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NO. 72012-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

REBECCA A. RUFIN,

Appellant,

v.

CITY OF SEATTLE AND JORGE CARRASCO

Respondents.

RESPONDENTS' BRIEF ON APPEAL

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I. INTRODUCTION

Ms. Rufin's LPSM claim was properly dismissed because she offered only speculation that Mr. Carrasco had anything to do with her LPSM application. The LPSM job is three levels below Mr. Carrasco in the City Light organization. Without evidence that Mr. Carrasco knew about the LPSM hiring process and had some involvement, Ms. Rufin's claim fails. Mr. Carrasco is the person she claims retaliated against her. Ms. Rufin has "been pointing to Carrasco from the beginning." (2/27/14 RP at 30:8–16.) She does not claim that Darnell Cola, the LPSM hiring manager, had any retaliatory motive (CP 1256 at 70:17–71:17), and she offers no evidence that Mr. Cola or his boss, Mr. West, knew anything about her protected conduct. (CP 1258 at 79:21–80:3.) The LPSM hiring process ended when Mr. Cola hired Ms. Steiner, about whom Ms. Rufin says "I could see how she could edge me out." (CP 1274 at 245:7–15.)

When asked squarely whether she believed that Mr. Carrasco was involved in the LPSM hiring process, Ms. Rufin would not even go that far: she said "I don't know that he necessarily did, but I believe Phil West – if he did not, then Phil West may very well be aware of Carrasco's feelings towards me and not want me in his organization as a result." Asked if she was uncertain about Mr. Carrasco's involvement, she said "[h]e would be involved inasmuch as his attitudes are permeating

downward in the organization." The only evidence Ms. Rufin offers supporting her speculation is a note from the hiring file that she says shows Mr. West decided that only two candidates (not including Ms. Rufin) would progress – but this document does not suggest that Mr. Carrasco was involved in the process.

The trial court properly rejected this showing as too thin to survive summary judgment. In response, Ms. Rufin argues that the trial court's summary judgment deliberations on the LPSM claim should have considered all of the evidence about the CME position, and she devotes most of her appellate briefing to a review of that evidence (all of which was considered, and rejected, by the jury). This argument fails because the trial court in fact considered all of this evidence. Trial courts grant partial summary judgment every day, and the court certainly did not err in determining that Ms. Rufin's LPSM claim (and other claims) failed as a matter of law, while allowing some of her case to proceed to trial.

Ms. Rufin's secondary arguments fail as well. Given that the trial court correctly dismissed Ms. Rufin's LPSM claim, it follows that the court properly rejected evidence about that claim at the trial on her CME claim. Finally, we respectfully submit that this Court should reject Ms. Rufin's argument that the trial court abused its discretion in admitting certain evidence after Ms. Rufin opened the door.

II. STATEMENT OF THE ISSUES

A. Whether this Court should affirm the trial court's summary dismissal of Ms. Rufin's retaliation claim as to the LPSM hiring process where Ms. Rufin failed to identify any evidence that connected Mr. Carrasco to the hiring decision at issue, thereby failing to establish the requisite causal connection.

B. Whether the trial court abused its discretion by excluding evidence related to the LPSM process where the trial court concluded that the decision not to hire Ms. Rufin for the LPSM position was not, as a matter of law, unlawful retaliation.

C. Whether the trial court abused its discretion by admitting evidence of the results of the Tobin investigation and Davis lawsuit where the trial court determined that evidence of the Tobin investigation was relevant to Mr. Carrasco's alleged motive to retaliate, and determined that plaintiff had opened the door to evidence regarding the Davis lawsuit.

III. STATEMENT OF THE CASE

A. Overview

Seattle City Light ("SCL") is a municipal utility owned by the City of Seattle. (*See* CP 316 ¶ 1.2.) SCL is one of the largest public utilities in the nation, providing power to more than 780,000 customers and employing over 1,600 employees. (CP 245 ¶ 2.) Jorge Carrasco is the General Manager and CEO of SCL. (*Id.* ¶ 1.)

Ms. Rufin worked at SCL from 1990 to 2006. (CP 1617 ¶ 1.) SCL hired Ms. Rufin in 1990 as an associate mechanical engineer and, in the years that followed, awarded her several promotions. (*Id. See also* CP 1226 at 9:8–10:22; CP 1242 at 8:19–9:10; CP 1269–70.) In April 2006, Ms. Rufin voluntarily quit her job at SCL to accept a position with the

Seattle Parks and Recreation Department ("Parks Department") (CP 328–29 ¶¶ 3.37, 3.40), where she remained employed throughout this litigation. (*See, e.g.*, Appellant's Brief, p. 7.)

In 2006 and 2007, Ms. Rufin was interviewed as a witness in an investigation into gender discrimination allegations made by Betty Tobin, another City Light employee, and she gave deposition testimony in a discrimination case brought by Wanda Davis, another City Light employee. (*E.g.*, CP 327–28 ¶¶ 3.34, 3.38.) Respondents always have conceded that in doing so, Ms. Rufin engaged in "protected activity" for purposes of her retaliation claims. (*E.g.*, CP 1083–84; CP 3029.)

In 2010, 2011, and 2012, Ms. Rufin submitted applications for a "CME" position (explained below) at SCL. She was not hired. And, in late 2011, Ms. Rufin applied for an "LPSM" position at SCL; she was not hired for this position, either.

Ms. Rufin commenced this lawsuit in December 2012, filing claims for unlawful gender discrimination, retaliation, and hostile work environment against the City. (CP 16 ¶¶ 4.1–4.4.) Ms. Rufin named Mr. Carrasco personally as a party. (*Id.* ¶¶ 4.1–4.5.) This is unsurprising, given that she has "been pointing to Carrasco from the beginning." (2/27/14 RP at 30:8–16.) Ms. Rufin's argument is that Mr. Carrasco masterminded what she claims were retaliatory actions.

Ms. Rufin's initial complaint related only to her failed candidacy for the CME position and her pre-2006 work experiences at SCL. (CP 2–16 ¶¶ 3.1–.50.) In July 2013, Ms. Rufin amended her complaint and asserted "an additional claim" related to the LPSM hiring process. (CP 331–36 ¶¶ 3.50–.68; CP 3958 at 1:16–18.)

In August 2013, Defendants moved for partial summary judgment to dismiss Ms. Rufin's claims for hostile work environment and her claim for discrimination based on events that occurred outside the statute of limitations. (CP 158–185.) The trial court granted Defendants' motion and dismissed Ms. Rufin's hostile work environment claim and all claims relating to events that occurred before October 5, 2009. (CP 862–63.) Ms. Rufin does not appeal that decision.

Eventually (see pp. 19–21, below), the trial court also dismissed Ms. Rufin's gender discrimination claim, as well as her retaliation claim relating to the LPSM position, leaving for trial only her retaliation claim relating to the CME position. It is undisputed that Ms. Rufin engaged in protected conduct and that she was not hired for either the CME or the LPSM position. The only question on the LPSM summary judgment and at the CME trial was whether Ms. Rufin's protected conduct was a "substantial factor" in the decisions to hire other women for the positions Ms. Rufin sought. The particulars of Ms. Rufin's protected conduct, and

the related underlying cases, were not really at issue. Thus, while we must eventually discuss the protected conduct and the related cases (because Ms. Rufin claims that the trial court abused its discretion in evidentiary rulings on these matters), we begin with a review of the evidence presented about the LPSM hiring process.

B. Ms. Rufin presented no evidence that Mr. Carrasco was involved in the decisions not to hire her in 2011 and 2012.

More than four years after she engaged in protected conduct, Ms. Rufin applied for two different positions at SCL. Mr. Carrasco was not involved in any of the hiring decisions or processes at issue. The decisions not to hire Ms. Rufin were made independently by people with no knowledge of Ms. Rufin's prior protected conduct. There is no evidence that Mr. Carrasco knew anything at all about the LPSM application process that is the subject of this appeal.

1. Mr. Cola, not Mr. Carrasco, decided not to hire Ms. Rufin for the LPSM position after the first interview.

On December 20, 2011, Ms. Rufin submitted an application for the Large Projects Senior Manager ("LPSM") position at SCL. (CP 332–33 ¶ 3.55.) Ms. Rufin first learned of the LPSM position in August 2011, when Darnell Cola, the Director of Large Projects and Asset Management at SCL and hiring manager for the LPSM position, contacted and met with Ms. Rufin and encouraged her to apply. (CP 331–32 ¶¶ 3.52–3.54; CP

1123 ¶ 3.)[1] Ms. Rufin was one of five individuals Mr. Cola contacted to encourage to apply for the LPSM position. (CP 1123 ¶ 3.)

Ms. Rufin and three other women submitted applications and were interviewed for the LPSM position. (CP 1123 ¶ 5; CP 1299–1307.) Mr. Cola was the hiring manager and he, along with the other members of the interview panel, interviewed each of the candidates. (CP 1122–23 ¶¶ 2, 5.) After the first round of interviews, the panel unanimously concluded that two candidates, Cheryl Ooka and Glynda Steiner, would be called back for second interviews. (CP 1123–24 ¶¶ 6–7; CP 1061–62 ¶¶ 2–4; CP 1063–64 ¶¶ 2–4; CP 1126–27 ¶¶ 2–4.) Mr. Cola, the hiring manager "felt that Steiner was the clear choice for the position." (CP 1123 ¶ 6.) Following a second interview, Ms. Steiner was offered and accepted the position. (*Id.*; CP 1124 ¶ 7.) Ms. Rufin admitted that the decision to hire Ms. Steiner was not discriminatory and expressed only admiration and respect for Ms. Steiner, a very intelligent woman who is well-respected in the industry. (CP 1259–60 at 85:21-86:10; CP 1274 at 244:13-245:15.)

Mr. Carrasco was not involved in the LPSM hiring process. (CP 1123 ¶ 4; CP 250 ¶ 24; CP 1062 ¶ 5; CP 1064 ¶ 5; CP 1127 ¶ 5.) He did

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[1] Ms. Rufin says she told Mr. Cola in this meeting that she might not be welcome at SCL because she had history with Mr. Carrasco. (Appellant's Brief, p. 21.) But this does not suggest that Mr. Carrasco was aware of or interfered with the LPSM process. Ms. Rufin's only evidence on this point is her own comment, reflecting her own subjective interpretation. And the evidence shows Mr. Cola was not negatively influenced by the comment. He still encouraged Ms. Rufin to apply. He still ranked her well. And Ms. Rufin acknowledges the person chosen was well-qualified.

not review resumes, interview applicants, or provide any input as to who should be hired; he was not even aware that Ms. Rufin had applied for the position. (CP 250 ¶ 24. *See also* CP 1259 at 85:10–17.) The uncontroverted evidence is that Mr. Cola and the members of the hiring panel decided not to hire Ms. Rufin. (CP 250 ¶ 24; CP 1123–24 ¶¶ 4, 6–7; CP 1061–62 ¶¶ 2–4; CP 1063–64 ¶¶ 2–4; CP 1126–27 ¶¶ 2–4, 6.)

Ms. Rufin argues, without evidence, that Mr. Carrasco must have learned of her application for the LPSM position, and that either he or Phil West, Mr. Cola's direct supervisor and a direct report to Mr. Carrasco, must have intervened in the hiring process. (CP 1256–57 at 73:10-76:21; CP 607 ¶ 77; CP 610 ¶ 92.) As "evidence," Ms. Rufin cites a single, handwritten entry in the LPSM hiring status report, which notes that three candidates were to receive second interviews, and later states "two [candidates, Ms. Ooka and Ms. Steiner] decided for 2nd intv by Phil West." (*Id.*; CP 1308–10.)[2] However, as Ms. Rufin admitted at deposition, this entry does not show that Mr. Carrasco intervened in the hiring process, and she can only speculate whether he did:

> Q. And you believe based on this that that decision was made by Phil West, correct?
>
> A. It says "by Phil West."[3]

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[2] On the next page, the document says "Darnell said to schedule 2nd intvs for Glynda Steiner & Cheryl Ooka." (CP 1310.)

[3] The better interpretation is that the second interview would be conducted by Mr. West, not that Mr. West decided to exclude Ms. Rufin. (*See* CP 1308–10; CP 1065–66 ¶¶ 2–3.)

Q. And you have not spoken with Phil West about the basis for his decision, correct?

A. No.

Q. Nor have you seen any documents that reflect the basis for Mr. West's decision, correct?

A. Except for this.

Q. Other than this, right?

A. That's correct.

Q. And you were aware that Mr. West reports to Mr. Carrasco, correct?

A. Yes.

Q. Is that the – and you believe that Mr. Carrasco intervened in this hiring process as well, correct?

A. I don't know that he necessarily did, but I believe Phil West – if he did not, then Phil West may very well be aware of Carrasco's feelings towards me and not want me in his organization as a result.

Q. Okay. So –

A. One or the other.

Q. So you were uncertain here as to whether or not Mr. Carrasco got involved, correct?

Due to the confidentiality agreements signed by all members of the hiring panel, Mr. West likely would not have known of Ms. Rufin's candidacy at the time this entry was made. (CP 1161–62 ¶ 4.) And, again, there is no evidence at all that Mr. Carrasco knew anything about her candidacy.

A. He would be involved inasmuch as his attitudes are permeating downward in the organization.

Q. And have you seen any documents that reflect Mr. Carrasco's attitudes permeating down to Mr. West?

A. This one here.

Q. Other than this document.

A. No.

Q. And have you – has anybody told you that Mr. Carrasco's attitudes affected Mr. West's decision about whether or not you would get a second interview for the LPSM decision?

A. Nobody has told me that.

(CP 1257 at 75:8–76:21. *See also* CP 610 ¶ 92.)

Ms. Rufin provided no other evidence that Mr. Carrasco was involved with or influenced the LPSM hiring process, and she provided no evidence that Mr. Carrasco's "attitudes" affected Mr. West or anyone else at SCL. The linchpin of Ms. Rufin's theory is that Mr. Carrasco's attitude about her "permeated down" to Mr. West, but she admits that this view is based on belief rather than fact. (CP 1257–58 at 76:7–79:20; CP 1272 at 219:17 – 220:8.) The uncontroverted evidence at summary judgment was that the hiring panel unanimously decided not to hire Ms. Rufin following the first interview, and made this decision without any influence from Mr.

Carrasco.[4] (CP 1123–25 ¶¶ 4, 6–7; CP 250 ¶ 24; CP 1061–62 ¶¶ 2–5; CP 1063–64 ¶¶ 2–5; CP 1126–27 ¶¶ 2–5.) And as Ms. Rufin conceded, there was no evidence that Mr. Cola or any other member of the panel was aware of her prior protected conduct. (CP 1256 at 70:17–71:17.)

2. Mr. Carrasco had nothing to do with Ms. Rufin's unsuccessful application for the CME position at SCL.

Several months before she applied for the LPSM position at issue in this appeal, in August 2011, Ms. Rufin had applied for the Civil/Mechanical Engineering manager ("CME") position at SCL. (CP 329 ¶ 3.41.)[5] Although Ms. Rufin devotes much of her briefing to evidence and argument concerning this CME process (*see* Appellant's Brief, pp. 10–20, 36–40), it is not really at issue here. The trial court had before it and considered the CME evidence when ruling on Defendants' motions for summary judgment. After considering all of this evidence, the trial court granted summary judgment on Ms. Rufin's LPSM claim, but *denied* summary judgment on the CME hiring process. Ms. Rufin eventually presented all of the CME evidence and all of her related

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[4] Ms. Rufin takes issue with Mr. Cola's decision to interview only two candidates during the second round, arguing that there was no "business reason" to do so. (Appellant's Brief, p. 41.) Mr. Cola explained, however, that he limited the number of candidates for the second round of interviews in order to demonstrate to his supervisor, Mr. West, that he was capable of making decisions and running a hiring process. (CP 1123 ¶ 5.) Mr. Cola's desire to appear competent to his supervisor is a rational business decision.

[5] Ms. Rufin first applied to return to SCL in November 2010, however, the 2010 hiring process was terminated without any interviews being conducted. (CP 1133 ¶¶ 6–7.) Ms. Rufin does not allege any discrimination related to this process. (*See* CP 316–40; CP 1253 at 61:21–25.)

arguments to a jury, which rendered a defense verdict. We nevertheless review the CME evidence in some detail below, in part because Ms. Rufin devotes so much attention to it.

After reviewing the resumes received, SCL contacted Ms. Rufin and others for initial interviews. (CP 1134 ¶ 8; CP 1282–87.) Then, after the first round of interviews, the interview panel selected four finalists, including Ms. Rufin, to return for second interviews. (CP 1134 ¶ 8; CP 1288–92.) The second interview was conducted by Mike Haynes, the hiring manger, and two additional SCL employees.[6] (CP 1134 ¶ 9; CP 1292.) Following the second round of interviews, Mr. Haynes decided that, in addition to the two panel interviews, he wanted to conduct a third round of interviews to allow his direct supervisor, Steve Kern, to meet each of the four finalists. (CP 1134 ¶ 10.) It was not unusual for Mr. Haynes to ask Mr. Kern to meet with candidates for a Manager-3 level position. (*Id.*) Mr. Haynes did not make a hiring decision following the second interview (*see* CP 2050 at 14:13–21), and there was no evidence that he requested a "qualifications audit" be performed on Ms. Rufin.[7]

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[6] SCL runs approximately 300–400 hiring processes per year. (CP 1160–61 ¶ 2.) Each hiring process is run by a hiring manger in coordination with HR. (*Id.*) The hiring manager has the autonomy to determine the substantive qualifications for the position and can modify the structure of the hiring process. (*Id.*) One, two or three rounds of interviews are fairly common for SCL hiring processes. (CP 1161–62 ¶ 4.)

[7] Ms. Rufin incorrectly asserts that a "qualifications audit" is performed only after a hiring decision has been made. (Appellant's Brief, pp. 13–14.) In fact, a qualifications

Accordingly, in October 2011, SCL contacted the four finalists, including Ms. Rufin, and scheduled a third and final round of interviews. (CP 1293–95; CP 1134 ¶¶ 10–11; CP 1146–50.) The third interview, which lasted approximately 30 minutes, consisted of targeted questions regarding each candidate's management style and leadership qualifications. (*See* CP 1135 ¶ 12.) Each applicant was asked the same questions and was scored based upon their answers.[8] (CP 1260 at 86:12-87:21; CP 1135 ¶ 12.) Dean McLean received the highest scores following the third interview and he was offered the position. (CP 1293–95; CP 1135–36 ¶¶ 13–14.) Mr. McLean declined the offer, and the position was left unfilled. (CP 1296–97; CP 1136 ¶ 14.)

Ms. Rufin's performance during the third interview convinced Mr. Haynes that she was not the correct candidate for the position.[9] (CP 1135–36 ¶¶ 12–14.) Among other reasons, Mr. Haynes was concerned that Ms. Rufin did not support the direction of the company, would not work well with Mr. Kern, and would not delegate work in accordance with Mr. Haynes' expectations for the position. (*Id.* ¶ 13.) For these reasons, Mr.

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audit can be requested at any time during the hiring process by the talent acquisition specialist assigned to the specific hiring process. (*See* CP 2329 ¶ 3.)

[8] During the interview process, ratings received from the resume rating or prior interviews are not considered. (CP 1161–62 ¶ 4; CP 1134 ¶ 11.) Thus, during the third interview, Mr. Haynes did not consider Ms. Rufin's performance during the second-round interview. (CP 1134 ¶ 11; CP 2053 at 27:7–16.)

[9] As hiring manager, Mr. Haynes had the final say on who to hire for the CME position. (CP 1161–62 ¶ 4; CP 2048 at 9:20–23.)

Haynes, with Mr. Kern's input, decided not to hire Ms. Rufin and to leave the CME position open and relist the position.[10] (*Id.* ¶ 14.)

Mr. Carrasco had nothing to do with Mr. Haynes' decision not to hire Ms. Rufin for the CME position. (CP 248–49 ¶¶ 19, 22; CP 1132–35 ¶¶ 2, 12.) He did not review resumes, interview candidates, or provide any input to the hiring panel. (*Id.*) Mr. Haynes and Mr. Kern did not consult with or seek approval from Mr. Carrasco following the third interview. (CP 1135 ¶ 12; CP 1187–88 ¶ 5.) At summary judgment, Ms. Rufin presented no evidence to the contrary.

Ms. Rufin admitted that Mr. Carrasco was not involved in the CME hiring process through her second interview, and admitted that the hiring process was fair and unbiased up to that point. (CP 1253 at 61:21–25.) She also admitted that she had no evidence that Mr. Carrasco was aware of the CME hiring process or of her pending application when Mr. Haynes decided not to hire her.[11] (CP 1254 at 63:11–24.)

In fact, Mr. Carrasco did not know about the CME process and was not involved in this hiring decision. (CP 248–49 ¶¶ 19, 22; CP 1132–33 ¶

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[10] SCL relisted the CME position in 2012, and, following two rounds of interviews, Mr. Haynes again relisted the position rather than hire either of the two remaining (male) candidates. (CP 1136 ¶ 15.) Mr. Haynes relisted the position in 2013 and, after conducting a single round of interviews, decided to hire Michelle Vargo. (CP 1137 ¶ 17.)

[11] As the trial court noted in her oral ruling at summary judgment, the only evidence that Mr. Carrasco was aware of Ms. Rufin's application was her email to Mr. Carrasco in June 2012, months after Mr. Haynes and Mr. Cola separately decided not to hire Ms. Rufin. (2/27/14 RP at 60:2–61:3.)

2; CP 1135–37 ¶¶ 12, 16; CP 1187–88 ¶ 5.) Mr. Haynes decided not to hire Ms. Rufin with input from Mr. Kern. Both Mr. Haynes and Mr. Kern (as Ms. Rufin admits) were unaware of Ms. Rufin's protected conduct. (CP 1132–33 ¶¶ 2–4; CP 1187 ¶ 4; CP 1244–45 at 14:1–15, 19:18–20:17.)

3. In 2012, Mr. Haynes decided not to re-interview Ms. Rufin for the CME position, and Ms. Rufin initiated contact with Mr. Carrasco.

In April 2012, SCL reopened the hiring process for the CME position. (CP 1136 ¶ 15.) Ms. Rufin again applied. (*See id.* ¶ 16; CP 1311–17.) Initially, the assigned personnel specialist was not aware of Ms. Rufin's involvement in the prior CME hiring process. (CP 1129 ¶ 3.) SCL typically does not re-interview unsuccessful applicants who received full consideration for the same position in a prior hiring process. (*Id.* ¶¶ 3, 5. *See also* CP 1136–37 ¶ 16.) Upon learning that Ms. Rufin had unsuccessfully participated in the prior CME process, the assigned personnel specialist, at Mr. Haynes' request, eliminated Ms. Rufin from the applicant pool. (CP 1136–37 ¶ 16; CP 1129 ¶ 4, CP 1131.)

Separately, on June 11, 2012, Ms. Rufin sent Mr. Carrasco an email requesting to speak with him about her *prior* application for the CME position in August 2011. (CP 260–61.) Her email did not mention or reference her application for the LPSM position (which had been given to Ms. Steiner in March 2012) or her then-pending reapplication for the

CME position. (*Id.*) Mr. Carrasco responded the same day to inform Ms. Rufin that he was not involved with the hiring decision at issue and, in the same email, asked SCL's Human Resources officer, DaVonna Johnson, to look into the matter. (*Id.*) Mr. Carrasco did not otherwise discuss Ms. Rufin's application for employment, and he testified that he was not even aware of her CME application. (CP 249 ¶¶ 20–22; CP 1281 at 54:10–21.)

Ms. Rufin speculates that Mr. Carrasco had something to do with the rejection letter, but admitted at deposition that she had no idea who sent the letter: "I don't. It's sheer speculation on my part. All I know is that the letter was sent." (CP 1273 at 224:8–24. *See also* CP 1267–68 at 166:18–167:18, 170:12–171:6.) She similarly admitted that there was no evidence that Mr. Carrasco ever made his alleged displeasure of hiring her known to his subordinates. (CP 1272 at 219:17–220:8.)

Following her June 11 email to Mr. Carrasco, Ms. Rufin met with Ms. Johnson on June 20 to discuss her application for employment. (CP 1164 ¶ 9; CP 1177–82.) The discussion at that meeting is disputed, but Ms. Rufin contends she left with the understanding that she would not be considered for any future management positions at SCL because she had "burned her bridges" when she left over five years earlier.[12] (*Id.*)

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[12] Ms. Johnson denies ever using the phrase "burned your bridges" during their meeting and contends that it was Ms. Rufin who used the phrase. (CP 1164 ¶ 9.)

Following their meeting, Ms. Rufin sent Mr. Carrasco another email. She asked what she had done to "burn her bridges" when she left in 2006. (CP 249 ¶ 23; CP 262–64.) Mr. Carrasco again informed Ms. Rufin that he had no involvement with the hiring decision at issue, but assured her that employees who leave are not shunned. (*Id.*) Mr. Carrasco had no part in the hiring processes in 2011 and 2012. (CP 248–49 ¶ 19.) This is consistent with his practice on personnel matters. (*Id.*)

Ms. Rufin provided no evidence to support her argument attributing to Mr. Carrasco the alleged "burned your bridges" comment. In fact, at no time after Mr. Carrasco sent his initial email to Ms. Rufin (instructing her to meet with Ms. Johnson) did Mr. Carrasco discuss Ms. Rufin's pending applications for employment with Ms. Johnson (or any other SCL employee). (CP 249 ¶¶ 21–22; CP 1163 ¶ 5; CP 2071 at 54:4–55:22.) Mr. Carrasco never told Ms. Johnson that Ms. Rufin had "burned her bridges." (*Id.*) There is no evidence to the contrary.

C. In 2006 and 2007, Ms. Rufin engaged in protected conduct.

Defendants did not deny that Ms. Rufin engaged in protected conduct. Thus, Defendants argued that the details of the investigation in which Ms. Rufin was interviewed, and of the case in which she provided deposition testimony, were largely irrelevant and prejudicial, particularly in light of the trial court's ruling on Defendants' statute of limitations

argument. (CP 2606–09; CP 3089–93.) Ms. Rufin nonetheless attempted to admit as much of this evidence as possible, but wanted the jury to hear only her side of this largely-irrelevant backstory (*e.g.*, 3/31/14 RP at 27:6–19). The trial court gave her some leeway, but carefully balanced relevance and the unfair prejudice involved. The remainder of this section summarizes this evidence, which pertains only to Ms. Rufin's claim that the trial court abused its discretion in striking this balance.

1. While employed at SCL, Ms. Rufin participated in a confidential investigation regarding alleged discrimination by Mr. Carrasco.

In late 2005, the Seattle Mayor's Office received an internal complaint of gender discrimination made by an SCL employee, Ms. Elizabeth "Betty" Tobin, against Mr. Carrasco. (CP 591–92 ¶ 43.) In response, the Mayor's office retained Ms. Lawton Humphrey, an independent investigator from the law firm Davis Wright Tremaine, to investigate Ms. Tobin's allegations. (*Id.*) In January 2006, Ms. Rufin was interviewed by and provided a confidential written statement to Ms. Humphrey. (CP 591–92 ¶ 43.b.) Mr. Carrasco never learned of Ms. Rufin's participation in the investigation. (CP 250 ¶ 25; CP 1275–80 at 34:3–37:12.) Mr. Carrasco only learned of Ms. Rufin's involvement after she commenced this lawsuit. (*Id.*) At the conclusion of her investigation, Ms. Humphrey determined that the allegations of discrimination were

unsubstantiated. (CP 1280 at 37:7–12.) Ms. Humphrey informed Mr. Carrasco of her conclusion. (CP 1277–80 at 34:3-37:12.)

2. In 2007 Ms. Rufin provided deposition testimony in an unrelated lawsuit.

In 2007, Wanda Davis filed a gender bias and harassment claim against the City of Seattle and Mr. Carrasco.[13] (CP 3905–06 ¶ 2; CP 3907–34.) Ms. Davis' counsel (who is also Ms. Rufin's counsel) deposed Ms. Rufin and questioned her about the events she described in her 2006 witness statement. (CP 1220 ¶ 2; CP 1224.) Ms. Rufin recounted some of the same events she previously described in her written statement, often qualifying or downplaying her original allegations. (*Id.* *See also* CP 168–170.) Judge Zilly dismissed Ms. Davis' claims against SCL and Mr. Carrasco on summary judgment. (CP 3907–28.)

D. Procedural History

1. The Trial Court dismissed Ms. Rufin's retaliation claim related to the LPSM position at summary judgment.

In February 2014, Defendants moved for summary judgment dismissal of Ms. Rufin's remaining claims for discrimination, retaliation, and (against Mr. Carrasco) aiding and abetting discrimination. (CP 1067–93; CP 1191–1219.) Each of these claims related to Ms. Rufin's failed

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[13] In fact, the lawsuit was originally filed against the City of Seattle and Michael Korling. (*See, e.g.*, CP 2229.) Mr. Carrasco was later named a defendant. (*See* CP 2632.)

applications for the CME and LPSM positions. The trial court granted the Defendants' motion in part. (CP 3130–32.)

First, the trial court dismissed Ms. Rufin's claims for sex discrimination and aiding and abetting discrimination, finding that the record did not contain any evidence to support those claims. (*Id.*; 2/27/14 RP at 58:13–58:2.) As the trial court correctly noted, "the focus of this case has been retaliation all along." (*Id.* at 58:18–19.) Ms. Rufin does not appeal the dismissal of those claims.

Second, the trial court dismissed Ms. Rufin's claim for retaliation as related to her application for the LPSM position. (*Id.* at 59:14–60:5.) The trial court found the evidence "insufficient to establish [Mr. Carrasco's] involvement in the large project position." (*Id.* at 60:2–4.)

Third, the trial court denied Defendants' motion as to Ms. Rufin's CME retaliation claim. (*Id.* at 60:5–61:3.) The trial court agreed that Ms. Rufin presented no direct evidence that Mr. Carrasco was involved in the CME hiring decision, noting that all the witnesses denied Mr. Carrasco had any such involvement. (*Id.* at 59:14–60:1.) However, the trial court held that certain circumstantial evidence, when viewed in the light most favorable to Ms. Rufin, created an issue of fact regarding Mr. Carrasco's purported involvement in the CME hiring process. (*Id.* at 60:5–61:3.) Specifically, the Court noted that there was evidence that Mr. Carrasco

learned of Ms. Rufin's CME application when she emailed him in June 2012, that Ms. Johnson spoke to Mr. Kern prior to meeting with Ms. Rufin in June 2012, and that Ms. Johnson (according to Ms. Rufin) told Ms. Rufin that she had "burned her bridges." (*Id.*) These facts, the trial court held, created an issue of fact as to whether Mr. Carrasco was involved in the CME hiring process. (*See id.*)

2. The trial court held that Ms. Rufin and Ms. Tobin could testify about the events of 2004–06, and excluded evidence regarding Ms. Rufin's application for the LPSM position.

The parties disagreed about the amount of evidence the trial court should admit at trial regarding the specifics of Ms. Tobin's complaints. (*See, e.g.,* CP 2597–609; CP 3089–93; CP 3033–39; CP 3154–65; CP 3166–73.) Defendants conceded that certain evidence, such as the fact that Ms. Rufin was interviewed as part of an investigation into potential discrimination by Mr. Carrasco, and that she subsequently provided deposition testimony, was relevant to her claims. (CP 2606–07; CP 3059–60.) Defendants were concerned, however, about the unfair prejudice that would result from permitting Ms. Rufin to present extensive evidence regarding Ms. Tobin's claim of discrimination, especially given that her complaint was deemed unfounded by the independent investigator, and further was materially different from Ms. Rufin's own claim of retaliation. (CP 2606–09.) Defendants moved to exclude evidence of Ms. Tobin's

claims beyond that needed to establish that Ms. Rufin engaged in protected conduct, including Ms. Tobin's testimony entirely. (*Id.*)

Ms. Rufin sought to elicit extensive testimony from both Ms. Rufin and Ms. Tobin regarding the events of 2005–06, (*e.g.*, CP 3033–3041; CP 3154–3164), even though Defendants did not dispute that Ms. Rufin had engaged in protected conduct. Ms. Rufin argued that such evidence was needed to establish that she opposed what she reasonably believed was discrimination, and that it was relevant to Ms. Rufin's credibility and Mr. Carrasco's alleged motive to retaliate against Ms. Rufin.[14] (CP 3158–64.) However, while Ms. Rufin sought to rehash extensively Ms. Tobin's and Ms. Rufin's allegations against Mr. Carrasco, she moved to exclude evidence that the investigator determined Ms. Tobin's allegation to be unsubstantiated. (*See, e.g.,* 3/31/14 RP at 27:6–19.)

The trial court held that both Ms. Tobin and Ms. Rufin could testify about the events that were the subject of the 2005–06 investigation.[15] (3/27/14 RP at 16:5–17:11, 17:24–18:5, 21:4–23; 3/31/14

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[14] Ms. Rufin argued that, to establish the she had engaged in protected conduct, she was required to show that she opposed what she reasonably believed to be unlawful discrimination. (*E.g.*, CP 3158–59.) Defendants argued this was unnecessary given that protected activity was conceded. Eventually the jury was instructed that this element was satisfied. (CP 3529, No. 7.)

[15] The trial court limited Ms. Tobin's testimony to the events discussed with the investigator because it was relevant to Ms. Rufin's reasonable belief that she opposed unlawful discrimination. (3/31/14 RP at 23:4–10, 29:17–30:19.) The trial court excluded evidence of Ms. Tobin's allegations of possible retaliation in 2006, holding that this evidence, first identified at trial, was not relevant to Ms. Rufin's reasonable belief and was improper ER 404(b) evidence. (*Id.* at 7:2–19:23.)

RP at 29:18–30:19; CP 3516–17 ¶ 7.) The trial court held their testimony was relevant to Ms. Rufin's prima facie case, as well as to her credibility and Mr. Carrasco's alleged motive to retaliate. (*Id.* *See also* 3/31/14 RP at 65:16–66:4.) However, the trial court was also concerned about the risk of unfair prejudice to Defendants from such testimony, as well as the risk of confusing the jury. (*E.g.*, 3/31/14 RP at 27:6–28:13.) The trial court limited Ms. Tobin's and Ms. Rufin's testimony to what they themselves discussed with Ms. Humphrey.[16] (CP 3516–19 ¶¶ 7, 16.a; 3/27/14 RP at 21:4–23; 3/31/14 RP at 29:17–30:19.) The trial court also held that Ms. Humphrey's finding of no discrimination was admissible because it too was directly relevant to Mr. Carrasco's alleged motive to retaliate. (CP 3517–18 ¶ 9; CP 3662–63; 3/31/14 RP at 27:6–28:13, 29:17–30:10.)

Defendants also moved to exclude evidence and testimony that was relevant solely to Ms. Rufin's LPSM retaliation claim. (CP 2609; 3/27/14 RP at 80:13–82:10.) Ms. Rufin opposed the motion. (3/27/14 RP at 81:18–25.) The trial court excluded the evidence; because Ms. Rufin had, as a matter of law, failed to present any evidence from which a jury could infer a connection between Mr. Carrasco and the LPSM hiring process at summary judgment, the court reasoned it would be

[16] The Court excluded Ms. Rufin's written statement and 2007 deposition testimony, finding both to be inadmissible hearsay. (3/27/14 RP at 16:5–17:2; CP 3516–17 ¶ 7.)

inappropriate to allow plaintiff to argue at trial that such a connection existed. (*Id.* at 82:1–7.)

3. During trial, Ms. Rufin testified that she left SCL because of the finding of no discrimination in the Tobin investigation, and her questioning of Mr. Carrasco opened the door to evidence regarding the result of the *Davis* lawsuit.

Trial commenced on March 31, 2014. On April 1, Ms. Rufin testified extensively about, among other things, her participation in the investigation of Ms. Tobin's complaint of possible discrimination. (4/1/14 RP at 81:19–105:14, 111:21–114:6.) During her testimony, Ms. Rufin's counsel sought to *admit* on direct the conclusions of the Tobin investigation because it evidenced why Ms. Rufin left SCL in 2006. (*Id.* at 106:7–109:1.) The trial court permitted Ms. Rufin to testify that she had learned that the investigation resulted in a finding of no discrimination.[17] (*Id. See also id.* at 113:20–114:6.)

On April 8, counsel for Ms. Rufin interrogated Mr. Carrasco about the *Davis* litigation. (4/8/14 RP at 98:24–111:17.) Counsel's interrogation implied that Mr. Carrasco, who was not originally a named party to the *Davis* litigation, was added as a defendant as a direct result of Ms. Rufin's 2007 deposition testimony. (*Id.* at 100:24–103:16.) Counsel's questions also implied that the *Davis* litigation involved claims

[17] Ms. Rufin later admitted, over Defendants' objection, a letter containing the results of the Tobin investigation.

against Mr. Carrasco similar to those at issue in this case. (*Id.* at 98:24–111:17, 126:21–127:15, 129:7–19, 130:8–14; CP 3661–62.)

Defendants argued, and the trial court agreed, that counsel's line of questioning opened the door to the result of the *Davis* litigation, evidence the trial court initially had ruled inadmissible. (*Id.* at 125:22–127:15, 129:7–19, 130:8–14; 4/9/14 RP at 4:23–28:6.) The Court was concerned that the jury "could believe misleadingly" that *Davis* involved claims against Mr. Carrasco for discriminating against female engineers at SCL, and further that Mr. Carrasco was highly motivated to retaliate against Ms. Rufin. (4/8/14 RP at 126:21–127:8; 4/9/14 RP at 8:18–9:14.) Thus the trial court permitted Defendants to call a single witness to testify that Ms. Davis was not an engineer and her claims were dismissed at summary judgment. (4/9/14 RP at 16:18–17:16, 108:5–109:16.)

4. At the conclusion of trial, the jury returned a verdict for defendants.

Trial on Ms. Rufin's CME retaliation claim lasted seven days. During trial, Ms. Rufin presented evidence regarding nearly all the facts discussed in her appellate brief. (*See, e.g.*, 4/10/14 RP at 22:18–71:12.) The only evidence cited in her appellate brief that the jury did not hear was that which was relevant solely to Ms. Rufin's LPSM claim.

The jury returned a verdict for Defendants. (CP 3533–34.) Ms. Rufin moved for a new trial, making the same arguments she makes on appeal. (CP 3535–46.) The trial court denied the motion. (CP 3660–68.)

IV. ARGUMENT

A. The Trial Court Properly Dismissed Ms. Rufin's LPSM Retaliation Claim at Summary Judgment.

This court reviews *de novo* a trial court's grant of summary judgment. *Fulton v. State, Dep't of Soc. & Health Servs.*, 169 Wn. App. 137, 147 (2012). Summary judgment should be affirmed "if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (citing CR 56(c); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 463 (2004)). This Court may affirm "on any grounds the record adequately supports." *Fulton*, 169 Wn. App. at 147. Ms. Rufin challenges only a limited aspect of the trial court's grant of summary judgment, the dismissal of her LPSM retaliation claim. (*Id.*)

1. Ms. Rufin's burden.

To establish a prima facie case of retaliation, Ms. Rufin was required to show (1) that she engaged in a statutorily protected activity, (2) that the City or Mr. Carrasco took adverse employment action against her, and (3) that there was a causal connection between the protected conduct

and the adverse action. *Milligan v. Thompson*, 110 Wn. App. 628, 638 (2002); *Graves v. Dep't of Game*, 76 Wn. App. 705, 711–12 (1994).

Summary judgment is appropriate where the plaintiff fails to establish each element of the prima facie case. *E.g., Crownover v. State ex rel. Dept. of Transp.*, 165 Wn. App. 131, 148 (2011). The plaintiff must do more than show "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Conclusory, speculative testimony in affidavits is insufficient to meet that burden. *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). "[B]are assertions that a genuine material issue exists will not defeat a summary judgment motion in the absence of actual evidence." *Trimble v. Washington State Univ.*, 140 Wn.2d 88, 93 (2000). Washington courts regularly grant (and affirm) summary judgment in employment discrimination cases where the plaintiff fails to establish *each element* of her claim. *See, e.g., Domingo v. Boeing Employees' Credit Union,* 124 Wn. App. 71, 77–78 (2004).

To avoid summary judgment, Ms. Rufin had to establish specific and material facts supporting each element of her prima facie case. Only the third element, a causal connection between the protected activity and the adverse employment action, was at issue. Ms. Rufin's theory was that (a) Mr. Carrasco, and Mr. Carrasco alone, was aware of her protected

activity, and (b) that Mr. Carrasco somehow prevented his subordinates from hiring her. Thus, in order to establish the requisite causal connection between the protected activity and the non-hiring, Ms. Rufin needed to show that Mr. Carrasco was involved. The trial court properly granted summary judgment on Ms. Rufin's LPSM claim because she failed to show that Mr. Carrasco had any connection to the LPSM hiring process.

2. Summary judgment was appropriate because Ms. Rufin failed to establish the causal-connection element of her prima facie case.

Mr. Rufin's theory was that Mr. Carrasco somehow learned of her application for the LPSM position, and that he thereafter intervened in that process. (*See, e.g.*, CP 1253 at 61:2–5; CP 1257 at 75:22–76:3; CP 610 ¶ 92. *See also* CP 327–29 ¶¶ 3.34–.35, 3.38–.39; CP 597 ¶ 57; 2/27/14 RP at 30:8–16, 41:9–42:6.) This *had* to be her theory: Ms. Rufin conceded that Mr. Cola and the other members of the LPSM hiring process did not know of Ms. Rufin's protected conduct, and Ms. Rufin admitted she had no evidence to the contrary. (CP 1123–25 ¶¶ 6–7, 9; CP 1061–62 ¶¶ 2–4; CP 1063–64 ¶¶ 2–4; CP 1126–27 ¶¶ 2–4; CP 1256 at 70:17–71:17.) Thus as a matter of law, the people charged with making the LPSM hiring decision could not have retaliated against Ms. Rufin. *See*, *e.g., Miller v. State of California*, 212 Fed. Appx. 592, 593 (9th Cir. 2006) ("To establish causal link, [plaintiff] must show that the decision-makers … were aware

of his testimony on behalf of his co-workers.... [M]ere speculation that [the decision-makers] had to know of his testimony and retaliated against him because of it, does not create a disputed issue of material fact sufficient to defeat summary judgment"); *Jones v. Barnhart*, 349 F.3d 1260, 1269 (10th Cir. 2003) (summary judgment appropriate where plaintiffs presented no evidence the decision maker was aware of plaintiff's alleged protected conduct).

To establish a causal link, Ms. Rufin had to show that Mr. Carrasco – the only person she claims had knowledge of her protected conduct – somehow influenced the hiring panel's decision not to hire Ms. Rufin. *See, e.g., Flores v. Merced Irrigation Dist.*, 758 F.Supp.2d 986 (E.D. Cal. 2010). In *Flores*, the plaintiff sued a public utility for discrimination and retaliation, and named the utility's general manager and its director of administrative services as defendants. The court noted that the general manager could not be held liable merely because he was the ultimate supervisor, and that the claim against the director of administrative services failed because "[p]laintiff's evidence does not show that Mr. Blum was involved in any of the decisions related to plaintiff's employment" or his "personal involvement in any of the alleged discrimination acts." *Id.* at 1001–03.

Ms. Rufin presented no evidence that Mr. Carrasco was involved in the LPSM hiring process. Without evidence that Mr. Carrasco was involved in (or even had any knowledge of) the LPSM hiring process, her LPSM claim failed. *See id.*; *Cain v. Geren*, 261 Fed. Appx. 215, 217–18 (11th Cir. 2008). Mere speculation that he participated in or influenced the LPSM decision is insufficient.[18]

The Eleventh Circuit's decision in *Cain* is instructive. 261 Fed. Appx. at 217–18. There, the evidence showed that plaintiff's supervisor (Fischer) was not aware that she had filed an EEO complaint when he recommended that she not receive a performance bonus that year. *Id.* at 218. In opposition to the employer's motion for summary judgment, Cain argued that the bonus decision was retaliatory because Stauner, the person who reviewed supervisor recommendations and ultimately decided who received a bonus, knew of plaintiff's protected activity when he approved Fischer's recommendation that Cain receive no bonus. *Id.* at 218. However, the evidence showed that Stauner never attempted to influence Fischer's bonus recommendations, Fischer's recommendations were

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[18] Ms. Rufin cites several cases for the proposition that the employer's knowledge of protected conduct can be inferred from circumstantial evidence. (*See* Appellant's Brief, pp. 36–38.) That argument misses the point. The trial court obviously found sufficient circumstantial evidence that Mr. Carrasco knew about the protected conduct to allow the CME claim to proceed to trial. Ms. Rufin's evidentiary failing at summary judgment was that she produced no evidence that Mr. Carrasco was involved in the LPSM hiring process, and the trial court correctly concluded that Ms. Rufin failed to present any evidence suggesting that Mr. Cola or the other members of the LPSM hiring panel were acting on Mr. Carrasco's orders or that Mr. Carrasco influenced the process in any way.

routinely approved by his superiors (including Stauner), and Fischer stated he decided not to recommend Cain for a bonus. *Id.* The trial court held that plaintiff failed to establish a prima facie case of retaliation. *Id.*

Here, Mr. Carrasco denied knowledge of either the LPSM hiring process or Ms. Rufin's application. (CP 250 ¶ 24. *See also* CP 1259 at 85:10–17.) The members of the LPSM interview panel denied that Mr. Carrasco was involved in their decision. (CP 1123–25 ¶¶ 4–7, 9; CP 1062 ¶¶ 3–5; CP 1064 ¶¶ 3–5; CP 1066 ¶ 3; CP 1127 ¶¶ 3–6.) There is no evidence that Mr. Carrasco was involved in the LPSM process.

Ms. Rufin's argument to the contrary is based upon a single, handwritten entry in the LPSM hiring status report. Ms. Rufin claims that this document states that Mr. West made a decision to take Ms. Rufin out of the running. There is no evidence to support this conjecture (or to in any way suggest that, if Mr. West did this, Mr. Carrasco had any involvement). And in fact, the entry indicates that the second interview would be conducted *by* Mr. West, not that Mr. West decided to exclude Ms. Rufin. (*See* CP 1308–10; CP 1065–66 ¶¶ 2–3.) But regardless of the interpretation of this note, as Ms. Rufin admitted at deposition, nothing in this entry shows that Mr. Carrasco intervened in the hiring process. (CP 1257 at 74:11–76:16.) Absent even circumstantial evidence that Mr.

Carrasco knew about or had any involvement in the LPSM hiring process, Ms. Rufin's LPSM claim was properly dismissed.

Ms. Rufin agrees there is no direct evidence of Mr. Carrasco's involvement with her failed applications (CP 1925), but insists that he "must have" intervened, or that his attitudes must have permeated down. Our Supreme Court rejected a similar circular argument in *Grimwood*,[19] the font of employment discrimination summary judgment law. Grimwood testified that he didn't "feel [he] was given a sufficiently good reason for his termination" and that therefore discrimination must be the real reason. The Supreme Court rejected this, pointing out that opposition to summary judgment must be based on facts – events or occurrences that exist in reality – not supposition or opinion. *Id.* at 360–61. Ms. Rufin's argument is the same as Grimwood's. Lacking any actual evidence of Mr. Carrasco's involvement, she concludes that *someone* must have intervened and that "the only person with the motivation and the power to do so was Jorge Carrasco." (CP 596–97 ¶ 56.) *Grimwood* rejects this sort of speculation in opposition to summary judgment.[20] Summary judgment

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[19] *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355 (1988).

[20] Other appellate court decisions also show that a plaintiff cannot argue that "it must have been so" to defeat summary judgment. *See Swanson v. Baker & McKenzie, LLP*, 527 Fed. Appx. 572 (7th Cir. 2013) (rejecting plaintiff's claim, based on irregularities in record-keeping rather than direct evidence, that employer "must have told prospective employers something adverse"); *Simmons v. McGuffey Nursing Home, Inc.*, 619 F.2d 369 (5th Cir. 1980) (rejecting plaintiff's claim that age must have been the reason for his termination "because I could see no other reason I could have been").

was proper because Ms. Rufin's claim against Mr. Carrasco was based on supposition and opinion, not fact.

3. The trial court considered the entire record, including the CME evidence, when it dismissed Ms. Rufin's LPSM claim, and properly dismissed the LPSM claim because the CME evidence does not show Mr. Carrasco was involved with the CME process.

Tacitly conceding the complete lack of evidence that Mr. Carrasco had anything to do with the LPSM hiring process, Ms. Rufin argues that the trial court should have considered the CME evidence in ruling on the LPSM claim. As we demonstrate below, this argument fails because (a) all of the CME evidence was before the trial court when it ruled on the LPSM claim, and the record is clear that the trial court considered all evidence before it (including the CME evidence) when dismissing the LPSM claim; and (b) nothing about the CME evidence suggests that Mr. Carrasco was involved in the LPSM process.

As an initial point, Ms. Rufin's assertion that the trial court failed to consider the entire record at summary judgment is incorrect. (Appellant's Brief, pp. 29–31.) As the trial court made clear, its decision to dismiss Ms. Rufin's LPSM retaliation claim at summary judgment was made in light of all the evidence in the record, including evidence related to her application for the CME position:

> After an extensive review of the admissible evidence, the Court concluded [on summary judgment] Ms. Rufin had

> not created an issue of fact, even when evaluating the evidence in light of what had occurred during Ms. Rufin's attempt to be hired into the CME 3 position.

(CP 3661.) At summary judgment, the trial court reviewed *all* of the evidence, and determined that Ms. Rufin did not present any evidence from which a reasonable juror could conclude that Mr. Carrasco was connected to the LPSM process. (*See, id.*; 2/27/14 RP at 59:3–60:5.)

There is no support in the record for Ms. Rufin's argument that the trial court failed to consider the entire record.[21] Ms. Rufin's real argument is that because the trial court dismissed the LPSM claim but not the CME claim, the trial court must have failed to consider the CME evidence. This argument proves too much. If this argument prevails, then trial courts may never enter partial summary judgment in employment discrimination cases (or in any cases). The law is, of course, to the contrary; trial courts regularly grant partial summary judgment, and are affirmed. *E.g.*, *Crownover v. State ex rel. Dept. of Transp.*, 165 Wn. App. 131 (2011) (affirming summary judgment dismissal of some of plaintiff's employment claims but denying motion as to others); *Graves v. Dep't. of Game*, 76 Wn. App. 705 (1994). *See also, Lam v. Univ. of Hawai'i,* 40

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[21] Ms. Rufin's argument to the contrary is based on the trial court's statement, in referring to the CME and LPSM hiring processes, that she would "analyze them separately." (3/27/14 RP at 58:8–12.) But all of the evidence was before the trial court. That the court analyzed the processes separately does not imply that she failed to consider all of the evidence.

F.3d 1551 (9th Cir. 1994); *Schulte v. Potter*, 218 Fed. Appx. 703 (10th Cir. 2007); *Green v. City of St. Louis, Mo.*, 507 F.3d 662 (8th Cir. 2007).[22]

Ms. Rufin cannot seriously deny the legitimacy of partial summary judgment. Her implicit argument is that the circumstantial evidence about the CME hiring process tended to show that Mr. Carrasco was involved in a different hiring process, the LPSM hiring process, and that therefore the court erred in dismissing her LPSM retaliation claim.

This doesn't follow. These were two separate hiring processes, and circumstantial evidence that Mr. Carrasco might have known something about one of them (the CME process) does not mean that he had anything to do with the other (the LPSM process). For example, Ms. Johnson is alleged to have made the "burned your bridges" comment in June 2012 (three months after SCL hired the eminently-qualified Ms. Steiner for the LPSM position). The conversation with Ms. Johnson had

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[22] Ms. Rufin cites various cases for the proposition that the trial court must consider the record "taken as a whole" at summary judgment. (Appellant's Brief, pp. 29–31, citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185 (9th Cir. 2003); *Diaz v. Jiten Hotel Management, Inc.*, 762 F.Supp.2d 319 (D. Mass 2011).) These cases are inapposite. *Reeves* and *Raad* concern the plaintiff's ultimate burden under the *McDonnell-Douglas* framework, holding that the plaintiff may demonstrate intentional discrimination with the same evidence used to satisfy the prima facie case and to demonstrate pretext. *Reeves*, 530 U.S. at 147, *Raad*, 323 F.3d at 1194. In *Diaz* the trial court simply held that it would not ignore ageist statements (direct evidence of discrimination) made by plaintiff's previous direct supervisor where, although the statements were made outside the statute of limitations, the plaintiff presented evidence demonstrating that those statements contributed to further discriminatory treatment. 762 F.Supp.2d at 322–23, 328–29. None of these cases suggests that this Court should disregard the fact that the trial court here considered the entire factual record.

solely to do with the CME hiring process. Ms. Rufin initiated the pertinent chain of events on June 11, 2012 by advising Mr. Carrasco of the CME hiring process (at the time still ongoing) (CP 261); Ms. Rufin received her CME rejection letter on June 12, 2012 (CP 1131); and on June 20, 2012, Ms. Johnson allegedly told Ms. Rufin that she had burned her bridges. (*See* CP 1163 ¶ 8). The trial court concluded that this evidence showed Mr. Carrasco was aware of the CME hiring process by June 2012, and that there sufficient circumstantial of potential involvement in the CME process to get Ms. Rufin past summary judgment. (2/27/14 RP at 60:5–61:3.)

But none of that has anything to do with the LPSM process. Ms. Rufin's email to Mr. Carrasco told him about the CME process, not the LPSM process. The CME process was ongoing when Ms. Rufin told Mr. Carrasco about it; the LPSM process was closed, and had been for three months. The purpose of the meeting between Ms. Johnson and Ms. Rufin was to discuss Ms. Rufin's concerns about the CME process, not the LPSM process. None of the CME evidence that the court found sufficient to warrant a trial on the CME retaliation claim had anything to do with the LPSM process.

Ms. Rufin also makes much of a statement that Mr. Cola made when the two met, on April 4, 2012, to discuss the LPSM process (which

had concluded on approximately March 19, 2012). At the April 4 meeting, Mr. Cola and Ms. Rufin also discussed the then-ongoing CME hiring process, and for purposes of summary judgment we must assume that Mr. Cola told Ms. Rufin that the decision not to hire her *for the CME position* was a political one. (*E.g.* CP 1252 at 54:10–55:1.) Ms. Rufin argues this was circumstantial evidence of Mr. Carrasco's involvement in the CME process, essentially claiming that any "political" decision must originate with Mr. Carrasco. But the comment was not about the LPSM process, and thus tells us nothing about the LPSM process.

Ms. Rufin's theory appears to have been that Mr. West, on orders from Mr. Carrasco, intervened to take her out of the running in the LPSM process. But nothing about any of the CME evidence – not the burning bridges comment; not the timing of Ms. Rufin's rejection for the CME job; and not the claim that the CME process was political – says anything at all about Mr. West, about communications between Mr. West and Mr. Carrasco, about Mr. Carrasco's knowledge of the LPSM process, or about intervention by Mr. Carrasco in the LPSM process.

In sum: the trial court did in fact consider all of the evidence about both the CME and the LPSM hiring processes. The trial court was correct to dismiss the LPSM retaliation claim, and none of the CME evidence

suggests, even circumstantially, that Mr. Carrasco was aware of or involved with the LPSM process.

4. Ms. Rufin's failure to establish a prima facie case ends the analysis.

Upon a plaintiff's failure to establish each element of the prima facie case, summary judgment is appropriate and the court's analysis ends. *See Clarke v. State Attorney General's Office*, 133 Wn. App. 767, 789 (2006); *Domingo v. Boeing Employees Credit Union*, 124 Wn. App. 71, 80–84 (2004); *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 862–863 (2000) (employee's failure to demonstrate causal connection warranted summary judgment to employer). Ms. Rufin failed to establish the causal connection element of her prima facie case. Ms. Rufin's arguments about alleged inconsistencies in the LPSM hiring process are, at most, circumstantial evidence of pretext. They do not relieve Ms. Rufin of her initial burden to establish each element of her prima facie case. *See, e.g., id. See also Alonso v. Qwest Comm. Co., LLC*, 178 Wn. App. 734, 754 (2013); *Crownover v. State ex rel. Dept. of Transp.*, 165 Wn. App. 131, 148 (2011); *Raad*, 323 F.3d at 1197. Because Ms. Rufin failed to establish a causal connection between her protected conduct and the LPSM hiring process, summary judgment was correctly granted, and this Court need not consider purported evidence of pretext.

5. Even assuming Ms. Rufin could establish a prima facie case, summary judgment was appropriate.

Under the *McDonnell-Douglas* framework, once the plaintiff establishes a prima facie case, the burden shifts to the defendant to produce a legitimate, non-retaliatory explanation for the hiring decision. *Milligan v. Thompson*, 110 Wn. App. 628, 636–37 (2002). Upon doing so, the burden shifts back to the plaintiff, who must show that the proffered explanation is a pretext for discrimination. *Id.* at 737. Even if the plaintiff establishes a prima facie case and offers some evidence of pretext, summary judgment is still appropriate where "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000); *Clarke v. State Attorney General's Office*, 133 Wn. App. 767, 788–89 (2006) ("Summary judgment is also proper where the plaintiff cannot present evidence that the defendant's reasons for terminating the plaintiff were untrue or mere pretext or if no rational trier of fact could conclude that the termination was discriminatory.")

Here, the City articulated a legitimate, non-retaliatory explanation for why it did not hire Ms. Rufin. Specifically, following the first round of interviews, Mr. Cola and the other members of the hiring panel unanimously decided Ms. Steiner and Ms. Ooka were the strongest candidates and would be called back for second interviews. (CP 1123–24

¶¶ 5–7; CP 1062 ¶¶ 3–5; CP 1064 ¶¶ 3–5; CP 1066 ¶ 3; CP 1127 ¶¶ 3–6.) The panel also unanimously decided Ms. Rufin was not as strong a candidate and would be removed from consideration.[23] (*Id.*)

Ms. Rufin does not attempt to rebut the substance of the City's explanation. Instead, Ms. Rufin asserts that alleged inconsistencies[24] in the hiring file suggest that the City's explanation is not worthy of belief. But Ms. Rufin's purported evidence of pretext does not address the major failing of her claim: no evidence connects Mr. Carrasco to the LPSM hiring process. Absent evidence the Mr. Carrasco was involved in or influenced the LPSM hiring process, no rational trier of fact could conclude that Mr. Cola's decision not to hire Ms. Rufin was retaliatory. *See Hoppe v. Lewis Univ.*, 692 F.3d 833, 842 (7th Cir. 2012) (trial court correctly granted summary dismissal of plaintiff's retaliation claim where plaintiff "failed to identify any evidence that Brogan, the person who removed her from the position, knew of her protected activity or that her protected activity was 'a substantial motivating factor' in Brogan's

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[23] As Mr. Cola explained in his declaration, "Becky Rufin was a strong candidate, but not the strongest, and there were some concerns about the lack of detail in her responses to some of the [interview] questions." (CP 1124, ¶ 7.) The other panel members had similar concerns and likewise felt the Ms. Steiner and Ms. Ooka performed better during the interview process. (CP 1062 ¶¶ 3–5; CP 1064 ¶¶ 3–5; CP 1127 ¶¶ 3–6.)

[24] The inconsistencies are manufactured. It is misleading to argue, as Ms. Rufin does at Appellant's Brief p. 41, that Mr. Cola admitted that his statements about the process were conflicting. Mr. Cola and all the members of the panel explained the process in a simple and consistent manner. *See generally* p. 6, *supra*. The citation Ms. Rufin provides, to CP 1124, is to a portion of the pertinent and consistent record. Any tension between the explanations of those actually involved and the personnel clerk's notes is not material: nothing in the hiring file suggests Mr. Carrasco was involved in the process.

decision."); *Alvarado v. Donahoe*, 687 F.3d 453, 459 (1st Cir. 2012) ("Speaking commonsensically, our cases have in the past explained that, to successfully establish a claim of unlawful retaliation there must be, 'at a minimum, ... competent evidence that the alleged retaliators *knew* of the plaintiff's protected activity and that a retaliatory motive played a part in the adverse employment actions alleged.'") (citing *Lewis v. Gillette Co.*, 22 F.3d 22, 24 (1st Cir. 1994)).

B. The Trial Court's Evidentiary Rulings Were Not An Abuse of Discretion.

"A trial court has broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion." *Goehle v. Fred Hutchinson Cancer Research Center,* 100 Wn. App. 609, 617 (2000) (citing *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662–63 (1997)). Abuse occurs only where discretion is exercised on untenable grounds or for untenable reasons. *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 572 (1986). The trial court is entitled to particular deference where there are fair arguments both for and against admission. *Id.*

1. The trial court correctly excluded evidence of Ms. Rufin's LPSM claim at trial.

The LPSM hiring process was not evidence of retaliation and was not relevant to Ms. Rufin's CME retaliation claim. The trial court correctly determined that the LPSM decision was not, as a matter of law, unlawful retaliation. (CP 3660–61.) Thus, the trial court held that it

would be improper and misleading to permit Ms. Rufin to argue at trial that the LPSM hiring process was another example of retaliation against Ms. Rufin. (CP 3661; 3/27/14 RP at 81:6–82:7.) Ms. Rufin does not explain how evidence regarding a hiring process that was not retaliatory as a matter of law has any tendency to show that retaliation occurred in a separate hiring process. The evidence was irrelevant to her remaining claim and was properly excluded. ER 402.

Nor was the evidence admissible under ER 404(b) because, as a matter of law, the LPSM process was not a prior bad act. In determining whether to admit evidence of prior wrongs under ER 404(b), the trial court must, among other things, find that the prior acts were proved by a preponderance of the evidence and determine whether the evidence is relevant. *State v. Guzman*, 119 Wn. App. 176, 182 (2003). Such evidence is presumed inadmissible, and doubts as to admissibility are resolved in favor of exclusion. *State v. Nelson*, 131 Wn. App. 108, 115 (2006). Here, the evidence was not admissible because Ms. Rufin could not prove by a preponderance of the evidence that the LPSM process was a prior bad act; Ms. Rufin presented no evidence from which a jury could conclude that retaliation had occurred. This alone required exclusion of evidence regarding of Ms. Rufin's LPSM application.

Finally, even assuming evidence of Ms. Rufin's LPSM application was somehow relevant, its probative value was substantially outweighed by the risk of unfair prejudice and misleading the jury, confusion of the issues, or considerations of waste of time. ER 403. *See also Schulte v. Potter*, 218 Fed. Appx. 703, 709–10 (10th Cir. 2007) (trial court correctly excluded evidence related to claims dismissed at summary judgment where excluded evidence was not relevant to remaining issues); *Ryan v. Donely*, 511 Fed. Appx. 687, 692 (10th Cir. 2013) (affirming exclusion of evidence related to plaintiff's dismissed claim).

Ms. Rufin's argument to the contrary asserts that the LPSM evidence should have been admitted so that Ms. Rufin could establish a "pattern" of retaliation. (Appellant's Brief, p. 44.) A plaintiff cannot present evidence of an alleged pattern of retaliation or discrimination using claims which have been determined as a matter of law to not be discriminatory or retaliatory. *E.g., Waters v. Genesis Health Ventures, Inc.*, 400 F.Supp.2d 808, 812 (E.D. Pa. 2005). No pattern and practice case supports the use of legally-insufficient allegations to establish a pattern, and Ms. Rufin cites no authority to the contrary.

Ms. Rufin also argues that evidence of time-barred prior discriminatory acts may be admitted in some circumstances, citing *Loeffelholz v. Univ. of Washington*, 175 Wn.2d 264, 274 (2012). In

Loeffelholz, the other acts were merely time-barred, rather than wholly unrelated to the actor at issue, and thus were potentially relevant to the actor's intent. 175 Wn.2d at 274. Here there was no connection between Mr. Carrasco and the LPSM evidence, and so the evidence was irrelevant.

2. Ms. Rufin chose to offer evidence regarding the result of the Tobin investigation, and the trial court properly admitted limited evidence regarding the Tobin investigation.

As an initial matter, Ms. Rufin has waived any objection to the admission into evidence of the results of the Tobin investigation because she herself introduced that evidence to explain why she left SCL in 2006. (4/1/14 RP at 106:7–109:1, 113:15–115:5.) A party waives any objection to the admissibility of evidence "by subsequently using it for his own purposes, or by introducing evidence similar to that already objected to." *Sevener v. Nw. Tractor & Equip. Corp.*, 41 Wn.2d 1, 15 (1952). Here, the trial court held that evidence of the result of the Tobin investigation was admissible because it was relevant to Mr. Carrasco's purported motive to retaliate. (*See, e.g.*, CP 3662–63.) At trial, however, Ms. Rufin offered the evidence for another reason, as an explanation for why she chose to leave SCL in 2006. (4/1/14 RP at 106:7–109:1, 113:15–115:5.) Further, Ms. Rufin also admitted, over Defendants' objection, a letter containing the findings of the investigation, presumably as circumstantial evidence of Mr. Carrasco's knowledge of the protected conduct. (4/7/14 RP at 100:3–

102:8; 162:19–166:19.) By offering the evidence for her own purpose, Ms. Rufin waived any objection to the trial court's order.[25]

Even if Ms. Rufin did not waive her right to appeal, the trial court did not abuse its discretion. First, the trial court correctly excluded Ms. Rufin's 2006 written statement. The trial court held that Ms. Rufin's written statement, as well as her deposition testimony in *Davis*, was inadmissible hearsay. (3/27/14 RP at 14:12–24, 16:5–17:11; CP 3516–17, ¶ 7.) The trial court therefore excluded the written statement, but permitted Ms. Rufin to testify about the majority of the facts recited therein. (*Id.*) Ms. Rufin cites no reason why this decision was in error.

Second, the trial court correctly limited Ms. Rufin's and Ms. Tobin's testimony to those matters of which they had personal knowledge. (3/27/14 RP at 16:5-17:11; 3/31/14 RP at 29:18–30:19; CP 3516–17, ¶ 7.) As the trial court correctly noted, some of Ms. Rufin's written statement contained hearsay within hearsay, and repeated allegations of which Ms. Rufin had no personal knowledge. (*See id.*; CP 1696–99.) The trial court therefore correctly prohibited Ms. Rufin from testifying about events of which she had no personal knowledge. ER 602; ER 801-803.

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[25] Because Ms. Rufin offered the evidence of the investigator's finding for her own, independent purpose, the facts here are distinguishable from cases where a party offers contested evidence in order to mitigate its impact. *See, e.g., Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426 (1991). Even if Ms. Rufin did not "open the door" to such evidence by offering it to explain why she left SCL in 2006, she did open the door when she admitted, over defense objection, a letter containing the Tobin investigation conclusion.

Third, the trial court correctly exercised its discretion under ER 403 to limit the scope of Ms. Rufin's and Ms. Tobin's testimony regarding the events of 2005–06. A trial court has broad discretion to balance probative value versus prejudice under ER 403 and may only be reversed upon a manifest abuse of discretion. *State v. Rice*, 48 Wn. App. 7, 11 (1987). The trial court recognized that the evidence regarding Ms. Tobin's prior complaint of discrimination and Ms. Rufin's participation in the subsequent investigation was admissible for a limited purpose: to establish that Ms. Rufin had a reasonable belief of discrimination in 2006, and as evidence of Mr. Carrasco's motive to retaliate. (3/27/14 RP at 16:5–17:11, 17:24–18:5, 21:4–23; 3/31/14 RP at 29:18–30:19, 65:16–66:4; CP 3516–17 ¶ 7.) However, the trial court also was concerned that admitting too much evidence of these dated allegations would result in unfair prejudice to Defendants, may confuse the jury, and could be a waste of time. (3/31/14 RP at 16:17–20:10, 27:6–28:13.) In attempt to balance these concerns, the trial court permitted Ms. Rufin and, over Defendants' objection, Ms. Tobin to testify extensively about their involvement in the events of 2005–06, including a detailed recitation of the concerns they raised with the investigator. (*See, e.g.*, 4/1/14 RP at 81:19–105:14, 111:21–114:6; 4/3/14 RP at 201:9–206:1; CP 3516–17.) This evidence was more than sufficient for Ms. Rufin to establish she engaged in

protected conduct, provided the necessary background to the retaliation claim at issue, and permitted her to argue Mr. Carrasco's purported retaliatory motive. The trial court did err.[26]

Finally, the trial court correctly held that the result of the Tobin investigation was admissible. Just as it found Ms. Rufin's and Ms. Tobin's testimony was relevant to Mr. Carrasco's purported retaliatory motive, the trial court found that the investigation results were similarly relevant to this contested issue. (CP 3662–63; 3/31/14 RP at 27:6–28:13, 29:18–30:19.) And this makes sense; assuming Mr. Carrasco knew of Ms. Rufin's protected conduct in 2006, a jury could conclude that he would be less motivated to retaliate because the allegations were deemed unfounded. Further, as the trial court noted, Ms. Rufin's own desire to present extensive testimony regarding the investigation into Ms. Tobin's complaints opened the door to further evidence from the investigation. Although whether discrimination occurred in 2006 was not at issue at trial, Mr. Carrasco's motive was, and the investigation results were offered solely to rebut Ms. Rufin's evidence of Mr. Carrasco's purported retaliatory motive. The trial court did not err.

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[26] With one exception, Ms. Rufin does not identify any testimony that she believes was improperly excluded by the trial court's order. (*See* Appellant's Brief, pp. 46-49.) Further, the trial court correctly excluded Ms. Tobin's allegation of possible retaliation by SCL in 2006. Following supplemental briefing offered by the parties, the trial court held that Ms. Tobin's previously-undisclosed allegations were inadmissible under both ER 404(b) and ER 403. (3/31/14 RP at 16:17–20:10.) Ms. Rufin does not cite any reason why that decision was in error.

3. Ms. Rufin opened the door to testimony regarding the results of the litigation in *Davis*.

A party may open the door to otherwise inadmissible evidence by voluntarily raising the subject. *State v. Hartzell*, 156 Wn. App. 918, 935 (2010); 5 KARL B. TEGLAND, WASH. PRAC.: EVID. LAW § 103.14 (5th ed.). The trial court has considerable discretion in this regard. *Hartzell*, 156 Wash. App. at 935; Id. As the trial court noted:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

(CP 3662, *quoting State v. Gefeller*, 76 Wn.2d 449, 455 (1969)).

That is what Ms. Rufin attempted here, and the trial court correctly held that Ms. Rufin's examination of Mr. Carrasco about the *Davis* litigation opened the door to evidence of the result in *Davis*. Counsel's examination of Mr. Carrasco was aimed at creating the impression that Mr. Carrasco, who was not originally a named defendant in *Davis*, was added as a defendant because of Ms. Rufin's deposition testimony, and further that he should have been highly motivated to find out why he was added to the litigation. (4/8/14 RP at 100:24–103:16.) The trial court held that this was misleading and permitted Defendants to admit evidence that

the case was dismissed at summary judgment. (*Id.* at 125:22–127:15, 129:7–19, 130:8–14; 4/9/14 RP at 4:23-28:6.) The evidence was offered only to rebut the improper and misleading questions from Ms. Rufin's counsel, and the trial court did not abuse its discretion by admitting such evidence. *Cf.*, *Hartzell*, 156 Wn. App. at 934–35.

C. Any evidentiary error was harmless.

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." ER 103. "Error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Maicke v. RDH, Inc.*, 37 Wn. App. 750, 754 (1984).

Even assuming the trial court erred by admitting the results of the Tobin investigation and *Davis* lawsuit, any error was harmless. Ms. Rufin admits that whether discrimination occurred in 2006 or the years prior was not at issue in this case. (Appellant's Brief, p. 48.) She further admits that Defendants did not contest whether she had a reasonable belief of discrimination in 2006, and the jury was instructed that Ms. Rufin had engaged in protected conduct. (*Id.*; CP 3529, No. 7.) The only issue before the jury was whether Mr. Carrasco retaliated against Ms. Rufin in 2011 and 2012. The facts and details of Ms. Tobin's and Ms. Davis' complaints were minimally, if at all, relevant to that determination. The

evidence of the results of those proceedings was admitted only to rebut similar evidence offered by Ms. Rufin regarding Mr. Carrasco's purported motive to retaliate.[27] Ms. Rufin was not prejudiced by its admission.

V. CONCLUSION

Respondents respectfully submit that, for all of the reasons set forth above, this Court should affirm the challenged rulings of the trial court. The trial court thoroughly and correctly analyzed all of the issues raised, and there is no reason to reverse her grant of summary judgment, or to conduct another jury trial of this matter.

DATED: February 13, 2015.

SAVITT BRUCE & WILLEY LLP

By: _____
David N. Bruce, WSBA No. 15237
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Peter S. Holmes
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Attorneys for Respondents

[27] The trial court offered to give a limiting instruction to the jury that the evidence regarding the outcome of the Tobin investigation was relevant only to Mr. Carrasco's motive to retaliate, and requested that Ms. Rufin draft an appropriate instruction. However, Ms. Rufin did not offer any instruction. (CP 3662–63.)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 13, 2015, true and correct copies of the following documents:

- **RESPONDENTS' BRIEF ON APPEAL**
- **APPENDIX OF UNPUBLISHED AUTHORITIES**

were served via hand delivery on the following party:

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DATED this 13th day of February, 2015, at Seattle, Washington.

Cindy M. Lein

Cindy M. Lein

NO. 72012-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

REBECCA A. RUFIN,

Appellant,

v.

CITY OF SEATTLE AND JORGE CARRASCO

Respondents.

RESPONDENTS' APPENDIX OF UNPUBLISHED AUTHORITIES

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APPENDIX OF UNPUBLISHED AUTHORITIES

ATTACHMENT 1

261 Fed.Appx. 215
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)
United States Court of Appeals, Eleventh Circuit.

Lynetta B. CAIN, Plaintiff-Appellant,
v.
Pete GEREN, Secretary of the United States Army, Defendant-Appellee.

No. 07-12929 | Non-Argument Calendar. | Jan. 7, 2008.

Synopsis

Background: Military employee brought Title VII retaliation action against military employer. The United States District Court for the Northern District of Alabama granted summary judgment in favor of employer. Employee appealed.

Holdings: The Court of Appeals held that:

[1] employee's receipt of second highest performance rating was not "adverse employment action," as required to establish prima facie Title VII retaliation claim, and

[2] employee failed to demonstrate causal link between failure to receive a performance bonus and filing of a discrimination complaint with the Equal Employment Opportunity Commission (EEOC).

Affirmed.

West Headnotes (2)

[1] **Armed Services**
Adverse Employment Action in General
Civil Rights
Public Employment

Military employee's receipt of second highest performance rating rather than the highest rating did not constitute an "adverse employment action," as required to establish prima facie Title VII retaliation claim against employer, absent evidence that the lower rating had any impact on her ability to receive a promotion, raise, bonus, or any other type of employment benefit. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

7 Cases that cite this headnote

[2] **Armed Services**
Adverse Employment Action in General
Civil Rights
Causal Connection; Temporal Proximity

Military employee failed to demonstrate causal link between her failure to receive a performance bonus and her filing of a discrimination complaint against employer with the Equal Employment Opportunity Commission (EEOC), as required to establish prima facie Title VII retaliation claim; there was a six-year gap between the EEOC complaint and the non-receipt of the bonus, and there was no showing that the supervisor who made recommendations for the bonus was aware of the EEOC complaint. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

Cases that cite this headnote

Attorneys and Law Firms

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Jenny Lynn Smith, U.S. Attorney's Office, Birmingham, AL, for Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama. D.C. Docket No. 05-01400-CV-LSC-S.

Before BLACK, MARCUS and WILSON, Circuit Judges.

Opinion

PER CURIAM:

Lynetta Cain appeals the district court's grant of summary judgment to the Secretary of the United States Army in her retaliation lawsuit, filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* [1] She asserts the district court erred in concluding she failed to demonstrate a *prima facie* case of Title VII retaliation based on her claims the Army retaliated against her for filing an Equal Employment Opportunity (EEO) complaint in 1995 by: (1) giving her a "2" on her 2001-2002 evaluation rather than a "1," and (2) not awarding her a performance bonus for the 2001-2002 performance year. [2] We affirm the district court.

We review *de novo* a district court's grant of summary judgment, using the same legal standard employed by the district court. *Crawford v. Babbitt,* 186 F.3d 1322, 1325 (11th Cir.1999). Title VII makes it unlawful for an employer to retaliate against an employee for enforcing her ***217** rights under the Act. 42 U.S.C. § 2000e-3(a). To make a *prima facie* showing of retaliation, Cain had to present evidence: "(1) that she engaged in statutorily protected expression; (2) that she suffered an adverse employment action; and (3) that there is some causal relation between the two events." *Meeks v. Computer Assocs. Int'l,* 15 F.3d 1013, 1021 (11th Cir.1994).

I. PERFORMANCE RATING

Prior to *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006), we defined an "adverse employment action" as "an ultimate employment decision, such as discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee." *Gupta v. Fla. Bd. of Regents,* 212 F.3d 571, 587 (11th Cir.2000) (quotation omitted). In *Burlington Northern,* however, the Supreme Court held, *inter alia,* that Title VII's anti-retaliation provision "does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace," but also covers those actions that are "materially adverse to a reasonable employee." 126 S.Ct. at 2409. In this respect, "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* However, "[a] lower score on [a] performance evaluation, by itself, is not actionable under Title VII unless [the employee] can establish that the lower score led to a more tangible form of adverse action, such as ineligibility for promotional opportunities." *Brown v. Snow,* 440 F.3d 1259, 1265 (11th Cir.2006) (Title VII sexual harassment claim).

[1] The district court did not err in concluding that receiving a "2" rating, the second highest performance rating, did not constitute an adverse employment action. It is undisputed that Cain was not disentitled to a bonus because of the "2" rating that she received. Specifically, Cain did not present any evidence that the "2" rating had an adverse impact on her ability to receive a promotion, raise, or any other type of employment benefit. Moreover, she failed to present any evidence, except her own self-serving allegations, that she would have been guaranteed a bonus had she received the higher rating of "1." The record shows the comparator whom Cain identified received a "1" rating, but was not recommended for, and did not receive, a bonus. Further, Cain did not present any evidence that the "2" rating had an adverse impact on her ability to receive a promotion, raise, or any other type of employment benefit. Thus, without more, Cain failed to demonstrate how receiving a "2" rating led to a more tangible form of adverse action, or how a reasonable employee would consider receiving the second highest rating to be materially adverse. Thus, the district court did not err in concluding that Cain failed to make a *prima facie* showing of retaliation as to her performance evaluation claim.

II. PERFORMANCE BONUS

To establish a causal connection between the protected activity and an adverse employment action, "a plaintiff must show that the decision-makers were aware of the protected conduct, and that the protected activity and the adverse employment action were not wholly unrelated." *Gupta,* 212 F.3d at 590 (quotations and brackets omitted). "It is not enough for the plaintiff to show that someone in the organization knew of the protected expression; instead, the plaintiff must show that the person taking the adverse action was aware of the protected expression." *Bass v. Bd. of County Comm'rs, Orange County, Fla.,* 256 F.3d 1095, 1119 ***218** (11th Cir.2001).

"The causal link element is construed broadly so that a plaintiff merely has to prove that the protected activity and the negative employment action are not completely

unrelated." *Pennington v. City of Huntsville,* 261 F.3d 1262, 1266 (11th Cir.2001) (quotations omitted). In some cases, a "[c]lose temporal proximity between the protected activity and the adverse action may be sufficient to show that the two were not wholly unrelated." *Bass,* 256 F.3d at 1119. "[A] plaintiff satisfies [the causality] element if [s]he provides sufficient evidence that the decision-maker became aware of the protected conduct, and that there was close temporal proximity between this awareness and the adverse employment action." *Farley v. Nationwide Mut. Ins. Co.,* 197 F.3d 1322, 1337 (11th Cir.1999) (addressing retaliation in ADA context where complaint made seven weeks before termination).

[2] Concerning Cain's claim that she did not receive a performance bonus for the 2001-2002 year in retaliation for her filing the 1995 EEO complaint, the district court did not err in concluding that Cain failed to satisfy the causal connection *prima facie* element. The record shows there was a six-year period between the protected activity, the filing of the EEO complaint in 1995, and the alleged adverse employment action of not receiving a performance bonus for the 2001-2002 performance year. Without more, a six-year period between the protected activity and the adverse employment action is far too tenuous to create a jury issue on causation, as a matter of law.

Additionally, there was no evidence that the decision maker was aware of the protected activity. Albert Fischer, Cain's supervisor who made the recommendations for performance bonuses, was not aware of Cain's 1995 EEO complaint until 2003, well after he had made the decision not to recommend her for a performance bonus for the 2001-2002 performance year. Moreover, although Bob Stauner was the ultimate decision maker as to who, if anyone, should receive a performance bonus, and Stauner was involved with, and had knowledge of, Cain's prior EEO complaint, Cain offered no evidence, other than her own self-serving allegations, to disprove Fischer's testimony that: (a) he did not recommend Cain for a performance bonus; (b) Stauner never attempted to influence Fischer's decision as to whom Fischer recommended for performance bonuses; and (c) none of the evaluees whom Fischer recommended for a performance award were turned down by his superiors, nor was anyone given an award whom Fischer had not first recommended. Thus, the district court did not err in concluding that Cain failed to demonstrate a *prima facie* case of retaliation with respect to her performance award claim.

AFFIRMED.

Parallel Citations

2008 WL 64007 (C.A.11 (Ala.))

Footnotes

1 Cain expressly abandons her race discrimination claims on appeal. Moreover, because Cain's brief does not present any argument with respect to her 42 U.S.C. § 1983 claims, we conclude that she has abandoned these claims as well. *See Lucas v. W.W. Grainger, Inc.,* 257 F.3d 1249, 1255 n. 1 (11th Cir.2001) (holding an appellant abandons a claim by not raising it in the initial brief on appeal).

2 Cain also asserts, for the first time, an "ongoing" retaliation claim based on incidents that occurred during the years 1997 through 2001. We lack jurisdiction to consider this "ongoing" retaliation claim because Cain did not administratively exhaust this claim, and the claim was not reasonably expected to grow out of the EEO complaint she filed in 2002, which was limited to incidents that occurred during the 2001-2002 performance year. *See Crawford v. Babbitt,* 186 F.3d 1322, 1326 (11th Cir.1999).

ATTACHMENT 2

212 Fed.Appx. 592
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Ninth
Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

Michael D. MILLER, Plaintiff-Appellant,
v.
STATE OF CALIFORNIA, Governor's Office-Criminal Justice Planning, Defendant-Appellee.

No. 05-15331. | Submitted Nov. 15, 2006. | Filed Dec. 1, 2006.

Synopsis

Background: Terminated state employee brought action against his former employer, Office of Criminal Justice Planning (OCJP), alleging retaliation claim under Title VII. The United States District Court for the Eastern District of California, Frank C. Damrell Jr., J., granted summary judgment in favor of employer, and employee appealed.

Holding: The Court of Appeals held that employee failed to show a causal link between his testimony on behalf of his co-workers on their discrimination complaints and his discharge, as required to establish a prima facie case of retaliation.

Affirmed.

West Headnotes (1)

[1] **Civil Rights**
Causal Connection; Temporal Proximity
States
Appointment or Employment and Tenure of Agents and Employees in General

Terminated state employee failed to show a causal link between his testimony on behalf of his co-workers on their discrimination complaints and his discharge, as required to establish a prima facie case of retaliation under Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

1 Cases that cite this headnote

Attorneys and Law Firms

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Stephen J. Egan, Esq., Tracy, Suzanne & Hendrickson, Sacramento, CA, for Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of California, Sacramento; Frank C. Damrell, Jr., District Judge, Presiding. D.C. No. CV-03-02046-FCD.

Before: KLEINFELD and THOMAS, Circuit Judges, and LEIGHTON *, District Judge.

MEMORANDUM **

This is a Title VII retaliation case. Michael Miller appeals the district court's grant of summary judgment in favor of his former employer. We review a district court's decision to grant summary judgment de novo. *Ray v. Henderson,* 217 F.3d 1234, 1239 (9th Cir.2000).

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" demonstrate "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The substantive law defines which facts are material. *593 *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

To prevail on summary judgment, the moving party carries the initial burden to show that no genuine issues of material fact exist. *MetroPCS, Inc. v. City and County of San Francisco,* 400 F.3d 715, 720 (9th Cir.2005) (citing *Celotex, Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). "Once the moving party has carried that burden, it then shifts to the non-moving party, who must

present evidence that there is indeed a genuine issue for trial." *Id.*

In order to establish a prima facie case of retaliation, Miller must show that (1) he engaged in protected activity, (2) OCJP subjected him to an adverse employment action, and (3) a causal link exists between the protected activity and the adverse action. *Steiner v. Showboat Operating Co.,* 25 F.3d 1459, 1464 (9th Cir.1994). To establish a causal link, Miller must show that the decision-makers at OCJP were aware of his testimony on behalf of his co-workers, Baul and Toran, in their discrimination complaints. *See Allen v. Iranon,* 283 F.3d 1070, 1076 (9th Cir.2002) (finding in a First Amendment retaliation case that "[i]n order to retaliate against an employee for his speech, an employer must be aware of that speech.").

Miller fails to establish a causal link between his testimony on behalf of his co-workers and his discharge and/or the delay in implementing the arbitrator's award. Miller does not offer any evidence to contradict the sworn statements of Sawyer, Strumpfer, Wang or Levy that they were not aware of or influenced by Miller's testimony on behalf of Baul or Toran. Miller's mere speculation that Sawyer, Strumpfer, Wang and Levy had to know of his testimony and retaliated against him because of it, does not create a disputed issue of material fact sufficient to defeat summary judgment. Miller's proposed amended complaint adds nothing to this analysis.

AFFIRMED.

Parallel Citations

2006 WL 3478277 (C.A.9 (Cal.))

Footnotes

* The Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

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ATTACHMENT 3

511 Fed.Appx. 687
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Tenth
Circuit Rule 32.1. (Find CTA10 Rule 32.1)
United States Court of Appeals,
Tenth Circuit.

Raymond H. RYAN, Plaintiff–Appellant,
v.
Department of the Air Force, Secretary,
Michael B. DONLEY, Defendant–Appellee.

No. 11–6335. | Feb. 14, 2013.

Synopsis

Background: Former civilian Air Force employee filed suit against Secretary of Air Force under Whistleblower Protection Act and for disability discrimination and retaliation, following decision by Merit Systems Protection Board (MSPB) upholding employee's second termination after it had ordered his reinstatement. The United States District Court for the Western District of Oklahoma entered judgment for Secretary, and employee appealed.

Holdings: The Court of Appeals, Paul J. Kelly, Jr., Circuit Judge, held that:

[1] Civil Service Reform Act (CSRA) preempted employee's claims under Whistleblower Protection Act;

[2] evidence supported MSPB's decision upholding second order of removal;

[3] denial of employee's motion to extend discovery was not abuse of discretion;

[4] Secretary's voluntary dismissal with prejudice of counterclaim to recover severance pay that employee received after MSPB ordered his reinstatement was appropriate;

[5] employee was not entitled to award of sanctions for having defended against counterclaim;

[6] order quashing subpoenas of six witnesses was warranted; and

[7] denial of employee's motion to recuse was not abuse of discretion.

Affirmed.

West Headnotes (7)

[1] **Officers and Public Employees**
Decisions Reviewable; Forum for Review

Civil Service Reform Act (CSRA) preempted former civilian Air Force employee's claim against Secretary of Air Force under Whistleblower Protection Act. Whistleblower Protection Act of 1989, § 1 et seq., 5 U.S.C.A. § 1201 note; 5 U.S.C.A. § 1101 et seq.

Cases that cite this headnote

[2] **Armed Services**
Discharge, retirement, and resignation

Merit Systems Protection Board (MSPB)'s decision upholding second order of removal of civil Air Force employee, after MSPB ordered employee to be reinstated due to procedural error in employee's original challenge to termination, was adequately supported by evidence that, following order that employment be reinstated, employee failed to report to Air Force base as ordered.

Cases that cite this headnote

[3] **Federal Civil Procedure**
Depositions and Discovery

District court's denial of former civilian Air Force employee's motion to extend discovery was not abuse of discretion, in employee's action against Secretary of Air Force for disability discrimination and retaliation, where district court had already granted two previous extensions, which gave employee several extra

months to conduct discovery, and it had previously warned employee that there would be no further extensions.

Cases that cite this headnote

[4] **Federal Civil Procedure**
Grounds and objections

Voluntary dismissal of counterclaim of Secretary for Air Force for recovery of severance pay that former civilian Air Force employee received after Merit Systems Protection Board (MSPB) ordered his reinstatement was appropriate, in employee's suit against Secretary arising out of his subsequent termination, given Secretary's representation that counterclaim was not necessary to protect Air Force's interests and that dismissal of counterclaim would simplify trial. Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

Cases that cite this headnote

[5] **Federal Civil Procedure**
Payment of costs and expenses

Former civilian Air Force employee was not entitled to award of sanctions for defending counterclaim asserted by Secretary of Air Force for recovery of severance pay that employee received after Merit Systems Protection Board (MSPB) ordered his reinstatement, as a condition of voluntary dismissal after Secretary voluntary dismissed counterclaim, in employee's action against Secretary arising out of his subsequent termination, where request for sanctions was essentially one for award of attorney fees, for he failed to cite statutory authority for award, and counterclaim was dismissed with prejudice. Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

Cases that cite this headnote

[6] **Witnesses**
Persons Who May Be Required to Appear and Testify

Order quashing subpoenas of six witnesses was warranted, in former civilian Air Force employee's trial for disability discrimination and retaliation, given witnesses' assertions that they knew nothing about employee's illnesses and therefore had no testimony to offer relevant to employee's subsequent termination or about alleged prior disciplinary actions that played role in removal decision.

Cases that cite this headnote

[7] **Judges**
Determination of objections

District court's denial of former civil Air Force employee's motion to recuse was not abuse of discretion, in action for disability discrimination and retaliation, where adverse rulings were not bias, and employee's allegation that judge had engaged in ex parte communications with counsel for Secretary of Air Force was based on speculation.

2 Cases that cite this headnote

Attorneys and Law Firms

*689 Raymond H. Ryan, Saint Hedwig, TX, pro se.

Laura M. Grimes, H. Lee Schmidt, Kay Sewell, Office of the United States Attorney, Oklahoma City, OK, for Defendant–Appellee.

Before KELLY, McKAY, and O'BRIEN, Circuit Judges.

ORDER AND JUDGMENT *

PAUL KELLY, JR., Circuit Judge.

Raymond H. Ryan, formerly a civilian Air Force employee, appeals the district court's judgment in favor of the Secretary of the Air Force in this lawsuit concerning the Air Force's termination of Mr. Ryan's employment. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

The Air Force first terminated Mr. Ryan's employment in 2006. Although the Merit Systems Protection Board (MSPB) rejected Mr. Ryan's claims of disability discrimination and retaliation for whistleblowing, in October 2007 it ordered him reinstated due to a procedural error. But Mr. Ryan

never reported to Tinker Air Force Base in Oklahoma as ordered, and the Air Force removed him from employment for the second time effective February 15, 2008. This time, in addition to rejecting Mr. Ryan's claims of disability discrimination and retaliation for whistleblowing, the MSPB upheld the removal. The Equal Employment Opportunity Commission concurred with the MSPB's final decision finding no discrimination.

Mr. Ryan then filed suit in the district court. The court granted the Secretary's Fed.R.Civ.P. 12(b)(1) motion to dismiss Mr. Ryan's whistleblowing claims on the ground that there is no private right of action under the Whistleblower Protection Act of 1989(WPA), 5 U.S.C. § 2302(b)(8). The court denied the Secretary's Fed.R.Civ.P. 12(b)(6) motion to dismiss Mr. Ryan's discrimination and retaliation claims and allowed them to go to a jury trial. After Mr. Ryan rested, the district court granted the Secretary's Fed.R.Civ.P. 50 motion for judgment as a matter of law because "there simply was not evidence presented from which a reasonable jury could determine that [the Air Force's] actions ***690** were discriminatory or retaliatory." R., Vol. 1 at 406–07.

On appeal, Mr. Ryan complains that the district court: (1) dismissed his whistleblower claims; (2) denied his motions to compel the Secretary to produce relevant evidence, instead allowing the Secretary to submit deficient privilege logs, and denied his third motion to extend the discovery schedule; (3) granted the Secretary's motion to voluntarily dismiss a counterclaim without ruling on Mr. Ryan's request for sanctions; (4) quashed certain witness subpoenas and excluded certain evidence at trial; (5) denied Mr. Ryan's motion to recuse; and (6) granted the Secretary's Rule 50 motion.

1. Whistleblower Claims

[1] We review the district court's Rule 12(b)(1) dismissal of the whistleblowing allegations de novo. *Lucero v. Bureau of Collection Recovery, Inc.,* 639 F.3d 1239, 1242 (10th Cir.2011). It appears that Mr. Ryan was trying to bring a freestanding WPA claim. We agree with the district court, however, that there can be no such claim, due to preemption by the Civil Service Reform Act (CSRA). *See Steele v. United States,* 19 F.3d 531, 533 (10th Cir.1994); *Petrini v. Howard,* 918 F.2d 1482, 1485 (10th Cir.1990). [1]

[2] To the extent that Mr. Ryan was seeking judicial review of the MSPB decision, the district court would have had jurisdiction to consider the claim. *See* 5 U.S.C. §§ 1221(h), 7703(b)(2); *Steele,* 19 F.3d at 532. But even assuming that Mr. Ryan intended to assert a judicial-review claim rather than a freestanding WPA claim, no remand is required. The district court could only uphold the MSPB decision, as it was not "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." *Daugherty v. Thompson,* 322 F.3d 1249, 1254 (10th Cir.2003) (internal quotation marks omitted). To the contrary, the MSPB decision was unassailably correct given the uncontroverted fact that Mr. Ryan never reported to Tinker Air Force Base.

2. Discovery Rulings

[3] We review the district court's discovery rulings for abuse of discretion. *See Regan–Touhy v. Walgreen Co.,* 526 F.3d 641, 647 (10th Cir.2008) (denial of motion to compel); *Rogers v. Andrus Transp. Servs.,* 502 F.3d 1147, 1151 (10th Cir.2007) (denial of request for continuance). "Under this standard, we will reverse a district court only if it exceeded the bounds of permissible choice, given the facts and applicable law in the case at hand." *Regan–Touhy,* 526 F.3d at 647 (internal quotation marks omitted). We have recognized that:

> In the discovery context, the range of permissible choices available to the district court is notably broad. This is so because discovery decisions necessarily involve an assessment of the anticipated burdens and benefits of particular discovery requests in discrete factual settings, while at the same time also requiring the trial judge to take account of the amount in controversy, the parties' ***691** resources, the importance of the issues at stake in the action, and the ability of the proposed discovery to shed light on those issues, among many other things.

Id.

We cannot conclude that any of the discovery decisions identified by Mr. Ryan were an abuse of the district court's discretion. In denying the motion to compel, the district court carefully evaluated the relevant factors, including the adequacy of the Secretary's privilege log, and

gave supportable reasons for declining to compel further production of evidence. As for the third motion to continue discovery, the district court had granted two previous extensions, giving Mr. Ryan several extra months to complete discovery, and it had warned Mr. Ryan there would be no further extensions. Denying the motion cannot be considered an abuse.

3. Voluntary Dismissal of the Secretary's Counterclaim

After initially bringing a counterclaim to recover severance pay that Mr. Ryan received for the first removal, just before trial the Secretary moved under Fed.R.Civ.P. 41 to dismiss the counterclaim with prejudice. Mr. Ryan responded, opposing dismissal but also requesting that the court award him monetary sanctions to compensate him for the time he had expended on the counterclaim. Although the district court dismissed the counterclaim with prejudice, it did not rule on the request for sanctions. On appeal, Mr. Ryan complains about the grant of the dismissal motion and the court's failure to rule on his sanctions request.

[4] Our review of this issue is also for abuse of discretion. *Vanguard Envtl., Inc. v. Kerin,* 528 F.3d 756, 759–60 (10th Cir.2008). Under Rule 41(a)(2), the district court may dismiss a claim "on terms that the court considers proper." It was not an abuse of discretion for the district court to accept the Secretary's representation that the counterclaim was not necessary to protect the Air Force's interests and to determine that dropping the counterclaim would simplify the trial.

[5] Regarding the sanctions request, it is unclear whether the district court overlooked the request, or if it simply did not consider a monetary sanction to be a proper condition of dismissal. We need not reverse for further consideration, however, because under these circumstances a grant of sanctions would have been an abuse of discretion. *See Ashby v. McKenna,* 331 F.3d 1148, 1151 (10th Cir.2003) ("[W]ith respect to a matter committed to the district court's discretion, we cannot invoke an alternative basis to affirm unless we can say as a matter of law that it would have been an abuse of discretion for the trial court to rule otherwise." (internal quotation marks omitted)). Mr. Ryan essentially sought an award in the nature of an attorney's fee, without specifying any authority for compensating him for the time he spent on the counterclaim. [2] But attorney's fee awards are not always available to pro se plaintiffs. *See Kay v. Ehrler,* 499 U.S. 432, 435, 111 S.Ct. 1435, 113 L.Ed.2d 486 (1991) (42 U.S.C. § 1988 case). Moreover, the counterclaim was dismissed with prejudice. Where a claim is dismissed with prejudice under Rule 41(a)(2), "attorneys' fees are usually not a ***692** proper condition of dismissal because the defendant cannot be made to defend again." *AeroTech, Inc. v. Estes,* 110 F.3d 1523, 1528 (10th Cir.1997). Although *AeroTech* acknowledged that a fee award "might be appropriate" if there were exceptional circumstances, *see id.,* this case does not present any such exceptional circumstances.

4. Evidentiary Rulings

"[W]e review the court's evidentiary rulings, including the court's decision to exclude evidence or testimony, for abuse of discretion." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort,* 629 F.3d 1173, 1189 (10th Cir.2010). "We ... revers[e] only if we have a firm and definite belief that the trial court made a clear error in judgment." *Tanberg v. Sholtis,* 401 F.3d 1151, 1162 (10th Cir.2005) (internal quotation marks omitted).

[6] The district court granted the Air Force's motion to quash six witness subpoenas on the ground that the witnesses had no testimony relevant to the second removal. Mr. Ryan argues that the witnesses falsely asserted that they had no knowledge of the second termination, and in fact they had knowledge about (1) Mr. Ryan's medical condition that they conveyed to other officials before the second removal, and (2) prior disciplinary actions that allegedly played a role in the removal decision.

We are not convinced that the district court made a clear error in judgment in excluding the six witnesses. And "even if we were to find an error that amounted to an abuse of discretion, reversible error may be predicated only upon errors that affect a party's substantial rights." *Id.;* Fed.R.Evid. 103(a). We recognize that Mr. Ryan believes that the witnesses were necessary for his case, but his descriptions of their testimony do not establish that his substantial rights were affected. Questioning of other witnesses established the Air Force's knowledge of his medical condition and provided information about the prior disciplinary actions. Thus, Mr. Ryan has failed to establish that any error in quashing the subpoenas was reversible error.

As for the limitation of evidence at trial, the district court excluded all evidence regarding employment decisions other than the second removal. On appeal Mr. Ryan complains that he was precluded from introducing evidence (1) concerning the period between the first and second removals, (2) regarding the Secretary's counterclaim for recoupment of

severance pay from the first removal, and (3) the validity of his reinstatement. We have held, however, that "a trial court has broad discretion to determine whether evidence is relevant and to exclude irrelevant evidence[.]" *Garcia–Martinez v. City & Cnty. of Denver,* 392 F.3d 1187, 1193 (10th Cir.2004) (internal quotation marks omitted). Moreover, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of ... confusing the issues, misleading the jury, undue delay, [or] wasting time[.]" Fed.R.Evid. 403. The first removal was not at issue in this litigation, and the district court was well within its discretion to try to keep the parties and the jury focused on the second removal and whether it resulted from discrimination or retaliation.

Mr. Ryan also asserts that his whistleblower claims were inextricably intertwined with his discrimination and retaliation claims, so that precluding evidence of the whistleblower claim fatally undermined his discrimination and retaliation claims. We are not persuaded that the different claims were so intertwined, and as discussed above, Mr. Ryan was not entitled to a trial on his whistleblowing allegations. ***693** Accordingly, the district court's exclusion of whistleblowing evidence was no abuse of discretion.

5. Motion to Recuse

[7] "We review the denial of a motion to recuse for abuse of discretion, and under that standard we will uphold a district court's decision unless it is an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Higganbotham v. Okla. ex rel. Okla. Transp. Comm'n,* 328 F.3d 638, 645 (10th Cir.2003) (citation and internal quotation marks omitted).

In seeking recusal, Mr. Ryan argued that the district court's rulings against him showed bias and that the district court had engaged in ex parte communications with the Secretary's counsel. But allegations regarding adverse rulings "almost never constitute a valid basis for a bias or partiality motion.... Almost invariably, they are proper grounds for appeal, not recusal." *Liteky v. United States,* 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). And the allegations regarding ex parte communications rested on speculation and suspicion, which also are insufficient to require recusal, *see United States v. Cooley,* 1 F.3d 985, 993 (10th Cir.1993); *Hinman v. Rogers,* 831 F.2d 937, 939 (10th Cir.1987) (per curiam). Therefore, the district court's denial of the recusal motion was not arbitrary, capricious, whimsical, or manifestly unreasonable.

6. Rule 50 Motion

Finally, we review the grant of the Secretary's Fed.R.Civ.P. 50 motion de novo. *Owner–Operator Indep. Drivers Ass'n, Inc. v. USIS Commercial Servs., Inc.,* 537 F.3d 1184, 1190 (10th Cir.2008). "In reviewing the grant of judgment as a matter of law, the question is not whether there is literally no evidence supporting the nonmoving party but whether there is evidence upon which the jury could properly find for that party." *Id.* at 1191 (brackets and internal quotation marks omitted).

Mr. Ryan argues that he presented sufficient evidence for a reasonable jury to find that the Secretary's proffered reason for the second removal was pretext for discrimination and retaliation. Having reviewed the transcript of the trial, however, we agree with the district court that there was insufficient evidence for the jury properly to find in favor of Mr. Ryan.

The judgment of the district court is affirmed.

Parallel Citations

2013 WL 540828 (C.A.10 (Okla.))

Footnotes

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

1 In *Wells v. Shalala,* 228 F.3d 1137, 1147 (10th Cir.2000), this court discussed the elements of "a prima facie case for whistleblowing under the WPA." *Steele,* however, had already held that whistleblowing allegations were preempted by the CSRA, and "when faced with an intra-circuit conflict, a panel should follow earlier, settled precedent over a subsequent deviation therefrom." *Haynes v. Williams,* 88 F.3d 898, 900 n. 4 (10th Cir.1996).

2 On appeal, Mr. Ryan refers to Fed.R.Civ.P. 11. However, his district-court response did not cite Rule 11, and in any event, it does not appear that the request met the strict requirements for Rule 11 motions. *See* Fed.R.Civ.P. 11(c)(2) (requiring that a Rule 11 motion be made separately and that the movant give the other party an opportunity to withdraw the offending paper before filing the motion).

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ATTACHMENT 4

527 Fed.Appx. 572 (Mem)
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Seventh
Circuit Rule 32.1. (Find CTA7 Rule 32.1)
United States Court of Appeals,
Seventh Circuit.

Gloria E. SWANSON, Plaintiff–Appellant,
v.
BAKER & McKENZIE, LLP,
et al., Defendants–Appellees.

No. 13–1740. | Submitted Aug. 15, 2013.* | Decided Aug. 21, 2013. | Rehearing En Banc Denied Sept. 19, 2013.**

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 12 C 8290, Amy J. St. Eve, Judge.

Attorneys and Law Firms

Gloria E. Swanson, pro se.

Susan M. Benton, Attorney, Winston & Strawn LLP, Chicago, IL, for Defendant–Appellee.

Before FRANK H. EASTERBROOK, Chief Judge DIANE P. WOOD, Circuit Judge DAVID F. HAMILTON, Circuit Judge.

ORDER

Seventeen years ago, Gloria Swanson left her position as a legal secretary with *573 the law firm of Baker & McKenzie, where she had worked for five years. Her relationship with the partner to whom she was assigned was not a happy one, and so in May 1995, she requested a transfer. When Baker denied that request, Swanson decided to resign. Believing that the firm had allowed comparable white secretaries to transfer, Swanson (an African–American) refused to sign a release that would have prohibited her from suing Baker for racial discrimination. Later, however, she negotiated a more favorable arrangement.

After she left Baker, Swanson obtained comparable employment at other Chicago law firms, including a 14–year stint with one. She was laid off in March 2011, unfortunately, and found herself back on the job market. Although she sent out numerous résumés, her efforts at securing new employment were unsuccessful. She wondered why this was so, since it seemed that she was often rejected at the final stage, and so she hired a reference-checking company, Allison & Taylor, to look into the situation. When A & T contacted Baker around July 18, 2012, Human Resources Manager Patricia Griffin told them that Baker could not find Gloria Swanson in its system, and thus it could neither confirm nor deny her employment there. Later, Nancy Offdenkamp, who worked for Griffin, told Swanson that Baker's payroll system had changed, but that she would try to obtain access to the older records. Swanson found this suspicious, because Baker was able to confirm the employment of the partner for whom she had worked, even though he had died in 2007 after working for the firm for 50 years. Baker continued searching, and on September 13, 2012, Offdenkamp called A & T and informed them that Baker had located Swanson's employment records and was now in a position to confirm this information upon Swanson's signing a release. Swanson did so; Baker told A & T that she had worked there from February 2, 1990, through May 22, 1995; and it also confirmed Swanson's employment history to an attorney who wanted a reference for her.

In the meantime, Swanson filed a charge of racial discrimination with the Equal Employment Opportunity Commission on July 23, 2012, alleging that Baker had discriminated against her based on her race and had retaliated against her for engaging in protected activity. The EEOC issued her a right-to-sue letter on August 2, 2012, and she filed this action two weeks later. The district court dismissed under Federal Rule of Civil Procedure 12(b)(6). Swanson challenges that decision on appeal, urging that her complaint states a plausible claim for relief.

To the extent that Swanson is attempting to resuscitate her allegations of racial discrimination in connection with her 1995 departure from Baker, it is plain that she cannot succeed. The complaint itself reveals that any such claim is time-barred. Even though the statute of limitations is an affirmative defense, district courts may grant judgment on the pleadings if there is no conceivable way to save the claim. That describes Swanson's case.

Swanson has also presented two theories that do not suffer from that flaw: first, she argues that the firm's responses to various requests for references in 2011 and 2012 amounted to retaliation against her for her 1995 accusations of racial discrimination; and second (relying on the district court's supplemental jurisdiction, 28 U.S.C. § 1367), she argues that Baker defamed her by giving false, negative information in response to inquiries from prospective employers. We address these in turn, reviewing the district court's decisions *de novo*.

With respect to her retaliation claim, Swanson urges that the district court ***574** erred by concluding that her complaint failed to allege any adverse employment action. She believes that Baker must have told prospective employers something adverse. In particular, she thinks that if she represented on her job application that she had worked for Baker between 1990 and 1995, yet Baker told the prospective employer that it could neither confirm nor deny her employment there, then the prospective employer would conclude that she was lying and would refuse to hire her. But, in the absence of any additional facts that would support that final inferential leap, this is the type of speculation that *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), identify as insufficient to pass muster under Rule 12(b)(6). The statement "we have searched our records and can neither confirm *nor* deny that X worked for us" says nothing about X's credibility. All it says is that Baker's record-keeping may leave something to be desired. This would be a different case, we can assume, if Baker had responded to the reference inquiry by saying that its records showed that Swanson had never worked there, but that is not what it said. Swanson's own complaint also shows that after two months of looking, Baker did find her records, confirmed her employment history to A & T, and then confirmed it to a prospective employer. Taking every reasonable inference as favorably to Swanson as one can, this account does not portray retaliation of any kind. As the district court properly found, it does not state a claim upon which relief may be granted.

For similar reasons, Swanson's defamation claim was properly dismissed. Under Illinois law, which applies here, a plaintiff must show that the defendant made a false statement concerning her, that the defendant made an unprivileged publication of that defamatory statement to a third party, and that the plaintiff suffered damages as a result. *Seith v. Chicago Sun–Times, Inc.,* 371 Ill.App.3d 124, 308 Ill.Dec. 552, 861 N.E.2d 1117, 1126 (2007). Swanson's complaint reveals that she cannot satisfy either of the first two requirements. Nothing but speculation suggests that Baker was lying when it said that it could not find her employment records. There is no reason to think that the records concerning partners would have been kept in the same place, in the same way, as records concerning staff. In addition, the statement that Baker could neither confirm nor deny her employment is not defamatory, because it is capable of an innocent construction. *See Lott v. Levitt,* 556 F.3d 564, 568 (7th Cir.2009). Finally, the statements Swanson attributes to Baker were made to her own agent, A & T, which does not qualify as a third party for defamation purposes. *See, e.g., Snyder v. Ag Trucking, Inc.,* 57 F.3d 484, 489 (6th Cir.1995).

As we said in an earlier case brought by Swanson, "a plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, *might* suggest that something has happened to her that *might* be redressed by the law." *Swanson v. Citibank, N.A.,* 614 F.3d 400, 403 (7th Cir.2010). We have no doubt that the experience Swanson recounts in the current complaint was frustrating, but that does not automatically mean that some form of legal remedy exists. This time, she has not presented a set of facts that support a claim for relief.

The judgment of the district court is therefore AFFIRMED.

Parallel Citations

119 Fair Empl.Prac.Cas. (BNA) 1293

Footnotes

* After examining the briefs and record, we have concluded that oral argument is unnecessary. The appeal is therefore submitted on the briefs and record. *See* FED. R.APP. P. 34(a)(2)(C).

** Judge Joel M. Flaum did not participate in the consideration of this matter.

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