Case No. 25-CV-0176

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

AARP SERVICES, INC.

Appellant,

v.

RICHARD A. DEUS, JR.,

Appellee

BRIEF OF APPELLANT

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RULE 28(A)(2) CERTIFICATION

Undersigned counsel of record for Appellant AARP Services, Inc. certifies that the following listed parties and counsel appeared in the proceedings below and appear in this appeal:

1. Richard "Rick" Deus, Jr., Plaintiff/Appellee (hereafter "Deus")

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5. AARP Services, Inc. Defendant/Appellant (hereafter "AARP")

6. Alison N. Davis and Kevin M. Kraham, Littler Mendelson, P.C., 815 Connecticut Ave., N.W., Washington, D.C. 20006 (Counsel for AARP in the trial court and in this Court).

/s/Alison Davis
Alison N. Davis

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 28 of the rules of the District of Columbia Court of Appeals, Defendant AARP Services Inc. ("ASI"), hereby submits the following corporate disclosure statement:

ASI is a wholly-owned subsidiary of American Association of Retired Persons ("AARP"). AARP is organized as a not-for-profit corporation qualified as a tax-exempt social welfare organization under the Internal Revenue Code. AARP has no parent corporation and does not issue any shares or securities.

/s/Alison Davis
Alison N. Davis

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I. JURISDICTIONAL STATEMENT

AARP Services, Inc. states that this Court has jurisdiction to consider this appeal from the Order of the Superior Court partially denying its Renewed Motion for Judgment as a Matter of Law, or in the Alternative for a New Trial, and/or for Remittitur, pursuant to D.C. Code §16-4427(a).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in denying ASI's post-verdict motion as Richard Deus did not satisfy his burden to demonstrate that ASI made the decision to terminate his employment because of his sexual orientation.

2. Whether the trial court erroneously found that the verdict was not a seriously erroneous result and that the denial of a request for a new trial would not result in a clear miscarriage of justice.

3. Whether the trial court erroneously found that the jury's lost wages and emotional distress damages award was not the result of passion, prejudice or mistake.

III. STATEMENT OF THE CASE

This is a dispute arising out of the termination of the employment relationship between Appellee Richard "Rick" Deus Jr. ("Deus") and Appellant AARP Services, Inc. ("ASI"). Deus alleges that ASI terminated his employment because of his sexual orientation in violation of the District of Columbia Human Rights Act ("DCHRA"),

D.C. Code §§ 2-1401.01, *et seq*. The case was tried by a jury, which found that Deus had proven by the preponderance of the evidence that ASI had discriminated against him based on his sexual orientation. The jury's verdict against ASI was inconsistent with its verdict that the decision-maker, Lawrence Flanagan ("Flanagan"), who was an individually named defendant, did not discriminate against Deus based on his sexual orientation.

At the time of the relevant events in this dispute, Flanagan was ASI's President & CEO. Flanagan made the decision to terminate Deus's employment upon his review of two investigation reports which Jon Easley, retired Director of the Ethics & Compliance Office (ECO), prepared. Easely conducted an independent investigation, and determined based on his findings that Deus and two heterosexual employees had violated ASI's Code of Conduct and Travel and Expense Reimbursement Policy. Easely made no recommendations regarding discipline. Flanagan determined the discipline in consultation with Michael Loizzi, Human Resources Consulting Director and a gay employee. Deus and a heterosexual employee were terminated. Two other heterosexual employees received other forms of discipline.

Deus brought this action on May 15, 2018 alleging that ASI, Flanagan, former ASI VP, Angela Jones, who was Deus's second level supervisor, and the General Counsel, Sarah Mika discriminated against him based on his sexual orientation and

marital status in violation of the DCHRA and several common law claims. After Deus filed a First Amended Complaint on September 4, 2018, the case proceeded through discovery.

ASI filed a motion for summary judgment on October 25, 2021. On June 28, 2022, the trial court granted the motion in part, which resulted in the dismissal of all claims, except discrimination based on sexual orientation and marital status against Flanagan and ASI, and a breach of contract claim against ASI[1]. Trial commenced in the action on March 5, 2024.

After eight (8) days of trial, Deus dismissed his claim of discrimination based on marital status against ASI and Flanagan. The jury then found that Flanagan did not discriminate against Deus, and ASI discriminated against Deus based on his sexual orientation. The jury awarded Deus $1,612,916.18 as lost wages and $578,351 as compensatory damages which was reduced to a total of $2,191,267.18. ASI noted this appeal.

IV. SUMMARY OF ARGUMENT

Construing the evidence in the record in favor of Richard "Rick" Deus Jr. ("Deus" or "Appellee"), Appellee failed to prove by a preponderance of the evidence that ASI terminated his employment because of discrimination based on his sexual

[1] ASI does not appeal the breach of contract claim.

orientation. A corporation makes decisions through individuals. The evidence in the record shows that there were three people who played a role in the termination of Deus—Jon Easley, Michael Loizzi and Lawrence Flanagan. There is no evidence in the record that identifies anyone else in the decision-making chain.

Here, the jury found that the evidence in the record did not prove that Flanagan discriminated against Deus based on his sexual orientation (Deus has not appealed that verdict). Thus, Deus could have only satisfied his burden of proving by a preponderance of the evidence that ASI intentionally discriminated against him based on his sexual orientation based on a theory of subordinate bias liability also known as "cat's paw" liability or rubber-stamping.

There had to be evidence from which the jury could have inferred that Flanagan did not independently decide to terminate Deus, and Easley and/or Loizzi, the only other ASI employees in the decision-making chain, harbored discriminatory animus against Deus based on his sexual orientation and influenced Flanagan's decision to terminate Deus. No evidence of such bias exists. The evidence showed that Loizzi recommended termination for both Deus and a heterosexual employee involved in the same or similar conduct. On the other hand, the evidence in the record showed that Easley, was not a decisionmaker. Easley's role was limited to conducting the investigations after ECO received complaints and making determinations that Deus violated ASI's Code of Conduct and Travel & Expense

Reimbursement Policy. Discipline is a management decision. The evidence in the record further showed that Easley determined that both gay and heterosexual employees violated ASI's policies. There simply was no evidence that either Loizzi or Easley treated heterosexual employees more favorably than gay employees, or specifically harbored animus towards Deus because of his sexual orientation.

Based on the evidence in the record, the jury could not have found that Flanagan was an unwitting conduit of any illicit motives of Loizzi, Easley or any other employee at ASI when he decided to terminate Deus. The jury could only have reached its verdict against ASI based on speculation, conjecture and second-guessing, which is not a proper basis for finding liability in this case. The jury was required to follow the jury instructions and it failed to do so. Here, it is clear that the jury rendered its verdict based on the notion of fairness, and not the law. Because the jury could not have found that ASI discriminated against Deus because of his sexual orientation based on the evidence in the record, the verdict must be vacated.

Second, the trial court erred in denying ASI's request for new trial. As explained above, the verdict could not have been based on the evidence in the record, especially in light of the lack of evidence that ASI has animosity towards gay employees. To the contrary, the overwhelming evidence in the record is that ASI has long supported the LGBTQ+ community; employees, including Deus, felt comfortable being open about their sexual orientation in the workplace; and at least

one member of senior management is a lesbian. To reach its verdict against ASI, the jury must have been swayed by counsel for Deus's argument in closing that unconscious bias, and not intentional discrimination, was the reason for Deus's termination. This is not based on conjecture by Appellant, but the lack of evidence in the record that proves Easley's investigation reports were unworthy of credence.

Finally, the trial court erred in denying ASI's request for remittitur with respect to the jury's lost wages and emotional distress damages award. First, contrary to the trial court's findings, Deus's earnings after ASI terminated his employment were not modest. He found a job equivalent to his role with ASI and was making nearly the same salary for approximately nine months, a value that was seemingly not considered by the jury or the trial court. Additionally, had the trial court considered Deus's failure to mitigate damages, it would not have reached the same conclusion. Finally, the only explanation for the excessiveness of the jury's emotional distress award is passion, prejudice, or mistake. This is especially true given Deus's therapist's testimony supporting the conclusion that other factors, outside of Deus's termination, were the cause of his post-traumatic stress disorder.

For all of these reasons, the Court of Appeals should (1) reverse the jury verdict and enter judgment in favor of ASI; or (2) grant a new trial, and (3) if the verdict stands against ASI, grant remittitur with respect to the award of damages.

V. STATEMENT OF FACTS

A. AARP Services, Inc.

ASI is a wholly-owned taxable subsidiary of AARP, Inc., a not for profit parent company. JA 683. ASI negotiates, manages, and oversees relationships with providers of benefits to AARP members. JA 688. ASI and AARP are separate entities but share certain services, such as the Ethics and Compliance Office ("ECO") which investigates ethics complaints at both entities. Employees have an affirmative obligation to report suspected violations of the Code of Conduct. JA 752. Ensuring employees act in an ethical manner is important to AARP maintaining the trust of the public and an image of being an ethical company. JA 687-89, 752. The importance of compliance with the Code of Conduct is emphasized to employees in training. JA 371-74.

ASI has a history of openly supporting the LGBTQ+ community. JA 690. For example, ASI features articles that address the concern of older members of the LGBTQ+ community. *Id.* One of ASI's senior leaders, Robyn Motley, is an openly lesbian employee. JA 537, 583. ASI has had an LGBTQ+ employee resource group ("Prism") for more than 20 years. JA 691. ASI has participated in LGBTQ+ events, including local Pride parades. JA 1408. Before gay marriage was legalized, ASI offered health benefits to domestic partners. JA 691.

B. Deus's Employment with ASI

Deus is gay. JA 259. Throughout Deus's more than 10-years of employment with ASI, it was known that he was gay. JA 984. Prior to being employed with ASI, Deus had worked at AOL, Inc. *Id.* At AOL, he had worked with and socialized with Angela Jones ("Jones") who hired him at ASI and seven years later promoted him to Director, Program Management. JA 642. Jones approved Deus's use of volunteer hours to be the Executive Director of the Capital Pride committee for two consecutive years (2015 and 2016). JA 416, 987. Deus also was approved to take his same-sex spouse on an ASI-paid extended vacation in France in 2015. JA 401-02, 441.

Deus was familiar with ASI's Code of Conduct and Travel & Expense Reimbursement Policy. JA 371-372, 374. Deus also understood that the gift policy prohibited the acceptance of valuable privileges, and the Code of Conduct defined a "valuable privilege." *Id* at 372. Deus participated in ASI's training about the Code of Conduct. *Id.* at 372-74.

C. The Source Marketing Trip and Resulting Investigation

In October of 2017, Deus and his direct report, Heather Ingram ("Ingram"), a heterosexual employee, traveled to New York City and met with ASI vendor, Source Marketing. JA 382. During this time, ASI and Source Marketing were in the process of negotiating a statement of work ("SOW"). JA 383. Prior to the trip, Ingram

notified Deus that she intended to stay overnight with a friend, a Source Marketing employee, at her home. JA 382. Deus did not tell Ingram that she should not be accepting accommodations from her friend. JA 383. Instead, after Deus and Ingram returned from New York City, he reported Ingram to ECO for misconduct. JA 384.

ECO assigned the investigation to Easley. JA 779. Easley had worked for AARP for about 12 years. JA 750. The majority of his professional career had been as a federal law enforcement officer. *Id.* Prior to joining ASI, Easley had been a postal inspector. *Id.* Prior to being employed with AARP, Easley had received training about conducting investigations. JA 754. As part of his training, Easley learned to assess the credibility of persons whom he was interviewing. JA 755.

The scope of the investigation was expanded from Ingram to include Deus after ECO received an anonymous complaint alleging that Deus also engaged in misconduct related to the same trip. JA 755. Easley investigated both complaints, and concluded that both Deus and Ingram violated ASI's Travel and Expense Reimbursement Policy. JA 1401-07. Ingram also violated the Code of Conduct. JA 1406. Specifically, Easley classified the trip as personal for both Ingram and Deus given the brief nature of the meeting. JA 782, 1401. In addition to Ingram's overnight stay with a friend, Easley had learned that Deus had scheduled a doctor's appointment in New York City the morning after the Source Marketing meeting. JA 782-83.

D. The Sugar Bowl Trip and Resulting Investigation

ECO received a second anonymous report shortly after Deus's New York trip concerning the attendance of Deus and his direct report, Andrew Herd ("Herd"), a heterosexual, at the 2018 Sugar Bowl with an ASI vendor. JA 796-97, 186. The investigation again was assigned to Easley, who looked into whether the trip was a valuable privilege under ASI's Code of Conduct, and thus not an acceptable form of entertainment that an employee could accept. JA 798, 186, 808. A "valuable privilege" includes:

- ***Admission to semi-final*** or final ***sporting events*** like the play-off games, the Super Bowl, the World Series, or the Olympics
- Admission to rare or unusual performances by famous people or stars, season tickets or a series subscription to cultural events
- Memberships to sports, country or other types of clubs
- Experiences such as travel by private aircraft, boat or luxury vehicle
- Payment for travel or lodging

JA 1304. In 2018, the Sugar Bowl was one of the College Football Playoff Semifinal games. JA 1390.

During the investigation, Deus told Easley that he had received approval from Laurel Gillis ("Gillis"), an attorney in the Law Department. JA 1341 Easley interviewed Gillis, a lesbian employee (JA 123), who could not recall approving the acceptance of the admission to the Sugar Bowl. JA 1342, 159-60. Gillis further told Easley that she was not authorized to approve the acceptance of gifts. JA 140, 150, 158-60.

After the interview, Gillis sent Easley an e-mail in which she mentioned being aware of employees attending sporting events over the years and, specifically, two employees attending the Sugar Bowl; one of which was in the 2012-2013 timeframe. JA 1285. Easley understood that the 2011 and 2012 Sugar Bowl games was not a play off or semi-final game. JA 808.

Based on his findings, Easley determined that Deus and Herd violated ASI's Code of Conduct and Travel and Reimbursement Policy. JA 1339. Specifically, Easley concluded that Deus failed to receive approval for the trip to the Sugar Bowl from ASI's legal department, as directed by his supervisor Victoria Borton ("Borton"). JA 1343-44. Easley also concluded that Deus, the supervisor, encouraged Herd, the direct report, to attend the sporting event despite the lack of approval. *Id.* Finally, Easley determined that Deus had lied to him during the investigation. JA 1344.

Easley presented his findings and determinations associated with the two investigations to Loizzi, then-Human Resources Consulting Services Director. JA 1103, 1117. Loizzi was a member of Flanagan's leadership team, and provided advice on human resources issues. JA 1037. Loizzi, a gay employee, (JA 1105) reviewed the investigation reports, and had no questions with respect to Easley's findings. JA 1120-21. After receiving the two investigation reports, Loizzi conferred with the legal department and his superior. JA1113-14, 1118, 1121-22. It was

Loizzi's practice to consider prior disciplines when making a recommendation for discipline.

> Q How do you decide what discipline is appropriate?
>
> A We look at the circumstances and the severity, what was substantiated through the investigation, look at potential other precedents, other situations that resulted in a precedent, and then determine the level of discipline or action that's taken.
> Q And so looking at precedents, to the extent you do, would you have to look at prior discipline?
>
> A Under the same circumstances, yes, as whatever the investigation was about.

Loizzi then made a recommendation to Flanagan about the discipline for Deus, Ingram, Herd and Borton. JA 1121-22. Based on the reports and Loizzi's advice, Flanagan made discipline decisions.

Loizzi recommended that ASI should terminate Deus (JA 1122) and Ingram (JA 1114). Loizzi did not recommend the termination of Herd because in his opinion Herd was encouraged to attend the game by Deus, his supervisor. JA 1122. Borton was issued a written warning for trusting Deus and failing to personally speak with the legal department regarding the trip and failing to provide proper leadership. JA 1125-26.

E. Deus's Employment After His Termination from ASI

Deus was earning $175,000 per year, plus incentives when he was terminated. JA 348. Six months after his termination from ASI, Deus was hired at Arcadia

Power, where he served as Arcadia Power's Director of Partner Marketing and earned a $150,000 salary. JA 348, 1185. Deus began having "problems" at Arcadia Power and was laid off in April of 2019. JA 349, 1192. After his termination from Arcadia Power, Deus started an online sexual lubricant company and spent most of 2020 building this business and working at SecondStar, a company which he and his husband co-own. JA 358-59, 361.

F. Dave Austin As a Comparator

Dave Austin was employed with ASI from June 2006 to March 2019. JA 523. Austin was hired as a Director (JA 524); promoted to Vice President of Marketing, and selected to be the Managing Partner of an internal advertising agency, Inflent50 during his last seven or eight years of employment; *i.e.*, approximately 2011 or 2012. JA 523. Austin's supervisors were Jeanne Alexander (JA 554), Linda Caliri and Motley (JA 558, 537). Austin was not supervised by Borton or Jones.

In his roles, Austin travelled frequently. JA 529. Austin travelled for Quarterly Business Reviews. JA 528-29. Austin would socialize with ASI providers who offered benefits to AARP members. JA 530. Austin would for example attend concerts (e.g., Bruce Springsteen and Billy Joel), baseball games, basketball games and participate in golf outings. JA 530-32, 534-535. Austin never received a golf membership from a provider. JA 579. Austin never attended a Stanley Cup final or World Series game with a provider. *Id*. Austin attended events with the approval of

his supervisor, and when necessary the legal department. JA 535-36. To Austin's knowledge, no one reported his socializing to ECO. JA 580.

In 2013, when Austin was the VP, Marketing Services, ECO conducted an investigation of a vendor relationship with ASI. JA 549, 1351. During the course of that investigation[2], Easley looked into the travel expenses of Austin. JA 202-03. That investigation determined that in 2012 and 2013 there were (1) 41 instances when Austin did not submit travel authorization requests in advance of the travel as required by the Travel & Expense Reimbursement Policy and his supervisor, Caliri, authorized the travel after the fact; (2) $2,905.18 of unreimbursable travel expenses; and (3) extending business travel for personal reasons. JA 205, JA 1360-63. Then President and CEO, John Wider (JA 548, 583-84) was informed of Easley's findings and determinations of violations of ASI policy. JA 1352-75. There was no finding that Austin had accepted a gift which was a "valuable privilege." Wider chose to sternly counsel Austin; document the discipline in Austin's personnel file; and require him to reimburse ASI for the improperly reimbursed expenses. JA 584, 587. Wider made it clear that future violations by Austin would not be tolerated, and he would be fired. JA 540-41, 554, 584.

[2] At trial, Austin testified that he was never shown the report (JA 551, 553, 557, 559)

Austin in his capacity as VP, Marketing Services (JA 575) attended the 2011 and 2012 Sugar Bowl games, which were not semi-final games (JA 574-75). When Austin attended the Sugar Bowl, there was no semi-final or championship game structure. *Id.* Legal approved his attendance. JA 575, 577. At that time, Austin reported to Caliri who reported to Alexander who reported to Wider. JA 576-77.

G. Jury Instructions

Deus proceeded on the theory that the sole reason for his termination was his sexual orientation. The trial court therefore proceeded with the following jury instruction:

> The fact that Deus is a gay man and was terminated is not sufficient, in and of itself, to establish Deus' claim. You may not find that an adverse employment action is unlawful solely because you disagree with the employer's stated reasons or solely because you believe the decision was harsh or unreasonable.

JA 1419. The instructions further stated:

> [I]t is Plaintiff's burden to show that the non-discriminatory reason provided by the employer is false and that the employer's action actually was motivated, in whole or in part, by a discriminatory reason.

JA 1420.

Contrary to the jury instruction, during closing argument, counsel for Deus argued that unconscious bias caused Deus's termination. JA 1206. However, there is no expert evidence in the record about unconscious bias. On March 15, 2024, the jury returned a verdict finding in favor of Flanagan and against ASI. JA 1426-27.

VI. ARGUMENT

A. The Trial Court Erred in Finding That There Was Sufficient Evidence for the Jury to Determine That ASI Discriminated Against Appellee Based on His Sexual Orientation

1. Standard of Review

The appellate court's review of a trial court's denial of a motion for judgment as a matter of law is *de novo*. *Hill v. Medlantic Health Care Grp*., 933 A.2d 314, 322 (D.C. 2007). The Court of Appeals applies the same legal standard as the trial court does in ruling on the motion in the first instance. *Ishakwue v. District of Columbia*, 278 A.3d 696,706 (D.C. 2022). The Court of Appeals must determine whether a reasonable jury could have found in favor of the appellee, viewing the evidence in the record in his favor. *NCRIC, Inc. v. Columbia Hosp. for Women Med. Ctr., Inc*., 957 A.2d 890, 902 (D.C. 2008)("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 part, could have reached the verdict in that party's favor."). When the jury has no evidentiary foundation on which to predicate intelligent deliberation and reach a reliable verdict, verdict must be entered for the defendant as a matter of law. *Scott v. James*, 731 A.2d 399, 403 (D.C. 1999).

In reviewing the denial of a motion for judgment as a matter of law, the Court of Appeals must review the record as a whole, drawing all reasonable inferences in favor of the appellee, but making no credibility determinations or weighing any

evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149-50 (2000)[3]. Reversal is warranted when "the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) ("The trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict."); *see also Iron Vine Sec., LLC v. Cygnacom Sols., Inc.*, 274 A.3d 328, 338 n.9 (D.C. 2022)("If . . . the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party . . . the court may . . . grant a motion for judgment as a matter of law[.]").

B. The Jury's Inconsistent Verdict Cannot Stand

The record is devoid of direct evidence of sexual orientation discrimination. The ultimate burden of persuading the jury that ASI intentionally discriminated against Deus remained at all times with Deus. *Hollins v. Federal Nat. Mortg. Ass'n*, 760 A.2d 563, 571 (D.C. 2000) (citing *Arthur Young*, 631 A.2d at 361 and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993)). Deus was required to prove that ASI's proffered reason for his termination "was not the true reason but was in fact merely a pretext 'to disguise discriminatory practice.'" *Atlantic Richfield Co. v.*

[3] Rule 50 of the Superior Court Rules of Civil Procedure is construed in light of the meaning of Federal Rule of Civil Procedure 50, as the two rules are "substantially identical." *Wash. Inv. Partners of Del., LLC v. Sec. House, K.S.C.C.*, 28 A.3d 566, 580 n.18 (D.C. 2011).

District of Columbia Comm'n on Human Rights, 515 A.2d 1095, 1100 (1986). In determining whether the proffered legitimate business reason did not actually motivate the adverse employment decision, courts consider whether there are "such weaknesses, implausibilities, inconsistencies, incoherences or contradictions in the proffered legitimate reason for [the employer's] actions that a reasonable factfinder could find them unworthy of credence." *Hsieh v. Formosan Ass'n for Pub. Affs.*, 316 A.2d 448, 457 (D.C. 2024)(citations omitted).

Viewing the evidence in the light most favorable to Deus can result in only one conclusion: the evidence simply does not support the jury's inconsistent findings that Flanagan did not discriminate against Deus based on his sexual orientation, but ASI did discriminate against him based on his sexual orientation. For claims of discrimination based on disparate treatment under the DCHRA, "liability depends on whether [sexual orientation] actually motivated the employer's decision." *Washington Convention Ctr. Auth. v. Johnson*, 953 A.2d 1064, 1073 (D.C. 2008). Deus was required to prove that his sexual orientation, "actually play[ed] a role in [ASI's decisionmaking] process and had a determinative influence on the outcome." *Reeves*, 530 U.S. at 144.

Further, Deus was required to demonstrate that his sexual orientation was a substantial contributing factor to ASI's decision to terminate his employment. *See Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 369 & n.32, 370 (D.C. 1993); *see*

also District of Columbia v. Bryant, No. 16-CV-1135 (D.C. Jan. 4, 2024) (quoting *Maestas v. Segura*, 416 F.3d 1182, 1188 (10th Cir. 2005) ("Where an improper factor exerts little or no influence on the employer's decision, such factor cannot be said to have played a *substantial* part in the employment decision.")). Given, the evidence, the inconsistent verdict demonstrates that ASI did not discriminate against Deus based on his sexual orientation as the jury found that the ultimate decisionmaker did not discriminate against Deus. Moreover, the record is devoid of any evidence that Loizzi or Easley, the only other persons arguably involved in the decision-making chain, harbored animus toward Deus because of his sexual orientation.

Incredibly, the jury found that Flanagan did not discriminate against Deus based on his sexual orientation, but ASI did, given the weight of the evidence. Notably, the evidence showed that Flanagan did not simply rubber stamp Easley's investigation reports. While Flanagan did not conduct an independent investigation, he determined the level of discipline in consultation with Loizzi independent of Easley. The record shows that Flanagan consulted with Loizzi because he understood ASI's policies and to ensure that any decision regarding discipline would comply with the DCHRA. JA 1042-44. Loizzi testified that he consulted with his supervisor and the legal department, and would have considered other discipline for

similar conduct before making his recommendation. JA 1112. Ultimately, however, it was Flanagan's decision to terminate Deus.

The record shows that Flanagan was not ASI's President and CEO when Austin attended the Sugar Bowl or when Easley determined during an investigation that Austin had violated the Travel & Expense Reimbursement Policy on multiple occasions. Rather, Wider determined Austin's discipline as CEO following that investigation. Deus introduced no evidence that Wider harbored discriminatory animus based on sexual orientation. Thus, any inference that Wider gave Austin preferential treatment because of his sexual orientation is based purely on conjecture.

1. Deus failed to prove that ASI should be held liable based on the theory of subordinate bias.

Since the jury found that the actual decisionmaker (Flanagan) did not have discriminatory reasons for terminating Deus, for the verdict to stand the decision must have been tainted by another member of management's involvement or influence. *See Furline v. Morrison*, 953 A.2d 344, 354 (D.C. 2008). That is, Deus had to proceed on "subordinate bias" theory. *Id* at 355.

Under the "subordinate bias" theory, a formal decisionmaker acts merely as a cat's paw for or rubber-stamps a decision, report, or recommendation of a biased subordinate. *Id.*

> In the employment discrimination context, "cat's paw" refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme

> to trigger a discriminatory employment action. The "rubber stamp" doctrine has a more obvious etymology, and refers to a situation in which a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate.

Id. (citing *Equal Employment Opportunity Comm'n v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484 (10th Cir. 2006)). Moreover, there must be evidence that the subordinate had more than mere influence or impact in the decisionmaking process. *Furline*, 953 A.2d at 356 ("To prevail on a subordinate bias claim, a plaintiff must establish more than mere 'influence' or 'input' in the decisionmaking process. Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action."). *See e.g., Staub v. Proctor Hosp*., 562 U.S. 411, 422 (2011) (holding that the cat's paw theory applies if a supervisor performs an act motivated by discriminatory animus that is "*intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action." (emphasis in original); *Todd v. JB for Governor*, 19 C00392 (N.D. Ill. Aug. 17, 2021)(Court found that plaintiff's cat's paw theory failed because (1) plaintiff failed to present evidence from which a reasonable jury could conclude that the supervisor's behavioral reports were motivated or inappropriately colored by discriminatory animus, and (2) plaintiff did not present any evidence that she was reprimanded or counseled for behavioral issues that went unaddressed with other employees, or that her supervisor made negative reports about plaintiff regarding conduct that she excused for others).

A corporate entity must act through individuals. *See Fox v. Johnson & Wimsatt*, 31 F. Supp. 64, 66 (D.C. 1940)("A corporation must act by and through its agents, directors or trustees because it can act in no other way."). Based on the evidence in the record, it is unclear whom the jury could have found harbored animus towards Deus because of his sexual orientation and caused his termination. The record shows that the only other individuals who played a role in the decision to terminate Deus, in addition to Flanagan, were Easley and Loizzi.

Neither Easley nor Loizzi was involved in the decision regarding the discipline Austin received for his violations of the Travel and Expense Reimbursement Policy. Notably, there was no evidence in the record that ASI deviated from a standard of discipline or process when disciplining Deus. Even viewing the evidence in the light most favorable to Deus, no reasonable jury could find that ASI's reason for terminating him was pretextual and discrimination based on his sexual orientation was more likely the reason for his termination. When all of the evidence in the record is considered, a reasonable jury could not have decided that Easley or Loizzi had a discriminatory attitude towards Deus because of his sexual orientation.

2. There is no evidence that Easley's actions were a pretext for discrimination based on sexual orientation.

The evidence in the record shows that ASI decided to terminate Deus based on the two investigations which Easley conducted whereby it was determined that

he had (1) violated ASI's Code of Conduct and the Travel and Expense Reimbursement policy, (2) failed to adequately lead subordinates, and (3) lacked candor during both ECO investigations into his conduct. Thus, as the Court held in *Hollins*, Deus needed to present evidence showing not only that the investigation and reports were a pretext for terminating him but also that they were a pretext for terminating him because of his sexual orientation. 760 A.2d at 573.

Easley was the investigator, but there is no evidence in the record that he initiated the investigations. In fact, the record shows that Deus initiated the Source Marketing investigation, and the scope was expanded due to an anonymous complaint. Consistent with its practice, ECO initiated the investigation upon receipt of the complaint.

There is no evidence in the record that Easley provided misinformation to Loizzi and Flanagan. *Furline* at 357 ("There is no evidence that [the subordinate] influenced the decisionmakers by furnishing misinformation to them or otherwise."). Further, Easley did not include any recommendations for discipline in either of the two investigation reports, which he prepared. That was a management decision.

Even if the jury found that Easley had an influence on the decision to terminate Deus, there is no evidence that he was biased because of Deus's sexual orientation. Easley conducted the investigation into both Deus and Ingram's trip to New York City and found that both of them, regardless of their respective sexual orientations,

violated ASI's policies. The jury could not reasonably have concluded that Easley harbored the animus when he found that both heterosexual and gay employees engaged in policy violations. To reach the conclusion that ASI discriminated against Deus, the jury had to have relied on conjecture without evidence.

At trial, Deus did not contend that ASI did not rely in good faith on the findings and determinations of the two investigations. Instead, Deus sought to undermine Easley's investigation. First, Deus presented no evidence that Easley participated in the decision to terminate his employment. The evidence in the record shows that the only recommendations which Easley would make related to improving systems for ensuring compliance with the Code of Conduct and the Travel & Expense Reimbursement Policy. JA 758-59. However, Deus did not deduce any evidence which showed that Easley lied about his findings and determinations, and harbored discriminatory animus towards Deus because of his sexual orientation. Easley denied that sexual orientation was a factor in his investigations. JA 760.

> Q Why is an individual's sexual orientation or marital status not relevant or germane in your investigations?
>
> A Our investigations are related to their conduct and adherence to our code of conduct and our policies and procedures, and that's all we consider. We compare the conduct that was observed or alleged to the evidence available to support or not support the allegations. And then -- I'm sorry. I lost my place there just a little bit. The issue is the conduct as it compares to our policies and procedures rather than any other factors.

JA 760-61.

Notably, Deus could not and did not refute the evidence that Easley investigated Ingram, a heterosexual employee, for her conduct on the same New York City trip and found that she too violated ASI's policies. The record is clear that Ingram also was terminated because of the same Easley investigation.

Easley did find that Deus made false statements, but did not make similar assessments of credibility for heterosexual employees. There however is no evidence in the record to support the speculation that Easley "targeted" Deus with respect to this determination. There is no evidence in the record from which the jury could have inferred that Easley's interpretation of Gillis's equivocating about whether she spoke to Deus about his attendance at the 2018 Sugar Bowl was unreasonable; much less because of Deus's sexual orientation. There is no evidence of Easley making inappropriate statements or comments about persons based on their sexual orientation. To the contrary, the evidence showed that Easley had never been accused of discriminating against a person because of their sexual orientation. JA760. There is no evidence in the record that Easley believed Ingram, Herd or anyone else interviewed during the investigations lied to him or were evasive, and it was not noted in the related investigation report. Nor did Deus produce evidence that Easley did not follow his usual process for conducting investigations. *See, e,g.*, *Hollins*, 760 A.2d at 576 ("To the contrary, the evidence demonstrated that in Hollins' case the Fannie Mae executives followed the procedures they had used in

the past, and thus that they treated Hollins fairly, regardless of what really may have been in their mind."). It is indisputable that Easley did not sweep under the rug the actions of Herd, Austin, Borton or Ingram. It should be noted that Easley did not find that Ingram was evasive, and still determined that she too violated the same policies as Deus.

No reasonable jury could conclude that Easley's determinations were based in discriminatory animus when he found that a heterosexual violated those same policies, and as a consequence she was terminated. It is pure speculation that Easley viewed Deus as evasive because he was "targeting" him as a gay employee, and there is no evidence in the record to support that speculation.

3. There is no evidence that Loizzi discriminated against a member of his own protected category.

The Court of Appeals cannot disregard the evidence in the record that it was Loizzi, also a gay employee, who recommended the lesser sanction for Herd for his attendance at the 2018 Sugar Bowl, or Austin, who attended the 2011 and 2012 Sugar Bowl games. Courts have found that where the decision-maker is of the same protected class as the employee, discrimination is not implausible, but the burden is higher. *See, e.g., Ranowsky v. Nat'l R.R. Passenger Corp*., 244 F. Supp. 3d 138, 144 (D.D.C. 2017)("Courts in [this] District have repeatedly held that a decision-maker's inclusion in the same protected class as the . . . plaintiff cuts against any inference of discrimination."). The evidence in the record shows that Loizzi testified that

sexual orientation had nothing to do with his recommendation to terminate Deus. JA 1118.

> Q And when you were making your recommendation to Mr. Flanagan, did Mr. Deus' sexual orientation play any part in your recommendation to him?
>
> A No, it did not.
>
> Q Or Mr. Deus' marital status?
>
> A No, it did not.
>
> Q Why not?
>
> A It had nothing to do with the investigation or the outcome of the investigation and what was substantiated with regard to the issues that were being investigated.
>
> Q And how are you sure of that?
>
> A We never discussed it. It never came up. It had nothing to do with the claim or the -- or what was investigated or what was questioned. And I would have had a heightened awareness about it since I'm gay and would have had concerns.
>
> Q What do you mean you would have had concerns?
>
> A I would have been concerned if there was any kind of discussion about sexual orientation, being a gay person in the workplace.

JA 1118-19. There is no evidence in the record that Loizzi did not believe in good faith that Easley's findings and determinations warranted termination. JA 844-46. *See Hollins*, 760 A2d at 574 ("To prove pretext in the context of this case, Hollins [had to] establish that Fannie Mae did not rely in good faith on the findings and recommendations of the two independent investigations.") With respect to Herd, even if the jury disbelieved that Herd attended the 2018 Sugar Bowl only because

his direct supervisor told him to go, the issue was whether Loizzi truly believed that a lesser sanction was warranted based on the report. JA 845.

Loizzi recommended termination for both Ingram and Deus, regardless of their respective sexual orientations after consulting with the legal department and his supervisor. The jury could not have reasonably concluded that a gay employee harbored discriminatory animus against someone in his own protected class while he suggested the termination of another heterosexual employee at the same time.

a. The trial court erred in concluding that a reasonable jury could have found pretext through comparator evidence.

The evidence in the record was not sufficient for the jury to conclude that Deus was treated differently from his ***similarly situated*** heterosexual peers. An employee can demonstrate an employer's discriminatory intent by citing the employer's better treatment of similarly situated employees outside the plaintiff's protected group. "An employee is considered similarly situated to the [employee] for the purpose of showing disparate treatment when all of the relevant aspects of the [employee's] employment situation are nearly identical to those of the other employee." *Hollins*, 760 A.2d at 576. The similarity between the plaintiff and the other employee must exist in all relevant aspects of their respective employment circumstances including their rank in the company and the alleged misconduct. *Id.* at 578 (citation omitted). "[T]o be similarly situated, the plaintiff and the other

employee must have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Id*.

As noted above, Deus was terminated based on the determination of Easley's investigation that he (1) violated ASI's Code of Conduct and the Travel and Expense Reimbursement policy, (2) failed to adequately lead subordinates, and (3) lacked candor during both ECO investigations into his conduct. Here, the jury likely inferred ASI discriminated against Deus looking at the evidence in the record regarding Herd, Borton and Austin. Unlike for Deus, Loizzi did not recommend the termination of Herd and Borton based on Easley's findings and determinations relating to the 2018 Sugar Bowl. In addition, there was evidence that Austin was permitted to attend the Sugar Bowl on two prior occasions. Also, Austin had been involved in a prior ECO investigation in which he was determined to have violated ASI's Travel and Expense Reimbursement Policy. However, a close look at the record shows that neither Herd, Borton nor Austin were similarly situated to Deus.

The only similarity between Deus and Austin with respect to the attendance at a Sugar Bowl game and being the subject of an ECO investigation was they both worked for ASI. Austin testified that he would obtain permission from his supervisor and the legal department to attend events (JA 535-38), and there was no evidence to show that he was not being truthful and did not have approval to attend the 2011 and

2012 Sugar Bowl games. In contrast, the record shows that Easley did not believe that Gillis approved Deus accepting the invitation to the 2018 Sugar Bowl. Easley testified that Deus's sexual orientation was not a concern in this investigation. JA 760.

Moreover, there is evidence in the record that Austin attended concerts and participated in golf outings with ASI vendors and/or partners with the knowledge of his supervisors and the legal department. JA 535-36. However, there is no evidence in the record that Easley (or Loizzi) had knowledge of these occurrences, or that Easley or Loizzi determined that Austin accepted a valuable privilege in violation of the Code of Conduct. To the extent that the jury determined that it was unfair that Austin was able to attend a Billy Joel or Bruce Springsteen concert and Deus was terminated, in part, for accepting an invitation to a weekend in New Orleans for the Sugar Bowl, Austin and Deus were not similarly situated.

With respect to the ECO investigation of Austin, Wider was the President & CEO who decided the discipline; not Flanagan. Borton did not approve Austin's travel or expenses. Austin was VP Marketing Services during the time period of the investigation. JA 1354. Austin was determined to have violated the Travel & Expense Reimbursement Policy. Deus was found to have violated that Policy and the Code of Conduct. JA 1367, 1343-44.

Austin testified that he attended the 2011 and 2012 Sugar Bowls when he was the Vice President of Marketing. JA 575-76. Deus was a Director. Austin was approved to attend the Sugar Bowl because it was just a bowl game and not a championship game. JA 566, 574-75. The 2018 Sugar Bowl was a College Football Playoff semifinal bowl game. JA 1390-91. There is no evidence that ECO received a complaint that Austin had attended the 2011 and 2012 Sugar Bowls in violation of the Code of Conduct. There also is no evidence that Easley, much less ECO, ever was on notice that Austin possibly attended the Sugar Bowl in violation of the Code of Conduct, and ECO chose not to initiate an investigation. Further, Deus failed to show that Easley was lying or wrong that the Sugar Bowl was not a semifinal game when Austin attended and therefore was not a "valuable privilege."

Deus's comparator evidence for Herd and Borton is likewise unavailing. There was no evidence that Easley determined that Borton engaged in the same type of conduct as Deus. Rather, Loizzi determined that Borton's handling of Deus's request to attend the Sugar Bowl did not meet ASI's expectations of a leader as a Vice President for ensuring compliance with its policies as he found with respect to Caliri in the investigation of Austin. JA 1125-26, 1365. Deus presented no evidence that Borton accepted a valuable privilege and was not terminated. Therefore, the jury could not reasonably have concluded that her discipline, or lack thereof, is evidence of intentional discrimination based on sexual orientation.

As to Herd, Loizzi testified that Herd received a written warning, rather than termination, because his direct supervisor, Deus, encouraged him to attend the game and told him it was allowable. JA 1122. There is no evidence in the record from which a jury could infer that Loizzi did not believe in good faith that Herd and Deus should be treated differently because Deus was the supervisor. There is no evidence in the record or case authority to support a finding that it was unreasonable for ASI to hold a supervisor to higher standard than his direct report where they engaged in similar conduct.

As such, neither Austin, Borton nor Herd support Deus's assertion of disparate treatment.

C. The Trial Court Erred in Denying ASI's Request for a New Trial

1. Standard of Review

A trial court has "broad latitude" in ruling on a motion for new trial. *United Mine Workers of Am., Int'l Union v. Moore*, 717 A.2d 332, 337 (D.C. 1998). The trial court's ruling is reviewed only for abuse of discretion. *See Washington Center Auth.*, 953 A.2d at 1081(citing *Lewis v. Voss*, 770 A.2d 996, 1002 (D.C. 2001)). In reviewing whether a trial court abused its discretion, the appellate court determines whether the decisionmaker failed to consider a relevant factor or relied upon an improper factor and whether the reasons given reasonably support the conclusion. *Ford v. Chartone, Inc.*, 908 A.2d 72, 84 (D.C. 2006)(citing *Johnson v. United States*,

398 A.2d 354, 365 (D.C. 1979)). A court abuses its discretion when it makes an error of law. *Ford*, 908 A.2d at 84 (D.C. 2006)(citing *Allen v. Yates*, 870 A.2d 39, 50 (D.C. 2005).

The trial court has "the power and [the] duty to grant a new trial if the verdict [ ] [is] against the clear weight of the evidence, or if for any reason or combination of reasons justice would miscarry if [the verdict] were allowed to stand." *Gebremdhin v. Avis Rent-A-Car Sys., Inc.*, 689 A.2d 1202, 1204 (D.C. 1997) (emphasis and alterations in original) (quoting *Fisher v. Best*, 661 A.2d 1095, 1098 (D.C. 1995)). In ruling on a motion for new trial, the trial court must consider "all the evidence, both favorable and unfavorable." *Lyons v. Barrazotto*, 667 A.2d 314, 324 (D.C. 1995) (citation omitted).

When acting on a motion for new trial, the trial judge need not view the evidence in the light most favorable to the non-moving party. "Indeed, the judge can, in effect, be the 'thirteenth juror;' he [or she] may 'weigh evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict.'" *Etheredge v. District of Columbia*, 635 A.2d 908, 917 n.11 (D.C. 1993) (emphasis added); *accord, Fisher*, 661 A.2d at 1098.

2. The trial court and the jury ignored both evidence and the jury instructions in reaching their respective conclusions

In its Order, the trial court denied ASI's request for a new trial because it found sufficient evidence for the jury to conclude that Deus's termination was the

result of discriminatory animus based on Easley's report, Loizzi's termination recommendation, and Flanagan's alleged rubberstamping of the termination decision. Therefore, the trial court found that the verdict was not a "seriously erroneous result." JA 1433. As outlined above, the jury's verdict is irreconcilable.

The evidence does not support a finding that Flanagan did not discriminate against Deus, but ASI did. Nor has Deus provided sufficient evidence for the jury to have concluded that Easley or Loizzi harbored discriminatory animus based on his sexual orientation, and influenced Flanagan's decision to terminate his employment. The trial court abused its discretion in denying ASI's request for a new trial because it did not consider all of the relevant evidence and did not recognize the jury's failure to follow the jury instructions.

The facts of this case, when analyzed with the jury instructions, do not reasonably support the trial court or the jury's conclusions. The jury instructions provided:

> The fact that Deus is a gay man and was terminated is not sufficient, in and of itself, to establish Deus' claim. You may not find that an adverse employment action is unlawful solely because you disagree with the employer's stated reasons or solely because you believe the decision was harsh or unreasonable.

JA 1419. The instructions also provided:

> [I]t is Plaintiff's burden to show that the non-discriminatory reason provided by the employer is false and that the employer's action actually was motivated, in whole or in part, by a discriminatory reason.

JA 1420.

Had the jury followed the above instructions, it could not have found that ASI was liable to Deus for sexual orientation discrimination, but the decisionmaker was not. Even if the jury disbelieved any or all of the reasons ASI provided for Deus's termination, it was still required to find an unlawful discriminatory motive. Indeed, Deus introduced no evidence from which it could be inferred that ASI's reason for terminating Deus was pretextual or that Loizzi or Easley had any discriminatory animus. Instead, the trial court and the jury ignored the overwhelming evidence to the contrary.

For the trial court to uphold the inconsistent verdict, it had to find that there was substantial evidence that Loizzi harbored discriminatory animus against his own protected class despite simultaneously recommending termination for individuals outside of his protected class. There is not a single piece of evidence in the record that reasonably supports this conclusion. Alternatively, the trial court had to have found substantial evidence that Easley discriminated based on sexual orientation (despite finding that heterosexual and gay employees violated ASI's policies) and influenced Flanagan's decision to terminate. Again, such evidence does not exist.

Further, the overwhelming evidence demonstrates that ASI is and has been at the forefront of supporting gay employees and the LGBTQ+ community openly. For example, Deus was promoted during his employment and enjoyed the benefit of

Community Builder volunteer hours to work with an LGBTQ+-affiliated group during his employment. Further, ASI employed and continues to employ gay and lesbian leaders, including Motley, Gillis, and Loizzi. The evidence supports one conclusion. The jury felt that it was unfair to terminate Deus, and relied on speculation and conjecture to second guess the decision not to terminate Herd and Borton, and Austin being permitted to attend concerts, baseball games, etc. *See Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996)(quoting *Milton v. Weinberger*, 696 F.2d 94, 100 (D.C. Cir. 1982)(The Court may not "second-guess an employer's personnel decision absent [a] demonstrably discriminatory motive.).

3. A new trial is warranted given counsel's prejudicial closing statement regarding unconscious bias

In its Order, the trial court found that there was sufficient testimony in the record to support a finding of intentional sexual orientation discrimination. The trial court asserted that it was not the arguments of counsel that supported this finding, but the testimony. The trial court erred in making this finding and ignored controlling case law supporting ASI's position that, as is here, a new trial is warranted when remarks contained in a closing statement may appeal to or instigate prejudice on a jury's verdict.

In *Scott v. Crestar Financial Corp*., the D.C. Court of Appeals held the trial court did not abuse his discretion by granting Crestar's motion for a new trial, based

upon prejudicial remarks contained in the closing argument of Plaintiff's counsel and the excessiveness of the verdict.[4] There, the Honorable John A. Terry wrote:

> …[T]he trial judge reasonably believed that he was confronted with an improper closing argument which appealed to and, indeed, instigated prejudice on the part of the jury, casting Crestar as a large, rich, and uncaring Goliath and Ms. Scott as a financially overmatched David. The jury's excessive award of damages might reasonably be viewed as reflecting prejudice against Crestar not only in relation to the amount of actual damages, but also with respect to the case as a whole.

928 A.2d at 689. Because sufficient testimony to support the jury's finding of intentional discrimination is lacking in this case, another aspect of the trial must have influenced the jury.

During closing remarks, counsel for Deus argued that unconscious bias tainted Easley's investigation of Deus:

> That's how -- that is -- that's the unconscious bias; right? The person who's just like me is -- oh, he's probably telling me the truth; right? The person who's sort of in this old boy's network, the person who is kind of (inaudible) -- oh, yeah, he's telling the truth. But the other -- if you're otherizing someone, that person is probably -- probably not telling the truth.

JA 1219. Not only is it improper to introduce evidence of a cultural ethos of discrimination to prevail on a claim of intentional discrimination, but Deus failed to introduce this evidence at all. *See, e.g., E.E.O.C. v. Wal-Mart Stores, Inc.*, No. CIVA

[4] At the new trial before a different judge, there were no new witnesses, nor was any additional evidence presented that had not been offered at the first trial. *Scott v. Crestar Fin. Corp.*, 928 A.2d 680, 682 (D.C. 2007). This time, the jury returned a verdict for Crestar on all counts. *Id.*

6:01-CV-339-KKC, 2010 WL 583681, at *4 (E.D. Ky. Feb. 16, 2010)(the court found the burden is on the plaintiff to prove that intentional discrimination occurred not just that gender stereotyping or intentional discrimination is prevalent in the world). Counsel for Deus's improper arguments during closing remarks had the ability to appeal to or instigate prejudice in the jury's verdict and ignored the relevant jury instructions.

If the trial court's decision to deny ASI's request for a new trial was based solely on the alleged presence of sufficient evidence to support intentional discrimination, it abused its discretion in reaching this conclusion. The trial court both failed to weigh the evidence properly, and consider counsel for Deus's prejudicial closing arguments influence on the jury.

D. The Trial Court Erred in Denying ASI's Request for Remittitur with Respect to the Lost Wage and Emotional Distress Awards

1. Standard of Review

This Court's review of the denial of a request for remittitur is governed by an abuse of discretion standard. *See George Wash. Univ. v. Violand*, 940 A.2d 965, 979 (D.C. 2008)(citing *Lacy v. District of Columbia*, 408 A.2d 985, 988 (D.C. 1979)).

An excessive verdict is one which "is 'beyond all reason, or . . . is so great as to shock the conscience.'" *Wingfield v. Peoples Drug Store, Inc.*, 379 A.2d 685, 687 (D.C. 1977) (citation omitted); *see Otis Elevator Co. v. Tuerr*, 616 A.2d 1254, 1261 (D.C. 1992); *Phillips v. District of Columbia*, 458 A.2d 722, 724 (D.C. 1983);

Graling v. Reilly, 214 F. Supp. 234, 235 (D.D.C 1963) (the test is whether the verdict "is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate"). An award of damages "must strike a balance between ensuring that important personal rights are not lightly disregarded, and avoiding extravagant awards that bear little or no relation to the actual injury involved." *Phillips*, 458 A.2d at 726 (citation omitted). It "must be proportional to the harm actually suffered," and the jury must be "instructed to focus on such harm in fixing compensatory damages." *Id.* (citations omitted).

2. The trial court erred in finding sufficient evidence to support the jury's award of lost wages

The trial court concluded that there was, "sufficient evidence" in the record of Deus's salary and benefits from ASI, and his comparatively modest earnings after his termination from ASI, to justify the amount of the verdict. JA 1442. The trial court abused its discretion in reaching this conclusion because it is not reasonably supported by evidence.

Generally, lost wages are comprised of the salary that the employee would have received from the employer but for the unlawful discriminatory acts. *Wisconsin Ave. Nur. Home v. Human Rights Comm'n*, 527 A.2d 282, 291 (D.C. 1987). The award should include what the employee would have received from the date of discharge until the jury verdict. The jury's award of $1,612,916.18 in lost income is excessive and not justified by the law or the evidence.

Specifically, Deus was earning $175,000.00 per year, plus incentives, at the time of his termination. Arcadia Power hired Deus to work in an equivalent role, earning $150,000.00 per year, plus commissions, six months after his termination from ASI. Deus remained in this role for approximately nine months before being laid off in April of 2019. The trial court refers to these earnings, and Deus's earnings from his tile installation and sexual lubricant business, as "comparatively modest." JA 1442. The evidence does not reasonably support this conclusion. Deus was hired in an equivalent role for a nearly equivalent salary for approximately nine months. And, Deus earned additional income during this time from his tile installation and sexual lubricant business. These earnings are in no way modest. Further, the length of Deus's employment with Arcadia Power broke the causal connection between alleged wrongful termination and future unemployment. *Wisconsin Ave. Nur. Home*, 527 A.2d at 292 (D.C. 1987) (Court found that the employees' subsequent employment of one month or less was short of the duration of subsequent employment that suffices to breach the causal chain that links wrongful termination with later joblessness.) The trial court abused its discretion in reaching this conclusion because it failed to consider the relevant evidence of interim earnings and controlling case law.

In its Order, the trial court did not address ASI's position that the jury's lost wages verdict was excessive because ASI demonstrated by a preponderance of the

evidence that Deus failed to mitigate his damages. If the trial court considered Deus's failure to mitigate damages, it would have concluded that remittitur was warranted.

Damages awards are subject to the defense of mitigation of damages. *District of Columbia v. Jones*, 442 A.2d 512, 524 (D.C.1982). The burden is on the employer to show that the employee "has obtained a substitute job, or could obtain one by reasonable effort." *Id*. (internal quotation marks omitted). As outlined above, Arcadia Power hired Deus in an equivalent role to his role at ASI. Further, the evidence demonstrates that Deus failed to diligently exercise good-faith efforts to find a new job after he was laid off from Arcadia Power. In fact, Deus testified that after his termination, he focused on his on-line sexual lubricant company by, among other things, getting the business license, incorporating the business, developing packaging, and creating a business plan in the summer of 2020. By admission, Deus is foreclosed from a damages award for the period following the summer of 2020 and the period after he incorporated his company on September 28, 2020. *See Conn v. Am. Nat'l Red Cross*, 149 F. Supp. 3d 136, 152 (D.D.C. 2016).

Because the trial court failed to consider Deus's failure to mitigate his damages, it erroneously denied ASI's request for remittitur with respect to the jury's lost wages award.

3. The trial court erred in finding sufficient evidence to support the jury's award of emotional distress damages

The jury's award of $578,351.00 in emotional distress damages was excessive and unsupported by the testimony. "Excessiveness refers not merely to the amount of the verdict but to whether, in light of all the facts and circumstances, the verdict appears to have been the product of passion, prejudice, mistake or consideration of improper factors rather than a measured assessment of the degree of injury suffered by the plaintiff." *Moss v. Stockard*, 580 A.2d 1011, 1035 (D.C. 1990). The trial court concluded that the jury's emotional distress award is not excessive enough to shock the conscious because Deus's testimony regarding feelings of worthlessness, inability to support himself and his spouse, and suicidal ideations support the jury's decision. Further, the trial court found that the jury finding that other factors in Deus's life caused his emotional distress rather than his termination does not render the verdict a result of passion, prejudice, or mistake.

The evidence does not reasonably support this conclusion. In fact, passion, prejudice, or mistake is the only reasonable explanation for the jury's emotional distress award when confronted with the testimony of Deus's licensed independent clinical social worker ("LICSW"), Dallas Sierra ("Sierra") which should have been

stricken.[5] Deus retained Sierra three and a half years after ASI terminated him. JA 477. Sierra testified that other factors, including trauma related to Deus's sister and father suffering from alcoholism, contributed to his post-traumatic stress disorder ("PTSD") diagnosis. JA 477-79, 511-13. Deus did not provide any testimony supporting the trial court's position that his termination, as opposed to childhood factors, was the true cause of his diagnosis. While the trial court references Deus's alleged suicidal ideations, Sierra testified that Deus did not have active ideations during his treatment and that he did not remember speaking to Deus regarding the same. JA 440, 508. The jury cannot rely on unsupported conjecture regarding Deus's alleged suicidal ideations to support a damages award, and the trial court certainly cannot either.

Additionally, Sierra testified that he departed from the standard classification of mental disorders used by mental health professionals, the DSM-5, when diagnosing Deus. JA 489. The DSM-5 requires "actual or threatened death, serious injury, or sexual violence." JA 490-92, 494. Sierra also testified that termination is not an event that results in a PTSD diagnosis. JA 492-93. The record evidence shows

[5] On January 24, 2024, Defendants filed a motion *in limine* to exclude the testimony of Sierra relating to a diagnosis of Post-Traumatic Disorder and General Anxiety Disorder on the grounds that it was unreliable and would create a substantial danger of undue prejudice or would mislead the jury. The trial court denied the motion and permitted Sierra to testify.

only that Deus's termination resulted in the cancellation of a trip to Costa Rica with friends. JA 407. It did not stop Deus from traveling worldwide shortly thereafter. The record does not demonstrate that Deus was a man experiencing trauma and the trial court abused its discretion in finding that the excessive emotional distress reward was not the result of passion, prejudice, or mistake. Thus, Deus failed to prove by a preponderance of the evidence that any PTSD, which Sierra may have diagnosed, was traceable to the termination of his employment with ASI. Thus, the trial court abused its discretion in not remitting Deus's compensatory damages award.

VII. CONCLUSION

For the foregoing reasons, the Court of Appeals cannot sustain the jury verdict.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation of DC Court of Appeals Rule 32(a)(5) because this brief is less than 50 pages, excluding the parts of the brief exempted by Rule 28(a)(1)-(4) and Rule 28(f).

2. This brief complies with the typeface and type style requirements of DC Court of Appeal Rule 32(a)(4) because this brief has been prepared using Times New Roman in 14-point font.

/s/ Alison N. Davis
Alison Davis

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August 2025, a true and correct copy of the foregoing Brief was filed electronically with the District of Columbia Court of Appeals, which will send a notice of the filing to all counsel of record.

/s/ Alison N. Davis
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