No. 46602-3-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CSILLA MUHL

Appellant,

v.

DAVIES PEARSON, P.C.

Respondent.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

Appellant Csilla Muhl ("Muhl") commenced the underlying suit against her former employer, Davies Pearson, P.C. ("Davies"), in Pierce County Superior Court by filing her Complaint on March 29, 2013. (CP 1-6). The Complaint alleged numerous species of discrimination arising from her employment with Davies. (CP 1-6). Muhl also alleged breach of contract and promissory estoppel. (CP 5).

Davies made two motions for summary judgment, both granted in their entirety. Only the second motion is the subject of Muhl's appeal. The second motion for summary judgment resulted in the dismissal of all Muhl's remaining claims, specifically her claims of 1) discrimination on the basis of sex, 2) discrimination on the basis of age, 3) discrimination on the basis of age-plus-sex, 4) hostile work environment because of sex, 5) retaliation in violation of RCW 49.60.210 and RCW 49.46.100(2), and 6) discrimination in compensation pursuant to RCW 49.60.180(3). (CP 1-6, CP 12).

Of the six claims dismissed on Davies' second motion for summary judgment, Muhl only appears to assign error to the dismissal of two claims: 1) discrimination on the basis of sex and 2) retaliation. (Brief of Appellant pg. 1; CP 660-62). Muhl also assigns error to the decision to disallow the testimony of Muhl's expert and avers that the oral argument

on summary judgment was unfairly conducted by the trial judge. (CP 665-71).

II. STATEMENT OF THE ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Was barring Dr. Barnett from testifying at trial appropriate where Dr. Barnett was disclosed more than six months after the disclosure of witness deadline and evidentiary issues are evident from her report?

2. Is striking Dr. Barnett from testifying moot where the summary judgment was appropriately granted and the order striking Dr. Barnett's testimony from being considered in opposition to summary judgment is not identified as an assignment of error or briefed? (Brief of Appellant at pg. 1) (CP 449-68).

3. Was summary judgment appropriately granted where Muhl failed to make out a prima facie case for sex discrimination or retaliation?

4. Was summary judgment appropriately granted where, even if Muhl could be said to have made out a prima facie case, it is apparent that Davies set forth legitimate reasons for its decision to terminate Muhl and where Muhl failed to set forth an issue of genuine fact that the legitimate reasons offered were pretext.

5. Did the trial judge's conduct reflect an absence of fairness?

III. ARGUMENT

Muhl only assigns error to the dismissal of some of her claims on summary judgment. Based on Muhl's briefing, it is apparent that Muhl is not challenging the dismissal of her hostile work environment, wage, and age discrimination claims; only the evidence relevant to those claims Muhl has assigned error to will be outlined in this brief.

A. Factual Background.

Muhl began working for Davies in 2006 in the firm's family law department. At the time of Muhl's hire, she had approximately eleven to twelve years of experience as a private practice attorney in Washington. (CP 177). During the bulk of Muhl's years at Davies, the family law department consisted solely of female attorneys over the age of forty. (CP 144). This did not change until the hire of Mark Nelson ("Nelson") (a male also over the age of forty) in January 2011. (CP 144, 496). The decision to terminate Muhl was not made until September 13, 2012, more than eighteen months after Nelson's hire. (CP 142). Although there were numerous deficiencies identified in Muhl's performance throughout her tenure at Davies, the decision to terminate Muhl was brought to a head by her failure to appear at a contempt hearing where she was counsel of record. (CP 71, 312-14). This incident was preceded by other issues with Muhl's performance and Muhl's own expression of her desire to

"transition out" of Davies. (CP 54-59, 61-63, 71, 86, 144-46, 151, 153-54, 156-57, 168, 170).

1. Muhl Was Not Replaced.

Muhl contends that she was replaced by attorney Nelson. Nelson was hired on January 18, 2011. (CP 496). Muhl's separation occurred in September 2012, with her last day of work occurring at the end of November 2012. (CP 142, 495). Consequently, the two practiced simultaneously for more than twenty months. Since Nelson's hire, he has consistently practiced in both family law and criminal law. (CP 538-39). Nelson has also helped where needed performing work on appeals, transaction matters, immigration cases, and the like. (CP 538). When Nelson's employment commenced, he was closely monitored and did not initially take lead on cases due to his lack of experience in family law. (CP 54, 497). Contrastingly, Muhl was hired with approximately eleven years' experience and was expected to work without the type of supervision required of a newer attorney. (CP 176-77). Nelson's first year with Davies was 2011; in 2011, he produced $132,042, while Muhl produced $329,360 in the same year. (CP 131). This demonstrates that there was ample work for an additional family law attorney. (CP 131). As these receipts demonstrate, and Muhl concedes, she remained busy after Nelson's hire. (CP 131, 237, 308). Muhl argues that intra-firm referrals

went to other female attorneys in the family law department as well as to Nelson. However, when deposed, Muhl testified that she did not know who received intra-firm referrals in the family law department. (CP 236). Ultimately, Muhl's own receipts demonstrate that Muhl remained busy after Nelson's hire and Nelson did not receive the "vast majority" of intra-firm referrals after his hire. (CP 3, 131).

2. Muhl's Performance Deficiencies Were Discussed With Her Repeatedly.

Muhl admits that she was made aware of issues with her performance. (CP 306). For example, when deposed, Muhl admitted that her issues with inefficient use of time, lack of focus, portraying a calm demeanor, and billing practices were all discussed with her repeatedly during her employment. (CP 65, 67, 76, 565-67). Muhl's own declaration in opposition to summary judgment recalls such discussions with Susan Caulkins ("Caulkins") and also with Ronald Coleman ("Coleman"), who was Muhl's assigned mentor at the time. (CP 306, 310). Specifically, Muhl's notes from October 2011, November 2011 and June 2012 meetings with Coleman reflect Coleman addressing Muhl's performance issues pertaining to collections, inefficient use of staff time, and lack of self-confidence. (CP 276, 337).

Muhl also does not deny that, among other performance deficiencies, three significant incidents with her performance actually occurred. (CP 145, 151-54, 170, 227, 565-66). The first of these incidents was Muhl's loss of her composure in front of a client and Davies' staff on the morning of a pending trial. (CP 312, 56-57). This was apparently triggered by the trial court judge's refusal to grant Muhl's requested trial continuance on the morning of trial. (CP 312, 56-57). Caulkins, who witnessed this event, reported that Muhl stated to the client that she was, "not ready for trial" and that the client became sufficiently agitated by Muhl's conduct that the client requested another attorney handle the trial. (CP 56-57). At the conclusion of the bifurcated trial, Caulkins provided Muhl with a detailed written critique of Muhl's conduct at the trial and relative to the partially denied motion for a continuance in a memorandum dated March 2011. (CP 61-63). Caulkins also discussed the issues pertaining to Muhl's conduct at trial with Muhl in person. (CP 61-63). Caulkins' critique also reiterated many of the issues previously brought to Muhl's attention regarding time management, lack of focus, and portraying a calm demeanor. (CP 62-63). Muhl admits that she received this and had a conversation with Caulkins regarding her performance, but Muhl states that she disregarded Caulkins' input because she regarded her as a peer without supervisory authority. (CP 306, 565-66).

Despite Muhl's assertion that she discounted Caulkins' input, it is evident that these same topics had been addressed with Muhl by Muhl's former mentors Anne Peck ("Peck" f/k/a Meath) and Jim Tomlinson ("Tomlinson"). (CP 143-47, 151, 153-54, 155-57). Further, Muhl concedes these same topics were addressed again by Coleman in their conversations. (CP 309-10). Though Muhl criticizes Coleman's manner in communicating, she also admits that she never discussed or observed another associate interacting with his or her mentor. (CP 212-13). In any event, this would not entitle Muhl to disregard Coleman's comments.

An additional incident involved a letter from Pierce County Superior Court Judge Hickman to Muhl questioning her conduct at trial. (CP 273, 313). Though the firm provided significant assistance to Muhl in responding to Judge's Hickman's letter, the shareholders found the incident troubling. Though hopeful matters would improve subsequent to this incident, the shareholders were uniformly troubled by a Pierce County judge taking the initiative to write a letter regarding an attorney's performance at trial. (CP 273).

Subsequently, Muhl failed to appear at a contempt hearing where no notice of withdrawal was filed. (CP 313-14). Muhl now contends that the client had directed her not to appear because he could not afford to pay her for her appearance. (CP 579, 313-14). However, her declaration,

executed under penalty of perjury, represented to the court that she would not be attending the client's contempt hearing in part because the hearing conflicted with Muhl's personal calendar. (CP 520). In addition, Muhl filed a substantive response addressing the contents of the contempt hearing, despite her assertion that she was terminated previously. (CP 518-20). Muhl concedes that she did not request another attorney in the family law department attend the contempt hearing with the client. (CP 580).

Fortunately, Caulkins learned from her review of the Pierce County Superior Court's docket that one of the firm's clients was attending a contempt hearing without counsel. (CP 57). Caulkins confirmed with the firm's family law staff that Muhl was not planning on attending the hearing, as a result Caulkins immediately went to the courthouse to attend the hearing on Muhl's behalf. (CP 58). Caulkins testified that the client welcomed Caulkins' appearance and participation in the hearing. (CP 58, 579, 587). Muhl testified that Caulkins spoke with Muhl following the hearing and conveyed that she was angry with Muhl's handling of the incident, specifically contending that a representative needed to be present when no notice of withdrawal was filed or effective. (CP 579-80).

Regardless of the instructions from the client, Davies' representatives uniformly testified that they believed attendance was required where a notice of withdrawal was not filed or yet effective. (CP 58). Caulkins also clearly testified that the client welcomed Caulkins' attendance at the hearing and permitted her to speak on his behalf. (CP 587). Muhl does not deny that these incidents occurred, but rather, contends that her employer should not have been troubled by them. (CP 313-14). When asked in her deposition why she failed to reference the client's instructions in pleadings submitted to the Court, Muhl replied that she did not know. (CP 581).

Davies' shareholders repeatedly testified that they found these incidents concerning, regardless of the views of the bench or the client. (CP 544, 556). This result in the shareholders' decision to terminate Muhl. (CP 544).

In addition to the issues brought to Muhl's attention by her peers and mentors, Davies' office manager, Angela Cooper ("Cooper"), also testified to repeated, consistent complaints from numerous support staff members assigned to work with Muhl. (CP 85-87). Cooper consistently reported these issues to Davies' shareholders and board. (CP 85-87, 527). Muhl attempts to distance herself from these issues by complaining that complaints were not distilled into a warning letter, reprimand, or

performance improvement plan. (CP 306). However, Muhl offers no evidence that Davies had a practice of using such tools. Muhl herself testified when deposed she was not aware of a single attorney receiving such a document in the entire time she worked for Davies. (CP 566-68). Consequently, while Muhl is critical of Davies' handling of her performance issues, there is no dispute that performance issues occurred and were discussed with Muhl. There is also no evidence that more favorable disciplinary measures were utilized with any other attorney at all, let alone one facing comparable issues.

3. Muhl Was Not Treated Differently; She also Fails to Identify a Comparator.

Muhl makes many allegations that she was treated differently than other attorneys. However, Muhl's version of events is demonstrably inaccurate and is not based on actual personal knowledge. For example, Muhl repeatedly shrouds her lack of actual knowledge by stating that it "appears" that males were disciplined differently. (CP 314). Muhl relies on such incidents as one allegedly involving Andrew Buffington which occurred on October 2, 2012, *approximately one month* after Muhl was told to transition out. (CP 314). Muhl admits that she was not familiar with other mentees' relationships with their mentors, including Coleman, and did not observe interactions between other attorneys and their mentors

at all. (CP 213-15, 569). Muhl also complains of an erroneously entered divorce decree, but fails to reveal that the alleged incident involving Nelson was predicated on her *own* erroneous instructions to Nelson. (CP 540). This is evidenced by Nelson's testimony and Muhl's own email to Nelson. (CP 540). In addition, Davies' shareholders only became aware of Nelson's role in this error in the context of this litigation; consequently, the firm did not "fail to discipline" Nelson, but rather, did not have a contemporaneous opportunity to address the incident-only learning about the December 2012 incident in June 2014. (CP 231, 548, 552).

Muhl also complains of Davies' bonuses as an incident of different treatment. Davies' bonus program eligibility at the time Muhl was employed by Davies was based on meeting a billable hours threshold; if an attorney meets the hours threshold, he or she is entitled to a bonus even if his or her receipts fell short of the attorney's goal. (CP 133, 134). Despite not meeting the hours threshold during the entire period of her employment, Muhl received several bonuses during her years with Davies, including one for $10,000 in 2011; this demonstrates *better* treatment of Muhl compared with other associates. (CP 136, 206, 572). These facts are unrefuted and Muhl admits that she did not meet her hourly billing requirements in any year she was employed by Davies. (CP 206).

Contrary to these objective facts, Muhl offers only speculation and argument regarding her economic performance. Yet, when questioned, Muhl testified that 1) she did not know what other associates were paid or the nature of their economic performance, 2) she did not take into account that she was able to charge a higher hourly rate than other associate attorneys due to her years of practice, 3) she based her calculations on inaccurate[1] associate averages, and 4) she based her revenue calculations for herself by giving herself credit for a 100% collection rate of outstanding receivables, which she then included in actual receipts before comparing her "number" with the "average" associate performance. (CP 206-09, 238-40). Finally, it is worth noting that Davies has never contended that the decision to terminate Muhl was motivated by her economic performance. Rather, such issues were addressed due to Muhl's repeated assertions that her performance was consistently superior to that of the "average" associate and relative to her 2010 pay decrease[2]. (CP 308-09).

Muhl broadly and repeatedly contends throughout her briefing that she had favorable performance during her time at Davies, but was treated

[1] Muhl compared herself favorably to the "average" associate, failing to recognize that such reports necessarily depress "average" performance due to attorneys commencing work mid-year and thereby providing less than a full year of performance and substantially reducing the overall "average."

[2] As Muhl has not appealed dismissal of her untimely claims relating to the reduction of her pay, a, detailed analysis of Muhl's economic performance as related to her January 2010 pay decrease is not discussed in detail.

unfavorably. Muhl does not rely on deposition testimony, contemporaneous communications from her mentors, or any other admissible evidence. Rather, she relies upon her own summary judgment opposition brief (which is not actual testimony), and her own self-serving declaration, which simply contradicts her own prior deposition testimony. (See e.g. Brief of Appellant at pg. 4). However, even in Muhl's own declaration, she notes that performance deficiencies were brought to her attention by Caulkins and Coleman. (CP 306, 310). She offers no evidence of other attorneys' treatment under similar circumstances. Muhl baselessly avers that Davies, "typically followed a practice of written disciplinary notifications." (Brief of Appellant). However, this citation is to Muhl's legal argument, not testimony; the evidence before the trial court reflects Muhl's own admissions that she received negative feedback both in writing and orally. (CP 65, 67, 565-67, 76, 306).

Muhl repeatedly distorts her economic performance. The records show Muhl repeatedly fell short of her own financial goals. Despite this fact, Muhl was, for several years, the most highly paid associate. (CP 81-82, 131). Muhl started at Davies with more than ten years of experience. Accordingly, she was able to command a higher hourly rate. (CP 179-80, 209). Muhl now attributes her economic performance to discrimination; however, during her tenure at Davies, and even afterward, Muhl

repeatedly asserted that the downturn in the economy negatively impacted her receipts. (CP 159-67, 81, 307). Muhl's proffered evidence, in the form of self-serving statements, is contrary to the objective facts and her own testimony. It does not demonstrate that Muhl was treated differently than any comparable employee.

4. Muhl Proposed Transitioning Out of Davies and Muhl Requested Her Departure be Characterized as Termination After Consideration of Alternatives.

Muhl contends that she was terminated as a consequence of a complaint she alleges was made to Coleman in November 2011. (CP 310). In Muhl's recent version of events, she fails to mention that Muhl herself repeatedly brought up leaving Davies in December 2011 and in June 2012. (CP 70-71). Muhl's notes from a December 21, 2011 meeting state, "What is firm prepared to do for transition out [?]" (CP 275-76). Muhl testified that this was an item she wished to discuss with Coleman and it was actually discussed between them in their December 2011 meeting. (CP 231-33). Muhl's contemporaneous notes from this meeting also reflect that Muhl initiated a discussion with Coleman regarding her transitioning out of Davies. (CP 231-33).

Muhl also alleges as evidence of discrimination that she was not given the opportunity to resign as, she contends, other males were.

However, Muhl's own testimony under oath regarding announcing her departure was:

> [Coleman] said we could announce my transition to the rest of the firm three different ways. We could let everyone know that I decided to move on; the second option was that we'd been working on this decision mutually and agree that I will leave the firm; and a third option was to announce that the firm asked me to leave by November 30th.

(CP 559-60, 495). In order to bolster Muhl's claims, she simply ignores her prior unequivocal testimony. This same testimony is also reflected in Muhl's contemporaneous notes from her September 28, 2012 meeting outlining options for announcing her departure. (CP 561). In addition to Muhl's notes, Davies also provided evidence of a contemporaneous email to all shareholders asking they remain quiet about the decision to terminate Muhl until Muhl decided how she wanted to handle announcing her departure. (CP 142). Consistent with this is Muhl's own testimony, in which she admits that she was the one who decided to characterize her departure as a termination. (CP 561). Muhl also avers that she is the sole attorney characterized as a termination in Davies' discovery responses. The document Muhl references was clearly created after the commencement of litigation, as the undersigned counsel is identified as the contact for all existing Davies' employees. (CP 1-5, 358). Muhl apparently fails to take into consideration that some "resignations" may

have been immediate resignations in lieu of termination, as was offered to Muhl. Muhl also admits that she does not know of a single person anyone at Davies spoke to regarding her departure from the firm. (CP 564). Finally, the attorney Muhl seeks to compare herself to favorably was the subject of an immediate announcement to associates that put the circumstances of his abrupt departure in an unfavorable light. (CP 497). Unlike Muhl, the male attorney was not given an opportunity to transition out of the firm or to decide how his departure would be announced to the firm. (CP 497).

5. Muhl's Alleged Statements Regarding the Firm's Demographics Occurred More than Nine Months Prior, Did Not Result in Retaliation and Were Not Known to Decision Makers.

Muhl's alleged complaint to Coleman regarding the firm's demographics preceded the decision to terminate her by more than nine months. (CP 493, 495). Ultimately, the decision to terminate Muhl was brought to a head by Muhl's failure to appear at the contempt hearing in September 2012. (CP 579-80, 587). Though Muhl now contends she was fired by the client, no notice of withdrawal was filed prior to the contempt proceeding. (CP 580). It is also undisputed that Caulkins' presence was welcomed by the client at the contempt hearing. (CP 57-58). Even if she were fired by the client, Davies' shareholders repeatedly testified that they

were critical of Muhl's failure to appear where she was still counsel of record in a matter. (CP 534, 543-44, 551-52, 555-56).

Muhl also contends that she was subsequently removed from the partnership track as result of her alleged complaints. Muhl contends that the first she learned that she was not on partner track was June 2012. (CP 311). Again, however, Muhl's contemporaneous notes from December 2011 show this topic was discussed months previously in response to her inquiry about her partnership prospects. (CP 276).

Approximately one month after Muhl's alleged complaint to Coleman, Muhl received a $10,000 bonus, despite once again missing the incentive plan's hours threshold. (CP 234, 572). The two males Muhl identifies as receiving bonuses in 2012 both exceeded the billable hours threshold. (CP 492-93). Accordingly, they were paid bonuses they had earned, as set forth in the firm's written incentive plan.

Coleman testified that he did not perceive Muhl's recitation of Davies' demographics to be a complaint of the existing firm structure or its treatment of women and, therefore, did not share the details of the conversation with Davies' other shareholders or firm administrator. (CP 69). As such, Coleman's motives, even if they could be shown to be retaliatory, cannot have influenced other shareholders. In addition, it is clear that Caulkins was the source of the information regarding the

contempt motion prompting consideration of Muhl's future at the firm. (CP 57-59). Caulkins testified that she shared information regarding Muhl's performance with Tomlinson and Coleman. (CP 57-59). Notably, Coleman also participated in the decision to hire Muhl in 2006. (CP 70). Finally, at the same time Muhl contends that she was the victim of discrimination on the basis of sex, both Caulkins and Rebecca Larson ("Larson"), also females over the age of forty, had already been repeatedly invited to consider becoming shareholders. (CP 53, 123-24, 127).

B. Facts Relevant to the Exclusion of Dr. Barnett's Opinion.

In opposition to Davies' second motion for summary judgment, Muhl submitted the report of Dr. Barnett. (CP 369-81). The witness disclosure deadline in the case was December 20, 2013. (CP 450). Dr. Barnett was disclosed on June 16, 2014, almost six months after the deadline. (CP 450). The content of Dr. Barnett's opinion was not disclosed to Davies until her report was actually provided to counsel on July 24, 2014, a full month after Davies had filed its second motion for summary judgment. (CP 453).

Muhl contends she did not become aware of Dr. Barnett's existence until April 2014. (CP 588). Assuming this is relevant, Muhl admits that the book that captured her attention was published in October 2013, two months prior to the required witness disclosure in December

2013. (CP 588). Davies moved to exclude the report of Dr. Barnett from consideration at summary judgment based on numerous other deficiencies in Dr. Barnett's report, including non-conformity with the local rules, applicable statutes, the rules of evidence, and case law. (CP 449-86). Based on Muhl's briefing, it does not appear that the decision to exclude Dr. Barnett's testimony from consideration on summary judgment is challenged, but solely the trial court's order from the bench prohibiting Dr. Barnett from testifying at trial. (Brief of Appellant pg. 1). Ultimately, the Court also excluded Dr. Barnett's testimony from consideration as part of summary judgment. (CP 663-64). In addition to the specific relief sought by Davies, during oral argument the judge also ruled that Dr. Barnett was prohibited from testifying at trial due to her late disclosure among other issues with the actual content of her testimony. (RP August 8, 2014 pgs. 9-10).

Muhl's disclosure was nearly six months beyond the deadline in the case schedule and the content of Dr. Barnett's opinion was not disclosed for another month. (CP 450, 453). Although Muhl had requested an extension of the time to conduct discovery, specifically depositions of Davies' employees, no other extension of deadlines was requested by counsel or addressed in the trial Court's order. (CP 83-84). As submitted on summary judgment, Dr. Barnett's report was not signed

or sworn under penalty of perjury. Rather, it was merely attached to the declaration of Muhl's counsel. (CP 368-81).

The substance of the report was also problematic. Dr. Barnett did not personally observe any of the interactions in Davies' offices. According to her own report, she reviewed only a fraction of the depositions taken in the case, excluding a number of depositions conducted of shareholders who actually participated in the decision to terminate Muhl. (CP 369-81, 460). Dr. Barnett also repeatedly averred that Davies should not have had issues with Muhl's performance where clients did not actually complain. (CP 369-81). Yet, no authority was ever offered, for example from a best-practices stand point or from the rules of professional conduct, as to why the existence or absence of client complaints is a necessary factor for termination, particularly in an industry with specialized training which lay clients are rarely in a position to criticize. Further, such opinion explicitly disregards Caulkins' testimony reflecting Muhl's client requesting new counsel on the day of trial. (CP 56). Among these troubling lapses, Dr. Barnett also opined regarding Sok-Khieng Lim's ("Lim") exceptional performance while working at Davies, discounting it because Lim is of Asian heritage. (CP 369-81). Notably, Dr. Barnett opined that Lim "benefited" from her Asian heritage, despite the fact that Lim was not deposed and did not submit a declaration

in the case. In addition, Dr. Barnett did not review any of Lim's billable hour information or receivables. (CP 369-81).

Although the trial Court primarily referenced the timing of the disclosure of Dr. Barnett as an expert witness, numerous bases for her exclusion were brought to the trial Court's attention, any of which provide an appropriate and supplementary basis for the trial Court's ruling. (CP 449-86).

When ruling on the motion, Muhl's counsel queried regarding consideration of the Burnet factors, stating:

> Dolman: [. . .] In the Burnet decision, it says that when the trial court chooses one of the harsher remedies allowable, it must be apparent on the record that the trial court explicitly consider the lesser sanction; and have you done so, Your Honor?
> Court: Well, there is no lesser sanction. I mean, the bottom line is: You disclosed her two weeks before the cutoff, you know. I mean, that isn't sufficient time for someone to go out, hire an expert to review whatever work this other individual did, render an opinion that it's, you know, based on nothing more than speculation; or it's actually go some reality to it. I mean, there really is no other way to deal with this because you didn't bother to get an expert in due diligent time; and you just don't walk out and hire one, you know, two weeks before the cutoff and expect that you're going to have meaningful discovery.
> Dolman: And just so that the record is clear, we disclosed her more than two weeks before the discovery cut-off.
> Court: Towards the middle or end of June. The discovery cutoff was – what was it – the 14th?
> Dolman: The 25th.
> Court: The 11th. The discovery cutoff was originally July 11th. I know it got extended but for other reasons, so I'm striking her as an expert witness.
> [. . .]

> Court: And it also doesn't look like she did any kind of an actual investigation. I mean, she certainly isn't considering any of the stuff that's been filed or has been tossed out there.

(RP August 8, 2014 pgs. 9-10). The substance of Dr. Barnett's actual opinion was not provided until July 24, 2014. (CP 453). Trial was scheduled for September 25, 2014. (Brief of Appellant, Appendix A). This left no time within the remaining case schedule to identify and disclose a rebuttal expert and arrange for necessary depositions without further modification to the case schedule, including the trial date. Though counsel repeatedly indicated that Dr. Barnett was identified before the discovery cut-off, counsel's statements ignored the fact that the witness disclosure deadline for Muhl was December 20, 2013, and the disclosure deadline for Davies' disclosure of rebuttal witnesses was May 2, 2014. (Brief of Appellant, Appendix A). Moreover, as of the date of the hearing, the August 1 deadline for exchange of witness and exhibit lists and documentary exhibits for trial had already passed. Finally, it is clear from the record that the Court also had issues with the admissibility of Dr. Barnett's opinion. (RP August 8, 2014 pgs. 9-10).

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C. Standard of Review.

1. The Standard of Review for Summary Judgment is De Novo.

On summary judgment, the appellate court reviews the motion *de novo*. Davis v. Fred's Appliance, Inc., 171 Wn. App. 348, 287 P.3d 51 (2012). In employment cases, the court engages in a burden shifting analysis:

> The moving party bears the initial burden of showing the absence of a genuine issue of material fact. Once that burden is met, the burden shifts to the party with the burden of proof at trial to make a showing sufficient to establish the existence of an element essential to that party's case. If the claimant fails to meet that burden, the trial court should grant the motion because there can be no genuine issue of material fact given that a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Washington v. Boeing Co., 105 Wn. App. 1, 7, 19 P.3d 1041 (2001) (analyzing Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989)). The court may grant summary judgment when the record conclusively shows some other, nondiscriminatory reasons for the employment decision, or if the plaintiff creates a weak issue of fact as to whether the employer's proffered explanation for its decision is untrue, and abundant and uncontroverted evidence reveals no discrimination. Milligan v. Thompson, 110 Wn. App. 628, 637, 42 P.3d 418 (2002). As demonstrated herein, Muhl cannot establish a *prima facie* case of any

species of discrimination; even if Muhl did so, Davies' basis for its employment decision conclusively reveals no discrimination. Washington courts have repeatedly held that "the courts are ill-equipped to act as super personnel agencies." White v. State, 131 Wn.2d 1, 19-20, 929 P.2d 396 (1997) (quoting White v. State, 78 Wn. App. at 840, 898 P.2d 331 (citing Washington Fed 'n of State Employees v. State Personnel Bd., 29 Wn. App. 818, 820, 630 P.2d 951 (1981)) (Supreme Court granted summary judgment because non-moving party failed to present sufficient *prima facie* case).

2. Summary Judgment Cannot be Overcome Based on Self Serving Assertions Contrary to Prior Testimony.

A non-moving party cannot survive summary judgment merely by offering testimony which contradicts prior unequivocal testimony. CR 56(e). Speculation and argumentative assertions, without more, will not establish genuine issues of material fact. Leonard v. Pierce County, 116 Wn. App. 60, 65-66, 721 P.2d 1 (1986); CR 56(e). Moreover, "[when] a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." Duckworth v. Langland, 95 Wn. App. 1, 7-8, 966 P.2d 1287 (1998) (citing

Marshall v. AC&S Inc., 56 Wn. App. 181, 185, 782 P.2d 1107 (1989)). "An affidavit cannot be used to create an issue of material fact by contradicting deposition testimony." Davis v. Fred's Appliance, Inc., 171 Wn. App. 348, 287 P.3d 51 (2012) analyzing McCormick v. Lake Wash. Sch. Dist., 99 Wn. App. 107, 111, 992 P.2d 511 (1999).

3. The Appellate Court Reviews Sanctions for Discovery Violations and Evidentiary Rulings for Abuse of Discretion.

No error is assigned or briefed regarding the trial Court's order to strike the opinion of Dr. Barnett in opposition to Davies' motion for summary judgment. (See Appellants' Opening Brief; CP 663-64). Rather, the trial Court's decision to bar Dr. Barnett from testifying at trial is assigned error. This ruling is moot if the motion for summary judgment is upheld. Discovery sanctions are reviewed for abuse of discretion. Phillips v. Richmond, 59 Wn.2d 571, 369 P.2d 299 (1962). An appellate court reviews a trial court's evidentiary rulings for abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); Kappelman v. Lutz, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex. Rel. Carrol v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "On appeal, an order maybe sustained on any basis supported by the record." Hadley v. Cowan, 60 Wn. App. 433, 444, 804 P.2d 1271 (1991).

D. Muhl Did Not Establish a *Prima Facie* Case of Any Species of Sex Discrimination.

Muhl's briefing repeatedly blends two species of sex discrimination: disparate treatment and wrongful termination. However, these are separate claims with separate basis for relief. Though neither claim has been successfully articulated, both disparate treatment and wrongful termination will be briefed. On Davies' motion for summary judgment, disparate treatment on the basis of sex was explicitly briefed. (CP 38-41). In its opposition on summary judgment, Muhl merely recited the applicable legal standard for a claim of disparate treatment, analyzing no facts which would support her claim. (CP 293-95). In addition, the statute of limitations was articulated as an additional basis for dismissing Muhl's disparate treatment claim, which was never briefed in Muhl's opposition materials. (CP 285-303). Generally, when responsive briefing identifying facts and/or law is not submitted on an issue, it is regarded as conceded by the responding party. State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005). Muhl does not address any of the factual allegations she previously made from 2010 and in years prior to 2010. Consequently, it appears that she is now arguing that her termination itself was an act of disparate treatment. However postured, these claims were properly dismissed.

1. Muhl Has Not Established that She Was Terminated on the Basis of Sex.

A *prima facie* sex discrimination case requires a plaintiff to show that she 1) is a member of a protected class, 2) was discharged, 3) was doing satisfactory work, and 4) was replaced with a person outside of the protected class. Domingo v. Boeing Employees' Credit Union, 124 Wn. App 71, 80, 98 P.3d 1222 (2004). In Muhl's brief, she misstates the elements set forth in Hill v. BCTI, 144 Wn.2d 172, 23 P.3d 440 (2001) and cites to federal law. Under the applicable Washington law, Muhl cannot establish a *prima facie* case of discrimination based on a failure to show that she was doing satisfactory work or that she was replaced by an individual outside the protected class. In Domingo, the plaintiff argued that she did not have the burden of showing that she was replaced by an employee outside of the protected class. Domingo, 124 Wn. App. at 80. This argument was rejected and the court held that the plaintiff's claim failed due to her inability to show that she was replaced by an employee outside the protected class. Id.

This outcome is in accord with Federal law, which has also held that a redistribution of duties is not a replacement for purposes of a discrimination claim. "[A] discharged employee 'is not replaced when another employee is assigned to perform the plaintiff's duties in addition

to other duties, or when the work is redistributed among other existing employees already performing related work.'" LeBlanc v. Great American Ins. Co., 6 F.3d 836, 846 (1st Cir. 1993) (*citing* Petitti v. New England Tel. & Tel. Co., 909 F.2d 28, 31 (1st Cir. 1990). Here, Muhl repeatedly asserts that she was replaced by Nelson. However, as a matter of law, Muhl cannot establish that she was replaced by Nelson when Nelson's hire preceded Muhl's termination by eighteen months. (CP 559-61, 495).

2. Muhl Has Not Articulated a *Prima Facie* Case for Disparate Treatment.

To present a *prima facie* case of disparate treatment, a plaintiff must establish that 1) she is a member of a protected class, 2) she was treated less favorably than a similarly situated non-protected employee in the terms of employment, and 3) the non-protected employee was doing the same work. Clarke v. Office of the Attorney Gen., 133 Wn. App. 767, 788-89, 138 P.3d 144 (2006); Johnson v. Dep't of Soc. & Health Services, 80 Wn. App. 212, 227, 907 P.2d 1223 (1996). "While the plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered 'similarly situated;' . . . the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in all of the *relevant*

respects." Arendale v. City of Memphis, 519 F.3d 587 (6th Cir. 2008) (citing Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 355 (6th Cir. 1998)) (emphasis in original).[3]

Muhl now appears to assert that she was terminated when another individual would not have been and that she was not permitted to resign when another employee was. Again, Muhl's own testimony conclusively established that she was given options for announcing her departure, including resignation, and she chose to characterize it as a termination. Further, Muhl was given two months to transition out, giving her ample time to transition clients or streamline any departure plan. (CP 493). Contrastingly, the individual she seeks to compare herself to favorably was the subject of an announcement to associates that put his immediate departure in an unfavorable light. Unlike Muhl, he was not given an opportunity to transition out of the firm. (CP 497).

Similarly, the comparison to Nelson regarding his entry of a divorce decree is also flawed. Muhl does not dispute that she gave Nelson the instructions regarding the entry of the divorce decree as evidenced by Muhl's email to Nelson. (CP 497, 500). Consequently, if this incident was worthy of discipline, it would still implicate Muhl, as it is undisputed

[3] See Hill v. BCTI Income Fund-I, recognizing that while Washington courts are free to adopt rationale and theory which serve the State's statute, federal employment law rulings can represent a "source of guidance." Hill, 144 Wn.2d at 180.

that she gave the erroneous instructions. (CP 497, 500). Finally, Davies was not aware of this incident in November 2012 when it allegedly occurred. Rather, the shareholders did not become aware of it until it was addressed in Nelson's deposition occurring in June 2014. (CP 231, 548, 552).

In Domingo, the court rejected these sorts of general allegations as insufficient to establish disparate treatment, concluding that the plaintiff's failure to identify more favorably treated employees outside of the protected class was fatal to her claim of disparate treatment, "[the plaintiff] presents no evidence that she was treated differently from a similarly situated man, summary judgment on [plaintiff]'s disparate treatment claim is proper." Id. The same is true in this case where Muhl does not point to more favorably treated individuals who are not female. In Domingo, like in this case, Muhl has merely alleged that she knew of no other employee who was treated similarly. Id.

3. Muhl Did Not Establish Pretext.

Even assuming Muhl established a *prima facie* case, Davies would still be entitled to summary judgment upon its showing that it had legitimate reasons, worthy of belief, for Muhl's termination. Domingo, 124 Wn. App. at 87; Grimwood v. University of Puget Sound, 110 Wn.2d 355, 364, 753 P.2d 517 (1988). Davies' burden is merely to produce a

legitimate reason for termination; Davies is entitled to summary judgment unless Muhl can show that Davies' explanation is not entitled to belief or that discriminatory motive was a substantial factor in the decision to terminate Muhl. Id. Numerous performance deficiencies were addressed with Muhl over the course of her employment, including during the time period preceding her termination. (CP 276, 337, 145, 151-54, 170, 227, 565-66). Muhl also does not deny that, among other performance deficiencies, three significant incidents with her performance actually occurred. (CP 145, 151-54, 170, 227, 565-66). Muhl's "evidence" that other employees were warned is merely her own testimony that she did not receive a warning. (CP 287-88). Finally, Muhl does not deny that she did not appear at a contempt hearing where she was still counsel of record. (CP 313, 314). Muhl does not think this issue is problematic, but Davies' shareholders disagreed. Regardless, "[a]n employee's subjective personal judgments of her competence alone do not raise a genuine issue of material fact." Bradley v. Harcourt, Brace and Co., 104 F.3d 267 (9th Cir. 1996).

Muhl's case is not bolstered by remarks she attributes to various shareholders such as Coleman's remark regarding Davies' alleged interest in hiring Nelson. First, such remarks are only attributable to Coleman, one of nine decision makers. In addition, "'[S]tray' remarks, 'when

unrelated to the decisional process, are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements are made by the decision-maker in issue.'" Flynn v. Portland General Elec. Co., 958 F.2d 377 (9th Cir. 1992) citing Smith v. Firestone Tire & Rubber Co., 875 F.2d 1325 (7th Cir. 1989). For example, the court in Domingo, found a remark regarding that the plaintiff was not a "spring chicken" to be such a stray remark and summary judgment was granted despite the comment. Domingo, 124 Wn. App. at 89. "Although stray remarks can occasionally help to establish pretext [. . .] pretext is not demonstrated by isolated statements unrelated to the employment decision at issue." Nidds v. Schindler Elevator Corp., 113 F.3d 912, 918-19 (9th Cir. 1996).

Here, there is no evidence that remarks attributed to Coleman regarding the hire of Nelson influenced the decision making process, particularly where they were made in June 2014 and Muhl was terminated in September 2012. Here, Coleman also participated in the decision to hire Muhl. There were eight other decision makers participating in the decision to terminate Muhl, against whom no bias has been alleged. In addition, the information considered by decision-makers came from individuals against whom no specter of bias can be raised, namely Caulkins. The stray remark repeatedly emphasized by Muhl is Coleman's statement regarding Davies' alleged interest in hiring a male family law

attorney. However, at best, such remark only evidences a desire to *hire* Nelson not *fire* Muhl. This is demonstrated by objective evidence that Nelson's hire preceded Muhl's termination by more than eighteen months. Further, Davies was still addressing staffing issues created by Tomlinson's transition out of family law beginning in 2006 and Peck's, also a family law attorney, retirement in 2010. (CP 143, 155).

4. Muhl Cannot Establish a Claim for Retaliation.

To establish a *prima facie* case of retaliation, Muhl must establish that 1) she engaged in statutorily protected activity, 2) Davies took some adverse employment action against her, and 3) a causal relationship exists between the protected activity and the adverse action. Tyner v. Dep't of Soc. & Health Servs., 137 Wn. App. 545, 563, 154 P.3d 920 (2007). Should Muhl present sufficient evidence of a *prima facie* case of discrimination, the burden shifts to Davies to articulate legitimate, nondiscriminatory reasons for its actions. Id. Summary judgment may be proper in favor of an employer on an employee's weak issue of fact where, "abundant, uncontroverted, independent evidence indicates that no discrimination or retaliation occurred." Id. at 564, quoting Milligan v. Thompson, 110 Wn. App. 628, 637, 42 P.3d 418 (2002).

Here, Muhl's alleged complaint is, at best, a recitation of the firm's demographics. By 2011, Davies had extended partnership invitations to

female attorneys Caulkins and Larson several times previously and had added a female shareholder in 2008. (CP 53, 123-24, 127). Muhl's alleged complaint also occurred in November 2011, more than nine months prior to the September 2012 conversation where she was asked to transition out of Davies. (CP 495). Muhl cannot demonstrate that the decision to terminate her was causally related to her November 2011 conversation with Coleman. Kahn v. Salerno, 90 Wn. App. 110, 130-31, 951 P.2d 321 (1998), *rev. denied* 136 Wn.2d 1016, 966 P.2d 1277 (1998). Muhl also cannot establish that decision makers were even aware of her alleged complaint to Coleman. (CP 69-70). Further, "opposition to an employer's possible discrimination does not enjoy absolute immunity; an employee may still be terminated for proper cause even when engaged in protected activity." Kahn, 90 Wn. App. at 128-29, (citing Coville v. Cobarc Servs., Inc., 73 Wn. App. 433, 439, 869 P.2d 1103 (1994)).

a. There Was No Complaint of Discrimination

The alleged complaint Muhl identifies in her briefing were Muhl's comments to Coleman regarding the bonus structure in 2011 and Muhl's observation that women were underrepresented at Davies in November 2011. (CP 310). While Muhl now characterizes her recitation of the demographics of the firm to be a complaint, the evidence does not support that she is engaged in protected activity. Muhl does nothing more than

recite the demographics at the firm at that time. She made no complaint regarding a hostile work environment or other discriminatory conduct. Decisions involving demographics reflect decisions years prior and include decisions to quit or retire, which Davies does not control. Rather, as Muhl's own notes reflect, Muhl inquired as to whether the firm had an interest in promoting and retaining women. (CP 310). It is undisputed the firm did have such an interest because, at the time, Davies had repeatedly inquired of Caulkins and Larson regarding their interest in becoming shareholders. (CP 53, 123-24). Davies had also made only two attorneys shareholders during the time Muhl was employed at Davies: Brian King and Lim (a female). (CP 127).

b. Muhl's Termination is Too Remote to Give Rise to an Inference of Termination.

Muhl concludes, without analysis, that she has demonstrated retaliation. Muhl must show that the retaliation was the cause for the adverse employment activity. Allison v. Housing Authority, 118 Wn.2d 79, 821 P.2d 34 (1991). Muhl attempts to establish causation by arguing that temporal proximity gives rise to the presumption that the adverse employment activity was motivated by the protected activity. Estevez v. Faculty Club, 129 Wn. App. 774, 120 P.3d 579 (2005). The presumption of causation is not automatic and is only appropriate where the adverse

employment action, "follows on the heels of the protected activity." Villarimo v. Aloha Island Air, Inc. 281 F.3d 1054, 1065 (9th Cir. 2002). "[I]n order to support an inference of retaliatory motive, the termination must have occurred 'fairly soon after the employee's protected expression.'" Paluck v. Gooding Rubber Co., 221 F.3d 1003, 1009-10 (7th Cir. 2000) (internal citations omitted) (Court finding that a one-year interval between the protected expression and the employee's termination, standing alone, is too long to raise an inference of discrimination)[4]. Muhl fails to analyze the applicable timeline in this case and merely concludes the presumption of retaliation arises. Even assuming Muhl engaged in protected activity[5] in November of 2011, her termination occurred more than nine months later in September of 2012. (Dec. of Muhl in Response ¶ 12). In Estevez, where a presumption of causation arose, the termination was nine *days* after the employee's complaint of sexual harassment; the timeline in this case is not remotely comparable. Estevez, 129 Wn. App.

[4] *See also* Filipovic v. K & R Express Sys., Inc., 176 F.3d 390, 398-99 (7th Cir. 1999) (four month interval between alleged protected activity and adverse employment action too long); Adusumilli v. City of Chicago, 164 F.3d 353, 363 (7th Cir.1998) (eight months too long), *cert. denied,* 528 U.S. 988, 120 S.Ct. 450, 145 L.Ed.2d 367 (1999); Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 511 (7th Cir.1998) (five months too long); Conner v. Schnuck Markets, Inc., 121 F.3d 1390, 1395 (10th Cir.1997) (four months too long).

[5] Again, Muhl's November 17, 2011 memo merely recites the firm's statistics with respect to female hires, "[A] company's overall employment statistics will, in at least many cases, have little direct bearing on the specific intentions of the employer when dismissing a particular individual." LeBlanc v. Great American Ins. Co., 6 F.3d 836, 848 (9th Cir. 1993).

at 800. Again, where causation has been inferred based on the timeline, the timeline is much shorter than in this case. Miller v. Fairchild Indus. 885 F.2d 498, 505 (9th Cir. 1989) (inference of causation based on termination forty-two and fifty-nine days after EEOC hearing).

Muhl also fails to address the fact that a mere month after Muhl's alleged gender based complaints to Coleman, she received a $10,000 bonus, despite the undisputed fact that she failed to meet the written criteria for a bonus under the Associate Incentive Program. (CP 493). Muhl's discretionary bonus would have been a clear opportunity to retaliate against her if Davies' shareholders were so motivated. In addition, to the extent that Muhl alleges that she made a complaint about the implementation of the bonus criteria, an exception benefitting her was made less than a month after her conversation with Coleman.

Muhl also fails to demonstrate any link between her alleged protected activity and her termination based on the inability to show that the eight shareholders who participated in the decision could have been motivated to retaliate based on information they never received. None of the shareholders testified to knowledge of Muhl's alleged complaint. Coleman did not regard Muhl's recitation of the firm's demographics as a complaint, and therefore did not convey it to the other shareholders. (CP 69-70). Coleman also participated in the decision to hire Muhl; courts

have long held that where a decision maker participates in the decision to hire and fire there is a strong inference that there was no discrimination. Bradley, 104 F.3d at 270-71 (*quoting with approval* Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173 (8th Cir. 1992), Burhmaster v. Overnite Transp. Co., 61 F.3d 461, 464 (6th Cir. 1995)). Muhl's evidence of a causal link must demonstrate that her complaints were a "substantial factor" in motivating Davies to terminate her. Allison v. Hous. Authority, 118 Wn.2d 79, 821 P.2d 34 (1991); Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270 (9th Cir. 1996); Coghlan v. Am. Seafoods Co. LLC., 413 F.3d 1090, 1098 (9th Cir. 2005); LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993). Although Muhl is critical of Coleman, Coleman was a shareholder at the time of Muhl's hire in 2006 and participated in the decision to hire Muhl. (CP 493). No inferences of retaliatory or discriminatory animus should arise where Coleman participated in the decision to hire Muhl as well as terminate her. Kirby v. City of Tacoma, 124 Wn. App. 454, 467, 98 P.3d 827 (2004) (*review denied* 154 Wn.2d 1007, 114 P.3d 1198).

Also significant is the fact that the information regarding Muhl's performance concerns were conveyed to shareholders by Caulkins, not Coleman. (CP 53-67). Caulkins is herself a woman over forty and was at the time of her hire. (CP 53). Caulkins had direct knowledge of Muhl's

performance, as she observed the incident regarding the trial continuance, attended portions of that same trial, and attended the contempt hearing in Muhl's stead. Caulkins also communicated directly with Muhl as to each of these incidents as well as sharing them with shareholders. (CP 57-58). As a non-shareholder at the time, Caulkins did not participate in the decision to terminate Muhl. (CP 56-59). Again, and significantly, Muhl does not dispute any of these facts. There is no evidence whatsoever that Caulkins' version of these events was tainted in any respect by discriminatory views with respect to gender, further no taint could arise where Muhl also admits to the incidents. Further militating against an inference of discrimination is the fact that Caulkins is a member of the same protected classes as Muhl.[6] Where information obtained from a subordinate, like Caulkins, is considered on a claim for discrimination, it must be shown that a, "subordinate, who lacks decision making power, uses the formal decision maker as a dupe in a deliberate scheme to trigger

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[6] Kenneth E. Novak, Plaintiff, v. Gordon R. England, Secretary of the U.S. Navy, Defendant, 2007 WL 4883517 (W.D.Wash.) (cannot rely on mere speculation, especially when alleged discriminatory actor is of similar age to claimant); Brown v. CSC Logic, 82 F.3d 651 (5th Cir. 1996) (when the decision maker is a member of the same protected class as plaintiff, there is an inference of no discrimination); Smith v. Equitrac Corp., 88 F. Supp.2d 727, 742 (S.D. Tex. 2000) ("if the decision maker and the plaintiff are the same race, that fact tends to greatly undermine the inference of racial discrimination even if the decision maker's stated justification is disbelieved"); Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 463 (6th Cir.1995), *cert. denied,* 516 U.S. 1078, 116 S.Ct. 785, 133 L.Ed.2d 736 (1996); Rand v. CF Industries, Inc., 42 F.3d 1139, 1147 (7th Cir.1994); LeBlanc v. Great American Ins. Co., 6 F.3d 836, 847 (1st Cir.1993); Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173, 175 (8th Cir.1992); Proud v. Stone, 945 F.2d 796, 797–98 (4th Cir.1991).

a discriminatory employment action." City of Vancouver v. State of Washington Public Empl. Relations Comm., 180 Wn. App. 333, 351 325 P.3d 213(2014) (internal citations omitted). No showing has been made whatsoever tainting Caulkins' testimony regarding Muhl's missed contempt hearing or the incident involving her lack of composure in front of a client on the morning of trial. (CP 61-63).

Fatally, Muhl admits that the three incidents involving 1) her trial, 2) the letter from Judge Hickman, and 3) her failure to appear at the contempt hearing, all occurred. (CP 312-14). Muhl also glosses over the fact that her client actually demanded another attorney to try her case on the day of trial. (CP 56). Muhl does not deny these issues, but rather, asserts that they should not have been of concern to Davies. The courts are not a super personnel department and the assertion that the employer should not have been concerned with incidents of performance is legally insufficient to survive summary judgment. "The WLAD is not intended as a general civility code. And not everything that makes an employee unhappy is an actionable adverse action." Alonso v. Qwest Communications Co., LLC, 178 Wn. App. 734, 747, 315 P.3d 610 (2013) (internal citations omitted).

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Muhl's argument that the real motivation for her termination was her complaint more than nine months prior is simply speculation and is not supported by the uncontroverted testimony or the timeline. Muhl's arguments are argumentative, conclusory and self-serving. As a consequence, summary judgment was properly granted.

E. The Court's Decision to Strike Dr. Barnett Was Appropriate.

Both evidentiary and discovery issues were raised by Davies with respect to the disclosure of Dr. Barnett and the content of her opinion. The appellate court can sustain the ruling on either evidentiary grounds or on the basis of discovery violations. (CP 449-63). These include the inadequate foundation, the speculation and conjecture upon which the opinion is based, and the fact that the opinion is irrelevant as to a species of intentional tort in so far as it describes an unconscious process. ER 702; ER 703; City of Vancouver v. State of Washington Pub. Empl Rel. Brd., 325 P.3d 213, 225 (2014). "On appeal, an order may be sustained on any basis supported by the record." Hadley v. Cowan, 60 Wn. App. 433, 444, 804 P.2d 1271 (1991). Further, upholding the trial Court's summary judgment makes rulings relative to any testimony at trial moot.

However, the record reflects that the trial Court did explicitly consider whether other sanctions would suffice, concluding that insufficient time remained for Davies to depose Muhl's expert, identify its

own expert to critique the opinion of Dr. Barnett, and allow for discovery for that expert-all within the six weeks remaining before trial. (RP August 8, 2014 pgs. 9-10); Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997). In addition to the discovery violations, the trial Court expressed reservations about the content of the opinion itself. The trial Court also did not consider the excuses offered by counsel regarding the timing of discovery to be compelling, particularly considering the impending date of the trial and the amount of time by which the witness disclosure deadline was missed. (RP August 8, 2014 pgs. 9-10).

1. The Trial Court Did Not Demonstrate Unfairness

"Due process, the appearance of fairness and Canon 3(D)(1) of the Code of Judicial Conduct (CJC) require that a judge disqualify from hearing a case if that judge is biased against a party or his or her impartiality may be reasonably questioned." Meredith v. Meredith, 148 Wn. App. 887, 902, 201 P.3d 1056 (2009). "Evidence of a judge's actual or potential bias is required." Id. at 903. "A judicial proceeding is valid only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing." Id.

Here, Muhl argues that the trial judge was not impartial based upon the allegation that, "the court failed to heed the requirements of established case law [. . .]." (Brief of Appellant at pgs. 39). Muhl also

argues that the trial Court's characterization of Muhl as having resigned shows unfairness. (Brief of Appellant at pg. 39). There is no evidence that the trial Court did not consider the applicable law or briefing submitted in this case.

For example, the trial Court had access to Muhl's testimony reflecting Muhl's notes from a December 21, 2011 meeting where she stated, "What is firm prepared to do for transition out [?]" (CP 275-76). In addition, Coleman testified that Muhl herself continued to bring up transitioning out of the firm as recently as June of 2012. (CP 71). The trial Court also had access to testimony regarding the demographics of the attorneys practicing family law specifically that the department consisted solely of females over the age of forty. (CP 54). In addition, the trial Court had access to the letter from Judge Hickman regarding Muhl as well as testimony regarding various attorneys' views that the incident was troublesome due to the rarity of such an event. (CP 57, 556).

Muhl also contends that the trial judge lacked attention to critical evidence favorable to Muhl. However, as the record demonstrates, Davies painstakingly demonstrated that the testimony put forth in Muhl's declaration in opposition to summary judgment was contradicted in every respect by Muhl's own prior testimony and objective undisputed evidence. The trial Court reasonably discounted Muhl's self-serving and

contradictory testimony as insufficient to survive summary judgment. Davis v. Fred's Appliance, Inc., 171 Wn. App. 348, 287 P.3d 51 (2012). In addition to casting aspersions on the trial judge, Muhl also baselessly infers that Judge Hickman may have had *ex parte* communications with the trial Court regarding the letter he wrote to Muhl. (Brief of Appellant at pg. 40). There is no evidence to support these allegations against Judge Hickman and Judge Stolz. The law requires actual evidence of misconduct or bias, not speculation. Meredith, 148 Wn. App. at 903. Here, as in Meredith, Muhl must present evidence of bias. Instead, what is offered here is "bald accusations" against the bench. Id. at 904. Such accusations are insufficient to show a lack of fairness.

Muhl's argument appears to be an effort to cast an unsuccessful opposition to summary judgment as a violation of due process. The evidence shows that the trial Court simply did not view the law and facts as presented by Muhl. This does not demonstrate that Muhl did not receive an impartial judge. In addition, prior to the hearing on summary judgment, the trial Court had granted on reconsideration a modest extension of the discovery cut-off requested by Muhl to permit additional depositions. (CP 283-84). In this case, the trial Court had several hundred pages of briefing, declarations and deposition excerpts to consider on summary judgment. Muhl attempts to create an issue of fairness based on

several innocuous stray comments at oral argument, while ignoring the quantity of material considered by the trial Court; oral argument cannot begin to reflect the work performed by the trial Court in reviewing the materials submitted by the parties. For example, while Muhl asserts that relevant authority was not considered, Muhl did not submit meaningful opposition briefing on a number of her claims, including statute of limitations issues, hostile work environment claims, and disparate treatment. No reasonably prudent individual would believe that bias or a lack of impartiality played any role in outcome of the summary judgment hearing.

F. Attorney Fees Should Not be Awarded to Muhl.

Pursuant to RCW 49.60.030, the prevailing party in a discrimination case is entitled to attorney fees and costs. In this case, should Muhl prevail on appeal, the appellate court should reserve any fee award pending final resolution of this case. Ultimately, Muhl may not prevail at trial. If she fails to do so, Muhl is not entitled to any fee award. RCW 49.60.030. In addition, Muhl brought several unsuccessful claims, including species of discrimination claims, which are not subject to this appeal. Muhl also brought contract claims, which were dismissed on

summary judgment and not appealed. Here, the trial Court would be in the best position to evaluate a fee request and account for Muhl's pursuit of numerous unsuccessful claims. Martinez v. City of Tacoma, 81 Wn. App. 228, 240, 914 P.2d 86 (1996).

G. Pursuant to RAP 18.1, Davies Seeks an Award of Statutory Attorneys Fees and Costs Should it Prevail.

Should Davies prevail in defending the instant appeal, it requests pursuant to RAP 18.1 an award of its statutory attorney fees and costs/expenses pursuant to RCW 4.84.030 and RCW 4.84.080. As set forth in Osborn v. Grant County By and Through Grant, 130 Wn.2d 615, 926 P.2d 911 (1996), an award of costs and statutory attorney fees to the prevailing party at the appellate level pursuant to RCW 4.84.030 and RCW 4.84.080 party is authorized pursuant to RAP 18.1

IV. CONCLUSION

The trial Court's grant of summary judgment was appropriate and should not be disturbed on appeal. The undisputed facts, including Muhl's own testimony, establish an absence of material facts relevant to numerous essential elements of her clams. Further, the trial Court's rulings relative to Muhl's late disclosed witness were appropriate and within the sound discretion of the trial Court. Finally, no evidence has been put forward

whatsoever raising an issue as to the fairness or conduct of the trial judge or her peer.

DATED this 7th day of January 2015.

MCGAVICK GRAVES, P.S.

By: _____
Lori M. Bemis, WSBA #32921
Dave J. Luxenberg, WSBA #28438
Of Attorneys for Respondent

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DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served via ABC Legal Messengers on January 12, 2015, a copy of the **BRIEF OF RESPONDENT** to:

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