STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-23-442

JENNIFER OWEN,

Plaintiff-Appellant

v.

TOWN & COUNTRY FEDERAL CREDIT UNION

Defendant-Appellee

On Appeal from Business and Consumer Docket
Docket No.: BCD-CV-21-00008

BRIEF OF APPELLEE TOWN & COUNTRY FEDERAL CREDIT UNION

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INTRODUCTION

Defendant-Appellee Town & Country Federal Credit Union ("Appellee") spent years supporting and coaching former employee, Plaintiff-Appellant Jennifer Owen ("Appellant"), through serious performance issues that disrupted Appellee's business and negatively impacted its members. Eventually, Appellant's performance deteriorated to the point where Appellee terminated Appellant's employment.

Appellant now claims that Appellee terminated her employment because of (i) her record of having had cancer six years before her termination, and (ii) Appellee's fear that her cancer had returned. Appellant, however, glosses over the following key facts: (i) Appellee made great efforts to support Appellant during her cancer treatment; (ii) the decision-makers had no knowledge of Appellant's fear of a potential return of cancer; and (iii) Appellee had previously issued Appellant a written warning and verbal warnings due to performance deficiencies similar to those that led to her termination. After a five-day trial, a jury returned a unanimous verdict—after roughly just one hour of deliberation—in favor of Appellee on all counts.

Prior to trial, Appellant spoliated evidence and led Appellee down "an intentionally misleading, time consuming, and costly wild goose chase" to search for and obtain responsive and relevant documents and information. (A. 16.) The trial court addressed Appellant's discovery violations and destruction of evidence by issuing the following sanctions: (i) Appellant to reimburse Appellee for reasonable attorneys' fees that Appellee incurred in addressing Appellant's discovery violations; and (ii) the

trial court to issue an adverse inference instruction at trial, on the condition that Appellee establish a foundation for Appellant's spoliation. In now claiming that these sanctions were unjust, Appellant mischaracterizes the nature of the sanctions, which were well within the trial court's discretion.

Appellant also incorrectly claims that the trial court abused its discretion in disallowing "Me Too" evidence that is unrelated to the facts of the instant case. In Appellant's view, she should have been permitted to conduct "trials within a trial" and introduce evidence from (i) an individual whom Appellant never called to testify at trial and whom she failed to provide an offer of proof regarding this "Me Too" evidence, and (ii) the individual who was the recipient and/or sender of many documents Appellant destroyed, leading to the trial court's finding of spoliation. Appellant is incorrect, and the trial court acted within its discretion in excluding this evidence.

Finally, Appellant erroneously argues that Appellee "opened the door" by introducing evidence that justified Appellant's introduction of "Me Too" evidence. The court was well within its discretion, however, in finding that Appellee did not "open the door" to any such evidence, and, even if it did, its introduction would cause delay, confusion, and prejudice that outweighed any marginal probative value. This Court should affirm the trial court's conclusions in all respects.

STATEMENT OF FACTS

I. Factual Background

In 2012, Appellee hired Appellant for the role of Teller. (II Tr. 104.) One year later, in 2013, Appellant was diagnosed with breast cancer. (*Id.*) Appellee rallied around Appellant by organizing a bake sale, yard sale, and other fundraisers to help her through this difficult time in her life. (I Tr. 113-14.) These efforts resulted in Appellee raising money to help Appellant pay for her medical expenses. (*Id.*) Appellee also permitted other employees to donate their paid time off to Appellant during her treatment. (II Tr. 9.) Appellant felt supported by her work "family." (Def.'s Ex. 32; II Tr. 109-110.)

By January 2014, Appellant no longer had cancer in her body. (II Tr. 244.) In 2015, Appellee promoted Appellant to Assistant Branch Manager. (I Tr. 162; II Tr. 20.) As Assistant Branch Manager, Appellee entrusted Appellant with serving as a leader in the branch and working with its members on loans. (I Tr. 119-120; II Tr. 20-21.) Loans were a critical component of this position, and the quality of Appellant's work would seriously impact Appellee's members and its reputation as a trusted financial institution. (*See id.*)

Appellee began noticing some performance issues with Appellant in 2015-2016. (*See* Pl.'s Ex. 1, 18.) The Retail Services Manager at the time, Betsy St. Pierre ("Ms. St. Pierre"), who was responsible for evaluating Appellant, expressed some performance concerns, but she gave Appellant the benefit of the doubt because Appellant was new to the Assistant Branch Manager role. (I Tr. 158, 161, 166; Pl.'s Ex. 18.) Ms. St. Pierre wanted Appellant to succeed. (I Tr. 165.) By 2016, these performance issues increased

in frequency and severity. (*See* Pl.'s Ex. 1.) Appellant was frequently careless in her performance and in her decision-making. (*See id.*)

By 2017, Appellant's performance took a nosedive when Appellant exhibited poor judgment and carelessness in both her managerial and lending roles. (*See* II Tr. 42-49, 65, 72; Def.'s Ex. 25) For example, with respect to her managerial duties, in January 2017, Appellant—who had elevated access to private information as an Assistant Branch Manager—provided a Teller with her password and instructed this Teller to log into her account. (II Tr. 35-36.) Uncomfortable with this violation of Appellee's security policy and the obvious security risks, this Teller reported Appellant to Ms. St. Pierre. (II Tr. 34-35; Def.'s Ex. 45.) Appellant was spoken to, acknowledged that this was wrong, and promised not to do it again. (II Tr. 38.)

Only a few months later, Ms. St. Pierre, who had since been promoted to Human Resources Manager, received several complaints about Appellant's carelessness. (I Tr. 147; II Tr. 42-43, 52, 58, 91; Def.'s Ex. 1-2.) For instance, on a night Appellant was responsible for closing the branch, Appellant left hundreds of thousands of dollars of member money unsecured by *leaving the vault open.* (II Tr. 43, 54.) Only two months after this incident, in June, Appellee learned that Appellant had lost her key to the vault. (II Tr. 52.) Apparently, Appellant had lost her key the same day another branch was robbed *in May*, i.e., weeks before the June incident, but she failed to tell anyone. (II Tr. 53.)

Toward the end of 2017, Appellee also learned of serious errors that Appellant had made on separate loans. (*See* IV Tr. 73.) One error was so egregious that the member who had applied for a loan through Appellant stated that she would never apply for a loan with Appellee again; that she had told her friends in the real estate community about her experience, and they were unlikely to consider Appellee for their future lending needs; and that she was considering closing her account altogether. (II Tr. 237; IV Tr. 77-78.)

In late 2017, perhaps recognizing her poor performance, Appellant asked to change her position from Assistant Branch Manager to Member Services Representative II ("MSR II"), to which Appellee agreed. (I Tr. 170; II Tr. 58-60.) Appellant started in this lower role in early 2018. (I Tr. 176.) As an MSR II, Appellant no longer had any managerial responsibilities; her role was primarily lending. (I Tr. 73, 120; II Tr. 28, 62.)

Shortly after switching to MSR II in early 2018, Appellant received her 2017 performance evaluation, where Ms. St. Pierre raised Appellee's "serious concerns" about Appellant's performance in lending. (II Tr. 68.) Appellant did not disagree with these concerns. (II Tr. 70.) In fact, Appellant checked "agree" on her evaluation raising "serious concerns" and included a few comments of her own, ranging from "You can say I've had a couple misjudgments. I'm an independent thinker," to including a "smiley face" emoji in the comment section near the end of the evaluation. (II Tr. 70-72.) Shortly after her evaluation, Appellant received a written warning for

her repeated errors and was coached through them throughout the next several months. (I Tr. 177, 195-96, 213; Def.'s Ex. 6, 8.)

Appellant's performance did not improve. Even after more coaching and encouragement from her new manager, Karina Rosewell (who Appellant was friends with and who previously raced in the Tri for a Cure for Appellant's benefit) ("Ms. Rosewell"), and others, Appellant made several major errors on loans in the summer and fall of 2018. (I Tr. 77, 83-90, 113; II Tr. 168; IV Tr. 86-88.) These major errors included: (i) a home equity loan for which Appellant was responsible needed to be redone because it was discovered that Appellant did not recognize that the individual applying for the loan *did not own* the home they were going to use as collateral; (ii) due to an error by Appellant, funding of a loan had to be delayed by several weeks for an individual who was experiencing a serious financial hardship; and (iii) Appellant provided a member with a different member's credit score, which was one-hundred points lower than her actual score, thereby resulting in a different interest rate for this member. (I Tr. 200-01; III Tr. 12-13, 170, 185-90; IV Tr. 13-24, 48.) Appellant also continued to exhibit poor judgment generally, informing Ms. Rosewell during a social outing that she was dating forms differently than when the member actually signed the form. (*See* I Tr. 129.)

In mid-October, Ms. St. Pierre and the Vice President of Lending, Heather Savage ("Ms. Savage" or "Ms. Therrien"), met to discuss Appellant's performance. (IV Tr. 111-12; 169-71.) During that meeting, they agreed to terminate Appellant's

employment; however, they did not yet agree on the timing of the termination. (*Id.*) A week or two later, Ms. Rosewell reported to Ms. Savage that Appellant was telling her coworkers that she was going to get fired, conduct she had previously been instructed not to do because it makes people uncomfortable. (I Tr. 131-32, 204-05.) As such, on October 25, 2018, Ms. St. Pierre and Ms. Savage went to the branch and terminated Appellant's employment. (IV Tr. 114-15; Def.'s Ex. 14.) Unbeknownst to Ms. St. Pierre and Ms. Savage at the time of Appellant's termination, Appellant apparently had a doctor's appointment that morning where she sought treatment for a lump on her arm that she claims to have feared was cancer that ended up being a wart. (I Tr. 208; II Tr. 86, 185-86, 210-11, 234; IV Tr. 113-15.) Ms. St. Pierre and Ms. Savage did not learn of this appointment until long after they terminated Appellant's employment. (II Tr. 86; IV Tr. 116.)

II. Procedural Background

Appellant filed the complaint initiating this action on September 4, 2020, alleging two-counts of disability discrimination and retaliation. (A. 2, 39-42.) Specifically, Appellant claimed that Appellee discriminated against her by terminating her due to "her history of cancer and the perceived recurrence of the cancer" and this termination constituted unlawful retaliation because Appellant engaged in the protected activity of going to a medical appointment. (A. 41.)

A. Appellant's Discovery Violations

In November 2020, Appellee served written discovery requests on Appellant. (A. 12.) Appellee's document requests included the following:

> [Request No.] 5. Any and all communications, including without limitation text messages/SMS, instant messages, or e-mail messages, sent to you, or that you sent, either to, from, or in any way relating or referring to: (a) Sara Thiel (sic); (b) Nicole Sears; (c) Jessica Dunton [Walker]; and/or (d) Courtney McNulty, (d) Leanne Duley or (e) any combination of the above-listed individuals from January 1, 2016, through the present regarding your employment with or termination from [Appellee] or any other employee of [Appellee].
>
> [Request No.] 6. Any and all texts or e-mail messages sent to you, or that you sent, from Wednesday October 24 – through Sunday, October 31, 2018, pertaining to your employment with or termination from [Appellee] or any other employee of [Appellee].

(A. 49-50.) Appellee instructed Appellant that its requests were continuing in nature. (A. 50) It also instructed Appellant to, inter alia, provide a written statement identifying any lost or destroyed documents and their contents, the time and reasons for any such loss or destruction, and any individuals who may have relevant knowledge. (*Id.*) Appellee also served interrogatories on Appellant, asking Appellant to identify who she claims has knowledge of the facts and issues in the lawsuit. (*Id.*)

In December 2020, Appellant responded that she had no documents responsive to Request No. 5 and that she would produce documents responsive to Request No. 6. (A. 12.) Appellant, however, did not produce a single written communication or identify any lost or destroyed documents, except when later ordered to do so. (A. 12, 51.) In her answer to interrogatories, Appellant identified Jessica Dunton Walker ("Ms. Walker") as having knowledge of the facts and issues in the lawsuit. (A. 50-51.)

Appellee served a deposition and document subpoena on Ms. Walker, requesting that she bring communications between her and Appellant and/or identify any lost or destroyed documents. (A. 51.) During her March 2021 deposition, Ms. Walker testified that she never texted Appellant about Appellee and never identified any lost or destroyed documents, while also testifying that she spoke with Appellant and Appellant's counsel about the deposition. (A. 13, 51-52.) She also testified that she had never seen Appellant's Charge of Discrimination before the Maine Human Rights Commission ("MHRC") despite having been the one to notarize that very document. (A. 13, 52.) Appellee deposed Appellant several days later, where she testified that she and Ms. Walker speak regularly by phone and text message but never spoke about the lawsuit. (A. 13.)

In April 2021, Appellee served a second request for documents on Appellant, again seeking texts and other written communications, as well as a copy of Appellant's phone records. (*Id.*) Appellant objected to Appellee's request for communications and stated that she did not have a copy of her phone records. (*Id.*) In light of Appellant's failure to produce these documents and Appellant's and Ms. Walker's contradictory and confusing deposition testimony, Appellee sought court intervention. (A. 13, 54.) On or about June 3, 2021, the trial court ordered Appellant to turn over her phone so Appellee could extract text messages between Appellant and Ms. Walker. (A. 13.) Appellant failed to comply, so Appellee moved for sanctions on July 21. (*Id.*) The very next day, Appellant provided her phone to Appellee, and it extracted

hundreds of text messages between Appellant and Ms. Walker; however, *no* such texts dated before January 11, 2020, existed on Appellant's phone. (*Id.*) The messages that were recovered, however, showed that Appellant and Ms. Walker had discussed topics responsive to Appellee's discovery requests. (A. 54-55.)

Due to the relevance of certain texts and Appellant's apparent misrepresentations, Appellee deposed Appellant for a second time. (A. 13, 55.) Appellant testified that she regularly deletes her voicemails. (A. 13.) Appellant also testified that she had texted Ms. Walker prior to January 11, 2020, but that she had lost or deleted her texts with Ms. Walker—an apparent critical witness in this case—when she purchased her current phone, despite her phone bill showing that she had obtained her new phone six months before January 11. (A. 14.)

After the close of discovery, in October 2021, Appellant produced her 2020-2021 phone records. (A. 14.) The records revealed that Appellant had spoken to Ms. Walker for twenty-six minutes the night before Ms. Walker's deposition and for twelve minutes immediately following the deposition. (A. 14.) They also revealed that Appellant had spoken to Ms. Walker for eight minutes *during the lunch break* of Appellant's first deposition; for twenty-three minutes across four calls after Appellant's first deposition; and before and after Appellant's second deposition. (A. 14.)

Shortly thereafter, Appellee filed a motion for sanctions requesting that the trial court dismiss the lawsuit with prejudice due to Appellant's spoliation of evidence, misleading and/or untruthful statements under oath, and her failure to comply with

her discovery obligations. (A. 47-67.) In February 2022, the trial court partially granted Appellee's request, declining to dismiss the case but sanctioning Appellant in the form of attorneys' fees for her discovery violations and an adverse inference instruction to cure the prejudice caused by her spoliation. (A. 11-20.) Specifically, it concluded that Appellant led Appellee "on an intentionally misleading, time consuming, and costly wild goose chase." (A. 16.) The trial court also permitted Appellee to introduce evidence during trial that may generate an adverse inference instruction.[1] (A. 17-19.)

B. Jury Trial

Shortly before the start of a jury trial, the parties filed multiple motions in limine. (A. 7-8.) Relevant to this appeal is Appellee's motion to preclude Appellant from introducing any evidence or mentioning "any allegations concerning discrimination, harassment or retaliation by [Appellee] directed toward anyone other than [Appellant]," i.e., "Me Too" evidence. (A. 27, 85-92.) Appellee filed this motion based on Appellant's intent to call Ms. Walker and an individual named Courtney McNulty ("Ms. McNulty") as witnesses, even though Appellant failed to identify Ms. McNulty in her discovery responses. (A. 85, 87.) Appellee argued that any potential "Me Too" evidence elicited from Ms. Walker and Ms. McNulty was irrelevant because their personal allegations have nothing to do with Appellant's claim of disability discrimination based on cancer. (A. 88-89.) It further argued that any such evidence

[1] Appellant appealed this Order, and this Court dismissed it as interlocutory. (A. 4-5.)

would be highly prejudicial and would result in "trial[s] within a trial." (A. 90.) The court granted Appellee's motion to preclude "Me Too" evidence, concluding that "[t]his is not a hostile workplace claim, and evidence of other employee's claims is both irrelevant and unduly prejudicial, and likely to confuse the jury." (A. 7, 27.)

A five-day jury trial was held from October 2-6, 2023. (A. 8.) Numerous exhibits were admitted in evidence, and Appellant, Ms. St. Pierre, Ms. Rosewell, Ms. Savage, Ms. Walker, and two underwriters that Appellant worked with during her employment testified primarily about Appellant's performance.

Two issues arose during Appellant's testimony. First, Appellant confirmed that she deleted her text messages with Ms. Walker, generating the potential for an adverse inference instruction. (III Tr. 38-61.) Second, after disregarding the trial court's prior two rulings on the inadmissibility "Me Too" evidence—both by motion in limine and on the record—Appellant claimed that Appellee had "opened the door" to "Me Too" evidence through (i) Appellee's position—which consisted of testimony regarding its efforts to support cancer research and Ms. St. Piere's reading of the Equal Employment Opportunity ("EEO") provision in Appellee's employee handbook—that it did not discriminate against employees with disabilities, (ii) a single note regarding Ms. Walker's performance and termination in a 95-page exhibit that had not been published to the jury, and (iii) a portion of Appellant's answers to interrogatories regarding a former employee that consisted of double hearsay. (*See* II Tr. 95; A. 217-18, 220-24.) Appellant also made the following offer of proof with respect to Ms. Walker:

"[Ms. Walker] feels so – she was fired when she was eight months pregnant after getting injured while working, while driving a car to pick up checks for" Ms. Rosewell. (A. 223.) Appellant did not attempt to call or make any proffer regarding Ms. McNulty, whose testimony she now claims the trial court improperly excluded. (A. 35, 224 (Appellant affirmatively stating that her offer of proof was complete with respect to the "Me Too" evidence); Blue Br. 7.)

After Appellant made her proffer, the trial court reiterated its ruling that such evidence was inadmissible:

> So I'm sticking with my earlier ruling. First off, for several reasons, I don't perceive that any of the testimony that's come in at this point in time has opened the door to any kind of probing evidence on the various other employee claims or lawsuits against [Appellee]. I just don't think that evidence that has come in has done that or even come close to doing that.
>
> Secondly, even if it came close, probing these other claims is so prejudicial and likely to confuse the jury and take this trial into two or three weeks that I'm not going to permit it. So all of that evidence stays out.

(A. 224.)

After the close of evidence, the court instructed the jury. (V Tr. 8-27.) It ultimately declined to read the adverse inference instruction with respect to Appellant's spoliation of evidence. (*See id.*) After deliberating for approximately one hour, the jury returned a unanimous verdict in favor of Appellee on all counts. (V Tr. 27-28, 30-32.) Appellant timely appealed. M.R. App. P. 2B(c)(1).

STATEMENT OF ISSUES

I. Whether the trial court abused its discretion in granting Appellee's motion for sanctions due to Appellant's repeated discovery violations.

II. Whether the trial court erred in excluding certain evidence concerning other individuals who were not parties to the lawsuit on the ground that such evidence was irrelevant to the issues in the case under M.R. Evid. 401, highly prejudicial to Appellee, and likely to cause delay or confusion under M.R. Evid. 403.

III. Assuming, arguendo, that the trial court abused its discretion in any of its evidentiary rulings, whether any such errors were harmless.

SUMMARY OF ARGUMENT

Contrary to Appellant's assertions otherwise, the trial court properly exercised its discretion in sanctioning Appellant in the form of paying Appellee's reasonable attorneys' fees. As an initial matter, Appellant mischaracterizes the nature of the sanction. Appellant was not ordered to pay Appellee's attorneys' fees based on her spoliation. The sanction was to remedy Appellant's discovery violations that led Appellee "on an intentionally misleading, time consuming, and costly wild goose chase." (A. 16.)

Even if the attorneys' fees sanction were for Appellant's spoliation of evidence, the trial court still properly exercised its discretion in imposing this sanction. Although this Court has not yet spoken on the doctrine of spoliation, the First Circuit evaluates the intent of the spoliating party and the prejudice to the non-spoliating party. The record reveals that Appellant, among other things, intentionally deleted text messages

with a critical trial witness shortly before she received her right-to-sue letter from the MHRC. This resulted in significant prejudice to Appellee, especially considering Appellant's later attempt at trial to introduce "Me Too" evidence. The trial court imposed a fair sanction on Appellant for leading Appellee "on an intentionally misleading, time consuming, and costly wild goose chase." (A. 16.)

Appellant's claim that the trial court should have permitted her to introduce "Me Too" evidence is incorrect. The trial court acted well within its discretion in excluding such evidence. First, the court correctly concluded that testimony from non-parties with personal grievances against Appellee was irrelevant to Appellant's lawsuit of disability discrimination, especially considering that the complaints of the two non-parties to whom Appellant refers to on appeal (one of which Appellant never attempted to call at trial and was not the subject of a proffer) have nothing to do with cancer. *See* M.R. Evid. 401. Second, even if such evidence were relevant, the court accurately noted that it would result in significant prejudice to Appellee, confuse the jury, and result in "trials within a trial." Notably, Appellant fails to grapple with this balancing test on appeal and offers no reason as to how her "Me Too" evidence overcomes Rule 403. And finally, the irony of Appellant claiming "prejudice" as a

result of not being permitted to elicit "Me Too" testimony from Ms. Walker—the very individual at the heart of Appellant's spoliation—should not be ignored. (Blue Br. 7.)[2]

In sum, the trial court properly exercised its discretion in sanctioning Appellant for her discovery violations and in its various evidentiary rulings. But even if the court did abuse its discretion (which it did not), this Court should not disturb the jury's unanimous verdict. First, the attorneys' fee sanction is completely separate from trial and had nothing to do with the verdict. Second, any error was harmless in light of the overwhelming evidence presented at trial that Appellant was terminated because of her poor performance, not because of a doctor's appointment or cancer. Accordingly, for reasons set forth in detail below, this Court should affirm the court's various rulings.

ARGUMENT

I. The trial court did not abuse its discretion in granting Appellee's motion for sanctions due to Appellant's discovery violations.

Appellant erroneously, and without legal support, asserts that the standard of review for a trial court's decision regarding discovery sanctions is *de novo*. (Blue Br. 3.) On the contrary, however, the law is well established that the Law Court reviews the trial court's determination as to what sanctions, if any, should be imposed for a discovery violation for an abuse of discretion. *Douglas v. Martel*, 2003 ME 132, ¶ 4, 835 A.2d 1099. "A trial court has broad discretion to choose the appropriate sanction" for

[2] Appellant's additional arguments regarding Appellee's alleged "opening the door" to this evidence, as well as impeachment and comparator evidence fail for the same reasons.

a plaintiff's abuse of the discovery rules. *Emp. Staffing of Am., Inc. v. Travelers Ins. Co.*, 674 A.2d 506, 508 (Me. 1996). "Because the imposition of discovery sanctions depends on the particular circumstances of each case, [the Law Court] will not lightly overrule a trial court's discretionary determination." *Est. of Galluzzo*, 615 A.2d 236, 239 (Me. 1992) (internal quotation marks omitted).

A. The trial court did not abuse its discretion in awarding Appellee its reasonable attorneys' fees arising from Appellant's discovery violations.

The trial court correctly awarded Appellee its reasonable fees arising from Appellant's conduct in leading Appellee "on an intentionally misleading, time consuming and costly wild goose chase" that violated M.R. Civ. P. 37. (A. 16.) As an initial matter, Appellant incorrectly attempts to tie the sanction solely to her spoliation of evidence; however, nowhere in her brief does she mention the various discovery abuses that actually formed the basis for the trial court's sanction. (*See* Blue Br. 3-7) Indeed, at the conclusion of trial, Appellant asked the trial court to reverse its grant of fees based on its prior finding of Appellant's spoliation of evidence due to its decision not to issue an adverse inference instruction to the jury. The trial court denied Appellant's request, making clear that the award of attorneys' fees was related to Appellant's discovery abuses, not her spoliation of evidence:

> [Appellant's Counsel]: Just one – yeah, one thing. In this case, you found that the defendant did not prove the spoliation issue. Given that, we'd ask you to reconsider the sanction that you issued in that case, in that – in - with regard to the spoliation.

> The Court: Well, the sanction for that specifically was the negative inference instruction which was not given. There was another whole piece of the discovery dispute related to how hard it was to get emails and texts, and so on and so forth with a financial award. I'm going to let that stand -
>
> [Appellant's Counsel]: OK.

(V Tr. 31-32.) Appellant did not present any argument to this Court to counter the trial court's ruling that its fee award was tied to her discovery abuses. Accordingly, Appellant has waived any such argument.

Moreover, Appellee presented ample evidence to the trial court to support its decision to impose sanctions on Appellant:

- Appellant made numerous inconsistent and misleading statements in her sworn answers to interrogatories and deposition. (A. 12-14, 47-58.)
- Appellant was evasive in producing any emails or text messages and, when ordered by the trial court to produce her phone for forensic examination, failed to comply with court-ordered deadlines. *Id.*
- Appellant failed to produce her phone records to Appellee until after discovery closed. *Id.*
- Appellant's phone records revealed that, contrary to Appellant's representations, she had spoken to Ms. Walker, one of her trial witnesses, before, during, and after her deposition. *Id.*
- Despite Appellant's representation that she had no relevant texts or emails with Ms. Walker, a review of texts obtained by Appellee through a forensic examination of Appellant's phone revealed several texts involving "[Appellant's] lawsuit and of [Appellee.]" *Id.*
- The forensic examination also revealed that Appellant deleted all texts between Appellant and Ms. Walker on or around January 11, 2020, within days of receiving her right-to-sue letter from the MHRC. *Id.*; (III Tr. 61.)

The court was well within its discretion in awarding Appellee its reasonable attorneys' fees caused by Appellant's conduct. *See Harris v. Soley*, 2000 ME 150, ¶¶ 10-18, 756 A.2d 499 (affirmed *dismissal* as a sanction for related discovery violations).

B. Although the sanction imposed by the trial court ultimately did not relate to Appellant's destruction of evidence, even if it did, the trial court did not abuse its discretion when it found that Appellant spoliated evidence.

The trial court relied on extensive documentary evidence, including Appellant's sworn deposition testimony, when it found that Appellant spoliated evidence. Although, as discussed *supra*, Appellant's spoliation was not the basis for the fee award, even if it were, this Court should still conclude that the trial court did not abuse its discretion in ordering Appellant to pay Appellee's reasonable fees.

Parties who know they are likely to be involved in litigation or who already are involved in litigation have a duty to preserve evidence relevant to the applicable claim. *See Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420, 425-26 (Mass. 2002) (explaining that sanctions, such as dismissal or an adverse inference instruction, are appropriate remedies for spoliation). When a party fails to abide by this duty and spoliates evidence—a doctrine about which this Court has not yet opined—the First Circuit considers "the degree of fault of the offending party" and the resulting "prejudice to the non-offending party." *Driggin v. Am. Sec. Alarm Co.*, 141 F. Supp. 2d 113, 120 (D. Me. 2000) (internal quotation marks omitted).

Although bad faith is not required, "the degree of fault" informs the type of sanction imposed. *Id.* at 123. "When the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a factfinder may reasonably infer that the party probably did so because the records would harm its case." *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1159 (1st Cir. 1996). "A party's destruction of evidence qualifies as willful spoliation if the party has some notice that the documents were *potentially* relevant to the litigation before they were destroyed." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) (internal quotation marks omitted).

With respect to prejudice, "[o]bviously, the relevance of and resulting prejudice from [the] destruction of documents cannot be clearly ascertained because the documents no longer exist. Under the circumstances, [the spoliating party] can hardly assert any presumption of irrelevance as to the destroyed documents." *Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1205 (8th Cir. 1982). Therefore, a court must look to whatever circumstantial evidence exists as to relevance. *See, e.g., DVComm, LLC v. Hotwire Commc'ns, LLC*, 2016 WL 6246824, at *8 (E.D. Pa. Feb. 3, 2016) (finding that the timing of destruction of evidence is compelling circumstantial evidence); *Lokai Holdings, LLC v. Twin Tiger USA LLC*, 2018 WL 1512055, at *16-17 (S.D.N.Y. Mar. 12, 2018) (sanctioning the spoliating party in the form of attorneys' fees even though the court declined to infer selective deletion).

Here, contrary to Appellant's assertions, Appellee not only established every element required to prove spoliation, but it also produced extensive circumstantial evidence of Appellant's intent and the potential relevance of the destroyed documents. First, Appellant's counsel sent a demand letter to Appellee in or around December 2018 and filed a Charge of Discrimination with the MHRC in May 2019. (A. 48.) Therefore, by approximately December 2018—or May 2019 at the latest—Appellant knew or should have known she would likely file a claim against Appellee. (*Id.*) Second, Appellant admitted to deleting all text messages with Ms. Walker within a few days of receiving a right-to-sue letter from the MHRC in January 2020. (III Tr. 61-64.) Third, the destroyed documents were relevant to this case. Specifically, Appellant admitted that Ms. Walker notarized Appellant's Charge of Discrimination, had information relevant to this lawsuit, referred Appellant to her attorney, discussed Appellant's decision not to settle her case, and answered Appellant's question about Appellant's cancer *the day before* Appellant's deposition. (*See* A. 11-14, 19, 47-58.) Appellant's phone records also showed that Appellant and Ms. Walker spoke on the phone before, during, and/or after both of their depositions. (A. 57-58.) Further, the text messages Appellee was able to recover reflected discussions between Appellant and Ms. Walker regarding this lawsuit and Appellee. (A. 55.)

To the extent Appellant claims that she was entitled to delete the texts because they were irrelevant, any such claim is purely self-serving and cannot be corroborated. Indeed, a party is not entitled to make a "unilateral decision, supplanting that of the

court, that the documents requested were not relevant to the case" and then proceed to destroy such documents. *Farm Constr. Servs., Inc. v. Fudge*, 831 F.2d 18, 21 (1st Cir. 1987). Therefore, the trial court acted well within its discretion when it imposed fair sanctions to remedy Appellant's numerous discovery violations and spoliation—which sent Appellee down a time consuming and costly "wild goose chase." (A. 16).

II. The trial court did not abuse its discretion in excluding certain evidence pursuant to M.R. Evid. 401, 403.

This Court reviews challenges to the relevance of evidence for clear error, and admissibility for abuse of discretion. *See State v. Dolloff*, 2012 ME 130, ¶ 24, 58 A.3d 1032. "Only in exceptional circumstances will reversible error be found in the [trial] court's determination of the probative value of testimony in a particular case." *United States v. Kepreos*, 759 F.2d 961, 964 (1st Cir. 1985). Appellant has not shown "exceptional circumstances" here, and this Court should affirm the trial court's rulings.

A. The trial court did not abuse its discretion in excluding "Me Too" evidence because it correctly concluded that such evidence was irrelevant, and even if it were relevant, it was highly prejudicial to Appellee.

i. The "Me Too" evidence Appellant sought to introduce was irrelevant.

Pursuant to M.R. Evid. 401, evidence is relevant only if it (a) tends "to make a fact more or less probable than it would be without the evidence; and (b) [t]he fact is of consequence in determining the action." Further, "[i]rrelevant evidence is not admissible." M.R. Evid. 402. Determining relevance under Rules 401 and 402 is an "inquiry . . . within the province of the [Trial] Court in the first instance." *Sprint/United*

Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 388 (2008). The trial court normally "is in the better position to assess the admissibility of the evidence in the context of the particular case before it." *Id.* at 387.

Although "Me Too" evidence *may* be relevant in limited circumstances, such circumstances are not present here. The First Circuit has explained that, although "evidence of a discriminatory atmosphere *may* sometimes be relevant to showing the corporate state-of-mind at the time of the termination," such evidence "should be let in sparingly." *Cummings v. Std. Reg. Co.*, 265 F.3d 56, 63 (1st Cir. 2001) (emphasis added); *see also Haskell v. Kaman Corp.*, 743 F.2d 113, 122 (2d Cir. 1984) (holding that the district court erred in allowing six former employees of defendant to testify about the circumstances of their own terminations on relevance grounds); *Hall v. Mid-State Mach. Prods.*, 895 F. Supp. 2d 243, 272 (D. Me. 2012) (stating that "evidence of a discriminatory atmosphere... should be let in sparingly" and is not admissible where "too attenuated"). Importantly, "[i]n a disparate treatment case the central focus is less whether a pattern of discrimination existed and more how a particular individual was treated, and why." *Ray v. Ropes & Gray LLP*, 799 F.3d 99, 116 (1st Cir. 2015) (internal quotation marks omitted). Therefore, in disparate treatment cases, such as here, "Me Too" evidence tends to have less probative value if it does not directly relate to how the plaintiff was treated.

In *Hall v. Mid-State Machine Products*, for example, the trial court not only determined that evidence arising from another employee's lawsuit alleging age

discrimination against the employer was only marginally probative under Rule 401, but also that the probative value of the evidence was substantially outweighed by the factors articulated in Rule 403. 895 F. Supp. 2d at 272-73. Specifically, in *Hall*, the plaintiff brought an age discrimination case against his employer and sought to introduce evidence regarding an age discrimination lawsuit previously brought against that employer by another former employee, as well as allegations by that other employee that a supervisor had previously made remarks reflecting discriminatory animus based on age. *Id.* at 271-72. Despite the fact that the witness had previously brought a formal lawsuit based on age and planned to testify about specific remarks by the defendant relating to discriminatory animus, the court found that plaintiff's "Me Too" evidence was only "marginally probative." *Id.* at 271-73.

The court's reasoning focused on the following factors: (i) the defendant in the prior lawsuit consistently denied the allegations of age discrimination; (ii) the trial court in the prior lawsuit never made a finding that the defendant discriminated against the proposed witness; (iii) the parties in the prior lawsuit settled the case after the court ruled on the defendant's summary judgment, but there was not admission of discrimination by the defendant; (iv) the facts and circumstances regarding the witness's lawsuit involved a different decision-maker and different set of facts; and (v) the alleged remark related to age was only marginally probative. *See id.* at 272-73.

Here, applying these factors, the "Me Too" evidence Appellant sought to introduce at trial has far less probative value than the evidence excluded in *Hall*. As

an initial matter, unlike *Hall*, where the two individuals brought lawsuits on the basis of age discrimination against the employer, there is nothing in the record to suggest that the two witnesses identified by Appellant brought lawsuits for cancer discrimination against Appellee. Specifically, according to Appellant's proffer, Ms. Walker felt "she was fired when she was eight months pregnant after getting injured while working, while driving a car to pick up checks," (A. 223.)—an allegation that has nothing to do with cancer. With respect to Ms. McNulty, although Appellant did not make any proffer whatsoever, according to Appellant's opening brief, she apparently would have testified that she filed a lawsuit against Appellee because Appellee allegedly terminated her employment because she "need[ed] to take time off to care for her sick child"—not because she ever had cancer or any covered disability. (Blue Br. 10.) Second, like the defendant in *Hall*, Appellee has consistently denied any allegations of discrimination made by Ms. Walker and Ms. McNulty. Third, there has *never* been a formal legal finding that Appellee has ever discriminated against an employee, much less against the two witnesses at issue here. Fourth, Appellant does not appear to claim that Ms. Walker or Ms. McNulty would testify about any disability-related remarks made by any of the witnesses in Appellant's case. Appellant appears to seek testimony regarding their subjective view of the reasons for the termination of their own employment, as well as their subjective opinions regarding the circumstances surrounding Appellant's termination. (*See* Blue Br. 9-10.) Fifth, the relevant facts are too attenuated for the reasons set forth above. Accordingly, the "Me Too" evidence

offered by Appellant in this case has no probative value whatsoever, and this Court should hold that the trial court properly exercised its discretion when excluding it.

Further, the Court should not credit any of the factual allegations in Appellant's brief that are not in the record or supported by evidence in this case. The Law Court has explicitly held that, "[w]here counsel fails to present a record and appendix upon which the Court can authoritatively determine the evidentiary bases of the case bearing on an issue posed by counsel, the Court must decline to address that issue." *Martin v. Scott Paper Co.*, 434 A.2d 514, 518 (Me. 1981). Here, none of the allegations on pages 9 and 10 of Appellant's initial brief are supported by record citations, trial testimony, or evidence in the record. Therefore, this Court should not consider any such assertions when assessing whether the trial court abused its discretion.

ii. Any marginal relevance of Appellant's "Me Too" evidence was significantly outweighed by prejudice, confusion of issues, and undue delay.

The trial court also did not abuse its discretion when excluding Appellant's "Me Too" evidence because it properly reasoned that allowing such evidence, even if relevant, would have led to lengthy "trials within a trial," confused the jury, and unduly prejudiced Appellee. Rule 403 provides that, even if evidence may be relevant, a trial court may exclude the evidence if its probative value is substantially outweighed by a danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay [or] wasting time." M.R. Evid. 403.

As an initial matter, in her opening brief, Appellant failed to set forth any argument addressing the unfair prejudice, confusion, and delay that would have been caused by introducing "Me Too" evidence at trial. Instead, she focuses her entire argument on her claims that the proposed "Me Too" evidence is relevant and, therefore, the trial court abused its discretion by excluding it. (Blue Br. 7-10.) The test for *admissibility*, however, requires that a court balance the probative value of the offered evidence with the potential for prejudice, delay, and confusion resulting from its admission. Appellant's complete failure to address the balancing required under Rule 403 dooms her appeal on this point.

Here, the trial court properly excluded Appellant's "Me Too" evidence by holding that, even if it were to have some probative value, (1) the prejudice, (2) confusion, and (3) delay resulting from its admission were too significant:

> THE COURT: . . . probing [Appellant's "Me Too" evidence] is so prejudicial and likely to confuse the jury and take this trial into two or three weeks that I'm not going to permit it.

(A. 224.) First, the danger of unfair prejudice alone justifies its exclusion. If Appellant were allowed to call non-parties to offer self-serving testimony as to their own subjective and unrelated experiences of alleged discrimination over an extended period—none of which have ever been proven in court—Appellee would have been unable to adequately respond on cross-examination or through documentary evidence due to the passage of time, unfair surprise, and lack of opportunity to obtain such evidence through discovery, in part due to Appellant's spoliation of such evidence.

Further, Appellee would have been prejudiced with the introduction of such evidence because Appellant never sought discovery on it and never insinuated that it might raise the argument at trial until closer to trial. (*See* A. 85-91a.) If Appellant had intended on presenting such evidence at trial, then she should have made this clear in discovery, at her deposition, in her answers to interrogatories, and her portion of the Joint Pre-Trial Memorandum—all of which she failed to do. With Appellant having failed to do so, Appellee would not have been able to procure discovery on any of the unrelated allegations of discrimination or retaliation by non-parties she would seek to probe, and Appellee would be unfairly "ambushed" by the presentation of such surprise evidence at trial. The prejudice resulting from this, standing alone, justifies the exclusion of Appellant's "Me Too" evidence.

Moreover, the trial court correctly found that the presentation of such highly speculative testimony to a jury would taint the jury's view of the case. (See A. 27.) As noted in *Moorhouse v. Boeing Company*, "even the strongest jury instructions [cannot] dull[] the impact of a parade of witnesses, each recounting [their] contention that defendant had [terminated their employment] because of [their protected characteristic or conduct]." 501 F. Supp. 390, 393 & n.4 (E.D. Pa. 1980) (excluding "Me Too" evidence on the ground that introduction of such evidence would cause unfair prejudice to defendant). The fact that the witnesses are non-parties and have little direct knowledge of Appellant's circumstances underscores the prejudice Appellee would suffer. Indeed, "the fact that these witnesses [could] ma[k]e each other's case

so well [would] distract[] attention from the fact that they ha[ve] little to say about [plaintiff's] termination[]." *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 303 (5th Cir. 2000). Therefore, any such evidence would shift the jury's focus to the allegations of the non-party witnesses instead of the facts and circumstances regarding Appellant's case in chief.

Second and third, the trial court properly concluded that allowing Appellant to introduce "Me Too" evidence from two non-party witnesses would lead to confusion of the issues and result in unnecessary delay and prolongment of trial. Each time a non-party would have testified as to their own, unrelated allegations of discrimination, Appellee would have been forced to rebut those allegations with evidence of the lawfulness of Appellee's actions with respect to each non-party. This would not only have required more time for cross-examination, but it would also have involved a significantly greater number of exhibits, examination into the circumstances of each witness's termination, each witness's performance history with Appellee, as well as potential testimony from additional witnesses about the employment history of each "Me Too" witness. Indeed, the facts and circumstances regarding Appellant's termination would have occupied just a fraction of the trial, with a large portion of the time spent by Appellee refuting the allegations of discrimination lodged by non-party witnesses about their own employment, resulting in multiple "trials within a trial." *See Hall*, 895 F. Supp. 2d at 273 ("The danger of a trial within a trial would be great

and weighs towards excluding the evidence."). Another court clearly articulated the impact of allowing such witnesses to testify:

> Had the Court permitted each of the proposed witnesses to testify about the circumstances surrounding his own lay off, each, in essence, would have presented a prima facie case of age discrimination. Defendants then would have been placed in the position of either presenting the justification for each witnesses' lay off, or of allowing the testimony to stand unrebutted. This latter alternative, of course, would have had an obvious prejudicial impact on the jury's consideration of [plaintiff's] case. To have pursued the former option, defendants would have been forced, in effect, to try all six cases together with the attendant confusion and prejudice inherent in that situation.

Moorhouse, 501 F. Supp. at 393 (footnote omitted). Based on the above, the trial court acted well within its discretion in excluding Appellant's proposed "Me Too" evidence.

B. The trial court properly exercised its discretion in concluding that Appellee did not "open the door" to the introduction of "Me Too" evidence.

Appellant erroneously argues that the trial court abused its discretion by not allowing her to present "Me Too" evidence after Appellee apparently "opened the door" to the introduction of that evidence. (Blue Br. 12-13.) Appellant's argument fails because, not only did Appellee not open the door to Appellant's proposed "Me Too" evidence, but the trial court allowed Appellant the opportunity to present limited rebuttal evidence that was appropriate and proportional to the scope of the evidence presented by Appellee. Accordingly, this Court should affirm the judgment.

In certain circumstances, when a party elicits testimony regarding excluded evidence, a court may find that the party "opened the door" to allowing the opposing party to "conduct limited questioning for the purpose of responding to" the other

party's testimony. *State v. Hall*, 2017 ME 210, ¶ 19, 172 A.3d 467. The "opening the door" doctrine comprises two doctrines governing the admissibility of evidence:

> The first, which we have described as the doctrine of "curative admissibility," arises when inadmissible prejudicial evidence has been erroneously admitted by one party, and the opposing party seeks to introduce other evidence to counter the prejudice. *State v. DePaula*, 170 N.H. 139, 146, 166 A.3d 1085 (2017). The second, which we have described as the doctrine of "specific contradiction," applies more broadly to situations in which a party introduces admissible evidence that creates a misleading advantage for that party, and the opposing party is then permitted to introduce previously suppressed or otherwise inadmissible evidence to counter the misleading advantage. *Id.*

State v. Roman, 313 A.3d 823, 827 (N.H. 2023). Regardless of which doctrine applies, "the fact that the 'door has been opened' does not permit all evidence to 'pass through' because the doctrine is intended to prevent prejudice and is not to be subverted into a vehicle for the introduction of prejudice." *Id.*

As an initial matter, shortly before making an offer of proof or presenting any substantial argument on this point during trial, Appellant's counsel attempted to prejudice Appellee by soliciting "Me Too" evidence in disregard of the trial court's order. (A. 217-21.) Indeed, the prejudice was so apparent that the trial court indicated shortly thereafter that it felt a mistrial could be appropriate due to the prejudice caused by Appellant's counsel's conduct. (A. 221.) Appellant now claims that she has been prejudiced by the trial court's orders excluding "Me Too" evidence, even after she had disregarded that order to such an extent as to potentially justify a mistrial. (*See id.*) If

any party had suffered prejudice regarding Appellant's proposed "Me Too" evidence, it was Appellee.

Nevertheless, Appellant does not allege that Appellee opened the door under the first doctrine, i.e., that Appellee erroneously admitted inadmissible evidence. *See Roman*, 313 A.3d at 827. Instead, she claims that, by (i) quoting Appellee's EEO policy from its employee handbook, (ii) introducing testimony regarding its efforts to support cancer research and cancer-related causes, and (iii) introducing small portions of documents referencing Ms. Walker and alleged double-hearsay statements by Ms. St. Pierre, Appellee somehow created a "misleading advantage" under the second doctrine to which Appellant feels she was entitled to respond with "Me Too" evidence. *See id.*; (A. 221-24) Not only did Appellee not create a misleading advantage by introducing this evidence, but the trial court also never refused Appellant the opportunity to introduce evidence to counter any potential misleading advantage. Accordingly, Appellant can hardly claim that Appellee created a misleading advantage.

Appellant first claims that Appellee introduced evidence that provided a misleading advantage when Ms. St. Pierre simply read Appellee's EEO policy from its employee handbook. (II Tr. 10-11.) Appellant erroneously claims that, by simply reading its EEO policy, Appellee opened the door to all "Me Too" evidence deemed excluded by the trial court in its order on Appellee's motion *in limine*. (A. 27.) This argument is misguided for two reasons.

First, Appellant's argument that, by reading its EEO policy verbatim, Appellee somehow created a "misleading advantage" that would require introduction of previously excluded evidence is specious. (Blue Br. 10-11) Appellee did not introduce evidence of specific allegations regarding the "Me Too" witnesses offered by Appellant; did not make subjective or editorial comments about whether it discriminated or retaliated against anyone; did not claim that it never previously discriminated against anyone; did not mention any of the "Me Too" witnesses identified by Appellant; nor did it mention the names of any employees who ever previously made claims of discrimination against it. Instead, Appellee merely quoted its EEO policy and then later, on redirect examination by Appellant's counsel, confirmed her prior testimony regarding the EEO policy. (A. 103; II Tr. 10-11.) It is unclear how Ms. St. Pierre's recital of Appellee's boilerplate EEO policy would somehow "mislead" a jury to the prejudice of Appellant, thereby potentially requiring days of additional testimony by two non-party witnesses who had virtually nothing to do with the facts of this case.

Second, even if such testimony could have potentially misled a jury—which it did not—the draconian relief Appellant asked for was far broader than would be appropriate. If Appellant wanted to challenge any evidence presented by Appellee, then Appellant would only be permitted to conduct "*limited* questioning for the purpose of responding to" Ms. St. Pierre's verbatim recital of Appellee's EEO policy. *Hall*, 2017 ME 210, ¶ 19, 172 A.3d 467 (emphasis added). Such "limited questioning"

would not include "trials within a trial" of the circumstances regarding Ms. Walker's and Ms. McNulty's employment, which would likely have taken the trial into the following week. (A. 224.) Indeed, such an outcome would subvert the "opening the door doctrine" into a "vehicle for the introduction of prejudice," confusion, and delay. *Roman*, 313 A.3d at 827.

Appellant also claims that, with respect to Ms. St. Pierre's testimony about Appellee's efforts to support cancer-related causes, as well as benefits offered to employees undergoing cancer treatment, Appellee "opened the door" to Ms. Walker's and Ms. McNulty's testimony regarding the circumstances of their terminations—neither of which had anything to do with cancer or cancer treatment. (II Tr. 8-11; III Tr. 87; Blue Br. 9-10.) This argument also fails. First, contrary to Appellant's claim, Ms. St. Pierre did not testify about "how great [Appellee] treated all its employees with disabilities." (Blue Br. 11.) Ms. St. Pierre testified about Appellee's efforts to support cancer-related causes and employees who suffered from or were recovering from cancer. (II Tr. 8-9.) Appellee did not introduce this evidence gratuitously but presented it specifically in rebuttal to Appellant's claim that Appellee had discouraged her from taking time off to address alleged cancer-related concerns. (II Tr. 186.) Ms. St. Pierre did not specifically mention anyone by name and did not indicate that Appellee had treated Ms. McNulty or Ms. Walker in a favorable or unfavorable way. By testifying about what benefits are offered to employees and its efforts regarding cancer-related causes, Appellant cannot reasonably argue that Appellee "misled" the jury to her

prejudice. The trial court correctly held that this brief testimony "hardly open[ed] the door to other claims." (A. 222.)

Further, the trial court never barred Appellant from specifically challenging Ms. St. Pierre's testimony on these points. Appellant was free to question Ms. St. Pierre about the nature or extent of Appellee's involvement in the community events at issue, participation by certain of Appellee's employees in those events or fundraisers, the veracity of Ms. St. Pierre's testimony, the consistency with which Appellee applied the policies regarding its benefits, or the circumstances under which Appellee implemented those policies. Testimony or evidence regarding any of those points would have been more than sufficient to prevent any prejudice that may have resulted from Ms. St. Pierre's testimony. Instead, Appellant wrongly insists that "Me Too" testimony was the only appropriate remedy. As set forth above, allowing such evidence would, in fact, cause prejudice, confusion, and delay—not remedy it.

Finally, Appellant claims that Appellee opened the door to Appellant's "Me Too" evidence by introducing some documents that had references to Ms. Walker and another former employee. (Blue Br. 12-13.) This argument also fails for a variety of reasons. First, as to the relevant portion of Exhibit 14, it did not create "a misleading advantage" because the portion of Exhibit 14 in question was not presented to the jury. Indeed, once Appellant's counsel raised that Exhibit 14 contained evidence regarding Ms. Walker and his intention to refer to that evidence, Appellee's counsel offered to redact any portions relating to evidence or testimony previously excluded

by the trial court before submitting the exhibit to the jury. (III Tr. 100.) Further, contrary to Appellant's argument, the court allowed Appellant's counsel to introduce in closing argument the portion of Exhibit 14 at issue and suggested that he redact that portion if he felt it would unfairly prejudice her. (III Tr. 94-96.) Appellee's counsel ignored this offer. Therefore, because (i) the evidence in question was never seen by the jury, (ii) Appellant's counsel ignored the offer to redact any objectionable portions of the Exhibit, and (iii) the court allowed Appellant to refer to the objectionable portions of the Exhibit during closing argument, Appellant's argument that any portion of Exhibit 14 created a "misleading advantage" that justified the introduction of extensive proposed "Me Too" evidence fails.

The same argument applies to Exhibit 36, which Appellant claims contained double hearsay regarding comments allegedly made by Ms. St. Pierre regarding a third party not identified as a "Me Too" witness. (A. 115.) As with Exhibit 14, at the time of Appellant's objection, the relevant portion of Exhibit 36 was not yet introduced to the jury, and Appellee's counsel offered to redact that portion of the Exhibit before it was shown to the jury. (III Tr. 94-96.) Further, contrary to Appellant's false statement that "[t]he Court . . . refused to allow [Appellant] to use the exhibits already submitted into evidence by [Appellee]," (Blue Br. 13), the trial court actually stated: "I will allow you to show [the portion in question from Exhibit 36] to [Appellant], or put it up on the screen . . . [a]nd simply say... is this your statement in response to that question?" (A. 225.) In response, Appellant's counsel stated that the trial court's ruling was "fine,"

and that counsel would show it on the screen during closing argument. (*Id.*) Therefore, to the extent the introduction of Exhibits 14 and 36 may have somehow "misled" the jury—which was impossible because that evidence had not yet even been introduced to the jury—the trial court appropriately allowed limited testimony to cure any prejudice. Thus, Appellant's arguments fail.

C. The trial court did not abuse its discretion in excluding comparative discipline evidence.

Appellant erroneously argues that the trial court erred by not allowing her to present evidence of "comparators" and, therefore, the jury's conclusion regarding pretext was unfairly prejudiced. This argument fails because (i) Appellant conflates comparator evidence with "Me Too" evidence, and (ii) the trial court never precluded her from producing evidence of similarly situated employees who were treated *differently* than she was. Indeed, Appellant provided no offer of proof and, in her opening brief, has cited to no specific examples of actual comparator evidence, i.e., evidence of similarly situated employee treated *differently* than she was, that the trial court excluded. (Blue Br. 11-12.) Without more, this Court is not only unable to determine whether there is sufficient support in the record to support Appellant's claim of clear error on the part of the trial court, but it also cannot even fully consider the issue.

First, Appellant conflates comparator evidence with "Me Too" evidence, which dooms her argument from the outset. Throughout most of her brief, Appellant has argued in several different ways how the trial court's exclusion of "Me Too" evidence

was in error. One of the points made by Appellant is that one of the documents admitted into evidence contains a note stating that Ms. Walker had similar performance issues as Appellant and *was also terminated* by Appellee. (A. 223.) Evidence of Ms. Walker's performance, however, is not comparator evidence and has nothing to do with pretext. A plaintiff in an employment discrimination case may use comparator evidence to show that "others similarly situated to [her] in all relevant respects were treated differently by the employer." *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 20 (1st Cir. 1999). Here, much of the "comparator evidence" Appellant sought to introduce involved errors made by other employees who were also terminated by Appellee. Because this is not actual comparator evidence relevant to pretext, the Court should disregard Appellant's argument in this regard.

Second, contrary to Appellant's claim that the trial court prevented her from introducing comparator evidence of pretext, a review of the record reveals that Appellant was never prohibited from introducing evidence of similarly situated employees who were treated differently than she was for similar errors. In fact, contrary to Appellant's claims, the trial court allowed Appellant to introduce evidence of Ms. St. Pierre's performance problems. (A. 29-30.) In fact, the trial court allowed Appellant to introduce evidence of errors made by Ms. St. Pierre on a confidential separation agreement—something Appellant specifically asked for during trial and Appellee opposed. (A. 223.) Therefore, Appellant's claim that the trial court prevented her from introducing evidence of pretext fails.

III. Any evidentiary errors by the trial court—which Appellee contends there are none—were harmless and would not have affected the jury's verdict.

Assuming, *arguendo*, that Appellant's claims here are correct, none of these errors substantially impacted the rights of the Appellant to justify reversal of the jury's verdict. Pursuant to M.R. Civ. P. 61, "[n]o error in either the admission or the exclusion of evidence... or in anything done or omitted by the court or by any of the parties is ground for" disturbing a judgment unless the error is "inconsistent with substantial justice." Whether an error is harmless depends on whether it affects a substantial right of the party, i.e., "that the error did not influence the jury, or (that it) had but very slight effect." *State v. Conner*, 434 A.2d 509, 514 (Me. 1981) (internal quotation marks omitted). "One step in applying a harmless-error standard is to assess the strength of the [Appellant's] evidence against the [Appellee]." *Id.*

Here, the excluded evidence cited by Appellant has little, if anything, to do with Appellant's case in chief. Appellant sought to introduce evidence of allegations of discrimination by other former employees who did not have cancer and whose terminations involved totally different circumstances. Moreover, Appellant has not included in her offer of proof any potential evidence regarding potentially discriminatory comments by the decision-makers in her case. Indeed, the only impact of that evidence would be to introduce trials within Appellant's trial, significantly delay the proceedings, and confuse the jury.

Further, Appellee's evidence against Appellant was overwhelmingly strong, thereby heavily weighing in favor of a finding of harmless error. Not only did Appellee conclusively show that there was no causal connection between Appellant's alleged disability or protected activity and the decision to terminate her employment (e.g., the decision-makers were not aware of her doctor's appointment at the time of her termination), but it presented overwhelming evidence of Appellant's performance problems and attitude prior to her termination. Indeed, the evidence in Appellee's favor was so strong that the jury returned a *unanimous* verdict in its favor after deliberating for roughly *an hour*. Such a rapid and decisive verdict suggests that there was no doubt in the jury's mind, and any testimony by "Me Too" witnesses would not have made any difference in the outcome of the case.

Finally, nowhere in Appellant's brief does she articulate how the excluded evidence would have swayed the jury's verdict in her favor. Instead, she makes passing, conclusory references to prejudice or unfairness, but does not explain how the admission of such evidence "was relevant and material to a crucial issue and... would probably have affected the result." 3 Harvey, *Maine Civil Practice* § 61:1 at 288 (2023-2024 ed.). Accordingly, she has not carried her burden to show that any error by the trial court was harmful and affected her substantial rights. *See* M.R. Civ. P. 61.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's sanction for Appellant's discovery violations and its various evidentiary rulings.

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CERTIFICATE OF SERVICE

I, Peter A. Hale, Esq., hereby certify that two copies of this Brief of Appellee Town & Country Federal Credit Union were served upon counsel at the addresses set forth below by email and first-class mail, postage-prepaid, on June 27, 2024:

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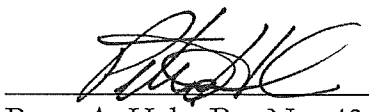

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