DISTRICT OF COLUMBIA COURT OF APPEALS

Case No. 25-CV-176

AARP SERVICES, INC.,
Appellant,

v.

RICHARD DEUS, JR.,
Appellee

Appeal from the Superior Court
of the District of Columbia
(Hon. Shana Frost Matini)

BRIEF OF APPELLEE

Thomas C. Mugavero, Esq. (#431512)
Kendra M. Leite, Esq. (#252688)
Whiteford, Taylor & Preston LLP
1800 M Street, NW, Suite 450N
Washington, DC 20036
(202) 469-3222

Counsel for Appellee Richard Deus, Jr.

APPELLEE'S CORPORATE DISCLOSURE STATEMENT

COME NOW the Appellee, and pursuant to D.C. App. R. 28(a)(2) hereby files this disclosure statement in order to enable the judges of this court to consider possible recusal:

A. Parties and Counsel

1. **Appellant**
AARP Services, Inc.

Counsel: Alison N. Davis, Esq.
Alexis Bosilovic, Esq.
Littler Mendelson, PC
815 Connecticut Avenue, NW
Suite 400
Washington, DC 20006
(202) 842-3400

2. **Appellee**
Richard A. Deus, Jr.

Counsel: Thomas C. Mugavero, Esq.
Kendra M. Leite, Esq.
Whiteford, Taylor & Preston LLP
1800 M Street, NW
Suite 450N
Washington, DC 20036
(202) 469-3222
(202) 327-6144 (facsimile)

Darrell Chambers, Esq.
Douglas S. Rosenbloom, Esq.
Chambers & Rosenbloom LLP
4800 Hampden Lane, Suite 200
Bethesda, MD 20814

TABLE OF CONTENTS

TABLE OF AUTHORITIES[1]

CASES

[1] Cases marked with an asterisk (*) are chiefly relied upon.

STATUTES

TREATISES

DISTRICT OF COLUMBIA COURT OF APPEALS

Case No. 25-CV-176

AARP SERVICES, INC.,
Appellant,

v.

RICHARD DEUS, JR.,
Appellee

Appeal from the Superior Court
of the District of Columbia
(Hon. Shana Matini)

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to D.C. Code § 11-721(a)(1), as the judgment against Appellant, AARP Services, Inc., is a final judgment.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly deny the motion for judgment notwithstanding the verdict, where there was substantial evidence to allow the jury to find that ASI's reasons for terminating Mr. Deus were pretextual?

2. Did the trial court properly deny the motion for new trial on the grounds that the jury verdict was inconsistent, where no objection was made before the jury was excused and where the evidence supported the conclusion that Mr. Flanagan ultimately based his decision on the ECO reports drafted by Mr. Easley without inquiring into the accuracy of those reports?

3. Did the trial court properly find that the jury verdict was not the product of prejudice or passion, where there was substantial evidence of Mr. Deus's emotional struggles after his termination, and a substantial basis for an award of back pay?

STATEMENT OF THE CASE

On May 18, 2018, Richard Deus, Jr. filed a complaint against AARP Services, Inc. ("ASI"), Lawrence Flanagan, Sarah Mika and Angela Jones, claiming discriminatory termination based on sexual orientation in violation of the D.C. Human Rights Act (D.C. Code § 2-1401.01, *et seq.*); he also asserted a claim for breach of contract for failure to reimburse him for certain job-related expenses. Through pretrial motions, Ms. Mika and Ms. Jones were dismissed from the case, leaving only ASI and Mr. Flanagan as defendants.

The matter went to trial on March 5, 2024, before a jury. On March 15, the jury returned a verdict in Mr. Deus's favor against ASI, awarding $1,612,916.18 in damages for lost wages and benefits, $578,351.00 for emotional distress, and

$1,118.89 for breach of contract. The jury also rendered a verdict in Mr. Flanagan's favor, and rejected Mr. Deus's claim for punitive damages. On April 15, 2024, ASI filed a Motion for Judgment as a Matter of Law or, In the Alternative, for a New Trial and/or Remittitur. On August 8, 2024, the Superior Court (Matini, J.) denied the motion for judgment as a matter of law and for new trial, but found that the breach of contract verdict was a mistake and ordered a remittitur of $1,118.89.

This appeal followed.

STATEMENT OF FACTS

Appellant ASI is a wholly owned taxable subsidiary of the American Association for Retired Persons ("AARP"), a membership organization. JA 683. ASI negotiates, manages, and oversees relationships with businesses like airlines, hotels and insurance companies, which businesses in turn provide services to members of AARP. JA 688. ASI shares several key personnel and functions with its parent company, including Human Resources ("HR") and AARP's Ethics and Compliance Office ("ECO"); these departments investigate ethics complaints at both entities. JA 751-52. Lawrence Flanagan was, at the time of the events complained of, the President and Chief Executive Officer ("CEO") of ASI. JA 1027.

Richard Deus started working for AARP Services in 2007 as a Marketing Manager before being promoted to a Director in the Lifestyle Department. JA 270. In that capacity, he was responsible for managing AARP's relationships with a specific set of business entities, and his job entailed a fair amount of travel to the offices of these businesses. JA 270-79, 282-293. Such trips generally consisted of formal meetings followed by more social events such as dinners and receptions. *Id*. Attending events with these corporate partners and vendors, including concerts, Cirque du Soleil shows, golf tournaments, baseball games, and other sporting events, was commonplace. *See id.*; JA 529-532.

At the time he was fired on February 22, 2018, Deus held the position of Director of Program Management and reported directly to Vice President of Lifestyle Victoria Borton. JA 293. His second level supervisor was Senior Vice President Angela Jones, who reported to Mr. Flanagan. As a Director, Mr. Deus supervised direct reports, including Andy Herd and Heather Ingram. JA 295. For more than a decade with ASI, Mr. Deus was a stellar employee with a demonstrated history of success. *See* JA 280, 296-300; JA 1317-23. Prior to the alleged incidents giving rise to his termination, Mr. Deus was never disciplined or found to have been in violation of company policy at any point in his employment at ASI. JA 304.

Mr. Deus is an openly gay man and did not hide his sexual orientation at work. JA 984. He openly and appropriately spoke about his husband as other employees would speak about their spouses. *Id.* He was open in the wider community as well, serving as an Executive Director for Capital Pride Alliance in 2014-2016. JA 416.

A. ASI's Policies

As described *infra*, ASI based its firing of Mr. Deus on claims that he had violated the AARP Code of Conduct and the Travel and Expense Reimbursement Policy. *See* JA 1289-1316; JA 1264-84. In pertinent part, the Code of Conduct has a section on "valuable privileges" that states as follows:

> Entertainment is considered a common courtesy if there is a legitimate business purpose to attend, the businessperson providing the entertainment will be present and it is local. However, entertainment that would be considered a Valuable Privilege is not acceptable.
>
> Examples of what would be considered a Valuable Privilege include
> - 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 1303, 1313; JA 1339, 1348.

Under this provision, as long as entertainment is connected with a valid business meeting, is local to that meeting and is attended by both the ASI employee and the vendor's employee, attendance is permitted. Excluded are certain high-level events, such as play-off games.

B. The Trip to New York City

On or about December 6, 2017, Mr. Deus was traveling back to D.C. from Atlanta, and on his return, had a meeting that lasted into the evening. He was scheduled to fly early the next morning to New York to meet with Source Marketing, but changed his flight to a later one in order to get some sleep. JA 311-2. Source Marketing was an AARP Services partner managed by Deus and his team.

While he was still in the Atlanta airport, his colleague (and direct report), Heather Ingram, informed him that she would be joining him at the Source Marketing meetings, but would be staying with her friend—and Source Marketing employee—at her friend's Connecticut home. JA 314, 320-1. Although Mr. Deus believed that this was contrary to ASI policy, he believed it too late to direct her to change her plans. *Id.*

Once in New York, Mr. Deus and Ms. Ingram met for two-and-a-half hours with their contacts at Source Marketing's offices, then joined those contacts for dinner. JA 313-14. This was fairly typical of Mr. Deus's meetings with Source

Marketing, and there had never been any question about whether the length of the business meeting justified a trip to New York. *Id*. In fact, Mr. Deus had never done Quarterly Business Reviews over the telephone, especially since in 2018 videoconferencing was still particularly inconvenient. JA 305-6. Upon his return to D.C., Mr. Deus provided two Statements of Work (SOW) resulting from his meetings in New York. JA 1324-1331.

The day after his Source Marketing meetings, Mr. Deus had a doctor's appointment in New York which he attended as his lunch break before returning to D.C. JA 315-16. As per ASI policy, he paid for any personal costs incurred, including any Uber fares and the increase in the airfare back to D.C. *Id*.

C. Sugar Bowl Trip to New Orleans

On October 18, 2017, Mr. Deus's direct report, Andy Herd (a heterosexual male), received an email invitation to the 2018 Allstate Sugar Bowl which he forwarded to Mr. Deus. JA 1332-33. Mr. Deus was not a football fan, but he believed that it would be a good opportunity to meet the Allstate team in advance of contract negotiations, which were scheduled later in 2018. JA 331. The email that Mr. Herd forwarded to Mr. Deus did not include the actual invitation, and did

not mention that the Sugar Bowl was, in that particular year, a semi-final game. JA 333, 1332-33.[1]

Pursuant to accepted protocol, Mr. Deus forwarded this email to his supervisor, Ms. Borton, and asked for permission to attend. JA 330-331. Mr. Deus knew that another AARP Services employee, Dave Austin (a heterosexual male), had previously attended the Allstate Sugar Bowl when he worked on the Allstate/AARP relationship, JA 335-36; Mr. Deus also knew that the trip did not coincide with any contract negotiations between AARP and Allstate, JA 331. Thus, Mr. Deus had no reason to believe that the trip would not be approved.

In response to Mr. Deus's request for approval for the event, Ms. Borton did not raise any specific concerns but simply told him to "run it by legal." JA 333, 335. As Mr. Deus recalls, he met with ASI Associate General Counsel Laurel Gillis over lunch in his office, where Ms. Gillis verbally indicated that he could attend the Sugar Bowl as a work trip, instructing him merely to expense his trip as normal and to cover his husband's expenses. JA 335-36. During that conversation, Ms. Gillis recalled that others had been approved to attend this and similar events in the past, including but not limited to Mr. Austin. *Id.*; *see also* JA 1285. Based on these conversations, Mr. Deus went on the trip and submitted his expenses as

[1] In a recent change of policy, events such as the Sugar Bowl and the Rose Bowl were alternately considered semi-final games or championship games, depending on the year. Prior to that change, the Sugar Bowl was simply a stand-alone championship game. JA 564-65.

usual. JA 335-36. His supervisor, Ms. Borton, approved his travel request and those expenses without question. JA 340; JA 1334-35.

D. The ECO Investigations

In January 2018, ASI received an anonymous complaint about Mr. Deus's attendance at the Sugar Bowl. JA 1339. Ironically, ASI had also opened a second investigation into Mr. Deus's trip to New York because Mr. Deus himself reported to his supervisors that Heather Ingram had violated company policy by incurring excessive airfare and travel costs in the trip to New York and inappropriately spending the night at the home of a Source Marketing contract negotiation representative in Connecticut during the trip. JA 382-84; JA 775, 780; JA 1401.

ASI, through ECO Director Jon Easley, decided to investigate Mr. Deus for purported ethical violations and alleged dishonesty. *See* JA 779; JA 1337-49 (Allstate Sugar Bowl ECO Report); JA 1399-1407 (Source Marketing/NYC ECO Report). The investigations were handled by ASI's ECO Department rather than Human Resources. *See id.* ECO has almost complete discretion regarding how investigations are conducted and which investigations it decides to pursue versus which complaints to pass on to HR. JA 179, 182.

As part of the investigation, Mr. Easley interviewed Ms. Gillis. JA 1342. During the interview, Ms. Gillis said that she did not recall a specific discussion with Deus about the Allstate Sugar Bowl. JA 138. Ms. Gillis did note that it was a

busy time of year, with many conversations with many people. She testified that it was "not impossible" that she could have had a conversation with Mr. Deus. JA 139. At the end of that conversation, she was not sure whether Mr. Easley had understood what she was saying, JA 141-2; over the following weekend, she sent an e-mail to Mr. Easley, further explaining her recollection. JA 144-5.

Specifically, Ms. Gillis explained that AARP Services staff attendance at provider-sponsored events had become "an established practice" spanning the last decade. JA 1285. She also pointed out that ASI staff "have attended the Allstate-sponsored football bowl game" for years, nearly as long as AARP had partnered with Allstate, and specifically named Dave Austin as someone who had attended the same event. JA 1285. Since employee attendance at such events was a common occurrence, general discussions in passing to attend one, absent a specific concern or more laborious discussion, was largely unremarkable to her. *Id.* She therefore "would not have registered" a conversation with Mr. Deus unless he had raised specific concerns. *Id.* At no point in the investigation, or in her testimony at trial, did Ms. Gillis state that Mr. Deus had never talked to her about the Sugar Bowl invitation. Although Mr. Easley received this email, he purposefully excluded it and the specific information entailed therein in his report. He also never interviewed Mr. Austin about his attendance at the Sugar Bowl, even after receipt of Ms. Gillis's email. *See* JA 1337-49.

Instead, the final ECO report concerning the Allstate Sugar Bowl trip to New Orleans mischaracterized Gillis's email as follows: "Subsequent to ECO's conversation with Laurel Gillis, she clarified that she does not recall any detailed conversation with Rick about this and found no record of one." JA 1342. The report makes no mention of the fact that other ASI employees had attended the same or similar events in the past. *See* JA 1337-49. Yet the report does include a section titled "False Statements Regarding Notification/Approval by Legal/Compliance and Risk Management," JA 1341-42, and expressly accuses Mr. Deus of "ma[king] false statements to ECO in order to rationalize and attempt to minimize his misconduct," all without any tangible evidence. JA 1343. A similar section titled "False Statements by Rick" is also included in the ECO report regarding Mr. Deus's trip to New York. No such headers are included with respect to any other employees mentioned in either report. *See* JA 1337-49; 1399-1407 (underline in original).

Other apparent omissions of information tending to exonerate Mr. Deus may be found in the ECO report concerning the trip to New York City to meet with Source Marketing. *See* JA 1399-1407. For years, ASI and Source Marketing held Quarterly Business Review meetings: twice a year, ASI representatives traveled to New York, to Source Marketing's offices, and twice a year Source Marketing employees traveled to D.C. JA 283. Mr. Easley's report failed to take this into

account. The report also claimed that the trip served no business purpose yet failed to include the Statements of Work produced as a result of the meeting. *See* JA 1324-1331 (Source Marketing Statement of Work).

Ultimately, Mr. Easley's investigations revealed, *inter alia*, that: (1) Mr. Deus's trip to New York was similar to previous trips he had made to meet with Source Marketing; (2) that Mr. Deus had paid for any expenses incurred because of his one-day delay for a doctor's appointment; (3) that Ms. Borton had had no qualms about Mr. Deus attending the Sugar Bowl, but had told Mr. Deus to "consult legal" as a matter of course; (4) that Mr. Deus had spoken with Ms. Gillis (although she could not expressly remember the specific conversation); and (5) that Ms. Borton had approved Mr. Deus's expenses upon his return from both trips. In addition, Ms. Gillis—one of Appellant's own lawyers—believed that attendance at this event was an "accepted practice," which should have ended the investigation into Mr. Deus. *See id.*; JA 1337-49; JA 1399-1407.

Despite this, the ECO reports claimed that the New York trip was personal in nature and served no business purpose because Mr. Deus went to a night-time show at Source's invitation after their meeting, and the next day Mr. Deus went to the doctor during his lunch break prior to flying back to D.C. JA 1399-1407. This finding ran directly contrary to the established ASI policy, as well as the plain language of the Code of Conduct quoted *supra*. Additionally, ECO claimed that

Deus had not only received "valuable privileges" in the form of attendance at the Sugar Bowl in New Orleans and tickets to an off-Broadway illusionist show in New York, but had lied during the investigation, despite the corroborating evidence provided by Ms. Gillis and Ms. Borton. Strikingly, Mr. Herd was not fired for attending the same football game along with Mr. Deus, nor was Mr. Austin fired for attending the same football game twice in years prior.

Mr. Easley forwarded his reports to Mr. Loizzi, the head of Human Resources, and to Mr. Flanagan. Based on the misrepresentations in the ECO reports, Mr. Flanagan openly and repeatedly accused Deus of "lying" about the prior approval he obtained from Ms. Borton and Ms. Gillis to attend the Allstate Sugar Bowl. *See, e.g.*, JA 862-67, 1078-79. He further testified that "[he thought] the ECO report that was created for the situation does an excellent job of describing the background, the findings of the investigation, and the recommendations" and repeatedly referred counsel to those documents. JA 598. For his part, Mr. Loizzi, who was Mr. Flanagan's "HR advisor," also accepted the statements in the ECO reports to be true, and recommended Mr. Deus be terminated based on the determinations made in the report. JA 1115-22.

E. Examples of Comparators and Similarly Situated Employees

Overall, the record demonstrates that heterosexual employees openly and regularly accepted invitations or other "valuable privileges" from vendors or

partners of AARP without reprimand or admonishment. For example, in 2015, Ms. Borton and Ms. Jones traveled to Portland, Oregon, for a business meeting and accepted a private wine tasting and dinner at a five-star resort provided by Consumer Cellular. JA 994-95. Other employees accepted U2 concert tickets provided by Walgreens, JA 289-90, 607; Bruce Springsteen concert tickets provided by Eicoff, JA 580-81; premium Cirque du Soleil tickets with dinner and backstage passes in Montreal, JA 289, 996; concert tickets and backstage passes from LiveNation/Ticketmaster to see Rhianna, JA 287; and Major League Baseball tickets from Avis Budget Group, JA 290-91, among others.

No one else involved faced termination. Ms. Borton did not face termination for approving Deus's trip to the Sugar Bowl despite having prior knowledge that he would attend and approving his expense reports after he attended. Mr. Herd also attended the Sugar Bowl along with Mr. Deus and expensed the trip. Although Mr. Herd was required to pay back the expenses, Mr. Flanagan gave him a raise that year and he was later promoted.

The record clearly evidences that Mr. Deus was treated differently from the heterosexual employees listed above who participated in the same or similar work-related events but faced no discipline. The only distinctions between the employees

who participated in similar work-related events without discipline and Mr. Deus are his sexual orientation and marital status. The record evidence further shows that Mr. Deus was terminated because of his sexual orientation.

1. Dave Austin

Dave Austin is heterosexual, and a former employee of ASI. JA 522, 554. He began his employment at ASI in 2006 as a director, the same role as Mr. Deus at the time the latter was fired. JA 523-24. Like Mr. Deus, Mr. Austin was required to travel extensively and met and worked with many of the same partners and vendors.

Mr. Austin testified that he twice attended the Allstate Sugar Bowl in New Orleans (*i.e.*, the exact same event Mr. Deus was fired for attending just a few years later) yet was neither investigated nor terminated for doing so. JA 565-68. Like Mr. Deus, Mr. Austin obtained verbal approval from his supervisor and Laurel Gillis in "legal" prior to attending the event. JA 535-36, 538. Mr. Austin also accepted lodging from Allstate for the event; however, unlike Mr. Deus, he faced no recourse or accusations of policy violations. JA 545. Record evidence also shows that Mr. Austin had been authorized to accept countless items in violation of purported ASI policy, including but not limited to luxury rounds of golf, VIP concert tickets to Bruce Springsteen, and box seats at Madison Square Garden for a Billy Joel concert. *See* JA 534-46. At the time Mr. Austin attended

these events, Mr. Flanagan was the decisionmaker and CEO at ASI. JA 544. Not only are these items considered "valuable privileges" in violation of ASI Code of Conduct, but the sole purpose of his travel was to attend these events. *See, e.g.*, JA 546-47.

When it was later discovered that Mr. Austin had violated the Travel and Expense Reimbursement Policy on at least 41 different occasions, he was obliged only to pay back roughly eight years of improper expenses totaling more than $5,000, but otherwise faced no discipline. JA 541, 553.[2] For example, when asked, "What other, if any, consequences did you face for what ECO found in that report?" JA 553. Mr. Austin testified, "I know it was put in my file. I got more than one pretty good talking to and just out of sheer embarrassment, but other than that, nothing." *Id*. By contrast, Mr. Deus was immediately terminated without warning for attending the exact same event as Mr. Austin, the Allstate Sugar Bowl, and for traveling to New York City for a routine quarterly business review meeting with ASI vendor Source Marking that resulted in tangible work product.

2. Jack Sanders

Jack Sanders is a former homosexual employee who began working at ASI in 2003 as a Marketing Manager. JA 27. After years of being passed over for

[2] All ECO investigations related to this dispute were conducted by the same investigator, Jon Easley. JA 549.

promotions despite stellar work performance, ASI wrongly and summarily terminated Mr. Sanders's employment in 2015. JA 28-29, 33, 44-48. Like Mr. Deus, Mr. Sanders's termination came after a pretextual investigation by ASI. JA 63-64. Mr. Flanagan was also the decisionmaker and CEO at ASI for both the termination of Mr. Deus and of Mr. Sanders. JA 86. ASI fired Mr. Sanders absent an opportunity to defend himself - no one from ASI spoke with or otherwise interviewed Mr. Sanders as part of its ECO investigation prior to terminating him. JA 71-86. He was never even notified that an investigation was being conducted into his conduct. JA 74-6. Mr. Sanders was merely informed via telephone call while on vacation in California that his employment was being terminated following a "full" investigation into allegations that he sexually harassed another employee. *Id.* In fact, it was not until after Mr. Sanders filed a lawsuit in D.C. Superior Court following his termination that he finally learned, through his attorney, the substance of the specific allegations made against him. JA 78-84. To date, ASI has never provided a copy of the investigative report to Mr. Sanders and there is no evidence that such investigation was ever completed prior to his summary dismissal.

F. Damages

Mr. Deus sought compensatory damages in this matter, including but not limited to lost wages and emotional distress. For the duration of his employment at

ASI, Mr. Deus consistently received merit increases; at the time he was terminated in February 2018, his annual base salary was approximately $175,000 per year, not inclusive of annual bonuses and other benefits. JA 348. Prior to his termination, Mr. Deus and his husband, Mark Wood, lived within their means and regularly contributed to their savings. JA 612. Mr. Deus routinely maximized his employment benefits, contributing the maximum annual amount to a 401(k) account each year, while Mr. Wood contributed the maximum annual amount to his Roth IRA and approximately $10,000 per year to the SEP-IRA maintained through his tiling business, SecondStar LLC. JA 612-614. Since Mr. Deus' termination, he and his husband are no longer able to continue such contributions.

Mr. Deus took the job loss very hard, and sank into depression in the weeks after leaving ASI. It got to the point that he did not want to leave the house. JA 345. He started seeing a therapist and began taking Xanax, but he still didn't sleep well. JA 346. After a couple of weeks, he started looking for work again, and in 2018, applied to approximately 200 jobs in all. JA 347. In 2019, he applied for another 100 jobs. JA 349. He also retained a career coach and life coach. JA 352.

Mr. Deus did eventually find work at Acadia Power in 2018, a start-up clean energy platform company, as director of partner marketing. His salary with Arcadia was $150,000/year (JA 348); by contrast, between salary, bonuses and incentives, Mr. Deus was making $200,000/year when he left ASI. JA 364. The

position with Arcadia only lasted for nine months, however, at which time Mr. Deus was laid off. JA 348-9.

With the onset of the coronavirus pandemic in March 2020, any potential employment prospects became increasingly difficult to find. Between 2020 and 2024, Mr. Deus has applied for about 100 jobs per year. JA 360. In 2020, Mr. Deus started having suicidal ideations. JA 353, 355. In 2021, Mr. Deus started treatment with Dallas Sierra, a trauma therapist. JA 357.

With the loss of his job with ASI, Mr. Deus lost health-care coverage for both himself and his husband. The COBRA charges came to $1,400 per month. JA 351. Although he and Mr. Wood own two condominium units used as rental properties, the rent charged barely covers the respective mortgages; they probably lost about $500/month on the units. JA 444. In addition, Mr. Deus has continued to assist his husband with the administrative aspects of the tiling company, but that company, too, was hit hard during the pandemic. In 2020 and 2021, SecondStar had no profits whatsoever, JA 365; in 2023, the company lost $18,000. JA 404. Mr. Deus has not been able to secure subsequent employment comparable to his position or earnings at ASI. He even attempted to embark upon his own entrepreneurial ventures by starting a small retail business named Ffaüsten LLC in 2020, but this company is yet to turn an annual profit in excess of $1,084. JA 358-60.

Mr. Deus has also endured considerable emotional distress due to ASI's acts. Through tears, Mr. Deus testified at trial the details of his plan to commit suicide following his termination. JA 343-366. He has since been diagnosed with depression and anxiety and continues to take medication and undergo treatment with his therapist, Dallas Sierra, who also testified at trial regarding Mr. Deus's emotional distress and related damages. JA 472-518.

The jury returned a verdict in Mr. Deus's favor against ASI, awarding $1,612,916.18 in damages for lost wages and benefits, $578,351.00 for emotional distress.

SUMMARY OF ARGUMENT

Under the law of the District of Columbia, direct evidence of improper bias is not required to show discrimination: the finding by the jury that the defendant's explanation is unworthy of credence can suffice. Here, there was ample evidence to discredit ASI's non-discriminatory reasons. First, Mr. Easley not only mischaracterized the nature of the trip to New York to meet with Source Marketing, but ignored established practice and the plain language of the Code of Conduct in deciding that the trip was personal in nature. Moreover, Mr. Easley disregarded Ms. Gillis' information both about her conversation with Mr. Deus and about how she viewed a request to attend the Sugar Bowl as so routine as not to warrant particular attention. Not only did he ignore her disclosures, but he found

the opposite—that Mr. Deus has lied about talking to Ms. Gillis. By contrast, Mr. Herd's bald statement that he did not know that the Sugar Bowl was a semifinal game, despite not only his keen interest in the sport but also the information on the email that he received, was treated merely as "unreasonable" by Mr. Easley, rather than a fabrication.

Too, the evidence showed that both Mr. Deus and Mr. Sanders, two homosexual employees, were given draconian penalties without the benefit of any kind of hearing or discussion, while Mr. Herd and Mr. Austin, two heterosexual employees, received far lighter disciplinary actions. Finally, the shifting nature of ASI's rationales for Mr. Deus's termination (first, violation of the travel and expense policy, then lying, then failing to reprimand a subordinate), provided a basis for the jury's conclusion that the reasons for firing Mr. Deus were pretextual.

The jury's finding that Mr. Flanagan did not harbor discriminatory bias is not inconsistent with the verdict against ASI. The evidence showed that Mr. Easley conducted the entire investigation, and skewed the ECO reports to place Mr. Deus in a poor light. By contrast, neither Mr. Flanagan nor Mr. Loizzi, the head of Human Resources, did any independent investigation or compare Mr. Deus with any other employees. On the contrary, they relied on Mr. Easley's report and assumed the contents to be accurate. Moreover, any objection to inconsistency in

the verdict comes too late, and should have been addressed before the jury was excused.

Although ASI argues that the jury verdict is excessive, in fact the findings comport with the testimony. Before his termination, Mr. Deus made $175,000 per year at ASI, along with significant bonuses and other incentives. He contributed to a 401(k) plan matched by ASI, and had health care for himself and his husband. After he was fired, he had to incur COBRA expenses, and could no longer contribute to these retirement accounts. Although he did find new employment, after a while, at Arcadia Power, the salary there was lower and there were few, if any, benefits. Moreover, the fact that he was laid off through no fault of his own after nine months did not break the causal chain and terminate his right to an award of back pay from ASI. Too, and contrary to Appellant's assertions, any income earned from either Mr. Deus's online business venture or his husband's tiling company was minimal, and did not make up for the loss of his salary and benefits at ASI. Finally, Mr. Deus testified at length of his emotional struggles after being fired, including depression and thoughts of suicide. There was more than enough testimony at trial to support the jury's award of emotional damages.

Finally, the trial court acted well within its discretion in denying the motion for new trial, both on the grounds that the verdict was contrary to the weight of the evidence and on the grounds that Mr. Deus's counsel had made allegedly improper

statements in closing. Certainly, by failing to object to Plaintiff's closing argument, ASI has waived its argument absent plain error, which does not exist here.

ARGUMENT

A. Standard of Review

Review of a ruling granting or denying a motion for judgment as a matter of law is *de novo* and under the same standard as applied by the trial court. *See, e.g.*, *District of Columbia v. Bryant*, 307 A.3d 443, 450 (D.C. 2024); *Wash. Convention Ctr. Auth. v. Johnson*, 953 A.2d 1064, 1072 (D.C. 2008). Still, the appellate court reviews a denial of a motion for judgment notwithstanding the verdict deferentially. *Arthur Young v. Sutherland*, 631 A.2d 354, 363 (D.C. 1993). "Reversal is warranted only if no reasonable person, viewing the evidence in the light most favorable to the prevailing party, could reach a verdict in favor of that party." *Oxendine v. Merrell Dow Pharmas., Inc.*, 506 A.2d 1100, 1103 (D.C. 1986). "A motion for judgment notwithstanding the verdict should be granted only in extreme cases . . . [and] a finding that the evidence was sufficient on any one of the claims found by the jury will support the judgment in this case in its entirety." *Wilson Sporting Goods Co. v. Hickox*, 59 A.3d 1267, 1274 (D.C. 2013).

In contrast, "[t]he trial court has broad latitude in passing upon a motion for new trial," and the appellate court reviews the disposition of such a motion only for abuse of discretion. *United Mine Workers v. Moore*, 717 A.2d 332, 337 (D.C.1998)

(*quoting Gebremdhin v. Avis Rent-A-Car Sys., Inc.*, 689 A.2d 1202, 1204 (D.C. 1997)). A new trial is appropriate only where the verdict is against the weight of the evidence, or that there would be a miscarriage of justice if the verdict is allowed to stand. *Id.*

Finally, the appellate court reviews for abuse of discretion the trial court's grant or denial of a motion for remittitur or new trial for excessiveness of verdict. *Asal v. Mina*, 247 A.3d 260, 277 (D.C. 2021).

B. The Trial Court Properly Denied the Motion for Judgment Notwithstanding the Verdict

1. The Framework for Discrimination Cases

It is well-established that the District of Columbia follows the approach of the U.S. Supreme Court in allocating the burdens of proof in a discrimination case. *See Atl. Richfield Co. v. D.C. Comm'n on Hum. Rts.*, 515 A.2d 1095, 1099 (D.C. 1986). Under that framework, the plaintiff has the initial burden of establishing a *prima facie* case of discrimination, which is "not onerous." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981). Once that *prima facie* case has been shown, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). If the employer meets that burden, the sole remaining issue is discrimination *vel non*. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S.

133, 142-3, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000). Ultimately, the burden rests on the plaintiff to show that the non-discriminatory reason is pretextual. *Id.*

Appellants devote much of their brief to the argument that the verdict must fail because the "record is devoid of direct evidence of sexual orientation discrimination." *See, e.g.*, App. Br. 25. Direct evidence of bias is not a *sine qua non* of a successful discrimination claim: "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves*, 530 U.S. at 147, 120 S.Ct. at 2108; *see also Estenos v. PAHO/WHO Fed. Credit Union*, 952 A.2d 878, 889 (D.C. 2008); *Propp v. Counterpart Int'l*, 39 A.3d 856, 871 (D.C. 2012) ("the jury may infer a retaliatory motive from its disbelief of the employer's proffered non-discriminatory reason").

2. There is Sufficient Evidence to Support the Jury Verdict

Here, there is ample evidence in the record to allow the jury to find that ASI's proffered non-discriminatory reason was not worthy of belief. First, there is the nearly unprecedented way that Mr. Deus's New York trip was assessed, and how his explanations were cavalierly rejected. Both Mr. Deus and Mr. Herd testified, without challenge, that trips to meet business partners in person were routine, that social activities were usually included in these trips, and that adding a personal errand at the end did not negate the business aspect of the trip.

Their testimony was consistent with the plain language of the Code of Conduct. Nonetheless, Mr. Easley concluded that the New York trip was unnecessary because it could have been conducted by teleconference—at a time before the COVID-19 pandemic and rise in Zoom and other video-conferencing technologies.[3] Mr. Easley also focused on Mr. Deus's medical appointment the following morning, although such personal errands were routinely accepted by ASI as long as the employee paid any additional costs incurred. Certainly, there was no evidence whatsoever that Mr. Deus either misled ASI about his appointment, nor that he somehow failed to carry his share of the travel expenses.

Moreover, the fact that Mr. Deus was summarily fired for attending the Sugar Bowl stands in direct contrast to the treatment afforded to Dave Austin and Andrew Herd. Mr. Herd attended the same game—and, in fact, received the invitation from Allstate that clearly stated that it was a "semifinal game." JA 333, 1332-33. Unlike Mr. Deus, Mr. Herd is an avid college fan and therefore would certainly have known the status of the Sugar Bowl that year and that it constituted a "valuable privilege." Nonetheless, Mr. Herd was not fired or disciplined but simply required to pay back his reimbursed expenses.

[3] In fact, defense counsel twice tried to minimize the business meeting by asserting that it only lasted for 90 minutes, despite the fact that it started at 3 PM and lasted until 5:30 PM. *See* JA 395.

Dave Austin's treatment stands in even greater contrast. Mr. Austin attended the Sugar Bowl, *twice*, a few years prior to Mr. Deus, JA 585-68; like Mr. Deus, Mr. Austin obtained verbal approval from his supervisor and from Ms. Gillis, JA 535-6, 538. Mr. Austin, however, was never even investigated for his attendance at this event. *See* JA 545. Mr. Austin also accepted luxury rounds of golf and VIP tickets to concerts by Bruce Springsteen and Billy Joel, and testified that the sole purpose of his travel was to attend these events: there was no business meeting attached. *Id*. Most striking, Mr. Austin was found to have violated the travel and expense reimbursement policy on at least 41 different occasions. He was not fired, however; he was merely required to pay back those improperly claimed expenses, which amounted to more than five thousand dollars ($5,000). JA 553. In contrast to Mr. Deus's draconian penalty, Mr. Austin was told to "just put this behind you and [move] on." JA 554.

The jury also heard about the termination of Jack Sanders, another gay man. Although his case was unrelated to the travel and expenses policy (ASI had asserted that Mr. Sanders had sent sexually explicit images to another employee), his treatment was similar to that of Mr. Deus. Mr. Sanders was accused through an anonymous complaint but was not given any opportunity to defend himself. *See* JA 71-86. Mr. Sanders was summarily terminated, without any consideration of a lesser penalty. *See* JA 74-6. And, like Mr. Deus, it was ultimately determined that

Mr. Sanders did not violate any ASI policy: he could not have sent the images, as the metadata showed that the images were sent from a phone in D.C. while he was in Chicago at the time. JA 89-90.

Further, the manner of Mr. Easley's investigation of Mr. Deus raised serious questions. Again, he concluded that Mr. Deus's New York trip was "personal," despite ASI's clear practice to the contrary. He further included a section in his report entitled "FALSE STATEMENTS BY RICK DEUS," although he did not do so for either Mr. Herd or Mr. Austin. *Compare* JA 1337-49, 1399-1407 *with* JA 1351-75.[4] Certainly, Mr. Easley made no attempt to challenge Mr. Herd's claim that he did not know that the Sugar Bowl was a "semifinal game." Too, although Mr. Easley claimed that Mr. Deus had told Mr. Herd that the trip was approved, *see* JA 173-4, Mr. Easley admitted that he had no idea what the two had actually discussed. JA 198. Certainly, Mr. Easley made no attempt to determine whether Mr. Herd had made any false statements. JA 199.

Finally, the jury heard evidence of ASI's shifting rationales for Mr. Deus's termination. ASI relied first on Mr. Deus's purported violations of the travel and

[4] Strikingly, in Mr. Austin's case, Mr. Easley forbore from accusing him of lying, but merely noted that "it does not seem reasonable to conclude that adding additional flight segments and destinations to a trip would not increase airfare in all six cases." JA 1363. In other words, when Mr. Austin improperly claimed thousands of dollars in reimbursements, Mr. Easley though he was simply being "unreasonable." When Mr. Easley found what he thought were discrepancies in the timeline for Mr. Deus's New York trip, or a variation in the accounts of Mr. Deus and Ms. Gillis, Mr. Easley immediately concluded that Mr. Deus was lying.

expense policy. JA 14. Then, according to Mr. Flanagan's deposition testimony as ASI's corporate representative (which was read to the jury), Mr. Deus was fired because he had "lied." *See* JA 862-67, 1078-79. Later in the trial, the claim was that Mr. Deus was fired because he had neglected to stop Ms. Ingram from staying at a vendor's home during the New York trip and by "forcing" Mr. Herd to attend the Sugar Bowl; neither contention was supported by any evidence in the record. *See, e.g.,* JA 383-84. Such shifting explanations over the course of the trial is sufficient for a reasonable jury to find pretext to cover up bias. *See, e.g.*, *Store v. Barr*, 960 F.3d 627, 646 (D.C. Cir. 2020).

The jury had more than enough evidence to conclude that any reason given by ASI for Mr. Deus's termination was not credible. It is uncontroverted that the New York trip conformed to established ASI practice, yet Mr. Easley concluded that the venture was entirely personal in nature. Too, the ECO report ignored any information that might have demonstrated that Mr. Deus honestly believed he was approved to attend the Sugar Bowl, skewing the results of Mr. Easley's investigation to fit what appears to be a pre-ordained conclusion. Finally, Mr. Deus's treatment stood in stark contrast to that of Mr. Austin and Mr. Herd, both heterosexual males. Mr. Herd attended the same Sugar Bowl – and, unlike Mr. Deus, knew that it was a semi-final game – yet was not disciplined. Mr. Austin, for his part, had a long history of submitting improper expense requests and accepting

valuable privileges, yet emerged unscathed. Given the evidence at trial, a reasonable jury could have, and indeed did, find that ASI's proffered reasons were pretextual and that the real reason for Mr. Deus's termination was improper bias.

3. The Trial Court Did Not Err in Rejecting the Claim that the Verdict was Inconsistent

As an adjunct to their argument that direct evidence of bias is necessary to support a verdict of discrimination, Appellant further argues that the verdict must be rejected as inconsistent because the jury found that sexual orientation bias was not a "substantial contributing factor" to Mr. Flanagan's decision to termination Mr. Deus. *See* Verdict Form, JA 1427. There are two fatal flaws with Appellant's argument. First, the objection comes too late; second, it misconstrues the evidence concerning Mr. Easley's investigation.

As this Court has noted, "a party waives its objection to any alleged inconsistency in a general verdict, with or without interrogatories, if it fails to object before the jury's discharge." *President, Dirs. of Georgetown Coll. v. Wheeler*, 75 A.3d 280, 288 (D.C. 2013) (*citing Dist. of Columbia Hous. Auth., v. Pinkney*, 970 A.2d 854, 868 (D.C. 2009) ("DCHA did not raise an objection based on inconsistent verdicts before the jury was excused, [after returning general verdict with special interrogatory,] and it therefore has waived this argument."); *Estate of Underwood v. Nat'l Credit Union Admin.*, 665 A.2d 621, 645 (D.C. 1995) (explaining that Rule 49, "particularly section (b), countenances a waiver of

objections to inconsistencies in the verdict that are not pointed out before the jury is discharged")).

The Verdict Form in this case was a general verdict: the jury was simply asked to find whether ASI and/or Mr. Flanagan had discriminated against Mr. Deus in his termination and, if so, what damages to award. Although it is not part of the Joint Appendix, the transcript from the final day of the trial clearly shows that, while Ms. Davis asked for the jury to be polled, at no point did ASI raise the issue of an inconsistent verdict. As such, the objection is waived.

Substantively, the findings in the verdict are not inconsistent. While "irreconcilable verdicts are taboo" in civil cases, "[w]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved [in] that way." *District of Columbia. v. Tulin*, 994 A.2d 788, 798 (D.C. 2010) (*quoting Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S. Ct. 780, 7 L.Ed.2d 798 (1962)). "As a general rule, a reviewing court indulges every reasonable presumption in favor of the legality of the verdicts." *Tulin*, 994 A.2d at 798 (*citing* 75 B. Am. Jur. 2d *Trial*, § 1586, at 378–80 (2007)).

Moreover, the jury is presumed to have followed the instructions given by the court. *See, e.g.*, *Blackwell v. Dass*, 6 A.3d 1274, 1278 (D.C. 2010). The jury was properly instructed that they could not find for Mr. Deus "solely because [they] disagree with the employer's stated reasons . . . or because [they] believe the

decision was harsh or unreasonable." JA 1419. The jury's findings should be overturned only if there is no question that it failed to follow these instructions.

Here, the evidence showed that both Mr. Loizzi and Mr. Flanagan relied on Mr. Easley's investigation into the anonymous complaints against Mr. Deus. *See, e.g.*, JA 598, 862-67, 1115-22. Moreover, the testimony was rife with examples where Mr. Easley either ignored available information or skewed that information to find Mr. Deus guilty of a violation of the travel policy. On the New York trip, he ignored the long-standing policy of allowing personal errands to be added to business trips, as long as the employee paid for the personal expenses incurred. *See* JA 235-6. He failed to talk to anyone from Source Marketing, or to review any of the work that came from that meeting and thus refused to consider the long-standing practice of traveling to meet business partners and combining business meetings with social activities. JA 182-3.

On the New Orleans trip, Mr. Easley ignored the fact that ASI employees had, for years, been attending the Sugar Bowl. He ignored both Mr. Deus's protestations that he did not realize the Sugar Bowl was a semi-final game that year and the fact that the email that Mr. Deus received did not disclose that fact. By contrast, although he had Mr. Herd's admission that the latter knew that the Sugar Bowl that year was a semi-final game (and therefore a "valuable privilege."), he merely accepted that Mr. Herd had misunderstood the travel and

expense policy. JA 200-1. Although he had no information as to the specific conversation between Mr. Deus and Mr. Herd regarding the Sugar Bowl, he nonetheless concluded categorically that Mr. Deus "forced" Mr. Herd to attend. JA 198. And, as described more fully above, Mr. Easley disregarded the past treatment of people like Dave Austin, who had flagrantly violated the travel and expense policy for years without real consequence.

There was also evidence that both Mr. Loizzi and Mr. Flanagan relied on Mr. Easley's report in making their final decision. Mr. Flanagan testified that he handled disciplinary actions rarely, less that one percent of the time, and usually left the matter to HR. JA 1042. He did review the ECO reports but never spoke with Mr. Easley. JA 1043-4, 1051. Similarly, he reviewed the ECO report on the Sugar Bowl attendance and believed it to be accurate. JA 1056-7. His decisions were based predominantly, if not solely, on the assumption of the accuracy of the ECO reports.

There was, therefore, nothing inconsistent in the jury verdict finding that ASI had discriminated against Mr. Deus, but that Mr. Flanagan had not. The jury found, based on the evidence, that Mr. Flanagan relied unquestioningly on the ECO reports. His only error, the jury clearly concluded, was in not seeing the discriminatory taint in those reports.

For his part, Mr. Loizzi was not involved in the investigation; once he received the ECO reports, he discussed it with in-house counsel and made a recommendation to Mr. Flanagan. JA 1118. Although Mr. Loizzi was in the HR Department, there was no joint investigation between HR and ECO; Mr. Loizzi had no role in the investigation. JA 1134-5. He did not question anything in the ECO reports, nor did he question Mr. Easley's motives. JA 1121. He also did not review any prior discipline cases, and thus did not know about Mr. Austin's case. JA 1135, 1141.

Appellant argues that Mr. Loizzi could not have discriminated against Mr. Deus, because both were gay men in same-sex marriages. The case upon which Appellant relies, however, does not support this conclusion. In *Ranowsky v. Nat'l R.R. Passenger Corp.*, 244 F. Supp. 3d 138 (D.D.C. 2017), the District Court found that there were legitimate, non-discriminatory reasons for the plaintiff's termination, and that plaintiff had failed to provide any evidence of pretext. The fact that the *Ranowsky* plaintiff was fired by someone of the same age, the Court found, meant that "any inference of discrimination is undercut." *Id.* at 144. This does not mean, however, that a finding of discrimination is *barred* if one agent of the employer is in the same protected class as the plaintiff.

Again, the evidence shows that although Mr. Loizzi recommended termination, he did so on complete reliance of Mr. Easley's ECO reports, without

any independent investigation. His role in the termination was thus secondary to Mr. Easley's; the fact that Mr. Loizzi is gay therefore does not act to undercut the underlying bias in the ECO reports.

While it is true that Mr. Loizzi testified that sexual orientation was never considered in his recommendation, he nonetheless admitted that he neither questioned Mr. Easley's reports, nor investigated whether heterosexual employees had received any lesser discipline for similar or identical violations. Like Mr. Flanagan, Mr. Loizzi accepted the ECO reports at face value. JA 1115-22. The jury had more than enough evidence to find that Mr. Easley's investigation was tainted and that his findings were not worthy of credence.

4. The Jury Verdict Was Neither Excessive, Nor the Result of Prejudice or Passion

Appellant effectively misreads the trial evidence to make its argument that the trial court erred in denying the request for remittitur on lost wages and emotional distress. Appellant asserts that Mr. Deus was hired at Arcadia "for nearly equivalent salary" despite Mr. Deus's uncontradicted testimony that he had lost the substantial bonuses and incentives that ASI provided (not to mention health care coverage and retirement plan contributions). App. Br. 40. Appellant also argues that Mr. Deus earned additional income from the tile installation and sexual lubricant businesses, and that those earnings were "not modest." *Id.* Given the testimony that the tile installation business faltered during the pandemic, and

lost $18,000 in 2013, and that the on-line lubrication business barely showed a profit, Appellant's claims do not deserve credence. Finally, Appellant baldly claims that "the evidence demonstrates that Deus failed to diligently exercise good-faith efforts to find a new job." *Id.* at 41. Mr. Deus testified that he applied for over 200 positions in 2018 and 2019, and, on average, for 100 positions a year thereafter. JA 347, 360. By any reckoning, he made a good-faith effort to find a new job.

Appellant also argues that the length of employment with Arcadia "broke the causal connection." App. Br. 40 (citing *Wisconsin Ave. Nursing Home v. Hum. Rts. Comm'n*, 527 A.2d 282 (D.C. 1987)). What the Court *actually* said in that case was that where the plaintiff found subsequent employment but then voluntarily quit, any liability for back pay would be terminated. "Such a rationale would obviously not apply where, as here, the complainant was terminated from [his] substitute employment through no fault of [his] own." *Id*. at 292. Such is the case here: Mr. Deus did find new work with Arcadia, but was laid off through no fault of his own. His brief stint with Arcadia Power did not end ASI's liability for back pay from the discriminatory termination.

In any event, it is not up to Mr. Deus to prove that he did, in fact, mitigate his damages; ASI had the burden of proof that Mr. Deus failed to mitigate. *See Walker v. Off. of Chief Info. Tech.*, 127 A.3d 524, 534-5 (D.C. 2015) (*citing*

Howard Univ. v. Lacey, 828 A.2d 733, 739 n. 8 (D.C. 2003)). ASI did not introduce any evidence on the question of mitigation, and, as the jury verdict clearly shows, thereby failed to persuade the jury on the issue.

Finally, Appellant argues that the award for emotional distress should have been remitted, first because Dallas Sierra should not have been allowed to testify, and second because "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 [of PTSD]." App. Br. 42. Other than noting that ASI had filed a motion *in limine* regarding Mr. Sierra, ASI does not offer much argument on that point, and the Court should not consider an argument that is only made in passing. *See Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.").

The remainder of ASI's contention is contrary to the evidence. Mr. Deus testified to his emotional turmoil after leaving ASI, and Mr. Sierra testified both to the treatment given for Mr. Deus's PTSD and his own qualifications in rendering such care. JA 476-485. ASI neither provided countervailing expert testimony, nor addressed at trial the overwhelming evidence of Mr. Deus's depression from his

termination, or his attempts to drag himself out of it. The jury's verdict on emotional damages is more than supported by the trial evidence.

5. Any Comment Made in Closing Argument Does Not Require a New Trial

Appellant further argues that it is entitled to a new trial because of mention of "unconscious bias" in Plaintiff's closing argument. App. Br. 36-7. The transcript clearly shows that there was absolutely no objection made at the time to what was a passing reference. JA 1219. Appellant has thus waived any argument. *See*, *e.g.*, *Mills v. U.S.*, 599 A.2d 775, 787 (D.C. 1991); *Dist. of Columbia Hous. Auth. v. Pickney*, 970 A.2d 854, 869 n.16 (2009).

Too, in light of the overwhelming evidence that heterosexual employees were given more preferential treatment than gay employees (or, at least, were more likely to have their sins forgiven), and given the full-throated defense of ASI's supposedly inclusive policies by Mr. Flanagan, these remarks by Plaintiff's counsel were not clearly improper. Unlike in *Scott v. Crestar Fin. Corp.*, 928 A.2d 680 (D.C. 2007), the trial court here did not believe that the comments made were sufficiently egregious to warrant a new trial. Such a finding lies squarely within the discretion of the trial court. *See Psych. Inst. of Wash. v. Allen*, 509 A.2d 619, 629 (D.C. 1986).

C. The Trial Court Properly Denied Appellant's Motion for a New Trial

As noted above, a new trial is appropriate only where the verdict is against the weight of the evidence, or that there would be a miscarriage of justice if the verdict is allowed to stand. *United Mine Workers v. Moore*, 717 A.2d 332, 337 (D.C.1998). Here, ASI's only argument for a new trial is based on the same contentions as its motion for judgment – that the jury verdict was presumably contrary to the evidence and based upon prejudice or passion. These assertions do not withstand scrutiny, and the trial court properly exercised its discretion in denying ASI's motion for a new trial.

CONCLUSION

For the reasons argued above, the trial court properly denied Appellant's motion for judgment notwithstanding the verdict or for a new trial. There was sufficient evidence for the jury to disregard ASI's proffered reasons for Mr. Deus's termination, and find that those reasons were a pretext for discrimination. Moreover, there was sufficient evidence to justify the awards of back pay and emotional damages. Further, the finding that Mr. Flanagan had not unlawfully discriminated was not inconsistent with the finding that ASI did. Finally, because the jury verdict was neither improper nor unsupported by the evidence, the trial court acted well within its discretion in refusing to order a new trial.

Appellee, Richard Deus, therefore respectfully requests that this Court affirm the judgment of the Superior Court.

Respectfully submitted,

/s/ Thomas C. Mugavero
Thomas C. Mugavero, Esquire (#431512)
Kendra M. Leite, Esquire (#252688)
WHITEFORD, TAYLOR & PRESTON LLP
1800 M Street, NW, Suite 450N
Washington, DC 20036
(202) 469-3222
(202) 327-6144 (facsimile)
tmugavero@whitefordlaw.com
kleite@whitefordlaw.com

Attorneys for Appellee Richard A. Deus, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2025, a copy of Appellee's Brief was served on the following through the Court's electronic filing system:

Alison N. Davis, Esq.
Alexis Bosilovic, Esq.
Littler Mendelson, P.C.
815 Connecticut Avenue, NW
Suite 400
Washington, DC 20006

/s/ Thomas C. Mugavero
Thomas C. Mugavero