchitis) other than tuberculosis; that DYRS has no record that a resident "with active tuberculosis was ever admitted to the facility"; and that neither of the two DYRS residents in question was shown to have contracted the disease. (J.A. 275-76).[21]

As noted, the only information that, in the eyes of the law, can "detract from" the reasonableness of an employee's belief is information that is **known** to

[20] At the summary judgment stage, the District did not even argue that the tuberculosis disclosures were unprotected by statute. (above in text, p. 3).

[21] As District counsel put it at closing, "just because a kid comes in and says he coughed up blood at some point in the past, doesn't mean he's a threat … [and] certainly doesn't mean he has tuberculosis." (J.A. 358). No, but it certainly does mean that the kid should be tested and isolated, rather than simply returned to a crowded residential facility without knowing whether he is infected.

the employee at the time of her disclosures. The District did not prove that Ishakwue, who had only been with the agency six months at the time of her disclosures, knew that no resident had ever been admitted to the medical unit with active tuberculosis. The District did not prove that Ishakwue knew at the time of her disclosures that the DYRS residents suspected of tuberculosis were not actually infected. (J.A. 358). In fact, **no one** knew, which is precisely why testing and isolation are required.

Of course, even if the District had established the foregoing, Ishakwue's beliefs would have been no less reasonable because patients suspected of tuberculosis may well be patients infected with tuberculosis. In either event, the potential threat to public health must be addressed. See Wojcicki v. Department of the Air Force, 72 M.S.P.R. at 635 ("the fact that the safety violations were quickly and easily alleviated… does not reduce the reasonableness of a belief that the violations were a substantial danger to safety").

Neither the infrequency of tuberculosis in the general population nor the fact that reported symptoms were consistent with diseases other than tuberculosis detracts from the reasonableness of Ishakwue's beliefs. Tuberculosis may or may not be frequently encountered either in the general population or at DYRS, but the District's Department of Health has an entire unit dedicated to its control and eradication. DYRS itself has a detailed written policy on tuberculosis designed to

accomplish similar goals. Evidently, tuberculosis very much remains on the government's radar screen; accordingly, Ishakwue's belief in the disclosed dangers can scarcely be deemed unreasonable.[22]

Moreover, the fact that classic symptoms of tuberculosis may indicate a different, perhaps less dangerous, disease does not detract from the reasonableness of Ishakwue's belief. Indeed, to argue that symptoms of tuberculosis do not matter if they are consistent with other diseases is to argue that patients with symptoms consistent with Covid-19, but also consistent with other diseases, should not be tested, or should not self-isolate.

Finally, the District's evidence really goes to the issue of whether Ishakwue's beliefs, with 20-20 hindsight, were "correct," not whether they were "reasonable." According to the District, Ishakwue could not have been "reasonable" in her beliefs unless the DYRS residents turned out to have contracted tuberculosis. The plain language of the DCWPA forecloses the District's argument. (above, p. 20). Compare EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 407 (4th Cir. 2005) (opposition activity under Title VII is protected "where an employee opposes either 'employment actions actually unlawful under

[22] The District did not call an expert witness to testify that tuberculosis was no longer a significant threat to public health. Instead, the District relied on the testimony of Bellard, who acknowledged that his expertise is pediatrics, not infectious diseases. (J.A. 292).

Title VII,' or 'employment actions [she] reasonably believes to be unlawful'" (internal citation omitted)).

In sum, the evidence supporting the reasonableness of Ishakwue's beliefs far outweighs the evidence, if any, detracting therefrom. Accordingly, the jury verdict of "no protected disclosures" must be set aside if for no reason other than Ishakwue's unequivocal showing of reasonableness.

However, there is a **second** reason to set aside the jury verdict. Ishakwue's disclosures, as shown below, in fact evidenced a "substantial" and "specific" danger to public health, as the terms have been defined by federal law.[23]

3. Ishakwue's disclosures evidenced a "substantial" and "specific" danger to public health, as defined by the landmark Chambers decision

a. The teachings of Chambers

In Chambers v. Department of Interior, 602 F.3d 1380, the leading decision on the meaning of "substantial" and "specific" danger, the Federal Circuit ruled that public health whistleblowers may prove their protected status through evidence of "detailed circumstances giving rise to a likelihood of impending harm." 602 F.3d at 1387. A "likelihood of impending harm," in turn, may be

[23] The Court of Appeals, in construing the DCWPA, frequently relies upon federal jurisprudence. E.g., Crawford v. District of Columbia, 891 A.2d 216, 221 n. 12 (D.C. 2006).

established by evidence that the disclosed danger is neither "negligible, remote, nor ill-defined." Chambers, 602 F.3d at 1387 n. 3.

The disclosure of a peril that may occur in the "immediate or near" future is more likely to be protected than a harm in the "distant" future. Id. The disclosure of a peril that involves a "particular person, place, or thing" is more likely to be protected than "general criticism" of a government agency. Chambers, 602 F.3d at 1379.[24] Finally, disclosure of a near-term danger with potentially very severe consequences enjoys statutory protection even if the likelihood of actual harm to public health is relatively low or cannot be accurately determined. Miller v. Department of Homeland Security, 111 M.S.P.R. 312, ¶¶ 16-19 (2009) (whistleblower statute protected employees who disclosed reasonable belief that a machine designed to detect explosives in luggage malfunctioned 10% of the time; the disclosure qualified for protection because "the potential consequences - - placement of an explosive device on a commercial airliner - - obviously would be

[24] The Court in Chambers offered the following example:

> [G]eneral criticism by an employee of the environmental protection agency that the agency is not doing enough to protect the environment would not be protected under this subsection [(E)]. However, an allegation by a Nuclear Regulatory Commission engineer that the cooling system of a nuclear reactor is inadequate would fall within the whistleblower protections.

Id., citing legislative history.

catastrophic"); see also INS v. Cardoza-Fonseca, 480 U.S. 421, 424-425, 431 (1987) (asylum applicants may have a "well-founded fear of persecution" even if only a small percentage of applicants returning to their country of origin are actually persecuted; "it is enough that persecution is a reasonable possibility").

Ishakwue's tuberculosis disclosures plainly satisfied the Chambers standard. They were not ill-defined or uninformed. They were based on first-hand knowledge, not on unsupported conjecture. They provided significant detail regarding the symptoms and treatment of two particular DYRS residents suspected of tuberculosis. They provided information on appropriate follow-up measures.

In short, Ishakwue did not simply complain in general terms that DYRS was not delivering adequate health care services to its residents. (above, p. 30, n. 24). See Coleman v. District of Columbia, 794 F.3d at 58-59 (reasonable jury could conclude that a memorandum which was "detailed and specific," rather than a "general undifferentiated complaint," disclosed a "substantial and specific danger to the public health and safety"; disclosures "go far beyond a mere difference of opinion among employees or self-interested finger pointing by Coleman").

In addition, Ishakwue did not warn of dangers that were "negligible" or "remote." Chambers, 602 F.3d at 1387 n.3. The harm to public health would have been immediate if the DYRS residents (or either of them) had been infected with tuberculosis. Moreover, if they **were** infected - - and recall that they reported or

exhibited classic symptoms of a highly contagious, insidious disease that could spread quickly in crowded DYRS residential facilities - - the public health consequences would have been catastrophic.

b. Two examples illustrate the fallacy, and folly, of the District's "no harm, no foul" position

Consider first the example of a school bus out on the road with faulty brakes. Despite its faulty brakes, the bus had never been involved in an accident. The driver, Mary Smith, reports to her manager that the bus is not safe to operate, and is fired as a result of her report.

Consider next the example of an employee, Jane Smith, who is fired because she reported to her manager that a co-worker, a model employee of long standing who had never threatened an employee with physical harm, was storing a gun in his locker. No one was harmed and, in fact, the gun was never removed from his locker.

Can there be doubt under the foregoing circumstances that the Smith reports would qualify as protected disclosures as a matter of law? No factfinder could rationally deny either Smith whistleblower protection - - even though public health escaped harm.

Ishakwue was no differently situated than the hypothetical Smiths. The DYRS residents suspected of tuberculosis were ticking time bombs. Ishakwue

attempted to defuse the bombs through her disclosures. Should she instead have waited for an explosion before acting?[25]

Surely, the answer is "no" given the basic objective of whistleblower statutes to encourage **early reporting** of potential danger, at a time when authorities might be able to avert harm. Whistleblower statutes are primarily intended to avert harm, rather than provide redress. Compare Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (the primary objective of Title VII is "not to provide redress but to avoid harm"); see also Boyer-Liberto v. Fountainebleau Corp., 786 F.3d 264, 283 (4th Cir. 2015) (en banc) (early reporting "vital to achieving Title VII's goal of avoiding harm"). Yet, under the District's very narrow reading of "protected disclosure," authorities would not learn of potential danger because employees would fear that if their disclosures are premature, they would lose both their jobs and the protections of the statute.

[25] Extending whistleblower protection under the DCWPA before a ticking time bomb explodes is consistent with a line of authority under federal whistleblower statutes underscoring the importance of early reporting. See, e.g., Phillips v. Interior Board of Mine Operations Appeals, 500 F.3d 772, 779 (D.C. Cir. 1974) (coal miner's "notification to the foreman of possible dangers" protected activity under Federal Coal Mine Health and Safety Act); Passaic Valley Sewerage Com'rs. v. U.S. Dept. of Labor, 992 F.2d at 478-79 ("it is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated, so as to facilitate prompt voluntary remediation and compliance with the Clean Water Act").

In addition, the DCWPA should not be read in a way that would put conscientious nurses like Ishakwue in the untenable position of "damned if you do, damned if you don't." On the one hand, Ishakwue risked complicity in the wrongdoing if she failed to disclose the tuberculosis dangers. She also risked violating ethical or professional obligations, not to mention DYRS nursing policies, by remaining silent. (above, pp. 5-6). On the other hand, under the District's reading of the statute, by warning of "mere" potential danger, she risked loss of job without recourse.

For Ishakwue, the time to report was the very moment she was confronted by DYRS residents with classic symptoms of tuberculosis. A delay in reporting, which the District's "no harm, no foul" standard would encourage, could well have resulted in a public health disaster if either resident had been infected.

The trial court committed plain legal error in denying Ishakwue Rule 50 relief. Accordingly, the jury's verdict of "no protected disclosures" cannot be permitted to stand.

B. Alternatively, The Jury Verdict Of "No Protected Disclosures" Was Not Based Upon Legally Sufficient Evidence And, Accordingly, Must Be Set Aside

The District's evidence, viewed most favorably to the District, showed that the incidence of tuberculosis is low and that, accordingly, the likelihood was that the DYRS residents had not contracted the disease. The District's evidence, even

if fully credited by the jury, cannot support its verdict because of undisputed evidence that DYRS policy, nursing ethics, and common sense dictate the testing and isolation of patients exhibiting classic symptoms of tuberculosis **no matter** how infrequently the insidious disease is encountered in the general population or at DYRS.

The District's evidence cannot support the verdict because even if Ishakwue were "insufficiently informed," or "profoundly misguided," which she plainly was not, she acted in good faith and in accordance with DYRS practices.[26] The District's evidence cannot support the verdict because the potential of serious harm to public health was real, not imagined. The District's evidence cannot support the verdict because the harm, if realized, would have been immediate and catastrophic.

Finally, the District's evidence fell short because no nurse worth her salt would have responded differently than Ishakwue to the at risk DYRS patients.

C. This Court's Decision In Raphael Requires Entry Of Judgment As A Matter Of Law In Ishakwue's Favor On The Issue Of Contributing Factor

1. The legal landscape

In its original incarnation, the DCWPA required plaintiffs to prove that their protected disclosures were a "substantial factor" in the adverse action. In 1998, the

[26] Passaic Valley Sewerage Com'rs. v. U.S. Dept. of Labor, 992 F.2d at 478.

Council amended the statute to lower plaintiffs' burden of proof to "contributing factor." Raphael v. Okyiri, 740 A.2d 935, 957 (D.C. 1999).

The DCWPA, as amended, defines "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." D.C. Code §1-615.52(a)(2). Under the "contributing factor" standard, plaintiffs need prove only that whistleblowing was "relevant" to the adverse action - - or, stated somewhat differently, that whistleblowing was "in the picture" or "part of the mix." A more relaxed standard of causation is difficult to imagine.

In Raphael v. Okyiri, 740 A.2d 935, which was decided under the original statute, an employee of the District of Columbia Public Library (DCPL) alleged that she was fired because of her disclosures to the Office of Inspector General (OIG) during its investigation of DCPL's financial practices. 740 A.2d at 951. The trial court determined that plaintiff's disclosures were protected, citing her reasonable belief that "violations of the law were occurring." The court then concluded that the protected disclosures were a "substantial" factor in her termination for several reasons. Id. at 953-54.

First, and most important, the firing decision coincided with plaintiff's protected activities. Id. at 954. Second, the District did not criticize plaintiff's job performance until "the auditors began to step up their investigation." Id. Third,

similarly situated employees, who did not blow the whistle, were treated differently than plaintiffs. Fourth, and last, there was no convincing evidence that plaintiff would have been fired even if she had not blown the whistle. Id.

The Court of Appeals agreed with the trial court, noting, in particular, that "[o]ne can often learn a great deal from the timing of events." 740 A.2d at 954. The Court of Appeals also relied upon evidence that the decisionmaker "fabricated" the charge against plaintiff, observing that fabrication "may give rise to an inference of consciousness of guilt." Id. at 955.

If Ms. Okyiri's evidence was enough to establish that her protected disclosures were a "substantial" factor in DCPL's firing decision, surely Ishakwue's evidence, detailed below, was more than enough to establish causation as a matter of law under the more forgiving "contributing" factor standard.

2. The compelling evidence that Ishakwue's protected activities contributed to the firing decision

As in Raphael, Ishakwue's firing coincided with protected activities. (above, p. 13). As in Raphael, the District did not have a serious problem with Ishakwue's job performance before her protected activities. 740 A.2d at 955.

In fact, Jackson did not even discuss job performance with Ishakwue at their six month review at the end of December, 2015. (above, p. 9). Only when Ishakwue embarrassed or angered decisionmakers with her tuberculosis disclosures did DYRS seek to resurrect stale, alleged incidents at New Beginnings in an effort

to justify its firing decision. (above, p. 13). Cf. Raphael, 740 A.2d at 955 (evidence that decisionmaker "fabricated" charge against plaintiff "may give rise to an inference of consciousness of guilt").

As in Raphael, similarly situated nonwhistleblowing employees were treated differently. Jackson acknowledged that Ishakwue was no more to blame than her co-workers for the alleged disharmony among the nurses. (above, p. 8). Yet, Ishakwue was fired and they were not. (above, p. 5). Finally, as in Raphael, the District did not prove, or even attempt to prove, that Ishakwue would have been fired even if she had not blown the whistle. (below, pp. 38-41).

In light of the foregoing, no jury could reasonably have determined that Ishakwue's tuberculosis disclosures had nothing at all to do with her firing. The trial judge, however, ruled that credibility conflicts foreclosed judgment as a matter of law. The trial judge did not identify a single credibility conflict, but, more to the point, how could there have been a material conflict when **undisputed** evidence dictated a finding in Ishakwue's favor on contributing factor?

Accordingly, the lower court plainly erred in denying Ishakwue's Rule 50(a) motion for judgment as a matter of law.

D. Ishakwue Was Entitled Under Rule 50(a) To Judgment As A Matter Of Law On The District's Affirmative Defense

Plaintiffs who prove "contributing factor" are entitled to judgment in their favor unless the District proves, clearly and convincingly, that the adverse action

would have taken place for "legitimate, independent reasons," even in the absence of plaintiff's protected activity. D.C. Code §1-615.54(b). "Clear and convincing" proof of a whistleblower's probable fate in the absence of whistleblowing typically requires evidence that **non**-whistleblowers who engaged in similar misconduct were disciplined similarly. E.g., Whitmore v. Dep't. of Labor, 680 F.3d 1353, 1374 (Fed. Cir. 2012) (an agency that fails to "liberally" produce evidence of similar personnel actions taken in other cases does so at the risk of failing to meet its clear and convincing burden of proof); Parikh v. Dept. of Veterans Affairs, 116 M.S.P.R. 197, 217 (2011) (agency that did not provide evidence of similar treatment of nonwhistleblowers failed to satisfy clear and convincing standard despite strong evidence of misconduct); Russell v. Dept. of Justice, 87 M.S.P.R. 317, 327-28 (1997) (accord).

In the absence of comparator evidence, the District may prevail on its affirmative defense only by a showing of unusual circumstances that leave little doubt of the whistleblower's probable fate. For example, strong evidence that a whistleblower was fired for theft, or other egregious misconduct that cries out for termination, might be enough to allow a jury to infer, even in the absence of comparator evidence, that the whistleblower would have been discharged in any event. The inference might be permissible because discharge would be the normal and predictable response to theft in the workplace.

In addition, the existence of a District policy that **mandates**, rather than merely permits, discharge for the offense in question, coupled with evidence of the policy's uniform enforcement, could allow a jury to find in the government's favor on independent causation. Finally, strong evidence that the whistleblower's discharge was decided upon **before** her protected activity, could allow a jury to decide in the government's favor on its affirmative defense.

But, here, the District offered **no** evidence at trial in support of its affirmative defense. The District did not identify even a single nonwhistleblowing employee, whether probationary or nonprobationary, who was fired for not being a good fit or not being a team player. The District did not point to a policy that mandated Ishakwue's termination.

The District did not argue that Ishakwue's fate was sealed before her protected activities. On the contrary, the District insisted that the decision to fire Ishakwue was reached on January 8, 2016, in the immediate aftermath of her first tuberculosis disclosure. Finally, the District did not even ask decisionmakers at trial whether they "would have" fired Ishakwue in the absence of her whistleblowing activities. Watkins v. District of Columbia, 944 A.2d 1077, 1085 (D.C. 2008) (the District failed to meet its "burden of showing that it **would have** discharged the employee because of the misconduct, not simply that it **could have** done so") (emphasis in original).

In light of the foregoing, Ishakwue's Rule 50(a) motion for entry of judgment as a matter of law on the District's affirmative defense should have been granted. The trial judge declined to do so, citing credibility conflicts, none of which was identified. More to the point, how could there have been an evidentiary conflict when the District did not offer evidence on its affirmative defense?

E. The Prejudicial Exclusion Of Evidence That Government Investigators Agreed With Ishakwue's Tuberculosis Disclosures

1. The DOH investigations

Federal Rule of Evidence 803(8) provides a "public records" exception to the rule against hearsay. In civil cases, government reports that include "factual findings from a legally authorized investigation" are admissible if "the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." FRE 803(8)(A)(iii), B. See, e.g., Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 162 (1988) ("factual findings" admissible under FRE 803(8) include "factually based conclusions or opinions").

In February, 2016, Ishakwue filed a complaint with OIG, raising many of the issues she had raised in her protected disclosures to Jackson and Bellard. OIG referred the complaint to DOH, which conducted two separate investigations, including an investigation by Derek V. Brooks that focused on requirements of the Board of Pharmacy and a subsequent investigation by Emilia M. Moran that focused on requirements of the Board of Nursing. (J.A. 83-100).

The final reports of Brooks and Moran documented numerous shortcomings in DYRS's medical and nursing practices, many of which were the subject of Ishakwue's protected disclosures. (J.A. 58, 59 n. 6, 83-100). At his deposition, Brook specifically corroborated Ishakwue's disclosure that a DYRS resident with an elevated PPD level was improperly released to the general population. (J.A. 58).[27]

The District moved to exclude the government reports solely on the ground that they postdated the termination of Ishakwue's government service. The District did not challenge the trustworthiness of the proposed evidence.

The trial court plainly erred in excluding the evidence. The probative value of the government's findings does not hinge on whether the investigations were conducted before or after Ishakwue was fired. If the law were otherwise, evidence of an after-the-fact comment by a decisionmaker that he fired plaintiff because of her race would not be admissible - - a result that would defy common sense and that in any event is contrary to law. E.g., Cash v. United States, 700 A.2d 1208, 1212 (D.C. 1997) ("Evidence of a subsequent act, if connected in some material

[27] In its motion in limine, the District asked the trial court to broadly exclude "evidence" and "testimony" regarding DOH's investigations and findings. (J.A. 118). By granting the motion, the lower court prevented Ishakwue from calling Brooks to testify that he **agreed** with her tuberculosis disclosure - - testimony that could well have persuaded the jury that Ishakwue was no mere outlier "crying wolf."

way with the event in question, can be probative of a prior state of mind"); Elion v. Jackson, 544 F. Supp. 2d 1, 9 (D.D.C. 2008) (accord); Ryder v. Westinghouse Electric Corp, 128 F.3d 128, 133 (3d Cir. 1997) (evidence of ageist statements one year after the last discriminatory act was admissible); Freeman v. Madison Metro. Sch. Dist., 231 F.3d 374, 382 (7th Cir. 2000) (error to exclude evidence of post-termination disparate treatment of comparator; "[t]he last date of the allegedly discriminatory conduct is not a bright line beyond which the conduct of the employer is no longer relevant in a discrimination case").

Surely, evidence that the government's own investigators agreed with Ishakwue's tuberculosis disclosures could have turned the tide in her favor. The evidence would have painted for the jury a very different picture than the picture painted by the District of a disgruntled employee who did nothing but pick fights with her colleagues.

In light of the foregoing, exclusion of the evidence severely prejudiced Ishakwue, and independently requires setting aside the jury verdict and ordering a new trial.

2. The Jerry M. investigation

Under FRE 404(b) or 408, a civil consent decree, while inadmissible to prove liability, may be admitted for other purposes. E.g., Johnson v. Hugo's Skateway, 975 F.2d 1408, 1413 (4th Cir. 1992) (evidence of violation of anti-

discrimination consent decree, which required posting of notices advising employees of their rights, was admissible on the issue of defendant's discriminatory motivation); U.S. v. Gilbert, 668 F.2d 94, 97 (2d Cir. 1982) (SEC consent decree admissible to prove defendant's knowledge of reporting requirements); United States v. Cohen, 946 F.2d 430, 434-35 (6th Cir. 1991) (sustaining admissibility, under Rule 801(d)(2), of consent judgment, in which defendant agreed to be enjoined permanently from infringing plaintiffs' copyrights, in subsequent criminal trial).

In 1985, a class action was filed in Superior Court on behalf of DYRS residents who were in the care of the District's criminal rehabilitation system. Jerry M. et al v. District of Columbia, Case No. CA 1519-85. In July, 1986, the court approved a consent decree requiring that medical services provided to class members comply with American Public Health Association standards. (J.A. 50-51).

The many substandard medical practices investigated by Jerry M. monitors included treatment of DYRS residents with communicable diseases. (J.A. 80 n. 26). The jury heard nothing about Jerry M. and, accordingly, could not evaluate Ishakwue's tuberculosis disclosures in the broader context of the long, troubled history of DYRS's medical services program. Exclusion of the evidence severely

prejudiced Ishakwue, and independently requires setting aside the jury verdict and ordering a new trial.

VIII. CONCLUSION

For the reasons stated, Ishakwue requests that the lower court's order denying her Rule 50(b) motion to set aside the jury verdict be vacated; that judgment in her favor be entered on the issues of protected disclosures, contributing factor, and the District's affirmative defense; and that the case be remanded for proceedings on damages. Alternatively, Ishakwue requests that the jury's verdict of "no protected disclosures" be set aside as contrary to law and unsupported by legally sufficient evidence, and that a new trial be ordered.

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August 24, 2020

CERTIFICATE OF FILING AND SERVICE

I hereby certify that this 24th day of August, 2020, I caused a true and correct copy of the forgoing Brief of Appellant and Appendix to be electronically filed with the Clerk of Court using the Electronic Filing System (EFS), which will send notification of such filing to the following:

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