STATE OF MAINE

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NO. BCD-23-442

JENNIFER OWEN,

Plaintiff/Appellant,

v.

TOWN AND COUNTRY FEDERAL CREDIT UNION

Defendant/Appellee

APPELLANT'S OPENING BRIEF

Dated: April 12, 2024

Respectfully submitted,

/s/ Guy D. Loranger, Esq.

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I. Introduction.

Plaintiff Jennifer Owen (Owen) filed a claim of disability discrimination and retaliation against her former employer Town and Country Credit Union ("T & C"). Specifically, Owen, who was in remission from breast cancer, feared the cancer had returned. Owen notified T & C of her concern. T & C then terminated Owen. Owen alleges the termination resulted from T & C concern Owen would have to go out on leave.

In the present appeal, Owen targets two areas. First, Owen appeals the Court's ruling during discovery that she engaged in spoliation of evidence resulting in a monetary sanction. Second, Owen appeals several erroneous evidentiary rulings by the Court which individually and/or collectively severely prejudiced her ability to establish T & C's discrimination and retaliation and necessitates a retrial.

I. Statement of Facts

Owen filed her complaint in September of 2020. *Appendix at 39-45*. The complaint alleges Owen began employment with Defendant in April of 2012. In 2013, Owens was diagnosed with cancer. Cancer is defined a per se disability under the Maine Human Rights Act ("MHRA"). T & C had notice of Owen's cancer. Owen's cancer was successfully treated, and she went into remission for several years. In September of 2018, Owen had a suspicious growth. The growth was biopsied. Owen gave notice to management of the discovery of the growth as it gave her tremendous

anxiety given her bout with cancer. On or about October 24, 2018, Owen had a doctor's appointment to re-examine the growth. Owen's supervisor discouraged her from going to the appointment during working hours. Owen, however, went to the appointment and afterwards returned to work. At the end of the day, T & C terminated Owen for alleged performance issues. The performance issues are a pretext created by T & C to terminate Owen because of her disability. Owen subsequently filed for unemployment benefits. The Department of Labor ruled in Complainant's favor, finding that the alleged performance issues did not amount to misconduct. After Owen's termination, she filed a complaint with the Maine Human Rights Commission ("MHRC") for discrimination and retaliation against Defendant and then filed the present complaint.

On February 2, 2022, the Court granted T & C's motion for spoliation and ordered Owen to pay a monetary sanction. On April 23, 2023, the Court denied Defendant's motion for summary judgment. On September 19, 2023, the Court granted T & C's motion in limine to exclude Owen's "ME Too witnesses". The trial of the matter took place from October 2, 2023, to October 6, 2023. The jury returned a defense verdict. Owen then filed a timely notice of appeal.

II. Issues on Appeal.

- The Court erroneously granted T & C's pretrial spoliation motion.
- The Court erroneously excluded Owen's "Me Too" witnesses.
- The Court erroneously refused to allow Owen to impeach T & C regarding its claim it did not discriminate again employees with disabilities.

- The Court erroneously refused to allow Owen to present evidence of comparative discipline.

- The Court erroneously refused to allow Owen's to question witnesses about evidence which T & C placed into evidence and concerned discrimination against other employees.

III. Argument.

A. <u>The Court erroneously granted T & C's pretrial spoliation motion.</u>

The standard of review is de novo. At the close of discovery, T & C filed a motion to dismiss or issue sanctions against Owen for alleged spoilation of evidence. *Appendix at 47-67* Specifically, T & C's asserted Owen intentionally destroyed text messages, with a friend Jessica Dunton ("Dunton") Walker, which allegedly had relevance to claims in her lawsuit.[1] *Id*. In response, Owen repeatedly testified she may have had innocuous communications with Dunton regarding the lawsuit, but she denied having any communications with Dunton regarding any claims related to her lawsuit or destroying any such communications. *Appendix at 50, 52, 53, 71, 83-84.* Unhappy with Owen's responses, T & C requested the Court order Owen to produce her phone to T & C to download all messages with Dunton. The Court granted the motion. T & C downloaded the phone. The download generated over 700 hundred pages with over

[1] Dunton also had a disability discrimination claim against T & C. Dunton's claim settled before the filing of a Maine Human Rights Commission complaint or a lawsuit. The settlement agreement between Dunton and T & C contained a confidentiality agreement thus Dunton was careful to avoid discussing her or Owen's claims against T & C.

7,000 text messages between Owen and Dunton. *Appendix at 73*.[2] The download corroborated Owen's testimony. Specifically, despite the overwhelming number of text messages with Dunton, not one message concerned any claims in the lawsuit. *Appendix at 55.* Further, only three messages even referenced the lawsuit, yet did not remotely refer to any issues in the lawsuit. *Appendix at 55.* Despite the lack of evidence of Owen intentionally destroying any text messages related to any issues in the lawsuit, T & C filed the motion for spoliation.

T & C's motion for spoliation argued, "In a claim of spoliation, two prongs must be considered, (1) prejudice to the non-offending party and (2) the degree of fault of the offending party." T & C's motion then set forth the evidence which it asserted satisfied the two prongs. *Appendix at 58.* T & C's motion, however, did not address or establish whether Owen intentionally destroyed text messages related to her claims in the present lawsuit, an essential element of the claim.

In response, Owen's pointed out both T & C's misapplication of the law, and T & C's failure to establish that Owen intentionally destroyed test messages to relevant her claims. *Appendix at 78.* Regarding the applicable law, Owen noted that to establish a claim of spoliation, the moving party must first establish the opposing party "knew of (a) claim (that is the litigation or the potential for litigation) and (b) the documents potential relevance to that claim*." Booker v Mass Dep't of Pub. Health* 612 F 3d 34, 46

(1sr Cir. 2010). Regarding the relevant facts, Owen pointed to the download of over 700 pages of text messages, only three innocuous texts mentioned T & C and the three texts did not concern any claims in the lawsuit. *Appendix at 77-78.* In other words, the download squarely corroborated Owen's testimony. Further, Owen submitted an affidavit stating she

> had never previously been involved in a lawsuit. I am not familiar with many of the legal terms used in this case. As I have testified, I often communicate with my friend, Jessica Dunton. We, however, have not really discussed my case in any depth, just general conversations like I stated in my deposition. I did not ever text Ms. Dunton regarding the claim in my case. I also never deleted any text messages to Ms. Dunton regarding the claim in my case. I will sometimes randomly delete messages from my phone, but I never intentionally deleted any text messages to Ms. Dunton related to my case. I understand that Town & Country claims that I intentionally deleted text messages with Ms. Dunton important to the case or my claim. That is absolutely false and very disturbing to me. *Appendix at 83-84.*

The Court, unfortunately, also misapplied the applicable law. Specifically, like T & C, the Court held that to establish a claim of spoliation, T & C must establish (1) prejudice to the non-offending party and (2) the degree of fault of the offending party.[3] *Appendix at 14-15.* Based on the erroneous application of the law, the Court found spoliation, yet it refused to dismiss the case, instead ordering Owen to pay T & C's attorney fees and an adverse inference instruction. *Appendix at 21.*

To establish spoliation, the First Court explained,

[3] The Court and T & C confused the standard to establish spoliation with the standard to remedy spoliation.

> The sponsor of the inference must lay a proper foundation, proffering evidence sufficient to show that the party who destroyed the document "knew of (a) claim (that is the litigation or the potential for litigation) and (b) the documents potential relevance to that claim*." Booker v Mass Dep't of Pub. Health* 612 F 3d 34, 46 (1sr Cir. 2010)

T & C and the Court failed to address or establish that Owen knowingly destroyed evidence relevant to her case. To the contrary, Owen repeatedly testified that she did not text Dunton regarding the claims in her case, nor did she delete any such messages. Owen's subject testimony was corroborated by the production of the 700 pages of texts containing no text messages relevant to Owen's claims in the case. T & C's motion, therefore, should have been denied. It was not. Fortunately, at trial the Court recognized its error and reversed its earlier decision.

At trial, T & C presented its evidence of spoliation. T & C represented that the evidence presented at trial was the same as the evidence submitted in its pretrial spoliation motion. *Appendix at 24, p 259.* Subsequently, at the jury instruction charge conference, the Court addressed the spoliation issue, ruling,

> I am familiar with the Booker case…I do find the Booker case useful and informative…I'm going to decide the issue on Booker primarily…I think it was established that Jennifer Owen knew of the claim, that is the litigation, or the potential for litigation…The problem is I don't there is any evidence she knew of the documents potential relevance to the claim. That is why I think now Town and Country falls down on this request for spoliation. Now, if prejudice is necessary to be shown here, and I'm not sure it is, I do not see any prejudice. She [Owen] went on to explain, and again in a manner that was not disputed, that whatever was on her phone that go deleted was in the lie kind to what was on her phone that was produced. The material that was produced in like kind was innocuous. I disagree, Dan, that it is all relevant stuff. I agree with Guy that what was there was

> really innocuous and does not go to the merits of the claim. *Appendix at 24-25, p. 260-262.*

The Court's reversal made clear what Owen had argued from the beginning, (1) Booker is the most pervasive authority (2) Booker requires evidence that Owen intentionally destroyed evidence with potential relevance to her claims, and (3) there is no evidence Owen destroyed documents with potential relevance to her claim. Accordingly, Owen requests the pretrial spoliation order and monetary sanction be reversed.

B. <u>The Court erroneously excluded Owen's "Me Too" witnesses.</u>

The standard on the evidentiary issues is abuse of discretion and prejudice to Owen. At trial, Owen intended to solicit the testimony of former T & C employees Jessica Dunton Walker and Courtney McNulty as "Me Too" witnesses who had similar medical disability discrimination/retaliation claims against T & C. *Appendix at 94-95*. T & C brought a motion in limine to exclude the subject testimony. *Appendix at 87-91.* The Court granted the motion, ruling 'This is not a hostile environment claim, and evidence of other employee claims is both irrelevant and highly prejudicial, and likely to confuse the jury." *Appendix at 27.* The Court's ruling was in error.

Case law makes clear that "Me too" evidence is admissible in discrimination cases. "Evidence of past discriminatory conduct by an employer against employees other than the plaintiff, so-called "Me too" evidence, is neither "*per se* admissible nor *per se* inadmissible." *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388,

128 S. Ct. 1140, 170 L. Ed. 2d 1 (2008). Such evidence can go toward establishing a "corporate state-of-mind or a discriminatory atmosphere[.]" *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987). *Brandt v. Fitzpatrick,* 22017 U.S. Dist. LEXIS 141875, *7, 2017 WL 384165. "Courts have found "me too" evidence of retaliation admissible when based on the same type of protected activity as that of a plaintiff. *See, e.g., Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1286 (11th Cir. 2008) (in case alleging racial discrimination and retaliation, "'me-too' evidence was admissible . . . to prove the intent of [the defendant] to discriminate and retaliate"; "There was also evidence that was probative of intent of [the defendant] to retaliate against any black employee who complained about racial slurs in the workplace."); Under F.R.E. 404(b), "[e]vidence of other crimes, wrongs, or acts . . . may . . . be admissible for . . . purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." F.R.E. 404(b). The Supreme Court has held that wide evidentiary latitude must be granted to those attempting to prove discriminatory intent and that "the trier of fact should consider all the evidence." *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). "We have approved the use of "me too" evidence under F.R.E. 404(b) in discrimination and retaliation cases." Demers v. Adams Homes of Northwest Fla., Inc., 321 Fed. Appx. 847, 853-854, 2009 U.S. App. LEXIS 5844, *14-15. "One way to infer that the adverse action is related to protected expression rather than other factors is to set forth "me too" evidence that

others who engaged in similar expression also suffered retaliation to show intent to discriminate and retaliate." Chandler v. Sheriff, Walton Cnty., 2023 U.S. App. LEXIS 29505, *28-29, 2023 WL 7297918. "Me-too evidence "should normally be freely admitted at trial" because "an employer's past discriminatory policy and practice [**16] may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination." *Dindinger v. Allsteel, Inc.,* 853 F.3d 414, 424-425, 2017 U.S. App. LEXIS 5661, *15-16.

Pursuant to the appliable case law, the Court should have denied T & C's motion to exclude the "Me too" witnesses. Owen, Dunton Walker, and McNulty all had common factors underlying their claims against T & C. T & C transferred Owen to the Scarbough branch in August of 2018 to help fill the void after T & C terminated Dunton Walker the previous month. Katrina Rosewell managed the Scarborough Branch. Owen suffered from a medical disability (cancer in remission). In October of 2018, Human Resources Director Betsy St. Pierre terminated Owen after Owen disclosed her fear that her cancer had returned, which would require medical leave. Owen filed a complaint for medical disability/retaliation. Likewise, Dunton Walker also worked at the Scarborough Branch supervised by Rosewell. Dunton Walker had a medical disability (a back injury) requiring her to take time off, and she was pregnant which required additional leave. Shortly before her pregnancy leave was scheduled to commence, in the early summer of 2018, St. Pierre terminated Dunton Walker. Dunton Walker notified T & C of her intent to file suit against

T & C for medical disability discrimination/retaliation. T & C immediately settled the claim. McNulty also worked at the Scarborough Branch. McNulty notified T & C of her need to take time off to care for her sick child. After the notice of the need for time off, St. Pierre terminated McNulty. As a result, McNulty filed suit against T & C. The claims of Owen, Walker, and McNulty contain sufficient common elements to testify as Me Too elements given all worked at the Scarborough branch, all had medical issues requiring potential medical leave, and all were fired by St. Pierre.

C. **The Court erroneously refused to allow Owen to impeach T & C regarding its claim it did not discriminate again employees with disabilities.**

At trial, on direct examination, St. Pierre described how T & C had a great history supporting employes with disabilities such as cancer, and how T & C provides medical leave for such employees. *Appendix at 100-102.* St. Pierre further testified that T & C policy states that.

> Town and Country will not discriminate in employment opportunities or practice on the basis of race, color, religion, sex, sexual orientation, national origin, age, physical or mental disability, ancestry, and other characteristic protected by law." *Appendix at 103, Page 10-11.*

On cross examination, St. Pierre again asserted that T & C did not discriminate against employees with disabilities. *Appendix at 106, page 95:14-23.* Given St. Pierre's assertions, Owen's counsel asked for a sidebar. At the sidebar, Plaintiff's counsel stated that T & C opened the door to present evidence of T & C discriminating against

employees beyond Owen. The Court denied the request. *Appendix at 106, P. 95:24-96:1-2.*[4]

The Court erred in again refusing to allow Owen to bring in evidence (outside of Owen) to impeach T & C on how it treated its employees with disabilities. T & C could have avoided the issue by limiting its testimony to the treatment of Owen. T & C, however, touted how great it treated all its employees with disabilities, not just Owen. Given that T & C made that choice, Owen should have been given an opportunity to impeach T & C on the issue. Impeachment evidence on this issue is clearly relevant. Me. R Evid 401. The Court allowed T & C to present evidence on this issue, yet it refused to allow Owen to present evidence to impeach T & C on the same issue. The decision was clearly prejudicial as it left the jury with the impression that contrary to Owen's lawsuit, T & C treated its disabled employees favorably.

D. <u>The Court erroneously refused to allow Owen to present evidence of comparative discipline.</u>

The Court allowed T & C to extensively question Owen about her mistakes, and the discipline she received for the mistakes.[5] The Court, however, steadfastly refused to allow Owen to question witnesses about how T & C treated other employee who made

[4] The transcript does not contain the discussion at sidebar. Owen has contacted the group which transcribed the transcript of the trial to attempt to retrieve the sidebar.

[5] T & C brought in witnesses St. Pierre, Jessica Cadorette, and Heather Therian to testify about Owen's mistakes on loan and the discipline for the mistakes.

similar mistakes. Specifically, at sidebar in response to Owen's complaints of not being allowed to question witnesses about comparative discipline, the Court ruled,

> I agree that I have been careful to not allow exploration [of discipline of other employees]. It is leading down the road to other employee's disciplines, including comparative loan information like this. So, I am going to sustain the objection. Now, you can ask the witness straight up about whether she did make a lot of errors, but not in the context of other people. And then do not go down the discipline road because I agree with the objection raised that I have limited the Plaintiff in certain respects. *Appendix at 29-30, p. 180:8-182:11.*

The Court's refusal to allow Owen to inquire about comparative evidence discipline is again clear error. Comparative evidence is highly relevant in a discrimination case. *See*, *e.g.*, *Perkins v. Brigham & Women's Hosp.*, 78 F.3d 747, 749, 751 (1st Cir. 1996); *Lanear v. Safeway Grocery*, 843 F.2d 298, 301-02 (8th Cir. 1988); *see also McDonnell Douglas*, 411 U.S. at 804 (noting that comparative evidence is "especially relevant" for a showing of pretext). The Court, therefore, committed a clear error with to prejudice to Owen by refusing to allow Owen to question witnesses about comparative discipline for mistakes made like her own. Again, the Court's refusal to allow Owen to pursue testimony beyond Owen herself prejudiced her ability to prove discriminatory conduct.

E. <u>The Court erroneously refused to allow Owen's to question witnesses about evidence which T & C placed into evidence and concerned discrimination against other employees.</u>

T & C placed two documents into evidence which touched on potential claims by other employees. Specifically, T & C submitted exhibits 14 and 36. Exhibit 14 contained

an interview with Katrina Rosewell. *Appendix at 108-109*. In the interview, the notes describe Owen's alleged poor work performance and "No other employees have performance like this. Jess [Dunton] has this type of performance, but she got let go." *Appendix at 109.* Exhibit 36 is Owen's response to T & C interrogatories. *Appendix at 110-120.* Interrogatory discloses that "Amber Branson, a branch manager in South Portland, told her [Owen] that Betsy St. Pierre to make Duley's life a "living hell" so she would resign." *Appendix at 115.* Owen gave notice to the Court of her intent to use the documents as evidence of St. Pierre's discriminatory practices. *Appendix at 31-35.*[6] The Court, however, refused to allow Owen to use the exhibits already submitted into evidence by T & C. *Appendix at 35, p. 91.* The Court's decision again hamstrung Owen by to not allowing Owen to use documents already in evidence which related to St. Pierre discriminating again other employees. The Court's exclusion of the evidence is a clear error and again prejudicial to Owen's (and highly unusual) ability to prove discrimination.

V. Conclusion.

Owen requests a reversal of the pretrial spoliation order and monetary sanction. Owen also requests a new trial based on the evidentiary errors which severely prejudiced her and did not allow her to fully present her case.

[6] Owen gave the Court notice because the Court had warned Owen that it would direct a verdict for T & C if Owen mentioned claims of persons other than Owen.

Dated: April 8, 2024

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CERTIFICATE OF SERVICE

I, Guy D. Loranger, do hereby certify that on April 8, 2024, I emailed the above document to:

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