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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.* BRANDON BARRICK, Plaintiff - Appellee, v. PARKER-MIGLIORINI INTERNATIONAL, LLC, Defendant - Appellant.	No. 22-4049

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:12-CV-00381-JNP)

Mark R. Gaylord, (Jason D. Boren and Jacqueline Mabatah of Ballard Spahr LLP, with him on the briefs), Salt Lake City, Utah, for Defendant - Appellant.

Katie Panzer (April Hollingsworth of Hollingsworth Law Office, LLC, with her on the brief), Salt Lake City, Utah, for Plaintiff - Appellee.

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

KELLY, Circuit Judge.

In April 2012, Plaintiff-Appellee Brandon Barrick filed this qui tam action against his then-employer, Defendant-Appellant Parker-Migliorini International LLC (PMI). Mr. Barrick alleged violations of the False Claims Act (FCA) and amended

his complaint to include a claim that PMI unlawfully retaliated against him under the FCA.[1] 31 U.S.C. § 3730(h).

A jury found that PMI retaliated against Mr. Barrick for his engagement in protected activity under the FCA when it terminated his employment on November 14, 2012. On appeal, PMI argues that the district court improperly denied its motion for judgment as a matter of law (JMOL). In the alternative, PMI argues that this court should order a new trial based on either the district court's erroneous admission of evidence or an erroneous jury instruction. At the least, PMI argues the district court erred in granting Mr. Barrick reinstatement without an evidentiary hearing and this court should remand so PMI can be heard. Aplt. Br. at 11–12. We have jurisdiction under 28 U.S.C. § 1291 and we affirm on all issues.

Background

A. Factual background

In 2012, Mr. Barrick was working as a senior financial analyst in the accounting department for PMI. PMI is a meat exporting company based in Utah. While working for PMI, Mr. Barrick noticed two practices he believed were illegal. The first was the "Japan Triangle": PMI exported beef to Costa Rica to a company

[1] We affirmed the dismissal of Mr. Barrick's underlying FCA claims on the basis that there was no established duty for PMI to pay the government for inspections of smuggled beef and thus the government had not been deprived of those fees. United States ex rel. Barrick v. Parker-Migliorini Int'l, LLC, 878 F.3d 1224, 1226–27 (10th Cir. 2017).

called Vision Commercial, which repackaged it, then sent it to Japan. At that time, Japan was concerned about mad cow disease from U.S. beef and was only accepting U.S. beef that passed higher levels of inspection. The second was the "LSW Channel": PMI informed the U.S. Department of Agriculture (USDA) it was shipping beef to Moldova on a shipping certificate, but sent it to Hong Kong. Then, according to Mr. Barrick, PMI smuggled the beef into China. At the time, China did not accept U.S. beef.

Mr. Barrick brought his concerns to Steve Johnson, PMI's CFO, at least three times. Mr. Johnson confirmed these shipping practices existed, and Mr. Barrick testified that Mr. Johnson also confirmed that they were illegal. Part of these conversations included review of files Mr. Barrick prepared, as part of his job, that reflected profit and loss on each shipment, including the inspection fees the USDA charged. Mr. Barrick told Mr. Johnson that he was not comfortable with the practices.

In April 2012, Mr. Barrick contacted attorneys and filed this qui tam action under seal, alleging PMI's exporting activities violated the False Claims Act. After doing so, Mr. Barrick worked with the USDA, DOJ, and FBI and became a confidential informant for the FBI. He started recording conversations with Mr. Johnson about PMI's shipping activities. To get the information the FBI wanted, Mr. Barrick asked Mr. Johnson repeated questions that he already had the answers to about the Japan Triangle and LSW Channel.

On October 10, 2012, the FBI raided PMI's office. The FBI conducted

interviews with some of the employees on site, including Mr. Barrick. The day after the raid, PMI asked for an inventory of all employee badges. Mr. Barrick could not provide his until the next day because he had given it to FBI Special Agent (SA) Crystal Bowen. The day after the raid PMI also imaged all employee computers and sent a memo to employees asking them to meet and relay what they had told the FBI. Mr. Barrick responded that he would not participate without his attorney present, and in communication with PMI's attorney, Mr. Barrick's counsel was informed that refusing to participate could result in termination. PMI claims that at the time, it did not know what the FBI was looking into.

On the same morning of the raid, SA Bowen went to Mr. Johnson's home to interview him. She prepared an FBI 302 Report ("302 Report") after the interview. It is standard FBI practice to prepare the report within five days of the interview. The 302 Report is not a transcript and was not contemporaneous with the interview, but SA Bowen used her notes she took during the interview and her memory to prepare the 302 Report. SA Bowen testified about the process of preparing such a report and how it is based upon the information and her recall of the statements provided by the interviewee. SA Bowen's testimony and the 302 Report reflect that Mr. Johnson provided answers to her questions regarding the Japan Triangle and LSW Channel. There was also a USDA agent present during the interview.

Mr. Barrick was terminated from PMI on November 14, 2012, about one month after the raid, as part of a company-wide reduction in force (RIF). PMI claimed the RIF was needed because in addition to the FBI raid, problems with

exports and bank lines of credit put a financial strain on the company. Nine employees were terminated as part of the RIF. PMI claims it did not learn about Mr. Barrick's cooperation with the FBI until October 2014, when the DOJ notified PMI of this qui tam action. Aplt. Br. at 7.[2]

B. Procedural background

The jury trial took place from June 28 to July 2, 2021. At trial, PMI objected to admission of the 302 Report. At the close of Mr. Barrick's case, PMI orally moved for directed verdict (JMOL) under Rule 50(a) and the district court took the motion under advisement. The jury returned a verdict in favor of Mr. Barrick, finding by a preponderance of the evidence PMI retaliated against him for his engagement in a protected activity. The jury awarded Mr. Barrick $125,000 in damages, an award not now challenged.

After trial, PMI renewed its motion for JMOL. Mr. Barrick moved for reinstatement, seeking either reinstatement or front pay. On March 25, 2022, in separate orders the district court granted Mr. Barrick's motion for reinstatement and denied PMI's renewed motion for JMOL. The court also entered judgment. On April 22, 2022, PMI filed a Rule 52(b) and 59(e) motion to amend, requesting an evidentiary hearing on the issue of reinstatement. The district court denied the motion.

[2] There is some ambiguity as to whether it was October 2013 or October 2014. Regardless, PMI's contention is it did not know Mr. Barrick was the informant until well after the RIF.

Discussion

A. Whether the district court erred by denying PMI's motion for JMOL

Our review is de novo. Harte v. Bd. of Comm'rs, 940 F.3d 498, 522 (10th Cir. 2019). We consider whether there is a "legally sufficient evidentiary basis for a reasonable jury to find for the moving party." Id. at 522 (quoting Keylon v. City of Albuquerque, 535 F.3d 1210, 1215 (10th Cir. 2008)). We take all reasonable inferences in favor of the nonmovant (Mr. Barrick) and disregard all evidence favorable to PMI that the jury is not required to believe. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 150–51 (2000). We do not reweigh the evidence, make credibility determinations, or challenge the legitimate factual conclusions of the jury. Id. JMOL is appropriate only if, after reviewing the entire record, "there is no legally sufficient evidentiary basis for a claim under the controlling law." Hysten v. Burlington N. Santa Fe Ry. Co., 530 F.3d 1260, 1269 (10th Cir. 2008). !

The FCA imposes liability for submitting false statements to the government to claim additional payment or to avoid payment of an obligation. 31 U.S.C. § 3729(a)(1)(A), (G). The FCA prohibits retaliation for "lawful acts done by the employee . . . in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." Id. § 3730(h)(1). To demonstrate retaliation, Mr. Barrick must show: (1) he was engaged in a protected activity; (2) PMI had notice he was engaged in a protected activity; and (3) PMI terminated him because of his engagement in a protected activity. See United States ex rel. Sorenson, 48 F.4th

1146, 1158–59 (10th Cir. 2022). PMI argues the evidence is insufficient to support the notice and causation elements.[3]

1. Standard for notice under the FCA

PMI contends that under Sorenson, Mr. Barrick was required to "convey a connection to the FCA" to put PMI on notice. Aplt. Br. at 13. Mr. Barrick argues Sorenson does not stand for that proposition, and PMI did not need to know Mr. Barrick's activity had a nexus with the FCA. Rather, all PMI needed to know was he was engaged in a protected activity. Aplee. Br. at 10–11. Mr. Barrick recognizes his protected activity needs a nexus to the FCA. Id. at 11–12; United States ex rel. Reed v. KeyPoint Gov't Sols., 923 F.3d 729, 767 (10th Cir. 2019). But Mr. Barrick contends PMI does not need knowledge of the nexus to show notice. Aplee. Br. at 11–12.[4]

Mr. Barrick's activity does not need to lead to a viable qui tam claim. Reed,

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[3] At the close of trial in the final jury instructions, the parties stipulated that Mr. Barrick engaged in protected activity. PMI does not contend that Mr. Barrick's conduct was not a protected activity. See Aplt. Br. at 10.

[4] Mr. Barrick also argues PMI waived its argument concerning notice because it should have challenged the jury instruction to preserve the argument. Mr. Barrick contends that because PMI's argument for notice is inconsistent with the jury instruction, this court is constrained to evaluate the argument under the allegedly lesser standard for notice in the instruction. Aplee. Br. at 12–14. We disagree.

First, PMI alerted the district court to the notice issue at the close of Mr. Barrick's case. So we review the motion for JMOL under the correct legal standard regardless of PMI's lack of objection to the jury instruction. Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs, 613 F.3d 1229, 1236 & n.2 (10th Cir. 2010). Furthermore, the jury instruction does not reflect a lesser standard for notice and PMI's argument is not inconsistent with the instruction. We find there was no waiver.

923 F.3d at 765. To the extent PMI implies Mr. Barrick needed to say magic words, such as "FCA violation" or "fraudulent report to the government to avoid payment," to put PMI on notice, this is contrary to the text of the FCA which protects "other efforts" to stop violations. 31 U.S.C. § 3730(h)(1); see Reed, 923 F.3d at 767. And, to the extent PMI argues an employer must know it is the FCA being violated, and know of the FCA and its elements, this is also incorrect. Moreover, PMI conceded both of these points before this court and before the district court. Aplt. Reply Br. at 6.

Because the protected activity itself must have a nexus to the FCA, to establish notice Mr. Barrick's actions must have conveyed to PMI that he was attempting to stop PMI from (1) engaging in fraudulent activity to avoid paying the government an obligation or (2) claiming unlawful payments from the government. See 31 U.S.C. § 3730(h)(1). PMI does not need to know the activity violates the FCA specifically and Mr. Barrick does not need to have furthered a qui tam action. Because there is no direct evidence here, the issue is whether a reasonable jury could infer notice from circumstantial evidence.

2. Merits

As noted, PMI argues Mr. Barrick presented no evidence that his actions or the actions of others conveyed a connection to the FCA. Aplt. Br. at 13–14. Mr. Barrick argues he demonstrated that PMI "made false statements to the USDA about where product was being shipped and those false statements allowed PMI to avoid paying higher inspection fees than it otherwise would have if it had been truthful." Aplee.

Br. at 17. Therefore, he contends his activity had a connection to potential FCA violations and together the evidence is sufficient for the jury to infer notice. Id. at 17–18.

PMI argues the following evidence is not enough to infer notice: (1) Mr. Barrick's conversations with Mr. Johnson about the Japan Triangle and LSW Channel; (2) SA Bowen's conversation with Mr. Johnson about the same; (3) Mr. Barrick's disclosure of having an attorney after the FBI raid; (4) his counsel's interaction with PMI's attorney; (5) Mr. Barrick's testimony that he gave the FBI his badge, a map of PMI's office, and the code to PMI's storage facility; (6) PMI imaging employee computers after the raid; (7) testimony from Mark Flanders, PMI's then-controller, that Mr. Johnson told him he suspected Mr. Barrick was the informant two weeks after Mr. Barrick was terminated; and (8) introduction of testimony regarding a false statement on a shipping certificate in 2011. Aplt. Br. at 14. Although PMI points to these eight items, we review the entire record. Only slight evidence in favor of the non-movant is required to defeat a JMOL motion. Stroup v. United Airlines, Inc., 26 F.4th 1147, 1156–57 (10th Cir. 2022).

Most of the evidence in this case is testimonial. Mr. Barrick testified he asked Mr. Johnson about the Japan Triangle, LSW Channel, and Vision Commercial, and that Mr. Johnson stated the practices were illegal. He testified that while he did not tell PMI it was violating the FCA in those terms, he told Mr. Johnson PMI was violating trade regulations related to inspection fees on the shipment of illegal product. He testified that countries that had more regulations — Hong Kong and

Japan — had higher inspection fees reflected in files he created as part of his job. He testified the inspection fees and shipment of illegal product are "all tied together" and shown in the files. XIV Aplt. App. 3358. He also testified he asked Mr. Johnson repeated questions on these topics, which Mr. Johnson knew Mr. Barrick would not have needed to ask again, to get it on recording for the FBI.

Mr. Johnson and PMI's CEO, Darin Parker, both testified to the existence of the same shipping practices. Mr. Parker testified that "triangulation" is to avoid "duties in the United States" and he believed this was an acceptable practice. XVI Aplt. App. 3828–29. SA Bowen testified she asked Mr. Johnson about the same topics in her interview with him. The 302 Report[5] contains SA Bowen's recollections of Mr. Johnson's responses when interviewed on these subjects. A USDA agent was also at the interview. Mr. Johnson testified he knew the FBI was interested in sales to Japan and China.

Further, although PMI asserts that at the time it did not know what the FBI was looking for, after the FBI raid Mr. Johnson testified PMI shut down the Japan Triangle and LSW Channel. And Mr. Parker testified PMI told a court in a separate proceeding that in 2011, PMI stated on a shipping certificate product was going to Moldova when that was not true. Mr. Johnson also testified that PMI stated on shipping certificates that product was going to Moldova, but was in fact going to Hong Kong.

[5] PMI contests the admission of the 302 Report, discussed infra Part B.

PMI argues the evidence, alone or taken together, relies on impermissible speculation that PMI would know Mr. Barrick was attempting to stop PMI from filing false claims to avoid payment of obligations to the USDA based on this testimony. Aplt. Br. at 26–27. At most, PMI contends Mr. Barrick notified Mr. Johnson of trade regulation violations when PMI was shipping meat to countries where it was not allowed to go, without conveying a connection to the FCA. Id. at 16.[6] But according to Mr. Barrick, he and Mr. Johnson discussed the process of how each scheme happened, which included mislabeling the destination to the USDA. Because USDA inspection fees were higher if shipping to more highly regulated countries than to countries with fewer regulations, it is inferable that these practices were at least in part to avoid payment to the USDA. Mr. Barrick testified that the destinations could have been listed as Japan or Hong Kong because there was no embargo on those countries. When asked why PMI could not have shipped directly to Japan, Mr. Johnson responded that he was not sure. The jury was not required to

[6] PMI argues because the FBI interviewed Mr. Johnson, it could put him on notice of a connection to the Foreign Corrupt Practices Act (FCPA) but not the FCA. Aplt. Br. at 20. The FBI did not disclose what it was investigating at the time, but Mr. Johnson testified he knew it was related to the Japan Triangle and LSW Channel. Mr. Barrick's conduct does not need to advance a lawsuit under the FCA and he can take "other efforts" to stop the activity. Reed, 923 F.3d at 765. That the FBI may have been looking into other violations does not preclude a finding of notice. PMI does not need to know the FCA exists so long as Mr. Barrick's actions put PMI on notice that he was attempting to stop false statements to the government to avoid payment of an obligation. In addition, Mr. Johnson acknowledged that a USDA agent was present during the FBI interview. The USDA agent's presence could have alerted Mr. Johnson to the existence of a separate civil investigation involving the USDA.

believe that PMI did not know what the FBI was looking into. We make reasonable inferences in favor of Mr. Barrick. It is not speculation, but a reasonable inference, that mislabeling the destination was to avoid fees.

Evidence susceptible to multiple inferences does not require reversal and it is the jury's role to resolve conflicting evidence. Stroup, 26 F.4th at 1156–57. The jury was entitled to believe Mr. Barrick's testimony that he had repeated conversations with Mr. Johnson on the Japan Triangle and LSW Channel, which PMI knew the FBI was interested in from SA Bowen's interview. Notice does not require 'magic words' or that PMI knows of the FCA for Mr. Barrick to convey that he was attempting to prevent the avoidance of higher inspection fees he viewed as due the government. 31 U.S.C. § 3730(h); see Reed, 923 F.3d at 767. Taking reasonable inferences in favor of Mr. Barrick, and while there is other evidence supporting Mr. Barrick in the record, the preceding discussion is more than enough to meet the slight quantum of evidence necessary to defeat a motion for JMOL. Stroup, 26 F.4th at 1156. We affirm the district court's denial of PMI's motion for JMOL.[7]

[7] PMI also argues that element three of the FCA claim, causation, fails because PMI lacked notice. Aplt. Br. at 27–28. Having concluded that the evidence was sufficient to support notice, we reject PMI's argument on this point.

B. Whether the district court abused its discretion by admitting the 302 Report[8]

1. Standard of review

A district court's decision on the admissibility of evidence is reviewed for abuse of discretion, with deference to the district court's familiarity with the case. Abraham v. BP Am. Prod. Co., 685 F.3d 1196, 1202 (10th Cir. 2012). If the district court abused its discretion, we then consider whether PMI made a showing of prejudice. Stroup, 26 F.4th at 1168. We may not grant relief if the error was harmless. Id. Error is harmless unless it "had a substantial influence on the outcome or leaves one in grave doubt as to whether it had such effect." Id. (quoting James River Ins. Co. v. Rapid Funding, LLC, 658 F.3d 1207, 1212 (10th Cir. 2011)). Stated another way, if the erroneously admitted evidence more likely than not had no effect on the jury's verdict, we do not reverse. Id.[9]

2. Merits

PMI argues the 302 Report was erroneously admitted for three reasons: (1) it did not satisfy hearsay exceptions; (2) it was unfairly prejudicial under Federal Rule of Evidence 403 because it led the jury to believe PMI was engaging in criminal

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[8] PMI presents its arguments on admission of the 302 Report as two separate issues on appeal. Aplt. Br. at 2, 35–36. We address all arguments on the admissibility of the 302 Report together.

[9] We note that PMI quotes the standard for harmlessness but does not separately develop it. Aplt. Br. at 28–29. The closest PMI comes to arguing that the error was not harmless is its discussion of why the 302 Report was unfairly prejudicial under Rule 403. Rule 403 is a rule of admission. It is a separate question as to whether evidence is admissible compared to whether it is harmless. See United States v. Otuonye, 995 F.3d 1191, 1207 (10th Cir. 2021).

activity and had no relevance to Mr. Barrick's retaliation claim; and (3) it violated Federal Rule of Evidence 612 when SA Bowen was allowed to read from the Report when testifying. Aplt. Br. at 28–38. We consider the first issue based upon the district court's stated basis for admitting the 302 Report, consider the potential prejudice under Rule 403, and then address Rule 612.

a. Hearsay

First, the 302 Report presents a double hearsay issue because it is SA Bowen's statement (the outer layer) of Mr. Johnson's statements (the inner layer). The 302 Report is not entirely clear what statements are directly attributable to Mr. Johnson compared to what is SA Bowen's impression of what was said but SA Bowen testified that the 302 Report reflected what was said by Mr. Johnson. When SA Bowen testified, the district court provisionally admitted the 302 Report over objections from PMI. In a written order two days later during trial, the district court found the 302 Report was admissible because the outer layer satisfied the public records exception, Fed. R. Evid. 803(8)(A)(ii), and the inner layer was a statement of an opposing party, Fed. R. Evid. 801(d)(2)(C)–(D). Although there was some debate about whether the 302 Report was offered for the truth of the matter asserted, Mr. Barrick stated he would also offer it for its truth. We assume that it was not merely offered for notice, as Mr. Barrick initially contended, but for its truth and thus that it required a hearsay exception to be admissible. We also note that the district court did not admit the 302 Report under Rule 612.

We start with the outer layer of hearsay. Because this is a civil case, Rule 803(8)'s general exclusion of law enforcement reports for criminal cases does not apply. SA Bowen was under a legal duty to prepare the 302 Report and testified that the 302 Report reflects her observations. Thus, Rule 803(8)(A)(ii) is satisfied on its face. Rule 803(8)(B) states that the opponent may then show that the source of the information or other circumstances indicate a lack of trustworthiness, precluding admission. PMI does not argue the Report lacked trustworthiness. And, PMI had a full opportunity to cross examine SA Bowen about the 302 Report. Indeed, other courts have found that in civil cases, 302 Reports and other law enforcement reports are admissible as public records unless they are shown to be untrustworthy or inadmissible for other reasons. See Jordan v. Binns, 712 F.3d 1123, 1131–34 (7th Cir. 2013); Dortch v. Fowler, 588 F.3d 396, 403–05 (6th Cir. 2009); Lubanski v. Coleco Indus., Inc., 929 F.2d 42, 46 (1st Cir. 1991); Bradford Tr. Co. of Boston v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 805 F.2d 49, 54 (2d Cir. 1986); United States v. De Peri, 778 F.2d 963, 976–77 (3d Cir. 1985). At the least, we find no abuse of discretion in applying the public records exception.

Turning to the inner layer of hearsay, Rule 801(d)(2)(C)–(D) defines a statement of an opposing party as either "(C) . . . made by a person whom the party authorized to make a statement on the subject; [or] (D) . . . made by the party's agent or employee on a matter within the scope of that relationship and while it existed." PMI does not challenge Mr. Johnson's status as a high-level employee of PMI or that he spoke on a matter within the scope of that relationship. Instead, PMI contends the

"statements" are not actually Mr. Johnson's statements, because (1) it is SA Bowen's recollection and (2) Mr. Johnson never adopted the Report. Aplt. Br. at 31–32.

First, the 302 Report was prepared based on SA Bowen's notes and her memory of the interview. She testified that the Report is standard and that it reflects what Mr. Johnson said. Thus, for purposes of the statement of an opposing party exception, Mr. Johnson "made" the statements. Jordan, 712 F.3d at 1130. Even if the 302 Report also contained some of SA Bowen's conclusions, it would not render the Report inadmissible. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 170 (1988). Again, PMI had a full opportunity to cross examine SA Bowen about her preparation of the 302 Report. Second, while his lack of adoption is relevant for other rules, for hearsay Mr. Johnson's denial of having made some of the statements in the Report goes to the credibility of the evidence, not admissibility. See Jordan, 712 F.3d at 1134. The district court did not abuse its discretion by finding that the statement of an opposing party exclusion applied.

Therefore, the 302 Report was properly admitted.

b. Rule 403

PMI also argues that under Rule 403, the probative value of the 302 Report was substantially outweighed by danger of unfair prejudice and confusing the jury. Aplt. Br. at 37; Fed. R. Evid. 403. PMI contends it was "so inflammatory [as] to lead the jury to make a decision on an improper basis." Aplt. Br. at 36. According to PMI, the 302 Report led the jury to believe it was engaging in criminal activity and

forced it to defend against evidence that had no relevance to Mr. Barrick's claim. Aplt. Br. at 36–38; Aplt. Reply Br. at 22.

The 302 Report is relevant to prove notice, as PMI acknowledges. Aplt. Br. at 30. Excluding relevant evidence under Rule 403 is an extraordinary remedy to be used sparingly. Eisenhour v. County, 897 F.3d 1272, 1277 (10th Cir. 2018). "Rule 403 does not protect a party from all prejudice, only unfair prejudice." Deters v. Equifax Credit Info. Servs., 202 F.3d 1262, 1274 (10th Cir. 2000). Moreover, our review of the record confirms that the 302 Report reflects what PMI itself explored at trial regarding the FBI's criminal investigation. Given the strong preference for admitting relevant evidence, the 302 Report was properly admitted and the district court did not abuse its discretion.

c. Rule 612

Finally, PMI contends the district court erred by allowing SA Bowen to read from the 302 Report. Aplt. Br. at 35–36. Rule 612 allows a witness to use a writing to refresh his or her present recollection. Fed. R. Evid. 612. The district court has discretion to withhold a writing from a witness if it determines a writing will be a "source of direct testimony rather than the key to refreshing the witness' recollection." United States v. Weller, 238 F.3d 1215, 1221 (10th Cir. 2001). Anything, even inadmissible evidence, can be used to refresh a witness' recollection. Id. PMI's contention that the 302 Report was admitted under Rule 612 is misplaced. Aplt. Br. at 36. The district court admitted it through hearsay exceptions and did not rely on Rule 612 for admission.

At trial, SA Bowen used the 302 Report during her testimony about her interview with Mr. Johnson. PMI objected twice on grounds that SA Bowen was impermissibly reading from the Report rather than refreshing her recollection and testifying to what she now recalls. Each time, the district judge told Mr. Barrick's counsel to ask SA Bowen if she recalled and if she needed to refresh her recollection before asking a question. After these two objections, there are later instances in the transcript where it appears SA Bowen may be reading from the 302 Report, but PMI did not object on this ground and did not ask for a continuing objection.

"A party forfeits an evidence objection by failing to timely object or move to strike." Burke v. Regalado, 935 F.3d 960, 1014 (10th Cir. 2019). PMI waived an appellate challenge to forfeited trial objections because it does not now argue plain error. Osterhout v. Bd. of Cnty. Cmm'rs, 10 F.4th 978, 992 & n.7 (10th Cir. 2021). Focusing only on the two objections actually made, the district court told Mr. Barrick's counsel to rephrase her questions to SA Bowen. The district court properly exercised its discretion to direct SA Bowen to use the 302 Report to refresh her recollection. It is unclear what PMI complains of when it did not continue to object. See id. at 992 & n.7. Thus, there was no error in allowing SA Bowen to use her 302 Report to refresh her recollection.[10]

C. Whether the district court abused its discretion by including a jury instruction on but-for causation with a car accident example

[10] In addition, PMI had an opportunity to cross examine SA Bowen and attack her credibility. This negates potential prejudice, if any, to PMI by allowing SA Bowen to use notes to refresh her recollection. United States v. Rinke, 778 F.2d 581, 588 (10th Cir. 1985).

1. Standard of review

We review a district court's decision on whether to give a particular jury instruction and the way the court phrased the instruction for abuse of discretion. Jensen v. W. Jordon City, 968 F.3d 1187, 1197 (10th Cir. 2020); United States v. Christy, 916 F.3d 814, 854 (10th Cir. 2019). We review de novo whether the jury instructions as a whole correctly stated the governing law and provided the jury with an understanding of the issues and principles. Jensen, 968 F.3d at 1197. The jury instructions "need not be flawless," but we must be satisfied "the jury was [not] misled in any way." Id. (alteration in original) (quoting Lederman v. Frontier Fire Prot., Inc., 685 F.3d 1151, 1155 (10th Cir. 2012)). If an instruction is legally erroneous, we reverse if the jury may have based its verdict on that instruction. Rural Water Dist. No. 4 v. City of Eudora, 659 F.3d 969, 974–75 (10th Cir. 2011).

2. Merits

The district court issued an order explaining the causation standard it adopted in the jury instructions. Final Jury Instruction 27 reads:

> Mr. Barrick must also prove, by a preponderance of the evidence, that PMI retaliated against him "because of" his engagement in protected activity. To establish this element, Mr. Barrick must prove that "but-for" his engagement in protected activity, PMI would not have retaliated against him. In other words, Mr. Barrick must prove, by a preponderance of the evidence, that PMI would not have retaliated against him in the absence of his protected activity.
>
> Often, events have multiple "but-for" causes. For example, if a car accident occurred both because the defendant ran a red light and because the plaintiff failed to signal his turn at the intersection, we

might call each a "but-for" cause of the collision.

VII Aplt. App. 1899. PMI argues the car accident example in the second paragraph indirectly reflects the motivating factor test and misled the jury. Aplt. Br. at 41–42.[11]

a. FCA causation standard

PMI argues that Bostock v. Clayton County, 140 S. Ct. 1731 (2020), should not extend to the FCA because (1) the FCA requires a higher standard of causation, that "because of" means "sole," and (2) Bostock limited its holding to Title VII. Aplt. Br. at 41–42, 44. PMI relies on two cases, University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 338 (2013), and Gross v. FBL Financial Services, 557 U.S. 167 (2009). First, Gross held that "because of" in the Age Discrimination in Employment Act (ADEA) meant that age was the "but-for" cause of the adverse employment action. Gross, 557 U.S. at 176, 180. This circuit in Jones v. Oklahoma City Public Schools explicitly rejected the argument that Gross's use of "but-for" meant age must be the sole cause of the adverse action, consistent with longstanding Tenth Circuit precedent. 617 F.3d 1273, 1276, 1277–78 (10th Cir. 2010). This forecloses PMI's reliance on Gross to support that "because of" means "the" or "sole" cause.

[11] Before the district court, PMI stated it renewed its objection to the instruction but affirmed the first sentence of the second paragraph. In its opening brief, PMI does not argue that the first sentence is incorrect, but that the car accident example "incorrectly defined 'but for' causation under the FCA." Aplt. Br. at 40. In Reply, PMI contends it objected to both the first sentence and the car accident example. Aplt. Reply Br. at 25–26. Given PMI's waiver in the district court, we look only at whether the car accident example misstated the causation standard. United States v. Leffler, 942 F.3d 1192, 1196 (10th Cir. 2019).

Second, Nassar is the Title VII case that Bostock relied on to hold that "because of" meant traditional "but-for," and not "sole." Bostock, 140 S. Ct. at 1739.[12] Bostock applies Nassar's discussion of the traditional but-for causation and explains it does not mean sole and that "[o]ften, events have multiple but-for causes." Bostock, 140 S. Ct. at 1739 (citing Nassar, 570 U.S. at 346, 350, 360). If sex was one but-for cause of the employment decision, meaning that the decision would not have occurred in the absence of that factor, Title VII is triggered. See id. (citing Nassar, 570 U.S. at 350).

PMI contends that unlike Gross and Nassar, Bostock has not been applied to the FCA by other circuits and other circuits have declined to extend it. Aplt. Br. at 42. Title VII is not the same as the FCA, but other circuits have extended Nassar to the FCA and found nearly identical statutory language in each. See Lestage v. Coloplast Corp., 982 F.3d 37, 46 (1st Cir. 2020) (finding because the FCA has "nearly identical statutory language" to Title VII and the ADEA as analyzed in Gross and Nassar, "retaliation claims under the [FCA] must be evaluated under the but-for causation standard" rather than the motivating factor test).

Given that the Nassar causation standard has been extended to the FCA and Bostock relies on Nassar to articulate the same standard, it is unclear why PMI

[12] PMI asserts: "[T]he sole or determinative cause, in a retaliation claim must be the protected activity. See Nassar, 133 S.Ct. at 2527-28, 2533." Aplt. Br. at 44. This is not what Nassar says. On page 2533 (570 U.S. at 360), Nassar states: "Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e-2(m)." The lessened standard Nassar refers to is the motivating factor test. 42 U.S.C. § 2000e-2(m).

believes that using an example from Bostock is impermissible. The district court did not abuse its discretion by applying the traditional but-for causation test to a similarly worded employment retaliation provision. The district court applied the higher standard and correctly instructed the jury on but-for causation.

b. Car accident example

Having determined the district court correctly concluded the applicable standard is but-for causation, we consider whether the inclusion of the car accident example either indirectly reflects the motivating factor test or otherwise confused the jury. Aplt. Br. at 41–45. First, the car accident example is taken virtually verbatim from Bostock. 140 S. Ct. at 1739. Bostock includes this paragraph as an example of the traditional but-for causation standard. Id. And, at the outset, the district court agreed the lower motivating factor test did not apply, even if the legislative history of the FCA implied it. As explained above, the jury instruction does not indirectly reflect the lower motivating factor test, particularly when taken directly from a Supreme Court opinion saying that it does not.

PMI argues the car accident example misled the jury in two ways: (1) it caused the jury to assume notice and (2) it led the jury to believe that an employer could never fire a whistleblower even with a legitimate reason. Aplt. Br. at 40, 43. A jury is presumed to follow the instructions given. Blueford v. Arkansas, 566 U.S. 599, 606 (2012). PMI notes that Mr. Barrick emphasized the second point, which is not the law, in its closing argument. Aplt. Br. at 43. The jury was instructed that closing arguments are not the source of the law and are not evidence.

Next, the jury was separately instructed on notice and that it was a required element of the FCA claim. And in another instruction, the jury was told PMI can have a legitimate reason for firing a whistleblower and it is Mr. Barrick's burden to show it was pretextual. We look at the instructions as a whole to determine if they correctly stated the governing law and provided the jury an understanding of the issues and principles. Jensen, 968 F.3d at 1197. The instructions satisfy this standard and did not cause the jury to assume either notice or that PMI could never fire a whistleblower even with a legitimate reason. The district court did not abuse its discretion.

D. Whether the district court erred when it granted reinstatement to Mr. Barrick

PMI requests reversal of the grant of reinstatement and remand for an evidentiary hearing on the issue. Aplt. Br. at 55. PMI makes two arguments for why the district court erred in granting Mr. Barrick's motion for reinstatement: (1) it did not order an evidentiary hearing prior to entry of judgment, Aplt. Br. at 46–52; and (2) it did not grant an evidentiary hearing after entry of judgment when PMI filed a Rule 59(e) motion, id. at 51–55.

After prevailing on an FCA retaliation claim, an employee's relief "shall include reinstatement." 31 U.S.C. § 3730(h)(2). Generally in employment discrimination, reinstatement is "the preferred remedy and should be ordered whenever it is appropriate," but front pay may be ordered when the defendant overcomes the presumption by "establishing the existence of extreme hostility

between the parties." Tudor v. Se. Okla. State Univ., 13 F.4th 1019, 1033–34 (10th Cir. 2021) (emphasis omitted) (first quoting Abuan v. Level 3 Commc'ns, Inc., 353 F.3d 1158, 1176 (10th Cir. 2003)). Hostility must be extreme because it will likely be present in every case, meaning it must rise to the level that a productive and civil working relationship would be impossible. Id. at 1034. Reinstatement is an equitable remedy within the discretion of the court. Bingman v. Natkin & Co., 937 F.2d 553, 558 (10th Cir. 1991).

PMI argued in its initial opposition to reinstatement, prior to entry of judgment, that Mr. Barrick waived reinstatement because he never indicated he would seek this remedy and had made clear reinstatement was untenable. PMI cited in support an email exchange proposing a jury instruction on front pay but not reinstatement. Relying on Tudor,[13] the district court found even if reinstatement may be difficult, PMI's argument that Mr. Barrick showed reinstatement was untenable did not rise to extreme hostility and was unsupported. PMI made no substantive opposition until its motion to amend, where it argued for the first time the district court should have held, and now should reopen the case to hold, an evidentiary hearing to consider that there was no comparable position available, Mr. Barrick's ability to work is in question, and an innocent employee may be displaced.

[13] Tudor was decided after briefing in the district court was complete on the motion for reinstatement and concerns a Title VII claim. The parties do not dispute that Tudor applies to reinstatement under the FCA.

1. Standard of review

We review the decision to award reinstatement for abuse of discretion. See Tudor, 13 F.4th at 1033. We also review the denial of a motion to amend for abuse of discretion. Sprint Nextel Corp. v. Middle Man, Inc., 822 F.3d 524, 535 (10th Cir. 2016). "A district court abuses its discretion when it (1) enters an arbitrary, capricious, whimsical, or manifestly unreasonable judgment or (2) applies the wrong legal standard." Id. (internal quotation omitted).

2. Whether the district court erred by granting reinstatement in the first instance

PMI argues "the district court shut the door on PMI's due process rights when it ruled without granting PMI a hearing on the contested issue of reinstatement, choosing to rely on the paucity of an undeveloped record." Aplt. Br. at 49. But PMI first sought an evidentiary hearing in its motion to amend the judgment, after the district court had ruled and entered judgment. PMI's contention that requesting oral argument on a group of post-trial motions is equivalent to requesting an evidentiary hearing on one specific motion is misplaced. See Aplt. Reply Br. at 28–29.

Cases like Tudor and Bingman have a more developed factual record and it may be best practice to hold a hearing. But those cases also relied on trial evidence to determine if reinstatement was appropriate. See Bingman, 937 F.2d at 558; Tudor, 13 F.4th at 1036–37. "Ordinarily, a district court does not abuse its discretion in deciding not to hold an evidentiary hearing when no such request is ever made." Robinson v. City of Edmond, 160 F.3d 1275, 1286 (10th Cir. 1998). PMI cites no

authority for the argument that the district court is required to hold an evidentiary hearing when none was requested and when PMI did not argue there were facts in need of resolution in its initial opposition. Indeed, one case that PMI relies on indicates that the parties requested to be heard and had not waived a hearing, at least suggesting that waiver of an evidentiary hearing on the issue of reinstatement is possible. See Selgas v. Am. Airlines, Inc., 104 F.3d 9, 15 (1st Cir. 1997).

Lastly, PMI argues Mr. Barrick must make an affirmative initial showing that reinstatement was warranted. Aplt. Br. at 49–50. Tudor makes clear that in the case of a Title VII claim (where the remedy is not mandated, unlike the FCA which indicates reinstatement "shall" be ordered) reinstatement is the preferred remedy unless one party argues extreme hostility. Tudor, 13 F.4th at 1035. Consistent with Tudor, Mr. Barrick sought reinstatement by moving for it and the district court properly found Mr. Barrick, as the movant, was not asserting that he would confront extreme hostility. PMI cites no authority that there is further burden on Mr. Barrick to show reinstatement is appropriate. The burden is on PMI to assert extreme hostility, which it did not do until its motion to amend.

There is no error for not sua sponte holding an evidentiary hearing prior to judgment. See Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 538, 545 (10th Cir. 2000) (finding no abuse of discretion when district court did not hold evidentiary hearing on motion to amend an award of attorneys' fees on FCA claim when no

request for an evidentiary hearing was made).[14]

3. Whether the district court erred in denying PMI's Rule 59(e) motion

Finally, we turn to the district court's denial of PMI's motion to amend, which we review for abuse of discretion. A motion to amend the judgment is not a place to present new arguments or evidence available at the time of the original motion. Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000). The district court found that except for one piece of evidence, PMI could have made all its arguments in the first instance.[15] It focused on the new evidence: in November 2021, Mr. Barrick stated in a local news broadcast and online story that PMI's mislabeling of beef was a health and public safety hazard. The interview occurred after PMI filed its opposition to Mr. Barrick's motion. The district court determined Mr. Barrick

[14] In a footnote, PMI asserts the district court denied it due process by preventing the evidentiary hearing and by "barring it from filing reply memoranda." Aplt. Br. at 47 n.12. PMI argues that Mr. Barrick improperly introduced new evidence in his reply to his motion for reinstatement, and PMI was not given an opportunity to respond. There is no extra-record evidence at issue that PMI did not have an opportunity to respond to — in its opposition to Mr. Barrick's motion, PMI asserted that he showed reinstatement was untenable. PMI cannot fault Mr. Barrick for responding to this general contention with specific examples in the record. Cf. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 897 (1990) ("[A] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk.").

[15] PMI's motion was also made under Federal Rule of Civil Procedure 52(b), which the district court found did not apply because it was limited to cases where the court issues factual findings following a non-jury trial on the merits. The district court also found even if it did apply, the standard was similar to the standard for denial of a motion to amend such that it made no difference. On appeal, PMI argues a Rule 52(b) motion is proper, but does not explain why it makes a difference or what the potentially different standard is. Aplt. Br. at 51–52. We decline to consider this argument because it is inadequately briefed. United States v. Leffler, 942 F.3d 1192, 1196 (10th Cir. 2019).

was referring to PMI's past activities in 2012, unrelated to current feelings, and it did not rise to a showing of extreme hostility.

The district court did not abuse its discretion in finding all arguments against reinstatement, except the news story, could have been made in the first instance. To be sure, PMI is correct that Supreme Court precedent has found that public disparagement of a company's product can be harmful, and here it may have generated a negative response from PMI's employees. Aplt. Br. at 53–54. But the district court did not abuse its discretion by concluding that one news story discussing PMI's past practices did not show the extreme hostility that would make a civil working relationship impossible. See Tudor, 13 F.4th at 1034 ("Courts must look beyond ill feeling . . . .").

There is no abuse of discretion by denying an evidentiary hearing and denying the motion to amend.

AFFIRMED.