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Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN HAYES,

Plaintiff - Appellee,

v.

SKYWEST AIRLINES, INC.,

Defendant - Appellant.

No. 19-1294

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:15-CV-02015-REB-NYW)

Marcy G. Glenn, Holland & Hart LLP, Denver, Colorado (Jessica E. Whelan of Holland & Hart LLP, Las Vegas, Nevada; Gregory M. Saylin and Tyson C. Horrocks of Holland & Hart LLP, Salt Lake City, Utah; and Scott M. Petersen of Fabian VanCott, Salt Lake City, Utah, with her on the briefs), for Defendant-Appellant SkyWest Airlines, Inc.

Paul Maxon, The Law Office of Paul Maxon, P.C., Boulder, Colorado (Sarah Parady of Lowrey Parady Lebsack, LLC, Denver, Colorado, with him on the brief), for Plaintiff-Appellee John Hayes.

Before **HOLMES**, **KELLY**, and **CARSON**, Circuit Judges.

CARSON, Circuit Judge.

Plaintiff John Hayes prosecuted his employment discrimination case to a favorable verdict and judgment. But he encountered bumps along the road. Now we

must examine a district court's authority to manage proceedings and sanction litigants before it, to grant a mistrial or a new one, and to award equitable remedies. Because these essential powers inhere to us and to our colleagues by the structure and independence of the judicial branch, we police them cautiously—especially as an appellate tribunal. Keeping this responsibility in mind, we conclude the district court did not abuse its discretion or authority in this case.

During trial, two instances of misconduct prompted Defendant SkyWest Airlines, Inc. to request a mistrial. But it was Defendant's own misconduct. Thus, the district court tried to remedy the misconduct and preserve the integrity of the proceedings but did not grant Defendant's request. After the trial, exercising its equitable powers, the district court granted Plaintiff's request for a front pay award. Following final judgment, Defendant moved for a new trial based, in part, on the district court's handling of the misconduct incidents and on newly discovered evidence. The district court denied that motion. Defendant appeals, asking us to reverse and remand for a new trial or, at the very least, to vacate (or reduce) the front pay award. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm the judgment of the district court.

I.

Defendant, an aviation company, provides ground services to airlines at airports across the country. For many years, Defendant provided ground services for United Airlines ("United") at Denver International Airport ("DIA"). Plaintiff worked as a "ramp agent" for Defendant at DIA from 2006 until his termination in 2014.

Defendant promoted Plaintiff twice—first to "ramp supervisor" and then, in 2013, to "ramp shift manager." Tragically, however, Plaintiff's chronic kidney disease deteriorated in 2013, so he resigned his management role and returned to regular line employment. But Plaintiff maintained his designation as a Certified Station Trainer ("CST"). That designation showed Plaintiff's authority and eligibility to train other employees and receive additional compensation for that work.

In 2014, because of his deteriorating condition, Plaintiff exhausted his Family and Medical Leave Act ("FMLA") benefits. Over the next few months, Plaintiff received and used discretionary leave, as well as leave donated to him by other employees. Eventually, Plaintiff returned to work, at which time the parties began the "interactive accommodation process" under the Americans with Disabilities Act ("ADA"). Plaintiff also sought reassignment to other positions within the company. When those discussions failed, Plaintiff's employment ended in November 2014. Meanwhile, in the fall of 2014, Defendant learned that United would not renew Defendant's contract at DIA for 2015. Therefore, Defendant furloughed many of its Denver employees in December 2014.

Plaintiff sued, alleging Defendant violated the ADA, the Rehabilitation Act, and the FMLA. After a week-long trial in 2017, the jury returned a verdict for Plaintiff. The jury found that Defendant discriminated against Plaintiff, failed to accommodate him, and retaliated against him, all in violation of the ADA. The jury awarded Plaintiff $2.3 million in back pay, compensatory damages, and punitive damages under the ADA. And the jury found that Defendant retaliated against

Plaintiff in violation of the FMLA, awarding him another $150,000 for that violation. The jury found against Defendant on all its affirmative defenses and found that Plaintiff did not fail to mitigate his damages. The district court reduced the monetary awards to reflect the single-recovery rule and statutory caps.

None of the events up to the December 2014 furlough are at issue on appeal, nor is the jury's verdict. But certain events at trial, as well as some post-trial events, are the subject of this appeal. During trial, two instances of misconduct prompted the district court to take remedial actions, including advisements to the jury. First, a paralegal for Defendant's team gestured to a witness. And second, Defendant's corporate representative conversed with a juror. After the second, Defendant moved for a mistrial. The district court denied that motion. After trial, Defendant moved for a new trial, arguing, among other things, that the incidents during trial and the district court's responsive conduct tainted the jury and deprived Defendant of a fair trial. The motion also sought a new trial based on newly discovered evidence, which Defendant said Plaintiff withheld. The district court denied that motion as well. Defendant urges us to grant it a new trial on either or both grounds.

Post-trial, Plaintiff moved for additional monetary awards, including front pay. The district court held an evidentiary hearing, and awarded over $300,000 in front pay. The district court found that Defendant's discrimination prevented Plaintiff from obtaining employment with the company that took over United's ground services contract at DIA, Simplicity USA ("Simplicity"). The district court found (1) Defendant's actions kept Plaintiff from knowing about or applying for the

"trainer" position with Simplicity, (2) Plaintiff possessed all qualifications for that position, (3) had he applied, Simplicity would more likely than not have offered Plaintiff the position, and (4) had Simplicity offered the position, Plaintiff would have accepted it. So the trainer position became the basis for the front pay award.

Although not in the trainer position, Plaintiff worked for a few companies between 2014 and judgment. In November 2014, after negotiations with Defendant fell apart, Plaintiff took an entry-level job with Signature Air ("Signature"). Plaintiff left that job because of trouble negotiating his return from a brief medical leave. But in March 2015, Plaintiff started in a part-time position with United's own ground services department. He chose United because of the health insurance and job protection it offered, as well as certain other benefits. During Plaintiff's employment with United, his spouse's employer laid her off from her job in Denver, forcing the couple to relocate to Memphis, Tennessee, where she found full-time work. Although Plaintiff could not support himself and his spouse on his part-time earnings alone, he could have supported them on the Simplicity trainer position. So, had he been in that position, they would not have had to move, and his spouse could have continued her job search in Denver, where the couple wished to stay.

After a few months searching for employment in Memphis, Plaintiff started a night-shift position with Delta Ground Services, but that conflicted with his overnight dialysis schedule. So he went to work in a part-time, entry-level position at PrimeFlight, and then transitioned to a position with United Ground Express ("UGE"), where he remained employed through the time of the front pay hearing.

The district court used the UGE job as the comparison point for the front pay award, calculating front pay as the difference between what Plaintiff made working for UGE and what he would have made in the Simplicity trainer position. The district court found that, more likely than not, Plaintiff would have stayed in the Simplicity trainer position until retirement at age 65, and that, more likely than not, he would remain at UGE for that same time.[1]

II.

This case presents three issues. First, whether the district court should have granted Defendant's motion for mistrial or its motion for new trial based on unfairly prejudicial trial proceedings. We review both denials for abuse of discretion. United States v. Meridyth, 364 F.3d 1181, 1183 (10th Cir. 2004) (citation omitted) (mistrial); Sanjuan v. IBP, Inc., 160 F.3d 1291, 1296 (10th Cir. 1998) (citation omitted) (new trial). Second, whether the district court should have granted Defendant's motion for a new trial based on newly discovered evidence—which we also review for abuse of discretion. FDIC v. Arciero, 741 F.3d 1111, 1117 (10th Cir. 2013) (citation omitted). Finally, whether the district court erred in awarding or calculating front pay. We review the award for abuse of discretion. Ballard v. Muskogee Reg'l Med. Ctr., 238 F.3d 1250, 1253 (10th Cir. 2001) (citation omitted).

[1] The district court therefore awarded front pay to run from judgment until Plaintiff's 65th birthday, considering the time value of money and inflation. The district court found it too speculative to adjust the amount based on any promotions, raises, or overtime Plaintiff might receive, or might have received, in either position, or on the differential value of benefits outside wage. These calculations and findings are not at issue on appeal.

A district court abuses its discretion if its ruling is arbitrary, capricious, or whimsical, or arises from an error of law or a clear error of fact. Amoco Oil Co. v. U.S. Envtl. Prot. Agency, 231 F.3d 694, 697 (10th Cir. 2000) (citations omitted). A fact finding is clearly erroneous only where it wholly lacks support in the record or if, after reviewing the evidence, we are definitively and firmly convinced that the district court made a mistake. Acosta v. Foreclosure Connection, Inc., 903 F.3d 1132, 1134 (10th Cir. 2018) (citation omitted).

III.

"It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (alteration in original) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)). Among these is the "power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." Id. (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821)). Another is the "power to punish for contempts," which "reaches both conduct before the court and that beyond the court's confines . . . ." Id. at 44 (first quoting Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1874); then citing Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 798 (1987)).

Neither rule nor statute governs these powers—rather, they derive from "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Id. at 43 (quoting Link v. Wabash

R.R. Co., 370 U.S. 626, 630–31 (1962)). Because these inherent powers have such potency and are governed by the court's own discretion, including the discretion "to fashion an appropriate sanction for conduct which abuses the judicial process," they "must be exercised with restraint." Id. at 44–45. Defendant argues that the district court abused these inherent powers and denied it a fair trial. Thus, Defendant says, the district court should have declared a mistrial or later granted a new trial.

A mistrial should result when the prejudicial impact of an error or errors, viewed in the context of the entire case, leads the district court to find that the error(s) impaired the moving party's right to a fair and impartial trial. Meridyth, 364 F.3d at 1183 (citations omitted). The district court occupies the best position to evaluate that question given its first-hand experience of the proceedings. Id. (citation omitted). We, on the other hand, review only on the cold record, so we give particular deference to the judge who observed the trial, Roberts v. Roadway Express, Inc., 149 F.3d 1098, 1106 (10th Cir. 1998) (citation omitted), and his evaluation of any alleged prejudice in the context of the entire case, Meridyth, 364 F.3d at 1183 (citation omitted). Therefore, we review the grant or denial of a mistrial only for an abuse of discretion. Id. (citation omitted). We keep in mind that "[a litigant] is entitled to a fair trial but not a perfect one." McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553 (1984) (alteration in original) (quoting Brown v. United States, 411 U.S. 223, 231–32 (1973)).

Defendant failed, both in the district court and here, to argue a legal standard under which the district judge should have granted a new trial because of unfairly

prejudicial proceedings. Although we have not yet articulated such a standard, the Eighth Circuit has said

> [a]n appellate court should be slow to reverse a case for the alleged misconduct of the trial court, unless it appears that the conduct complained of was intended or calculated to disparage [a party] in the eyes of the jury and to prevent the jury from exercising an impartial judgment upon the merits.

Rush v. Smith, 56 F.3d 918, 922 (8th Cir. 1995) (en banc) (alterations in original) (quoting La Barge Water Well Supply Co. v. United States, 325 F.2d 798, 802 (8th Cir. 1963)). We think this cautious approach is appropriate.

We also conclude that an adapted version of our mistrial standard is the best measure by which to evaluate alleged judicial misconduct. So when we review the denial of a motion for new trial based on the district court's alleged misconduct, we will examine the trial court's actions in the context of the entire record, United States v. Saenz, 134 F.3d 697, 702 (5th Cir. 1998) (citations omitted), to "determine whether the judge's behavior was so prejudicial that it denied the [litigant] a fair, as opposed to a perfect, trial," United States v. Bermea, 30 F.3d 1539, 1569 (5th Cir. 1994) (citation omitted).[2]

As in the mistrial context, "we are mindful that '[t]he trial judge is in the best position to determine' the prejudicial effect of [any error], and thus whether a new trial is warranted . . . as well as to fashion an appropriately tailored remedy."

[2] This parallels our familiar standard for a new trial based on improper argument. See Whittenberg v. Werner Enters., Inc., 561 F.3d 1122, 1131–33 (10th Cir. 2009). In that context, the ultimate question is, considering the record as a whole, whether the perpetrating party achieved an "inappropriate and prejudicial advantage." Id. at 1131.

Whittenberg v. Werner Enters., Inc., 561 F.3d 1122, 1127–28 (10th Cir. 2009) (quoting Ketchum v. Nall, 425 F.2d 242, 244 (10th Cir. 1970)). So we review the denial of a motion for new trial for abuse of discretion. Id. at 1127 (citations omitted). The district court's discretion, however, is not boundless, and we may not serve as a rubber stamp—we must "mark and guard the outer boundaries of acceptable trial conduct." Id. at 1128, 1133. That responsibility includes policing the boundaries of judicial conduct, as well as litigant conduct.

Defendant identifies two incidents the district court supposedly mishandled. One involving a paralegal for the defense team. And one involving a juror. We examine these two incidents, evaluating them under our deferential standard of review, to determine whether either, or perhaps the two in conjunction, required a mistrial or new trial. We conclude they did not.

A.

We begin with "the paralegal incident." The trial transcript provides the best and only source for us to understand what happened and whether the event impaired Defendant's right to a fair and impartial trial. During trial, the district court saw Defendant's paralegal gesture to Defendant's corporate representative while she was on the stand—the court immediately instructed counsel to approach the bench. It informed counsel what it observed, that it intended to remove the paralegal and initiate contempt proceedings against her, and that it intended to remove the jury so it could resolve the incident. Upon the jury's departure, the court asked the paralegal what happened. She admitted that she gestured to the corporate representative that

she should not answer a question. The court informed her that it would "immediate[ly] exclu[de] and banish [her] from" the courtroom and would subject her to contempt proceedings, and it invited counsel to make any record they felt necessary.

Defendant's counsel said the paralegal's removal was proper, he urged the court to avoid tainting the jury with its explanation, and he suggested that the court examine the corporate representative to see if the incident had any effect on her. Plaintiff's counsel requested the court not order a mistrial but asked that the court inform the jury of the incident because of its relevance to the witness's and Defendant's credibility. The court cautioned counsel that, were it to discover that the incident prejudiced any of the jurors, it would likely declare a mistrial. Plaintiff's counsel stated his opposition to polling the jury and simply proposed that the court give a brief statement that the paralegal tried to influence the witness and thus the court dismissed her. Defendant's counsel also explicitly disavowed a mistrial, but requested again that the court question the corporate representative, suggested that the court should poll the jury, and said he would defer to the court to "give the appropriate remedy and instruction to the jury."[3]

[3] In requesting a poll, Defendant's counsel said: "if a jury member was prejudiced or polluted or saw this, again, it should come to the Court's attention. Your Honor should know it and then also determine whether that is going to have a prejudicial effect one way or another on that juror and if that juror says so, exclude that juror and hope we don't run out of alternates . . . If they've been impacted, this Court should know."

The court asked the corporate representative whether she saw the gesture. She said emphatically she did not. The court then informed the parties it would advise the jury that the paralegal "attempted to improperly communicate with" the corporate representative, that it found the behavior "highly inappropriate" and "contemptuous," and that it had dismissed the paralegal. The court also told them that it intended to poll the jury to determine whether any jurors saw the misconduct. Neither party objected. The jury returned and the court said:

> Ladies and gentlemen of the jury, in apparent reaction and response to [Plaintiff's counsel's] last question to [the corporate representative], the witness on the stand, the paralegal for the defendant SkyWest . . . attempted to communicate improperly, inappropriately, with [the corporate representative]. As a result, I have banished [the paralegal] from the courtroom and this trial. These observations were made by me personally. What I need to know from you, did any of you observe any communication or attempted communication between [the paralegal]; again, the paralegal for the defendant, and the witness, [the corporate representative]? If you did, please raise your hand.

No juror responded affirmatively, so the trial continued without objection or further discussion of the incident.

Defendant argues four points. First, that the district court twice called the paralegal "paralegal for the defendant" before the jury and thus improperly cast Defendant as the bad actor. We think this factual description harmless. Second, the district court's use of the word "banished" constituted "pejorative hyperbole" and "dramatic embellishment" that, by association, cast Defendant as an "archetypal villain." We think this argument hyperbolic and dramatic. Third, that it was prejudicial and unnecessary to describe the paralegal's conduct as improper and

inappropriate. Again, we think those accurate descriptors harmless—and Defendant concedes the conduct was both improper and inappropriate. Finally, that the district court's question to the jury implied the corporate representative participated in the misconduct. The transcript of the district court's statement makes clear that it made no such implication to the jury.

We view the district court's advisement as appropriate to the circumstances. It was factual, it was disapproving but not pejorative, and it fulfilled a necessary purpose—to identify potential prejudice among the jurors. We see no inappropriate or unduly prejudicial conduct on the part of the district court. Contra Rush, 56 F.3d at 920–21 (where the district court commented that "the races have a tendency to stick together and that may be good or bad, but whatever it is, it exists."); Saenz, 134 F.3d at 706 (where the district court's "string of short, direct, and sometimes leading questions [to the witness] created an appearance that the court was assisting the government in proving its case."). The district court did not abuse its inherent powers or taint the proceedings. The record does not reflect that the district court intended to prevent the jury from rendering an impartial verdict. Nor did the district court's actions deprive Defendant of a fair, as opposed to a perfect, trial. So the district court did not abuse its discretion in denying a mistrial or a new trial based on this incident.

B.

After proceedings ended on the day of the paralegal incident, another instance of misconduct occurred—"the juror incident." Again, the transcript provides the best

evidence by which we can evaluate the incident and the district court's responsive conduct. After completing her testimony that evening, the corporate representative got in the courthouse elevator to leave for the day. A juror in the case also entered the elevator to ride down. The following dialog occurred:

> *Juror*: You've done great.
>
> *Corporate Rep.*: Thank you, it's my first one. It's been a long and stressful week.
>
> *Juror*: You have a big job and you had to talk about it all. We just continue to hear the same thing over and over again. I've got 80 pages of notes to go through.
>
> *Corporate Rep.*: You all have a big job.
>
> *Juror*: It's a critical case.
>
> *Corporate Rep.*: I'm just doing my best to keep it clear and concise.
>
> *Juror*: You need to go home and get a glass of wine. Wine makes everything better.
>
> *Corporate Rep.*: I can't wait to take off my shoes and relax.

The corporate representative immediately alerted Defendant's counsel about this interaction and produced the preceding transcription from her memory of the conversation. That evening, Defendant's counsel produced a notice, which included the transcription, and served it on the district court and Plaintiff's counsel.

At the beginning of the next morning's proceedings, outside the presence of the jury, the district court opened the record to deal with the incident. The court invited Defendant's counsel to describe what happened. Counsel explained that the corporate representative engaged with the juror, rather than declining to converse, because of her high stress level, rural upbringing, and respect for elders. He also said that she forgot about the court's order not to speak with jurors. The court called the

corporate representative to the podium and explained that it would initiate indirect contempt proceedings, informed her of her right to keep silent and to counsel, and asked her whether the notice was a "complete and accurate accounting of the exchange." She affirmed that it was.

After the court confirmed the identity of the juror involved, the court stated that it intended to question her and that it would permit counsel to approach the bench and propose any other questions. The juror entered the courtroom and confirmed that she initiated and participated in the conversation despite her understanding of the court's instructions and orders. The court informed her that it would subject her to contempt proceedings. Although Plaintiff's counsel requested a more thorough voir dire to confirm the veracity of the corporate representative's version of the conversation, the court declined that request. Instead, the court confirmed that no other members of the jury heard or learned about the conversation and excused the juror to the hallway.

The court invited counsel to request any relief. Plaintiff's counsel asked that the court enter judgment against Defendant as sanction. Defendant's counsel requested a mistrial, which the district court immediately denied, saying "[y]ou're not going to reap any potential benefits that you may see accruing to you by the second act of contemptuous misconduct by a member of your team." Defendant's counsel opposed entry of an unfavorable judgment, arguing that sufficient jurors and alternates remained to continue trial. Plaintiff's counsel stated his opposition to a mistrial. The court laid out for counsel its proposed order and then, without

objection, ordered that the juror be discharged from service and that she would face contempt proceedings. The court also excused the corporate representative from trial, ordered her to leave the courthouse, and advised that she would also face contempt proceedings. The court took Plaintiff's motion for sanctions under advisement and again denied Defendant's motion for mistrial. Neither party objected to any of the court's actions or orders.

After the corporate representative and the juror departed, the court informed counsel that it would

> advise [the jury] of the misconduct which has occurred between [the corporate representative] and [the juror] further advis[e] the jurors that both [the corporate representative] and [the juror] have been discharged from further duty and participation in the trial of this case, and that under the circumstances the Court intends to pursue indirect criminal contempt charges and proceedings against them, then reiterate the rules, admonitions, and prohibitions that govern the conduct, communication, and deportment of the remaining eight jurors as trial jurors.

Neither party objected. When the jury returned to the courtroom, the court gave the following advisory—

> The Court was confronted with an extraordinary issue and matter. Last night after trial while exiting the courtroom, your former colleague, [the juror], engaged [the corporate representative], the corporate representative for the defendant, in a conversation that touched on the merits of this trial, as incomprehensible to me as that is. As a result, I have discharged [the juror] in the trial of this case and she will be involved in contempt proceedings. Also, as a result I have required [the corporate representative] to exit this courtroom, this trial, and [the corporate representative] will be involved in contempt proceedings. When I began this trial, I indicated to all of you to please accept our apologies in advance because outside of the courtroom we're ignoring you deliberately and for important purposes; to rehearse, to preserve the important integrity of these trial proceedings and avoid the appearance of impropriety. Both of those principles were

> violated by the improper, inappropriate conduct of [the juror] and [the corporate representative].

The court emphasized the many times jurors had heard the rules of juror conduct during the proceedings and admonished the jurors to obey those court-ordered rules. Finally, the court reviewed the rules again before continuing trial. Neither party objected.

Defendant now argues that the district court's *only* responsibility and authority was to determine whether the interaction caused prejudice. This is an oversimplification. The trial judge must manage litigation and the litigants before him and must enforce compliance with—and punish noncompliance with—his orders. Chambers, 501 U.S. at 43. And the district court did precisely what Defendant now charges it with not doing—it questioned the corporate representative and the juror and found the juror could not continue in service (in other words, the court questioned the juror's impartiality and found it impaired). See United States v. Day, 830 F.2d 1099, 1104 (10th Cir. 1987) (a juror may testify to the effect of extraneous matters on the juror's impartiality); United States v. Gordon, 710 F.3d 1124, 1155 (10th Cir. 2013) (the district court has broad discretion to dismiss a juror for potential bias, even during trial). Because sufficient jurors and alternates remained, the court did not declare a mistrial—and we find no abuse of discretion in that ruling.

Nor did the district court abuse its discretion by expelling the corporate representative from the courtroom. A criminal defendant—who has a constitutional right to be present during trial—may, within the district court's discretion, lose his

right to be present. Illinois v. Allen, 397 U.S. 337, 342–43 (1970) (citations omitted). It follows that a civil party's misconduct may, within the district court's discretion, justify removal of the party or its representative from the courtroom. See Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 81 (1919) (recognizing a civil party's entitlement "to be present in person *or by counsel*" during trial (emphasis added)); Helminski v. Ayerst Labs., 766 F.2d 208, 213 (6th Cir. 1985) (exclusion of a civil party does not offend due process "so long as the litigant is represented by counsel" and exclusion is not arbitrary). See also Woods v. Thieret, 5 F.3d 244, 246 (7th Cir. 1993) (recognizing Allen's application to the civil context); Kulas v. Flores, 255 F.3d 780, 784–87 (9th Cir. 2001) (same).

Defendant's final argument—that the district court's advisement to the jury entitles it to a new trial—also rings hollow. Defendant claims the district court should have simply advised the jury that "[the juror] has been excused and you should not speculate about her absence." But the district court's advisement served a permissible purpose: to impress on the jurors the seriousness of its repeated admonitions and emphasize that it would consider any contact between jurors and parties a breach. Defendant also argues that the district court misled and prejudiced the jury by referring to contempt proceedings. But the district court did not say or imply that it had convicted either the corporate representative or the juror. And they were, indeed, involved in contempt proceedings. Finally, Defendant argues that the conversation did not touch on the merits of the case and the district court's saying so was incorrect and prejudicial. Because the conversation touched on the corporate

representative's testimony (which she had just finished giving), we agree with the district court that it could have impacted the juror's impression of her as a witness and her veracity. In any event, the conversation violated the district court's strict instruction that jurors and parties should not engage each other, even in pleasantries.

The district court advised the jury in a factual, straight forward, brief, and not unnecessarily detailed or disparaging manner. The transcript betrays Defendant's attempts to characterize the event differently. Defendant's speculation that the district court left the jurors to imagine the worst about the corporate representative and the juror is just that: speculation. Moreover, that same possibility would have arisen had the district court either not advised the jurors or advised them as Defendant now suggests. And we cannot imagine Defendant would be content had the district court expounded every detail of the incident to the jury.

In circumstances such as these, a district court must exercise its best judgment to resolve a difficult problem: what, if anything, should it tell the jury? That a party perceives itself disadvantaged by the consequences of its own misconduct or that of its agent does not mean that the district court acted inappropriately. In reality, the district court's actions do not compare to the abuses described in Defendant's cited authorities. As with the paralegal incident, we see no cause to believe that the district court crafted its advisements to undermine the impartiality of the jury or that the advisements rendered the proceedings unfair to Defendant.

Because we identify no errors, we also reject Defendant's cumulative error argument. United States v. Lopez-Medina, 596 F.3d 716, 741 (10th Cir. 2010)

("Where, as here, a defendant 'has failed to establish the existence of multiple non-reversible errors . . . he cannot benefit from the cumulative error doctrine.'" (quoting United States v. Barrett, 496 F.3d 1079, 1121 (10th Cir. 2007))).

IV.

Next, Defendant argues that the district court abused its discretion when it denied Defendant's motion for a new trial based on newly discovered evidence. We require the same showing to obtain a new trial based on newly discovered evidence under both Federal Rule of Civil Procedure 59 and 60, and the standard of review is the same for both. FDIC v. Arciero, 741 F.3d 1111, 1117 (10th Cir. 2013) (citations omitted). A movant must show

> (1) the evidence was newly discovered since the trial; (2) the moving party was diligent in discovering the new evidence; (3) the newly discovered evidence was not merely cumulative or impeaching; (4) the newly discovered evidence is material; and (5) . . . a new trial with the newly discovered evidence would probably produce a different result.

Id. (alteration in original) (quoting Dronsejko v. Thornton, 635 F.3d 658, 670 (10th Cir. 2011)). Any newly discovered evidence must be admissible. Id. at 1118 (citations omitted). And the newly discovered evidence must have existed at the time of trial and therefore show facts that existed at the time of trial. See New Eng. Mut. Life Ins. Co. v. Anderson, 888 F.2d 646, 652 (10th Cir. 1989). We will not disturb the district court's denial unless we find a "manifest abuse of discretion." Joseph v. Terminix Int'l Co., 17 F.3d 1282, 1285 (10th Cir. 1994) (citations omitted). Plaintiff argues (1) that Defendant forfeited some of its arguments and (2) that, in any event, none entitle it to a new trial. We agree on both fronts.

A.

On appeal, Defendant describes three categories of new evidence. First, evidence showing that UGE had Plaintiff on indefinite medical leave from July 2017 through the time of trial in September of that year. Second, evidence that Plaintiff received a kidney transplant in June 2018, shortly before the front pay hearing. And third, evidence that Signature put Plaintiff on medical leave for some time in 2015. Because the transplant did not occur before trial and no evidence of it existed at the time of trial, Defendant concedes in its reply brief that it cannot justify a new trial. This leaves the first and third categories of evidence. Defendant only identified the first—the UGE evidence—in its motion for new trial below. Thus, Plaintiff argues that Defendant forfeited the Signature evidence argument.

Forfeiture occurs when a party fails to raise a theory, argument, or issue before the district court. Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1127–28 (10th Cir. 2011) (citations omitted). We agree that Defendant forfeited its argument about the Signature evidence by failing to raise it before the district court. We will reverse a district court based on a forfeited theory only under our rigorous plain-error standard, for which "a party must establish the presence of (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." Id. at 1128 (citation omitted). When the appellant fails to argue for plain error, we consider the theory waived and not entitled to review. Id. at 1130–31 (citation omitted).

Defendant did not raise plain error until its reply brief, but we need not decide whether that late argument avoids waiver because Defendant's argument is insufficient. An error is plain where it is "clear or obvious" under "well-settled law." United States v. Trujillo-Terrazas, 405 F.3d 814, 818 (10th Cir. 2005) (quoting United States v. Whitney, 229 F.3d 1296, 1309 (10th Cir. 2000)). Defendant did not materially argue how it is clear or obvious that the district court should have granted a new trial based on evidence Defendant did not present—the Signature evidence. Without such an argument, we conclude Defendant waived the issue. Richison, 634 F.3d at 1131.

B.

Although we hesitate to *reverse* a district court on an unraised theory, "we may *affirm* on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal." Richison, 634 F.3d at 1130 (emphasis added) (citations omitted). The district court assumed, without deciding, that Defendant could meet the first three prongs of the new trial test as to the UGE evidence—that it discovered the evidence after trial, that it acted diligently to discover the evidence sooner, and that the evidence was not merely cumulative or impeaching. The parties do not dispute that evidence of the UGE leave from July 2017 to the time of trial existed at the time of trial.[4] Nor do the

[4] The time after trial is irrelevant to our inquiry. Anderson, 888 F.2d at 652.

parties dispute the first prong. But because the parties have fully litigated the second prong before us, we will not, like the district court, assume Defendant can meet it.

Defendant claims that, despite Plaintiff's disclosure obligations and Defendant's diligence in propounding written discovery requests, Plaintiff withheld the UGE evidence.[5] Plaintiff argues that the Rules did not obligate him to disclose that evidence, that Defendant never propounded any written requests for discovery that would have covered that evidence, and that, in any event, Defendant never moved to compel production or disclosure. We conclude that Defendant was not diligent in discovering the evidence.

1.

Turning first to Defendant's disclosure argument, the rules obligate a party to disclose evidence that the disclosing party "may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(i). The rules also obligate a party to supplement its disclosures when it learns that they are "incomplete or incorrect." Fed. R. Civ. P. 26(e)(1)(A). Plaintiff argues that because he did not intend to, and indeed did not, use documents relating to the UGE leave to support his claims, the rules did not require him to disclose them or supplement his initial disclosures to

[5] Defendant argues that Plaintiff's spouse testified misleadingly about Plaintiff's employment at UGE because she did not testify that he was on leave at the time of trial. But after reviewing the testimony, we conclude that Ms. Hayes simply answered the questions posed. Although her testimony may have left the jury with an incomplete picture of Plaintiff's situation, we will not disturb the district court's fact finding that she lacked intent to mislead the jury. Since Ms. Hayes did not perjure herself, we struggle to understand how this incident supports Defendant's case for a new trial. Moreover, had Defendant been diligent in discovery, a more thorough cross examination may have been possible.

include them. He also points out that Defendant "never served requests for any information related to [Plaintiff's] post-termination medical leave or condition." Defendant argues to the contrary that Plaintiff initially disclosed pay records from his then-employer, United, and thus "confirmed the relevance of subsequent pay records to his claims." But the fact remains that Defendant did not directly request time and attendance information from any subsequent job, and Defendant misunderstands the disclosure obligation.

The rules do not require a party to disclose all relevant evidence, but only evidence it wishes to use. Compare Fed. R. Civ. P. 26(a)(1)(A) (initial disclosure), with Fed. R. Civ. P. 26(b)(1) (scope of discovery). See also Cummings v. Gen. Motors Corp., 365 F.3d 944, 953–54, 956 (10th Cir. 2004), abrogated on other grounds by Unitherm Food Sys., Inc., v. Swift-Eckrich, Inc., 546 U.S. 394 (2006). The consequence for failing to disclose such a document is ordinarily that the party may not then use that document to support its claims or defenses. Fed. R. Civ. P. 37(c)(1). So Rule 37 contemplates that a party may choose not to disclose relevant (and therefore discoverable) documents and, as a result, may not later use those documents.[6] This fact tracks the disparity in scope between Rules 26(a)(1)(A) and 26(b)(1). We conclude that Rule 26(a)(1)(A)(ii) did not impose a duty to disclose documents pertaining to the UGE leave under the circumstances of this case.

[6] To be sure, Rule 37(c) also contemplates that a district court may issue other sanctions when a party fails to disclose or supplement in dereliction of an *obligation* to do so, but, as we explain, the Rules did not *obligate* Plaintiff to disclose the materials at issue.

2.

Turning next to written requests, Defendant cites its motion for new trial. Defendant attached, as Exhibit D to that motion, a set of requests for production ("RFPs") and a set of interrogatories, both propounded in early 2016. Defendant argued below that document requests nine and ten and interrogatory four, coupled with Plaintiff's ongoing duty to supplement under Rule 26(e), should have caused discovery of the UGE leave.

RFP ten asked for "all documentation which relates in any way to your efforts to obtain employment since your termination of employment from SkyWest, including any jobs that you could have applied for, and/or have been hired to perform, copies of advertisements/job postings, applications, resumes, offer letters, pay stubs, and job descriptions." Plaintiff argues this request pertains only to his "efforts to obtain employment" and does not suggest an interest in "his subsequent relationship with future employers." He says it was "entirely foreseeable" that he might need medical leave from future employers and that Defendant could have requested information on that topic. Defendant, on the other hand, points out that it requested "documentation which relates in any way to . . . jobs that you . . . have been hired to perform" including "pay stubs." Defendant's reading does not account for the structure of the request and does not persuade us.

The first clause limits the scope of the question to that "which relates in any way to your *efforts to obtain employment* since your termination of employment from SkyWest." The rest of the sentence offers examples, and while "jobs that you . . .

have been hired to perform" and "pay stubs" are two items on the list, the opening clause limits their scope. This request did not so obviously encompass information beyond the job search context that it obligated production of information about the UGE leave. Defendant crafted this request with a limited scope and, while that may have had unintended consequences, we cannot now expand that scope.

RFP nine asked for "copies of documents concerning any alleged damages you are seeking in this case, including but not limited to those for pain and suffering, inconvenience, and loss of enjoyment of life." Plaintiff argues that this request was vague and did not encompass future medical leaves because they did "not support damages [Plaintiff] was seeking." Defendant argues that pay records from future employers would have been directly probative of, and therefore would have concerned, Plaintiff's damages. And that Plaintiff now seeks to rewrite "concerning" to "support[ing]." Fair enough. But Plaintiff is right that this request is vague. The phrase "concerning any alleged damages" opens the door to Plaintiff's interpretation—that he should produce any documents he used to make his damages calculation. Further, Defendant cannot credibly claim it could not have known that Plaintiff might have withheld evidence Defendant believed to fall within the scope of its requests. And defining the scope of those requests is a task properly undertaken by discovery motion in the district court, as is compelling compliance with them.[7]

[7] Defendant appears to concede, by not arguing to the contrary, that it cannot prevail based on interrogatory four, so we do not discuss it.

This case does not compare to Advanced Display Systems, Inc. v. Kent State University, 212 F.3d 1272 (1st Cir. 2000), as well as Defendant would have us believe. There, the evidence fell unmistakably within the scope of a timely propounded request. Id. at 1286. But the plaintiff so successfully concealed the existence of the evidence as to "seal off" the defendant from it and render the defendant "powerless to unearth [it]." Id. Here, Defendant knew that Plaintiff held other employment since his termination—Plaintiff answered responsively to both requests we have discussed and to interrogatory four. And Defendant could have propounded additional requests to seek more information about that employment—especially about medical leave and other damages-mitigating evidence. Or Defendant could have moved to compel compliance with the existing requests.

We find this case more alike, although not a perfect parallel, to cases in which we explained that a party on notice that documents or information might be missing must do more than rest on its laurels. See Somerlott v. Cherokee Nation Distribs., Inc., 686 F.3d 1144, 1153–54 (10th Cir. 2012); Zurich N. Am. v. Matrix Serv., Inc., 426 F.3d 1281, 1289–90 (10th Cir. 2005). See also Kings Langley, Ltd. v. FDIC, 108 F.3d 338, at *2–3 (9th Cir. 1996) (unpublished table decision) ("reliance [on opposing party's duty to supplement] is not a substitute for diligent pursuit of discovery"). And circumstances beyond Defendant's control did not prevent its diligence or, at least, Defendant has not persuasively described any such circumstances. We need not decide whether we require a motion to compel to show

diligence—we simply conclude, on this record, that Defendant's requests alone, by their vague wording or their narrow scope, do not constitute diligence.[8]

We reach the same conclusion as the district court, though for a different reason. Defendant failed to exercise diligence in discovering evidence of the UGE leave. As a result, the district court did not abuse its discretion in denying the motion for new trial on the new evidence ground.

V.

We turn finally to the district court's award of front pay as an equitable remedy, which we review for abuse of discretion, Ballard v. Muskogee Reg'l Med. Ctr., 238 F.3d 1250, 1253 (10th Cir. 2001) (citation omitted), keeping in mind that an error of law is a per se abuse of discretion, Amoco Oil Co., 231 F.3d at 697 (citation omitted). The district court's discretion encompasses both whether to award front pay and the amount of the award. Abuan v. Level 3 Commc'ns, 353 F.3d 1158, 1176 (10th Cir. 2003) (citations omitted). The latter decision, in particular, "requires the district court to predict future events and consider many complicated and interlocking factors," so we give that decision "considerable deference." Id. at 1177 (quoting Mason v. Okla. Tpk. Auth., 115 F.3d 1442, 1458 (10th Cir. 1997)). And we review

[8] Although we do not rely on this principle, we have said that failure to file discovery motions, such as motions to compel, suggests lack of diligence. See Husky Ventures, Inc. v. B55 Invs., Ltd., 911 F.3d 1000, 1021–22 (10th Cir. 2018) (citing cases in agreement). See also Rivera-Almodovar, v. Instituto Socioeconomico Comunitario, Inc., 730 F.3d 23, 27 (1st Cir. 2013) (calling a motion to compel "a routine motion" and a "standard tool, well within the capability of any reasonably diligent litigant").

the district court's fact findings for clear error. Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 964 (10th Cir. 2002) (citation omitted).

The district court's authority to grant an equitable remedy arises from statute. The Americans with Disabilities Act of 1990 ("ADA") incorporates the remedies provision of Title VII of the Civil Rights Act of 1964 ("Title VII"). 42 U.S.C. § 12117. Title VII, in turn, provides that

> [i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or *any other equitable relief* as the court deems appropriate. . . .

42 U.S.C. § 2000e-5(g)(1) (emphasis added). Although we presume and prefer reinstatement, Auban, 353 F.3d at 1176, front pay is an equitable remedy constituting money awarded for lost compensation instead of reinstatement, Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001).

Reinstatement is not appropriate if the continuing hostility between a plaintiff and a defendant or its employees renders the plaintiff's continued employment nonviable. Id. Or if the litigation irreparably damages the employer-employee relationship. Abuan, 353 F.3d at 1176 (citation omitted). In such cases, courts award front pay as "a necessary part of the make whole relief" Congress mandated. Id. (quoting Pollard, 532 U.S. at 850). Front pay serves as one arrow in the ADA's remedial quiver by helping ensure that "the aggrieved party is returned as nearly as possible to the economic situation he would

have enjoyed but for the defendant's illegal conduct." Id. (quoting EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1173 (10th Cir. 1985)).

A front pay award should specify an end date, which is within the district court's discretion to set but "must be based on more than mere guesswork." Davoll v. Webb, 194 F.3d 1116, 1143 (10th Cir. 1999) (quoting Carter v. Sedgwick Cnty., 929 F.2d 1501, 1505 (10th Cir. 1991)). The award should "take into account any amounts that [the plaintiff] could earn using reasonable efforts," considering such relevant factors as

> work life expectancy, salary and benefits at the time of termination, any potential increase in salary through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities, the period within which a plaintiff may become re-employed with reasonable efforts, and methods to discount any award to net present value.

Id. at 1143–44 (citations omitted). And it should "reflect the individualized circumstances of the plaintiff and the employer." Id. at 1144. As the "make whole" objective of the remedy directs, courts "must avoid granting the plaintiff a windfall." Whittington v. Nordam Grp. Inc., 429 F.3d 986, 1001 (10th Cir. 2005) (quoting Mason, 115 F.3d at 1458).

The district court may consider all evidence from trial and, as in this case, may take more evidence at a hearing or by submission. See Davoll, 194 F.3d at 1143–44 (citations omitted). As noted above, a front pay calculation is, to some degree, inherently speculative and depends on the district court's prediction of future events from evidence of past and current ones. See Greene v. Safeway Stores, Inc., 210 F.3d 1237, 1246 (10th Cir. 2000) (citations omitted). But our "conceptions of justice" demand that a wrongdoer "shall bear the risk of the uncertainty which his own wrong has created." Abuan, 353

F.3d at 1180 (quoting Prudential, 763 F.2d at 1173). See also Wulf v. City of Wichita, 883 F.2d 842, 873 (10th Cir. 1989) (explaining that, in the front pay context, "[the defendants] are the cause of this uncertainty, and they may not take advantage of an uncertainty that they have themselves created").

Defendant's argument against front pay does not rely on the possibility of reinstatement. Rather, Defendant argues that front pay is inappropriate as a matter of law because its contract with DIA ended in December 2014 and it would have laid Plaintiff off at that time regardless of any discrimination. Rejecting that argument, the district court found that Defendant's discrimination caused Plaintiff's inability to obtain employment with the successor company that took over Defendant's responsibilities at DIA, Simplicity. Therefore, the district court held, front pay was appropriate. Defendant also argues that, even if not barred as a matter of law, the district court's conclusions relied too heavily on speculation and that the record did not support a front pay award. We agree with the district court on both fronts. Defendant also argues four other events it says should limit the award, essentially claiming a failure to mitigate damages. We reject these arguments as well.

A.

Front pay serves to make a plaintiff whole—to return him to his economic status and prospect before the discrimination. So front pay must ordinarily not go beyond the "tenure plaintiff would have enjoyed with his company" with no discrimination. Sandlin v. Corporate Interiors, Inc., 972 F.2d 1212, 1215 (10th Cir. 1992). It follows that when the defendant "cease[s] to do business before judgment"

and thus plaintiff's tenure would have necessarily ended along "with the rest of the work force," front pay is inappropriate. Id. (citation omitted). This reflects the focus on causation in fashioning equitable remedies. Defendant's contract to provide ground services at DIA ended in December 2014—well before trial—and consequently it furloughed all its employees. Defendant says that Plaintiff would have lost his employment at that point, so he has no entitlement to front pay. Defendant analogizes this case to Sandlin, where the defendant went out of business before judgment and we affirmed the denial of front pay. See 972 F.2d at 1214–15. Were these the only facts, and were Sandlin the only relevant law, we might agree. But equity is broad, and the facts are not so simple.

1.

In fashioning an appropriate equitable remedy, the district court reasoned that, although back pay and front pay differ, they both sound in equity, serve the same overarching purpose, and can share precedents. Thus, it found certain back pay cases and principles applicable. Some courts have held that when, but for the defendant's discrimination, a third-party employer would have hired the plaintiff at a higher wage, the court should measure the plaintiff's *back pay* award by the higher wage which the defendant's actions denied him.[9] Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1526–27 (11th Cir. 1991), superseded by statute on other grounds as

[9] See also Szeinbach v. Ohio State University, 820 F.3d 814, 822–24 (6th Cir. 2016); Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 455 (5th Cir. 2012), vacated and remanded on other grounds by 570 U.S. 338 (2013); Gaddy v. Abex Corp., 884 F.2d 312, 319 (7th Cir. 1989).

recognized in Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1347 (11th Cir. 2000). This rule works to make the plaintiff whole when a causal connection exists between the loss of opportunity for higher wage and the discriminatory action. The district court reasoned that where a defendant's discriminatory conduct denies a plaintiff an employment opportunity with a successor or other third party, a court should also measure a *front pay* award based on the position and wage the plaintiff would have held but for the discrimination.[10]

We agree with the district court that this is an appropriate and equitable rule. Despite Defendant's protestations, the district court's analysis did not impermissibly conflate back pay principles with front pay principles. Yes, the district court drew on back pay cases. But, in our view, the district court applied general concepts of equity to achieve an appropriate remedial objective. In fact, one of the district court's cited cases suggested approval of this rule for front pay. Weaver, 922 F.2d at 1528 ("[The right to front pay] was not terminated by the sale of [the defendant's] assets for, as with back pay, [the defendant's] failure to promote or retain [the plaintiff] was the proximate cause of his not being transferred along with the other management personnel when [the defendant] was sold.").

[10] The district court put it this way: "[A] plaintiff who can show he would have had an employment opportunity with a third party absent his employer's discrimination should have the value of his award measured by that lost opportunity. Such is the case here. Had Mr. Hayes not been discriminated and retaliated against by SkyWest, he would have had the opportunity to apply for a job with the company that assumed the SkyWest contract to service United Airlines at DIA, Simplicity Aviation."

Applying these back pay principles to the front pay context promotes the dual objectives of the remedies available under Title VII and the ADA—to end unlawful discrimination by deterrence and to make whole the victims of discrimination.[11, 12] See Ford Motor Co. v. E.E.O.C., 458 U.S. 219, 230 (1982). As the Eleventh Circuit has recognized, "[b]ack pay and front pay are not independent and severable items of damages." Weaver, 922 F.2d at 1529. The two concepts do not, as Defendant claims, "serve fundamentally different purposes." True, one compensates for damages incurred before judgment and one for damages incurred after, but "[t]hey are each part of the remedy the court is charged with fashioning, a remedy that, as a whole, achieves the remedial purposes of the [ADA]." Id. So principles articulated for one may, in the pursuit of equity, apply to the other.

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[11] See also Est. of Pitre v. W. Elec. Co., Inc., 975 F.2d 700, 704 (10th Cir. 1992) ("[t]he [district] court's reasoning [in that case] clearly implement[ed] both the deterrent and the 'make whole' purposes of Title VII and accordingly [was] a proper exercise of discretion."); Bartee v. Michelin N. Am., Inc., 374 F.3d 906, 910–11 (10th Cir. 2004) ("[A] district court has broad discretion in fashioning relief to achieve the broad purpose of eliminating the effects of discriminatory practices and restoring the plaintiff to the position that she would have likely enjoyed had it not been for the discrimination." (quoting Dilley v. SuperValu, Inc., 296 F.3d 958, 967 (10th Cir. 2002))); Zisumbo v. Ogden Reg'l Med. Ctr., 801 F.3d 1185, 1203 (10th Cir. 2015).

[12] As Plaintiff points out, the district court's reasoning finds support in other areas of employment law. For example, the Supreme Court has interpreted Title VII to protect former employees who filed EEOC charges during their employment from retaliation in the form of undeserved negative references. Robinson v. Shell Oil Co., 519 U.S. 337, 339, 345–46 (1997). That ruling necessarily recognizes that a defendant's discriminatory or retaliatory action may deprive a plaintiff of a future employment opportunity, and that such deprivation is cognizable under Title VII and compensable under Title VII's expansive remedies provision.

To be sure, a causal connection between the remedy and the wrongful act must exist—the notion that the award should compensate injuries sustained *because of* the discrimination demands as much. See Abuan, 353 F.3d at 1176. But the district court's reasoning did not violate that principle either. Rather, the district court carefully articulated its ruling with causation in mind. In sum, we identify no error in the district court's conclusion that it could measure front pay, like back pay, based on an employment opportunity which Defendant's discriminatory conduct cost Plaintiff.

Defendant's final attack relies on an overly broad application of Sandlin. But that case included no suggestion that the Sandlin defendant, by its discriminatory acts, barred the plaintiff from employment with a third party. See 972 F.2d at 1214–15. So when that defendant stopped doing business (and the defendant would have laid off the plaintiff anyway), the plaintiff's lack of employment lost any causal connection to the discrimination. See id. The same is not so here. For this reason, we conclude that Sandlin is distinguishable and does not bar front pay as a matter of law in this case.[13] In so concluding, we simply recognize that this case lies outside Sandlin's "tenure rule." See Weaver, 922 F.2d 1528–29.

2.

Defendant next argues that the district court's ruling relied on speculation and lacked support in the record. First, it challenges the district court's finding that Defendant's discriminatory conduct prevented Plaintiff from knowing about or

[13] Defendant cites cases from other circuits that apply the Sandlin rule, but, like Sandlin, those cases are distinguishable.

applying for jobs with Simplicity. Second, it challenges the district court's finding that, if Plaintiff had been aware of and applied for one of those jobs, Simplicity would have, more likely than not, offered him one. We review fact findings for clear error, Smith, 298 F.3d at 964, and we will reverse where a finding wholly lacks support in the record or if, after reviewing the evidence, we are definitively and firmly convinced that the district court made a mistake, Acosta, 903 F.3d at 1134. We find no such error here.

The district court found that, when Simplicity assumed the DIA contract, Simplicity had 14 open positions for "trainers" and that Plaintiff was unaware of those open positions by no fault of his own. The district court relied mainly on the testimony of Robert Hopkins, a SkyWest employee who obtained employment (and later promotions) with Simplicity. Hopkins served as one of the four witnesses at the front pay hearing. Defendant argues four items in the record to refute the finding that Plaintiff was not and could not have been aware of those positions.

First, Defendant challenges the district court's conclusion that Simplicity did not advertise the positions online. At the hearing, counsel asked Hopkins "Did Simplicity advertise in 2014 for available positions?" Hopkins answered, "I'm sure they would have." He also testified "I'm sure there was recruiting" and that Simplicity has fulltime recruiters. Finally, he stated that "[the job] was posted on the United website" but did not say when that occurred. Those responses paralleled his other testimony that Simplicity eventually filled some positions with non-SkyWest employees. But Hopkins did not express personal knowledge of any outside

recruiting efforts, let alone any degree of certainty about when or how Simplicity advertised those positions. Thus, the district court did not commit clear error in not giving conclusive weight to that testimony.

Second, Defendant points to Hopkins' testimony that "there would have been common knowledge [in the airline industry] that [Simplicity was] hiring [in 2014 and 2015]." Again, this testimony lacked foundation as to how Hopkins would have personally known it to be true and thus amounts to speculation or undeveloped opinion. As above, the district court did not clearly err in impliedly deciding that testimony had low probative value for showing what Plaintiff did or should have known about those positions.

Third, Defendant points to trial exhibit 94. That exhibit—a memo that Defendant says all SkyWest customer service employees, including Plaintiff, "would have received"—explained that SkyWest lost the Denver ground services contract and set out the timeline for the end of that operation. It also included the following paragraph, which Defendant says informed Plaintiff of the opportunities for employment with Simplicity:

> We will do everything possible to provide numerous options for DEN CS employees, including a $500 retention bonus if a position is not secured with United, Simplicity, or within SkyWest; as well as transfer opportunities within SkyWest, and first-priority hiring with United and Menzies, if our people prefer.

But Defendant does not point to any testimony or other evidence establishing that Plaintiff read or even received the memo. Nor have we found any in the record. Without

such evidence, trial exhibit 94 does not show Plaintiff's awareness of the available positions or the priority hiring scheme.

Finally, Defendant points to Hopkins' testimony that he "could have gotten ahold" of Plaintiff during the Simplicity hiring process. Hopkins testified that he knew Plaintiff for eight or nine years and that they shared mutual friends. He also testified they never had each other's phone numbers, but he could have contacted Plaintiff. Defendant suggests the mutual familiarity between Hopkins and Plaintiff and their probable ability to contact one another precludes the district court's findings. This argument lacks merit—especially considering that, in his next breath, Hopkins explained he never reached out to Plaintiff.

We remain unpersuaded that the district court erred in finding that Plaintiff was unaware of, and "could not have been expected to know" of, the trainer position. And Defendant does not challenge the district court's finding on causation—that Plaintiff found himself in that position because of Defendant's discrimination. We turn now to the district court's finding that Simplicity "most likely would have [] offered" Plaintiff the trainer position, had he applied. Again, the district court relied largely on Hopkins' testimony. Defendant challenges the district court's finding that Plaintiff was fully qualified for the trainer position and the broader conclusion that Simplicity would have offered it.

As to Plaintiff's qualifications, Defendant argues that Hopkins testified on cross examination that a person in the trainer position would need to lift 70 pounds. However, Hopkins also testified that ability to lift heavy objects "wasn't needed"

because the trainers could use other members of the team to coordinate a lift of a heavy item. After having a chance to review Plaintiff's medical restrictions, he testified that Plaintiff met the job's qualifications and could perform the job. The district court did not clearly err in crediting the latter, more specific testimony. See Mathis v. Huff & Puff Trucking, Inc., 787 F.3d 1297, 1305–07 (10th Cir. 2015) (explaining that the district court "has the exclusive function of . . . determining the weight to be given testimony . . . and resolving conflicts in the evidence," so pointing to conflicting testimony cannot, alone, establish clear error (internal citations omitted)).

As to the district court's ultimate conclusion, Defendant claims Hopkins only said that Plaintiff "would have had the opportunity" to apply. Defendant argues that Hopkins "studiously avoided speculating" whether Simplicity would have offered Plaintiff the position. Again, we conclude that the record does not clearly contradict the district court's finding. Hopkins testified about his familiarity with Simplicity's hiring process and that, as one of the first SkyWest employees brought onboard, he had helped hire and place some of the other SkyWest employees who came over to Simplicity. He testified to a "definite possibility" that he would have named Plaintiff to come along to Simplicity, had Plaintiff been working at SkyWest at the time. Hopkins expressed great respect for Plaintiff's work ethic and work product. And he testified that SkyWest employees had preference in Simplicity's hiring process. Of the eight trainer positions available during the transition, Simplicity filled five with SkyWest employees. Hopkins clarified on cross examination that he was not the

final decision maker, but that he would have been in favor of hiring Plaintiff and would have written a letter of recommendation, which he did not do often. Although Hopkins did not say with confidence that Simplicity *would* have hired Plaintiff, the district court found it more likely than not. That finding, like the others we have discussed, is not wholly unsupported in the record, nor are we firmly convinced of a mistake. See Acosta, 903 F.3d at 1134.

B.

Finally, Defendant argues several events which, in its estimation, should limit any front pay award. First that, even if Simplicity hired him, Plaintiff would not have held employment there for long because of his medical issues and restrictions. Second, that Plaintiff decided to leave Signature for a different job that paid less. Third, that Plaintiff decided to move to Memphis. And finally, Plaintiff's medical leave from the job he held in Memphis.[14]

First, Defendant argues that even if Simplicity hired Plaintiff, he would not have lasted long. That employment would have begun in the fall of 2014, after the transition at DIA. But Plaintiff suffered a ruptured kidney cyst in early 2015, at which time he went on medical leave from his job with Signature. Defendant says that "[a]s a new hire without job-protected leave," this event "would have certainly ended [Plaintiff's] hypothetical tenure at Simplicity." Furthermore, says Defendant,

[14] The parties debate how much the jury's finding that Plaintiff did not fail to mitigate his damages bound the district court, but we need not address that issue. Instead, we simply dispose of Defendant's arguments on their lack of merit.

even if Simplicity "extended discretionary leave" for the ruptured cyst, Plaintiff would not have been able to complete the job's essential functions.

In making this argument, Defendant does not point to any evidence that Plaintiff would not have had job-protected leave in the Simplicity trainer position. Defendant also ignores the fact that Plaintiff received leave from Signature for that burst cyst, which suggests Simplicity might have also extended him medical leave. At bottom, the argument that Simplicity would have ended Plaintiff's hypothetical employment as a result of the cyst event relies as heavily on speculation as does the contrary assumption. And where Defendant fails to point to evidence in the record to contradict the district court's findings, we will not second guess those findings.

In addition, the argument that Plaintiff could not have completed the essential functions of the Simplicity job contradicts the testimony at the front pay hearing. See Section V.A.2, supra. The further suggestion that Plaintiff could not have completed those functions to the age of 65 also ignores evidence. Specifically, that Plaintiff eventually underwent a successful kidney transplant operation—a fact known at time of the front pay hearing. Although Plaintiff may have needed leave or other accommodations, at least in the time before his transplant, Defendant has not firmly convinced us that the district court's finding was a mistake.

Defendant's remaining three arguments more closely resemble failure-to-mitigate arguments.[15] A plaintiff must make "a reasonable and good faith effort" to

[15] Although we discuss and dispose of Defendant's arguments in the nonstandard way Defendant presents them, we also note that they would fail on their

mitigate his damages but "is not held to the highest standards of diligence." Spulak v. K Mart Corp., 894 F.2d 1150, 1158 (10th Cir. 1990). Defendant bears the burden to show that Plaintiff did not exercise the reasonable diligence expected of him. Id. A plaintiff need not "go into another line of work, accept a demotion, or take a demeaning position." Ford Motor Co., 458 U.S. at 231. But he must not "[refuse] a job substantially equivalent to the one he was denied." Id. at 232. "Substantial equivalence" involves more than just similar work—it considers such factors as pay and benefits, promotional opportunities, job responsibilities, working conditions, comparable hours, distance from home, dangerousness, and comparability of status. Weaver, 922 F.2d at 1527; Sellers v. Delgado Cmty. Coll., 839 F.2d 1132, 1138 (5th Cir. 1988); Rasimas v. Mich. Dept. of Mental Health, 714 F.2d 614, 624 (6th Cir. 1983). Importantly here, the law does not require a plaintiff who has accepted "noncomparable employment" to "remain employed despite dissatisfaction." Weaver, 922 F.2d at 1527.

These principles quickly dispose of Defendant's second argument—that Plaintiff cut off his entitlement to front pay when he left Signature to go to a lower paying job at United. Defendant does not argue that the Signature job was

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face as traditional failure to mitigate arguments. As the district court correctly pointed out, to prove a failure to mitigate a defendant must show that there were substantially equivalent positions that the plaintiff could have discovered and for which he was qualified, but that he failed to exercise reasonable diligence to discover them. Aguinaga v. United Food & Com. Workers Int'l Union, 993 F.2d 1463, 1474 (10th Cir. 1993). None of Defendant's arguments go to the first prong—that substantially equivalent positions existed for which Plaintiff was qualified. Nor do they challenge the district court's finding that Plaintiff did exercise diligence in seeking employment.

substantially equivalent to the Simplicity trainer position. Without such a showing, Plaintiff did not have to remain at Signature despite his dissatisfaction. See id. Moreover, this move from Signature to the lower-paying United job did not ultimately impact the amount of the front pay award, as the district court calculated that amount as the difference in pay between the Simplicity position and the position Plaintiff later held in Memphis.

Third, Defendant says Plaintiff should not have "followed" his spouse to Memphis. But at that time, Plaintiff was working part time for United and not earning enough to support the couple alone. So, when his spouse lost her job in Denver, the two relocated to Memphis where she accepted a job and Plaintiff also eventually obtained part-time work. Defendant makes no cogent argument that this move did not result from its discrimination. In fact, Defendant all but admits that Plaintiff could have supported himself and his wife had he obtained the Simplicity trainer position. And again, Plaintiff did not have to stay in the United job, as Defendant does not argue it was substantially equivalent to the Simplicity trainer position. See id.

Nor must a plaintiff leave his family to mitigate his damages, at least when he fulfils his diligence obligation in his family's location or upon relocation to his family's new home.[16] See Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 937

[16] See also Sellers, 839 F.2d at 1138 (listing "distance from home" as a factor for substantial equivalence); NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1314, 1319 (D.C. Cir. 1971) (the court found no failure to mitigate when the plaintiff

(5th Cir. 1996) (finding no failure to mitigate when the plaintiff left work in Houston, Texas, to return home to her family in Gatesville, Texas, where she resumed looking for work). Given these authorities and the framework we have already discussed, when a plaintiff's spouse relocates for work and the plaintiff is not already in substantially equivalent work (and thus need not remain in the non-equivalent job he has), the plaintiff's "family home" has changed and he may relocate, subject to fulfilling his diligence obligation in the new location. We reach this conclusion especially easily when the need for the spouse to relocate arises, at least in part, because of the defendant's discriminatory conduct.

Finally, Defendant points to Plaintiff's leave from his job in Memphis, which he took because he collapsed at work. While on that leave, he became eligible for a kidney transplant, which ultimately succeeded. Defendant argues that no evidence shows Plaintiff returned from that leave and "for all we know, [he] remains on leave or [his] leave has ended but he is still not working." This argument amounts to speculation and thus cannot show a clear error of fact. In contrast, the record supports the district court's finding. At the time of the front pay hearing, Plaintiff had scheduled a time to return to work after having recovered from his operation. Defendant's argument does not undermine the district court's findings or award.

In sum, the district court did not abuse its discretion in its award of front pay. Defendant has identified no error of law or clear error of fact. And we give broad

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declined a position "because she did not want to be away from her family" and the court emphasized the distance from home factor).

discretion to the district court's exercise of its equitable powers. Whether we would have reached all the same conclusions is immaterial—we cannot say that the district court's ruling was arbitrary, capricious, or whimsical. See Amoco Oil Co., 231 F.3d at 697.

The district court did not err by denying a mistrial or a new trial, or in its award of front pay.

AFFIRMED.[17]

[17] We GRANT Plaintiff's Unopposed Motion to Supplement Record on Appeal.