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No. 72012-1-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

REBECCA A. RUFIN,

Plaintiff/Appellant,

v.

CITY OF SEATTLE and JORGE CARRASCO,

Defendants/Respondents,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Beth M. Andrus)

Case No. 11-2-01374-7

BRIEF OF APPELLANT

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I. INTRODUCTION

In 2006 and 2007, Rebecca Rufin opposed gender discrimination by Seattle City Light ("SCL") Superintendent Jorge Carrasco. Mr. Carrasco subsequently made her work environment intolerable, causing Ms. Rufin to leave SCL for the City's Parks Department.

In 2010, 2011, and 2012, Ms. Rufin sought to return to Seattle City Light by applying for two (2) positions: a Civil / Mechanical Engineer Manager ("CMEM") position and a Large Projects Senior Manager ("LPSM") position. Throughout the hiring processes for both positions, Ms. Rufin was the top candidate or a top candidate until Mr. Carrasco's direct reports intervened and her promising candidacy abruptly ended. One of the hiring managers who was involved in both processes told Ms. Rufin that the decision not to hire her was "political." Therefore Ms. Rufin sought to meet directly with Mr. Carrasco regarding the situation, but Mr. Carrasco declined to do so. Instead, the City's Human Resources Officer met with Ms. Rufin at Mr. Carrasco's direction. She told Ms. Rufin that she had "burned her bridges" and would never be considered for any future management positions at Seattle City Light.

Ms. Rufin filed suit under RCW 49.60, *et seq.*, claiming, *inter alia*, that the City's failure to hire her for either of the two positions was retaliation. The City and Mr. Carrasco moved for summary judgment. The

trial court denied summary judgment as to Ms. Rufin's claim for retaliation with respect to non-hiring for the CMEM job; yet dismissed her claim related to the City's contemporaneous non-hiring of her for the LPSM job.

Ms. Rufin moved for reconsideration, arguing that under the evidence presented claims for retaliation based on the two non-hirings should have survived summary judgment to be tried to a jury together; or both should have been dismissed. Ms. Rufin's motion for reconsideration was denied.

The trial court also granted a motion in limine that excluded all evidence and testimony about the City's failure to hire Ms. Rufin for the LPSM job during the same period it refused to hire her for the CMEM job.

Due to the Court's rulings, the jury deliberated without knowing that the City passed Ms. Rufin over for promotion not once, but twice under a similar fact pattern and during the same time frame. The two retaliation claims were similar and overlapping. Each was circumstantial evidence that supported the other. Yet, the jury was only permitted to learn about one of the claims in isolation.

At trial, over the objections of Ms. Rufin's counsel, the court also admitted into evidence the "no finding of discrimination" outcome of the City's 2006 internal investigation into a gender discrimination complaint

that Ms. Rufin had supported (the "Tobin" matter). The trial court also admitted testimony that the 2007 litigation in which Ms. Rufin had testified about Mr. Carrasco (the "Davis" matter) was dismissed on summary judgment. The trial court granted a motion in limine that barred Ms. Rufin from presenting most of the evidence underlying either the Tobin or Davis matters.

Based on the limited retaliation claim and evidence allowed by the trial court, the jury returned a verdict for the City.

Summary judgment should be reversed as to the LPSM retaliation claim and the case should be remanded for a new trial on Ms. Rufin's claims for retaliation with respect to the non-hiring for both the CMEM and LPSM positions, in order that the jury may review the allegations together and consider all of the circumstantial evidence supportive of the retaliation claim.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in granting the City's motion for summary judgment, when it dismissed Plaintiff's WLAD retaliation claim with respect to non-hiring for the Large Projects Senior Manager ("LPSM") position, while denying the motion with respect to non-hiring for the Civil / Mechanical Engineer Manager ("CMEM") position. (CP 3131-32, 2444)

2. The trial court abused its discretion when it excluded from trial of the retaliation claim for non-hiring for the CMEM position all evidence about the City's similar treatment of Ms. Rufin in

the contemporaneous LPSM hiring process. (CP 3519, RP (Mar. 27, 2014), at 46-47, 80-82; RP (Apr. 3, 2014) at 64; RP (Apr. 7, 2014) at 63)

3. The trial court abused its discretion in admitting over objection, evidence that an internal investigation exonerated Carrasco regarding Ms. Tobin's discrimination claims and that a federal claim by Ms. Davis against Carrasco was dismissed at summary judgment, which should have been excluded under ER 402 and 403, because Carrasco denied knowing that Rufin gave a statement or testimony in either case, making any discussion of the outcomes irrelevant and prejudicial bolstering. (CP 3517 (¶ 9), CP 3518-19 (¶¶ 16.a., 16.b.); RP (Apr. 9, 2014), at 17:5-16, 107:19-109:17).

B. Issues Pertaining to Assignments of Error

1. When two acts of retaliation are closely related in time and involve the same actors, whether the trial court errs when it dismisses one claim at summary judgment, but allows the other claim to go to trial?

2. After dismissing one retaliation claim, whether the trial court errs when it rules that no evidence of the second retaliation claim may be presented at trial under ER 403.

3. After Defendant Carrasco denied at trial that he knew that Rufin had provided a statement and testimony in connection with the claims of discrimination by Seattle City Light employees Betty Tobin and Wanda Davis, whether it is an abuse of discretion to allow over objection evidence that an internal investigation exonerated Carrasco regarding Tobin and that a federal claim by Davis against Carrasco was dismissed at summary judgment?

III. STATEMENT OF THE CASE

A. The City and Superintendent Jorge Carrasco Engaged in Gender Discrimination During Ms. Rufin's Tenure at Seattle City Light, Resulting in Her Departure From the Agency.

Prior to 2004, before Mr. Carrasco took over as Superintendent of

SCL, Ms. Rufin was a respected leader, manager, and engineer at SCL. CP 575-77 (¶¶ 8-9, 13-14). But after Mr. Carrasco became Superintendent of SCL, Ms. Rufin's accomplishments were ignored, and the communications chain changed markedly and meetings with the superintendent became extremely rare. CP 578 (¶¶15-17). Mr. Carrasco ignored and dismissed Ms. Rufin's work, he avoided communicating with her as much as possible, and he refused to meet with Rufin for positions at SCL for which she was qualified. CP 578-597 (¶¶ 17-20, 27-28, 32-33, 35, 42, 48, 53-58). Mr. Carrasco openly minimized and dismissed Ms. Rufin's work in meeting with other coworkers, and questioned her role, and the role of other women, within the organization. *Id.* Under Carrasco's leadership, Rufin no longer received the recognition, gratitude, acknowledgment, and career advancement opportunities she had under prior leadership. *Id.* Mr. Carrasco ignored Rufin's accomplished skills in asset management and repeatedly stated publicly that SCL needed to go outside the organization, and increase compensation levels, to obtain someone with skills in asset management. CP 580 (¶19), CP 651. Mr. Carrasco cut Ms. Rufin off in the middle of a presentation she was giving, told her the project rating system she was using was not a proper ranking system without allowing her to explain how the system was used in conjunction with other asset management considerations, questioned her

role within the organization and her ability to do her job, questioned her involvement in the budget, and would not allow her to finish her explanations, sent her patronizing emails, and was rude to her in public settings. CP 578-79 (¶ 18), CP 585-86 (¶ 32).

In 2004, when Ms. Rufin applied for a temporary assignment to Special Assistant to the Superintendent, Mr. Carrasco declined to even interview her and explained only that he "liked the project orientation" of the male candidate. CP 580 (¶ 20). During the 2005 reorganization, led by Mr. Carrasco, none of the consultants he hired ever talked to her, although they met repeatedly with male employees at her level in the organization. CP 583 (¶ 27). As a result of the reorganization, Ms. Rufin essentially had to reapply for her job, since all positions at her level were redefined. CP 568. After successfully completing the first interview for the position that most closely matched her prior position, she received notification that she would receive a second interview. *Id.* However, no second interview was scheduled and she was informed by the hiring authority for the job that Mr. Carrasco headed up the second interview process for all candidates, and that Mr. Carrasco had declined to interview Ms. Rufin. CP 587-89.

Ms. Rufin witnessed other women in technical positions at SCL being discriminated against by Mr. Carrasco. CP 580-81, 583, 587, 588-92, 594-595 (¶¶ 21, 27, 36, 39-40, 43, 51, 53). Her female colleague, Betty

Tobin, complained that Mr. Carrasco engaged in the same kind of discriminatory treatment towards her. *Id.*

By March 2006, Ms. Rufin's experience with SCL had changed drastically under Carrasco's leadership. CP 577-78 (¶ 15). She no longer felt respected or encouraged, her input and opinions were not valued by Carrasco, she was not promoted, and was in fact demoted, in the reorganization. CP 578-94 (¶¶ 16-48). Rufin then decided to accept a position with the Parks Department as the Engineering Manager, a position she still holds today. CP 592-94 (¶¶ 44, 49). In terms of advancing at the Parks Department, Rufin cannot advance in an engineering capacity because she is currently at the highest rank that requires an engineering degree. *Id.*

B. Rufin Reported and Opposed Gender Discrimination by Seattle City Light Superintendent Jorge Carrasco.

On January 12, 2006, Rebecca Rufin provided a statement to the City Mayor's office titled "Written Statement Regarding Possible Discriminatory Practices at Seattle City Light" in which she recounted Jorge Carrasco's discriminatory conduct towards her. CP1696-699. She submitted the statement in support of a gender discrimination complaint made by Seattle City Light employee Betty Tobin. *Id.* In her 4-page single-spaced statement, Ms. Rufin provided detailed allegations about: her experience working with Mr. Carrasco; Mr. Carrasco's hostility

towards her and other female employees; Mr. Carrasco's failure to advance Ms. Rufin and another qualified female candidate, Ms. Tobin, through a promotional process; Mr. Carrasco's complimentary comments about male candidates, and his failure to even interview well-qualified female candidates; and Mr. Carrasco's participation in the hiring process and interview questions designed to determine how "loyal" candidates would be to him. *Id.* Ms. Rufin's statement concluded with the following:

> Whether the above-described incidents can be construed as discrimination on the part of Jorge Carrasco or others is not for me to decide. It does appear to me that Betty Tobin and myself are being treated differently from others with regard to the director hiring process, that this treatment is unfair, and that [it] is originating in the Superintendent's office....

CP 1699. The City's investigator, attorney Lawton Humphrey, interviewed Ms. Rufin on January 13, 2006. *See* CP 2224, 2205.

In October 2006, Wanda Davis filed a lawsuit against the City of Seattle alleging that she had experienced gender discrimination at Seattle City Light. *See* CP 2229. On September 20, 2007, Ms. Rufin was deposed in the *Davis* matter and questioned about her experience at Seattle City Light and her allegations that Mr. Carrasco discriminated against her based on her gender. CP 2081-2094. Ms. Rufin testified that:

- Betty Tobin made allegations about Carrasco's discrimination against women and asked her to participate in the investigation, which she did. CP 2082.
- She prepared a written statement as part of the investigation. *Id.*

- She believed there may be gender discrimination at Seattle City Light, and Mr. Carrasco's actions appeared to be discriminatory. CP 2087.

- She and Tobin were being treated differently than others regarding the hiring process and the treatment originated at the Superintendent's office. CP 2091.

- She discussed with Ms. Tobin her perception that Mr. Carrasco may be discriminating against her because she is a woman. *Id.*

- She met with several other female employees at Seattle City Light about possible discrimination. CP 2093-94.

C. Superintendent Carrasco Was Informed of Ms. Rufin's Allegations of Gender Discrimination in 2006 and 2007.

On January 23, 2006—two weeks after Ms. Rufin provided her written statement about gender discrimination and was interviewed by Ms. Humphrey—Ms. Humphrey interviewed Jorge Carrasco. *See* CP 2224. During his interview, Ms. Humphrey questioned Mr. Carrasco about the allegations against him, CP 1984 (119:12-14; 120:9-17), and he was later informed about the outcome of the investigation. *Id.* (121: 4-11). Mr. Carrasco admits that Ms. Humphrey informed him that certain persons had complained that he mistreated women and informed him of those allegations, CP 2011 (36:5-8, 36:17-22), though he claims he does not remember the details of his discussion with Ms. Humphrey. *Id.* (35:9-15).

On March 3, 2006, Ms. Humphrey authored a 9-page memo titled "Rebecca (Becky) Rufin Follow-up." The City identified this document in discovery, but refused to produce it. CP 2257. Mr. Carrasco admits that if

someone alleges discrimination involving Seattle City Light, he expects to be apprised of the allegations. CP 1993 (157:1-20).

Mr. Carrasco was deposed in the *Davis* lawsuit on October 16, 2007—four weeks after the deposition of Ms. Rufin. *See* CP 1979, 2081. He answered questions about the investigation of Ms. Tobin's 2006 complaint and acknowledged that he knew she made allegations of gender discrimination, that he was interviewed about her allegations, and that he was informed of the outcome of the investigation. CP 1984, 1988. Mr. Carrasco denied knowledge that Ms. Tobin alleged that there was a "perception that women are being treated more harshly in disciplinary matters than are males," CP 1987, but was made aware of that allegation through counsel's questioning. *Id.* In the same deposition, three questions later, plaintiff's counsel questioned Mr. Carrasco about the work performance of Ms. Rufin and her unsuccessful candidacy for the Power Supply Asset Management Director position. CP 1987-88.

D. In 2010, 2011, and 2012, Rufin Attempted to Return to Seattle City Light by Applying for Its Civil Mechanical Engineering Manager ("CMEM") Position.

1. Rufin's November 2010 Application for CMEM Position: She is the Only Candidate Rated "High" by Each Resume Rater; City Ends Hiring Process.

In November 2010, Ms. Rufin sought to return to Seattle City Light when she applied for a job titled Civil Mechanical Engineering

Manager ("CMEM"). CP 625. After the City conducted a minimum qualifications screening, a resume review panel of three persons rated four applicants, including Ms. Rufin. CP1133 (¶ 6). The panelists could rate the applicants "low" "medium" or "high." *Id.* CP 1141. Ms. Rufin was the *only* candidate rated "high" by all three resume raters. CP 1140-43.[1] The hiring process ended there. For several months, Ms. Rufin did not receive any communications from the City regarding the status of her application until she ran into one of the resume raters, David Holmes. CP 625. Mr. Holmes told her that someone had "complained" and the hiring process came to a halt. CP 626.

2. Rufin's August 2011 Application for CMEM Position: She is the Only Candidate Rated "High" By Each Resume Rater and Each Interview Panelist, and is Selected For Hire, Until Carrasco's Direct Report Intervenes; City Offers Job to Male Candidate.

In August 2011, Ms. Rufin submitted her application for the CMEM position, again, after she was contacted by Marsha Brown, executive assistant to Mike Haynes, who encouraged her to reapply. *Id.*

Mr. Haynes was the hiring manager for the CMEM position, meaning that he was the person who had the ultimate authority to hire any applicant. CP 2048 (9:14-23), CP 2053 (26:21-24). This time, ten

[1] Mr. Haynes states in his declaration "I was concerned about the small number of people in the applicant pool and also concerned that only two of those candidates had received high ratings from all three resume reviewers." CP 1133 (¶ 6). This statement is incorrect and misleading. Although each of the panelists rated at least two candidates "high," only one candidate, Rufin, received a "high" rating from all three panelists. *See* CP 1140-43.

applicants advanced to the resume rating stage. Ex. 1;[2] *accord* Sealed Appendix ("SA")[3] at 2. There were three resume raters, and each rated Ms. Rufin "high." *Id.*, SA 2-4. This time, three candidates were rated "high" by all three raters—two male candidates, and Ms. Rufin. *Id.*

Five candidates advanced to the first interview stage with three interview panelists. Ex. 2; SA 6-8. Based on the interviews, the panelists rated the candidates "low" "medium" or "high." *Id.* Ms. Rufin received "high" ratings by all three interview panelists, as did Mr. McLean. *Id.* In the "comments" section of the 1st Interview Rating form, one panelist wrote "good/strong comm. strong manager" next to Ms. Rufin's name. *Id.* The other panelists did not write comments for any candidates. *See id.*

Four candidates advanced to the second interview stage with three different interview panelists. CP 2280-82. Hiring Manager Haynes was on this panel. *Id.* Again, the panelists could rate candidates "low" "medium" or "high" and did so on September 19, 2011. *Id.* The panelists again

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[2] All references to "Ex." refer to the Trial Exhibits designated by Appellant.

[3] Certain "confidential" documents submitted by Ms. Rufin in opposition to summary judgment were served on the City and Mr. Carrasco and provided to the trial court under a procedure specified in the Protective Order for Protection of Confidential Discovery Documents. *See, e.g.*, CP 1946-51 and CP 153-54. If no motion to seal was filed, the order provided that the "documents will be filed, unsealed, after the expiration of ten (10) business days." *Id.* It appears that although no motion to seal was filed regarding the "confidential" documents Rufin submitted in response to summary judgment, the court did not file the documents. In this brief, Rufin cites "confidential" records submitted on summary judgment as "SA," and includes their designated Trial Exhibit number. Appellant will provide the court with an Appendix of the "confidential" summary judgment evidence and file a motion to seal appendix and supplement the record, if the City and Mr. Carrasco do not stipulate to her filing the appendix documents unsealed.

unanimously rated Rufin "high." However, this time she was the *only* candidate rated "high." No other candidate was given a "high" rating for the second interview. *Id.*; CP 2049-51. The panelists rated Mr. McLean as "medium" or "medium/high" and the other two candidates received "medium" ratings. *Id.* The interview rating form contains rating benchmarks, including "high: candidate portrays strong experience in most of the following areas: Management and Leadership Skills…." *Id.* Mr. Haynes was the only panelist who wrote comments on his rating sheet. *Id.* He wrote critical notes next to each candidate's name, except for Ms. Rufin, whom he ranked "high" and did not comment. *Id.* He noted that Mr. McLean "needed more depth." *Id.* Mr. Haynes told his assistant, Ms. Brown, that Ms. Rufin "did really well" at her interview. CP 1975. Darnell Cola also rated Ms. Rufin "high" using the benchmarks on the rating sheet, and thought she was a "very strong candidate." CP 2025.

Ms. Rufin then advanced to the qualification audit stage of the hiring process, indicating that the second interview panel identified Ms. Rufin as the top candidate and recommended her for hire. CP 2267-68 (¶¶ "o," 11, 12), CP2285. This occurred on or before September 21, 2011. *Id.* According to SCL Human Resources Officer, DaVonna Johnson, it is the "approval to hire" that triggers the submission of the qualification audit and other processes. CP 2064 (26:19-27:17). Thus, the paper record

demonstrates that the decision to hire Ms. Rufin for the CMEM position was made after the second interview.

The City never notified Ms. Rufin that she was recommended for hire, nor was she offered the job. CP 2307 (¶ 2).

A page appears to be missing from the "Hiring Status Report" produced by the City in discovery relating to the relevant time period. *See* SA 17-18; CP2287-88; CP 2268-69 (¶ 15); CP 2299-300 (¶¶ 2-3); CP 2261-62; CP 2302-03 (¶¶ 2-3); and CP 1897-1907. The first page ends with a note dated 9/19/11, authored by Olayinka Ogunyemi, in which she indicates with an arrow that her note continues to another page, but the next page produced starts with a new note dated 10/6/11. CP 2299-300 (¶¶ 2, 3), CP2287-88; SA 17-18. So, there are no notes explaining the circumstances of Ms. Rufin's qualifications audit or the reason why she was not offered the job after a decision to hire was made.

In November 2011, the same four candidates who participated in the second interview stage—in which only Ms. Rufin received a "high" rating—were invited to participate in a third interview, with Mr. Haynes and his boss, Mr. Steve Kern. CP 2290, 2296. Mr. Kern reported directly to Defendant Jorge Carrasco, the Superintendent for Seattle City Light, CP 1187 (¶ 2) CP 2052 (22:19-23:1). Ms. Rufin had previously provided witness testimony indicating that Mr. Carrasco discriminated against her

and other women due to their gender. *See* CP 2081-2094. Mr. Carrasco held Mr. Kern "accountable for the hiring and filling of all positions within his divisions." CP 1187-88 (¶ 5). Prior to the third interview, one of the four candidates withdrew, leaving Ms. Rufin, Mr. McLean, and another female candidate as the three remaining candidates. CP 2296.

Mr. Haynes and Mr. Kerns collaborated about the interviews before deciding how to rate the candidates. CP 2053-54 (29:10-30:1). Mr. Haynes then reversed his previous ratings for Ms. Rufin and Mr. McLean. *Compare* CP 2280 and 2290; *see* CP 2053. He lowered his rating for Ms. Rufin from "high" to "medium." *Id.* And he raised his rating for Mr. McLean from "medium" to "high." *Id.* Mr. Kern's ratings for the third interview were identical to Mr. Haynes. CP 2290, 2296. Both Mr. Haynes and Mr. Kern rated the third candidate—a woman—"medium." *Id.*

The City offered the CMEM job to Mr. McLean. CP 2054 (30:2-4; 31:4-6). He turned it down. *Id.* Instead of hiring Ms. Rufin—who had previously been the top candidate and recommended for hire—the City did not fill the position and the job remained vacant. *Id.* (31:7-12).

Susan McClure, the Personnel Specialist assigned to Mr. Haynes' division, recalls a conversation she had with another Personnel Specialist working with Mr. Haynes, regarding the CMEM position. *See* CP 2262 (¶ 4); CP 1128-29. "In probably December 2011, I learned from [Personnel

Specialist] Heather that 'Scott' Dean McLean did not take the job, so I asked her if it was being offered to 'Becky [Rufin].' Heather said there was '***an issue***' with her." CP 2262 (¶ 4).

3. Rufin's April 2012 Application for CMEM Position: She and a Male Candidate Receive "High" Rating by Each Resume Rater; Rufin Is Removed From Hiring Process While Male Candidate and Others Rated Lower Advance.

In April 2012, the City opened up the CMEM hiring process once again, and Ms. Rufin applied for the third time. CP 628. In May 2012, nine (9) candidate resumes were rated by three raters. CP 1312-16; SA 69-71. Only two (2) candidates receive unanimous "high" ratings—Ms. Rufin and a male candidate with the initials I.D. *Id.*

By June 11, 2012, Ms. Rufin had not received any communication about her application and the hiring process, so she sent an email to Mr. Carrasco, the Superintendent of Seattle City Light, and requested a meeting to discuss the results of the August 2011 CMEM hiring process. CP 719. The next day, the City sent a letter to Ms. Rufin thanking her for her interest in the CMEM position and informing her that "we will not be considering your application at this time for this position." CP 1961.

Meanwhile, the City interviewed five candidates, including the one male candidate (I.D.) who was rated equal to Ms. Rufin at the resume rating stage. SA 73 (CP 2193). The other four candidates who advanced

had all received lower ratings than Ms. Rufin at the resume rating stage. *Compare* SA 69-71 (CP 2192); *and* SA 73 (CP 2193). Two of the candidates, both men, received medium ratings from all the interview panelists, and advanced to the second level interviews, including I.D. and another male candidate with the initials D.S. SA 77-82 (CP 2194); CP 1136 (¶ 15). D.S. advanced all the way to the reference check stage of the hiring process. *See* Ex. 126; SA 83-92 (CP 2260).

The City did not fill the position and it remained vacant for another year. CP 1136-37 (¶¶ 15, 17).

4. The City Tells Rufin the Hiring Decision Was "Political" and She Had "Burned Her Bridges"; Its Subsequent Explanations Are Not Worthy of Credence.

On April 4, 2012, Mr. Rufin met with Mr. Darnell Cola, the Director of the City's Large Projects and Asset Management Division. CP 2025 (21:20-23). Mr. Cola had been a panelist on the second interview panel on September 19, 2011, and rated Ms. Rufin "high" after her interview. *Id.* (18:9-15); CP 2281. During their conversation, Mr. Cola brought up the CMEM position and told Ms. Rufin that Mike Haynes had informed Cola that the decision not to hire her was a "***political***" one. CP 2103 (20:13-21:10); *see also* CP 2027 (27:23-29:2).

On June 11, 2012, Mr. Carrasco responded to Ms. Rufin's email inquiring about the CMEM position and why she had been turned down

during the 2011 hiring process. CP 1963. In doing so he copied DaVonna Johnson, and asked Ms. Johnson to respond on his behalf. *Id.*; CP 2070 (50:22-24). Ms. Johnson is the Human Resource Officer for Seattle City Light and during all relevant times she reported directly to Jorge Carrasco. CP 2058-59 (5:12-6:2). Ms. Johnson met with Ms. Rufin on June 20, 2012. CP 628. In that meeting, Ms. Johnson told Ms. Rufin that she had "***burned her bridges***" and would never be considered for any future management positions at Seattle City Light. *Id.*; CP 2145-46 (189:13-190:5). Ms. Rufin reported by email to Mr. Carrasco that Ms. Johnson had told her she "burned her bridges", and Ms. Rufin asked to speak with him about why she was being "effectively shunned" at Seattle City Light. CP 2196. Mr. Carrasco received Ms. Rufin's email but refused to meet with her. CP 629, 731. Mr. Carrasco did not speak to Ms. Rufin about Ms. Johnson's statement that she had "burned her bridges" or Ms. Rufin's statement that she was "effectively shunned" from Seattle City Light. CP 2016-17 (55:4-58:21). Nor did he speak to Ms. Johnson about her statements or initiate any corrective counseling. *Id.*

Mr. Carrasco testified that he thinks "employees ought to be able to communicate with the leader of an organization if there is something important they need to convey." CP 2013 (44:23-25). Indeed, he has exhibited this philosophy in the case of Adelle Heaward (a retiree who just

needed to talk to him) and Eddie Byrd (who wanted a 20 minute meeting). *See*, *e.g.*, CP 2199-203. However, even though Rufin had specific and legitimate reasons to request a meeting, Carrasco did not extend that philosophy to Rufin.

Mr. Haynes admits he did not plan to have a third interview in the 2011 hiring process and decided to have a third interview only after the second interview was complete. CP 2050 (15:2-6; 17:20-22). Haynes claims he "had questions" after the second interview about "leadership capacity, leadership competencies," because allegedly the "second panel questions tended towards technical nature of the position as opposed to the leadership competency nature of the position." CP 2051 (18:21-19:9). He explained: "leadership was a gap that wasn't necessarily dialed into the nature of the questions in the second round" and he could not recall who drafted the questions. CP 2051 (20:17-21:15). But the questions for the second interview *were* about leadership, not technical skills. *See* SA 50-52 (CP 1969) (*e.g.* "*As an organization with multiple skilled trades, one of our core values is Safety. Discuss what role(s) a leader should have in promoting a positive safety culture... A managerial competency is Leadership. Describe an organizational initiative in which you had a leadership role* ..."). Mr. Haynes participated in drafting or reviewed and approved the interview questions he now states were inadequate. CP 2052

(22:4-14); CP 1975-76 (8:17-12:4). He did not complain about the quality of the questions or otherwise indicate the questions were poorly drafted during the hiring process. CP 1976.

When asked about what specific questions or concerns he had about Rufin, Mr. Haynes testified only that "I had a sense about her and the others." CP 2051 (19:18-23). Haynes' explanation for reversing his "high" rating of Ms. Rufin and deciding to hire Mr. McLean after the interview with Mr. Kern is vague and wholly lacking in specificity--"did not get the sense Becky and Steve [Kern] would work well together, and Steve told me he did not think they would work well together." CP 1135. Mr. Kern has no memory of this hiring process, the interviews, or the candidates. *See* CP 2077-78.

In 2012, Mr. Haynes rejected Ms. Rufin's application without even a first level interview because of her "failed candidacy" in 2011, CP 1136 (¶ 16), despite the fact that she had been the City's top candidate and recommended for hire, CP 2268 (¶¶11, 12), CP 2285, and despite the fact that she was one of only two candidates that received high ratings by all resume raters for that process.

E. Rufin Also Applied for the Large Projects Senior Manager ("LPSM") Position, Contemporaneous with the City's Refusal to Hire Her for the CMEM Position.

In August 2011, Darnell Cola met with Ms. Rufin and encouraged her to apply for the Large Projects Senior Manager (LPSM) position. CP 2021 (7:9-22); CP 2023 (11:24-12:7). Mr. Cola was the Director of SCL's Large Projects and Asset Management Division, and was the hiring authority for the position. CP 2021 (5:13-20); CP 2028 (31:15-33:4). During that meeting, Ms. Rufin disclosed to Mr. Cola that she might not be welcomed at City Light due to history with Superintendent Jorge Carrasco. CP 2022-23 (9:16-11:20).

In December 2011, Ms. Rufin noticed a job announcement for the Large Projects Senior Manager (Exec 2) position. CP 2311. She called Mr. Cola and confirmed this was the position he had mentioned during their August meeting. *Id.* He encouraged her to apply. *Id.*

1. Rufin is Rated "High" by Each Resume Rater and Interview Panelist; Unanimous Decision to Advance Rufin to Second Interview Is Reversed When Carrasco's Direct Report Intervenes.

Twenty-two candidates made it to the resume rating stage. SA 53-55 (CP 1970). Darnell Cola and Mike Haynes rated the resumes. *Id.* They rated five candidates "high", including Ms. Rufin. *Id.* All five were invited to interview, though one declined. CP 1304. Ms. Rufin interviewed on February 9, 2012. CP 2311. The interview panel included Darnell Cola,

Kelly Enright, Paula Laschober, and John Nierenberg. CP 1300-06. The four interview panelists were unanimous in rating Ms. Rufin "high." *Id.*; CP 2028-29 (31:11-34:8). They also rated two other interviewees "high." CP 1300-06. On February 13, 2012, when the first interviews were complete, the Personnel Specialist Ogunyemi wrote in the Hiring Status Report that the "[interview] panel unanimously recommended three candidates for 2nd [interview], Thursday 2/16/12. Darnell to give times later." CP 2303 (¶ 4), CP 1120.

Then, in a separate entry dated February 14, 2012 she wrote, "Two decided for 2nd inter[view] by Phil West due to their technical expertise and familiarity with CL [Projects]." CP 2303 (¶ 4), CP 1120. This February 14 entry is squeezed in at the bottom of the page, next to and underneath the February 13 entry, while a separate February 14 entry follows at the top of the next page on the Hiring Status Report. *Id.* Ms. Ogunyemi noted that, "This is what Darnell told me." CP 2303. Also, in this entry, Ms. Ogunyemi "drew an arrow to show that the note would continue on to the next page." *Id.* In this case, the entry continued on the next page.

2. The City's Explanations Are Contradictory and Unworthy of Credence.

Mr. Cola contends he pressed the first interview panel to narrow the candidates from three to the top two, but admits there was no business

reason to limit the panel to two. CP 2029 (34:14-35:4). He testified that he "didn't want to come off as not being able to make a decision." *Id.* (36:5-37:7). There is no City policy or practice that provides guidelines to a hiring manager as to how many people to advance from a first to a second interview. CP 2069 (48:13-16). The other three panelists, in declarations filed in response to Rufin's lawsuit over a year later, say it was "unanimous" that the two other candidates should meet Phil West, who is a direct report to Defendant Jorge Carrasco, and that Ms. Rufin should not advance to a second interview. CP 1127 (¶ 3), CP 1062 (¶ 3), CP 1064 (¶ 3). But their recollections conflict with the unambiguous, contemporaneous notation in the hiring file, that the panel "unanimously recommended *three* candidates for 2nd inter[view]." CP 1120.

In preparation for the second interview, Ms. McClure pushed Mr. Cola to write questions for the interview, but Cola refused to write questions, insisting that it was not an interview but only a "discussion." CP 2029-30 (37:13-40:12). Personnel specialists are assigned to hiring managers for the purpose of giving them advice and counsel on how to follow the proper procedures for doing hiring. CP 2069 (49:5-11). A personnel specialist is responsible for making sure that a particular interview process is fair and unbiased. CP 2061 (17:4-9).

So instead of a formal second interview, Mr. West had a "discussion" with the candidates that consisted of him saying "Hi, I'm Phil West[.] … [I]t wasn't much questions from Phil. He just said, he just reiterated some of the things we were going through in asset management and it was just kind of, it was, we were in and out of there pretty fast." CP 2031 (42:2-11).

On March 22, 2012, Mr. Rufin received a rejection email notifying her that she was not hired for the LPSM position. CP 2312. Upon receiving this news, Ms. Rufin contacted Mr. Cola and asked him for some feedback. *Id.* They met on April 4, 2012. Mr. Cola told her that all of the candidates for the LPSM position were exceptional, but the job went to Glynda Steiner. *Id.* He did not mention a second interview and left Ms. Rufin with the impression that there was only one interview. *Id.* She asked Mr. Cola what had given Ms. Steiner the edge over her. *Id.* He said that Rufin's greatest weakness was that she did not have much experience in the disciplinary process, especially in later steps. *Id.* Ms. Rufin explained that she had generally been successful in identifying and resolving performance and discipline problems in the early stages of progressive discipline, a positive result. *Id.* Mr. Cola agreed but stated that that lack had been the deciding factor. *Id.* This "deciding factor" is absent from the

interview panelists' notes, the hiring status report, and the panelists declarations. *See* CP 1300-06, CP 1120; CP 1126-27; CP 1061-64.

It was at the same April 4 meeting, that Mr. Cola told Ms. Rufin that the decision not to hire her for the CMEM position with Seattle City Light was a "***political***" one. CP 2103 (20:13-21:10); *see also* CP 2027 (27:23-29:2).

The oddly placed February 14 note on the Hiring Status Report states that the two other candidates advanced to interview with Phil West "due to their technical expertise and familiarity with CL [projects]." CP 1120. But even Mr. Cola admits that this could not be the reason that they, and not Ms. Rufin, were selected to meet with Mr. West. CP 1124 (¶ 8) ("no one informed Talent Acquisition that we chose [them] because of expertise on City Light ["CL"] Projects. I know these candidates well and was aware prior to asking them to apply for the LPSM position that they were not experts on City Light Projects, as they were working at that time in other City Departments."). The only panelist comment about technical abilities and City Light Projects is about Ms. Rufin. *See* CP 1302 (Comment about Rufin: "very good technical—SCL Background").

Ms. Ogunyemi was told by a peer that her manager, Jen, "said they can have an informal second interview without structured interview questions with benchmarks but they have to document their discussions

with the candidates." CP 2303 (¶ 6). Ms. Ogunyemi was shown the blank documents that were to record the decision-making process of the second interview, which was conducted by Cola and West. She identified the documents and stated, "They show that Cola and West were the interview panel members, and that they were interviewing Ooka and Steiner, all of which is consistent with my understanding. If these pages are records of the 'informal' second interview, it would mean that the hiring panel did not take notes and did not follow Jen's instructions. Jen Swidler was my manager. Without documentation, we cannot tell how they made the decision to hire G1ynda" for the LPSM position. CP 2304 (¶ 8). Entries made in the hiring file after that show that Cola, as the hiring manager, was the relevant manager; West played no role after the second interview. CP 2304-05 (¶¶ 9-14).

Just three months later, after Ms. Rufin contacted Mr. Carrasco regarding the CMEM hiring process, Ms. Johnson—who reports directly to Mr. Carrasco and was communicating with Ms. Rufin at his request—informed Ms. Rufin that she had "burned her bridges" and would never be considered for any future management positions at Seattle City Light. *Id.*; CP 2145-46 (189:13-190:5).

IV. ARGUMENT

A. Standard of Review

An appellate court reviews "a summary judgment order *de novo*, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party." King v. Rice, 146 Wn. App. 662, 668, 191 P.3d 946 (2008). A *de novo* standard of review applies to "all trial court rulings made in conjunction with a summary judgment motion." Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (noting that "[a]n appellate court would not be properly accomplishing its charge if the appellate court did not examine *all* the evidence presented to the trial court…").

Summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law." CR 56(c) (emphasis added). If there is a genuine issue as to any material fact, a trial is "absolutely necessary." Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963), *quoted by* Davis v. West One Automotive Group, 140 Wn. App. 449, 460-01, 166 P.3d 807 (2007) (reversing summary judgment and remanding for trial, noting "[i]t is unclear if retaliation was a substantial motive behind the termination. …

This is a jury question.")

B. Summary Judgment Should Rarely Be Granted in Employment Discrimination Cases.

"[S]ummary judgment to an employer is seldom appropriate in the WLAD cases because of the difficulty of proving a discriminatory motivation." Scrivener v. Clark College, _Wn.2d _, 334 P.3d 541, 545 (2014), *citing* Sangster v. Albertson's, Inc., 99 Wn. App. 156, 160, 991 P.2d 674 (2000) ("Summary judgment should rarely be granted in employment discrimination cases."); *accord* Davis, 140 Wn. App. at 456 ("Summary judgment in favor of the employer in a discrimination case is often inappropriate because the evidence will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury.") Indeed, the WLAD "mandates liberal construction." Martini v. Boeing Co., 137 Wn.2d 357, 364, 971 P.2d 45 (1999), RCW 49.60.020.

[A]ny indication of discriminatory motive ... may suffice to raise a question that can only be resolved by a fact-finder." McGinest v. GTE Service Corp., 360 F.3d 1103, 1124 (9th Cir. 2004).[4] A plaintiff alleging

[4] "RCW 49.60 substantially parallels federal law, and thus in construing the Washington statute, Washington courts may look to interpretations of the federal law." Hollingsworth v. Washington Mutual Sav. Bank, 37 Wn. App. 386, 681 P.2d 845 (1984). Although federal discrimination cases are not binding on this court, they are persuasive and their analyses may be adopted "where they further the purposes and mandates of state law." Antonius v. King County, 153 Wn.2d 256, 266, 103 P.3d 729 (2004).

employment discrimination "need produce very little evidence in order to overcome an employer's motion for summary judgment. This is because the ultimate question is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by a factfinder, upon a full record." Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1124 (9th Cir. 2000).

> The existence of an intent to discriminate may be difficult to discern in [declarations and] depositions compiled for purposes of summary judgment, yet it may later be revealed in the face-to-face encounter of a full trial.

Lam v. University of Hawaii, 40 F.3d 1551, 1564 (9th Cir.1994).

C. The Trial Court Erred In Not Viewing the Summary Judgment Record "As A Whole."

In its oral ruling, the trial court indicated that she analyzed the CMEM and LPSM hiring processes separately. RP (Feb. 27, 2014), at 58:8-12. This was error. At summary judgment, "the court must review the record 'taken as a whole.'" Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (holding that the Court of Appeals erred in ruling that the plaintiff in an employment discrimination case must prove more than the prima facie elements and sufficient evidence to reject the employer's explanation).

"All of the evidence - whether direct or indirect - is to be considered cumulatively." Raad v. Fairbanks N. Star Borough Sch. Dist.,

323 F.3d 1185, 1194 (9th Cir.2003). Reviewing "*all of the evidence* in the record," the Court must "draw all reasonable inferences in favor of the nonmoving party" and "disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves, 530 U.S. at 150-151 (emphasis added); *see also* Diaz v. Jiten Hotel Management, Inc., 762 F. Supp. 2d 319, 322 (D. Mass. 2011) (denying defendant's motion for summary judgment and invitation to "'slice and dice' the complex phenomenon of discrimination into pieces, and evaluate each piece out of the context of the whole....")

The two retaliation claims should have been evaluated together because the law requires the Court to evaluate the record as a whole, the evidence supporting the two claims overlap, and the fact that Plaintiff was shut out of a hiring process—twice—under similar, irregular circumstances is itself evidence of Defendants' retaliatory intent.

The Washington State Supreme Court, recognizing that "[p]roof of the employer's motivation may be difficult for the employee to obtain," aptly noted that "[e]vidence of an actual **pattern** of retaliatory conduct is, of course, very persuasive." Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 69, 821 P.2d 18 (1991); *accord* Porter v. California Dept. of Corr., 419 F.3d 885, 895 (9th Cir. 2005) ("[C]ircumstantial evidence of a 'pattern of antagonism' following the protected conduct can also give

rise to the inference" of discriminatory motive.); E.E.O.C. v. Recruit U.S.A., Inc., 939 F.2d 746, 755 (9th Cir. 1991) (evidence of an employer's "pattern of action" is relevant); Diaz v. American Tel. & Tel., 752 F.2d 1356, 1363 (9th Cir. 1985) (a "discriminatory pattern in an employer's hiring or promotion practices ... is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue.").

D. Ms. Rufin Is Only Required To Make A 'Minimal' Prima Facie Case And To Provide Evidence From Which A Jury Could Conclude That The Employer's Proffered Reason For Its Action Is False Or Retaliation Was a Substantial Factor.

To make out a prima facie case of retaliation, a plaintiff "must show that (1) [s]he engaged in a statutorily protected activity, (2) [the employer] took adverse employment action against him, and (3) there is a causal link between the activity and adverse action."[5] Defendants' motions for summary judgment challenged only whether there is "a causal link" between Ms. Rufin's statutorily protected activities and the City's not hiring her for the CMEM and LPSM positions. *See* CP 1083-84, 1214.

In Washington, a plaintiff bringing a retaliation claim proves causation by "showing that retaliation was a *substantial factor* motivating the adverse employment decision." Allison v. Housing Authority of City of Seattle, 118 Wn.2d 79, 96, 821 P.2d 34 (1991). "A retaliatory motive

[5] Milligan v. Thompson, 110 Wn. App. 628, 42 P.3d 418 (2002).

need not be the employer's sole or principal reason ... so long as the employee establishes that retaliation was a substantial factor." Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 621, 60 P.3d 106 (2002). "An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable under the WLAD." Scrivener, _Wn.2d _, 334 P.3d at 546. "An employee does not need to disprove each of the employer's articulated reasons to satisfy the pretext burden of production." *Id.*

"While retaining the ultimate burden of persuasion at trial, the employee's task at the summary judgment stage is limited to showing that a reasonable trier of fact could, but not necessarily would, draw the inference that [retaliation] was a [substantial factor] in the decision."[6] "[C]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden."[7] "Indeed, in discrimination cases it will seldom be otherwise...."[8]

Various kinds of evidence are used to create a question of fact that an employer acted with a discriminatory or retaliatory motivation. Relevant, circumstantial evidence includes "remarks" about an employee's

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[6] Sellsted v. Wash. Mut. Sav. Bank, 69 Wn. App. 852, 860, 851 P.2d 716 (1993), *review denied,* 122 Wn.2d 1018 (1993), *overruled on other grounds by* Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 310, 898 P.2d 284 (1995).
[7] Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 180, 23 P.3d 440 (2001), *overruled in part on other grounds by* McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006).
[8] deLisle v. FMC Corp., 57 Wn. App. 79, 83, 786 P.2d 839 (1990).

protected status, even if "not made directly in the context of an employment decision or uttered by a non-decision-maker." *See* Scrivener, _Wn.2d _, 334 P.3d at 548, n. 3. The employer's "reaction" to an employee's "legitimate civil rights activities" is likewise relevant. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). "When the plaintiff offers direct evidence of discriminatory motive in a Title VII claim, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." Estevez v. Faculty Club of University of Washington, 129 Wn. App. 774, 801, 120 P.3d 579 (2005).

"Proof of discriminatory motive … can in some situations [also] be inferred from the mere fact of differences in treatment."[9] Thus, the employer's deviation from normal procedures is relevant evidence of motive. *See*, *e.g.*, Lyons v. England, 307 F.3d 1092, 1101-02, 1115-16 (9th Cir.2002); Diaz v. Eagle Produce Ltd. Partnership, 521 F.3d 1201 (9th Cir. 2008); Nicholson v. Hyannis Air Service, Inc., 580 F.3d 1116, 1127 (9th Cir. 2009).

> At the summary judgment stage, a plaintiff's prima facie burden is not onerous. … The requisite degree of proof necessary to establish a prima facie case … is *minimal* and does not even need to rise to the level of a preponderance of the evidence.

[9] Johnson v. DSHS, 80 Wn. App. 212, 227, n. 20, 907 P.2d 1223 (1996), *quoting* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335, n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977).

Fulton v. DSHS, 169 Wn. App. 137, 153, 279 P.3d 500 (2012) (emphasis in original) (citations omitted).

The plaintiff creates a genuine issue of material fact as to the employer's motivation either with evidence (1) showing that discrimination was a "substantial factor," *or* (2) showing that the employer's proffered explanation is unworthy of credence because it is inconsistent or otherwise not believable. *See* Scrivener, _Wn.2d _, 334 P.3d at 547. No further evidence of discrimination is needed to withstand summary judgment if the evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons, as it does here. *See* Chuang v. Univ. of Cal. Davis Bd. of Trustees, 225 F.3d 1115, 1127 (9th Cir.2000), *citing* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 147-48, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993).

> An employee can demonstrate that the reasons given by the employer are not worthy of belief with evidence that: (1) the reasons have no basis in fact, *or* (2) even if based in fact, the employer was not motivated by these reasons, *or* (3) the reasons are insufficient to motivate an adverse employment decision.

Renz, 114 Wn. App. at 619 (emphasis added).

Showing that the City's reasons conflict or that there is evidence rebutting the reasons' accuracy or believability is sufficient to create competing inferences of retaliation and non-retaliation, which cannot be

resolved on summary judgment. Renz, 114 Wn. App. at 624; Sellsted, 69 Wn. App. at 862-863. *See also* Dumont v. City of Seattle, 148 Wn. App. 850, 869, 200 P.3d 764 (2009) (shifting explanations are evidence that proffered explanation is pretextual). "Multiple, incompatible reasons may support an inference that none of the reasons given is the real reason." Renz, 114 Wn. App. at 623.

E. Viewing the LPSM Hiring Process In The Context of All Circumstances, A Jury Could Reasonably Infer That Ms. Rufin's Protected Activities Were A Substantial Factor In Defendant's Non-Hiring.

Several types of circumstantial evidence, when viewed in the light most favorable to Ms. Rufin, raise a genuine issue of fact about Defendants' motivation for not hiring her for the LPSM position.

1. Ms. Rufin Can Show That Seattle City Light Superintendent Jorge Carrasco Knew That She Reported Or Opposed His Gender Discrimination.

With the circumstantial evidence and all reasonable inferences viewed in the light most favorable to Ms. Rufin, she can show that Mr. Carrasco had knowledge of her allegations of gender discrimination. In 2006, Ms. Rufin reported and opposed gender discrimination by Mr. Carrasco. CP1696-699. In 2007, she testified by deposition about Mr. Carrasco's discriminatory behavior and actions. CP 2081-2094. In 2006, after Ms. Rufin reported her allegations of gender discrimination to the City, the City informed Mr. Carrasco of the allegations against him, during

his investigatory interview and also informed him of the investigation's outcome. CP 1984, 2011. In 2007, Mr. Carrasco learned (or was reminded) that Ms. Rufin alleged that he treated her differently than men when he was deposed in a separate discrimination lawsuit. CP 1987-88.

2. Ms. Johnson Told Ms. Rufin That She Had "Burned Her Bridges" at Seattle City Light, and Mr. Cola Told Ms. Rufin That The Decision Not To Hire Her Was a "Political" One.

Mr. Carrasco would not meet with Ms. Rufin, despite purportedly having an open door policy. *Compare* 2199-2203, 2103 *with* CP 731.[10] Instead, Mr. Carrasco had his direct report, DaVonna Johnson, meet with Ms. Rufin in his place. While standing in his shoes—just three months after Rufin was removed from the LPSM hiring process—Ms. Johnson told Ms. Rufin that she had "*burned her bridges*" and would never be considered for any future management positions at Seattle City Light. CP 628, CP2312. Mr. Cola similarly told Rufin around the same time that the decision not to hire her for the CMEM position was a "*political*" one. CP. 2103. Mr. Cola, the hiring manager for the LPSM position, admitted to using that word with Rufin. CP 2027, 1122.

Based on the circumstances of Ms. Rufin's departure from SCL and her complaints of gender discrimination in 2006, and these statements

[10] One might ask why he would violate his "open door policy" unless he knew Ms. Rufin had opposed his harassment and discrimination in 2006, and thus "*burned her bridges*."

by Ms. Johnson and Mr. Cola, a reasonable juror could find that Mr. Carrasco directed his subordinates that Ms. Rufin was not welcome and cannot work at Seattle City Light, including in either the CMEM or LPSM positions; and that a substantial factor in his doing so was the fact that she had previously complained about his treatment of women. *See* Bonds v. Leavitt, 629 F.3d 369, 383 (4th Cir. 2011) (holding that "a jury could reasonably infer" that an individual with direct knowledge of Plaintiff's protected activity "would have told" her supervisor about her complaint; and that issue of fact also existed where supervisor "would have suspected [Plaintiff] of bringing about the investigation"); Jones v. Bernanke, 557 F.3d 670, 679 (D.C. Cir. 2009) (employee "needn't provide direct evidence that his supervisors knew of his protected activity; he need only offer circumstantial evidence that could reasonably support an inference that they did."); Gordon v. New York City Bd. of Educ., 232 F.3d 111, 117 (2000) ("A jury... can find retaliation even if the agent denies direct knowledge of a plaintiff's protected activities, for example, so long as the jury finds that the circumstances evidence knowledge of the protected activities or the jury concludes that an agent is acting explicitly or implicit upon the orders of a superior who has the requisite knowledge.")

There was no believable business reason for not hiring Ms. Rufin in 2011 or 2012. She did exceptionally well in both interview processes

until Carrasco's direct reports inserted themselves into the processes—at those moments, Ms. Rufin's applications were doomed. A jury can infer Carrasco is behind these actions—even with no direct supporting evidence—because the circumstantial evidence is overwhelming.

While the statements that hiring decisions were "political" and that Ms. Rufin had "burned her bridges" and would never be considered for any future management positions at Seattle City Light alone establish there is a genuine issue of material fact, additional circumstantial evidence confirms that the facts must be determined by the jury.

3. After The Second Interview, Ms. Rufin Was The Clear Top Candidate For The CMEM Position And Advanced To The Qualifications Audit Stage, Yet Was Not Hired.

Every single rater and panelist who reviewed Ms. Rufin's credentials and interviewed her gave her a "high" rating—*until* Mr. Carrasco's direct report, Steve Kern, participated in the hiring process. *See* CP 1140-43; Ex. 1 (SA 2-4); Ex. 2 (SA 6-8); CP2280-82. That included six resume raters and six interview panelists—a total of twelve people—including the manager who later told Ms. Rufin the decision to not hire her was "*political*." *Id.*, CP 2103, 2027. No other candidate received the same unanimous support. *See* CP 1140-43; Ex. 1 (SA 2-4); Ex. 2 (SA 6-8); CP2280-82.

After the second interview, Rufin advanced to the "qualification audit" stage, indicating the second interview panel identified her as the top candidate and recommended her for hire. CP 2267-69; 2285; 2064; 2304.

"In 2011, it was typical to have [just] two interviews." CP 2265. Mr. Haynes admits he did not plan to have a third interview in the 2011 hiring process and decided to do so only after the second interview was complete (and Ms. Rufin was the top candidate). CP 2050. Haynes' claimed reason for requiring the third interview—to address "leadership capacity," as opposed to "technical" matters, CP 2051—is not credible. The second interview questions *were* about leadership, SA 50-52; and Haynes helped draft and approved the second interview's questions about leadership that he later claimed were inadequate. CP 2052; CP 1975-76.

The reasonable inference is that Mr. Haynes made a decision to hire Ms. Rufin, which led to a qualification audit, before Mr. Kern, at Mr. Carrasco's direction, intervened and a third interview was set. When the third interview was held, Mr. Haynes reversed the ratings he previously gave to Ms. Rufin and Mr. McLean. *Compare* CP 2280 and 2290; *see* CP 2053. He gave Ms. Rufin her *first* "medium" rating, elevated Mr. McLean to "high," and offered McLean the job. *Id.*; CP 2054. When asked about what specific concerns there were with Rufin, Haynes testified only that "I had a *sense* about her and the others," CP 2051 (19:18-23); and "did not

get the sense [Rufin] and [Kern] would work well together, and [Kern] told me he did not think they would work well together." CP 1135. *Compare* Scrivener, 334 P.3d at 547 (holding issue of fact existed as to pretext, in case where employer offered "vague" and "ambiguous reasons" that "other candidates were clearly qualified and 'best fit'"). "[T]he absence of objective hiring criteria [can] provide[] a ready mechanism for discrimination." Domingo v. New England Fish Co., 727 F.2d 1429, 1436 (9th Cir. 1984).

When Mr. McLean declined the job, Mr. Haynes (who reports to Mr. Kern, who reports directly to Mr. Carrasco, CP 2048, 2052) let the position remain vacant for two years instead of hiring Ms. Rufin who was highly rated all along. CP 2054. And in 2012, Rufin was considered by three more resume raters. They too unanimously rated her "high." CP 1312-16 (SA 69-71). But Haynes removed her from contention, allowing one man who was rated the same as Rufin and several rated lower, but who had not engaged in protected activity, to advance. Such evidence of Ms. Rufin's "superior qualifications" to other candidates permitted to advance in the selection process may alone suffice to show pretext. *See* Dumont v. City of Seattle, 148 Wn. App. at 869; *see also* Scrivener, _Wn.2d_, 234 P.3d at 547.

4. Ms. Rufin Was A Top Candidate for the LPSM Position and Was Again Removed From Consideration When Mr. Carrasco's Direct Report Intervened.

In December 2011, Ms. Rufin applied for the LPSM job. CP 2311. There were 22 applicants, and Rufin was one of only five whose resume was unanimously rated "high." SA 54-55. She performed very well in the first interview round and again received "high" ratings from all four interview panelists. CP 1300-06. Two other interviewees also received "high" ratings, and the Hiring Status Report explicitly records that the panel "unanimously recommended *three* candidates for 2nd inter[view]," with Mr. Phil West, a direct report to Carrasco. CP 2303, 1120.

However, this decision was reversed and Ms. Rufin was taken out of the running. *Id*. There was no business reason to limit the second round to two. CP 2029. The reason for the change documented in the Hiring Status Report at the time states: "Two decided for 2nd interview ***due to their technical expertise and familiarity with CL*** [***City Light***] [***Projects***]." CP 1120, 2303 (¶ 4). The City's Personnel Specialist who wrote this note testifies that the explanation was given to her by the hiring manager, Mr. Cola. CP 2303 (¶ 5). Mr. Cola admits that this statement, the only documented reason for Ms. Rufin's non-selection, is not true. CP 1124 (¶ 8). Notes of a panelist also undermine the documented reason, identifying Rufin as "very good technical—SCL background." CP 1302.

> [T]he trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'

Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 184, 23 P.3d 440 (2001).

In April 2012, Mr. Cola met with Ms. Rufin and provided her another explanation for her non-selection, telling her the "deciding factor" was her lack of experience in the disciplinary process. CP 2312. No such factor was documented in the panelists' notes, the Hiring Status Report, or any of the panelist declarations. *See* CP 1300-06, CP 1120; CP 1126-27; CP 1061-64. An employer's "lack of documentation … may be circumstantial evidence that the proffered … justifications were fabricated post hoc." Griffith v. Schnitzer Steel Industries, Inc., 128 Wn. App. 438, 450, 115 P.3d 1065 (2005). It was at the same April 2012 meeting that Cola told Ms. Rufin that the City's failure to hire her for the CMEM job was "political." CP 2103, 2027. In his declaration on summary judgment, Cola submitted an entirely different, undocumented basis for not advancing Ms. Rufin in the LPSM hiring process, stating vaguely that although "Rufin was a strong candidate, … there were some concerns about the lack of detail in her responses to some of the questions." CP 1124. Among the three other panelists who submitted declarations in "support" of Defendants' motions for summary judgment, only one

(Enright) even attempts to explain why Rufin did not advance, stating that the other two candidates discussed "many more examples of relevant work experience." *See* CP 1127 and 1061-64. This justification is vague and not contained in any contemporaneous writing. To the contrary, Enright's contemporaneous note about Ms. Rufin states "Very good technical—SCL background." CP 1302.

Where, as here, the employer's explanation changes with time, or there are "conflicting reasons or evidence rebutting their accuracy or believability," such inconsistencies create competing inferences that cannot be resolved at summary judgment. Renz, 114 Wn. App. at 624; Dumont, 148 Wn. App. at 869. Such evidence must also be considered "cumulatively," with the "record taken as a whole," showing a pattern of irregularities that further support an inference of unlawful motivation.

F. The Trial Court Erred In Excluding From Trial The Facts Of A "Pattern" In Non-Hiring Of Ms. Rufin In 2011 And 2012.

The standard of review for evidentiary rulings is abuse of discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). A trial court abuses its discretion when discretion is exercised on untenable grounds or for untenable reasons. Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 572, 719 P.2d 569 (1986). Facts that tend to establish a party's theory or disprove an opponent's evidence are relevant and should be admitted. Fenimore v. Donald M. Drake Constr. Co., 87

Wn.2d 85, 89, 549 P.2d 483 (1976). Excluding evidence that prevents a party from presenting a crucial element of its case constitutes reversible error. *See* Grigsby v. City of Seattle, 12 Wn. App. 453, 457, 529 P.2d 1167 (1975).

Evidence of other wrongs or prior bad acts is admissible as proof of motive or intent. ER 404(b). The Washington Supreme Court has held that evidence that an employer retaliated against other employees is admissible to show motive or intent. Brundridge v. Fluor Federal Services, Inc., 164 Wn.2d 432, 445-46, 191 P.3d 879 (2008). The Court also suggested that "the preponderance standard for [prior acts] testimony may be too stringent in the civil context, where the ultimate standard itself is preponderance." *Id.*, at 448. Evidence of time-barred prior discriminatory acts may similarly be used as relevant evidence where another discriminatory act is at issue. *See* Loeffelholz v. Univ. of Washington, 175 Wn.2d 264, 274, 285 P.3d 854 (2012) (recognizing that an employee may use unrecoverable prior acts as "background evidence" in support of a timely claim). A plaintiff may also use statistical or "pattern" evidence—relating to other promotional decisions—to show pretext. *See*, *e.g.*, Dumont, 148 Wn. App. 850, 868 (2009) (explaining "[w]hen combined with the fact that Chief Morris never promoted a non-minority person out of order based on their greater experience, this fact constitutes evidence

from which a jury could conclude that minority status was the actual reason for Chief Morris's out-of-order promotion[.]"); Diaz, 752 F.2d at 1363 (a "discriminatory pattern in an employer's hiring or promotion practices ... is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue.").

In the trial of her retaliation claim for non-hiring into the CMEM position, the Court granted Defendants' motion in limine and ordered that, "Plaintiff may not present evidence that Defendants' failure to hire her to the LPSM position was retaliation." CP3519. The result of this ruling meant Plaintiff could not present any testimony or evidence about the facts of what happened to her during the contemporaneous LPSM hiring process. *See* RP (Mar. 27, 2014), at 46-47, 80-82; RP (Apr. 3, 2014) at 64; RP (Apr. 7, 2014) at 63).

Ms. Rufin was substantially prejudiced in not being allowed to present to the jury facts and evidence that showed similar instances of irregularities and inconsistencies in the City's non-hiring of her for the LPSM job, during the same time period in which she was told that she had "burned her bridges" and would never be considered for any future management positions at Seattle City Light, and contemporaneous with the City's refusal to hire her for the CMEM position. These similar bad

acts are circumstantial evidence of Defendants' intent that are supportive of one another. The jury should have been allowed the opportunity to conduct "a searching inquiry … upon a full record." Chuang, 225 F.3d at 1124.

G. The Trial Court Erred In Admitting Into Evidence the Outcome of City's Internal Investigation of the Tobin Complaint and the Outcome of the *Davis* Litigation, While Excluding Most of the Evidence Underlying Those Matters.

Prior to trial, the City filed a motion to exclude evidence of "unrelated claims," which the trial granted in part. Over Ms. Rufin's objection, the trial court limited testimony from her former colleague at Seattle City Light, Betty Tobin, to testimony "about competing for the PSAMD position, that [Tobin] thought she was passed over because of her gender, that she complained of gender discrimination, that her complaint was investigated and that she participated in that investigation, and that the investigation concluded that no discrimination had occurred" and excluded testimony from Ms. Tobin "about any purported retaliation against her in 2006 after the conclusion of the investigation" and evidence of her settlement with the City. CP 3518-19 (¶ 16.a.). The Court also denied Plaintiff's motion in limine to exclude evidence of the City's investigative conclusion and allowed Defendants to admit evidence that "the 2006 investigation found no discrimination by Mr. Carrasco." CP 3517 (¶ 9). And the Court excluded from evidence Plaintiff's 4-page single-spaced

written statement that she provided to the City during its investigation in which she reported gender discrimination. CP 3516-17 (¶ 7). Similarly, over Plaintiff's objection,[11] the Court admitted the outcome of the Wanda Davis litigation against the City of Seattle and Carrasco, while it excluded all testimony from Ms. Davis herself.[12] The investigator's conclusion and Judge Zilly's order granting at summary judgment were irrelevant.

Mr. Carrasco in his testimony specifically denied knowing that Ms. Rufin had made allegations of gender discrimination against him in 2006 and denied having seen Ms. Rufin's written statement in the Tobin matter. RP (Apr. 7, 2014), at 70:10-24, 72:24-73:4, 82:17-19. He similarly denied being aware that Ms. Rufin had testified in the Davis matter, in which he was a named Defendant. RP (Apr. 7, 2014), at 81:24-82:6.

In both the Tobin investigation and the Davis litigation, there was at least, implicitly, a finding that gender was not a substantial factor in those claims, but those two legal conclusions do not provide the jury with "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. To inject those findings into a retaliation case, without allowing plaintiff to present

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[11] RP (Apr. 9, 2014), at 22:11-15.

[12] *See* CP 3519 (¶ 16.b.). Although the Court initially excluded "[e]vidence regarding the outcome of Ms. Davis's lawsuit," CP 3518 (¶ 9) *and* CP 3519 (¶ 16.b.), it later reversed that ruling and permitted a City attorney to testify that the Davis lawsuit was dismissed. RP (Apr. 9, 2014), 17:5-16, 107:19-109:17.

evidence to oppose those findings, created the impression that the underlying rulings were relevant—without explaining the differing legal standards. ER 402, 403. This mixing of legal standards and conclusions, when only the conclusions were brought to the attention of the jury, and important facts that would have given a balance to the presentation were omitted over objection, created confusion and prejudice. ER 402, 403.

These decisions of the trial court to admit evidence of the outcome of the City's internal Tobin investigation and the Davis litigation, while excluding evidence of the underlying facts and the written form of Ms. Rufin's protected activity, was an error in law, an abuse of discretion, and prevented Ms. Rufin from having a fair trial. The outcome of the City's investigation was highly prejudicial to the Plaintiff, especially in light of the fact that her hands were tied by the Court's other rulings to exclude evidence that could show that the City's investigation, by an attorney paid by the City, was one-sided and did not uncover the truth. Although Ms. Rufin was not required to show that the City actually discriminated against her in 2006 and the years prior, she was required to show that that she had an objectively reasonable belief that gender discrimination occurred. Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 852, 292 P.3d 779 (2013), *citing* Ellis v. City of Seattle, 142 Wn.2d 450, 460-61, 13 P.3d 1065 (2000). While the City conceded that she engaged in protected activity, the

evidence underlying her report of discrimination was highly relevant to her credibility and to Carrasco's motivation to retaliate against her.

For these reasons, the Court should have excluded the outcomes of the Tobin investigation and Davis litigation under ER 403, or the Court should have permitted Plaintiff to present evidence of the facts underlying those disputes and the details of Plaintiff's involvement and the documents containing her opposition activity. Instead, the jury was provided only a summary of Plaintiff's 2006 report of gender discrimination from Plaintiff herself, and the fact that the City's attorney-investigator concluded there was no gender discrimination. The jury was provided no information about the allegations made by Ms. Davis or the evidence supporting her allegations, and only a summary of Plaintiff's 2007 testimony (a summary of her 2006 report of gender discrimination), and the fact that the lawsuit was dismissed. In summary, the jury was not fully informed about the basis for the two disputes that were core to this case, while the defense was permitted to inform the jury that it determined that there was no discrimination in the Tobin dispute and a judge dismissed the Davis lawsuit. While no trier of fact has determined whether Carrasco discriminated against Rufin in 2004-2006, it is very likely that the jury was led to believe that there had been a determination against her.

V. ATTORNEY FEES AND COSTS

Recognizing that the case will have to be re-tried assuming remand, appellant respectfully requests that attorney fees for this appeal be awarded at that time, and that costs of this appeal be awarded in accordance with the Rules of Appellate Procedure.

VI. CONCLUSION

For all of the foregoing reasons, summary judgment should be reversed as to the LPSM retaliation claim and this case should be remanded for a new trial on Ms. Rufin's claims for retaliation with respect to the non-hiring for both the CMEM and LPSM positions.

RESPECTFULLY SUBMITTED this 15th day of December, 2014.

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DECLARATION OF SERVICE

Patti Lane states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by the Sheridan Law Firm, P.S., and I make this declaration based on my personal knowledge and belief.

2. On December 15, 2014, I caused to be delivered via ABC Legal:

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David Bruce / Ryan Solomon
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Seattle, WA 98101

a copy of BRIEF OF APPELLANT.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of December, 2014 at Seattle, King County, Washington.

s/Patti Lane
Patti Lane
Legal Assistant