THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SCOTT KINGSTON,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, a New York corporation,

Defendant.

Case No. 2:19-cv-01488-MJP

PLAINTIFF'S TRIAL BRIEF

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I. INTRODUCTION

Why was Scott Kingston fired? This is the central question of this case. Kingston claims he was fired for reporting IBM's misconduct and refusing to unlawfully cap commissions. He also claims that IBM fired him because he was an older worker. IBM claims that Kingston was fired because he failed to properly apply IBM's commissions policies. The evidence at trial will show that Kingston's explanation is far more credible. As this Court found, the evidence shows that Kingston "followed IBM's written policies to the letter," that Kingston "was terminated for failing to violate those policies," and that IBM cannot "articulate a reason for terminating Plaintiff that is consistent with its own policies." Dkt. No. 75 at 14. A reasonable jury is likely to come to the same conclusion and find in Kingston's favor on each of his claims.

Kingston's claim for wrongful termination in violation of public policy is premised not only on reporting racial discrimination but also on Kingston's efforts to address IBM's misconduct in relation to commission payments, as IBM acknowledges in its trial brief. *See* Dkt. No. 88 at 2. This includes both IBM's refusal to pay Beard the wages he was owed and IBM's termination of Kingston for approving a payment to Donato of his full wages.

In its recent order, the Court denied IBM's motion for summary judgment on Kingston's claim for wrongful termination in violation of public policy. Dkt. No. 75 at 14-15. The Court addressed Kingston's allegations that IBM's termination of him was motivated by retaliation for his reports of (1) racial discrimination and/or (2) IBM's unlawful withholding of wages owed to sales representatives. The Court denied the motion on the first basis, racial discrimination. On the second, the Court said: "Plaintiff has failed to meet his burden of demonstrating that he was protecting any employee's public-policy backed right to the commissions." *Id.* Although the evidence and jury instructions are not impacted, this decision limits the arguments Kingston can make to the jury in support of his claim for wrongful termination in violation of public policy.

Candidly, Kingston struggled with how to raise this issue. Since IBM's motion on this claim was denied, a motion to reconsider on an additional basis seemed to be an awkward fit. Motions in limine were due the same day the Court's order was entered (March 1), which

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eliminated that option. Kingston's counsel researched the issue and found this Court has directed parties to address issues that remained unclear after summary judgment in the trial briefs. *See Hunter v. Am. W. Steamboat Co., LLC*, No. C06-182P, 2007 WL 895092, at *5 (W.D. Wash. Mar. 21, 2007) ("Plaintiff's supplemental brief suggests that his insurer may be seeking reimbursement of medical costs it has paid. In this situation, it is not clear as to who actually owns the claims for maintenance and cure with respect to the amounts paid by the insurer. The parties should address this question in their trial briefs.").

So, in light of that, Kingston thought it best to raise the issue here.[1] Should the Court prefer a different procedure, Kingston will gladly be guided accordingly and commits to provide any additional support or analysis on this issue in any format by any date.

II. WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY (WAGE THEFT)

A. The legal standard for a wrongful termination in violation of public policy claim.

The elements of a wrongful termination in violation of public policy claim are: (1) termination may have been motivated by reasons that contravene a clear mandate of public policy, *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 725 (2018) (*quoting Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232-33 (1984) (additional citation omitted)); and (2) public-policy-linked conduct was a significant factor in the decision to terminate. *Martin*, 191 Wn.2d at 723. "The question of what constitutes a clear mandate of public policy is one of law." *Blackford v. Battelle Mem'l Inst.*, 57 F. Supp. 2d 1095, 1100 (E.D. Wash. 1999). "[T]here are four scenarios giving rise to wrongful discharge in violation of public policy claims that can be 'easily resolved' under the framework initially articulated in *Thompson*." *Singleton v. Intellisist, Inc.*, No. C17-1712RSL, 2018 WL 2113973, at *2 (W.D. Wash. May 8, 2018) (*citing Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 286-287 (2015); *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 258 (2015)).

[1] Although they are certainly explored in greater depth and, hopefully, clarity here, each of the arguments Kingston makes was included in his opposition to IBM's motion for summary judgment. Dkt. No. 54.

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> **These scenarios do not require much analysis because they implicate clear public policies.** *Id.*; *Karstetter v. King Cty. Corr. Guild*, 1 Wn. App.2d 822, 832 (2017). The four scenarios are:
>
> > (1) **when employees are fired for refusing to commit an illegal act**,
> > (2) when employees are fired for performing a public duty or obligation, such as serving jury duty,
> > (3) when employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims, and
> > (4) **when employees are fired in retaliation for reporting employer misconduct, i.e., whistle-blowing**.
>
> *Rose*, 184 Wn.2d at 286–87 (internal citation omitted). If one of these four situations is at issue, the burden shifts to the defendant to show plaintiff's dismissal was for other reasons. *See Id.* at 287.

Singleton, 2018 WL 2113973, at *2 (emphasis added). Scenarios (1) and (4) apply to Kingston's claim. This Court essentially found in its summary judgment order that its order on IBM's motion to dismiss (Dkt. No. 27) controlled on the wage basis. Dkt. No. 75 at 14-15. Kingston respectfully submits that the Court's finding on that issue is in error.

B. The motion to dismiss order does not control the wage basis.

The motion to dismiss order addressed *Kingston's* right to commissions under the Wage Rebate Act. Dkt. No. 27 at 12-13 ("This conclusion dictates the dismissal both of Plaintiff's contractual causes of action and of the state statutory claims premised on the theory that Plaintiff was contractually entitled to the commissions which he was denied."). The motion to dismiss order did not address (1) Kingston's reasonable beliefs about Jerome Beard's or Nick Donato's rights to their own uncapped commissions, (2) the unlawful conduct Kingston opposed, or (3) what Kingston reported to IBM about that misconduct. And the two situations, Kingston's commissions versus Beard's and Donato's commissions, are different for reasons that were not argued and really could not be addressed on the motion to dismiss Kingston's commission-related claims:

The facts are different. Beard and Donato were promised that their commissions were uncapped, but IBM capped Beard's commissions and fired Kingston because he did not cap

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Donato's commissions. Kingston never argued that IBM capped his commissions (*see* Dkt. No. 26); rather, he argued that he was not paid all he was owed based on sales his team generated in Q1 2018. As noted below, these factual distinctions have a major impact on what claims Beard alleged versus the ones that Kingston alleged. Also, Donato and Beard were still employed by IBM when their commissions were paid or not paid, respectively, whereas Kingston had already been fired when IBM refused to pay his commissions. This matters because IBM argued the "Leaving the Plan Early" section of the IPL required that Kingston still be employed in order to earn the disputed commissions. Dkt. No. 26, p. 5. This provision could never apply to Beard or Donato because they still worked at IBM when their commissions became due.

The law is different. Beard brought misrepresentation-based and California statutory claims[2] because there was no contract for commissions,[3] whereas the Court found Kingston's commissions claims arose exclusively under Washington contract law. Dkt. No. 27 ("if IBM was within its contractual rights to determine Plaintiff was entitled to no commissions for the time period at issue, the state statutes do not afford Plaintiff a remedy"). Put another way, Beard brought claims based on what he alleged was a misrepresentation that his commissions were uncapped. Donato probably would have done the same if he had not been fully paid. Kingston, on the other hand, did not allege any "uncapped commissions" claims, which makes the potential or actual claims of Donato and Beard fundamentally different from Kingston's and requires an independent analysis of their respective rights to be paid commissions by IBM under the law.

Kingston reasonably believed that Donato and Beard were entitled to their earned wages. IBM promised Beard and Donato uncapped commissions. Dkt. No. 54 at 3-4. IBM admitted it was reasonable for Beard, Donato, and Kingston to believe that commissions were uncapped. *Id.* IBM also admitted that if a manager capped a sales representative's commissions, such conduct would violate IBM policy. *Id.* These admissions are sufficient to prove that

[2] Had IBM capped Donato's commissions, as IBM claims Kingston should have, he could have brought similar claims under Pennsylvania law.

[3] *Beard v. Int'l Bus. Machines Corp.*, No. C 18-06783 WHA, 2020 WL 1812171, at *7 (N.D. Cal. Apr. 9, 2020) ("…this order determines that the IPL, according to its own terms, is not a contract.)

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Kingston had a reasonable belief that Beard and Donato had earned their uncapped commissions/wages.[4] Even if more were required, Kingston has direct evidence that Beard's and Donato's uncapped commission were earned. As the Court knows, [redacted] Dkt. No. 71-1. And because Kingston approved them and would not cap, Donato was paid (and still has) 100% of his uncapped commissions. Donato was paid without a fight, but Beard had to engage in a long court battle [redacted] The Court should consider what was actually paid when it decides whether Kingston reasonably believed that (1) Beard's and Donato's wages/commissions were earned and (2) IBM refusing to pay them was (or would have been) wrong.

C. The Wage Rebate Act operates here not to perfect the wrongful termination claim as a whole but to show Washington's clear mandate of public policy.

Two of the scenarios that "do not require much analysis because they implicate clear public policies" are "(1) when employees are fired for refusing to commit an illegal act," and "(4) when employees are fired in retaliation for reporting employer misconduct, i.e., whistle-blowing." *Singleton*, 2018 WL 2113973, at *2 (*citing Rose*, 184 Wn.2d at 287). Once a plaintiff has shown that one (or more) of these situations exists, the burden shifts to the defendant. *Id.*

Kingston's activity falls within these categories. As a result, he has carried his burden, and the burden shifts to IBM. Even if he were required to show more (which Kingston disputes), Kingston can demonstrate that his "discharge may have been motivated by reasons that contravene a clear mandate of public policy." *Martin*, 191 Wn.2d at 723. "In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, *statutory*, or regulatory provision or scheme." *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232 (1984) (emphasis added). This Court found that "Washington has a public policy against racial discrimination"

[4] "The term 'wages' has been held to include commissions." Dkt. No. 27 (*citing Int'l Assoc. of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35 (2002)).

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(Dkt. No. 75), but the Court did not speak to Washington's public policy in favor of ensuring the payment of the full amount of wages earned.

The Wage Rebate Act establishes a clear mandate of public policy specifically in favor of "ensuring the payment of the full amount of wages earned," *Morgan v. Kingen,* 166 Wn.2d 526, 536-38, (2009) (RCW 49.52.050 and 49.52.070 express legislature's "strong policy in favor of ensuring the payment of the full amount of wages earned. The enactment of both a criminal and civil penalty for the willful failure to pay wages earned evidences that strong policy."). Indeed, it is a *crime* (misdemeanor) for "**[a]ny employer**" to pay "**any employee** a lower wage than the wage such employer is obligated to pay such employee by **any statute**, ordinance, or contract." RCW 49.52.050. (emphasis added).[5]

By the plain language of the statute, Washington's "strong policy" must also apply to *any* employer, *any* employee, and *any* statute. For that reason, Kingston's allegations were not limited to his protection of employee wages only to the extent that they were enforceable under the Wage Rebate Act—it is Washington Wage Policy not the existence of a Wage Rebate Act claim that controls.[6] Washington's broad, policy-establishing statutory language must be construed to extend Washington Wage Policy goals to out-of-state employees whose employers are obligated to pay them. It is inconsistent with that policy for Washington to look the other way when an employer fires a whistle-blower in retaliation for protecting out-of-state wages.

[5] Chapter 49.52 RCW is part of a larger "comprehensive scheme" through which the Washington legislature "has evidenced [the state's] strong policy in favor of payment of wages due" to employees. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157-59 (1998) (citing chapters 49.46, 49.48, and 49.52 RCW as well as case law to support the assertion that Washington has a policy of "protect[ing] the wages of an employee against any diminution . . . therefrom by . . . underpayment" (citation omitted)); *see also Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, (2002) (recognizing Washington's "long and proud history" of protecting employees in relation to compensation (citation omitted); *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 671, 682-83, (2014) (pointing to Washington's "strong policy in favor of payment of wages to employees" in holding supervisor can be held liable for wage violations).

[6] Kingston alleges a violation of public policy in favor of wages earned generally, not just Wage-Rebate-Act-enforceable wages. Dkt. No. 20, ¶¶ 109-111. That was necessary because Beard and Donato were out-of-state employees and could not bring claims under the Wage Rebate Act (but they could under their own respective state's laws).

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IBM is a global corporation. IBM chose to have Kingston manage employees all over the country. IBM required Kingston to comply with all laws and regulations that applied to its business.[7] If he failed, IBM told Kingston that he could be fired.[8] When "wages [are] earned" can differ from state to state, but Washington Wage Policy seeks to protect payment of the "full amount of wages earned" generally, regardless of an employee's jurisdiction; otherwise, the policy would be expressed: "ensuring the payment of the full amount of wages earned *under the Wage Rebate Act*," which, of course, it is not.

Limiting Washington Wage Policy to the protection of in-state wages only would also lead to absurd results. Take, for example, this scenario: an employer tells a Washington-based manager not to pay an Oregon employee his wages. Everyone admits that the wages were earned and owed. The employer gives no reason. The manager (who used to be a lawyer) researches Oregon law and finds that it is a crime not to pay the wages and he could be charged along with the employer if he complies. So, he pays the Oregon employee anyway. The employer is enraged, stops the payment before it goes through, and fires the manager, telling him: "You are fired for trying to pay the wages we owed against our instructions." The Oregon employee has no Wage Rebate Act claim but sues under Oregon law and wins.

When the manager sues for retaliation in Washington, would Washington Wage Policy offer him no protection? That cannot be because it would contravene the purpose of Washington adopting the wrongful termination tort. *See Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 258 (2015) ("[The tort for wrongful discharge in violation of public policy] is recognized as a means of encouraging employees to follow the law and preventing employers from using the at-will doctrine to subvert those efforts to promote public policy."). When it adopted this policy-based tort, Washington sought to counterbalance the draconian side of at-will employment and

[7] IBM's Business Conduct Guidelines state: "1.3 Importance of Compliance. … Furthermore, IBM's policy is to comply with all laws and regulations that apply to its business. … Penalties for failure to comply with laws are severe and can result in fines, lawsuits, loss of business privileges and, in some cases, imprisonment of individuals.")

[8] IBM's Business Conduct Guidelines state: "A violation of any IBM guideline can result in disciplinary action, including dismissal.")

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offer protection for those with selfless, ethical motives who stand up for others. To find that Kingston has no such protection ignores the essential goal of Washington Wage Policy: to protect the protectors like Kingston.

D. As with his discrimination-based claim, Kingston's burden is to show his reasonable belief that wages were owed to Beard or Donato, not that they would prevail on claims for those wages.

To prove his Washington Wage Policy claim, Kingston only has to prove he had a *reasonable belief* that IBM owed wages to Beard or Donato. That is true even outside of the four scenarios cited by *Rose*, 184 Wn.2d at 286–87, each of which requires no additional public policy showing. *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 312, (2015) *as amended* (Nov. 23, 2015), a recent and seminal Washington Supreme Court opinion on wrongful termination in violation of public policy claims, held: "We have never adopted as an element of the four-part Perritt test, or of wrongful discharge generally, a requirement that the plaintiff confirm the validity of his or her concerns before taking action." *See also Singleton*, 2018 WL 2113973, at *3 ("As plaintiff was not required to confirm the validity of his concerns before taking action, see *Rickman*, 184 Wn.2d at 312, it is sufficient that plaintiff reasonably believed that his employer was wrongfully accessing and using the call recording data."); WPI 330.51 ("To recover on [his] [her] claim of wrongful termination in violation of public policy,(name of plaintiff) has the burden of proving that a substantial factor motivating the employer to terminate [his] [her] employment was [his] [her] [**refusing to commit an unlawful act**] [performing a public duty] [exercising a legal right or privilege] [**reporting what [he] [she] reasonably believed to be employer misconduct**]") (emphasis added).

E. Kingston reasonably believed that Beard and Donato were owed commissions.

The core of Kingston's claim is that IBM policy dictates that commissions to sales employees like Beard and Donato are uncapped. When IBM capped Beard, IBM violated this policy and Washington Wage Policy. IBM must argue at trial that it instructed Kingston to cap (or "adjust") Donato's commissions; otherwise, it has no legitimate, non-discriminatory reason

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for firing Kingston and he would be entitled to a directed verdict on his racial discrimination based claim. *See Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 70 (1991) ("If the employer fails to produce any evidence of other motivation for the discharge, a directed verdict in favor of plaintiff may result."). IBM has admitted that capping Donato's commission would have violated its written policies. Dkt. No. 75 at 13 ("[IBM's Rule 30(b)(6) witness, Karla Johnson] also testified that using the significant transaction provision to cap Donato's commission would have violated IBM's written policies."). The same rules applied to Beard that applied to Donato. Dkt. No. 75 at 5 ("In denying IBM's motion for summary judgment on Beard's race discrimination claim in that case, the court found that '[a]t least with respect to Donato, Beard has shown that Donato was a similarly situated employee outside of his protected class whom IBM treated more favorably, or so a jury could reasonably find.' ") (*quoting Beard*, 2020 WL 1812171 at *12).

Kingston reasonably believed that Beard and Donato were owed uncapped commissions. Kingston refused to unlawfully cap Donato's commissions and blew the whistle on IBM's (unlawful) cap of Beard's commissions. It was reasonable for Kingston to believe that both were wrong because IBM's policy instructed him explicitly and repeatedly that neither he nor anyone else at IBM was permitted to cap commissions. *See also* Dkt. No. 75 at 4 ("Nevertheless, Beard's commissions were capped, while Donato kept his.") and *Beard*, 2020 WL 1812171 at *6 ("Here, as in *Swafford*, IBM's employees referred to the adjustment of Beard's commissions on the HCL deals directly as 'caps.' For instance, internal emails here show that [Maria Lipner], [Karla Johnson], and [Rose Nunez] all referred to reducing the commissionable revenue from $12.6 million to two million as a 'cap' (See Dkt. No. 78, Exhs. 7, 30, 45, 46). Moreover, Kingston testified that Beard's "pay was limited, capped, contrary to the written policy" (Kingston Dep. 194:25–195:1). Mulada testified that "capping commission would be saying I am not going to pay more than X amount" (Mulada Dep. 5:14–16). Beard himself testified that he understood uncapped to mean IBM could not place an artificial limit on his earnings (Beard Dep. 84:18–25).").

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When IBM capped Beard, IBM did not pay him the "full amount of wages earned." That violated Washington Wage Policy, which seeks to "ensur[e] the payment of the full amount of wages earned." *Morgan,* 166 Wn.2d at 536. Kingston opposed that misconduct and reported it numerous times, as he did with IBM's discriminatory conduct. These facts alone are more than sufficient to send Kingston's Washington Wage Policy claim to the jury.

The Court should issue an order setting a deadline for IBM to serve a written response, if any, on this issue. After that, if the Court agrees with the position Kingston has outlined here, the Court should issue an order clarifying that Kingston is permitted to argue the Washington Wage Policy in support of his wrongful termination claim (in addition to racial discrimination) to the jury at trial.

III. STATEMENT OF EVIDENCE

The following is a summary of the evidence Kingston will present at trial to demonstrate that: (1) IBM terminated Kingston because he opposed IBM's discriminatory treatment of Beard; (2) IBM terminated Kingston because he opposed IBM's decision to not pay Beard the full commissions to which he was owed; (3) IBM terminated Kingston because he refused to unlawfully cap Donato's or Beard's commissions; (4) IBM terminated Kingston because he was an older employee; (5) IBM was unjustly enriched when it refused to pay Kingston all of the commission he was owed after he was terminated; and (6) Kingston suffered damages as a result of IBM's conduct.

A. Kingston was a highly valued IBM employee for nearly eighteen years.

Before he was terminated on April 16, 2018 at the age of 58, Scott Kingston worked for IBM for nearly eighteen years. Kingston managed a team that sold technology and software through embedded solutions agreements (ESA), deals under which IBM licenses its technology and software to other companies. The ESA team was required to be involved in any IBM ESA deals. ESA team members were viewed within IBM as valuable specialists due to the increasing use of the ESA model to effectuate deals. As a second-line manager, Kingston directly

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supervised two first-line managers, Andre Temidis and Greg Mount, who in turn supervised sales representatives Nick Donato and Jerome Beard respectively.

Kingston was described as "very ethical and very committed and [] smart" by his direct supervisor Dave Mitchell. His most recent performance review, issued just six weeks before he was terminated, noted that his team brought in $162 million on a fiscal year target of $111.6 million and that he exceeded or met expectations on four of his five performance ratings. Mitchell stated in the review that he expected Kingston's role as a subject matter expert to increase as IBM continued to recognize the value of the embedded solutions model. Kingston's 2017 performance review is consistent with the positive reviews he received in each of the three preceding years.

B. IBM's method of establishing quota.

IBM paid Kingston and other members of the ESA team under a commissions plan called the individual quota plan (IQP). Every six months, IBM's finance team provided a total quota amount to Kingston that was allocated among members of the team. To calculate the total quota, finance first set a specific amount for each account based on an account's baseline sales from the same period the preceding year and any increase ("uplift") IBM wanted to drive for that period ("growth rate"). The sum of sales employees' individual quotas for those accounts equaled the total quota. When he received the total quota for a given period, Kingston had his managers allocate it among team members exactly as it was prescribed by the accounts each team member held. When the finance team assigned a $0 quota to an account, the allocated quota to the sales employees' who held the account would also be $0. That process puts a high value on new business for sales employees consistent with the difficulty of securing new business and the value of new business to IBM. Individual target quotas were delivered to members of the ESA team every six months through an electronically issued Incentive Plan Letter (IPL).

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C. IBM policies prohibit the capping of commissions and the tying of commissions to contribution.

IBM's policies barred capping commissions for anyone working under an IQP. IBM used this policy to motivate sellers and made sure managers understood that capping commissions was a violation of IBM policy. IBM also requires that IQP commissions be calculated based on sales, not an individual's contribution. IBM provided clear guidance to the ESA team that capping was prohibited, and that contribution should not be factored into commissions. The "primary education" IBM used in 2017 was a PowerPoint presentation, which called out in red text: "Managers are required to assign a territory and quota for each seller on an individual quota plan. Seller earnings for these plans are uncapped and the plan is paid based upon achievement results rather than on an assessment of employee contribution." (Emphasis in original.)

D. Nick Donato closes a large sale to SAS Institute and earns an uncapped commission of $1.6 million.

1. The SAS deal closes and triggers a large commission to Nick Donato.

On June 20, 2017, another sales division asked Kingston's team for help closing a deal with SAS Institute. The deal was in Kingston's territory, which included all possible ESA sales in North America, but because there had been no sales to SAS in the prior year the account had been assigned a $0 sales quota.

It was not unusual for there to be a $0 quota for an account within Kingston's territory. Unlike other teams at IBM, the ESA team could work with any account making it more likely that an ESA sales representative would end up working on a large deal with a customer that had no recent history of ESA deals with IBM. Typically, the commissions even out over time because any large deal comes with the added burden of carrying a large quota the following year established by that deal plus uplift.

Kingston assigned the SAS deal to Nick Donato and his first line manager because Donato's territory was the mid-Atlantic region, where SAS was headquartered, and Donato may have actually covered SAS at some point. With the assistance of Kingston, Temidis, and Donato, the SAS deal closed on June 30, 2017, bringing in more than $18 million for IBM.

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After the SAS deal closed, IBM was apparently confused about who would be paid. IBM finance executive Mark Baglini emailed a commissions team leader, noting that "[i]t is being suggested" only three people should be paid commissions for the multi-million-dollar sale and asking, "Is this possible? How should this be managed?" The following week, as part of a group email chain with Baglini, another executive wrote that Andre Temidis and Nicholas Donato "SHOULD get paid for this deal." After reviewing the SAS deal, Karla Johnson, a commissions executive, told Baglini and North American Finance VP Cindy Alexander that Temidis and Donato would not be paid under their existing compensation plans because SAS was not in their territory or assigned quota. But Baglini and several other executives, Karla Johnson and Alexander, had an extended debate about how commissions should be paid. Alexander wrote:

> Why did Temidis and Donato work on this deal if not in their territory, and how did everyone think they were going to be comp'd?

The executives agreed that Temidis and Donato should be compensated through a "share of credit" process. But they did not tell Kingston they wanted him to use a share of credit to compensate Donato, which Johnson agrees was a "mistake." None of the executives said that Kingston should apply the significant transaction clause or add quota to Donato's account—the reasons later given for Kingston's termination.

On July 19, 2017, nearly 20 days after the deal had closed, Temidis updated the coverage ID for the SAS transaction in IBM's commission system, which gave credit to Donato, Temidis, and ESA Tech Employee Bil Sherrin. It was not unusual for a coverage ID to be updated like this after a deal closed. Under Donato's commission formula, he earned a $1.6 million payment because he sold more than 2000% of his overall quota between SAS and other deals he had closed that period.

2. Kingston and Temidis approved Donato's payment consistent with IBM's high achievement review process and no-capping policy.

Kingston and Temidis's review and approval of Donato's commission was consistent with IBM's process for reviewing "out-of-range" or "high achievement" commissions.

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According to IBM's policies, the commission team first checked for errors and then, for large payments, emailed first-line managers asking them to "confirm that each employee's sales role, territory, and quota were correct." Communication to second-line managers, like Kingston, was "optional." But an informational email was supposed to be sent to the Business Unit VP.

Because Donato's commission was greater than 400% of his quota, the commission team emailed Temidis (first-line manager) and chose to include Kingston (second-line manager) requesting approval. [redacted] Kingston and Temidis approved the commission on August 14, 2017. They did not believe they had authority to cap the commission. Kingston also "[redacted]" which Karla Johnson agrees was a reasonable assumption.

E. Jerome Beard closes two large deals with HCL that earn him nearly $1.5 million each, but IBM caps him at less than 15% of what he was owed.

Just weeks after Donato received his $1.6 million commission, one of Kingston's other team members, Jerome Beard, who is Black, closed a deal on September 30, 2017 that earned him a commission payment of approximately $1.5 million. But instead of paying him, IBM capped the payment at less than 15%. Beard then closed a second deal in December 2017 that also generated a nearly $1.5 million commission payment to him. But as with the deal Beard closed in September, IBM capped him at less than 15% of that amount. Beard earned the commissions on two deals with HCL worth a total of $100 million and $15 million, respectively, to IBM (and laid the foundation for a $1.8 billion HCL deal in December 2018). In both cases, Beard's commissions were capped at the insistence of Brian Mulada, the VP, CFO, and COO of IBM's Cognitive Solutions Group.

On October 7, 2017, Mulada contacted Vice President of IBM Global Sales Incentives and the head of commissions at IBM, Maria Lipner, about reducing Beard's commissions on the first HCL deal. Lipner pushed back, telling Mulada that [redacted]

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[redacted]." On November 21, 2017, Rose Nunez, IBM's Director of Channel Management, emailed Mulada and Johnson with her recommendation that Beard's commissions be "'capped' at between 200 and 250 percent on the second HCL deal. Johnson responded by informing Nunez that IBM does not cap commissions and that 'setting a pre defined cap is not consistent with the design and terms within our plane [sic].'" Nevertheless, Beard's commissions on both deals were capped, while Donato kept his.

After an internal investigation found no wrongdoing, Beard filed suit. In denying IBM's motion for summary judgment on Beard's race discrimination claim in that case, the court found that "[a]t least with respect to Donato, Beard has shown that Donato was a similarly situated employee outside of his protected class whom IBM treated more favorably, or so a jury could reasonably find." Subsequently, IBM and Beard reached a settlement, [redacted]

F. Kingston repeatedly objects to capping Beard's payments.

Kingston did not learn that Beard's commission would be capped until November 13, 2017, when Nunez called to tell him. Kingston immediately told Nunez that capping Beard's commission was a violation of the company's policies and potentially the laws and complained about the incongruity of capping Beard when Donato had recently received an uncapped commission. Kingston pointed out the possibility of racial discrimination and the fact that it was an appearance that would be hard to overlook, given that Nick Donato was White and Jerome Beard was Black.

Following that call, Nunez wrote to Brian Mulada that she "connected with [Kingston] yesterday" and described Kingston's "general comments":

> Make sure these 'caps' are known up-front going forward. They are okay with the limitation but they don't want reps [to] think they are being singled out or treated unfairly

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> It is like playing football, winning the game, then someone tells you the touchdowns are now worth 3 pts instead of 7 pts.

The following day Mulada forwarded the message to Cindy Alexander, the North American Finance VP who would later play a role in terminating Kingston.

After speaking with Nunez, Kingston called his supervisor Dave Mitchell and told him that the fact that Beard was Black and IBM had fully paid a White sales representative in the preceding months left the possibility of discrimination open and valid. Kingston begged Mitchell to escalate his concerns to get proper review and hopefully resolve the problem in a logical way. Kingston also told his new supervisor, Dorothy Copeland, about his concerns, bringing up Beard's commission every time he spoke to her (or Mitchell) in the subsequent days and weeks. In early January, Kingston had a call with Nunez, Copeland, Mitchell, Greg Mount, "and maybe some others," where he explained that the IBM's treatment of Beard was unfair, there was no policy for it, it was contrary to the written policy, and Beard's race was the obvious remaining root cause for the behavior.

G. IBM attempts to cover its differential treatment of Jerome Beard, and get rid of Kingston, by portraying Kingston as the problem.

1. Karla Johnson reverses course on the Donato payment to justify capping Beard and offers contradictory bases for Kingston's purported error.

On October 7, 2017, the same day Mulada contacted Lipner about reducing Beard's commissions, the Director of Finance of IBM's North America Systems emailed Johnson about Donato's commission: "do you know how these payments were validated before they were made?" In response, Johnson wrote, "first it is IBM's policy that we do not cap payments." She then noted that Donato's commission approval had followed the normal process for significant overachievement. Johnson did not note any surprise or any kind of problem at that point. Johnson's manager, Maria Lipner, also did not indicate "any kind of a problem" with Donato's commission.

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On October 16, 2017, just one week after she found no issues with Donato's uncapped payment but after learning IBM intended to cap a similar payment to Beard, Johnson reported Kingston to the internal audit department, purportedly because he added SAS to Donato's territory without increasing Donato's quota. Johnson would later testify that she agrees quotas should not be increased after a deal closes because it would not be fair to the sales representative. And neither Johnson nor anyone else at IBM has identified what dollar amount Kingston should have used to increase Donato's quota.

The timing of Johnson's allegation in relation to the HCL deal, her sharp reversal on the Donato payment, and the contradictory nature of her allegations suggest that IBM recognized the company's differential treatment of Beard was a problem and began looking for fault with the Donato payment to cover its already-determined course with Beard.

2. Larkin's report is incomplete and inconsistent with IBM policies and heavily influenced by Johnson.

Charles Jeffrey Larkin, an internal audit investigator at IBM, began his investigation in late October or early November of 2017, conducted most of his interviews in January 2018, and submitted his completed report on February 28, 2018. The report introduced a new alleged "failure" by Kingston that was not included in Johnson's allegation or raised by any of the commission, finance, or sales executives who had previously reviewed the account. According to Larkin, Kingston should have applied the IPL's "significant transaction" clause. But the evidence shows that the significant transaction clause conflicted with IBM's other commission policies, and IBM did not have a process or provide guidance for applying the clause. Larkin admitted when he was deposed that the guidance IBM provided to managers contradicts his finding that the significant transaction clause can be used to ensure that the seller is fairly compensated based on management's judgment of the seller's contribution in closing the deal. In other words, the "failure" to apply the significant transaction clause was just another reason concocted by IBM after the fact to justify capping Beard and to silence Kingston.

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When Larkin interviewed Kingston in January, Kingston told him that Beard's situation was the first time he'd ever seen the company arbitrarily decide to cap somebody's pay without a logical explanation, and the fact that he was a minority left a possibility that it was race related. Beard came up in interviews Larkin conducted with other witnesses as well. Despite this, and despite admitting that comparative situations were relevant, Larkin did not investigate IBM's capping policy or Beard's capped commissions.

3. IBM changed it policies but still prohibits capping or contribution-based reductions to commission payments.

After terminating Kingston, IBM changed its commission review process by eliminating "management high achievement review as part of the process." Now, the "worldwide process team" reviews any payment in excess of $400,000 to confirm the territory and quota are validated. The team does not consider whether the significant transaction provision should be applied. Likewise, the team does not consider "any information about the employee's contribution to the deal." It is still IBM's policy that commissions on individual quota plans are uncapped and, as a result, "no one at IBM would be allowed to cap a commissions payment" even today.

H. Kingston is terminated.

On February 28, 2018, Larkin submitted his final report on Donato's commission to IBM HR executive Linda Kenny, concluding:

> Mr. Temidis and Mr. Kingston were negligent in not initiating an adjustment (reduction) of Mr. Donato's commission for his work in closing a significant transaction into an account (SAS) for which he had no quota . . . . [B]oth told IA that they were familiar with the significant transaction clause which allows IBM the latitude to reduce commissions in such circumstances. However, both . . . were uncomfortable about capping commissions under any circumstances[.]

After reviewing Larkin's report in early April 2018, IBM HR executive Linda Kenny recommended terminating Kingston, Temidis, and Lee. She sent the recommendation to consistency reviewer Russ Mandel, Dorothy Copeland, and a Disciplinary Action Review

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Committee consisting of Lisa Mihalik, Cindy Alexander, and Scott Ferrauiola. Copeland reviewed the recommendation with her boss, Stephen Leonard. The "decision-makers" on Kingston's termination were Dorothy Copeland, Stephen Leonard, Lisa Mihalik, Scott Ferrauiola, and Cindy Alexander. Just two days after the Committee met, before IBM fired Kingston, Alexander forwarded Nunez's email describing Kingston's concerns about Beard's commission to Larkin, Kenny, the internal audit investigator, and the HR executive who recommended terminating Kingston. IBM has taken the position that the topics discussed during the Committee meeting are privileged.

Testimony and emails from the individuals involved in Kingston's termination reveal additional inconsistencies in the basis for Kingston's termination. For example, Mihalik testified she relied on the fact that Kingston's case was consistent with other actions taken by IBM. But IBM did not consider any other specific cases in determining whether this result was consistent. Furthermore, the assertion by IBM decisionmakers that Kingston erred in failing to apply the significant transaction clause conflicts with the testimony of IBM's designated representative as well as interrogatory responses stating that Kingston's error was a failure to add quota. Again, IBM's purported legitimate basis for terminating Kingston is rife with inconsistencies.

I. Kingston was not paid his full commissions for work in the first quarter of 2018.

When Kingston was terminated, he was paid his commissions for the first quarter of 2018 based on the ledger at that time. But after April 1, 2018, the ledger was revised and $4,315,736 was added to the revenue credit from deals closed within Kingston's territory. Kingston alleges he is owed an additional $113,728 from this adjustment based on his commission formula.

J. Evidence of age discrimination

Kingston heard IBM mangers talk about the desire to place younger people in roles. He heard Stephen Leonard, who was on the Disciplinary Action Review Committee, suggest he supported Project Sunrise, an IBM program to lay off older workers in favor of younger ones. And around the time Kingston was terminated, the EEOC issued a determination based on charges brought by older employees of IBM who alleged they were discharged based on their

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age. "The investigation uncovered top-down messaging from [IBM]'s highest ranks directing managers to engage in an aggressive approach to significantly reduce the headcount of older workers to make room for Early Professional Hires" and found nationwide evidence "supporting a discriminatory animus based on age."

Further, several people involved in Kingston's termination had reason to believe he was older than 40. Larkin testified that he "would have assumed" Kingston was over 40, Copeland understood that Kingston had "worked at IBM for a long time." And consistency reviewer Russ Mandel, who reviewed Larkin's recommendation before sending it to the Committee, testified that he read in Larkin's report that Kingston had been with IBM for 17 years.

IV. ARGUMENT & AUTHORITY

A. Retaliation.

To prove retaliation under the WLAD, Kingston must show by a preponderance of the evidence that he was opposing what he reasonably believed to be discrimination on the basis of race and that his opposition was a substantial factor in IBM's decision to take an adverse employment action. Wash. Pattern Jury Instr. Civ. WPI 330.05 (7th ed. July 2019); *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 411-413 (2018).

The evidence will show that Kingston was opposing what he reasonably believed to be racial discrimination. It is undisputed that in the second half of 2017, Beard closed two deals, each of which would have led to a commission payment of approximately $1.5 million. But IBM paid Beard less than 15% of what IBM's commission formula provided he should have been paid. Just weeks earlier, a White colleague of Beard's received an uncapped $1.6 million commission on a similar deal. It is also undisputed that IBM has a no-capping policy.

Beard complained to Kingston that he believed he was being discriminated against because of race. In fact, Beard believed this so fervently that he sued IBM while he was still working for IBM. The judge in Beard's case found that a reasonable juror could determine Beard had been treated less favorably than Donato. Ultimately, IBM and Beard reached a settlement

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under which IBM [redacted] These facts show that Kingston's belief that IBM was discriminating against Beard was reasonable.

The evidence will also show that Kingston's opposition was a substantial factor in IBM's decision to terminate him. Just six weeks before his termination, Kingston received a glowing review that showed him on a growth trajectory at IBM. During this same time, the decisionmakers at IBM began to learn that Kingston was complaining about racial discrimination. Kingston was terminated shortly thereafter, suggesting a retaliatory motive. *Currier v. Northland Servs., Inc*., 182 Wn. App. 733, 747 (2014) ("Proximity in time between the protected activity and the discharge, as well as satisfactory work performance and evaluations before the discharge, are both factors suggesting retaliation.").

IBM concedes that Kingston's supervisor was aware of his concerns that Beard was being discriminated against. The evidence shows that other IBM employees, including the decision makers, knew as well. *See* Dkt. No. 75 at 11 ("The evidence suggests" that Kingston's supervisors told others about Kingston's concerns). Kingston reported racial discrimination in his interview with Larkin, the internal investigator who recommended disciplinary action. And two days after the Disciplinary Committee met but before Kingston was terminated, Alexander, "an ultimate decisionmaker," forwarded an email describing Kingston's concern to Kenny, another "ultimate decisionmaker," and Larkin. After this email, Mitchell, Copeland, Mount, Nunez, Mulada, Alexander, Kenny, Larkin, and possibly others were all aware that Kingston raised concerns about Beard's capped commissions.

Finally, the evidence will show that IBM's purported non-discriminatory reason for terminating Kingston is simply a pretext. Indeed, the evidence will show that Kingston "followed IBM's written policies to the letter [and] was terminated for failing to violate those policies." Dkt. No. 75 at 14. IBM has "yet to articulate a reason for terminating [Kingston] that is consistent with its own policies." *Id*. Instead, IBM has presented multiple shifting and incompatible reasons for Kingston's termination that contradict IBM's policies and suggest a pretext. *See Renz v. Spokane Eye Clinic, P.S.,* 114 Wn. App. 611, 623 (2002) ("Multiple,

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incompatible reasons may support an inference that none of the reasons given is the real reason.").

B. Wrongful termination in violation of public policy.

To prove wrongful termination in violation of public policy, Kingston must show by a preponderance of the evidence that reporting employer misconduct was a substantial factor in his termination. Wash. Pattern Jury Instr. Civ. WPI 330.51, 330.51 (7th ed. July 2019). Determining whether employer misconduct implicates a clear public policy is a question for the Court. *See Hubbard v. Spokane Cty.*, 146 Wn.2d 699, 708 (2002), *overruled on other grounds by Rose*, 184 Wn.2d 268 ("Whether a particular statute contains a clear mandate of public policy is a question of law.").

Washington has a clear public policy against racial discrimination. RCW 49.60.030 ("The right to be free from discrimination because of race … [or] color … is … a civil right."). As noted previously, Washington also has a clear public policy in favor of ensuring employees are paid their full wages earned. *See* RCW 49.52.050; *Morgan*, 166 Wn.2d at 536-38 (RCW 49.52.050 and .070 express legislature's "strong policy in favor of ensuring the payment of the full amount of wages earned"). For the reasons discussed above, the evidence will show that either Kingston's refusal to commit an unlawful act or his reporting of employer misconduct was a substantial factor in IBM's decision to fire him and that IBM's supposed legitimate reasons for firing Kingston were pretextual.

C. IBM discriminated against Kingston because of his age.

To prove age discrimination under the WLAD, Kingston must show by a preponderance of the evidence that his age was a substantial factor in IBM's decision to terminate him. *See* Wash. Pattern Jury Instr. Civ. WPI 330.01 (7th ed. July 2019).

The evidence will show that Kingston's age was a substantial factor in IBM's decision to fire him. IBM does not dispute that Kingston was over 40 and doing satisfactory work when he was discharged. Several people involved in Kingston's termination knew he was older than 40. And while others involved in Kingston's termination testified that they did not know his age, "a

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reasonable fact-finder could find it implausible that the individuals who terminated him, including his direct supervisor, believed he was younger than the protected age category of 40, or hat the HR committee terminated him without reviewing his personnel file." Dkt. No. 75 at 16.

Before his termination, Kingston heard Stephen Leonard, one of the members of the Disciplinary Committee, express support for Project Sunrise, an IBM initiative to lay off older workers. Kingston also heard conversations about IBM's desire to hire younger workers. This evidence is consistent with an EEOC investigation during the same time Kingston was fired that found "top-down messaging from [IBM's] highest ranks directing managers to engage in an aggressive approach to significantly reduce the headcount of older workers to make room for Early Professional Hires." Dkt. No. 75 at 16. The investigation found nationwide evidence of "discriminatory animus based on age." This evidence suggests a discriminatory motive. *See Scrivener v. Clark College*, 181 Wn.2d 439, 448-50 (2014) (employer's expressed desire to hire "younger talent" constituted "circumstantial evidence probative of discriminatory intent"); *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1095 & n.6 (9th Cir. 2005) (an "employer's animus toward the class to which the plaintiff belongs" constitutes direct evidence of bias (citation omitted)).

As discussed above, IBM will not be able produce evidence of a legitimate, non-discriminatory reason for firing Kingston.

D. Unjust enrichment

To prove unjust enrichment, Kingston must show by a preponderance of the evidence that he performed services for IBM's benefit and with IBM's knowledge and that under the circumstances, IBM either knew or should have known that the services were performed and received with the expectation of payment of reasonable value. Wash. Pattern Jury Instr. Civ. WPI 301A.02 (7th ed. July 2019); *Young v. Young*, 164 Wn.2d 477, 484 (2008); *Chandler v. Washington Toll Bridge Auth.*, 17 Wn.2d 591, 600 (1943).

The evidence will show that Kingston performed work for IBM with IBM's knowledge in the quarter before his termination and that Kingston did not receive all of the commissions he

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was owed for that work. Specifically, IBM has admitted that after April 1, 2018, $4,315,736 was added to the revenue credit from deals closed within Kingston's territory. Kingston would be entitled to a portion of the additional revenue based on his commission formula. If Kingston is successful in proving that he was terminated for retaliatory or discriminatory reasons, IBM's retention of this commission would be inequitable.

E. Damages and restitution.

1. Kingston suffered economic harms as a result of IBM's unlawful conduct.

A plaintiff who proves discrimination in violation of the WLAD may recover his actual damages, including back pay and front pay. See RCW 49.60.030(2); *Martini v. Boeing Co*., 137 Wn.2d 357, 364 (1999). Back pay includes lost wages and fringe benefits from the time the plaintiff was terminated until the date of trial. Front pay includes lost wages and fringe benefits from the date of trial through the likely duration of the terminated employment, which may extend to retirement. *See Blaney v. Int'l Ass'n of Machinists and Aerospace Workers*, Dist. No. 160, 151 Wn.2d 203, 210–11 (2004).

Erick West, a forensic economist, will provide expert testimony on Kingston's economic losses proximately caused by IBM's wrongful termination of her employment.

2. Kingston suffered emotional harm as a result of IBM's unlawful conduct.

Mental anguish and emotional distress damages are also actual damages recoverable under the WLAD. *See* RCW 49.60.030(2); *Blaney v. Int'l Ass'n of Machinists and Aerospace Workers*, 114 Wn. App.80, 97 (2002) (citing *Ellingson v. Spokane Mortgage Co.*, 19 Wn. App. 48, 56–7 (1979)). Medical testimony and objective evidence is not required to prove emotional distress in an employment discrimination case; lay testimony by the plaintiff and others is admissible. *See Herring v. Dep't of Soc. & Health Servs.*, 81 Wn. App. 1, 23–24 (1996).

In addition to Kingston's own testimony, Kingston's wife will provide testimony regarding the emotional impact and distress Kingston suffered as a result of IBM's wrongful termination of his employment.

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3. Unjust enrichment.

The remedy for unjust enrichment is restitution. *Ehsani v. McCullough Fam. P'ship*, 160 Wn.2d 586, 594–95 (2007) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.") (citing Restatement of Restitution § 1). "In Washington the proper damages for a recovery in restitution upon a wrongfully terminated contract is the reasonable value of services." *Dravo Corp. v. L.W. Moses Co.*, 6 Wn. App. 74, 91 (1971); Wash. Prac., Contract Law And Practice § 14:7 (3d ed.).

Erick West will testify that Kingston is entitled to an additional $113,728 in commissions for the first quarter of 2018 based on IBM's commission formula.

F. Affirmative Defenses.

IBM has indicated that it intends to introduce evidence at trial related to three affirmative defenses—mitigation, after acquired evidence, and same decision. Dkt. No. 82 at 1-5. Kingston submitted a motion in limine asking the Court to prohibit IBM from introducing any evidence or argument related to these defenses. Dkt. No. 78. at 6-13. Even if the Court allows IBM to present these affirmative defenses, none of them support a reduction of Kingston's damages based on the evidence in this case.

1. Mitigation

IBM has the burden of proving the affirmative defense that Kingston failed to mitigate his damages. *See Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 529 (1992), *aff'd*, 123 Wn.2d 93 (1994). "To satisfy its burden, the defendant must show that there were suitable positions available and that the plaintiff failed to use reasonable care and diligence in seeking them." *Burnside*, 66 Wn. App. at 529. If IBM fails to prove "substantially equivalent" employment was available, then as a matter of law the "mitigation" defense fails. *Id.* at 529-30.

Kingston filed a motion in limine requesting that the Court exclude any argument, evidence or testimony regarding mitigation, including Peter Nickerson's testimony of the effect this defense (if proven) would have on Kingston's damages. IBM has not produced admissible evidence showing there were suitable positions available that Kingston failed to apply to. Indeed,

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the only evidence IBM has produced in support of its mitigation defense is the report of William Skilling, which the Court already excluded.

If the Court denies Kingston's motion in limine on IBM's mitigation defense, the evidence will establish that Kingston sufficiently mitigated his damages. Kingston applied to at least 157 positions between April 2018 and September 2020. He also looked for potential employers and employment opportunities through various job search engines such as LinkedIn and GlassDoor and reached out to his personal networks in an attempt to find employment. Despite these efforts, Kingston has not received more than an initial interview with any company. This evidence refutes IBM's mitigation affirmative defense. *See Stewart v. Snohomish Cty. PUD No. 1,* 262 F. Supp. 3d 1089, 1112 (W.D. Wash. 2017), *aff'd sub nom.* 752 F. App'x 444 (9th Cir. 2018) (finding plaintiff properly mitigated his damages where he made "significant efforts to secure a comparable or lesser position, including applying to over 100 jobs").

2. After-acquired evidence.

To establish an after-acquired evidence defense, an employer must show that the employee's "wrongdoing was of such severity that the employee would have been terminated on those grounds alone once the employer discovered the wrongdoing." *See Janson v. North Valley Hosp.*, 93 Wn. App. 892, 901 (1999). IBM has not disclosed a factual basis in support of this defense despite Kingston's repeated requests that IBM do so and despite the fact that Washington's pattern jury instruction, which IBM has indicated should be used at trial, calls for IBM to state the basis of the defense. *See* Dkt. No. 78 at 8-12; Wash. Pattern Jury Instr. Civ. WPI 301A.02 (7th ed. July 2019). IBM's motion in limine response appears to suggest (though it is far from clear) that IBM may present an after-acquired evidence defense on the basis that Kingston failed to fully deploy quota, or on the basis that Kingston took documents after he was terminated from IBM. Neither fact pattern supports the after-acquired evidence defense.

IBM's assertion that Kingston failed to deploy quota is the latest in the company's series of after-the-fact justifications for Kingston's termination. Kingston's position, as noted in his motion in limine, is that IBM should be precluded from introducing evidence related to the

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purported failure to deploy quota because IBM failed to produce admissible evidence regarding this defense. Even if the Court allows IBM to introduce evidence related to this defense, the overwhelming evidence will show that Kingston deployed his quota consistent with IBM policies and practices and that the alleged failure is simply another pretextual basis for Kingston's termination.

IBM's assertion that Kingston would have been terminated because he took documents from IBM is similarly misguided. The evidence will show that the only documents Kingston took were related to his termination and the events leading up to it. Kingston took the documents after he was terminated, and he took the documents because he was terminated and wanted to pursue his rights against IBM for its unlawful conduct. Moreover, Kingston will testify that he only shared the documents with his attorneys in connection to this litigation. Several of the emails Kingston took were not produced by IBM in this litigation. This shows that Kingston's concerns were well founded. For these reasons, Kingston's act of taking the documents cannot serve as a separate ground for IBM's decision to terminate him and the evidence does not support the after-acquired evidence defense.

3. Same-decision defense.

IBM has indicated that it intends to raise an affirmative defense that "even if a prohibited factor played a role in Plaintiff's termination…the same decision would have been made without consideration of this factor." *See* Dkt. No. 82 at 4. IBM has not submitted a jury instruction on this defense and should be precluded from introducing any evidence or argument related to such a defense. *See Conti v. Corp. Servs. Grp., Inc.*, 30 F. Supp. 3d 1051, 1072 (W.D. Wash. 2014), *aff'd*, 690 F. App'x 473 (9th Cir. 2017) ("Defendants' failure to request a jury instruction on a WLAD same-decision defense is fatal to their attempt to invoke it now.").

Even if IBM had submitted a proposed jury instruction, it is an open question whether the same-decision defense is applicable for WLAD claims. While the Washington Supreme Court recognized the same decision defense in *Davis v. Dep't of Lab. & Indus.*, 94 Wn.2d 119, 127 (1980), no Washington appellate court has applied any version of the same-decision defense

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since *Mackay v. Acorn Cabinetry, Inc.* which rejected the determining factor standard of proof of discriminatory causation. 127 Wn.2d 302, 308-12 (1995); *see also Scrivener*, 181 Wn.2d at 445 (rejecting determining factor standard because it is "contrary to Washington's 'resolve to eradicate discrimination' and would warp this resolve into 'mere rhetoric.") (quoting *Mackay*, 126 Wn.2d at 310–11)). Indeed, in *Conti*, which IBM cites in its motion in limine for the proposition that Washington recognizes a same-decision defense, the court notes it is unclear whether such a defense exists under the WLAD. 30 F. Supp. 3d at 1072.

If the Court determines that the same-decision affirmative defense applies and that IBM can belatedly include a jury instruction on this defense, IBM will have to prove by clear and convincing evidence that even if a prohibited factor played a role in Kingston's termination, the same decision would have been made without consideration of this factor. *Davis*, 94 Wn.2d at 127. For all of the reasons discussed above, IBM will not be able to do meet this burden.

V. CONCLUSION

Scott Kingston will present evidence at trial proving that a substantial factor in IBM's decision to terminate him was his refusal to commit an unlawful act, his reporting of employer misconduct, and/or his age. He will also show IBM was unjustly enriched when it terminated him. Finally, Kingston will prove that he is entitled to economic and non-economic damages.

RESPECTFULLY SUBMITTED AND DATED this 23rd day of March, 2021.

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