Case No. 25-CV-0176

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

AARP SERVICES, INC.

Appellant,

v.

RICHARD A. DEUS, JR.,

Appellee

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF ARGUMENT

Richard Deus, Jr. erroneously contends that he presented enough evidence for the jury to find that AARP Services, Inc. discriminated against Deus because of his sexual orientation, and thus the trial court did not err in denying ASI's motion for judgment as a matter of law. The weakness in Deus's position regarding the evidence is highlighted by the numerous misstatements of the record, transcripts and other matters, unsupported conclusory allegations and repeated failure to cite to the record or transcripts. Deus simply cannot and has not pointed to any facts in the record or transcripts, much less case authority that lead to the conclusion that the jury properly found that ASI discriminated against Deus based on his sexual orientation when it terminated his employment. Given the lack of evidence to support a finding that ASI is liable, it would be a miscarriage of justice to permit the verdict to stand.

Both parties agree that considering the evidence introduced at trial the jury could only have found ASI liable based on the "cat's paw" theory. Other than Jonathan Easley, Deus does not argue that the evidence shows anyone else acted with discriminatory intent. This Court's review of the record thus boils down to deciding one issue: whether there was evidence that Easley conducted his investigations in furtherance of an intent to cause the termination of Deus's employment *because of his sexual orientation*. To the contrary, the evidence shows Easley applied the same standard to heterosexuals and Deus.

The record show that Easley held Deus accountable for violating ASI's Code of Conduct and T&E policy. Most importantly, the record show that Easley held everyone, including managers, accountable, JA 456-457, 1368, regardless of their sexual orientation when he was tasked with looking into whether an employee's actions complied with ASI's standards of ethics.

Given the lack of evidence in the record, to show that the jury correctly found ASI terminated Deus's employment because of his sexual orientation, Deus improperly resorts to questioning the correctness of Easley's judgment during the investigations to prove pretext. *See, e.g,*, *Smith v. Gordon Hartogensis*, 541 F.Supp.3d 1, 15 (D. D.C. 2021) ("Showing pretext . . . requires more than simply criticizing the employer's decisionmaking process.")(citation omitted). Contrary to Deus's contention, there is no evidence that Michael Loizzi, a gay man, who recommended his termination, and Lawrence Flanagan who was the ultimate decision-maker, were the unwitting conduits of an illicit motive of Easley to get rid of Deus because of his sexual orientation.

Deus does not point to evidence of untruthfulness or lack of an honest belief regarding Easley's findings relating to, for example, his itinerary for the trip to New York City; his doctor's appointment; that the T&E Policy encouraged video or teleconferences when appropriate; that Deus accepted dinner and entertainment from the vendor while a statement of work was being negotiated; that the 2018 Sugar

Bowl was a valuable privilege; and that he told Herd they had permission to attend the Sugar Bowl. Deus recalls that the reason he was told that he was being terminated was "I accepted a valuable privilege from Allstate and dinner and a show from Source Marketing." JA 388. That explanation is consistent with Easley's reports.

Deus does not point to any evidence that Easley deviated from ECO's or his standard investigation process. JA 780-781, 797. In fact, the evidence shows that Easley was consistent in his conclusions. Yet, Deus wants the Court of Appeals to ignore the fact that the same investigations which resulted in Deus's termination, included both heterosexual and gay employees, and Easley found violations of ASI's Code of Conduct and/or T&E Policy for everyone investigated, regardless of sexual orientation. Indeed, Easley found using the same techniques and training of prior investigations that Heather Ingram, Andrew Herd, Victoria Borton and David Austin (all heterosexual) all failed to comply with ASI's policies and procedures. Notably, Deus points to no evidence in the record that termination was the mandated next step for him based on Easley's findings, but not any heterosexual person who also was found to have violated the same rules. Instead, the evidence shows that discipline was a discretionary decision by management; in this case Loizzi and Flanagan. JA 837, 1111-1112, 1116. Easley did not provide input regarding any discipline.

Deus contends that Easley's determination regarding Deus "appears to be a pre-ordained conclusion." Appellee's Brief ("App. Br.") 29. Yet, there is nothing in

the record or transcripts to support that inference. Even if true, there is no evidence to show that Easley had a bias towards Deus because of his sexual orientation. Deus also attempts to bolster the lack of evidence regarding Easley being hostile towards him by pointing to the termination of Jack Sanders, another gay man. However, the termination of Sanders does not paint a picture of Easley being hostile towards gay men working at ASI. There is nothing in the record or transcripts to connect Easley to Sanders. There is no evidence that Easley either investigated or participated in the decision to terminate Sanders. Based on the record, the only commonality between Deus and Sanders is Flanagan, who decided the appropriate discipline was termination in both cases. That is the same Flanagan whom the jury found had not discriminated against Deus based on his sexual orientation.

Deus's arguments regarding remittitur are likewise unavailing. ASI's position still stands: the jury's lost wages and emotional distress damages awards were the result of passion, prejudice, or mistake. Notably, Deus does not address ASI's argument associated with the three-year gap between Deus's termination and his retention of therapist, Dallas Sierra, Sierra's departure from the accepted criteria for diagnosing post-traumatic stress disorder, and Sierra's testimony that termination is not an event that results in a PTSD diagnosis.

Finally, with respect to ASI's request for a new trial, Deus relies on conclusory statements that lack evidentiary support to bolster his arguments. Deus

boldly contends that counsel's reference to unconscious bias during closing arguments was warranted, despite the lack of supporting evidence. Such contentions do not adequately support the trial court's denial of ASI's request for a new trial. In fact, by arguing unconscious bias, counsel for Deus was telling the jury that it could ignore the trial court's jury instructions.

For all of these reasons, and those outlined in ASI's opening brief, 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.

II. ARGUMENT

A. Deus Has Not Provided any Evidence Supporting a "Cat's Paw" Theory of Liability as the Basis for ASI's Liability

Deus concedes that to reconcile the verdict that Flanagan did not discriminate against Deus because of his sexual orientation there had to be evidence that someone at ASI other than Flanagan acted with discriminatory intent. Deus does not contend that he did not have to prove a specific person acted with intent to discriminate against him although at times he paints with a broad brush that ASI acted in a discriminatory manner. Rather, Deus devotes most of his arguments to showing Easley acted with discriminatory intent.

Deus contends that there is nothing inconsistent about the jury's verdict because the jury found that Flanagan relied unquestioningly on Easley's reports—

his only error being that he did not see the alleged discriminatory taint in them. App. Br. 31. There is simply no evidence[1] that Easley acted with intent to cause the termination of Deus because of his sexual orientation. *Furline v. Morrison*, 953 A.2d 344, 356 (D.C. 2008).

While Deus asserts that the jury is presumed to have followed the jury instructions, the evidence demonstrates that there is no question they failed to do so. The jury was instructed that they could not find for Deus "solely because [they] disagree with the employer's stated reasons or . . . because [they] believe the decision was harsh or unreasonable." JA 1418-19. Yet, that is what Deus focuses on in arguing that the verdict should be affirmed.

Deus concedes that Loizzi did not harbor any discriminatory animus. App. Br. 34-35. Instead, Deus contends that both Loizzi and Flanagan relied on Easley's investigation into Deus, which purportedly was "rife" with examples of Easley ignoring information or skewing information to find Deus guilty of policy violations. App. Br. 32. Even if there was evidence of Easley skewing evidence to find policy violations for Deus—which there is not— the jury was required to find that Easley

[1] ASI does not contend that Deus had to prove through direct evidence that ASI discriminated against him based on his sexual orientation. App. Br. 25. Rather, ASI made a single reference to direct evidence before examining the circumstantial evidence in this case.

did so because he harbored discriminatory animus towards Deus. There simply is no evidence in the record or transcripts to support that finding.

Deus contends there is sufficient evidence to support the jury's conclusion that ASI's proffered non-discriminatory reason was not worthy of belief or credible. App. Br. 25, 29. However, to reconcile the jury's finding that Flanagan, the person who made the decision to terminate Deus, did not harbor discriminatory animus because of Appellee's sexual orientation, the evidence had to show that Easley intended to cause Deus's termination because of his sexual orientation. There simply is no such evidence in the record. Deus attempts to cobble together evidence by critiquing Easley's investigation and pointing to the other gay man who was terminated, but not because of an investigation by Easley, to argue inconsistencies, deviation from established procedures or criteria and poor treatment of other gay employees. *See Hsieh v. Formosan Ass'n for Pub. Aff.*, 316 A.3d 448, 457 (D.C. 2024) ("courts consider whether there are 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence.'")(cleaned up).

Deus points to no evidence in the record to support a finding that Easley, Loizzi and Flanagan were not truthful when they testified that Easley did not recommend Deus's termination. In addition, the evidence shows that Easley found

that both Deus and his heterosexual colleagues engaged in policy violations. JA 204, 1343-44, 1366-68, 1406. Deus also points to no evidence that his fate was predetermined when Easley presented his findings and conclusions to Loizzi and Flanagan. Finally, Deus points to no evidence to show that Easley did not treat Ingram and Deus the same, and that Ingram's termination should have been disregarded in deciding whether Easley acted with discriminatory animus.

Deus also contends that ASI presented shifting rationales for Deus's termination which is evidence of pretext. App. Br. 28-29. The trial court rejected this argument in ruling on ASI's motion for judgment as a matter of law. JA 1437. Deus has not cured that defect in responding to ASI's arguments in support of vacating the verdict. Deus's contention that ASI proffered shifting rationales appears to be based solely on testimony from Loizzi and Flanagan. Deus concedes that there is no evidence of discriminatory animus on Loizzi's part, and the jury found Flanagan did not discriminate against Deus. Significantly, Deus points to no evidence in the record that Easley ever provided different findings or conclusions related to his investigations of Deus during the lawsuit; much less retracted any findings.

Deus suggests that Austin received preferential treatment. App. Br. 27. Specifically, Deus points to Austin's policy violations and lesser discipline as evidence of pretext. *Id*. Yet, Deus ignores one fatal flaw: John Wider was the CEO in 2013, not Flanagan. JA 1352-75. When Wider received Easley's report finding

policy violations, he decided to counsel Austin, who understood that future violations would not be tolerated. JA 554-555, 583-584. There is no evidence that Easley had a role in the discipline imposed. Easley did not sugar coat his findings and conclusions.

Lastly, Deus relies on Easley's conclusion that Deus lied during the investigation as evidence of pretext. App. Br. 28-29. This evidence is likewise unavailing. Deus contends that Easley included a section regarding false statements for his investigation into Deus and not for Herd or Austin. *Id*. at 28. There is no evidence in the record that Easley ever concluded that Herd or Austin made false statements. There is no evidence that Easley went digging for false statements that Deus made or purposefully sought to categorize him as a liar. Nor is there evidence that Easley deviated from his typical process for conducting investigations.

Instead, the evidence shows that Easley had an honest belief that Deus was not forthcoming with him. Easley uncovered contradictory statements and documents during his investigation, leading him to conclude that Deus had been evasive and made false statements to him during the investigation of the trip to New York City. With respect to Deus's attendance at the Sugar Bowl, Laurel Gillis, who also is gay, JA 123, never confirmed to Easley that she had approved Deus's attendance and testified accordingly. JA 159-160. Notably, Herd testified that Gillis

told him that he should not attend the Sugar Bowl when it was not a semi-final game because it could be perceived as a conflict of interest. JA 651-653.

1. There is no evidence that Easley's investigation of the trip to New York City was biased because of Deus's sexual orientation.

At the outset, it should be noted that Deus presents no evidence to dispute the fact that Easley began his investigation of the trip to New York City because Deus reported that he believed Ingram had violated the Code of Conduct. JA 775-776.[2] Instead, Deus questions the propriety of Easley's findings.

For example, Deus relies on Easley's decision to forgo speaking with Source Marketing regarding the business meeting as support for the jury finding pretext. App. Br. 32. Easley provides a plausible explanation. Easley testified that it was not necessary to speak with anyone from Source Marketing because he had no doubt that the meeting took place. JA 185-186. It was the length of the meeting that presented cause for concern and Ingram's and Deus's other activities. Moreover, Deus attempts to show that Deus was not treated consistently by pointing to evidence in the transcripts that Quarterly Business Reviews frequently occurred in person. The evidence shows that Easley did not conclude that QBRs did not occur in person.

[2] For point of clarity, the record shows that the investigation into the New York City trip was opened initially. Thereafter, ECO received an anonymous report which included allegations regarding Deus accepting gifts, which included tickets from Source Marketing and to the Sugar Bowl. *Compare* JA 1401 to App. Br. 9.

JA 842. Moreover, the evidence shows that the trips to New York City and the Sugar Bowl were not the first occasions on which Deus travelled on behalf of ASI, and the evidence shows that both Deus and Austin attended a concert with a provider. JA 289-290.

Without any evidence, Deus contends that the jury could have considered "the nearly unprecedented way that [] Deus's New York trip was assessed, and how his explanations were cavalierly rejected." App. Br. 25. Deus points to no evidence in the record that Easley had previously investigated a similar trip and reached a different determination. Assuming *arguendo* that the jury did find that Easley's determination that the trip was primarily for personal reasons was inconsistent with evidence that other employees tacked on personal travel or personal errands to business trips, App. Br. 25-6, there still needed to be evidence that Easley was aware and the inconsistency was a pretext for discrimination based on sexual orientation. *Washington Convention Ctr. Auth. v. Johnson*, 953 A.2d 1064, 1073 (D.C. 2008). The record is devoid of any evidence that could reasonably lead the jury to this conclusion.

What the evidence shows is that Easley also investigated Ingram, a heterosexual employee, regarding her conduct on the same New York City trip and found that she too, violated ASI's policies. JA 1406. Throughout Easley's report, he

states that the primary purpose of the New York trip was personal for both Ingram and Deus. For example, in his report, Easley made the following conclusions:

> ECO investigated whether Rick and/or Heather violated AARP's Code of Conduct (Code) in regards to conflict of interests and our Guidance on Acceptance of Gifts by accepting prohibited items from Source Marketing. The evidence suggests that the trip made to New York, NY (New York), by Heather and Rick on December 6-7, 2017, was more personal than due to a legitimate need to travel for business. We therefore included that in the scope of our investigation. . .
>
> As described in detail below, ECO found that Rick Deus and Heather Ingram violated the Code in regards to conflicts of interest and Guidance on Acceptance of Gifts when they accepted Valuable Privileges from Source Marketing.

JA 1401-1402.

Easley reached the same conclusion for both Deus and Ingram regarding the purpose of the New York City trip and the acceptance of gifts and valuable privileges from Source Marketing. ASI terminated Ingram for her conduct. JA 438, 1113-1114. There is no evidence that Easley singled Deus out or treated him differently during this investigation because of his sexual orientation. There simply is no evidence in Easley's report or testimony from which a reasonable juror could have inferred that Easley was more lenient on Ingram or any other heterosexual employee whom he investigated.

It is not enough for the jury to feel that Easley reached the wrong conclusion in his investigation that the New York City trip was primarily for personal reasons. JA 1419. Deus needed to have introduced evidence that Easley had previously

investigated heterosexual employees for similar travel and never found that they were not for a legitimate business purpose. In fact, Easley investigated Austin for his expense practices during travel and found he had violated ASI's policies. JA 202-05, 549, 1360-63. The evidence shows, however, that Austin and Deus were not similarly situated. In Austin's case, it was Wider, who determined Austin should be counseled, documented, and required to reimburse ASI for the improper expenses as opposed to terminated. JA 540-41, 554-555, 583-584. Like here, there is no evidence in the record to show Easley had a role in Wider's decision not to impose more severe consequences for Austin. The jury would have had to speculate regarding the reason for the difference in the consequences for Austin and Deus.

2. There is no evidence that Easley was biased in his investigation of Deus's attendance at the Sugar Bowl.

Next, Deus points to Easley's investigation into Herd's and Deus's attendance at a Sugar Bowl game as evidence of Easley's bias which influenced Flanagan and Loizzi's decision to terminate Deus. App. Br. 32-33. Again, Deus does not point to any evidence to show that Easley targeted Deus or set him up for termination. In fact, the evidence shows that Easley opened the investigation because of an anonymous report that two employees attended the Sugar Bowl. JA 796-97. It was only after the investigation began that Easley learned Deus was one of the employees. JA 797.

Deus contends that the evidence showed that Easley "disregarded" the past handling of Austin, who had been found to have violated the T&E Policy, in an investigation which Easley conducted. App. Br. 33. This argument, again, does not support the jury's verdict that ASI discriminated against Deus based on his sexual orientation. As noted above, the evidence shows that Easley was not the decisionmaker with respect to Austin's discipline; just as he was not for Deus, Herd, or Ingram. JA 824, 1053, 1114, 1122. Easley was not responsible for determining the consequence Austin faced. Easley simply looked at the information presented to him, and he indeed found that Austin was not in compliance with ASI's T&E Policy. Deus points to no evidence that shows it was Easley's practice to consider prior discipline for violations of the same policy when preparing his investigation report and making recommendations thereto, and he failed to do so when reaching his conclusions about Deus.

The same is true for Herd. Deus argues that Easley should have known Herd was aware that the Sugar Bowl was a semi-final game but instead chose to accept that he misunderstood the T&E Policy. App. Br. 32-33. Yet, there was a finding relating to Herd's knowledge in Easley's final report:

> Although Andrew relied on Rick's guidance, ***he still should have known that acceptance of this invitation would create a conflict of interest and that acceptance of Valuable Privileges is not permissible under any circumstances.*** . .

> We found that on November 10, 2017, Rick Deus and Andrew Herd received an email invitation for each to attend and bring a guest to the 84th Allstate Sugar Bowl from Saturday, December 30, 2017 to Tuesday January 2, 2018, ln New Orleans, LA The invitation clearly states that the Allstate Sugar Bow! will be the host to one of the College Football Playoff Semifinal games. Both accepted the invitation and attended. Each of them also brought a guest who attended the game with an Allstate-provided ticket. . .
>
> While Andrew told ECO he relied on Rick telling him that the trip had been cleared by legal counsel, ***Andrew must bear responsibility*** for not being personally aware of the Code's restrictions on accepting Valuable Privileges and understanding that acceptance of gifts of this nature create conflicts of interest.

JA 1340-1344 (emphasis added).

The record could not be clearer that Easley held Herd accountable for accepting the invitation to the Sugar Bowl. *See also* JA 660. There is no evidence in the record or transcripts to show Easley attempted to hide or sweep under the rug Herd's awareness that it was a semifinal game.

Next, Deus appears to argue that there is evidence of pretext because of the inconsistent consequences for attendance at the Sugar Bowl. App. Br. 32-33. The evidence does show that Loizzi and Flanagan were more lenient with Herd and Austin for attending the Sugar Bowl. However, the evidence showed that Easley did not decide the level of punishment for Herd – it was Loizzi and Flanagan. Moreover, the evidence shows that Easley did investigate Austin's attendance at the Sugar Bowl as part of his investigation of Deus and Herd, and determined it was not a valuable privilege when he attended. JA 808. Deus points to no evidence in the record to show

that Easley was lying when he testified that the Sugar Bowl was not a semi-final playoff game and thus not a valuable privilege in 2011 and 2012 when Austin attended. JA 766-767. As with Ingram, Easley found that Herd and Austin, both heterosexual employees, violated ASI's policies. JA 1360-63, 1339, 1401-1407. With respect to Herd, Deus points to his football fandom as evidence that he knew the game was a "valuable privilege." App. Br. 26. Easley's investigation concluded that both Deus and Herd had violated ASI's Code of Conduct and T&E Policy. It was not Easley, but Loizzi and Flanagan, who determined Herd's discipline should be mitigated given his supervisor, Deus, told him they had approval to attend the Sugar Bowl. JA 1122-1123.

3. Deus erroneously contends that Sanders' "me too" evidence supported a finding that Easley acted with intent to discriminate against Deus because of his sexual orientation.

Deus points to Sanders' termination as evidence of ASI's purported discriminatory treatment of gay employees. App. Br. 27-28. First, Deus contends that "[L]ike Mr. Deus, it was ultimately determined that Mr. Sanders did not violate any ASI policy . . . ." *Id*. While Deus to this day may not accept that he was terminated for a lawful reason –violating the Code of Conduct and T&E Policy, Easley never has wavered from his conclusions regarding Deus. *See, e.g.*, JA 782-791, 798-805, 808, 842, 844-846, 849, 866-867. To the extent that Deus is contending that ASI got it wrong in the case of Sanders, and therefore Easley's

finding that Deus violated ASI's Code of Conduct and T&E Policy could not have been believed, he misstates the evidence and does not link the decision to terminate Sanders to Easley. While the evidence shows that there was a finding that the illicit text messages were sent from a cellphone in D.C. when he was in Chicago, JA 89-90, there is no evidence that it was determined that Sanders did not initiate, influence, or otherwise participate in the sending of the photos. Second, there was no evidence in the record regarding the outcome of the dispute with Sanders. If the jury determined, as Deus would like, that ASI discriminated against Sanders, it was pure conjecture.

Finally, there was no evidence that Easley participated in the investigation of Sanders. Notwithstanding Deus's unsupported assertion that "no one from ASI spoke with or otherwise interviewed [] Sanders as part of ***its ECO investigation***" (App Br. 17), the termination of Sanders was overseen by John Sigmund in Human Resources. JA 1091, 80-82. Easley and Loizzi testified at trial that ECO is separate from Human Resources. JA 179-180; JA 1110. As Deus concedes, the only commonality between Sanders and Deus is Flanagan approved both terminations. App. Br. 17. Again, the jury found that Flanagan did not terminate Deus because of his sexual orientation.

B. Deus Fails to Distinguish Evidence and Legal Arguments Which ASI Offered to Show That the Trial Court Erred in Denying ASI's Request for Remittitur with Respect to the Lost Wage and Emotional Distress Awards

Deus contends that the trial court did not err in finding that his post-termination earnings were relatively modest despite receiving a nearly equivalent salary during his time with Arcadia Power. App. Br. 35-36. Even if the Court of Appeals agrees, Deus, by admission, should be foreclosed from a damages award for the period following the summer of 2020 and the period after he incorporated his new company on September 28, 2020. *See Conn v. Am. Nat'l Red Cross*, 149 F. Supp. 3d 136, 152 (D.D.C. 2016). Indeed, Deus testified at trial that he focused on his on-line sexual lubricant company after his termination in the summer of 2020. JA 358-361.

With respect to the award of emotional distress damage, Deus categorizes ASI's argument regarding the jury's excessive award as perfunctory and, in essence, asks the Court of Appeals to ignore it. App. Br. 37. Specifically, Deus argues that aside from noting that it filed a motion *in limine* regarding Sierra's ability to testify, ASI does not offer much argument on this issue. *Id*. Yet ASI provides extensive argument – three pages – supporting why Sierra's testimony should have been stricken and why it does not support the jury's excessive emotional distress verdict.

In sharp contrast, Deus provides only one paragraph addressing, in a conclusory manner, the lack of evidence demonstrating that Deus's emotional distress was the result of his termination from ASI. *Id*. Deus does not address the three-year gap between his termination and his retention of Sierra, Sierra's departure

from the accepted standard for diagnosing PTSD, and Sierra's testimony that termination is not an event that results in a PTSD diagnosis. The only argument that Deus presents to support the excessive emotional distress award is that Sierra testified to the treatment given for Deus's PTSD and his own qualifications in rendering such care. *Id*. This alone does not justify the trial court's denial of remittitur with respect to the jury's award of excessive emotional distress damages.

C. Deus Has Not Provided Evidence or Argument Supporting the Trial Court's Denial of ASI's Request for a New Trial

Deus argues that counsel's reference to unconscious bias during closing arguments was proper. App. Br. 38. Specifically, Deus contends that ASI's "full-throated" defense of its inclusive policies and purported overwhelming evidence demonstrating preferential treatment of heterosexual employees gives credence to counsel's unconscious bias reference. *Id*. At trial, ASI presented substantial evidence demonstrating that it has long supported the LGBTQIA+ community and supported gay employees, including those that have been promoted to senior leadership. Given the weight of the evidence, counsel for Deus made the strategic decision to tell the jury that even if ASI did not intend to discriminate based on sexual orientation, it could find for Deus because of unconscious bias. Not only was that argument improper, but it misconstrued the evidence, which does not demonstrate that ASI gave heterosexual employees preferential treatment. Just look at Ingram who had the

same fate as Deus when she was terminated for the New York City trip just as Deus was following an Easley investigation.

Deus also contends that ASI waived any argument regarding the prejudicial closing comments because it did not object at trial. App. Br. 38. In *Scott v. Crestar Financial Corp*., the court noted that it can still examine prejudicial closing statements when counsel does not object, "[I]n the absence of objection by defendants, however, the court will examine this matter within the context of plain error." 928 A.2d 680, 686 (D.C. 2007). To downplay the significance of counsel's comments, Deus indicates they were made only in "passing." App. Br. 38. Yet, counsel specifically referenced unconscious bias during closing and spent approximately four sentences thereafter developing his argument. This reference was in no way passing. Further, Deus contends, in two conclusory sentences, that the trial court properly denied ASI's motion for a new trial. There, Deus asserts that ASI's only argument for new trial is based on the same contentions in its motion for judgment and "these assertions do not withstand scrutiny." App. Br. 39. Deus does not provide any support for these statements, legal or factual. Nor does Deus address ASI's argument that the trial court and jury ignored the jury instructions in reaching their respective conclusions. The record show that this was a case where the jury simply felt it was unfair to terminate Deus, not that his termination was pretextual because of animus based on his sexual orientation.

III. CONCLUSION

For the foregoing reasons, the Court of Appeals should vacate the judgment of the trial court.

Dated: October 13, 2025

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 20 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 13th day of October 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
Alison N. Davis