

No. 67215-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STEVEN LODIS and DEBORAH LODIS, a marital community,

Appellants/Cross-Respondents,

v.

CORBIS HOLDINGS, INC., a Washington corporation,
CORBIS CORPORATION, a Nevada corporation,
and GARY SHENK, an individual,

Respondents/Cross-Appellants.

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APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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TABLE OF CONTENTS

I. INTRODUCTION1

II. RESTATEMENT OF ISSUES3

III. RESTATEMENT OF THE CASE.....4

 A. Restatement of Facts.4

 1. Lodis Was Corbis’ Senior Officer for Human Resources. He Became A Member of Corbis’ Executive Team At Age 55.4

 2. After Executive Team Members Lost Trust In Lodis, Shenk Placed Lodis On Probation And Terminated Lodis In 2008, Concluding That Lodis Had Lied About His Discussions With Other Executive Team Members And Had Again Retaliated Against A Subordinate.7

 3. Corbis Discovered That Lodis Had Failed To Record Vacation Time And Failed To Report That He Had Been Paid A Duplicate Bonus.10

 a. Lodis Was Paid For Vacation Time That He Used But Did Not Report..... 11

 b. Lodis Retained A Duplicate \$35,000 Bonus, Claiming That He Did Notice That It Had Already Been Paid..... 13

 B. Procedural History15

 1. An Order In Limine Precluded Lodis From Introducing Evidence Of Emotional Distress As A Sanction Following Lodis’ Refusal To Allow Discovery Of His Counseling Records.15

2.	Lodis’ Retaliation Claim Was Dismissed On Summary Judgment, And Again At Trial. The Jury Rejected His Age Discrimination Claim.....	16
3.	A Second Jury Found That Lodis Breached His Fiduciary Duty By Accepting A Payout Of Accrued Vacation Time He Had Failed To Report.	17
IV.	ARGUMENT.....	18
A.	Lodis Did Not Engage In Protected Activity That Could Support A Retaliation Claim.....	18
1.	A Senior HR Vice President Does Not Engage In Protected Activity By Warning Other Senior Management Against Making Age-Related Comments.	18
2.	Lodis Could Not Meet His Burden Of Proving That The Reasons For His Dismissal Were Retaliatory.	27
B.	Lodis Was Not Prejudiced By The Trial Court’s Order Excluding Emotional Distress Damages As A Discretionary Sanction For His Refusal To Allow Discovery.	29
1.	The Trial Court’s Order In Limine Excluding Evidence Of Emotional Distress Damages Did Not Prejudice Lodis Because The Jury Found Against Lodis On Liability And Never Reached The Issue Of Damages.....	29
2.	The Trial Court Properly Excluded Evidence Of Emotional Distress Damages Because Lodis Refused To Allow Corbis Discovery Of Evidence Directly Bearing On His Claim That He Suffered Emotional Distress.	30

C.	The Jury’s Verdict That Lodis Breached His Fiduciary Duty In Failing To Report Excessive Vacation Was Supported By Substantial Evidence And The Trial Court’s Evidentiary Decisions Were Well Within Its Broad Discretion.	37
1.	Lodis Cannot Claim Prejudice From Alleged Errors During The First Trial Relating To Corbis’ Breach Of Fiduciary Duty Counterclaim.....	38
2.	As Corbis’ Highest Ranking Human Resources Officer, Lodis Was A Fiduciary Who As A Matter Of Law Owed Corbis A Duty of Loyalty.....	39
3.	The Trial Court Did Not Abuse Its Discretion In Allowing Evidence That Lodis Failed To Record His Vacation Time	41
4.	The Trial Court Properly Denied Lodis’ Motion For A New Trial Or Remittitur Because Substantial Evidence Supports The Jury’s Verdict.....	44
V.	CORBIS’ CROSS-APPEAL.....	46
A.	Assignment of Error.....	46
B.	Issue Related To Assignment of Error.....	46
C.	Facts Related To Cross-Appeal.	46
D.	Argument in Support of Cross-Appeal.	47
1.	As Corbis Did Not Dispute His Obligation To Return His Excessive Bonus, Corbis Was Entitled For Judgment As A Matter Of Law.	47
2.	In The Event Of A Remand, This Court Should Allow Corbis To Introduce Evidence Of Prior Complaints Against Lodis.	48
VI.	CONCLUSION.....	49

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Atkinson v. Lafayette College</i> , 653 F.Supp.2d 581 (E.D. Pa. 2009).....	23
<i>Brady v. Houston Indep. Sch. Dist.</i> , 113 F.3d 1419 (5th Cir. 1997).....	29
<i>Claudio-Gotay v. Becton Dickinson Caribe, Ltd.</i> , 375 F.3d 99 (1st Cir. 2004), <i>cert. denied</i> 543 U.S. 1120 (2005).....	23
<i>Coghlan v. American Seafoods Co. LLC.</i> , 413 F.3d 1090 (9th Cir. 2005).....	28
<i>Correa v. Mana Products, Inc.</i> , 550 F.Supp.2d 319 (E.D.N.Y. 2008).....	21
<i>Cyrus v. Hyundai Motor Mfg. Alabama, LLC</i> , 2008 WL 1848796 (M.D. Ala. Apr. 24, 2008)	21
<i>Doe v. Oberweis Dairy</i> , 456 F.3d 704 (7th Cir. 2006), <i>cert. denied</i> , 549 U.S. 127 (2007).....	34
<i>E.E.O.C. v. California Psychiatric Transitions</i> , 258 F.R.D. 391 (E.D. Cal. 2009)	34
<i>E.E.O.C. v. HBE Corp.</i> , 135 F.3d 543 (8th Cir. 1998).....	21, 25
<i>E.E.O.C. v. Wyndham Worldwide Corp.</i> , 2008 WL 4527974 (W.D. Wash. Oct. 3, 2008)	35
<i>Fitzgerald v. Cassil</i> , 216 F.R.D. 632 (N.D. Calif. 2003)	31, 34, 36
<i>Fox v. Gates Corp.</i> , 179 F.R.D. 303 (D. Colo. 1998)	35
<i>Garcetti v. Ceballos</i> , 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).....	23

<i>Hagan v. Echostar Satellite, L.L.C.</i> , 529 F.3d 617 (5th Cir. 2008).....	23, 24
<i>Jaffee v. Redmond</i> , 518 U.S. 1, 116 S. Ct. 1923, 135 L.Ed.2d 337 (1996).....	33, 34
<i>Johnson v. Stupid Prices, Inc.</i> , 2008 WL 4835876 (W.D. Wash. Nov. 6, 2008)	28
<i>Love v. RE/MAX of America, Inc.</i> , 738 F.2d 383, (10 th Cir. 1984)	24
<i>Lowe v. J.B. Hunt Transport, Inc.</i> , 963 F.2d 173 (8th Cir. 1992).....	28
<i>Maniates v. Lake County, Oregon</i> , 2008 WL 4500373 (D. Or. Oct. 7, 2008).....	34
<i>McKenzie v. Renberg’s Inc.</i> , 94 F.3d 1478 (10th Cir. 1996), <i>cert. denied</i> , 520 U.S. 1186 (1997)	22-24, 26
<i>Pettit v. Steppingstone, Ctr. for the Potentially Gifted</i> , 429 F. App’x 524 (6th Cir. 2011).....	25
<i>Prue v. Univ. of Washington</i> , 2008 WL 3891466 (W.D. Wash. Aug. 19, 2008)	36
<i>Schoffstall v. Henderson</i> , 223 F.3d 818 (8th Cir. 2000)	34
<i>Sims v. Lakeside School</i> , 2007 WL 5417731 (W.D. Wash. Mar. 15, 2007)	36
<i>Stewart v. Masters Builders Ass’n of King & Snohomish Counties</i> , 736 F.Supp.2d 1291 (W.D. Wash. 2010).....	23
<i>T.A. Pelsue Co. v. Grand Enterprises, Inc.</i> , 782 F. Supp. 1476 (D. Col. 1991).....	48

<i>Tony & Susan Alamo Found. v. Sec’y of Labor</i> , 471 U.S. 290, 105 S. Ct. 1953, 85 L.Ed.2d 278 (1985).....	24
<i>U.S. v. McPartlin</i> , 595 F.2d 1391 (7 th Cir. 1979).....	43
<i>Uzzell v. Teletech Holdings, Inc.</i> , 2007 WL 4358315 (W.D. Wash. Dec. 7, 2007).....	36
<i>Vidal v. Ramallo Bros. Printing, Inc.</i> , 380 F. Supp. 2d 60 (D.P.R. 2005).....	21

STATE CASES

<i>American Oil Co. v. Columbia Oil Co., Inc.</i> , 88 Wn.2d 835, 567 P.2d 637 (1977).....	29
<i>Bunch v. King County Dept. of Youth Services</i> , 155 Wn.2d 165, 116 P.3d 381 (2005).....	32, 44
<i>Carson v. Fine</i> , 123 Wn.2d 206, 867 P.2d 610 (1994).....	33, 34
<i>Coville v. Cobarc Services, Inc.</i> , 73 Wn. App. 433, 869 P.2d 1103 (1994).....	20
<i>Deschamps v. Mason County Sheriff’s Office</i> , 123 Wn. App. 551, 96 P.3d 413 (2004).....	4
<i>Doe v. Puget Sound Blood Ctr</i> , 117 Wn.2d 772, 819 P.2d 370 (1991).....	31
<i>Estep v. Hamilton</i> , 148 Wn. App. 246, 201 P.3d 331 (2008), <i>rev. denied</i> , 166 Wn.2d 1027 (2009).....	27
<i>Guardianship of Atkins</i> , 57 Wn. App. 771, 790 P.2d 210 (1990).....	40, 43
<i>Griffith v. Schnitzer Steel Indus., Inc.</i> , 128 Wn. App. 438, 115 P.3d 1065 (2005), <i>rev. denied</i> , 156 Wn.2d 1027 (2006).....	27

<i>Griffith v. Whittier</i> , 37 Wn.2d 351, 223 P.2d 1062 (1950).....	43
<i>Guijosa v. Wal-Mart Stores, Inc.</i> , 144 Wn.2d 907, 32 P.3d 250 (2001).....	40
<i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172, 23 P.3d 440 (2001).....	28
<i>Hines v. Todd Pac. Shipyards Corp.</i> , 127 Wn. App. 356, 112 P.3d 522 (2005).....	20
<i>Hizey v. Carpenter</i> , 119 Wn.2d 251, 830 P.2d 646 (1992).....	4, 29, 44
<i>In re Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992), <i>cert. denied</i> , 506 U.S. 958 (1992).....	33
<i>Interlake Porsche & Audi, Inc. v. Bucholz</i> , 45 Wn. App. 502, 728 P.2d 597 (1986), <i>rev. denied</i> , 107 Wn.2d 1022 (1987).....	47
<i>Kieburz & Assoc., Inc. v. Rehn</i> , 68 Wn. App. 260, 842 P.2d 985 (1992).....	39
<i>Kimball v. Otis Elevator Co.</i> , 89 Wn. App. 169, 947 P.2d 1275 (1997).....	29
<i>Matteson v. Ziebarth</i> , 40 Wn.2d 286, 242 P.2d 1025 (1952).....	41
<i>Meadows v. Grant's Auto Brokers, Inc.</i> , 71 Wn.2d 874, 431 P.2d 216 (1967).....	40
<i>Medcalf v. Dept. of Licensing</i> , 83 Wn. App. 8, 920 P.2d 228 (1996), <i>aff'd</i> , 133 Wn.2d 290, 944 P.2d 1014 (1997).....	31
<i>Milligan v. Thompson</i> , 110 Wn. App. 628, 42 P.3d 418 (2002).....	27

<i>Momah v. Bharti</i> , 144 Wn. App. 731, 182 P.3d 455 (2008), <i>rev. granted</i> , 165 Wn.2d 1027 (2009).....	42
<i>Northington v. Sivo</i> , 102 Wn. App. 545, 8 P.3d 1067 (2000).....	38
<i>Oliver v. Pacific Northwest Bell Tel. Co., Inc.</i> , 106 Wn.2d 675, 724 P.2d 1003 (1986).....	21
<i>Palmer v. Jensen</i> , 81 Wn. App. 148, 913 P.2d 413, <i>rev. granted</i> , 130 Wn.2d 1006 (1996).....	43
<i>Pellino v. Brink's Inc.</i> , __ Wn. App. __, 2011 WL 5314222 (Nov. 7, 2011).....	41
<i>Poweroil Mfg. Co. v. Carstensen</i> , 69 Wn. 2d 673, 419 P.2d 793 (1966).....	47
<i>Roberson v. Perez</i> , 123 Wn. App. 320, 96 P.3d 420 (2004), <i>rev. denied</i> , 155 Wn.2d 1002 (2005).....	31
<i>Smith v. Orthopedics International, Ltd., P.S.</i> , 170 Wn.2d 659, 244 P.3d 939 (2010).....	32
<i>State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.</i> , 64 Wn.2d 375, 391 P.2d 979 (1964).....	39
<i>State v. Barnes</i> , 85 Wn. App. 638, 932 P.2d 669 (1997), <i>rev. denied</i> , 133 Wn.2d 1021 (1997).....	44
<i>State v. Lui</i> , 153 Wn. App. 304, 221 P.3d 948 (2009), <i>review granted</i> , 168 Wn.2d 1018 (2010).....	44
<i>Subia v. Riveland</i> , 104 Wn. App. 105, 15 P.3d 658 (2001).....	49
<i>Von Gohren v. Pac. Nat. Bank of Wash.</i> , 8 Wn. App. 245, 505 P.2d 467 (1973).....	39
<i>Woo v. Firemen's Fund, Ins. Co.</i> , 161 Wn.2d 43, 164 P.3d 454 (2007).....	33

STATUTES

42 U.S.C. § 2000e-3(a)..... 21
42 U.S.C. § 2000e-2 (1982)20
RCW 5.45.02041, 42
RCW 5.60.06032, 33
RCW 18.83.11032
RCW 23B.08.400.....40
RCW 23B.08.420.....39
RCW 49.6020, 21
RCW 49.60.18010
RCW 49.60.2101, 10, 19

RULES AND REGULATIONS

ER 40349
ER 70344
ER 80142
ER 100644
KCLR 3333

OTHER AUTHORITIES

6 James Wm. Moore, *Moore’s Federal Practice* §
26.50[5] (3d. ed. 2011)34
[http://www.kcba.org/4lawyers/pdf/Pattern_ Interrog
atories_Defendant](http://www.kcba.org/4lawyers/pdf/Pattern_Interrogatories_Defendant)33
Restatement (Third) of Agency § 8.01 (2006).....39

I. INTRODUCTION

Appellant Steven Lodis served as respondent Corbis Holdings, Inc.'s ("Corbis") Senior Vice President for Human Resources – the highest-ranking Corbis employee in charge of personnel and employee relations and a member of Corbis' nine-member Executive Team. Lodis sued, alleging that Corbis discriminated against him on the basis of age, and that Corbis fired Lodis in retaliation for his opposition to age discrimination. Two superior court judges rejected Lodis' retaliation claim, on summary judgment, on reconsideration, and again upon conclusion of his case in chief. Following a three-week trial, a properly instructed jury found that Lodis was not a victim of age discrimination.

As a matter of law, Lodis had no viable retaliation claim because Lodis did not "oppose" illegal activity as required by RCW 49.60.210(1) when as the senior officer responsible for human resources he advised Corbis' CEO to comply with anti-discrimination laws. As Lodis concedes that his alleged "admonishments" or "warnings" were made in his capacity as Senior Vice President for Human Resources, and that his actions were required by his job and furthered the interests of Corbis, they were not "protected activity" that could support a claim for retaliation.

Lodis' claims also fail as a matter of fact. Corbis' CEO, who allegedly retaliated and discriminated against Lodis, was the same CEO

who promoted Lodis and made him part of his Executive Team. Corbis' CEO lost confidence in Lodis after concluding that Lodis had lied to him about the steps he was directed to take to improve his poor performance, because of complaints from other Executive Team members, and after a subordinate accused Lodis of retaliation. This court should affirm the dismissal of Lodis' claims.

Corbis counterclaimed against Lodis after discovery revealed that Lodis failed to report and to return to Corbis excessive compensation. The jury initially found that Lodis had breached his fiduciary duty, but that Corbis suffered no damages. At a second, four-day trial ordered because the jury's failure to award damages on Corbis' counterclaim was contrary to undisputed evidence, a jury again found that Lodis had breached his fiduciary duty and awarded Corbis \$42,389.65 for his failure to report that he had taken vacation for which he was paid upon leaving Corbis.

Lodis argues that the jury's verdict in the first trial was tainted by evidence that he breached his fiduciary duty to Corbis, challenges the trial court's evidentiary rulings, and seeks reversal of the judgment on Corbis' counterclaim on the grounds that he did not owe his employer any fiduciary duties whatsoever. But Lodis owed his employer a duty of loyalty as a matter of law, and the trial court's evidentiary decisions, including its sanction for Lodis' refusal to allow discovery relevant to his

claim for emotional distress damages, were all well within the trial court's discretion and caused him no prejudice given the overwhelming evidence supporting the jury's verdict. On Corbis' cross-appeal, this court should direct entry of judgment for Lodis' failure to return a bonus that he concedes he did not earn.

II. RESTATEMENT OF ISSUES

A. Can a company's highest ranking human resources officer assert a claim for retaliation under the Washington Law Against Discrimination for advising the company's CEO to refrain from making statements regarding his "young" management team?

B. Is a plaintiff prejudiced by an order in limine precluding evidence of his emotional distress, entered as a discovery sanction after plaintiff refused to allow discovery of his psychotherapy records, where the jury found that he failed to prove liability?

C. Did the company's senior vice president in charge of human resources, who admitted that he failed to report any vacation time during his 3-year tenure with the company in violation of a policy he was responsible for administering, breach his fiduciary duty by taking over \$40,000 for "unused" vacation time?

III. RESTATEMENT OF THE CASE

A. Restatement of Facts.

This court reviews the evidence supporting the jury's findings that Corbis did not discriminate against Lodis on the basis of age and that Lodis breached his fiduciary duty in the light most favorable to Corbis as the prevailing party after a trial on the merits. *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992). With respect to Lodis' retaliation claim, this court applies the standard applicable to summary judgment and reviews the trial court's refusal to allow Lodis to reinstate his retaliation claim to conform to the evidence under CR 15 for abuse of discretion. *Deschamps v. Mason County Sheriff's Office*, 123 Wn. App. 551, 563, 96 P.3d 413 (2004).

As appropriate, this restatement of the case cites to the evidence introduced in the first trial related to Lodis' age discrimination claim, to the evidence from the second trial related to Corbis' breach of fiduciary duty counterclaims, and to the evidence on summary judgment and before the trial court in dismissing Lodis' retaliation claim.

1. **Lodis Was Corbis' Senior Officer for Human Resources. He Became A Member of Corbis' Executive Team At Age 55.**

Respondent Corbis, founded by Bill Gates, is a leading supplier of digital images and stock photography, with offices worldwide. (CP 4751-

52) Corbis' CEO Steve Davis hired Lodis as Vice President of Worldwide Human Resources ("HR") in July 2005, when Lodis was 53. (CP 2412, 2442, 2607-20, 3/1 AM RP 3, 7) ¹ Lodis' starting salary was \$200,000. (CP 2607, 2619; Ex. 310; 3/1 AM RP 9)

Lodis lived in Scottsdale, Arizona, and split his time between Arizona and Seattle, where Corbis is headquartered. (II RP 378, 454) Lodis did not report to Davis, but to Susan MacDonald, Corbis' CFO and COO. (CP 1308, 3367; 2/25 RP 140) Several executives, including Corbis General Counsel Jim Mitchell, complained to MacDonald that Lodis was frequently unavailable. (2/24 RP 85-94; 2/25 RP 140-42) These complaints continued throughout Lodis' employment at Corbis. (*E.g.*, 3/11 RP 13-15)

In the fall of 2006, Davis hired a management consultant to evaluate Corbis' HR department. (CP 3592; 3/4 RP 26-28; 3/16 PM RP 157-58) After concluding her report in March 2007, the consultant told Davis that while the HR department received positive feedback, Lodis did not. (CP 3593-94; Ex. 18 at 2-3; 3/4 RP 41-43) The consultant

¹ The report of proceedings for the first trial in 2010 was not sequentially paginated. Citations to the first trial are by date and, where applicable, morning (AM) or afternoon (PM) sessions, *e.g.*, "3/2 AM RP 8." The report of proceedings for the second trial is sequentially paginated, and is cited as "II RP ___", without corresponding dates. Exhibits in the first trial are cited as "Ex. __," and in the second trial as "II Ex. __."

questioned whether Lodis had the skills to effectively lead the department. (CP 3597; Ex. 18 at 6; 3/4 RP 41-43)

The consultant also confirmed that there was a significant rift between Lodis and one of his subordinates, Krista Hale. (CP 3595, Ex. 18 at 4, 7; 3/4 RP 81-82) Hale complained that Lodis had engaged in inappropriate behavior, leading to an investigation of Lodis by outside counsel. (CP 5170-71; 3/11 RP 17) Following that investigation in April 2007, Davis issued Lodis a written reprimand for “conduct that is unbecoming of our Vice President of Human Resources.” (CP 2443, 3679; Ex. 306) Davis further warned Lodis that “[a]ny retaliatory action toward any person involved in the investigation will not be tolerated.” (Ex. 306)

Corbis’ current CEO, respondent Gary Shenk, was hired as Davis’ replacement in July 2007. (CP 2442, 3367) As Shenk was transitioning to CEO, Davis expressed concerns to Shenk about Lodis’ performance, and suggested that Shenk consider terminating Lodis. (CP 2442; Exs. 357, 385; 3/16 PM RP 154-57) Shenk rejected Davis’ advice and appointed Lodis to his nine-person Executive Team. (CP 2442, 3368)

Upon assuming the CEO position, Shenk embarked on a restructuring of Corbis that included layoffs. (CP 3653-57) In July 2007, only three months after being warned not to retaliate, Lodis fired Krista Hale as part of this reduction of force. (CP 2443, 3653-57; 3/11 RP 19,

93-94) Hale hired counsel and complained that Lodis had illegally retaliated against her. (CP 2442-43; 3/16 PM RP 160-61) In October 2007, Corbis paid an undisclosed substantial sum to settle this litigation. (CP 2443)

In the fall of 2007, Shenk gave Lodis a favorable performance review. (CP 2442, 3372, 3394) On December 20, 2007, Shenk promoted Lodis to Senior Vice President of Human Resources. (CP 2413, 2442-43, 3368; Ex. 355) Lodis' salary was increased to \$260,000, not including an incentive bonus. (CP 2442-43, 2474, 2681, 3399; 3/1 AM RP 11)

Both before and after his promotion, Lodis was the highest ranking Human Resources officer at Corbis. (CP 2443, 9450-51, 9483; 3/15 AM RP 63) Lodis was 55 when Shenk promoted him. (CP 3368; 3/2 AM RP 38) Including Lodis, five of the nine members of Shenk's Executive Team were over 40, and two were over 50. (CP 2474; 3/8 AM RP 85-86)

2. After Executive Team Members Lost Trust In Lodis, Shenk Placed Lodis On Probation And Terminated Lodis In 2008, Concluding That Lodis Had Lied About His Discussions With Other Executive Team Members And Had Again Retaliated Against A Subordinate.

Shenk's primary goal when restructuring Corbis in mid-2007 was to revitalize and reposition Corbis, which had focused on print media and stock photography, as an internet media company. (2/24 RP 129-30; 3/16 PM RP 149-50) Shenk hired a consultant to conduct a "360 review," to

obtain “anonymous upward feedback about each member of [the Corbis] executive team from their direct reports,” and to summarize each team member’s strength and weaknesses. (Exs. 387, 388; CP 2443, 3375, 3615-16, 3749, 3/10 AM RP 20)² After extensive interviews, the consultant reported in February 2008 that the feedback for Lodis was “off the charts negative,” and recommended placing Lodis on probation. (CP 2443, 3608-11, 3771; Ex. 429; 3/17 AM RP 37-38)

One particular subject of criticism related to Lodis’ mismanagement of the HR aspects of Corbis’ acquisition of Veer, a Canadian company purchased in late 2007. Lodis’ job description required him to “[w]ork in conjunction with executive management on company acquisitions/mergers and integrations.” (CP 2618) Lodis failed to promptly provide Veer’s executives with Corbis employment agreements, and in a post-acquisition strategy meeting was unable to cogently present Corbis’ long term incentive program to key employees who Corbis wished to retain. (3/11 RP 55-59; 3/16 PM RP 55-56; 3/17 AM RP 6-8, 20-21; Ex. 342, CP 2448)

On March 5, 2008, Shenk placed Lodis on a probationary Performance Improvement Plan (“PIP”), documenting his performance

² Lodis contends that the “360” review was directed solely toward Lodis, but it is undisputed that the consultant reviewed the other Corbis Executive Team members as well. (CP 2443, 3468, 3616; Ex. 388)

deficiencies. (CP 2444, 2448-50, 3375-76; 3/17 AM RP 57-58; Ex. 319)

In the PIP, Sherk advised Lodis “that your continued employment with Corbis is in jeopardy unless significant and lasting changes are made.” (CP 2448, 3375; Ex. 319) Sherk directed Lodis to discuss his working relationships with his peers, to complete performance evaluations for his subordinates, and to address ongoing operational issues, including the search for a new CFO. (CP 2444, 2449-50; Ex. 319) Sherk also instructed Lodis not to “blame” his subordinates or otherwise engage in retaliatory conduct for their comments in the 360 review. (CP 2444, 2449-50; Ex. 319)

Nevertheless, on March 12, 2008, Sherk received an email from Lodis’ subordinate Kirsten Lawlor that Lodis had retaliated against her for the comments Lawlor had made to the 360 review consultant. (CP 2444, 2462-64; Ex. 326; 3/17 AM RP 99-100) On March 24, 2008, Sherk notified Lodis that he had still not completed reviews of his subordinates and had not taken steps to improve his relationship with other members of the Executive Team. (CP 2444, 2452-53; Ex. 343; 3/17 RP AM 82-83)

In response, Lodis reported to Sherk that that he had met with most of the Executive Team, and provided detailed notes relating to the “feedback” provided by each member. (CP 2452-60, 3407-13) Sherk then talked with several Executive Team members, who disputed the

extent and the substance of their meetings with Lodis. (CP 2444-45, 2466, 3407-13; Ex. 382; 3/10 AM RP 41; 3/10 PM RP 30-33; 3/17 AM RP 85-98) Shenk concluded that Lodis had either deliberately fabricated or grossly misrepresented the substance of his conversations with the Executive Team. (CP 2445, 2468) On March 26, 2008, Shenk terminated Lodis for (1) ongoing performance issues; (2) an irreparable loss of trust on the part of Shenk and other Executive Team members; and (3) retaliatory behavior toward Lawlor. (CP 2413, 2444-45, 2466-69, 2580-83, 3455; Ex. 317; 3/17 AM RP 102-03)

When Lodis was terminated, seven of the Executive Team members were over 40. (CP 2474) At the time of the March 2010 trial, every member of the Executive Team was over 40. (3/16 PM RP 102)

3. Corbis Discovered That Lodis Had Failed To Record Vacation Time And Failed To Report That He Had Been Paid A Duplicate Bonus.

Less than three months after his termination, Lodis sued Corbis Holdings Inc., Corbis Corporation,³ and CEO Gary Shenk, alleging age discrimination under RCW 49.60.180 and retaliation under RCW 49.60.210. (CP 1-15, 4738-48) In preparing its defense and responding to discovery, Corbis noticed two significant discrepancies in Lodis' payroll

³ Lodis was employed as an officer of Corbis Holdings, Inc., the parent of Corbis Corporation. (3/16 PM RP 43; II RP 447)

records. First, Lodis had received a duplicate, unauthorized bonus payment of \$35,000, which Lodis concedes was paid in error. (II Ex. 13; II RP 250-51, 607) Second, having failed to record a single day of vacation during his three years at Corbis (II Ex. 22; II RP 287, 297, 628), Lodis had received \$41,555, for claimed accrued but unused vacation. (II RP 288-89, 632; II Ex. 14) In an amended answer Corbis alleged that Lodis was liable for breach of fiduciary duty, fraudulent misrepresentation, and unjust enrichment. (CP 4751-63)

a. Lodis Was Paid For Vacation Time That He Used But Did Not Report.

Lodis' own HR department was responsible for all of Corbis' time reporting policies, including a policy that required all employees to report their use of vacation time. (II RP 194-95, 258, 405, 431-32, 623-24; II Ex. 20 at 16 ("Human Resources is the owner of this policy.")) Lodis maintained an Outlook calendar. (II Ex. 48-49) Both Lodis and his executive assistant at Lodis' instruction made entries on the calendar, including entries for vacation time. (II RP 321, 376-78, 383, 632; II Ex. 48-50) Lodis' assistant recorded whether his time in Arizona was spent working or on vacation, and noted on his calendar when his plans changed. (II RP 632) Lodis reviewed daily and weekly print outs of his

calendar, and never complained to his assistant about these vacation entries or her characterization of his time. (II RP 329, 383)

When he was hired by Corbis, Lodis negotiated four weeks of annual vacation. (II Ex. 5) Lodis conceded that although he took vacation, he never reported using *any* vacation time during his three-year tenure at Corbis. (II Ex. 22; II RP 287, 297, 429, 626, 628; App. Br. at 47) Mary Tomblinson, another Corbis HR employee, spoke with Lodis regarding his failure to record vacation time. (II RP 297-99) Lodis told her that other Executive Team members did not record their vacation hours. (II RP 298) After reviewing their records, Tomblinson confirmed to Lodis that other executives followed the HR policy and recorded their vacation. (II RP 287-88, 297-99) Despite regular reminders, Lodis continued not to record any vacation. (*E.g.*, II Ex. 23; II RP 265-66) Lodis' ever increasing accrued vacation time was reflected on each of his paychecks. (*E.g.* II Ex. 14; II RP 431-32)

When Lodis was terminated, Corbis paid him \$41,555 for 329 hours of "accrued but unused" vacation, plus an accompanying 401k match, of \$1,234.65, for a total payment of \$42,789.65. (II RP 288-89, 632; II Ex. 14) Lodis accepted this payment. (II Ex. 14; II RP 632)

After Lodis sued Corbis, Tomblinson calculated the vacation that Lodis had actually used and failed to report by reviewing Lodis' Outlook

Calendar, phone records, and e-mails. (II RP 289-90, 295; II Ex. 48-50) Tomblinson concluded that Lodis had in fact used at least 35 more vacation days (seven weeks) than he was entitled to. (II RP 297; II Ex. 50)

b. Lodis Retained A Duplicate \$35,000 Bonus, Claiming That He Did Notice That It Had Already Been Paid.

When Corbis hired Lodis, it agreed to pay Lodis a \$35,000 signing bonus and a \$69,469.23 relocation bonus, and to enroll Lodis in its Short-Term Incentive (STI) and Long-Term Incentive (LTI) bonus programs. (II Ex. 6, 11, 12, 36, 38; II RP 221, 223, 230-32, 607) In its initial 2005 offer letter, Corbis guaranteed Lodis an STI bonus of \$35,000 for the year. (II Ex. 6, 11, 36; II RP 225, 607) Lodis received this guaranteed STI payment when he started with Corbis in July 2005, in addition to his signing and relocation bonus. (II RP 607; Ex. 11, 36)

In calculating STI bonuses for all employees for 2005, Corbis overlooked Lodis' \$35,000 STI payment, and mistakenly calculated the STI payment that Lodis could have otherwise earned at \$5,546. (II RP 250-51, 607; II Ex. 13) When Lodis saw the figure, he told a subordinate, Becky Masters, that he thought his STI bonus should be higher and directed her to check his 2005 offer letter. (II RP 576, 615) Confirming that the letter reflected the \$35,000 figure, Masters sent Tomblinson an email directing her to "Please adjust the STI payout for Steve L from

\$5,546 to \$35,000 per a special agreement.” (II Ex. 29; II RP 246-47) Tomblinson confirmed with Masters that the “correct” amount was \$35,000, and adjusted Lodis’ STI bonus. (RP II 247) In March 2006, Corbis paid Lodis this second \$35,000 STI bonus, and made a corresponding 401(k) match of \$1,050. (II RP 251, 607; II Ex. 13)

Lodis did not tell Tomblinson (or anyone else) about this erroneous payment. (II RP 251-52) Corbis only discovered the overpayment when Tomblinson reviewed Lodis’ compensation after he sued. (II RP 252) After vehemently denying that he had received the duplicate bonus, Lodis eventually conceded that he received the guaranteed \$35,000 bonus, and the corresponding 401(k) match, twice. (II RP 607, 633)

In September 2009, Lodis tendered a \$35,000 check to Corbis’ counsel. (II RP 468; CP 2700-01) Corbis rejected the tender because it did not include the \$1,050 401(k) match, interest, or costs. (II RP 468-69) Lodis now claims that he moved for leave to deposit \$35,000 into the court registry (App. Br. 17), but Lodis never separately filed or noted a CR 67 motion for hearing.⁴

⁴ Lodis’ “motion” (CP 1019-20) is not separately listed in the index to clerk’s papers or docket sheet, but is contained within his motion for summary judgment. (CP 999-1020; Dkt 67) Corbis did not object to the deposit into the court registry. (CP 1140-41) The record contains no order or ruling from the trial court.

B. Procedural History

1. An Order In Limine Precluded Lodis From Introducing Evidence Of Emotional Distress As A Sanction Following Lodis' Refusal To Allow Discovery Of His Counseling Records.

Lodis alleged he had suffered “emotional harm,” and sought damages for his medical expenses, for loss of enjoyment of life, for pain and suffering, mental anguish, emotional distress, and humiliation. (CP 4748) Corbis asked for discovery regarding Lodis’ treatment for emotional distress and related damages. (*E.g.*, CP 3079-81, 3085-90, 3213-16) Lodis acknowledged that he had been treated by two psychologists, but resisted Corbis’ discovery requests, asserting the physician-patient and psychotherapist-patient privilege. (CP 3073-97, 3202-20) Lodis did not seek a protective order under CR 26.

Finding that Lodis’ claims for emotional distress constituted a waiver of the psychotherapist-patient privilege, and that Lodis had “refused to provide discovery pertaining to his psychological/psychiatric treatment,” King County Superior Court Judge Michael Hayden granted Corbis’ motion in limine, precluding Lodis “from introducing evidence of his alleged emotional distress through testimony or documents at trial.” (CP 3226-27, 4000-01) On reconsideration, Judge Hayden allowed Lodis to waive the psychologist/patient privilege and permit Corbis additional

discovery as a condition to permitting Lodis to introduce evidence of his emotional distress. (CP 4391-93) When Lodis again blocked discovery of his psychotherapy by the pre-trial deadline, the court prohibited Lodis from introducing evidence related to his allegations of emotional distress. (CP 6564) The Supreme Court denied Lodis' motion for direct discretionary review. (CP 4373-82)

2. Lodis' Retaliation Claim Was Dismissed On Summary Judgment, And Again At Trial. The Jury Rejected His Age Discrimination Claim.

Judge Hayden granted summary judgment in favor of Corbis dismissing Lodis' retaliation claims. (CP 4383-86, 4434) The remaining claims were tried to a jury before King County Superior Court Judge Bruce Heller from February 24 to March 18, 2010.

As he had in his retaliation claim, Lodis claimed in his action for age discrimination that Shenk wanted to replace older members of his Executive Team with younger executives. (3/1 AM RP 84-85; 3/15 AM RP 113) After the close of evidence, Lodis moved to reinstate his retaliation claim, arguing that "the facts that prove discrimination are the same facts that prove retaliation." (3/9 RP 38) Judge Heller determined that Judge Hayden's ruling was not "binding" and considered under CR 15 Lodis' motion to amend "to conform to the evidence," but denied the motion. (3/18 PM RP 67-68) As had Judge Hayden, Judge Heller

accepted Lodis' testimony that he "express[ed] his concerns" to Corbis' general counsel and to Shenk, but that Lodis did not engage in prohibited activity by "providing advice, guidance, or engaging in risk management as part of his HR functions," in his capacity as Senior Vice President of Human Resources. (3/18 PM RP 68-69)

The jury found that Corbis had not engaged in age discrimination, and that Lodis had breached his fiduciary duty by failing to disclose his vacation and double bonus, but awarded Corbis no damages. (CP 9014-17) The trial court granted a new trial on Corbis' fiduciary duty counterclaims because the jury's verdict that Lodis had breached his fiduciary duty to Corbis was irreconcilable with its refusal to award damages. (CP 9415-19, 10617-19)⁵

3. A Second Jury Found That Lodis Breached His Fiduciary Duty By Accepting A Payout Of Accrued Vacation Time He Had Failed To Report.

Before the second trial, Corbis moved for partial summary judgment to establish that Lodis was a Corbis fiduciary, relying on Lodis' testimony at the first trial that he owed fiduciary duties to Corbis and on corporate resolutions signed by Corbis' sole director, Bill Gates, appointing Lodis an officer of Corbis Holdings, Inc. (CP 9483, 9880-89;

⁵ Lodis does not assign error or otherwise challenge the order granting new trial on appeal.

3/15 AM RP 63) The trial court concluded that Lodis “owed a fiduciary duty to Corbis by virtue of being an Officer of Corbis,” (CP 9992-93), but denied Corbis’ motion for judgment as a matter of law on the ground that Lodis’ breach of duty was a jury question. (CP 10532-33)

The jury found that Lodis breached his fiduciary duty by failing report his vacation time and awarded Corbis \$42,389.65, but found that Lodis did not breach his fiduciary duty by failing to return the erroneous \$35,000 bonus payment. (CP 10528-29) The trial court entered final judgment for Corbis for \$42,389.65. (CP 10624-26) Lodis appealed, and Corbis cross-appealed. (CP 10627-709, 10710-12)

IV. ARGUMENT

A. Lodis Did Not Engage In Protected Activity That Could Support A Retaliation Claim.

1. A Senior HR Vice President Does Not Engage In Protected Activity By Warning Other Senior Management Against Making Age-Related Comments.

Lodis’ retaliation claim fails as a matter of law because Lodis did not engage in a statutorily protected activity by raising concerns regarding CEO Shenk’s age-related comments, but rather was merely performing his job as Senior Vice President of Human Resources. Both Judge Hayden and Judge Heller both properly held that because Lodis had not “stepped outside” his role as Senior Vice President of Human Resources or asserted

a right adverse to Corbis, he never engaged in an activity protected under the WLAD.

Both before and after his promotion, Lodis was the highest ranking Human Resources Officer at Corbis. (CP 2443, 2577, 9450-51, 9483; 3/15 AM RP 63) Lodis claims that he “admonished” Shenk against expressing a desire for “young” employees and “warned” Corbis General Counsel Jim Mitchell about the impropriety of age discrimination. (App. Br. at 9-12) Corbis disputed Lodis’ specific allegations (CP 2445), and Lodis does not contend that Shenk dismissed anyone over Lodis’ objection. Lodis stated that his purpose in warning Shenk was to protect Shenk and Corbis from potential legal liability. (CP 3639 (“I was trying to protect Gary”), 3640 (“there were legal precedents here . . . Gary needed to be very careful as to how he was perceived by the employees”), 3/1 AM RP 76 (“I was trying to help Shenk and give him advice and counsel.”))

The trial court correctly held, both on summary judgment and again at trial, that Lodis did not engage in protected activity under the Washington Law Against Discrimination (“WLAD”). A retaliation plaintiff must show he suffered adverse employment consequences “because he or she has opposed any practices forbidden by this chapter.” RCW 49.60.210(1). “A prima facie case for retaliation requires a plaintiff to show: 1) he engaged in protected activity, 2) the employer took adverse

employment action, and 3) there is a causal link between the protected activity and the adverse action.” *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 374, ¶ 36, 112 P.3d 522 (2005). “Opposition to an employer’s possible discrimination does not enjoy absolute protection or immunity; an employee may still be discharged for cause.” *Coville v. Cobarc Services, Inc.*, 73 Wn. App. 433, 439, 869 P.2d 1103 (1994). “To determine whether an employee was engaged in protected opposition activity, the court must balance the setting in which the activity arose and the interests and motives of the employer and employee.” *Coville*, 73 Wn. App. at 439.

Lodis concedes that the Legislature has not defined what it means to “oppose any practices forbidden by this chapter,” (App. Br. at 24), and recognizes that the term “oppose” in the WLAD means “to be hostile or adverse to.” (App. Br. at 25) Lodis fails to acknowledge, however, that federal courts interpreting the federal anti-retaliation statutes on which the WLAD is patterned uniformly hold that a human resources officer must go beyond merely “doing his job” in order to “oppose” a company practice and establish “protected activity.”

“RCW 49.60 is patterned after Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 (1982). Consequently, decisions interpreting the federal act are persuasive authority for the construction of

RCW 49.60.”⁶ *Oliver v. Pacific Northwest Bell Tel. Co., Inc.*, 106 Wn.2d 675, 678, 724 P.2d 1003 (1986). To establish a “protected activity” under Title VII, an employee “must step outside” his normal job duties and assert a right adverse to his employer, or refuse to implement a discriminatory policy. See *E.E.O.C. v. HBE Corp.*, 135 F.3d 543, 554-55 (8th Cir. 1998) (manager “stepp[ed] outside . . . a normal managerial role” when he “refused to implement a discriminatory company policy”); *Correa v. Mana Products, Inc.*, 550 F.Supp.2d 319, 328-29 (E.D.N.Y. 2008) (HR manager’s investigation and resolution of discrimination complaints were not “outside the scope of her employment” and thus were not protected activity under Title VII); *Vidal v. Ramallo Bros. Printing, Inc.*, 380 F. Supp. 2d 60, 62 (D.P.R. 2005) (employee’s “actions were not adverse to the company, and were part of his job responsibilities”); *Cyrus v. Hyundai Motor Mfg. Alabama, LLC*, 2008 WL 1848796 at *11 (M.D. Ala. Apr. 24, 2008) (“To constitute protected activity, ‘the employee must step outside his or her role of representing the company.’”).

⁶ “It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . .” 42 U.S.C. § 2000e-3(a).

Lodis cites no authority to support his argument that a company's highest ranking corporate human resources officer engages in "statutorily protected activity" by warning the company's CEO or other senior management to comply with employment laws. In *McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) (App. Br. 22-24), the Tenth Circuit affirmed the district court's dismissal of a personnel director's claim that she was terminated after complaining to the defendant's president and attorney that the company was not complying with the Fair Labor Standards Act ("FLSA"). The plaintiff did not engage in protected activity because she "never crossed the line from being an employee merely performing her job as personnel director to an employee lodging a personal complaint about the wage and hour practices of her employer and *asserting* a right adverse to the company." *McKenzie*, 94 F.3d at 1486 (emphasis in original). "In order to engage in protected activity . . . the employee must step outside his or her role of representing the company and either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting FLSA rights, or otherwise engage in activities that reasonably

could be perceived as directed towards the assertion of rights protected by the FLSA.” *McKenzie*, 94 F.3d at 1486-87 (footnote omitted).⁷

Lodis did not refuse to implement a discriminatory policy. As in *McKenzie*, Lodis’ alleged “opposition” consisted of performing his normal job duties as Corbis’ senior Human Resources officer. (CP 2617 (Lodis’ job description included “ensur[ing] compliance with all applicable U.S. Federal and State employment laws.”)) Lodis’ “admonishment” regarding conduct that might subject Corbis to liability was not adverse to his employer—indeed, it is exactly what employers expect of a human resources manager:

If we did not require an employee to ‘step outside the role’ or otherwise make clear to the employer that the employee was taking a position adverse to the employer, nearly every activity in the normal course of a manager’s job would potentially be protected activity.

Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 628 (5th Cir. 2008).

See Atkinson v. Lafayette College, 653 F.Supp.2d 581, 599 (E.D. Pa.

⁷ *Accord, Claudio-Gotay v. Becton Dickinson Caribe, Ltd*, 375 F.3d 99, 102 (1st Cir. 2004) (employee’s report of potential overtime violations was “in furtherance of his job responsibilities” and not protected activity under the FLSA), *cert. denied* 543 U.S. 1120 (2005); *Stewart v. Masters Builders Ass’n of King & Snohomish Counties*, 736 F.Supp.2d 1291, 1302 (W.D. Wash. 2010) (director did not engage in protected activity under the FLSA by raising concerns regarding compliance with FLSA overtime requirements); *cf. Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (“when public employees make statements pursuant to their official duties . . . the Constitution does not insulate their communications from employer discipline”).

2009) (employee’s “advocacy was not adverse to the College’s interests, but rather was precisely what the College expected of her in order for it to avoid Title IX compliance issues”). Under a contrary rule, “[a]n otherwise typical at-will employment relationship could quickly degrade into a litigation minefield, with whole groups of employees-management employees, human resources employees, and legal employees, to name a few-being difficult to discharge without fear of a lawsuit.” *Hagan*, 529 F.3d at 628.

Lodis makes several misguided policy arguments that either overstate the trial court’s holding or misstate the law. For instance, Lodis attempts to distinguish *McKenzie* by citing the WLAD’s “mandate for liberal construction,” (App. Br. at 22), but ignores that the FLSA is also liberally construed. See *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 296, 105 S. Ct. 1953, 85 L.Ed.2d 278 (1985) (Supreme Court has “consistently construed the [FLSA] liberally”) (internal quotations removed).⁸

⁸ Contrary to Lodis’ assertion (App. Br. at 25-26), protected activity under FLSA’s anti-retaliation provision may include internal complaints as well as those made to government agencies. *McKenzie*, 94 F.3d at 1486 (FLSA “applies to the unofficial assertion of rights through complaints at work”) (quoting *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 387 (10th Cir. 1984). Yet “[d]espite our expansive interpretation of [the FLSA], we have never held that an employee is insulated from retaliation for participating in activities which are neither adverse to the company nor supportive of adverse rights under the statute which are asserted against the company.” *McKenzie*, 94 F.3d at 1486.

Lodis' argument that HR managers would lose all protection under the trial court's interpretation of the WLAD, (App. Br. at 25-26), is similarly unfounded. Courts have not hesitated to find that HR managers have "stepped outside" their normal roles when acting adversely to their employer. *See, e.g., HBE Corp.*, 135 F.3d at 554 (plaintiff's "refus[al] to implement a discriminatory company policy . . . placed him outside the normal managerial role which is to further company policy."); *Pettit v. Steppingstone, Ctr. for the Potentially Gifted*, 429 F. App'x 524, 527, 530, 531 (6th Cir. 2011) (contrasting HR resources manager's complaints "made in the course of performance of human resource job duties" with threat to "report unlawful activity to the U.S. Department of Labor").

The trial court in fact refused to hold that "HR directors aren't protected against discrimination, because they are." (3/18 PM RP 71) But Lodis did not claim that he had refused to implement a discriminatory practice, or that he "had actually advocated on behalf of employees claiming discrimination." (3/18 PM RP 72) Lodis in fact supported Shenk's personnel decisions. (CP 3649; 3/2 PM RP 4-5, 3/8 AM 65-66;

3/18 PM RP 22)⁹ Instead, Lodis claimed that he objected to age-related comments that “he felt [were] inappropriate.” (3/18 PM RP 72)

Lodis’ conduct in his capacity as the senior HR officer was not protected activity. Like the plaintiff in *McKenzie*, Lodis claimed that he expressed concerns about age discrimination to CEO Shenk and general counsel Mitchell in an effort to protect Corbis from potential legal liability. (CP 3639 (“I was trying to protect Gary”), 3640 (“there were legal precedents here . . . Gary needed to be very careful as to how he was perceived by the employees”); *see also* CP 2618). Lodis never “stepped outside” his role as Senior Vice President of Human Resources, did not take a position adverse to Corbis, and did not assert or threaten to assert his rights or those of other employees. Judge Hayden did not err in dismissing, and Judge Heller did not abuse his discretion in refusing to reinstate, Lodis’ retaliation claim.

⁹ Lodis himself made the decision to terminate Tim Sprake, an “over 40” employee who he claims Shenk called “the old guy on your team.” (App. Br. at 11; CP 3649) Lodis alleges that he once “admonished” Shenk after Shenk said he wanted to replace Mark Sherman with a “young Hollywood type.” (App. Br. 11) However, it is undisputed that Corbis never took any steps to replace Sherman, or another “over 40” employee who, according to Lodis, Shenk also called “old.” (App. Br. at 11; CP 2568, 3649-50) Corbis’ former COO/CFO Susan McDonald testified that she left Corbis voluntarily (CP 3983), not because Shenk sought to replace her with a younger woman as Lodis claims. (App. Br. 8-9)

2. Lodis Could Not Meet His Burden Of Proving That The Reasons For His Dismissal Were Retaliatory.

“When the employee’s evidence of pretext is weak or the employer’s non-retaliatory evidence is strong, summary judgment is appropriate.” *Milligan v. Thompson*, 110 Wn. App. 628, 638-39, 42 P.3d 418 (2002). Summary judgment should be affirmed on the alternate ground that Lodis could not show that Corbis acted with a retaliatory motive in terminating him. *Estep v. Hamilton*, 148 Wn. App. 246, 256, ¶ 21, 201 P.3d 331 (2008) (appellate court “may affirm a summary judgment grant if it is supported by any grounds in the record”), *rev. denied*, 166 Wn.2d 1027 (2009).

Shenk promoted Lodis to Senior Vice President of Human Resources in December 2007, *after* Lodis allegedly engaged in protected activities.¹⁰ Under the WLAD, “when an employee is both promoted and fired by the same decisionmakers within a relatively short period of time, there is a strong inference that he or she was not fired due to any attribute the decisionmakers were aware of at the time of the promotion.” *Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 438, 453, ¶ 30, 115 P.3d

¹⁰ Lodis claimed he warned Shenk about hiring a “young Hollywood type,” after his promotion, but his testimony regarding the date of this alleged warning was not consistent. (CP 3373) (stating in ¶ 28 that admonishment occurred in December 2007-January 2008 and in ¶ 29 that admonishment occurred in November-December 2007).

1065 (2005), *rev. denied*, 156 Wn.2d 1027 (2006); *see also Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 189-90, 23 P.3d 440 (2001); *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 174-75 (8th Cir. 1992) (“It is simply incredible . . . that the company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than two years later.”). This “same actor inference” applies equally to retaliation claims under the WLAD. *Coghlan v. American Seafoods Co. LLC*, 413 F.3d 1090, 1098 (9th Cir. 2005) (The same actor inference is a “‘strong inference’ that a court must take into account on a summary judgment motion.”); *Johnson v. Stupid Prices, Inc.*, 2008 WL 4835876 at *5 (W.D. Wash. Nov. 6, 2008) (granting summary judgment under WLAD where employee could not rebut same actor inference).

Lodis presented no evidence to rebut the same actor inference.¹¹ Lodis could not explain why Shenk, allegedly motivated by a desire to retaliate against Lodis, would promote Lodis and increase his salary to \$260,000 even after Corbis had paid a substantial sum to settle a retaliation and harassment claim against Lodis. (CP 2413, 2442-43, 2474, 3370-72; 3/1 AM RP 11; App. Br. at 9-12) Shenk’s actions are “utterly

¹¹ The trial court instructed the jury that Corbis was entitled to the same actor inference on Lodis’ age discrimination claim. (CP 8991) Lodis does not assign error to this instruction, or otherwise argue that Corbis was not entitled to an inference that Lodis was fired for legitimate reasons.

inconsistent with an inference of retaliation.” *Brady v. Houston Indep. Sch. Dist.*, 113 F.3d 1419, 1424 (5th Cir. 1997).

B. Lodis Was Not Prejudiced By The Trial Court’s Order Excluding Emotional Distress Damages As A Discretionary Sanction For His Refusal To Allow Discovery.

1. The Trial Court’s Order In Limine Excluding Evidence Of Emotional Distress Damages Did Not Prejudice Lodis Because The Jury Found Against Lodis On Liability And Never Reached The Issue Of Damages.

This court should reject Lodis challenge to the trial court’s pre-trial order in limine excluding evidence of emotional distress damages for Lodis’ “refus[al] to provide discovery,” (CP 3226-27, 4000-01, 4391-93), because the jury found in Corbis’ favor on liability and never reached the issue of damages. Where the jury finds against the plaintiff on the issue of liability, a trial court’s decision regarding the admission or exclusion of evidence that relates solely to damages cannot, as a matter of law, be reversible error. *See Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 174-75, 947 P.2d 1275 (1997) (appellate court “need not decide” whether physician’s deposition was improperly admitted “because the deposition testimony related solely to the issue of damages, which the jury never reached, and not to the issue of liability”). Any “[e]rror relating solely to the issue of damages is harmless when a proper verdict reflects nonliability.” *Hizey*, 119 Wn.2d at 270; *American Oil Co. v. Columbia*

Oil Co., Inc., 88 Wn.2d 835, 841-42, 567 P.2d 637 (1977) (error in excluding evidence of damages harmless as it “could have no effect upon the jury’s conclusion” that defendant was not liable).

Here, the trial court did not compel any of Lodis’ treatment providers to testify or to release any information that Lodis claims was privileged. (CP 4392) Whether the trial court’s order excluding evidence of emotional distress damages was right or wrong, Lodis cannot show that the trial court’s order caused him any prejudice whatsoever.

2. The Trial Court Properly Excluded Evidence Of Emotional Distress Damages Because Lodis Refused To Allow Corbis Discovery Of Evidence Directly Bearing On His Claim That He Suffered Emotional Distress.

The trial court’s order in limine excluding Lodis’ evidence of emotional distress was a reasonable sanction for Lodis’ refusal to provide Corbis relevant discovery. Lodis alleged that Corbis caused him pain, suffering, and mental anguish and claimed damages for emotional distress and medical expenses. (CP 4748) After putting his mental health at issue, Lodis refused to allow discovery of his mental health care providers. The trial court did not abuse its discretion in barring Lodis from introducing evidence of his alleged emotional distress.

This court reviews for abuse of discretion the trial court’s discovery and evidentiary decisions, including an order excluding

evidence for failure to provide discovery. See *Doe v. Puget Sound Blood Ctr*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991) (affirming trial court order rejecting claim of privilege); *Medcalf v. Dept. of Licensing*, 83 Wn. App. 8, 16, 920 P.2d 228 (1996) (“We review a trial court’s grant of a motion in limine for abuse of discretion.”), *aff’d*, 133 Wn.2d 290, 944 P.2d 1014 (1997). Here, the trial court modified its sanction order on reconsideration to impose the least severe sanction, to address the prejudice caused by Lodis’ refusal to allow discovery of his treatment records. (CP 4392) See *Roberson v. Perez*, 123 Wn. App. 320, 333, 96 P.3d 420 (2004) (“we give wide latitude to the trial court in fashioning an appropriate remedy for discovery abuse.”), *rev. denied*, 155 Wn.2d 1002 (2005).

Lodis concedes that his “mental health records . . . may be relevant” to his claim for emotional distress. (App. Br. at 33) He cites no Washington authority to support his argument that a plaintiff claiming emotional distress damages can shield from discovery relevant information under a claim of privilege. Instead, he primarily relies on a federal magistrate’s decision to argue that a discrimination plaintiff alleging “garden variety” emotional distress damages cannot be compelled to waive the psychotherapist-patient privilege. *Fitzgerald v. Cassil*, 216 F.R.D. 632, 637 (N.D. Calif. 2003).

No Washington court has distinguished “garden variety” emotional distress damages from any other type of emotional distress damages, and Lodis fails to provide a workable distinction. Lodis cites *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 180-81, ¶¶ 26-27, 116 P.3d 381 (2005), where the Court held that expert testimony was not required for a jury to award emotional distress damages under the WLAD. (App. Br. at 32-33) However, the plaintiff in *Bunch* had not consulted with a mental health provider, and the Court did not discuss whether counselling records could be shielded from discovery under a claim of privilege.¹²

A patient may waive the privilege for communications or records that would be otherwise shielded from discovery under either RCW 5.60.060(4) (physician-patient privilege) or RCW 18.83.110 (psychotherapist-patient privilege). *See, e.g.*, RCW 5.60.060(4)(b) (“Ninety days after filing an action for personal injuries or wrongful death,

¹² Lodis also cites *Smith v. Orthopedics International, Ltd., P.S.*, 170 Wn.2d 659, 244 P.3d 939 (2010), where the Court reaffirmed the prohibition against *ex parte* contacts by a defendant with the plaintiff’s treating physicians, relying in part on the purpose of the statutory physician-patient privilege. (App. Br. at 33-34) *Smith* does not address the waiver issue present here.

the claimant shall be deemed to waive the physician-patient privilege.”);¹³ *Carson v. Fine*, 123 Wn.2d 206, 213, 867 P.2d 610 (1994) (“patient voluntarily placing his or her physical or mental condition in issue in a judicial proceeding waives the privilege”); *In re Rice*, 118 Wn.2d 876, 894, 828 P.2d 1086 (1992) (“Since Rice placed his mental condition at issue, he waived his privileges.”), *cert. denied*, 506 U.S. 958 (1992). Pattern interrogatories promulgated by King County Superior Court for use in cases in which a plaintiff seeks emotional distress damages require the plaintiff to disclose the type of information withheld by Lodis under a claim of physician and psychologist-patient treatment. KCLR 33(a).¹⁴

Lodis’ discussion of the policy of encouraging “private and sensitive counseling” and the “public good” of encouraging mental health treatment that underlies the recognition of a federal common law privilege, (App. Br. at 35, *quoting Jaffee v. Redmond*, 518 U.S. 1, 3-4, 116 S. Ct. 1923, 135 L.Ed.2d 337 (1996)), ignores Washington law that the statutory physician-patient privilege is in derogation of the common

¹³ Lodis claims that he did not claim “bodily injury” in his lawsuit. (App. Br. at 32) But the legislature provided for automatic waiver of the privilege upon assertion of a claim for “personal injuries” under RCW 5.60.060(4)(b). While the statute does not define the term, “personal injuries” are generally understood to encompass mental and emotional harm or humiliation. *See Woo v. Firemen’s Fund, Ins. Co.*, 161 Wn.2d 43, 65, ¶ 52, 164 P.3d 454 (2007)

¹⁴ *See* http://www.kcba.org/4lawyers/pdf/Pattern_Interrogatories_Defendant_to_Plaintiff.pdf.

law, and must be “construed strictly, and limited to its purposes.” *Carson*, 123 Wn.2d at 213. The issue in this case is not whether to recognize a common law psychotherapist-patient privilege, as in *Jaffee*, but whether Lodis waived the privilege by putting his mental health at issue.

Moreover, Lodis’ reliance on the magistrate judge’s decision in *Fitzgerald* to distinguish “garden variety emotional distress” from other types of damages ignores the “more widely accepted view” among the federal courts, “that a plaintiff waives the privilege . . . when a plaintiff seeks damages for emotional distress.” 6 James Wm. Moore, *Moore’s Federal Practice* § 26.50[5] (3d. ed. 2011).¹⁵ See, e.g., *Doe v. Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006) (“If a plaintiff by seeking damages for emotional distress places his or her psychological state in issue, the defendant is entitled to discover any records of that state.”), *cert. denied*, 549 U.S. 127 (2007); *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) (affirming district court’s dismissal of claims for emotional

¹⁵ The magistrate judge’s decision in *Fitzgerald* has not been followed in other cases within the Ninth Circuit. See, e.g., *E.E.O.C. v. California Psychiatric Transitions*, 258 F.R.D. 391, 400 (E.D. Cal. 2009) (privilege waived where plaintiff seeks recovery of emotional distress even though “no specific emotional injury was alleged, or no claim of intentional infliction of emotional distress was made.”); see also *Maniates v. Lake County, Oregon*, 2008 WL 4500373 at *2 (D. Or. Oct. 7, 2008) (plaintiff’s medical records before and after termination from employment were relevant to alleged emotional distress damages, and that plaintiff put his mental health at issue by alleging damages for “anguish”).

distress following sex discrimination plaintiff's refusal to allow discovery of medical and mental health treatment records); *Fox v. Gates Corp.*, 179 F.R.D. 303, 306 (D. Colo. 1998) (discrimination plaintiff's prayer for emotional distress damages waived privilege with respect to counseling records regardless whether plaintiff intended to elicit testimony from providers).

The other cases cited by Lodis do not compel a contrary result here. Judge Martinez in *E.E.O.C. v. Wyndham Worldwide Corp.*, 2008 WL 4527974 (W.D. Wash. Oct. 3, 2008), denied a defense motion for summary judgment on discrimination claims seeking damages for emotional distress. The court "did not have an opportunity to consider the issue and weigh the various factors involved in the waiver determination, because defendant never filed a motion to compel the discovery or otherwise challenged plaintiff's objections to the requested discovery." *Wyndham*, 2008 WL 4527974 at *6. Here, Lodis did not move for a protective order to limit the scope of discovery, instead defying Corbis'

discovery requests.¹⁶ Judge Hayden had the discretion to choose an appropriate sanction under CR 37.

Lodis also fails to cite contrary authority within this federal judicial district. Judge Pechman refused to allow an employment discrimination plaintiff to shield his counseling records from discovery by claiming that he was alleging only a “garden variety” emotional distress claim under *Fitzgerald*, and denied a motion for a protective order in *Uzzell v. Teletech Holdings, Inc.*, 2007 WL 4358315 (W.D. Wash. Dec. 7, 2007). Like Lodis, “[i]n addition to alleging damages for ‘emotional upset, stress, and anxiety,’ [plaintiff] seeks compensation for ‘out-of-pocket expenses,’ including ‘medical expenses.’” Judge Pechman held that “[b]y asking the Court to award medical expenses, [plaintiff] has put his medical status and history at issue. . . . [and] has waived the privilege.” 2007 WL 4358315 at *2. *See also Prue v. Univ. of Washington*, 2008 WL 3891466 at *2 (W.D. Wash. Aug. 19, 2008) (granting defendant’s motion to compel treatment records of employment discrimination plaintiff; “the records could lead to information regarding whether plaintiff has mitigated his damages, by, for example, following up on previous recommendations by health care providers.”)

¹⁶ In *Sims v. Lakeside School*, 2007 WL 5417731 (W.D. Wash. Mar. 15, 2007), by contrast, the district court exercised its discretion to grant plaintiff’s motion for a protective order protecting discovery of psychotherapy records.

Here, Lodis expressly sought recovery not just for “humiliation,” but also for medical expenses and pain and suffering, putting treatment by his health care and mental health care providers directly at issue whether or not he intended to call them at trial. Should this court choose to address this issue, it should hold that Lodis could not claim emotional distress damages while at the same time blocking discovery of his therapy records by asserting privilege.

C. The Jury’s Verdict That Lodis Breached His Fiduciary Duty In Failing To Report Excessive Vacation Was Supported By Substantial Evidence And The Trial Court’s Evidentiary Decisions Were Well Within Its Broad Discretion.

Lodis assigns error to (1) the trial court’s refusal to determine as a matter of law in the first trial whether Lodis owed Corbis a fiduciary duty, (2) the trial court’s partial summary judgment before the second trial that Lodis was a fiduciary, (3) the trial court’s evidentiary rulings allowing the jury to consider Lodis’ Outlook calendar and Corbis’ payroll coordinator’s analysis of Lodis’ accrued and unused vacation, and (4) the jury’s verdict that Lodis received excessive compensation for unreported vacation. (App. Br. at 2-3) The court should affirm the jury’s verdict for breach of fiduciary duty as supported by established law and abundant evidence, including Lodis’ own admissions.

1. Lodis Cannot Claim Prejudice From Alleged Errors During The First Trial Relating To Corbis' Breach Of Fiduciary Duty Counterclaim.

Lodis can show no prejudice from Judge Heller's "failure to decide as a matter of law whether a fiduciary duty existed" and from the denial of "Lodis' motions for judgment as a matter of law on the breach of fiduciary duty counterclaims" in the first trial. (App. Br. at 2 (*citing* RP 3/22 at 12-13, CP 9000-01, 9093)) Lodis was not prejudiced by decisions in the first trial because the trial court granted a new trial on the breach of fiduciary duty claims. (CP 9415-19, 9992-93, 10519)

Lodis' argument that the jury's consideration of fiduciary duty claims in the first trial somehow prejudiced that jury's finding that Corbis did not discriminate against Lodis because of age is also without merit. There was overwhelming evidence, presented over 13 days of testimony, that Corbis terminated Lodis for cause, not because of his age. "Error without prejudice is not grounds for reversal and will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial." *Northington v. Sivo*, 102 Wn. App. 545, 551 n.10, 8 P.3d 1067 (2000).

2. As Corbis' Highest Ranking Human Resources Officer, Lodis Was A Fiduciary Who As A Matter Of Law Owed Corbis A Duty of Loyalty.

Two juries have now found that Lodis breached his fiduciary duty to Corbis. Lodis argues that the trial court erred in holding on summary judgment before the second trial “as a matter of law that Lodis was an officer of Corbis” and thus owed Corbis a fiduciary duty. (App. Br. at 2, CP 9992-93) Lodis’ argument that he owed no duty of loyalty to his employer ignores both established law and his own admissions.

Any employee, and certainly a corporate officer, owes his or her employer a duty of loyalty. *Restatement (Third) of Agency* § 8.01 (2006). Corporate officers “owe undivided loyalty, and a standard of behavior above that of the workaday world.” *State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.*, 64 Wn.2d 375, 381, 391 P.2d 979 (1964); *see also Von Gohren v. Pac. Nat. Bank of Wash.*, 8 Wn. App. 245, 254, 505 P.2d 467 (1973) (employee breaches fiduciary duty when dealing with employer funds for her own benefit); *Kieburz & Assoc., Inc. v. Rehn*, 68 Wn. App. 260, 266 n.2, 842 P.2d 985 (1992) (discussing cases); RCW

23B.08.420(1)(c) (corporate officer must act “in a manner the officer reasonably believes to be in the best interests of the corporation”).¹⁷

Corbis hired Lodis as the Vice President of Worldwide Human Resources, effective July 25, 2005, promoted him to Senior Vice President and made him a member of Corbis’ Executive Team. (CP 9441, 9446-47, 9449, 9551, 9559, 9572, 9656; Ex. 355) Both before and after his promotion, Lodis was the highest ranking Human Resources officer at Corbis. (CP 9450-51, 9483, 9656) Lodis was appointed an officer by the sole director of Corbis, and served as an officer from 2005 until his termination in 2008. (CP 9880-9889) *See* RCW 23B.08.400(1), (“A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws.”)¹⁸

¹⁷ Lodis does not assign error to the trial court’s instruction that “[a]n individual who has a fiduciary relationship with a corporation must discharge the duties of his position in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances and in a manner the officer believes to be in the best interests of the corporation.” (CP 10519) He did not except to this instruction below. (II RP 695-97) “Instructions to which no exceptions are taken become the law of the case.” *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001).

¹⁸ Lodis has waived any argument that the “only evidence presented by Corbis to establish that Lodis was an officer should have been stricken.” (App. Br. at 42) Lodis did not note or file a motion to strike in the trial court, and provides no argument in his brief to support this argument. *See Meadows v. Grant’s Auto Brokers, Inc.*, 71 Wn.2d 874, 881, 431 P.2d 216 (1967) (failure to move to strike, waives any alleged deficiency of the evidence); *Guardianship of Atkins*, 57 Wn. App. 771, 775, 790 P.2d 210 (1990) (“An assignment of error not supported by argument or authority is waived.”).

The trial court could properly rely on Corbis' corporate resolutions as business records. RCW 5.45.020; *see also Matteson v. Ziebarth*, 40 Wn.2d 286, 293, 242 P.2d 1025 (1952) (Board of Directors meeting minutes admissible as business records). In any event, Lodis in his testimony "acknowledged that [he was] . . . an officer of Corbis Corporation or Corbis Holdings." (II RP 636-37) Lodis conceded that he had a "fiduciary responsibility to Corbis" on summary judgment, in the first trial, and during the second trial. (CP 9483; 3/15 AM RP 63; II RP 623)

Lodis' legal argument, that he did not owe his employer any duty of loyalty, is without merit. Lodis asks this court to adopt a rule that would give carte blanche to a company's senior executives to engage in self-dealing. This court should affirm the judgment in favor of Corbis.

3. The Trial Court Did Not Abuse Its Discretion In Allowing Evidence That Lodis Failed To Record His Vacation Time

Lodis also challenges the documentary evidence and testimony that he failed to record his vacation time and was paid for more vacation than he was entitled to receive. As Lodis concedes, this court reviews the admission of evidence and expert testimony for manifest abuse of discretion. (App. Br. at 43); *Pellino v. Brink's Inc.*, __ Wn. App. __, ¶ 61, 2011 WL 5314222 (Nov. 7, 2011).

Lodis' calendar was not hearsay, but was an admission by a party opponent. ER 801(d)(2). "Statements considered admissions include the party's own statement or 'a statement of which the party has manifested an adoption or belief in its truth.'" *Momah v. Bharti*, 144 Wn. App. 731, 750, 182 P.3d 455 (2008), *rev. granted*, 165 Wn.2d 1027 (2009). Admissions also include "a statement by a person authorized by the party to make a statement concerning the subject." ER 801(d)(2)(iii).

Lodis controlled his calendar and either made the entries himself or adopted those made by his assistant, whom he had authorized to record his time, including his vacation. (II RP 120-25, 321, 376-78, 663) Lodis' assistant noted on his calendar when his plans changed and printed out for Lodis daily and weekly views of his calendar. (II RP 379, 383) Lodis claimed that he was working from home on many days in which his calendar showed he was on vacation, but the jury was entitled to believe that his assistant diligently recorded all his vacation. (II RP 377-83, 632: "Teri was very persistent and would always ask about vacation months in advance.")

Lodis' calendar was also admissible as a business record. RCW 5.45.020. (II RP 125) Lodis' executive assistant kept his calendar

in the ordinary course of business and made contemporaneous entries into Lodis' calendar so that other executives could know Lodis' schedule and where to contact him. (II RP 377, 381, 383) See *U.S. v. McPartlin*, 595 F.2d 1391, 1347-48 (7th Cir. 1979) (calendar entries "were kept as part of a business activity and the entries were made with regularity at or near the time of the described event.").¹⁹

Nor did the trial court abuse its discretion in allowing Mary Tomblinson, Corbis' payroll coordinator and HR system analyst, to testify regarding Lodis' payroll and vacation records.²⁰ (II RP 118-21) Tomblinson reviewed Lodis' Outlook Calendar, email, and phone records to determine when Lodis was on vacation, and if unsure gave Lodis the benefit of the doubt. (II RP 290, 295) Tomblinson concluded that Lodis had used 35 days more of vacation than he accrued. (II RP 297)

Lodis does not argue that Tomblinson lacked the qualifications of an expert, but rather contends that "Tomblinson had no personal knowledge as to specific days Lodis was on vacation during his employment with Corbis." (App. Br. at 46) Tomblinson was qualified to

¹⁹ *But see Griffith v. Whittier*, 37 Wn.2d 351, 354-55, 223 P.2d 1062 (1950) (affirming denial of new trial because "desk calendar book" kept by decedent would not have been admissible.)

²⁰ As Lodis offers only a single sentence of argument in support of this assignment of error, it is waived. *Atkins*, 57 Wn. App. at 775. *Palmer v. Jensen*, 81 Wn. App. 148, 153, 913 P.2d 413, *rev. granted*, 130 Wn.2d 1006 (1996).

summarize her analysis of Lodis' calendar entries, regardless whether she had personal knowledge. (II Ex. 50) ER 703; ER 1006; *State v. Lui*, 153 Wn. App. 304, 321, ¶ 28, 221 P.3d 948 (2009) (“expert witnesses are not required to have personal, firsthand knowledge of the evidence on which they rely”), *review granted*, 168 Wn.2d 1018 (2010); *State v. Barnes*, 85 Wn. App. 638, 662-63, 932 P.2d 669 (1997) (affirming admission of summary prepared by expert), *rev. denied*, 133 Wn.2d 1021 (1997). Lodis vigorously cross-examined Tomblinson (II RP 303-338, 351-363) The trial court was within its discretion to allow the jury to resolve questions regarding her methodology.

4. The Trial Court Properly Denied Lodis' Motion For A New Trial Or Remittitur Because Substantial Evidence Supports The Jury's Verdict.

In reviewing Lodis' challenge to the jury's finding that he breached his fiduciary duty, this court must “view the evidence in the record in the light most favorable to the nonmoving party.” *Hizey*, 119 Wn.2d at 271-72. A trial court's decision to deny a new trial or remittitur is reviewed for an abuse of discretion. *Hizey*, 119 Wn.2d at 271-72; *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 176, ¶ 20, 116 P.3d 381 (2005).

The jury had ample evidence to conclude that Lodis breached his fiduciary duty to Corbis by accepting payment for vacation he had used

but failed to record. (CP 10529) As head of Human Resources, Lodis was in charge of Corbis' vacation recording policy, which required all employees to enter the vacation time they used. (II Ex. 20; II RP 195-19, 405, 432)²¹ Lodis received regular reminders to record his vacation time, and each of his paychecks reflected accrued vacation. (*E.g.* II Exs. 14, 23) Lodis concedes that he did not report *any* vacation during his time at Corbis. (II Ex. 22; II RP 287, 297, 429, 626; App. Br. at 47)

Lodis' calendar supports Tomblinson's testimony that Lodis took 35 days more vacation than he accrued. (II Ex. 48-50) Tomblinson calculated the excess compensation for Lodis' unreported vacation payout at \$42,389.65. (II RP 288-89, 632; II Ex. 14) The trial court did not abuse its discretion in denying Lodis' motion for a new trial and remittitur.

²¹ Lodis' HR department, and not the Payroll Department (as Lodis argues), was responsible for Corbis' vacation reporting policy. (II Ex. 20 at 16 ("Human Resources is the owner of this policy."))

V. CORBIS' CROSS-APPEAL

A. Assignment of Error

1. The trial court erred in denying Corbis' motion for judgment as a matter of law. (CP 10471-79, 10532-33)

2. The trial court erred in partially granting plaintiff's motion in limine No. 6 in the first trial. (CP 6560)

B. Issue Related To Assignment of Error.

1. Was Corbis entitled to judgment as a matter of law where it was undisputed that Lodis retained a \$35,000 bonus and matching 401(k) payment of \$1,050 to which, by his own admission, he was not entitled?

2. Did the trial court erroneously exclude evidence that a female subordinate had accused Lodis of retaliation and violation of Corbis' anti-harassment policy?²²

C. Facts Related To Cross-Appeal.

As detailed in Section III.A.4.b, *supra*, it was undisputed that Corbis mistakenly paid Lodis \$35,000 more than he was eligible to receive as a bonus, and, as a result, contributed an additional \$1,050 to his retirement account. Lodis never returned the money.

²² Corbis raises this issue conditionally, only in the event this court remands for a third trial.

D. Argument in Support of Cross-Appeal.

1. As Corbis Did Not Dispute His Obligation To Return His Excessive Bonus, Corbis Was Entitled For Judgment As A Matter Of Law.

Lodis conceded that he was paid an unearned bonus of \$35,000, plus a related contribution to his 401(k) retirement fund. Because Lodis was a fiduciary, he had an obligation to return this money. The trial court erred in failing to grant Corbis judgment as a matter of law on its claim for return of the excessive bonus. (CP 10471-79)

Corporate officers “stand in a fiduciary relation to the corporation they serve and are not permitted to retain any personal profit or advantage . . .” *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 508, 728 P.2d 597 (1986), *rev. denied*, 107 Wn.2d 1022 (1987). Lodis conceded that he was mistakenly paid a \$35,000 bonus to which he was not entitled, but argued that he was not aware of it until after this litigation commenced. (II RP 607, 633) Lodis’ excuse of ignorance ignores the evidence that he solicited the extra payment when Corbis mistakenly calculated Lodis’ 2005 STI payment at \$5,546. (II RP 576, 615) In any event, Lodis’ claimed ignorance is not a defense because an officer may be liable for breach of fiduciary duty “even where he acted without intent to defraud or injure the corporation.” *Poweroil Mfg. Co. v. Carstensen*, 69 Wn. 2d 673, 678, 419 P.2d 793 (1966).

If Lodis unfairly gained an advantage during his employment, he is obligated to return to Corbis any sums unfairly obtained until after termination of his employment. See *T.A. Pelsue Co. v. Grand Enterprises, Inc.*, 782 F. Supp. 1476, 1486-87 (D. Col. 1991) (former director and employee liable for post-employment profits) Regardless what Lodis knew or should have known at the time the payment was made, he had a fiduciary obligation to return the excessive payment to Corbis. Corbis was entitled to judgment as a matter of law on its claim for return of the \$35,000 bonus, plus the related \$1,050 401(k) contribution, and interest.

2. In The Event Of A Remand, This Court Should Allow Corbis To Introduce Evidence Of Prior Complaints Against Lodis.

Judge Heller limited Corbis' ability to establish that it acted reasonably and with cause when it terminated Lodis by excluding evidence that Lodis had sexually harassed and retaliated against former employee Krista Hale before his promotion by Shenk. (CP 6560) Lodis' prior misconduct was highly relevant to Corbis' good faith reasons for terminating him when Shenk received yet another allegation that Lodis was retaliating against a female subordinate. Hale's demand letter, which contained specific allegations of harassment and retaliation, was relevant to show that Shenk was justified in refusing to further tolerate such

conduct. (CP 4983, 5810-13) The Hale complaint was also relevant to Corbis' "same actor" argument, because Shenk promoted Lodis and made him part of his Executive Team even after Lodis received a warning for conduct unbecoming a Vice-President. (Ex. 306)

The trial court abused its discretion in excluding this evidence under ER 403. *See Subia v. Riveland*, 104 Wn. App. 105, 114-15, 15 P.3d 658 (2001) (reversing ER 403 exclusion of polygraph evidence that was relevant to "whether DOC had legitimate reasons for investigating [] allegations of [] sexual misconduct."). In the event of a remand on either of Lodis' claims, this court should direct the trial court to allow the jury to consider the circumstances surrounding Lodis' previous warning against engaging in retaliatory behavior.

VI. CONCLUSION

The trial court properly entered judgment for Corbis on Lodis' claims for retaliation and age discrimination because Corbis had legitimate reasons for terminating Lodis' employment, and on Corbis' claim for breach of fiduciary duty because Lodis took excessive compensation for vacation time that Lodis did not report he had used. The court should affirm and remand for entry of judgment for Corbis on its claim that Lodis received a double payment for his \$35,000 bonus.

Dated this 14th day of December, 2011.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 14, 2011, I arranged for service of the foregoing Brief of Respondents/Cross-Appellants, to the court and to counsel for the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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DATED at Seattle, Washington this 14th day of December, 2011.



Victoria K. Isaksen

No. 67215-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STEVEN LODIS and DEBORAH LODIS, a marital community,

Appellants/Cross-Respondents,

v.

CORBIS HOLDINGS, INC., a Washington corporation,
CORBIS CORPORATION, a Nevada corporation,
and GARY SHENK, an individual,

Respondents/Cross-Appellants.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 DEC 16 AM 10:55

APPENDIX OF UNPUBLISHED AUTHORITY CITED IN BRIEF OF
RESPONDENTS/CROSS-APPELLANTS (GR 14.1)

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Index

- App. A:** *Johnson v. Stupid Prices, Inc.*, 2008 WL 4835876 (W.D. Wash. Nov. 6, 2008)
- App. B:** *Prue v. Univ. of Washington*, 2008 WL 3891466 (W.D. Wash. Aug. 19, 2008) (Lasnik, J.)
- App. C:** *Sims v. Lakeside School*, 2007 WL 5417731 (W.D. Wash. Mar. 15, 2007)
- App. D:** *Uzzell v. Teletech Holdings, Inc.*, 2007 WL 4358315 (W.D. Wash. Dec. 7, 2007)
- App. E:** *E.E.O.C. v. Wyndham Worldwide Corp.*, 2008 WL 4527974 (W.D. Wash. Oct. 3, 2008)
- App. F:** *Maniates v. Lake County, Oregon*, 2008 WL 4500373 (D. Or. Oct. 7, 2008)
- App. G:** *Pettit v. Steppingstone, Ctr. for the Potentially Gifted*, 429 F. App'x 524 (6th Cir. 2011)
- App. H:** *Cyrus v. Hyundai Motor Mfg. Alabama, LLC*, 2008 WL 1848796 (M.D. Ala. Apr. 24, 2008)

2008 WL 4835876

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Bruce L. JOHNSON, Plaintiff,
v.
STUPID PRICES, INC., Defendant.

No. Co7-1817 MJP. | Nov. 6, 2008.

Attorneys and Law Firms

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Opinion

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION TO CONTINUE

MARSHA J. PECHMAN, District Judge.

*1 This matter comes before the Court on Defendant's motion for summary judgment. (Dkt. No. 18.) The Court has considered Defendants' motion, Plaintiff's letter (Dkt. No. 23), Defendants' reply (Dkt. No. 21), and other pertinent documents in the record. Even though Plaintiff filed an untimely response to the motion (*see* Dkt. No. 24), the Court considered it and it does not alter the Court's ruling on the matter. For the reasons stated below, the Court GRANTS Defendant's motion.

Background

On August 11, 2006, Plaintiff, an African-American, began working for Defendant Stupid Prices, Inc. ("SPI") at its Kent, Washington location. SPI, a Washington corporation, operates a chain of liquidation outlets selling merchandise acquired from, among other sources, other retailers' overstock. (Baisch Decl. at ¶ 4.) Phil Germer, the manager at the SPI store in Kent, hired Plaintiff as a warehouse helper. (*Id.* at ¶ 6.) Mr. Johnson worked for SPI between August 11, 2006 and August 23, 2006. (*Id.*)

During his time at SPI, Plaintiff heard his immediate supervisor, John Murphy, made a derogatory statement.

(Johnson Decl. at ¶¶ 5, 8-9.) Plaintiff asserts Mr. Murphy said "how do you like the new monkey we got working here." (Johnson Decl. at ¶ 9.) Defendant claims its investigation revealed Murphy had no intent to make a slur and that he was teasing a female Caucasian worker about the way she was walking. (Baisch Decl. at ¶ 8.) Nevertheless, on August, 19, 2006, SPI reprimanded Murphy with an "Employee Warning Notice" for the "possible racial slur." (Baisch Decl., Ex. 2.) The warning states that Murphy was supposed to apologize to Mr. Johnson for the incident. (*Id.*) Johnson states that Murphy never apologized. (Johnson Decl. at ¶ 18.) Mr. Johnson missed work for at least a day as a result of the incident and claims that when he spoke to Germer about the incident, he was told to "get over it." (Johnson Decl. at ¶ 16.)

Plaintiff states he reported the incident to several store managers who failed to "effectively remedy" the situation. (*Id.* at ¶¶ 11-13.) He further states the he suffered from increased blood pressure as a result of this incident and that he had to seek medical attention. (*Id.* at ¶ 14.) When Plaintiff returned to work, he claims Murphy made monkey sounds and gestures in the area where Plaintiff worked. (*Id.* at ¶¶ 19-20.) Plaintiff claims he reported this incident to Germer who ignored his complaints. (Dkt. No. 23.) Defendant states that there have been no other complaints of harassment or discrimination from SPI employees. (Baisch Decl. at ¶ 14.)

In SPI's view, Johnson was unable to perform his job duties because of his high blood pressure and his employment was terminated by mutual agreement. (Baisch Decl. at ¶ 12.) Johnson did not return to work after the second Murphy incident because he felt Murphy created a hostile work environment. (Dkt. No. 23.) He claims Germer terminated him for this failure to return to work. (*Id.*)

*2 In April 2007, Plaintiff filed a complaint against SPI with the Equal Employment Opportunity Commission ("EEOC") and on August 9, 2007, the EEOC dismissed his charge. (Pugh Decl., Ex. 1.) After filing for leave to proceed in forma pauperis, Plaintiff filed his complaint in November, 2007. (Dkt. No. 4.) Plaintiff, proceeding pro se, asserts claims for: (1) harassment in violation of federal law, (2) harassment in violation of state law, (3) retaliation in violation of federal law, (4) retaliation in violation of state law, and (5) unlawful and wrongful discharge. (Dkt. No. 4 at 4-5.) Defendant requests the Court grant summary judgment on all of Plaintiff's claims.

Discussion

I. Summary Judgment Standard

Summary judgment is not warranted if a material issue of fact exists for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995), *cert. denied*, 516 U.S. 1171, 116 S.Ct. 1261, 134 L.Ed.2d 209 (1996). The underlying facts are viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "Summary judgment will not lie if ... the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). However, once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To discharge this burden, the nonmoving party cannot rely on its pleadings, but instead must have evidence showing that there is a genuine issue for trial. *Id.* at 324.

II. Harassment

Plaintiff asserts that SPI violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(a)(1) and 42 U.S.C. § 1981, by creating a racially hostile work environment. (Dkt. No. 4 at 4.) Plaintiff also argues SPI's actions violated Washington's Law Against Discrimination, RCW 49.60.180. Because Washington law tracks federal law on this issue, the court will analyze both harassment claims simultaneously. *See Hardage v. CBS Broadcasting, Inc.*, 427 F.3d 1177, 1183 (9th Cir.2005) (citing *Anderson v. Pac. Mar. Ass'n*, 336 F.3d 924, 925 n. 1 (9th Cir.2003)).

To prevail on his claim of disparate treatment based on race, a plaintiff must offer direct or circumstantial proof that his employer's challenged decision was motivated by intentional discrimination. *Washington v. Garrett*, 10 F.3d 1421, 1432 (9th Cir.1993); *see also Cannon v. New United Motors Mfg., Inc.*, 141 F.3d 1174 at *3 (9th Cir.1998). Direct evidence is evidence which "proves the fact [of discriminatory animus] without inference or presumption." *Godwin v. Hunt Wesson,*

Inc., 150 F.3d 1217, 1221 (9th Cir.1998) (quoting *Davis v. Chevron, U.S.A., Inc.*, 13 F.3d 1082, 1085 (5th Cir.1994)). Unlike the statements at issue in *Godwin*, the statements and actions Johnson describes are not directly related to any adverse action by his employer (e.g. his termination). 150 F.3d. at 1221 (employer's comment was related to position plaintiff sought). Thus, Johnson has not presented any direct evidence of racial discrimination.

*3 In the absence of direct evidence that he was the victim of racial discrimination, Plaintiff's case must pass through the *McDonnell Douglas* burden shifting analysis. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *see also Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061-62 (9th Cir.2002). First, Plaintiff bears the burden of establishing a prima facie case of employment discrimination based on race. *Garrett*, 10 F.3d at 1432. Second, Defendant then bears the burden of articulating a legitimate non-discriminatory reason for the adverse employment decision. *Id.* Finally, the burden shifts back to Plaintiff to show that Defendant's stated reason was merely a pretext. *Id.* (citations omitted).

To establish a prima facie case, Plaintiff must show (1) he was subject to verbal or physical conduct of racial or sexual nature, (2) that conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of his employment. *Gregory v. Widhall*, 153 F.3d 1071, 1074 (9th Cir.1998). Moreover, the conduct must be imputed to the employer. *See Washington v. Boeing Co.*, 105 Wash.App. 1, 13, 19 P.3d 1041 (Wn.Ct.App.2000). Viewing the evidence presented in a light most favorable to Plaintiff, Johnson has described conduct that is of racial nature. (Johnson Decl. at ¶ 9.) Similarly, Johnson's complaint to his superiors at SPI makes it clear the comment was unwelcome. (*Id.* at ¶¶ 11-13, 19 P.3d 1041.)

The question then turns to whether Plaintiff has described conduct that is sufficient or pervasive enough to alter the conditions of his employment. *Gregory*, 153 F.3d at 1074. The working environment must be both objectively and subjectively perceived as abusive. *Brooks v. City of San Mateo*, 229 F.3d 917, 923-24 (9th Cir.2000) (quotations omitted). Isolated, single incidents of harassment are generally insufficient to support a finding of objective unreasonableness. *Id.* at 924. In *Harris*, the Supreme Court listed frequency, severity, and level of interference with work performance as factors relevant to a court's inquiry on this issue. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Here, Johnson

points to two events: Murphy's original comment Johnson "overheard" and Murphy's gestures. Johnson's extremely short stay with SPI makes it somewhat difficult to assess whether his working conditions were altered. His timecard indicated he was worked at SPI on seven days over the course of two weeks. (Baisch Decl., Ex. 1.) The Court finds that the two events are more like the isolated incident described in *Brooks* than more frequent transgressions contemplated by *Harris*. Plaintiff states he has physically disturbed by the event, but offers nothing beyond his own declaration to demonstrate distress. (See Johnson Decl.) As such, the Court cannot conclude, based on the record before it, that Plaintiff has described conduct sufficient or pervasive enough to alter the conditions of his employment.

*4 Plaintiff has failed to present a prima facie case for a racially hostile work environment in violation of either federal or state law. Defendant is entitled to summary judgment on both claims.

III. Retaliation

A plaintiff's claim for retaliation in violation of Title VII is analyzed under the *McDonnell Douglas* framework outlined above. *Jurado v. Eleven-Fifty Corp.*, 813 F.3d 1406, 1411 (9th Cir.1987). To establish his prima facie case, Plaintiff must show (1) he engaged in statutorily protected activity, (2) SPI imposed an adverse employment action, and (3) there was a causal link between the protected activity and adverse action. *Id.* Because the test for retaliation is identical under RCW 49.60.210(1), the Court will analyze the federal claim and state claim simultaneously. See *Coville v. Cobarc Services, Inc.* 73 Wash.App. 433, 439, 869 P.2d 1103 (Wn.Ct.App.1994) (listing the test as: "(1) he or she engaged in statutorily protected activity; (2) an adverse employment action was taken; and (3) a causal link between the former and the latter"). The parties do not dispute that Johnson's complaint of discrimination was a protected activity. (Dkt. No. 18 at 11.)

An employment decision is adverse if it is based on a retaliatory motive and is likely to deter protected activity. *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir.2000) (adopting the EEOC's interpretation of "adverse employment action"); see also *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 ("a plaintiff must show that a reasonable employee would have found the challenged action materially adverse"). Viewing the evidence in the light most favorable to Plaintiff, Johnson's termination was a decision squarely within this definition

of "adverse." A causal link between protected activity and adverse action may be inferred where the two events are close in time. *Ray*, 217 F.3d at 1244. As a matter of logic, this inference may carry less force when the total length of Johnson's employment was less than two weeks and when his timecard indicates he only worked seven days during that period. (See Baisch Decl., Ex. 1.) Nevertheless, the proximity is close enough in time to infer a causal link between his complaint and his termination. Under the minimal evidence standard required under this initial burden phase, Plaintiff has stated a prima facie case. See, e.g., *Coughlan v. American Seafoods Co. LLC.*, 413 F.3d 1090, 1094 (9th Cir.2005)

Pursuant to *McDonnell Douglas*, the burden shifts to SPI to articulate a non-discriminatory reason for its action. 411 U.S. at 802-805. Here, SPI states they had a legitimate reason to his termination: he was no longer able to perform his job functions because of his high blood pressure and there were no other job openings. (Dkt. No. 18 at 11-12.) Johnson's case is bereft of any evidence that would show this justification to be a mere pretext. His own declaration, filed after Defendant's motion and reply, is silent on the cause of his termination. While he argues in his pleadings that his blood pressure did not interfere with his work, a party may not simply rely on pleadings to create a material issue of fact. *Celotex Corp.*, 477 U.S. at 324. There is simply no evidence, either direct or circumstantial, in the record that would show SPI's justification to be mere pretext. *Coughlan*, 413 F.3d at 1095 (noting that direct evidence need only be minimal to establish pretext but further observing that circumstantial evidence must be specific and substantial to defeat summary judgment). Plaintiff thus fails to carry his burden under *McDonnell Douglas*.

*5 Moreover, the fact that the same decision-maker hired and fired Johnson creates a strong inference that SPI was not racially motivated. *Coughlan*, 413 F.3d. at 1096-97. The inference arises where the same individual is responsible for hiring and firing a plaintiff and both actions take place in a short time frame. *Id.* at 1096. Here, Germer was responsible for hiring Johnson and had the conversation with Johnson that terminated his employment. (Baisch Decl. ¶¶ 6, 12.) Both conversations took place just weeks apart. (*Id.*) While the inference is neither a "mandatory presumption" nor a "mere possible conclusion," a district court must consider the same actor analysis when evaluating a motion for summary judgment. *Coughlan*, 413 F.3d at 1097. Plaintiff has offered no evidence to counter this inference.

Thus, because Plaintiff cannot carry his burden under *McDonnell Douglas* or rebut the same actor inference, Defendant is entitled to summary judgment on the retaliation claims.

IV. Wrongful Discharge

Plaintiff asserts a claim for “unlawful and wrongful discharge” in violation of the common law of Washington. (Dkt. No. 4 at 5.) Defendant apparently interprets this action as a claim for constructive discharge. (See Dkt. No. 18 at 12-13.) Johnson's pleadings offer no clarification on this issue. (Dkt. No. 23.) The Court reads Plaintiff's complaint as asserting a claim for wrongful discharge in violation of public policy. In Washington, an employer may be liable for the tort of wrongful discharge “where employees are fired for exercising a legal right or privilege.” See *Reninger v. State Dept. of Corrections*, 134 Wash.2d 437, 447, 951 P.2d 782 (Wn.1998). Again, Plaintiff has offered no evidence beyond his own pleadings explaining the reasons for his termination. He merely states that “Defendant has hidden the true reasons for Plaintiff's termination.” (Dkt. No. 4 at 5.) Plaintiff has failed to produce any evidence that would create a material issue of fact on the cause of his discharge. *Adickes*, 398 U.S. at 159. In the absence of any such evidence, Defendant is entitled to summary judgment on Plaintiff's wrongful discharge in violation of public policy claim.

V. Motion to Continue

On September 24, 2008, five days after Defendants' motion for summary judgment came ripe for consideration, Plaintiff filed a motion for a continuance. (Dkt. No. 26.) By that date, Plaintiff had already filed a response (Dkt. No. 21) as well as a sur-reply (Dkt. No. 24) to Defendant's motion for summary judgment. In his motion for a continuance, Plaintiff asks the Court to delay the trial date so he can retain an attorney.

(Dkt. No. 26.) His motion came ripe just a month and a half before his scheduled trial date and more than two years after his departure from SPI. Since he filed his complaint in November, 2007, Plaintiff has failed to serve Defendant with any discovery request or any request for a deposition. (Pugh Decl. ¶ 12; Dkt. No. 28 at 3.) The Court's scheduling order, dated January 31, 2008, states specifically that failure to complete discovery is “not recognized as good cause” for the purposes of altering the dates. (Dkt. No. 17 at 1.) The Court is sympathetic to Johnson's attempts to retain an attorney. However, attorneys in such matters can be retained without any up-front costs to plaintiffs on a contingent fee basis. Plaintiff has not explained whether he has attempted to contact any attorney nor has he stated if any attorneys have turned down his requests for representation in the two years since he stopped working for SPI. On this record, the Court cannot find good cause to continue the matter.

Conclusion

*6 The Court agrees with Johnson that Murphy's conduct, if it occurred as Plaintiff described, is undoubtedly offensive. However, the standards for evaluating hostility under Title VII and other relevant statutes are demanding. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). Plaintiff's failure to provide the Court with any evidence beyond his own declaration is detrimental to his claims. The Court hereby GRANTS Defendant's motion for summary judgment on all claims. (Dkt. No. 18.) The Court DENIES Plaintiff's motion for a continuance. (Dkt. No. 26.) Plaintiff's action is dismissed with prejudice.

The clerk is directed to send a copy of this order to counsel of record and to Plaintiff.

Parallel Citations

91 Empl. Prac. Dec. P 43,384

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Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

George PRUE, Plaintiff,

v.

UNIVERSITY OF WASHINGTON,
et al., Defendants.

No. C07-1859RSL. | Aug. 19, 2008.

Attorneys and Law Firms

Michael C. Subit, Jillian M. Cutler, Frank Freed Subit & Thomas, Seattle, WA, for Plaintiffs.

Jayne Lyn Freeman, Keating Bucklin & McCormack, Seattle, WA, for Defendant.

Opinion

ORDER GRANTING MOTION TO COMPEL

ROBERT S. LASNIK, District Judge.

I. INTRODUCTION

*1 This matter comes before the Court on defendants' motion to compel plaintiff to identify the medical and mental health providers he has seen for the past ten years, to identify the nature of treatment and approximate dates thereof, and to compel him to sign stipulations to release the records directly from those providers to defendants. Defendants also seek an award of fees and costs for having to bring this motion.

For the reasons set forth below, the Court grants the motion to compel.

II. DISCUSSION

Plaintiff, who is African American, alleges that the University of Washington and two individual defendants discriminated against him based on his race and age when they failed to hire him for an open position in September 2005. Plaintiff seeks emotional distress damages. He contends that he suffers from depression and post traumatic stress disorder ("PTSD") as a result of defendants' conduct.

Plaintiff has agreed to provide medical records regarding his mental, emotional, or psychological health, and has provided the names of people who have treated him for those issues. He has refused to provide any other information in response to the interrogatory. The parties met and conferred prior to defendants' filing this motion but were unable to resolve the matter.

A. The Discovery Requests.

Defendants are entitled to information relevant to "any party's claim or defense" and to broad discovery of information "reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). Plaintiff does not argue that he has seen an inordinate number of providers or that it would be otherwise burdensome to respond. Plaintiff concedes that defendants are entitled to information from the past ten years regarding his mental, emotional, or psychological health. He argues that because he is not alleging that defendants caused him any physical harm, any information related to his physical health is privileged and irrelevant. Although plaintiff relies on Washington's physician-patient privilege, it does not appear to apply in this case.¹ Plaintiff has asserted only federal claims, and the federal law of privilege governs federal question cases. *See, e.g., Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 n. 10 (9th Cir.1992). Although the Supreme Court has recognized a federal psychotherapist-patient privilege, it has not approved of a broader federal privilege. Accordingly, the information is not privileged.

To support plaintiff's relevancy argument, he cites two published cases from California courts that have limited the scope of similar discovery requests. Although a defendant would not automatically be entitled to review all of a plaintiff's medical records every time an emotional distress claim is made, three points persuade the Court that broad disclosure is appropriate in this case. First, unlike in one of the cases plaintiff cites, he has alleged damages well beyond "garden variety" emotional distress. *See, e.g., Fitzgerald v. Cassil*, 216 F.R.D. 632, 637 (N.D.Cal.2003) (explaining that courts have found a waiver of the privilege "when the plaintiff has done more than allege 'garden variety' emotional distress"). Second, plaintiff has not been forthcoming in his discovery responses in two areas. Supplemental Declaration of Jayne Freeman (Dkt.# 27) at ¶¶ 10, 11 (explaining that plaintiff subsequently stated that he had applied for positions with several employers not previously identified, and seen at least one other medical provider since moving

to Seattle who he had not previously identified). Regardless of whether the omissions were intentional or the result of memory lapses, they show that defendants may not obtain complete information about plaintiff's emotional distress unless they are able to review the medical records themselves. Third, defendants have engaged a physician to perform an independent medical examination of plaintiff who has opined that he needs to review plaintiff's medical records from the last ten years to complete his evaluation:

*2 [V]alid application of diagnostic criteria in the DSM IV requires direct access to collateral information such as medical history. Complete and accurate information regarding medical as well as mental health history can be important in not only determining prior functional abilities or impairments, but also evaluating alternate causes of symptoms that meet diagnostic criteria of mental disorders, such as medical conditions, side effects of medication, or substance abuse.

Declaration of Dr. John Hamm, (Dkt.# 17) at ¶ 9. Dr. Hamm's declaration shows that defendants are not merely conducting a "fishing expedition" as plaintiff alleges. Plaintiff has not offered a competing medical opinion. Accordingly, defendants are entitled to information about plaintiff's medical history beyond his mental health records.

The Court considers whether a narrowing of the request would be appropriate. Plaintiff invited defendants to narrow the scope "to inquire about serious health conditions that might have an impact on Mr. Prue's current emotional distress damages." Plaintiff's Opposition at p. 5. However, defendants are not required to rely on plaintiff's determination of what information might be relevant or his determination, in his lay opinion, of what might have caused his symptoms. Rather, defendants are entitled to review the records themselves to evaluate issues of causation, including whether any of plaintiff's other ailments or medications might have caused his symptoms and whether any of the symptoms predated defendants' actions. Similarly, the records could lead to information regarding whether plaintiff has mitigated his damages, by, for example, following up on previous recommendations by health care providers.

Plaintiff also offered to narrow the request to records created after plaintiff moved to Washington in May 2005. However, the relevant employment decision was made just a few months later, in September 2005. Defendants are entitled to information prior to that date to evaluate plaintiff's condition before and after the decision.

Footnotes

Accordingly, plaintiff shall be required to provide a complete response to the challenged interrogatory. As for the medical records, the Court will not require plaintiff to sign stipulations for their release. Although the collegial practice of doing so is fairly routine in this district, it is not set forth in the Rules. Defendants can seek the records either through requests for production or subpoenas. If defendants choose to issue requests for production, plaintiff must use his best efforts to secure the records. The Court acknowledges that plaintiff's foreign residences and multiple state moves may make it very difficult to obtain all of his medical records even with his best efforts in this area. Plaintiff will not be required to use extraordinary efforts to obtain the records.

B. Fees and Costs.

Defendants request an award of its fees and costs in bringing this motion pursuant to Federal Rule of Civil Procedure 37(a)(4) (A) which permits an award unless the party's failure to disclose was "substantially justified." In this case, plaintiff's opposition to the discovery request was substantially justified. He has a legitimate privacy interest in his medical records. Also, he had a good faith basis to argue that defendants should not be entitled to records other than from his mental health physicians. Accordingly, the Court will not require him to pay defendants' fees and costs.

C. Document Filed Under Seal.

*3 Defendants have filed a document under seal without filing a motion to do so as required by Local Rule 5(g). *See* Declaration of Jayne Freeman, (Dkt. # 19), Exhibit C. Because the document contains plaintiff's social security number, the Court will not order it unsealed. Rather, within ten days of the date of this order, defendants must either (1) file a redacted copy of the document in the docket, or (2) file a motion or stipulation and proposed order to maintain the document under seal. If the parties seek to file any additional documents under seal in this case, they must comply with Local Rule 5(g).

III. CONCLUSION

For all of the foregoing reasons, defendants' motion to compel (Dkt.# 16) is GRANTED. Plaintiff must provide a complete response to Interrogatory No. 5 within ten days of the date of this order.

- 1 Even if the privilege applied, it is likely that plaintiff has waived it. RCW 5.60.060(4)(b) (“Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions.”).

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Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Chance SIMS and Novella Coleman, Plaintiffs,

v.

LAKESIDE SCHOOL, Defendant.

No. C06-1412RSM. | March 15, 2007.

Attorneys and Law Firms

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Chelsea D. Petersen, Linda D. Walton, Perkins Coie, Seattle, WA, for Defendants.

Opinion

ORDER GRANTING MOTION FOR PROTECTIVE ORDER

RICARDO S. MARTINEZ, District Judge.

*1 This matter comes before the Court on plaintiff Chance Sims' Motion for Protective Order. (Dkt.# 36). Plaintiff asks this Court to issue a Protective Order prohibiting defendant from obtaining his medical records as defendant has indicated it intends to request in its Notice of Intent to Subpoena Dr. John Vassall's records. Defendant argues that federal courts do not recognize a physician-patient privilege, and that, to the extent a psychotherapist-privilege applies, Mr. Sims has waived that privilege. (Dkt.# 39). Therefore, defendant asserts that the Court should deny plaintiff's motion.

Having reviewed plaintiff's motion, defendant's response, plaintiff's reply, and the remainder of the record, the Court hereby finds and ORDERS:

(1) Plaintiff's Motion for Protective Order (Dkt.# 36) is GRANTED. As an initial matter, the Court notes that it appears only one type of record is at issue here—pure medical records. While the subpoena will apparently request “counseling and psychological” records, defendant emphasizes in its response that Dr. Vassall is not a licensed psychiatrist or psychologist, and “the relevant issue here is whether a physician-patient privilege exists.” (Dkts. # 37, Ex.

2 and # 39 at 1). To that end, the Court notes that it must first determine whether such pure medical records are even relevant to this action. Here, the Court agrees with plaintiff that they are not. Mr. Sims has not made any claim for bodily injury in this case, he does not plan on calling any health care providers as witnesses, and he is not asserting any independent claim for negligent infliction of emotional distress, outrage or intentional infliction of emotional distress. Thus, the Court could issue a Protective Order on that basis alone.

To the extent that defendant actually intends to subpoena psychological records through Dr. Vassall and Minor and James Medical Center, a psychotherapist-patient privilege is explicitly provided for under the federal common law, *see Jaffee v. Redmond*, 518 U.S. 1, 15, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), and the Court agrees with plaintiff that such privilege has not been waived in this case. This Court is persuaded that the narrow approach discussed in *Fitzgerald v. Cassil*, 216 F.R.D. 632, 636-40 (N.D.Cal.2003) should be applied here. Mr. Sims has asserted “garden variety” emotional distress symptoms, including depression, anger, irritability, sleep loss, discouragement, withdrawal, relieved experience and low self esteem. He has not asserted a bodily injury claim, he is not relying on any provider or other expert to prove emotional distress symptoms, and he has not pled a cause of action for intentional or negligent infliction of emotional distress.

In addition, as the *Fitzgerald* court explained, there are other avenues for defendant to obtain the information it now intends to seek:

While the privilege may bar access to medical records, the defendant may cross-examine the plaintiff, as was done in the instant case, about other stressors or contributing factors that may explain or have contributed to the alleged emotional distress. The occurrence and dates of any psychotherapy including that which occurred before the incident is not privileged and subject to discovery. The defendant can examine percipient witnesses or find other evidence to show, for example, that plaintiff's description of his or her distress is exaggerated. It may elicit from the plaintiff the fact that the plaintiff did not seek and obtain treatment or therapy for the alleged distress.

*2 *Fitzgerald*, 216 F.R.D. at 638 (citations omitted).

Accordingly, the psychotherapist-patient privilege, to the extent it exists with respect to those records defendant intends to subpoena from Dr. Vassall and the Minor and James

Medical Center, has not been waived. See *Fitzgerald*, 216 F.R.D. at 639. For this reason, and on the basis that plaintiff's pure medical records are not relevant in any event, the Court

agrees that a Protective Order prohibiting defendant from obtaining Dr. Vassal's records should be granted.

(2) The Clerk shall forward a copy of this Order to all counsel of record.

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2007 WL 4358315

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Carl UZZELL, Plaintiff,

v.

TELETECH HOLDINGS, INC., a Delaware
corporation; and Teletech Customer
Care Management (Colorado), Inc.,
a Colorado corporation, Defendants.

No. C07-0232MJP. | Dec. 7, 2007.

Attorneys and Law Firms

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Blankenship Law Firm, Seattle, WA, for Plaintiff.

Eric Meckley Eric Meckley, Morgan Lewis & Bockius, San
Francisco, CA, Donald W. Heyrich, Law Office of Donald
W. Heyrich, Seattle, WA, for Defendants.

Opinion

ORDER DENYING PROTECTIVE ORDER

MARSHA J. PECHMAN, District Judge.

*1 This matter comes before the Court on Plaintiff Uzzell's motion for a protective order and for the return of his medical and psychiatric records. (Dkt. No. 20.) Defendants oppose the motion. (Dkt. No. 25.) Having considered the motion and response, Plaintiff's reply (Dkt. No. 27), all documents submitted in support thereof and the record herein, the Court DENIES Plaintiff's motion.

Background

Plaintiff Carl Uzzell is suing Defendants Teletech Holdings and Teletech Customer Care Management (collectively "Teletech") for alleged retaliation and wrongful termination. Plaintiff alleges that Teletech took adverse employment action against him in retaliation for his protected activity opposing Defendants' alleged efforts to force employees to work off-the-clock and without overtime payments. Plaintiff alleges claims under the Fair Labor Standards Act, the Washington Minimum Wage Act, and Washington statutory, common law, and public policy. Plaintiff alleges that

Defendants caused Plaintiff damages, including lost wages and benefits; emotional upset, stress, and anxiety; and "out-of-pocket expenses" including attorneys' fees, litigation costs, and medical expenses. (Compl. ¶¶ 20-25.)

In July 2007, Defendants served Interrogatories and Requests for Production on Plaintiff, requesting, among other things, that Plaintiff identify all medical treatment providers from whom Plaintiff sought treatment for any medical condition "caused or exacerbated" by Defendants' conduct, and produce documents related to such treatment or any prior or subsequent treatment. Plaintiff objected on the grounds that the requests invaded Plaintiff's expectations of privacy and the patient-provider privilege. (Meckley Decl. ¶ 2.) Nevertheless, Plaintiff provided the name and contact information for four medical treatment providers.¹ (*Id.*, Ex. 1.)

On August 30, 2007, Defendants served Plaintiff with subpoenas seeking Plaintiff's medical records from the four medical service providers identified in Plaintiff's answer to Defendants' interrogatories. On October 4, Defendants served Plaintiff with a subpoena seeking medical records from an additional provider based on information discovered in the earlier subpoenaed records. (Meckley Decl., Ex. 4.) Plaintiff never indicated that any of these subpoenas were objectionable, never asked Defendants' counsel to meet and confer regarding the subpoenas, and never filed a motion to quash or modify the subpoenas. (Meckley Decl. ¶ 4.) Some, but not all, of the providers produced Plaintiff's medical records. (Meckley Decl. ¶¶ 6, 7, 8, 10.)

On November 1, Plaintiff filed this motion for a protective order and for the return of the produced medical records. Plaintiff argues that the medical records produced are protected by the psychotherapist-patient privilege and that Plaintiff has not waived that privilege by placing his mental health at issue.

Discussion

Federal Rule of Civil Procedure 45 governs subpoenas. Subsection (c)(3) provides that "[o]n timely motion, the issuing court must quash or modify the subpoena that ... (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies." Fed.R.Civ.P. 45(c)(3) (emphasis added).² A party who does not timely object to a Rule 45 subpoena waives any objection to the subpoena. *Millenium Holding Group, Inc. v. Sutura, Inc.*, 2007 WL

121567, *3 (D.Nev. Jan.11. 2007). Because Plaintiff never objected, filed a motion to quash, or filed a motion for a protective order until more than two months after the subpoenas were issued, he has waived all objections to the subpoenas.

*2 Plaintiff argues that Defendants' failure to provide fourteen-days advance notice to Plaintiff and the health care providers violates RCW 70.02.060 and resulted in the inadvertent disclosure of the medical records. But RCW 70.02.060 is a *state* procedural rule. Plaintiff cites no persuasive authority for his assertion that RCW 70.02.060 applies to subpoenas issued by the federal district court in a case in which the federal court has original jurisdiction.³ Absent contrary authority, the Court applies the Federal Rules of Civil Procedure, and not Washington State procedural rules to civil actions over which the Court has original jurisdiction. *See* Fed.R.Civ.P. 1; *see also* *U.S. v. Orr Water Ditch Co.*, 391 F.3d 1077, 1082 (9th Cir.2004) (noting that when a situation is covered by both state and federal procedural rules, federal courts generally apply federal procedural rules).

In “unusual circumstances and for good cause,” the failure to timely act will not bar consideration of objections to a Rule 45 subpoena. *McCoy v. Southwest Airlines Co., Inc.*, 211 F.R.D. 381, 385 (C.D.Cal.2002). “Courts have found unusual circumstances where: (1) the subpoena is overbroad on its face and exceeds the bounds of fair discovery; (2) the subpoenaed witness is a non-party acting in good faith; and (3) counsel for the witness and counsel for the subpoenaing party were in contact concerning the witness' compliance prior to the time the witness challenged the legal basis for the subpoena.” *Id.* Here, the Court does not find good cause to excuse the untimely objection because the subpoenas were not overbroad or outside the bounds of fair discovery. To the contrary, the subpoenas seek relevant information. Mr. Uzzell put his mental health at issue by alleging that his damages include “emotional upset, stress, and anxiety” and by requesting compensation for his “out-of-pocket expenses” including medical expenses. His medical records, before, during, and after his termination are relevant to the question of whether Defendants caused his mental distress and the amount of damage caused.

Mr. Uzzell argues that he has only alleged “garden variety” emotional distress claims and therefore has not put his mental health at issue. He cites several district court cases in which the courts concluded that “garden variety” emotional distress claims do not constitute a waiver of the psychotherapy

privilege. *See, e.g., EEOC v. Lexus Serramonte*, 237 F.R.D. 220, 223-24 (N.D.Cal.2006) (where plaintiff brought only “garden-variety” claim for emotional distress damages and did not intend to rely on medical records or medical expert testimony, she did not waive the privilege); *Fitzgerald v. Cassil*, 216 F.R.D. 632, 639 (N.D.Cal.2003) (holding that plaintiffs did not waive the privilege because they did not allege any “specific psychiatric injury or disorder or unusually severe emotional distress extraordinary in light of the allegations”). The federal courts are split on the issue of whether a party waives the psychotherapist-patient privilege, and more specifically, whether a “garden variety” claim of emotional distress damages waives the privilege. *See Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 474 (N.D.Tex.2005) (collecting cases); 25 Charles Alan Wright & Kenneth Graham, *Federal Practice & Procedure* § 5543 (2007). The Ninth Circuit has not decided the issue, and the cases cited by Plaintiff are not binding on this Court. Moreover, it does not appear that Mr. Uzzell has only alleged a “garden variety” emotional distress claim. In addition to alleging damages for “emotional upset, stress, and anxiety,” he seeks compensation for “out-of-pocket expenses” including “medical expenses.” By asking the Court to award medical expenses, Mr. Uzzell has put his medical status and history at issue. *See Fritsch v. City of Chula Vista*, 196 F.R.D. 562, 568-69 (S.D.Cal.1999) (“Defendants must be free to test the truth of Fritsch's contention that she is emotionally upset because of the defendants' conduct. Once Fritsch has elected to seek such damages, she cannot fairly prevent discovery into evidence relating to the element of her claim.”). Therefore, Mr. Uzzell has waived the privilege and this case does not present unusual circumstances or good cause warranting late implementation of a protective order.

*3 Although tangential to the issue of the merits of Plaintiff's motion, the Court notes that both parties here failed to follow the applicable procedural rules in bringing and responding to this motion. In addition to Plaintiff failing to timely move to quash the subpoenas, Defendants filed an overlength brief that was not signed by local counsel in violation of Local Civil Rule 7(e) and Local General Rule 2(d). The Court expects counsel to make themselves aware of and to follow all applicable local and federal procedural rules for the remainder of this litigation.

Conclusion

For the above stated reasons, the motion for protective order and for return of medical documents is DENIED.

Footnotes

- 1 On November 7, 2007, one day before Defendants' opposition to this motion was to be filed, Plaintiff served supplemental answers to Defendants' interrogatories, in which Plaintiff responded with only objections and without the information about the medical providers. (Meckley Decl. ¶ 17.) The Court will not consider the supplemental response for purposes of this motion.
- 2 The Court refers to the amended Federal Rules, which became effective on December 1, 2007. The changes were intended to be stylistic only. 2007 Advisory Committee Notes.
- 3 To the extent that they conflict with the Court's conclusion, the two district court cases cited by Plaintiff-*Lloyd v. Valley Forge Life Ins. Co.*, 2007 U.S. Dist. LEXIS 40526, *9, 2007 WL 2138756 (W.D.Wa.2007) and *Hankins v. City of Tacoma*, 2007 U.S. Dist. LEXIS 5209, *6-7, 2007 WL 208419 (W.D.Wa.2007)-are not binding on this Court.

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2008 WL 4527974

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, Plaintiff,

v.

WYNDHAM WORLDWIDE CORPORATION,
d/b/a Worldmark By Wyndham, formerly
Trendwest Resorts, Inc., Defendant.

No. C07-1531RSM. | Oct. 3, 2008.

Attorneys and Law Firms

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Opinion

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

RICARDO S. MARTINEZ, District Judge.

*1 This matter is before the Court for consideration of defendant's motion for partial summary judgment, Dkt. # 14. The Court held oral argument on September 19, 2008, and the matter has been fully and carefully considered. For the reasons set forth below, the Court now GRANTS IN PART and DENIES IN PART defendant's motion.

FACTUAL BACKGROUND

Plaintiff Equal Employment Opportunity Commission ("EEOC") brought this employment discrimination action pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII") and Title I of the Civil Rights Act of 1991, alleging unlawful employment practices by the defendant Wyndham Worldwide Corporation ("Wyndham") at one of its properties, the Birch Bay Resort. Specifically, plaintiff contends that five male employees at the Birch Bay

Resort were subjected to unlawful sexual harassment by a supervisor. Defendant has moved for partial summary judgment on five separate bases. The Court gave a preliminary ruling on the motion at the close of oral argument, and now sets forth the analysis.

BACKGROUND

The five young men-Ryan Vaughan, Bryan Berndtson, Michael Poitras, Steven Poitras, and Ryan Henley___ worked in various capacities at Birch Bay Resort from September 2004 through December 2005, the date the harasser Matt Brennan resigned. Brennan was the resort manager. The claimants' allegations against him include touching, suggestive remarks, outright solicitation, lewd talk, invitations to drink, and one incident of groping. The conduct toward claimants Vaughan and Berndtson was the most egregious.

In moving for partial summary judgment, defendant does not dispute the allegations regarding Mr. Brennan's conduct, but rather asserts five separate bases for dismissal of some of the claims. Specifically, defendant contends that:

- (1) Berndtson's claims must be dismissed as untimely;
- (2) the claims of the two Poitras brothers and of Ryan Henley fail because they do not sufficiently allege severe or pervasive harassment;
- (3) the claims of the Poitras brothers, Henley, and Berndtson fail under the Faragher/Ellerth "Reasonable Care" affirmative defense;
- (4) there is no basis for injunctive relief; and
- (5) the claimants cannot recover damages for emotional distress.

Defendant has not moved for summary judgment as to the merits of the claims asserted by Vaughan, except to the extent that grounds (4) and (5) would apply to him.

ANALYSIS

To prevail on a Title VII hostile work environment claim, a plaintiff must show that (1) he was subjected to verbal or physical conduct of a sexual nature; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive work environment. *Vasquez v. County of Los*

Angeles, 349 F.3d 634, 642 (9th Cir.2003). To determine whether the conduct was sufficiently severe or pervasive, the Court should look at all the circumstances, “including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (internal quotations omitted).

*2 The Ninth Circuit Court of Appeals has held that “the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.” *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir.1991) (citing *King v. Board of Regents of University of Wisconsin System*, 898 F.2d 533, 537 (7th Cir.1990)). Thus, multiple acts that individually might not create a hostile work environment may in the aggregate amount to a violation of Title VII. However, prior incidents of which a plaintiff is unaware cannot contribute to a hostile work environment with respect to that plaintiff. *Brooks v. City of San Mateo*, 229 F.3d 917, 924 (9th Cir.2000).

I. Motion regarding the claims of the two Poitras brothers and of Ryan Henley

Defendant asserts that the claims of these three men fail because they do not sufficiently allege severe or pervasive harassment. Defendant contends that “no reasonable factfinder could conclude that their allegations describe an actionably hostile and abusive work environment.” Defendant's Motion, Dkt. # 14, p. 3.

The allegations made by these three men are that Brennan repeatedly touched their hair and faces (to check for shaving), sniffed their necks (to check if they had showered), leered suggestively at them, commented on their physical attributes, provided uniforms that were too tight, suggested that they change their clothes in his office and in his presence, said he knew where they could get great oral sex, and invited them to his home for drinks. While it may be arguable that none of these actions standing alone would create a hostile work environment, when they are viewed together, the Court cannot say as a matter of law that they are not sufficiently severe or pervasive to create a hostile work environment. “The required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.” *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir.1991).

The Court finds that Brennan's conduct toward these three men presents issues of fact for the jury and DENIES defendant's motion for summary judgment as to these men's claims.

II. The Faragher/Ellerth Affirmative Defense

Defendant also contends that the claims of the Poitras brothers, Henley, and Berndtson all fail under the *Faragher/Ellerth* “reasonable care” affirmative defense. This defense arises from two Supreme Court cases holding that when no adverse employment action has been taken, a defendant employer may raise an affirmative defense against damages where the employer can demonstrate that (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). The affirmative defense is intended to encourage the development of antiharassment policies, promote conciliation, and encourage employees to report harassing conduct before it becomes severe or pervasive. *Kohler v. Inter-Tel Techs*, 244 F.3d 1167, 1175 (9th Cir.2001) (quoting *Ellerth*, 524 U.S. at 764).

*3 There is no dispute regarding the absence of adverse employment action here. Therefore, defendant is entitled to assert the defense if the required elements are proven.

As to the first element, defendant argues that it exercised reasonable care to prevent sexual harassment in the workplace through an anti-harassment policy, which is enunciated in a handbook given to every new employee. Defendant further states that when it first became aware of allegations that the Poitrases had been harassed, a Human Resources manager was dispatched to the resort to investigate. HR manager Ellen Perrin apparently obtained only one statement, from Steven Poitras (the only one besides Vaughan who was still working at the resort at the time). This was in December, 2005, and the investigation ended shortly thereafter with Brennan's resignation.

Plaintiff EEOC contends that defendant cannot meet the requirements for either prong of the affirmative defense. As to the first prong, plaintiff asserts that defendant has not demonstrated that it exercised reasonable care to prevent and correct the harassment. It is insufficient for the employer

to simply have an anti-harassment policy in place. *Swinton v. Potomac Corp.*, 270 F.3d 794, 811 (9th Cir.2001). The immediate investigation of a harassment complaint is an essential element of the affirmative defense. *Swenson v. Potter*, 271 F.3d 1184, 1192-93 (9th Cir.2001). According to plaintiff, defendant had notice of Mr. Brennan's conduct well before the December 2005 investigation was opened. Plaintiff states that Assistant Manager Kay McCroskey testified that defendant was aware of the harassment fifteen months before the investigation began, and complained to the regional vice-president at least six months prior to the investigation. These and other allegations by plaintiff regarding awareness within the company raise an issue of fact for the jury with respect to the first prong of the affirmative defense.

Similarly, the parties are in dispute regarding the facts relating to the second prong of the affirmative defense: whether the harassed employees "unreasonably" failed to take advantage of preventive or corrective measures. Defendant argues that none of the claimants utilized the "hotline" number given in the employee handbook to report the harassment anonymously, and four of them admitted that they did not report Brennan's behavior to Human Resources. Michael Poitras testified that he spoke to Vaughan about Brennan's actions in September or October of 2005, but three remaining claimants testified that they never reported the harassment to anyone other than each other. Defendant's Motion, Dkt. # 14, p. 16.

Plaintiff disputes this characterization of the employees' actions. Plaintiff contends that three of the men—M. Poitras, S. Poitras, and Berndtson—all reported the harassment to Vaughan, their immediate supervisor. Apparently Vaughan did not carry the reports forward as a formal complaint, but Vaughan was himself being harassed, and Brennan was also his supervisor. According to plaintiff, Vaughan did complain of his own harassment to his direct supervisor, Kay McCroskey, and she took the complaint to a district vice president, Mike Elson, who was Brennan's direct supervisor. Ms. McCroskey later requested a transfer to another resort, apparently due to the intolerable situation regarding Brennan.

*4 The availability of the *Ellerth/Faragher* affirmative defense is a question of fact for the jury. The Comment to the Ninth Circuit's Model Jury Instruction on this affirmative defense states,

When harassment is by the plaintiff's immediate or successively higher supervisor, an employer is vicariously liable, subject to a potential affirmative defense. *Faragher*,

524 U.S. at 780; *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 875 (9th Cir.2001). For vicarious liability to attach it is not sufficient that the harasser be employed in a supervisory capacity; he must have been the plaintiff's immediate or successively higher supervisor. *Swinton*, 270 F.3d at 805, citing *Faragher*, 514 U.S. at 806. An employee who contends that he or she submitted to a supervisor's threat to condition continued employment upon participation in unwanted sexual activity alleges a tangible employment action, which, if proved, deprives the employer of an *Ellerth/Faragher* defense. *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1173 (9th Cir.2003) (affirming summary judgment for the employer due to insufficient evidence of any such condition imposed by plaintiff's supervisor). See *Pennsylvania State Police v. Suders*, 542 U.S. 129, 137-38, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004), for discussion of tangible employment action.

The adequacy of an employer's anti-harassment policy may depend on the scope of its dissemination and the relationship between the person designated to receive employee complaints and the alleged harasser. See, e.g., *Faragher*, 524 U.S. at 808 (policy held ineffective where (1) the policy was not widely disseminated to all branches of the municipal employer and (2) the policy did not include any mechanism by which an employee could bypass the harassing supervisor when lodging a complaint).

"While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

Although proof that the plaintiff failed to use reasonable care in avoiding harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the defendant, a demonstration of such failure will normally suffice to satisfy this prong. See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

Comment, Ninth Circuit Model Civil Jury Instruction 10.2B. Thus, while the *Ellerth/Faragher* affirmative defense may be available to defendant, the parties' disputes regarding the immediacy of defendant's investigation, and the claimants' reports, present questions of fact for the jury as to its

actual applicability. Summary judgment shall accordingly be DENIED as to this affirmative defense.

III. Injunctive Relief

*5 The EEOC has requested injunctive relief in the complaint, asking the Court for a permanent injunction to enjoin defendant from “engaging in any employment practices which discriminate on the basis of sex against any individual.” Complaint, p. 4. Plaintiff also asks the Court to order defendant to institute and carry out policies and programs which provide equal employment opportunities for all employees, and which “eradicate the effects of its past and present unlawful employment practices.” *Id.* Defendant contends that there is no basis for awarding injunctive relief, because “the specific harassment alleged in this lawsuit cannot possibly reoccur because Brennan and all of the claimants have long since left Wyndham’s employ.” Defendant’s Motion, p. 17. Defendant argues that injunctive relief is unavailable when an injunction is “unnecessary to prevent future violations of Title VII.” *Id.*

The injunctive relief available under Title VII is far broader than that necessary to prevent a recurrence of the specific behavior alleged in the lawsuit (i.e., by the same perpetrator). Pursuant to statute, once the Court has found that the defendant has “intentionally” engaged in the unlawful employment practice charged in the complaint, the Court may enjoin the defendant from “engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, [including] ... any other equitable relief as the court deems appropriate.” 42 U.S.C.2000e-5(g). Thus, the Court is authorized to enjoin further acts of sexual harassment, regardless whether Mr. Brennan is still employed there.

Where a district court denies injunctive relief without specifically finding that the defendant employer is unlikely to repeat its actions, the court abuses its discretion. *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir.1987). Although Mr. Brennan has resigned, other managers who knew of the on-going harassment and failed to react are still with the company. On the record now before the Court, the Court cannot find that the employer is unlikely to repeat its actions. Therefore, the Court shall decline to dismiss the claim for injunctive relief. Defendant’s motion for summary judgment on this basis is DENIED.

IV. Damages for Emotional Distress

Plaintiff has requested that defendant compensate the claimants for losses arising from emotional distress, pain and suffering, and loss of enjoyment of life. Complaint, pp. 4-5. Defendant contends that the claimants are barred from recovering damages for emotional distress because the EEOC failed to produce evidence relating to the claimants’ mental and emotional state when requested to do so in discovery. Plaintiff asserted objections in response to the request for medical or therapy records of each claimant, stating that the request was burdensome, overbroad, sought irrelevant information, and further was subject to doctor/patient and psychotherapist/patient privilege. Defendant’s motion to exclude damages for emotional distress is based on the two-pronged argument that federal law does not recognize a physician-patient privilege, and while it does recognize a psychotherapist-patient privilege, that privilege was waived by the assertion of claims for emotional distress.

*6 The courts are split on whether a plaintiff waives his psychotherapist-patient privilege by putting his mental state at issue when claiming damages for emotional distress. *See, Fritsch v. City of Chula Vista*, 187 F.R.D. 614 (S.D.Cal.1999) (collecting cases). The *Fritsch* court found that the plaintiff had not waived the privilege by claiming damages for emotional distress. *Id.* at 632. Here, this Court did not have an opportunity to consider the issue and weigh the various factors involved in the waiver determination, because defendant never filed a motion to compel the discovery or otherwise challenged plaintiff’s objections to the requested discovery. Those objections were not based on privilege alone. In the absence of any Court determination that plaintiff’s objections to providing the claimants’ medical records were invalid, the Court will not penalize claimants by denying their claims to damages for emotional distress.

This result is not prejudicial to defendant because the claimants’ emotional distress claims are not based on their medical records but rather on their own testimony, which defendant may test by cross-examination. The medical records will not be used to support the claimants’ testimony. This is appropriate where plaintiffs assert merely “garden variety” emotional distress symptoms, such as depression, anger, low self-esteem, and so on. These “garden variety” emotional distress claims do not place the claimants’ mental state sufficiently at issue to constitute a waiver of the privilege. *See, Fitzgerald v. Cassil*, 216 F.R.D. 632, 636-40 (N.D.Cal.2003).

Defendant's motion for summary judgment as to the claims for emotional distress is accordingly DENIED.

V. Time Bar as to Berndtson's Claim

Finally, defendant contends that the EEOC's claim on behalf of claimant Berndtson must be dismissed because the last conduct which he alleges occurred more than 300 days before the EEOC filed charges. Mr. Berndtson's last date of employment was December 23, 2004, and the EEOC suit was not filed until April 7, 2005 (originally based on the charges laid by Vaughan).

The parties are in agreement over the Title VII statute of limitations and filing limits, but disagree on how they should be applied in this case regarding hostile work environment claims. Defendant contends that the later-filed charges, even those involving the same perpetrator, cannot revive claims which are no longer viable at the time of filing. Plaintiff, in opposition to this argument, asserts that under the Supreme Court's recent clarification of the "continuing violation" doctrine set forth in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), no part of the EEOC's claim is time-barred. The Court finds that this is an overbroad reading of the holding in *Morgan*.

The *Morgan* Court rejected application of the continuing violation doctrine for discrete acts of harassment or discrimination by holding that "discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period.... [D]iscrete discriminatory acts are not actionable if time-barred, even when they are related to acts alleged in timely filed charges." *Id.* at 112-113. However, "hostile environment claims are different in kind from discrete acts." *Id.* at 115. "In order for the charge to be timely, the employee need only file a charge within ... [the limitations period] of any act that is part of the hostile work environment." *Id.* at 118.

*7 Plaintiff has focused on the language in *Morgan* stating that "it does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period." *Id.* at 117. Further, "[h]ostile work environment claims **will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period.**" *Id.* at 122 (emphasis added). Plaintiff argues that this means that even though all acts toward claimant Berndtson fell outside the statutory filing

period, his claims are actionable because other acts toward different claimants fell within that period, thus fulfilling the "at least one act" requirement.

However, the Court finds that this language applies to **acts**, not **claimants**. Plaintiff has not cited to a single case in which additional claimants, whose stale claims would otherwise be time-barred, were bootstrapped into a Title VII case by acts directed toward other claimants which fell within the filing period. On the contrary, plaintiff's very argument has been rejected by at least one court in this circuit. In a case involving eight claimants, six with claims based on at least one act with the filing period and two whose harassment occurred entirely before the 300 day period began to run, the court found the claims of the two time-barred. *EEOC v. GLC Restaurants, Inc.*, 2006 WL 3052224 (D.Ariz.2006). The following language in the court's opinion is instructive:

The EEOC alleges a hostile work environment on behalf of eight people it claims were harassed from January, 2001 to September, 2002. The four named Plaintiffs filed charges with the EEOC on March 17 and 20, 2003. Under Title VII, the EEOC can assert hostile work environment claims on behalf of these individuals only if at least one of the acts that contributes to the hostile work environment occurred within the 300 days that preceded those filings___ that is, after May 21 and 24, 2002, respectively. Individual claims based on acts that occurred before that period are time-barred.

Class members Charlene Hannah and Mary Hellman allege harassment that occurred entirely before May 21, 2002. Neither filed a charge with the EEOC. The EEOC argues, nevertheless, that as long as *some* harassment directed toward *some* of the plaintiffs occurred within 300 days of the filing of the charge, it can bring suit on behalf of any Plaintiff, even if that Plaintiff did not experience harassment within the 300-day period. In support, the EEOC cites *EEOC v. Local 350 Plumbers and Pipefitters*, which allowed a challenge to a union's allegedly discriminatory policy using evidence of discrimination both within and outside the 300-day period. 998 F.2d 641, 644-45 (9th Cir.1993). Reliance on this case is misplaced, however, because the evidence of discrimination outside the 300-day period was used only to support the claims of a plaintiff who had alleged discrimination within the 300-day period. *Local 350* differs from this case, in which the EEOC attempts to use some Plaintiffs' timely charges to support other Plaintiffs' entirely untimely claims.

*8 *Id.* at *2.

Thus, while under *Morgan* “the entire time period of the hostile environment may be considered by a court for the purposes of determining liability,” there is no basis for resurrecting the stale claims of claimant Berndtson. *Morgan*, 536 U.S. at 117. This language authorizes the use of Berndtson's testimony regarding his harassment, as it relates to Wyndham's liability for the hostile employment

environment throughout the period 2004-2005. However, it does not authorize inclusion of Berndtson himself as a claimant, because his claims are time-barred. Defendant's motion for summary judgment as to claimant Berndtson is accordingly GRANTED.

Parallel Citations

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United States District Court,
D. Oregon.

Judith MANIATES, Plaintiff,
v.
LAKE COUNTY, OREGON, et al., Defendant.

No. CV 08-03038-PA. | Oct. 7, 2008.

West KeySummary

1 Federal Civil Procedure

☞ Medical and Hospital Reports and Records

A county's motion to compel as to the county's request for production of certain medical documents was granted where the plaintiff stated in her complaint that as a direct result of the county's actions, she suffered harm to her professional reputation and anguish. The county properly limited its request to records concerning medical treatment received by the plaintiff for any injuries plaintiff was contending were caused by the conduct of the county set forth in the plaintiff's complaint. Damages to the plaintiff that resulted from or were associated with previous medical problems were also discoverable.

Attorneys and Law Firms

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Robert E. Franz, Jr., Law Office of Robert E. Franz, Jr.,
Springfield, OR, for Defendant.

Opinion

OPINION AND ORDER

OWEN M. PANNER, Senior District Judge.

*1 A telephonic hearing on Defendant's Motion to Compel was held on Monday, October 6, 2008 at 1:30 p.m. before the Honorable Owen M. Panner. The Plaintiff was represented by

William D. Stark. The Defendant was represented by Robert E. Frantz, Jr.

Defendant moved for an order compelling plaintiff to produce items in his First Request for Production of Documents, production numbers 1 and 2.

1. "All medical records and other documents, including, but not limited to: chart notes, x-rays, x-ray reports, nursing notes, physician reports, test results, diagnostic tests, diagnostic treatment, prescription records and rehabilitative-care records from any and all examining physicians, psychologists, hospitals, nurses, chiropractors and any others involved in the medical or related fields, concerning medical treatment received by plaintiff for any injuries plaintiff is contending were caused by the conduct of the defendant set forth in plaintiff's complaint on file herein
2. All documents pertaining to any type of mental health counseling received by plaintiff for the past ten (10) years, including any documents from any psychiatrist, psychologist, mental health counselor and marriage counselor. This request includes, but is not limited to, chart notes, billings, invoices, memoranda, correspondence, reports, test data and test results...."

Plaintiff objected to defendant's requests to the extent that they conflict with or exceed the Fed. R.Civ.P. regarding discovery and on the grounds the request was overbroad. For production request no. 1, plaintiff agreed to provide documents related to any medical treatment she received relating to the conduct of the defendants, subject to a protective order. For production request no. 2, plaintiff objected to the request as overbroad and unnecessarily intrusive, but she agreed to provide any mental health treatment records regarding any counseling she received after moving to Lakeview in 2004, subject to a protective order.

Plaintiff contends that her general medical records are not relevant and therefore, not discoverable, and that her past mental health records are protected from discovery by the psychotherapist-patient privilege. Plaintiff agreed to provide the records of the only two mental health contacts she had from 2004 to the present, the time she began living in Lakeview. Plaintiff states that there are no other records of any mental health treatment from 2004 to June of 2007.

Requests Nos. 1 and 2

Defendant's requests nos. 1 and 2 seek medical records of Plaintiff. In Plaintiff's Complaint, she alleges that as a result of defendant's conduct she has suffered "anguish." (Complaint p. 4, paragraph 12). Anguish is defined in the "New Oxford American Dictionary as 'severe mental or physical pain or suffering.' " Defendant's position is that plaintiff should be required to produce the records, or be prevented from producing any evidence of anguish suffered at any time.

*2 Defendant cites two District Court cases to support his position. The first is *Doe v. City of Chula Vista*, 196 F.R.D. 562, 568 (S.D.Cal.1999) for the contention that a plaintiff who seeks to recover emotional distress damages is relying on her emotional condition as an element of her claim and places her mental condition at issue, and plaintiff must show that the damage was proximately caused by the defendant's unlawful conduct. The position of the parties in *Doe* was an "all or nothing" approach. The Plaintiff contended that none of the medical records were discoverable, while the Defendant contended that all of the medical records were discoverable. In the *Doe* decision, the court expected the parties to find a "middle ground so that the discovery requests to Doe's medical providers will be narrowly tailored to the particular area of her emotional health." *Doe*, 196 F.R.D. 562, 572 (S.D.Cal.1999). The court does not find this case in point. However, the court finds that *Uzell v. Teletech Holdings*, 2007 WL 4358315 (W.D.Wa.) is in point as to Defendant's production request number 1. In *Uzell*, plaintiff put his mental health at issue by alleging damages for "emotional

upset, stress and anxiety," and Psychiatric records before, during and after employment termination were relevant to the question of whether defendants *caused* his mental distress and the amount of damage caused.

Plaintiff's statement regarding "anguish" in her Amended Complaint states, "As a direct and proximate result of Defendant's actions, plaintiff has suffered harm to her professional reputation and **anguish**, all to her non-economic damages in the amount of \$100,000." Amended Complaint, pg. 4. Plaintiffs second and third claims re-allege the same.

The Court grants Defendant's Motion to Compel as to Defendant's Request for Production Number 1. Defendant has properly limited the request to those records concerning medical treatment received by plaintiff for any injuries plaintiff is contending were caused by the conduct of the defendant set forth in plaintiff's complaint. This necessarily includes any damages resulting from or associated with previous medical problems.

The court denies Defendant's Request for Production number 2, except as admitted by Plaintiff.

Defendant may renew a Request for Production of documents if the deposition of Ms. Maniates reveals evidence of documents pertaining to any type of prior medical treatment received by Plaintiff which relates to her claims in this case.

IT IS ORDERED.

End of Document

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429 Fed.Appx. 524

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 Sixth Circuit Rule 28. (Find CTA6 Rule 28) United States Court of Appeals, Sixth Circuit.

Patricia PETTIT, Plaintiff–Appellant,

v.

STEPPINGSTONE, CENTER FOR THE POTENTIALLY GIFTED and Kiyō Morse, Defendants–Appellees.

No. 09–2260. | July 7, 2011.

Synopsis

Background: Former employee brought action against her prior employer and its headmistress, allegation retaliation under Fair Labor Standards Act (FLSA). The United States District Court for the Eastern District of Michigan, Paul D. Borman, J., 2009 WL 2849127, granted defendants summary judgment. Employee appealed.

Holdings: The Court of Appeals, Jane B. Stranch, Circuit Judge, held that:

- 1 employee engaged in activity protected under FLSA;
- 2 employer's insistence that employee sign employment contract constituted adverse employment action under FLSA;
- 3 contract was provided to employee after she engaged in protected activity, thereby creating inference of retaliation through temporal proximity under FLSA;
- 4 defendants proffered legitimate, non-retaliatory explanations for their insistence that employee sign contract, as required to rebut prima facie retaliation claim under FLSA; and
- 5 employee did not rebuff explanations provided by defendants for their insistence that employee sign contract.

Affirmed.

West Headnotes (8)

1 Labor and Employment

↔ Protected activities

Former employee engaged in activity protected under Fair Labor Standards Act (FLSA) in e-mailing employer's Executive Committee and indicating her concern that employer improperly classified employees under FLSA, and her later email to Committee and employer's headmistress which asserted employer's failure to pay her overtime failure as required under FLSA, as required for prima facie FLSA retaliation claim against former employer. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3).

2 Labor and Employment

↔ Protected activities

To degree complaints of employer's former human resources and admissions director, that employer improperly classified employees in violation of Fair Labor Standards Act (FLSA), were made in the course of her performance of human resource job duties assigned to her and undertaken for the purpose of protecting employer's interests, complaints did not constitute protected activity under FLSA. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3).

3 Labor and Employment

↔ Other particular actions

Employer's insistence that employee sign employment contract constituted adverse employment action, as required for prima facie retaliation claim under Fair Labor Standards Act (FLSA), where certain terms of various contracts presented to employee differed materially and adversely from her prior agreements with employer. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3).

1 Cases that cite this headnote

4 Labor and Employment

↔ Other particular actions

Employer's refusal to allow employee to barter for after-school enrichment classes for her children, who were enrolled at school, after she made complaints that certain employees were not

properly classified under Fair Labor Standards Act (FLSA) did not constitute adverse action violative of FLSA, since she did not have ability to barter for enrichment classes before her complaints. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3).

5 Labor and Employment

☞ Causal connection; temporal proximity

Employee was given an employment contract containing a number of unfavorable terms only 4 days after her e-mail to employer's Executive Committee indicating her concern that employer improperly classified employees under FLSA, and on same day she sent later email to Committee and employer's headmistress which asserted employer's failure to pay her overtime as required under FLSA, thereby creating inference of retaliation through temporal proximity, as required for prima facie retaliation claim under Fair Labor Standards Act (FLSA) against former employer and its headmistress. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3).

6 Labor and Employment

☞ Exercise of rights or duties; retaliation

Although e-mail sent from employer's headmistress to employee indicating employee's hours would be capped at 20 hours per week until employee's concerns regarding classification of employees under Fair Labor Standards Act (FLSA) were resolved was germane to proving prima facie retaliation case under FLSA against employer and headmistress, e-mail was insufficient to constitute direct evidence of retaliatory intent because, standing alone, it required an inference of intent to reach conclusion of unlawful motive. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3).

1 Cases that cite this headnote

7 Labor and Employment

☞ Motive and intent; pretext

Employer and its headmistress proffered legitimate, non-retaliatory explanations for their insistence that employee, the former director of human resources and admissions, was required to sign contract with adverse and onerous terms, as required to rebut employee's prima facie retaliation claim under Fair Labor Standards Act (FLSA); employee was stripped of her human resources duties because school was in enrollment crisis due to relocation and needed her to focus on admissions, they limited employee's hours to 20 per week absent approval due to budget concerns related to relocation, they prohibited employee from bartering for time in extended day program for her children, who were students at school, because employee abused her ability to use program free of charge by gradually working later and longer hours, and to extent employee's contract differed from those presented to other non-faculty employees, those differences were based on advice of counsel and were necessitated by employee's position, responsibilities and behavior. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3).

8 Labor and Employment

☞ Motive and intent; pretext

Employee did not rebuff, as pretextual, the legitimate, non-retaliatory explanations provided by employer and its headmistress for their insistence that employee, the former director of human resources and admissions at the school, was required to sign contract with adverse and onerous terms, thereby precluding employee's retaliation claim under Fair Labor Standards Act (FLSA). Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3).

*526 On Appeal from the United States District Court for the Eastern District of Michigan.

Before: MARTIN and STRANCH, Circuit Judges, and THAPAR, District Judge.*

Opinion

OPINION

JANE B. STRANCH, Circuit Judge.

This is a case brought by Pettit against her prior employer, Steppingstone, and its headmistress, Morse, alleging retaliation under the Fair Labor Standards Act. The district court granted summary judgment to the defendants, and Pettit timely appealed that order. We affirm.

I. Background

A. Factual Background

Patricia Pettit began working for Steppingstone in January 2006 under a part-time barter arrangement whereby Pettit's salary was credited towards the tuition of her three sons. Her starting title was Director of Admissions, and she also began to serve as Director of Human Resources in the fall of 2006.

All employees at Steppingstone worked under one-year form letter agreements, generally spanning a single fiscal year (August to August). Employees were required to sign a new agreement every year, although often Steppingstone failed to provide new contracts, and employees continued to work anyway. Pettit signed her first letter agreement with Steppingstone in September 2006, which expired in December 2006. She was never presented with a written contract during the 2007 calendar year. Other non-faculty employees signed one-year contracts in August 2007, which had been revised by legal counsel and differed substantially from prior years' versions.

As Director of Human Resources, Pettit suspected two employees were misclassified under the Fair Labor Standards Act ("FLSA"), and in December 2007 she so advised her supervisor and head of the school, Kiyu Morse. Throughout December, Pettit investigated, contacted outside legal counsel for an opinion, and drafted an informative memorandum which she gave to Morse. At the same time, Morse was preoccupied with an event of major concern for Steppingstone, the relocation of the entire campus from the current donated property to a leased property. Morse worried that this relocation would harm enrollment and potentially threaten the school's existence, and so she told Pettit to concentrate on admissions, rather than human resources. In fact, as Morse reminded Pettit in an e-mail in February 2008, she had told Pettit at every meeting since returning from the

New Year's break in January 2008 that "I need you to put all your time and energy into admissions."

Hourly employees at Steppingstone were required to keep a "work diary" to catalogue daily activities. In December 2007, Morse reminded Pettit that she was supposed to be keeping a work diary. Morse asked another employee, Sandra Blay, to lay out specific instructions about the diary in an e-mail to all hourly employees, including Pettit. The e-mail was sent on January 14, 2008. At about that time, Pettit began to press Morse on the perceived FLSA issue.

On January 15, 2008, Pettit brought up the FLSA issue in an office meeting. It *527 appears that this was the only time Pettit and Morse engaged in a face-to-face conversation about her FLSA concerns, as evidenced by a later e-mail from Morse to Pettit asking why, if Pettit wanted to discuss the issue, she never raised it in any of their regular weekly meetings. Instead, Pettit pursued the issue with Morse electronically. That same day she sent the first in a series of lengthy e-mail communications to Morse about FLSA compliance. These e-mails spanned three, four, up to seven pages, single-spaced, and took an increasingly personal and accusatory tone towards Morse.

On February 1, 2008, Pettit sent an e-mail to the Executive Committee of the Steppingstone Board of Trustees which read, in relevant part:

As your Human Resources Director as well as your Admissions Director, it is my professional opinion that Steppingstone School for Gifted Education has been and continues to be in violation of the Fair Labor Standards Act. I have notified/renotified school administration regarding the problem numerous times in writing and verbally over the last 8 weeks. Responses indicate to me little interest in coming into compliance at this time. Further, numerous indications are that there is little understanding of the issues so I am unclear that there will ever be interest in coming into compliance.

Should Steppingstone decide to create a Wage and Hour program that is in compliance with the law by February 15, 2008, I will enthusiastically support the decision and work to meet that goal in addition to dedicating myself to our admissions goals. Should Steppingstone decide not to seek the support of professional resources to rectify the problem, as I do not want to be in a position of knowingly working in an organization that is out of legal compliance, I see no choice but to report unlawful activity to the U.S. Department of Labor.

This e-mail developed into the first of several e-mail chains between Pettit, Morse, and/or members of the Board. For three days, Pettit, Morse, and Richard Niemisto, a member of the Executive Committee, engaged in back-and-forth e-mailing about Steppingstone's FLSA compliance, in which Pettit ultimately called into question Morse's ability to make an informed decision. At the same time, Morse and Pettit were engaged in communications on an e-mail chain about the work diary requirement, in which Pettit suggested Morse was spreading gossip about her.

On February 3, 2008, Pettit sent Morse yet another e-mail, copying the entire Executive Committee, in which Pettit complained that Morse failed to deal with all of Pettit's concerns about FLSA compliance. A back-and-forth exchange continued daily between Morse and Pettit, copying the Committee, and on February 5, 2008 Pettit asserted her own FLSA rights in her response e-mail.

And also, recently now that you've emailed to me that I am 'hourly' which was different than how we were handling what I understood to be an exempt classification and how it would be handled properly on the books ..., you will owe me—and this is a quick guess—probably over \$1000 for work (2007—doesn't include 2006) you knew I performed but was not put down on my time sheet.... There is a two year statute of limitations, I believe, on issues like this. ¹

***528** Subsequent to that, Pettit again e-mailed Morse to point out the flaws and inconsistencies she found in Morse's approach to the FLSA issue and questioned Morse's honesty in relaying information to Pettit. Morse sent Pettit a final message on February 7, 2008 stating, "Dear Pat, I think we'll have to agree to disagree and move on to the issues of admissions, which I repeat, is where the focus needs to be."

However, Pettit had already made clear to Morse that she did not intend to leave the FLSA issue and focus on admissions, despite Morse's repeated instructions to do so. In a February 3 e-mail to Morse and the Executive Committee, Pettit explains why she would not work as instructed:

You have let me know that your focus must be on the building issue—very understandable. Unfortunately, as I have indicated to you, that won't be a good defense if a non-compliance charge comes our way.... Further, never have I been in a position to have to choose between following the law and following my boss' [sic] direction....

I am also organizationally minded, so that my work focuses on what's right for the organization [sic] will be right for all associated in the long run. In weighing everything out, I came to the very difficult decision to push this issue to the board level.

I have never entertained an 'end run' with any other manager in my career. The communication problems have reared up so strongly externally and internally in the last nine months, that I have felt compelled not once but twice in the last two months.

This is an extremely unpleasant position for me. And an unnecessary waste of time and resources, from my point of view.

Overall, Pettit's e-mails show that rather than focusing on admissions now as instructed and returning to the FLSA issue at a later date, Pettit was spending her work time on a campaign to institutionalize her view of the FLSA and to force the immediate creation of a wage and hour policy in accord with her expectations. Her lengthy communications also extended beyond that purpose to include comments on Morse's capabilities as a supervisor, such as: "Your investment of time in back and forth emails when I am right down the hall is a strong indicator of a problem beyond wage and hour compliance;" and "[T]he information here clearly indicates avoidance, conflict, poor communication and the absence of teamwork at the minimum." Pettit presented this stream of complaint and comment to and about Morse before members of the governing Board.

On February 5, 2008, during this period of debate, Morse presented Pettit with a contract for the remainder of the 2007–2008 year that included new provisions. In August 2007, other non-faculty employees had signed a new contract that had been revised by counsel. The contract proposed to Pettit contained provisions that were unfavorable to her: her human resources duties were removed; it expired on June 20, 2008 rather than at the end of the fiscal year; her schedule was set to specific hours on certain days; and her salary could not be credited towards non-tuition expenses. Pettit did not sign the contract.

On March 11, Morse presented Pettit with a revised contract including additional provisions added by the school's attorney. The new provisions included: a requirement that Pettit report only to Morse; a limitation of Pettit's hours to 20 per week ***529** unless "specifically authorized in writing by the Head of School"; a termination clause allowing

termination by either party for any reason given 30 days' written notice; a confidentiality provision; a non-compete provision; an arbitration provision; and a provision limiting Pettit's right to sue to 180 days after any actionable event.

Pettit hired her own attorney to negotiate the contract terms, and a number of contract drafts were exchanged. Morse yielded in changing the contract to expire on December 31, 2008 but refused other changes. She gave Pettit a "final" contract on May 5, 2008, and Pettit declined to sign it, instead insisting upon further negotiation.

On May 9, 2008, Pettit showed up for work, but Morse sent two other employees outside to tell Pettit either to sign her contract or turn in her keys. Pettit refused to do either, instead telling her co-workers that she would discuss her contract with Morse. Morse refused to come out to speak with Pettit, and instead contacted a Board member who sent two uniformed police officers to escort Pettit from the premises.

B. Procedural Background

At the conclusion of discovery, Defendants moved for summary judgment. On September 1, 2009, the district court granted summary judgment to the Defendants, finding that Pettit had made her prima facie case of retaliation but failed to prove pretext. Specifically, the court found that Pettit had not presented sufficient evidence to rebut Defendants' legitimate business explanations for the adverse actions taken against her. The district court also found Pettit not to be credible. She timely filed this appeal.

II. Analysis

A. Standard of Review

This Court reviews a district court's grant of summary judgment *de novo*. *Stauch v. Cont'l Airlines, Inc.*, 511 F.3d 625, 628 (6th Cir.2008). Summary judgment is appropriate if the record shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). The moving party has the burden of proving the absence of a genuine issue of material fact and its entitlement to summary judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This burden can be discharged by showing that the nonmoving party has failed to establish an essential element of his case, for which he bears the ultimate burden of proof at trial. *Id.* To refute such a showing, the nonmoving party must present some significant, probative evidence indicating the necessity of

a trial for resolving a material, factual dispute. *Id.* at 322, 106 S.Ct. 2548. A mere scintilla of evidence is not enough. *Anderson v. Liberty Lobby*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). All facts, including inferences, are viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

B. The Sufficiency of Pettit's Evidence under the Burden-Shifting Analysis

The Fair Labor Standards Act proscribes retaliation by "discharg[ing]" or otherwise "discriminat[ing]" against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act." 29 U.S.C. § 215(a)(3) (2010). Claims of FLSA retaliation are subject to *530 the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Adair v. Charter Cnty. of Wayne*, 452 F.3d 482, 489 (6th Cir.2006).

On a motion for summary judgment, the district court considers whether there is sufficient evidence to create a genuine dispute at each stage of the *McDonnell Douglas* inquiry. Thus, the plaintiff must first submit evidence from which a reasonable jury could conclude that a prima facie case of discrimination has been established. The defendant must then offer sufficient evidence of a legitimate, nondiscriminatory reason for its action. If the defendant does so, the plaintiff must identify evidence from which a reasonable jury could conclude that the proffered reason is actually a pretext for unlawful discrimination.

Macy v. Hopkins County Sch. Bd. of Educ., 484 F.3d 357, 364 (6th Cir.2007) (internal citations and quotation marks omitted). Pettit asserts error by the district court at every stage of the *McDonnell Douglas* inquiry.

C. Plaintiff's Four-Part Prima Facie Case

To make her prima facie case of retaliation, the plaintiff must prove that (1) she engaged in protected activity under the FLSA; (2) her exercise of this right was known by the employer; (3) the employer took an employment action adverse to her; and (4) there was a causal connection between the protected activity and the adverse employment action. *Adair*, 452 F.3d at 489.

1. Protected Activity

1 2 A prototypical claim of FLSA retaliation involves a complaint of FLSA violation made in the interest of employee(s), generally regarding some aspect of one's own pay or the pay of other employees. Under FLSA retaliation law, Pettit's situation is different because her complaints were made in her capacity as Director of Human Resources, alleging misclassification of other employees and lack of a company-wide wage and hour policy. To the degree that Pettit's FLSA complaints were made in the course of performance of human resource job duties assigned to her and undertaken for the purpose of protecting the interests of the employer, they do not constitute protected activity under § 215(a)(3).²

Under FLSA retaliation law, there is a legally cognizable distinction between the performance of job duties and the assertion of one's own FLSA rights or the rights of others. For an employee specifically tasked with personnel or human resources duties, dealing with FLSA compliance is part of the job, to be undertaken with the interests of the employing company in mind. An assertion of FLSA rights, on the other hand, will normally be specific *531 to one or more employee(s) or a class of employees and will usually be made in the interests of that employee, group or class of employees and, thus, may be adverse to the employer's interests.

In this case, Pettit brought her concerns about Steppingstone's FLSA compliance to Morse's attention on several occasions, primarily in January and February 2008. Pettit argues that her repeated disclosures to Morse and the Steppingstone Board *all* constitute protected activity under § 215(a)(3). However, the district court determined that only one of Pettit's complaints, the February 1, 2008 e-mail to the Executive Committee, constituted protected activity. We agree that Pettit's invocation of threatening language took her February 1 complaint outside the realm of job performance. Although she suggests she is acting in her official capacity ("As your Human Resources Director ..., it is my professional opinion that ..."), she is clearly stepping outside her official capacity, as any action resulting from this complaint would be adverse to Steppingstone.

Additionally, we find Pettit's February 5 e-mail to Morse and the Executive Committee also constitutes protected activity because Pettit asserts a violation of her own FLSA rights, namely Steppingstone's failure to pay her approximately \$1,000 in overtime pay. Pettit also implies she could institute legal action, an act clearly in her own interest and, thus, outside her job duties.

The complaints made by Pettit prior to the February 1 e-mail are not protected activity, as they were undertaken on behalf of the interests of the school and neither assert individual or group rights nor threaten action adverse to the school. Instead, Pettit's requests were for Steppingstone to change its wage and hour policy, one of her responsibilities as Human Resources Director. Pettit now argues that she was not responsible for Steppingstone's FLSA compliance while employed with the school. However, Pettit's basis for bringing this issue to the school's attention was her insistence, in her stated capacity as Human Resources Director, that Steppingstone immediately comply with her determinations regarding application of the FLSA.

Finally, the Defendants argue that even if Pettit's threat to report violations would ordinarily constitute protected activity, in this case the threat is not protected by the FLSA anti-retaliation provision because Morse had already remedied the violation by consulting outside counsel. It is unnecessary to address that issue here. As this Court has stated previously, corrective action is appropriately considered under the causal connection element of the plaintiff's prima facie case and is not relevant to the issue of whether the plaintiff engaged in protected activity. *Moore v. Freeman*, 355 F.3d 558, 562–63 (6th Cir.2004).

Pettit satisfied step one of her prima facie case: she engaged in protected activity under the FLSA in her February 1 and 5 emails.

2. Exercise of Right

The parties agree that Steppingstone was aware Pettit claimed to be exercising her rights under the FLSA. Pettit established step two.

3. Adverse Action

"The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 67, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). "[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it *532 well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68, 126 S.Ct. 2405 (internal citations and quotation marks omitted). To be materially adverse, an adverse action "must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Kocsis*

v. *Multi-Care Mgmt.*, 97 F.3d 876, 886 (6th Cir.1996) (internal citations and quotation marks omitted). Though not by way of limitation, this Circuit has enumerated certain employment actions that are usually indicative of material adversity, including “termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.” *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 461–62 (6th Cir.2000) (internal quotation marks omitted).³

Pettit argues that Defendants took a number of adverse actions against her. Specifically, she points to: (1) termination; (2) her children's “de facto expulsion” from school; (3) Steppingstone's insistence on a revised contract with adverse conditions, including removal of human resources duties; (4) denial of a raise; (5) reduction in number of work hours unless authorized; (6) removal of children from enrichment classes; (7) disallowing Pettit to barter for enrichment classes; (8) imposing new timekeeping requirements; and (9) elimination of a just cause provision in her employment contract. On appeal, Defendants concede that two of the actions taken against Pettit were materially adverse: (1) the removal of Pettit's human resources duties, and (2) the contract term prohibiting Pettit from bartering for extended day service for her children.

3 Termination is a materially adverse action against an employee. *See, e.g., Bowman*, 220 F.3d at 462. Defendants' argument that they never terminated Pettit, that she voluntarily quit by not signing her new contract, is unconvincing. A significant change in the terms of employment imposed by an employer may constitute a constructive discharge. However, requiring an employee to sign an employment agreement is not actionable if there are no materially adverse changes to the terms of the employment in the agreement. *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir.1987). Because certain terms of the various contracts presented to Pettit in 2008 differed materially and adversely from her prior agreements with Steppingstone, the insistence that Pettit sign the contract constitutes an adverse employment action.⁴

4 While Defendants have conceded the adverse nature of disallowing Pettit to barter for extended day care services, they do not concede adversity with regard to Pettit's claim that she was no longer allowed to barter for after-school enrichment classes. The evidence demonstrates that the ability to barter for these classes was never part of Pettit's

arrangement with Steppingstone. Pettit alleges that, prior to her February 1 e-mail, her children were routinely allowed to take these classes by offsetting the cost against her hours. However, the Defendants have offered invoices and canceled checks indicating *533 that Pettit paid for the classes in 2006 and 2007. Morse states that one class was mistakenly credited against Pettit's earnings in 2008 due to error by the office administrator. Because Pettit did not have the ability to barter for enrichment classes before her protected activity, Defendants' refusal to allow her to barter after her complaints cannot constitute adverse action.⁵

The remainder of the adverse actions alleged by Pettit on appeal—the reduction of her hours and the imposition of time-keeping requirements—do not qualify as materially adverse. First, we are not convinced that the 20-hour-per-week restriction constitutes a change at all. Pettit's 2006 contract set her hours at less than 10 per week, specifically on Tuesdays, Wednesdays, and Thursdays from 9:00 until 11:30 a.m., “to be expanded by mutual agreement as needs dictate.” The new contract stated that Pettit's work hours were to be limited to 20 per week unless Morse gave approval to exceed that number. Pettit's relationship with the school had always required agreement of the school for expansion of hours over a minimal number. Therefore, the contract provision does not qualify as a new materially adverse condition imposed by the employer.

The time-keeping diary requirements fail also. They were requested prior to Pettit's undertaking protected activity and were required of other employees. Even if time keeping were considered a new condition, it affected neither Pettit's position nor compensation and is the type of inconvenience that falls short of an actionable level of material adversity.

Because Pettit has established some of her allegations of adverse action, she satisfies step three of her prima facie case.

4. Causal Connection

“[T]o establish the element of causal link a plaintiff is required to proffer evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action.” *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir.1997) (internal quotation marks and citation omitted). At this stage, the plaintiff's burden to show causation entails “requiring the plaintiff to put forth some evidence to deduce a causal connection between the retaliatory action and the protected activity and requiring

the court to draw reasonable inferences from that evidence, providing it is credible.” *Id.* The burden is easily met.

Closeness in time between the protected activity and the adverse action is strong evidence, but “temporal proximity, standing alone, is not enough to establish a causal connection for a retaliation claim.” *Spengler v. Worthington Cylinders*, 615 F.3d 481, 494 (6th Cir.2010). However, temporal proximity combined with other evidence of “retaliatory conduct” can be enough to prove this element of a plaintiff’s prima facie case. *Id.* One example of such sufficient, additional evidence is evidence of disparate treatment. See *Cantrell v. Nissan N. Am. Inc.*, 145 Fed.Appx. 99, 105–06 (6th Cir.2005).

5 Pettit has met her burden to prove causal connection.⁶ She was given an employment *534 contract containing a number of unfavorable terms only 4 days after her February 1 e-mail and on the same day as her February 5 e-mail, thus creating an inference of retaliation through temporal proximity. Additionally, the parties agree that the contracts presented to Pettit differed materially from those presented to Pettit in previous years and to other employees the same year. Thus, Pettit has presented sufficient proof of causation to satisfy the fourth step of her prima facie case.

5. Direct Evidence as Alternative to Inferential Evidence of Retaliation

In addition to arguing that she has offered sufficient evidence of prima facie retaliation to shift the burden to the Defendants under *McDonnell Douglas*, Pettit alternatively argues the district court erred in applying the *McDonnell Douglas* framework to her claim. She alleges she provided direct evidence of retaliation, which removes her claim from the burden-shifting framework. The evidence presented by Pettit, while applicable to her prima facie case, is not direct evidence of retaliation or retaliatory motive.

“Direct evidence is evidence, which if believed, does not require an inference to conclude that unlawful retaliation motivated an employer’s action.” *Spengler*, 615 F.3d at 491. In other words, direct evidence requires the drawing of the conclusion that the defendant retaliated against the plaintiff. *Id.* In this case, Pettit points to an e-mail from Morse in which she tells Pettit that her hours will be capped at 20 per week “until the FLSA issues have been resolved.”⁷

6 This e-mail is germane to proving Pettit’s prima facie case and does raise questions; however, it is insufficient

to constitute direct evidence of retaliatory intent because, standing alone, it requires an inference of intent to reach the conclusion of unlawful motive. Pettit infers that Morse was impermissibly motivated by Pettit’s prior complaints in restricting her hours. It could also be inferred that Defendants were restricting her hours to enforce her part-time status for budgetary reasons and to enforce Morse’s prior requests that Pettit spend all her time on admissions. The fact that an inference is required to get from the e-mail to Morse’s motive disqualifies it as direct evidence.

D. Defendants’ Legitimate Reasons for their Adverse Actions

Once plaintiff has established her prima facie case, the burden shifts to the employer to “articulate some legitimate, nondiscriminatory reason for the employee’s [discharge].” *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817.

Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee....

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone *535 else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant’s evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.

Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 254–255, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (citations omitted). The employer’s burden at this stage is one of production, not persuasion. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

The adverse action established by Pettit is, at its core, a claim based on the contract required by Steppingstone. The gravamen of her argument is that she was required to sign a contract with terms so adverse and onerous that it effectively ended her employment, whether that end is defined as a termination or a constructive termination.

7 Defendants proffer a legitimate, non-retaliatory explanation for their insistence on the adverse provisions of Pettit’s contract. First, Defendants argue that Pettit was stripped of her human resources duties because the school was in an enrollment crisis due to the relocation and needed her to focus on admissions, which would determine whether the

school could survive in its new location. Morse also stated in her deposition that Pettit was not particularly skilled at human resources tasks. Second, Defendants assert that they limited Pettit's hours to twenty per week absent approval due to budget concerns related to the relocation. Third, Defendants contend that they prohibited Pettit from bartering for time in the extended day program because Pettit abused her ability to use the program free of charge by gradually working later and longer hours. Finally, to the extent Pettit's contract differed from those presented to other non-faculty employees, Defendants assert that they based those changes on the advice of counsel and such clauses were necessitated by Pettit's position, responsibilities and behavior.

At this stage, Defendants have the burden of production. They have satisfied that burden by presenting legitimate business reasons that raise a genuine issue of fact as to whether they discriminated against Pettit.

E. Pretext

At the final stage of the *McDonnell Douglas* inquiry, the burden of production requires the plaintiff to prove the employer's proffered reasons for its adverse actions against the employee were, in fact, pretext for retaliation. "To raise a genuine issue of fact as to pretext and defeat a summary judgment motion under this position, the Plaintiffs must show that (1) the proffered reason had no factual basis, (2) the proffered reason did not actually motivate Defendants' action, or (3) the proffered reason was insufficient to motivate the action." *Adair*, 452 F.3d at 491 (citations omitted).

This Court recognizes the appropriateness of plaintiff's presentation of overlapping evidence in support of both the causal connection element of the prima facie case and the pretext stage of inquiry. While evidence of causal connection at the prima facie stage is often probative of pretext also, the plaintiff's burden at the prima facie stage is easily met. However, that evidence may be insufficient, standing alone, to raise a genuine issue as to pretext. *See, e.g., Blair v. Henry Filters, Inc.*, 505 F.3d 517, 533 (6th Cir.2007) ("[T]he evidence that [the plaintiff] produce[s] in support of his prima facie case may, but will not necessarily, suffice to *536 show a genuine issue of material fact concerning pretext and thus to survive summary judgment.") (overruled on other grounds). Importantly, any requirement of additional evidence "is limited to the production of evidence rebutting the defendant's proffered legitimate, nondiscriminatory reason for taking the challenged action."

Id. at 533 (discussing *Reeves*, 530 U.S. at 149, 120 S.Ct. 2097).

In satisfying the prima facie, causal-connection requirement, Pettit presented evidence of both temporal proximity and disparate treatment in the terms of her contract. In support of her burden to show pretext, Pettit relies on this same evidence with additional responses to Defendants' claimed legitimate reasons for their actions. The district court granted summary judgment to Defendants on the basis that Pettit had not proven pretext. Its decision was based, in part, on an adverse credibility determination—that Pettit's behavior cast doubt on her credibility. It is not proper to weigh credibility against the non-movant on a motion for summary judgment. *See Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir.2005) ("In reviewing a summary judgment motion, credibility judgments and weighing the evidence are prohibited. Rather, the evidence should be viewed in the light most favorable to the non-moving party." (citing *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505)).

8 However, this Court may affirm a trial court decision on alternative grounds that support the decision on the record. *Murphy v. Nat'l City Bank*, 560 F.3d 530, 535 (6th Cir.2009). We find that the record, as well as the district court's rationale not based on Pettit's credibility, support affirmance. Pettit has not rebutted Defendants' proffered, legitimate reasons for their actions. Pettit never specifies which of the three pretext factors applies to her situation, but it appears she seeks to show that the "proffered reason[s] did not actually motivate Defendants' action." To do so, Pettit must present some evidence rebutting each of those proffered reasons. Temporal proximity is insufficient to carry this burden. An examination of Plaintiff's pretext evidence shows it to be insufficient as well.

The removal of Pettit's human resources duties. As a legitimate reason for this action, Defendants proffered that Pettit's attention was needed in admissions due to the school's relocation crisis and the fact that she was not particularly skilled in the area of human resources. To show that these reasons are pretextual, Pettit states that she was available to work more hours to complete both the admissions and human resources duties. But that does not tend to rebut Defendants' rationale nor address the stated concerns. Pettit fails to dispute the real issues: that Steppingstone was facing an enrollment crisis that threatened the existence of the school; that based on the school budget and this crisis, she had been requested since January to concentrate all her efforts on admissions; that she was asked to "agree to disagree" on the human resources issue

until after the crisis; and, that Pettit refused to do so. Further, Pettit makes no attempt to show that she was, in fact, skilled in human resources. Thus, we are left with the conclusion that Pettit failed to show Defendants' legitimate reason for the removal of her human resources duties was pretext.

No bartering for extended day care. As legitimate reasons for this action, Defendants proffered that: Pettit abused her limited ability to use the program without charge; because she was supposed to be part-time, it was never intended that she could use the program extensively; and, another employee who overused the program *537 was also charged. To show pretext, Pettit states that she was never asked to reduce her use of the program. While this may raise a question, it is insufficient to create a genuine issue as to pretext. Defendants showed that Pettit was not actually charged for much of her use of the program in March, April, and May 2008, and that another employee was charged for excess use of the program in the same way Pettit was. Further, because Pettit was hired as a part-time employee limited to a set schedule during school hours, Defendants' explanation that it never intended for Pettit to use the day care program extensively is certainly legitimate. Defendants' failure to request that Pettit reduce her use of the program is not sufficient to rebut the evidence and reasoning proffered by Defendants, and thus no genuine issue of fact exists as to this term.

Termination and Insistence that Pettit sign the new, adverse employment contract. As discussed earlier, Defendants allege Pettit was not terminated but was no longer employed because she failed to sign her employment contract, which was required of all employees for continued employment. Pettit alleges termination and, to show pretext, states that Morse lied to other employees about the termination, saying that Pettit had quit to devote more time to her sons and to scrapbooking. We view this issue as akin to constructive discharge. Thus, the adverse action that resulted in Pettit's loss of employment is more appropriately addressed under Steppingstone's insistence on an employment contract with new and adverse terms. To show pretext regarding that action, Pettit argues she was the only employee required to sign a contract so favorable to Steppingstone's interests. Pettit is correct that disparate treatment is probative of retaliatory intent. See, e.g., *Tinker v. Sears, Roebuck & Co.*, 127 F.3d 519, 524 (6th Cir.1997); *Reynolds v. Humko Prod.*, 756 F.2d 469, 472-73 (6th Cir.1985). However, Pettit has failed to show that she is similarly situated to the employees whose contracts were different. We do not require an exact match in a comparator, but our comparison must nonetheless take into

account Pettit's burden to rebut the legitimacy of Defendants' proffered reasons.

As the nondiscriminatory basis for the differences between Pettit's contract and that of other Steppingstone employees, Defendants note that the school crisis, Pettit's unique position as Director of Admissions and her actions are legitimate reasons for making the changes to Pettit's contract upon the advice of counsel. In regard to the charge that Pettit's contract was different from those of other employees and from her own prior contract, it is also important to note that: Pettit's original contract was merely a form; it included language negotiated by Pettit that differed from the contracts signed by other employees; Defendants had the form contract revised in the summer of 2007 to better safeguard the school's interests,⁸ and that revised contract was presented to, and signed by, all other Steppingstone employees.

Though all employment contracts were changed in Steppingstone's favor in 2007, it is true that Pettit's contract also differed in its terms from those of other employees. While this is not an easy case, the record supports a finding that Pettit's behavior, bordering on insubordination, was a reasonable basis for inserting into her contract certain terms drafted by counsel to safeguard Steppingstone's interests. Pettit's *538 position, contract negotiations and her actions make her dissimilar from the other employees. No other employee had retained legal counsel to negotiate the particulars of an employment contract that had and would contain provisions different from those of other employees. More telling is the lack of similarity based on Pettit's actions. No other employee had attacked Morse's character and abilities or aired grievances in lengthy series of e-mails that copied and sought to engage the Board of Trustees. Perhaps most importantly, no other employee was ignoring Morse's instructions calculated to guide the school through the enrollment crisis created by the forced location change. Pettit was the Director of Admissions. Morse anticipated lower enrollment and extra expenses for the school in the upcoming year and thereafter. It was not illegitimate for Defendants to seek to obtain contractually that which they had been requesting for some time: Pettit's sole focus on admissions and cessation of expending school resources and time outside that needed focus. Pettit has not presented evidence showing these actions were pretext for retaliation. Therefore, even assuming Pettit has proven disparate treatment, as we did at the prima facie stage, she has failed to rebut Defendants' legitimate reasons for changing the terms of her contract.

III. Conclusion

Defendants proffered legitimate reasons for their actions as to Pettit. Pettit has failed to identify evidence from which a reasonable jury could conclude that the legitimate reasons given by the Defendants were actually a pretext for unlawful discrimination. She has failed to present probative

evidence indicating the necessity of a trial for resolving a material factual dispute. Therefore, the district court's grant of summary judgment to the Defendants is AFFIRMED.

Parallel Citations

2011 WL 2646550 (C.A.6 (Mich.)), 271 Ed. Law Rep. 132, 18 Wage & Hour Cas.2d (BNA) 219

Footnotes

- * The Honorable Amul Thapar, United States District Judge for the Eastern District of Kentucky, sitting by designation.
- 1 Pettit believed that she herself had been previously classified as exempt, but that Morse had begun treating her as an "hourly," and presumably non-exempt employee, thus entitling her to overtime pay.
- 2 While the Sixth Circuit has not addressed the issue of distinguishing job performance from protected activity, district courts within the Circuit have come to the conclusion that complaints within the scope of one's job duties cannot be protected activity. *See, e.g., Pettit v. Steppingstone Ctr. for the Potentially Gifted*, No. 08-12205, 2009 WL 2849127, 2009 U.S. Dist. LEXIS 78262 (E.D.Mich. Sept. 1, 2009); *Samons v. Cardington Yutaka Techs, Inc.*, No. 2:08-cv-988, 2009 WL 961168, *5-6, 2009 U.S. Dist. LEXIS 30398, *15-16 (S.D. Ohio April 7, 2009); *Robinson v. Wal-Mart Stores, Inc.*, 341 F.Supp.2d 759 (W.D.Mich.2004). The other Circuits that have addressed the issue have reached the same conclusion. *See, e.g., Hagan v. Echostar Satellite, L.L. C.*, 529 F.3d 617, 627-28 (5th Cir.2008); *Claudio-Gotay v. Becton Dickinson Caribe, Ltd.*, 375 F.3d 99, 102 (1st Cir.2004); *EEOC v. HBE Corp.*, 135 F.3d 543, 554 (8th Cir.1998); *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1486-87 (10th Cir.1996).
- 3 However, as the Court held in *Burlington*, for the purpose of retaliation, adverse actions are not limited to employment actions, but encompass a broader range of actions, even outside the employment context, that harm an employee. 548 U.S. at 61-67, 126 S.Ct. 2405.
- 4 We consider Pettit's argument that the elimination of the just-cause provision of her contract constitutes an adverse action to be subsumed in the requirement that Pettit sign a contract.
- 5 We treat Pettit's argument that Defendants' pulling her children from their enrichment classes is an adverse action as being part and parcel of this argument that the loss of the enrichment classes as a benefit of employment is an adverse action.
- 6 Defendants argue that they took action to correct any FLSA problem, negating Pettit's showing of causal connection. The corrective action asserted is a conversation between Morse and one member of the Board, Nancy Furman, who has a master's degree in human resources. According to Furman's deposition, Morse asked Furman if she knew the laws for overtime. Furman responded that anything over forty hours a week was time and a half by law unless the employee is exempt. Furman could not remember the month or year this conversation took place. Because there are genuine factual issues as to when this conversation took place and whether it constituted "corrective action," granting summary judgment on this ground would be inappropriate.
- 7 Pettit also points to four other examples of what she calls "the lead up" to this e-mail. However, none are direct evidence.
- 8 For example, the revised contract included a liquidated damages clause for breach by the employee.

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United States District Court,
M.D. Alabama,
Northern Division.

Robert CYRUS, Plaintiff,

v.

HYUNDAI MOTOR MANUFACTURING
ALABAMA, LLC, Defendant.

Civil Action No. 2:07cv144-ID. | April 24, 2008.

Attorneys and Law Firms

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Opinion

MEMORANDUM OPINION AND ORDER

IRA DeMENT, Senior District Judge.

I. INTRODUCTION

*1 Plaintiff Robert Cyrus ("Plaintiff") was fired from his managerial job with Defendant, Hyundai Motor Manufacturing Alabama, LLC ("Defendant"). In this lawsuit, Plaintiff sues Defendant, claiming that Defendant fired him because he is Caucasian and American, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e2000e-17 ("Title VII") and 42 U.S.C. § 1981 ("§ 1981"). Plaintiff also claims that his termination was retaliatory, in violation of Title VII.

Before the court is Defendant's motion for summary judgment which is accompanied by a brief and an evidentiary submission. (Doc. Nos.22-24.) Plaintiff filed a response and evidence in opposition to the motion, and Defendant filed a reply. (Doc. Nos.30-32.) After careful consideration of the arguments of counsel, the relevant law, and the record as a whole, the court finds that Defendant's motion is due to be granted in part and denied in part.

II. JURISDICTION AND VENUE

The court properly exercises subject matter jurisdiction over this action, pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1343 (civil rights jurisdiction). Personal jurisdiction and venue are adequately pleaded and not contested.

III. STANDARD OF REVIEW

A court considering a motion for summary judgment must construe the evidence and make factual inferences in the light most favorable to the nonmoving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). At the summary judgment juncture, the court does not "weigh the evidence and determine the truth of the matter," but solely "determine[s] whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citations omitted).

Summary judgment is entered only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. The movant can meet this burden by presenting evidence showing that there is no dispute of material fact or by showing that the non-moving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Id.* at 322-23, 325. The burden then shifts to the nonmoving party, which "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Summary judgment will not be entered unless the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. *See id.* at 587.

IV. FACTS¹

*2 Defendant operates an automobile assembly and manufacturing facility in Montgomery, Alabama. (Pl.Ex. 9 (Doc. No. 31).) Plaintiff, a Caucasian-American male, began

working for Defendant in or about May 2002 as the director of the Purchasing and Parts Development Department. When Plaintiff was hired, Defendant still was in its formative stages and its manufacturing facility was under construction. (Pl. Dep. at 23-24, 31, 33.) When operations commenced at the Montgomery facility, Plaintiff supervised approximately thirty individuals and had hiring authority. (Pl. Dep. at 35-38); (Def. Resp. to Pl. EEOC charge (Doc. No. 31-10).) As a member of management, Plaintiff negotiated with outside vendors to obtain contracts for the purchase of all parts needed to produce automobiles at Defendant's facility in Montgomery. (Def. Resp. to Pl. EEOC charge (Doc. No. 31-10).) At all pertinent times, Plaintiff reported to H.J. Hyun ("Hyun"). (Pl. Dep. at 183, 263.)

In August 2005, J.Y. Choi ("Choi"), who previously served as the manager of the Department of Development for Parts Overseas at Defendant's headquarters in Seoul, Korea, joined Defendant's management team at the Montgomery plant. (Choi Dep. at 16-17.) Choi, a Korean male, was assigned to work in the Purchasing and Parts Development Department and reported directly to Hyun. (Choi Dep. at 18-19, 45-46.) At some point after Choi's arrival, Plaintiff's position was split. Plaintiff maintained his duties as director of parts development, and Choi took over as director of purchasing. (Pl. Dep. at 303); (see also Pl. Dep. at 50-51, describing Choi as his equal.)

Plaintiff worked harmoniously with his peers and superiors and without any negative feedback until September 16, 2005. (Pl. Dep. at 216, 323.) On September 16, 2005, Defendant held a meeting with a parts supplier, Murakami Manufacturing Company ("Murakami"), to discuss defects that were appearing on several of the outside mirrors that Murakami produced for Defendant. The defects were particularly problematic because they caused downtime on the production line. Some of the defects were the result of "scratch marks," caused not by Murakami, but by Glovis Alabama ("Glovis"), which operates a parts consolidation warehouse and delivers the mirrors to Defendant's plant. (Pl. Dep. at 74-77, 93.) Other defects were the result of "buff marks" and "bag marks" caused by improper lighting and curing time at the Murakami plant. (*Id.* at 61, 63-65, 67-70, 99-100, 108-10.) There is a dispute between Plaintiff and Defendant as to the purpose of the September 16 meeting, with Defendant arguing that its sole purpose was to discuss the "buff"/"bag" mark defects which were within Murakami's control and Plaintiff contending that the "scratch mark" defects also were ripe for discussion. (*Id.* at 72, 87, 123.)

The meeting was called by H.I. Kim ("Kim"), Defendant's chief operating officer, who also chaired the meeting. (*Id.* at 47, 53 .) Kim and the other attendees, who were not fluent in the English language, spoke in Korean and their comments were translated into English for the benefit of the English-only speaking attendees which included Plaintiff. (*Id.* at 48, 107.) Choi also was present at the meeting. In all, there were approximately thirty individuals at the meeting. (*Id.* at 191.) It is unnecessary to set out all of the details of this meeting. Suffice it to say, Plaintiff ultimately was fired because of his alleged unprofessional (but disputed) conduct during this meeting.

*3 After the meeting, Kim reported to J.S. Ahn ("Ahn"), the president and chief executive officer, that he was concerned that Plaintiff's unprofessional behavior during the meeting had damaged his (Kim's) credibility and authority. (Kim Dep. at 63-64, 166-68.) Consequently, either Ahn or Kim requested that several of those in attendance at the meeting provide written statements as to what occurred. (Pl. Dep. at 107.) Overall, there were twelve statements, including Plaintiff's and Choi's. (*Id.* at 184); (Pl. Summ. J. Resp. at 14.) The statements were conflicting, but there were reports from individuals other than Kim that Plaintiff used profanity once during the meeting (saying "bullshit"), that he twice interrupted Kim to make arguments in support of Murakami, that he disregarded Kim's directives to cease discussion about the "scratch marks" and to focus on the "buff" and "bag" marks, and that he compared Defendant's production system to Toyota's.² (See Def. Summ. J. Br. at 7-8); (Pl. Dep. at 117); (Def. Ex. G, translated statements of September 16 meeting, attached to Ihn Hwan Chu Decl.) Plaintiff denies all of these accusations. (Pl. Dep. at 111-12, 116, 118-19, 125, 127-28, 133-36.)

Plaintiff says that Kim, not him, acted "childish" and inappropriately by yelling during the meeting, throwing papers and abruptly adjourning the meeting. (*Id.* at 71, 104, 115, 117, 190); (Pl. Dep. Ex. 5 (Pl. statement concerning September 16 meeting).) Plaintiff also asserts that he and Choi, as representatives from the Purchasing and Parts Development Department, "spoke in lockstep" during the meeting, raising the same issues concerning the "scratch marks." (Pl. Summ. J. Br. at 9, 31); (Pl. Dep. at 142-43.) For instance, Plaintiff testifies that both he and Choi explained during the meeting that the downtime on the production line was multifaceted and not caused solely by the "buff" and "bag" marks, but also by Glovis' handling of the mirrors. (Pl. Dep. at 114-15, 141.) Plaintiff also states that, at one

point during the meeting, Kim said to Choi, "Are you here to defend the vendors?" (Kim Dep. at 209-12.) As for his conduct, Plaintiff says that, at all times during the meeting, he acted professionally and in Defendant's "best interest." (Pl. Dep. at 147-48.)

After the meeting, fearing that his job was in jeopardy, Plaintiff spoke twice with Deputy President Keith Duckworth ("Duckworth"), Hyun and Chief Financial Officer Jason Lee about what had occurred earlier in the day at the meeting.³ (Pl. Dep. at 155, 189-90); (Pl. Decl. ¶ 3.) Plaintiff told Duckworth that during the meeting Kim acted very "hostile"; he yelled, threw paper and twice walked out of the meeting room. (Pl. Dep. at 190); (Pl. Decl. ¶ 3.) Plaintiff said that Kim's conduct was very "embarrassing" and created "a hostile environment." (Pl. Dep. at 190.) Plaintiff also informed Duckworth that he was worried about "retaliation" from Kim "because of his reputation" for vengefulness. (Pl. Decl. ¶ 3); (Pl. Dep. at 193.) Duckworth responded that Plaintiff's work performance was excellent and assured him that his job was secure. (Pl. Decl. ¶ 3); (Pl. Dep. at 140.)

*4 This was not the first time that Plaintiff had discussed with Duckworth adverse working conditions at Defendant's plant. According to Plaintiff, when Duckworth was transferred to the Montgomery facility, Duckworth requested a meeting with each director, individually, to discuss "improprieties" allegedly occurring at the facility. (Pl. Dep. at 221, 280.) Plaintiff pinpoints his meeting with Duckworth as occurring during the last week of August 2005. (Pl. Summ. J. Resp. at 32 n. 3); (Pl. Dep. at 222-50.) Plaintiff cited for Duckworth examples of what he described as preferential treatment of Korean employees. Specifically, he said that non-Korean employees were excluded from certain meetings (under the guise that expediency required that the meetings be conducted only in the Korean language), (*id.* at 233), that the Korean and non-Korean employees comprised "two separate teams," (*id.*), that non-Korean employees' expense reports were subjected to stricter scrutiny than those of Korean employees (*id.* at 243-44), that Korean employees disregarded safety rules without any repercussion, (*id.* at 245-46), and that Korean employees were assigned favorable work duties. (*Id.* at 246.) Plaintiff also reported that a managerial employee was having inappropriate sexual relations with a receptionist, (*id.* at 202, 246-47), that a different manager offered to give a terminated employee two weeks additional pay if she had sex with him,⁴ (*id.* at 247), that a female assistant manager was not permitted to act as the manager in the manager's absence⁵ (*id.* at

248-50), and that two Korean employees were not disciplined for violent workplace behavior. (*Id.* at 234-39; *see also id.* at 210-11.) Approximately a month after Plaintiff's meeting with Duckworth, in early September 2005, Duckworth asked Plaintiff to discuss these same matters with attorneys from Korea who were visiting the facility (and who presumably worked for Defendant), and Plaintiff complied. (*Id.* at 222, 227-29, 252); (Pl. Summ. J. Resp. at 32.)

Shortly after the September 16 meeting, Plaintiff experienced medical problems and, for the most part, was out of the office between September 16, 2005, and October 22, 2005. (Pl. Decl. ¶ 5.) On October 22, Duckworth called Plaintiff and asked Plaintiff to meet him for dinner at a local restaurant, stating that he was concerned about Plaintiff's health. (Pl. Dep. at 185, 199-200.) During dinner, the topics of conversation were varied, but, after ordering dessert, Duckworth told Plaintiff that Defendant's executive managers, namely, Ahn and Kim, were "unhappy" with him and wanted him to "resign." (Pl. Dep. at 216, 286); (Pl. Decl. ¶ 8.) When Plaintiff asked if there was "anything [he] could do" to avoid a forced resignation, Duckworth said that it was a "done deal"; in other words, "the decision had already been made." (Pl. Decl. ¶ 8); (Pl. Dep. at 218.) Duckworth also said that he (Duckworth) "had nothing to do with the decision to ask for [Plaintiff's] resignation." (Pl. Decl. ¶ 8.) The meeting ended with Duckworth advising Plaintiff to "go home" and think about terms for a severance package. (Pl. Dep. at 220.)

*5 At this juncture, the court observes that Plaintiff points out that there is contradictory evidence concerning who made the decision to fire him. (Pl. Summ. J. Resp. at 28.) Relying on the evidence which the court recited in the preceding paragraph, Plaintiff says that Duckworth told him at the October 22 meeting dinner meeting that Kim and Ahn were the decisionmakers. (*Id.*) Duckworth, however, claims in his declaration, submitted in support of Defendant's motion for summary judgment, that the termination decision was made solely by him. Namely, Duckworth says that Ahn contacted him after Ahn reviewed the statements prepared by the attendees at the September 16 meeting. Duckworth and Ahn agreed that Duckworth would meet with Plaintiff and explain to him that management was dissatisfied with his attitude. If Plaintiff was unwilling to improve his attitude, Duckworth and Ahn agreed that he (Duckworth) would decide whether to terminate Plaintiff's employment. (Duckworth Decl. ¶ 7.) Duckworth says that, during the dinner meeting, he "made the decision to terminate [Plaintiff's] employment" and told Plaintiff that, "based on his responses, the only appropriate

step to take at that point was [for Plaintiff] to sever his ties with [Defendant].” (*Id.* ¶ 9.)

This is not the only dispute. Duckworth says that, during the dinner meeting, Plaintiff refused to acknowledge that there were any problems with his attitude, denied that he engaged in any unprofessional conduct during the September 16 meeting, and claimed that there was a “conspiracy” to fire him. (*Id.*) In contrast, Plaintiff says that Duckworth did not mention that Plaintiff had conducted himself in an adversarial or antagonistic way during the September 16 meeting and did not bring up any alleged performance problems. (Pl.Decl.¶ 8.)

It is undisputed, though, that after the October 22 dinner meeting, Plaintiff remained on approved medical leave and that Duckworth sent a letter to Plaintiff, dated October 24, 2005. (Ex. 18 to Pl. Dep.) The letter provided that, “to ensure clear understanding of the employment differences between [Defendant] and yourself, as discussed in our business dinner of October 22, 2005, the following information will clarify actions necessary to resolve the issues which were raised.” (*Id.*) Duckworth then instructed Plaintiff “to make an appointment” with him prior to returning to Defendant's facility and not to “represent the company in any business negotiations” during his medical absence. (*Id.*) He further advised Plaintiff that his “access card w[ould] be temporarily suspended.” (*Id.*) Plaintiff did not return to work until his FMLA leave ended, which appears to have been on December 6, 2005. (Pl. Dep. at 347-48.) At that time, Duckworth informed Plaintiff that Defendant was terminating his employment, effective December 7, 2005, as memorialized in a letter from Duckworth to Plaintiff. (Pl.Dep., Ex. 19); (Duckworth Decl. ¶ 10, Ex. 1); (Pl. Dep. at 318.)

*6 As to who replaced him, Plaintiff points to Choi. During his deposition taken on November 29, 2007, Choi testified that he “currently” works as a senior manager and the “head” of “Parts Development” and reports directly to Hyun. (Choi Dep. at 36-38.)

Plaintiff filed a charge of discrimination against Defendant with the Equal Employment Opportunity Commission (“EEOC”) in March 2006, complaining that Defendant fired him based upon his race (Caucasian) and national origin (American) and because he “reported issues of Koreans discriminating against Americans, sexual harassment and Koreans involved in workplace violence.” (EEOC charge (Doc. No. 31-7).) After exhausting his administrative remedies before the EEOC (*see* Compl. ¶ 4), Plaintiff filed

this lawsuit on February 16, 2007. In Count One of his two-count complaint, Plaintiff alleges wrongful termination, asserting that “Defendant discriminated against [him] on the basis of his race and national origin when it terminated him,” in violation of Title VII and § 1981. (*Id.* ¶ 16.) In Count Two, Plaintiff alleges that he was terminated in retaliation for “reporting discriminatory treatment,” in violation of Title VII. (*Id.* ¶¶ 18-19.) Plaintiff requests back pay, reinstatement (or, in lieu, front pay), compensatory damages, punitive damages, attorney's fees and costs and demands a jury trial. (*Id.* at 6.) After Defendant filed its answer, it moved for summary judgment on both counts.

V. DISCUSSION

As stated, Defendant moves for summary judgment on Plaintiff's Title VII/ § 1981 wrongful termination claim and Title VII retaliation claim. Section 1981 provides that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State ... to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens [.]”⁶ 42 U.S.C. § 1981. Title VII makes it unlawful for an employer “to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's race ... or national origin [.]” 42 U.S.C. § 2000e-2(a). Title VII's anti-retaliation provision, codified at 42 U.S.C. § 2000e-3, “forbids employer actions that ‘discriminate against’ an employee (or job applicant) because he has ‘opposed’ a practice that Title VII forbids or has ‘made a charge ... in’ a Title VII ‘investigation, proceeding, or hearing.’” *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 126 S.Ct 2405, 2410 (2006) (quoting 42 U.S.C. § 2000e-3).

To survive summary judgment on his claims, Plaintiff must demonstrate that there is a genuine issue of material fact as to whether his former employer acted with discriminatory or retaliatory intent in terminating his employment. *Hawkins v. Ceco Corp.*, 883 F.2d 977, 980-81 (11th Cir.1989). Because this is not a direct evidence case, Plaintiff's discrimination and retaliation claims are governed by the familiar *McDonnell Douglas* burden-shifting framework.⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In the first *McDonnell Douglas* phase, the employee must produce evidence sufficient to make out a prima facie case, thus giving rise to a presumption that the employer unlawfully discriminated or retaliated against him in taking the alleged adverse employment action. *See St. Mary's Honor*

Ctr. v. Hicks, 509 U.S. 502, 506 (1993). Next, the employer must rebut this presumption by producing evidence that the negative employment action was motivated instead by a legitimate, nondiscriminatory reason. *St. Mary's Honor Ctr.*, 509 U.S. at 509. Finally, to avoid summary judgment, the employee must respond with evidence, which may include previously produced evidence establishing a prima facie case, which would allow a reasonable jury to conclude that the reason given by the employer was not the real reason for the adverse employment decision. *See Combs v. Plantation Patterns, Meadowcraft, Inc.*, 106 F.3d 1519, 1528 (11th Cir.1997); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000).

A. Prima Facie Case

I. Wrongful Termination

*7 Urging summary judgment, Defendant argues that Plaintiff's prima facie case fails because Plaintiff cannot point to a similarly-situated coworker of another race or national origin who was treated more favorably. (Def. Summ. J. Br. at 20.) Plaintiff says, however, that "according to Choi, he [Choi] took Plaintiff's place as the head of the Parts Development Department" and that, therefore, he proves his prima facie case by demonstrating that he was replaced by a Korean employee who is outside of his protected class (Caucasian and American). (Pl. Summ. J. Resp. at 26-27); (Choi Dep. at 36-37, 43); (Pl. Dep. at 303.) In a footnote in its reply brief, Defendant says that Choi held a position as a senior manager, not the more advanced position of director like Plaintiff, and that Choi only had some duties similar to those previously performed by Plaintiff. (Def. Reply Br. at 5 n. 2, citing Choi Dep. at 35-37.) Defendant also cites Plaintiff's statement that Choi "worked for him." (*Id.*, citing Pl. Dep. at 302.) For the reasons to follow, the court agrees with Plaintiff.

In its opening summary judgment brief, Defendant focuses its argument on the "similarly situated" comparator prima facie case, which is articulated in a number of Eleventh Circuit decisions. *See, e.g., Knight v. Baptist Hosp. of Miami, Inc.*, 330 F.3d 1313, 1316 (11th Cir.2003) (evaluating Title VII/§ 1981 wrongful termination claim). The prima facie case, however, is not "rigid or inflexible," *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1268 (11th Cir.1999), and there are more ways than one to raise a presumption of discrimination. A plaintiff can bypass the "similarly situated" prong by demonstrating instead that he was replaced by someone outside his protected

class. *See Maynard v. Bd. of Regents*, 342 F.3d 1281, 1289 (11th Cir.2003). In this case, Plaintiff relies on the "replaced" formulation. The prima facie elements under this scenario require a plaintiff to show that he "(1) was a member of a protected class, (2) was qualified for the job, (3) suffered an adverse employment action, and (4) was replaced by someone outside the protected class." *Cuddeback v. Fla. Bd. of Educ.*, 381 F.3d 1230, 1235 (11th Cir.2004). As stated, in its reply brief, Defendant redirects its focus, arguing that under this alternative formulation Plaintiff likewise cannot establish a prima facie case because there is no evidence which establishes the fourth element, as set out in *Cuddeback*.⁸

The court carefully has reviewed the evidence cited by the parties in support of their competing arguments as to whether Choi replaced Plaintiff. True, as Defendant says, Choi testified during his deposition, taken on November 29, 2007, that he was a "senior manager," (Choi Dep. at 36), which in Defendant's supervisory hierarchy is a position subordinate to a director. In his next sentence, however, Choi adds that he also was the "head" of "part[s] development" and that he reported directly to Hyun. (*Id.* at 36-38.) According to Plaintiff's evidence, "head" of parts development was the same position which Plaintiff occupied when he was fired. (*See* Pl. Dep. at 303, wherein Plaintiff testifies that he was the director of parts development and was supervised by Hyun.) Construing the inferences from Choi's testimony in the light most favorable to Plaintiff, the court finds that there is sufficient evidence from which a jury could find that Choi replaced Plaintiff. *Cf. Tolbert v. Briggs & Stratton Corp.*, 510 F.Supp.2d 549, 554 (M.D.Ala.2007) (finding that "[i]nsofar as most of [plaintiff's] duties were assumed by a white employee, a reasonable jury could conclude that [plaintiff] was 'replaced by someone outside the protected class'").

*8 Defendant's reliance on page 302 of Plaintiff's deposition testimony does not alter the court's finding. During Plaintiff's deposition, defense counsel showed Plaintiff a transcript in which Plaintiff said, "Choi works for me."⁹ (Pl. Dep. at 302.) Plaintiff admitted that he made that statement, but stated that, actually, Choi was Plaintiff's "equal and peer" as the director of purchasing. (*Id.* at 303.) Again, viewing the evidence in the light most favorable to Plaintiff, the court finds that a jury could view Plaintiff's testimony as a clarification of his earlier (and unsworn) statement that "Choi works for me." In any event, Plaintiff's statement that "Choi works for me" relates to Choi's position when Choi "started" working at the Montgomery plant (*id.*), not Choi's

position after Plaintiff was fired, which obviously is the relevant time period for determining the identity of Plaintiff's replacement. Accordingly, based on the foregoing, the court finds that Plaintiff has demonstrated a prima facie case of discrimination on his Title VII/ § 1981 wrongful termination claim.

2. Retaliation

Plaintiff also brings a retaliation claim under Title VII. To prove a prima facie case of retaliation under Title VII, Plaintiff must demonstrate that (1) he "engaged in statutorily protected activity, (2) an adverse employment action occurred, and (3) the adverse action was causally related to the plaintiff's protected activities." *Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1279 (11th Cir.2004) (citation omitted). The first and third prongs are at issue. (Def. Summ. J. Br. at 23.)

Turning to the first element, Plaintiff says that he engaged in protected activity when he complained to Duckworth during August 2005 about multiple instances of what he perceived as Defendant's preferential treatment of Korean employees and workplace sex discrimination. (Pl. Summ. J. Resp. at 32-34); (see Pl. Dep. at 222-50.) He also says that his complaints to Duckworth on September 16, 2005-*i.e.*, that Kim created a "hostile environment" during the meeting earlier that day and that Plaintiff feared "retaliation" from Kim-constitute protected activities. (Pl. Summ. J. Resp. at 30.)

Moving for summary judgment, Defendant contends that Plaintiff has not demonstrated that he engaged in protected activity in August 2005 because (1) the topics which Plaintiff raised in his meeting with Duckworth "did not implicate Title VII" or were too "vague," (2) Plaintiff did not "actually oppose" any conduct made unlawful under Title VII and (3) Plaintiff merely was doing his job by voicing concerns about matters which Defendant needed to rectify in order to be successful.¹⁰ (Def. Summ. J. Br. at 25-27.) Concerning Plaintiff's communication with Duckworth on September 16, 2005, Defendant says that Plaintiff "seeks to now morph his conversations with Duckworth immediately following the Murakami meeting into supposed complaints of discrimination and retaliation," but asserts that Plaintiff's complaints are too "generic" to qualify as "opposition to conduct made unlawful by Title VII." (Def. Reply at 12 n. 6.)

*9 "Under [Title VII's] opposition clause, an employer may not retaliate against an employee because the employee 'has opposed any practice made an unlawful employment practice

by this subchapter.' " *EEOC v. Total Sys. Servs.*, 221 F.3d 1171, 1174 (11th Cir.2000) (quoting 42 U.S.C. § 2000e-3(a)). This clause "protects conduct by an employee who is not the direct victim of a practice made unlawful under Title VII, but who 'opposes' such discrimination against others." *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1487 n. 8 (10th Cir.1996).

The first issue is whether Plaintiff's statements to Duckworth in August 2005 and on September 16, 2005, are too ambiguous to qualify as protected expression under Title VII's opposition clause. The Eleventh Circuit's decision in *Brown v. City of Opelika* is instructive concerning the level of specificity required to bring an informal expression within the protections of Title VII's opposition clause. *See* 211 Fed. Appx. 862, 863 (11th Cir.2006). In *Brown*, the Eleventh Circuit affirmed the district court's summary judgment ruling on a Title VII retaliation claim in favor of the employer where the employee argued that her statement to a superior that she "wanted to make a complaint of 'harassment' " constituted protected activity. *See id.* at 863-64; *Brown v. City of Opelika*, No. 3:05-CV-236-W, 2006 WL 1515836, *4 (M.D.Ala. May 30, 2006). Affirming the judgment, the Eleventh Circuit explained that there was no evidence that, when making her complaint, the employee referred to "racial discrimination or harassment" or "mentioned the word 'race' " and that the employee "never voiced a complaint that the City was engaged in an unlawful employment practice." *Brown*, 211 Fed. Appx. at 211; *see also Jeronimus v. Polk County Opportunity Council*, 145 Fed. Appx. 319, 326 (11th Cir.2005) (plaintiff did not engage in Title VII protected activity when he complained of being "singled out" and being subjected to "harassment" and a "hostile environment" because plaintiff did not "suggest[]" that his "treatment was in any way related to his race or sex").

Applying the foregoing principles, the court finds that Plaintiff's complaints to Duckworth on September 16 fail based upon the reasoning in *Brown* and *Jeronimus*. In complaining that Kim created "a hostile environment," Plaintiff did not use the words "race" or "national origin" or otherwise indicate that he believed he was the victim of any type of harassment made unlawful by Title VII. Moreover, the mere fact that Plaintiff told Duckworth that he feared "retaliation" from Kim is insufficient because Plaintiff has not provided evidence that any of his complaints to Duckworth pertained to conduct which reasonably could be viewed as a Title VII-prohibited employment practice that could have created a motive for the feared "retaliation" by Kim. Accordingly, the court finds that summary judgment is due to be entered in Defendant's favor on Plaintiff's Title

VII retaliation claim predicated on Plaintiff's September 16 complaints to Duckworth because Plaintiff cannot demonstrate an essential element of his prima facie case.

*10 The court also agrees with Defendant that, for the most part, Plaintiff's August 2005 complaints to Duckworth were insufficient to alert Duckworth that Plaintiff was complaining of discriminatory conduct prohibited by Title VII. The topics discussed during Plaintiff's meeting with Duckworth were varied, and Plaintiff does not allege in this lawsuit that all of his complaints were protected by Title VII. For instance, one incident which Plaintiff raised during the meeting involved what he described as a "moral issue," not a discrimination issue. (Pl. Dep. at 245.) Other topics which undisputedly are not related to discrimination, included Plaintiff and Duckworth's discussion about the need for a "master schedule" and improved communications with suppliers. (*Id.* at 239-40.)

Plaintiff, though, points out that he enumerated for Duckworth several instances of Defendant's alleged preferential treatment of Korean workers. He contends that, in making these complaints, he engaged in protected activities because he reported "adverse employment actions." (Pl. Summ. J. Resp. at 33-34.) The issue, however, is not whether the types of differential treatment about which Plaintiff complained are "adverse employment actions," but whether Plaintiff conveyed to Duckworth his belief that the differential treatment was unlawful under Title VII, *i.e.*, occurred on account of a criterion protected by Title VII. *See, e.g., Webb v. R & B Holding Co.*, 992 F.Supp. 1382, 1389 (S.D.Fla.1998) (To engage in Title VII protected activity, an employee, "at the very least," must convey to the employer his or her "belief that discrimination is occurring.... It is not enough for the employee merely to complain about a certain policy or certain behavior of co-workers and rely on the employer to infer that discrimination has occurred."); *Hill v. IGA Food Depot*, No. 2:04cv966-WKW, 2006 WL 3147672, *4 (M.D.Ala. Nov. 2, 2006) (To determine whether a Title VII plaintiff has engaged in opposition conduct, the material issue is " 'whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.' ").

In this case, Plaintiff has not presented any evidence that he conveyed to Duckworth his belief that discrimination on a basis prescribed by Title VII was the reason underlying Defendant's preferential treatment of Korean employees. (Pl. Dep. at 242-246.) There, in fact, is evidence to the contrary.

Namely, during his deposition, Plaintiff did not profess to know the cause of the preferential treatment, stating at one point, "I don't know if it [*i.e.*, the differential treatment] was a lack of trust or what. It was definitely different-different handling of the same type of procedure[.]" (*Id.* at 244.) As the decisions cited above emphasize, it is Plaintiff's responsibility to alert Defendant that, not only is he complaining about unequal treatment, but that he also believes that the root cause of the unequal treatment is a form of discrimination prohibited by Title VII. Based on these facts, the court finds that Plaintiff's complaints about disparate treatment are insufficient to constitute protected opposition under Title VII's anti-retaliation provision.

*11 Plaintiff also says that he reported three incidents of workplace sexual mistreatment. (Pl. Summ. J. Resp. at 33-34.) He points to his reports to Duckworth of one manager's *quid pro quo* sexual offer to a terminated employee, another manager's inappropriate sexual relations with a receptionist, and the female assistant manager who was not allowed to act as the manager in the manager's absence. (*Id.*) Defendant, however, argues that, as to these complaints, and others as well, Plaintiff, as a department director, simply was doing the job for which he was hired by reporting to his superior incidents of alleged discrimination in the workplace. Defendant relies principally on *McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir.1996), to support its position that a managerial employee does not engage in statutorily protected activity when his job requires him to report alleged unlawful conduct because he is not stepping outside his normal employment role to take action against discriminatory conduct.

In *McKenzie*, the Tenth Circuit held that a personnel director did not engage in protected activity when she advised her employer about potential violations of wage and hour laws because it was her job to monitor compliance with laws regulating the workplace. The Tenth Circuit explained, "[Plaintiff] never crossed the line from being an employee merely performing her job as personnel director to an employee lodging a personal complaint about the wage and hour practices of her employer and *asserting* a right adverse to the company." *Id.* at 1486 (emphasis in original). To constitute protected activity, "the employee must step outside his or her role of representing the company." *Id.* Activities which the Tenth Circuit said would bring the employee outside of his or job role include "fil[ing] (or threaten[ing] to file) an action adverse to the employer" or providing active assistance to other employees in asserting protected statutory rights. *Id.*; *see also EEOC v. HBE Corp.*, 135 F.3d 543,

554 (8th Cir.1998) (An employee steps out of his or her normal job role where he or she takes “some action against a discriminatory policy ... and that the action was based on a reasonable belief that the employer engaged in discriminatory conduct.”).

While *McKenzie* addressed protected activities under the Fair Labor Standards Act (“FLSA”), Plaintiff has not presented any reason why the court should not apply *McKenzie*'s reasoning, which the court finds persuasive, in this case.¹¹ See, e.g., *Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 1342-43 (11th Cir.2000) (analyzing FLSA retaliation claim consistent with the burden-shifting approach applicable to Title VII retaliation claims). Plaintiff undisputably was a high-level manager at Defendant's Montgomery plant. As a member of Defendant's management team, Plaintiff admits that his job constantly required him to bring to the management roundtable areas of concern in the workplace. During his deposition, for example, Plaintiff explained that, on a weekly basis, he participated in meetings convened between Duckworth and the directors for the specific purpose of addressing “concerns for the benefit of the company” and flagging problems that needed to be “rectif [ied].” (Pl. Dep. at 254-55.)

*12 While Plaintiff's meeting with Duckworth in August 2005 was an individual (versus a group) meeting, Plaintiff provides no evidence that, in talking with Duckworth on this occasion, he was doing anything other than performing the regular duties of his job. Significantly, Plaintiff confirms that the August 2005 meeting was not initiated by him, but rather by Duckworth, who at the time recently had been assigned to work at the Montgomery plant as the deputy president. In other words, Plaintiff participated in the meeting with Duckworth because in essence he was asked by Duckworth to do so. Moreover, Duckworth met not only with Plaintiff, but also with the other directors at the Montgomery facility, and the undisputed purpose of Duckworth's individual meetings with the directors was to familiarize himself with “improprieties” which previously had been identified as problems at the Defendant's Montgomery plant. (Pl. Dep. at 221, 280.) Indeed, the purpose of the meeting between Duckworth and Plaintiff was achieved, as Plaintiff discussed with Duckworth employee issues of which his superiors already were aware. For example, Plaintiff admits that one of the “issues” which Plaintiff and Duckworth discussed-*i.e.* , the manager who requested sex from a terminated employee as a *quid pro quo* for two-weeks pay-had been addressed already by upper management. (*Id.* at 247.)

Another example also highlights why Plaintiff's present argument that his reports to Duckworth are protected conduct runs counter to the evidentiary record. Plaintiff testified that, prior to his August 2005 meeting with Duckworth, the female assistant manager, referred to above, complained to him that she “felt” that she was not allowed to serve as the acting manager because she was not a Korean male. (*Id.* at 249-51.) Having received this complaint, Plaintiff reported the incident to the appropriate officials as he was required to do in accordance with company policy. (*Id.* at 251); (see also Pl. Dep. at 234-36.) Not only does this evidence reinforce that Plaintiff's job entailed receiving and properly redirecting employee complaints, but there also is no evidence that Plaintiff reported the conduct, then or later in August 2005, because of his personal opposition to what he believed was treatment prescribed by Title VII. See *HBE Corp.*, 135 F.3d at 554. Specifically, during his deposition, Plaintiff did not take the position that he believed that unlawful discrimination had occurred against the female assistant manager. He concurred with opposing counsel that “quite possibly” there could have been “concerns about her performance” or other non-discriminatory reasons for the failure of the manager to put the female assistant manager in charge in his absence. (Pl. Dep. at 251.)

There simply is no evidence that Plaintiff stepped out of his role as a director and asserted a right adverse to Defendant. The facts are distinguishable from *HBE Corp.*, *supra*, where the Eighth Circuit applied the *McKenzie* rule, but reached a different result because the plaintiff stepped outside of his “normal managerial role which [was] to further company policy” and “refused to implement a discriminatory company policy.” 135 F.3d at 554. Here, there is no evidence that Plaintiff took a similar action adverse to Defendant or, as provided in *McKenzie*, threatened to file an action adverse to Defendant. Plaintiff merely was acting within the confines of his managerial job duties. Likewise, then, the facts are distinguishable from those in *Conner v. Schnuck Markets, Inc.*, in which the Tenth Circuit concluded that a food clerk engaged in protected activity when he reported that he was denied overtime pay because he had “no management responsibilities regarding the calculation of overtime wages.” 121 F.3d 1390, 1394 (10th Cir.1997).

*13 In sum, to the extent that Plaintiff's complaints to Duckworth in August 2005 relate to unlawful Title VII practices by Defendant, the court finds that the undisputed evidence demonstrates that, consistent with his job responsibilities, Plaintiff discussed the matters, which he

now says are protected complaints, at Duckworth's request in order to assist Duckworth address workplace problems for the betterment of the company. Because in reporting misconduct to Duckworth in August 2005 Plaintiff was merely doing his job, not engaging in protected conduct, Plaintiff's cannot establish a prima facie case.¹² Accordingly, the court finds that summary judgment is due to be entered in Defendant's favor on Plaintiff's Title VII retaliation claim.

B. Defendant's Legitimate, Nondiscriminatory Reasons for Plaintiff's Termination

Defendant argues that, even if Plaintiff could demonstrate a prima facie case on his wrongful termination claim, Plaintiff is unable to raise a genuine issue of material fact as to whether Defendant's proffered reasons for his termination are pretextual. Defendant asserts that it legitimately, for nondiscriminatory reasons, fired Plaintiff (1) based upon its "good faith" belief that Plaintiff exhibited unprofessional behavior during the September 16 meeting, (Def. Summ. J. Br. at 25-26), and (2) because Plaintiff subsequently demonstrated an "unwilling[ness] to improve his attitude." (*Id.* at 24 (citing Duckworth Decl. ¶ 9)); (Def. Reply at 5.) The alleged unprofessional conduct is outlined in Duckworth's declaration. Namely, Duckworth says he received reports that, during the September 16 meeting, Plaintiff was argumentative, cursed once, compared Defendant's manufacturing process to Toyota's, and directly questioned the judgment of Kim, causing Kim embarrassment. (Duckworth Decl. ¶ 5.) Moreover, concerning the second reason, Duckworth says that, when he met with Plaintiff to discuss Plaintiff's alleged behavior at the September 16 meeting, Plaintiff denied that he had any attitude problems and was unwilling to accept any form of correction, thus, causing Duckworth to conclude that termination was warranted. (*Id.* ¶ 9.)

The court finds, and no contrary argument has been advanced, that Defendant has "clearly set forth, through the introduction of admissible evidence, the reasons for [Plaintiff's] [termination]." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981). The court also finds that Defendant's properly-supported reasons are legitimate and nondiscriminatory. *Coutu*, 47 F.3d at 1073; *see also Ashe v. Aronov Homes, Inc.*, 354 F.Supp.2d 1251, 1259 (M.D.Ala.2004) (finding that failure to follow instructions and insubordination are legitimate, nondiscriminatory considerations); *Garcia-Cabrera v. Cohen*, 81 F.Supp.2d 1272, 1281 (M.D.Ala.2000) (finding that "[i]t is beyond

question that an inability to get along with co-workers and demonstrated caustic or rude behavior is a legitimate, non-discriminatory reason for an employment decision").

C. Pretext

*14 Because Defendant has satisfied its burden of producing competent evidence of legitimate, nondiscriminatory reasons for Plaintiff's termination, the burden shifts to Plaintiff to "meet [the proffered] reason[s] head on and rebut [them]." *Chapman*, 229 F.3d at 1030. To satisfy his burden on summary judgment, Plaintiff "must come forward with evidence sufficient to permit a reasonable fact finder to conclude that the legitimate reasons given by the employer were not its true reasons, but were a pretext for discrimination." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 771 (11th Cir.2005). The pretext inquiry focuses on whether the employee has presented "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [Defendant's] proffered legitimate reasons ... that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538 (citation and internal quotation marks omitted); *see also Rioux v. City of Atlanta, Ga.*, --- F.3d ---, *7 2008 WL 710441 (11th Cir. March 18, 2008).

As discussed below, Plaintiff focuses principally on inconsistencies in the evidence as indicative of pretext. For the reasons to follow, the court is persuaded that Plaintiff's Title VII § 1981 wrongful termination claim cannot be decided as a matter of law and that the issue of whether Defendant's proffered reasons are nondiscriminatory is for the jury to decide.

Plaintiff argues that he has shown pretext because there is contradictory evidence as to who made the decision to fire Plaintiff and who had input in that decision. (Pl. Summ. J. Resp. at 28.) According to Plaintiff's evidence, Duckworth told Plaintiff at the October 22 restaurant meeting that Kim and Ahn already had made the decision to terminate Plaintiff's employment, that he "had nothing to do with the decision to ask for [Plaintiff's] resignation," and that he did not have the authority to reverse the decision. (Pl. Decl. ¶ 8.) In contrast, according to Defendant's evidence, which takes the form of Duckworth's declaration, Duckworth says that Ahn "left it to [him]" as to whether to terminate Plaintiff and that, during the October 22 restaurant meeting, Duckworth independently "made the decision to terminate [Plaintiff's] employment." (Duckworth Decl. ¶¶ 7, 9.) These facts create a dispute as to whether Duckworth made the decision to

fire Plaintiff or whether the decision involved a collaborative decision between Kim and Ahn. Each party has presented competent evidence in support of its and his competing positions.

The issue is whether the contradiction is material. *See, e.g., Valance v. Wisel*, 110 F.3d 1269, 1274-75 (7th Cir.1997) (“existence of a factual dispute will not preclude summary judgment if the disputed fact is not material”). Defendant says that it is not. Because neither Ahn nor Duckworth attended the September 16 meeting, Defendant says that each was entitled to rely upon the reports he received concerning Plaintiff's conduct during the meeting. Defendant says that, under these facts, the relevant inquiry is whether Defendant “had a good faith belief that [Plaintiff] engaged in unprofessional behavior, not whether [Plaintiff] actually did.” (Def. Summ. J. Br. at 22, citing *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466 (11th Cir.1991)). The court is not persuaded by Defendant's argument.

*15 Plaintiff's testimony, if credited by a jury, undercuts Defendant's assertion that Duckworth was the decisionmaker and brings Kim into the picture as a decisionmaker. Defendant's argument, above, does not account for Plaintiff's evidence concerning Kim's role in the decisionmaking process. At the summary judgment juncture, though, the court must credit Plaintiff's testimony that Kim is a decisionmaker. Kim's involvement is significant for purposes of determining whether Plaintiff survives summary judgment on his wrongful termination claim. Because Kim was present at the September 16 meeting, the holding in *Elrod* would be inapplicable if Kim made the decision to terminate Plaintiff. Rather, the holding in *Damon v. Fleming Supermarkets, Inc.*, 196 F.3d 1354 (11th Cir.1999), would apply. In *Damon*, the Eleventh Circuit held that, when the employer justifies the plaintiff's discharge by relying on a work rule violation, one way a plaintiff may prove pretext is by proffering evidence “that [he or] she did not violate the cited work rule.” *Id.* at 1363. As explained by this court in *Sweeney v. Alabama Alcoholic Beverage Control Board*, “That part of the *Damon* holding, which allows a plaintiff to establish pretext by demonstrating that the work rule violation did not occur, applies in cases where the decisionmaker observes the alleged work rule violation and, thus, has personal knowledge thereof.” 117 F.Supp.2d 1266, 1272 (M.D.Ala.2000).

Plaintiff vehemently denies that, during the September 16 meeting which Kim chaired, he committed any of the misconduct of which he was accused. He says that he was not disrespectful toward Kim, did not curse, did not

mention the “taboo” Toyota word, and did not otherwise act unprofessionally. (Pl. Dep. at 111-12, 116, 118-19, 125, 127-28, 133-36.) At this stage, the court regards the facts submitted by Plaintiff as true since those facts are supported by evidentiary material, *i.e.*, deposition testimony. *See Adickes*, 398 U.S. at 157. A comparison of Defendant's evidence against Plaintiff's reveals that the evidence is disputed on the issue of whether Plaintiff committed the misconduct which led to his termination.¹³ Hence, because there also is evidence that Kim was a decisionmaker, the court finds that the contradictory evidence concerning who actually made the decision to terminate Plaintiff creates a *material* issue of disputed fact for the jury to decide. *See Fed.R.Civ.P.* 56(c); *see also Miller v. King*, 384 F.3d 1248, 1259 (11th Cir.2004) (“Issues of credibility and the weight afforded to certain evidence are determinations appropriately made by a finder of fact and not a court deciding summary judgment.”).

Citing *Chapman, supra*, however, Defendant argues that, at the very least, Plaintiff has failed to rebut Defendant's second independent reason for his termination. As stated, the second reason focuses on Duckworth's perception that Plaintiff was unwilling to improve his attitude when Duckworth discussed management's concerns with Plaintiff during the October 22 restaurant meeting. (Def. Reply at 5); *see Chapman*, 229 F.3d at 1037 (holding that “to avoid summary judgment, a plaintiff must produce sufficient evidence for a reasonable factfinder to conclude that *each* of the employer's proffered nondiscriminatory reasons is pretextual”). Defendant asserts that there “is no inconsistency” between Plaintiff's and Duckworth's testimony because Plaintiff's unwillingness to acknowledge that there was a “problem[] with his attitude” is manifested in a telephone conversation Plaintiff had with his mother on an unspecified date. (Def. Reply at 10.) The material dispute, however, lies not in an unrelated, separate conversation Plaintiff had with his mother (which Plaintiff recorded and later transcribed), but rather in the evidence presented by Plaintiff that, at the October 22 dinner meeting, Duckworth did not seek any dialogue from Plaintiff concerning his work performance or criticize his work performance, but rather simply pronounced that the decision had been made to end Plaintiff's employment. (Pl.Decl.¶ 8.) Again, at the core of the dispute is who terminated Plaintiff. Did Duckworth make that decision on October 22 based upon Plaintiff's denials of wrongdoing and Duckworth's perception that Plaintiff was “unwilling to accept any form of correction or [to] consider the possibility that his behavior needed improvement”? (Duckworth Decl. ¶ 9.) Or was Plaintiff's termination already a “done deal,” with

Kim and Ahn instructing Duckworth to deliver the news of Plaintiff's fate at the October 22 dinner meeting? (Pl. Dep. at 218); (Pl. Decl. ¶ 8.) This dispute is central to both reasons asserted by Defendant for Plaintiff's termination.

*16 It also has not gone unnoticed by the court that Defendant's evidence that Duckworth made the decision to terminate Plaintiff undercuts Defendant's reliance on *Elrod, supra*, concerning Defendant's second articulated reason for Plaintiff's termination. As discussed above, an employer may not rely on an employer's honest belief that an employee engaged in misconduct "when the actual predicate of such a belief is the personal knowledge of the decisionmaker." *Strickland v. Prime Care of Dothan*, 108 F.Supp.2d 1329, 1334 (M.D.Ala.2000) (discussing *Elrod, supra*, and *Damon, supra*.) Here, Duckworth and Plaintiff present different accounts of what occurred during their October 22 restaurant meeting, and the court must accept Plaintiff's version at the summary judgment juncture. While the contradictory evidence as to who is the decisionmaker and whether Plaintiff engaged in the charged misconduct may well be sufficient to raise a jury issue on the subject of pretext, the court need not rest its decision solely on these contradictions.

Plaintiff has identified other inconsistencies in the evidence, as well. As pointed out by Plaintiff, in paragraph six of his declaration, Duckworth cites instances of alleged "problems" with Plaintiff's "behavior" which allegedly occurred during the "recent months" preceding the September 16 meeting. (Duckworth Decl. ¶ 6.) For example, Duckworth says that he observed Plaintiff "verbally berate [] and attempt[] to embarrass a fellow executive." (*Id.*) Construed in the light most favorable to Plaintiff, the inference, *albeit* subtle, is that the problematic "behavior" which Duckworth discussed with Ahn, as set out in paragraph seven of Duckworth's declaration, encompassed the "behavior" which Duckworth described in paragraph six of his declaration and that, therefore, this "behavior" encompassed part of the reason for Plaintiff's termination. (*Id.* ¶¶ 6-7.)

Plaintiff asserts that these so-called behavioral problems surfaced for the first time when Defendant submitted Duckworth's declaration in support of its motion for summary judgment. Not only does Plaintiff deny that he committed any of the infractions listed in paragraph six of Duckworth's declaration, (*see* Pl. Decl. ¶¶ 5-6), but, in contrast to Duckworth's present assertion of repeated behavioral problems, Plaintiff presents evidence of a history of positive feedback from Duckworth. On September 16, in direct response to Plaintiff's concerns about his job security,

Duckworth told Plaintiff that "everyone at [Hyundai] thought the world of [Plaintiff], that [he] was doing an excellent job, and that he had not heard of any complaints from anyone about [Plaintiff]." (Pl. Decl. ¶ 3.) While "there were no reviews" of Plaintiff's job performance, which the court takes to mean no formal written evaluations, Plaintiff testified also that, during his tenure, he never received any criticism of his work, not from Duckworth or anyone else. (Pl. Dep. at 323.) To the contrary, Plaintiff said that he "was given letters from the chairman's son and handwritten notes from the president about how good a job [he][was] doing." (*Id.*)

*17 Plaintiff's argument that the conflicting evidence concerning his job performance further demonstrates pretext finds support in the law. The Eleventh Circuit has held that inconsistent reasons articulated by an employer for the adverse action can be evidence of pretext. *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 935 (11th Cir.1995). As stated, Plaintiff has submitted evidence that Duckworth expressly told him that he was an exemplary employee, a fact which a reasonable jury could conclude directly opposes Duckworth's present assertion that, prior to the September 16 meeting, Duckworth was aware of and personally observed Plaintiff engage in unprofessional workplace conduct. Moreover, courts have held that, in appropriate circumstances, evidence of satisfactory work performance can belie an employer's assertion that the employee was fired for performance-related problems. *See Abramson v. William Paterson College*, 260 F.3d 265,284(3d Cir.2001) (plaintiff established jury issue as to pretext on religious discrimination claim, in part, because her evidence of "glowing teaching evaluations" and other positive reviews refuted employer's reliance on performance problems as a reason for her discharge); *Wilson v. AM Gen. Corp.*, 167 F.3d 1114, 1120-21 (7th Cir.1999) (plaintiff raised question of fact as to whether employer's performance-related reasons for his termination were pretext for age discrimination with evidence which included exemplary performance reviews and plaintiff's testimony that no one ever mentioned any performance problems to him). Based on the foregoing authorities and the facts of this case, the court finds that the contradictions surrounding Plaintiff's job performance are relevant to the question of pretext.

Based on the record as a whole, the court finds that Plaintiff has identified a sufficient number of disputes in the material facts on the issue of pretext that, when combined with the evidence supporting his prima facie case, demonstrates such "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in

[Defendant's] proffered legitimate reasons ... that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538. The court agrees with Plaintiff that the trier of fact, not the court on summary judgment, must resolve the factual disputes and determine the ultimate issue of discrimination. Accordingly, the court finds that Defendant's motion for summary judgment on Plaintiff's Title VII/ § 1981 wrongful termination claim is due to be denied.

VI. CONCLUSION

Applying the summary judgment standard, the court finds that Plaintiff has not demonstrated a Title VII prima facie

case of retaliation and that summary judgment in Defendant's favor is appropriate on this claim. Plaintiff, though, has raised genuine issues of material fact on his Title VII/ § 1981 wrongful termination claim. Defendant's motion for summary judgment, therefore, is due to be granted in part and denied in part.

VII. ORDER

*18 Accordingly, it is CONSIDERED and ORDERED that Defendant's motion for summary judgment (Doc. No. 24) be and the same is hereby GRANTED in part and denied in part.

Footnotes

- 1 The material facts are presented in the light most favorable to Plaintiff. Facts which are immaterial to the pivotal issues are omitted. When pertinent, the court notes disputes in the material facts.
- 2 Discussion or mention of "Toyota" is "taboo" at Defendant's facility. (Pl. Dep. at 136.)
- 3 Plaintiff's fears were sparked by discussions he had with Choi after the meeting. Namely, remarking that Kim was "very upset," Choi told Plaintiff, "You and I may be going home early today." (Pl. Dep. at 179-80.)
- 4 Defendant already knew about this incident and had "sent" the employee "back to Korea" because of his inappropriate conduct. (Pl. Dep. at 247.)
- 5 Plaintiff says that, previously, when the assistant manager had complained to him, he "followed" Defendant's policies and reported the complaint to Team Relations which, "to the best of [his] knowledge," investigated and resolved the complaint. (Pl. Dep. at 251.)
- 6 "Section 1981 protects all persons, Caucasian and non-Caucasian[.]" from race-based discrimination. *Ellison v. Chilton County Bd. of Educ.*, 894 F.Supp. 415, 419 (M.D.Ala.1995); *Chavis v. Clayton County Sch. Dist.*, 300 F.3d 1288, 1292 n. 5 (11th Cir.2002) (noting that the Supreme Court has decided that a Caucasian plaintiff may bring a claim of discrimination under § 1981). Although the Supreme Court of the United States broadly has defined "race" discrimination under § 1981, § 1981's protections do not extend to discrimination based "solely on the place or nation of ... origin." *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987); see *Tippie v. Spacelabs Med., Inc.*, 180 Fed. Appx. 51, 56 (11th Cir.2006) (holding that "[b]y its very terms, § 1981 applies to claims of discrimination based on race, not national origin"). Here, in addition to alleging a race discrimination claim under § 1981, Plaintiff brings a separate § 1981 claim based on his national origin (American). (See Compl. ¶ 15.) Defendant has not urged summary judgment on the ground that § 1981 does not recognize discrimination solely on the basis of national origin. Absent briefing on this legal point from the parties, the court declines to address the issue *sua sponte*, particularly given that "[t]he line between national origin discrimination and racial discrimination is an extremely difficult one to trace." *Bullard v. Omi Georgia, Inc.*, 640 F.2d 632, 634 (5th Cir.1981). In other words, Plaintiff's American ethnicity is not necessarily irrelevant to his § 1981 race discrimination claim. As recognized in *Bullard*, "[i]n some contexts, 'national origin' discrimination is so closely related to racial discrimination as to be indistinguishable." *Id.*
- 7 The Title VII circumstantial evidence approach to proving employment discrimination also applies to Plaintiff's § 1981 wrongful termination claim. See *Shields v. Fort James Corp.*, 305 F.3d 1280, 1282 (11th Cir.2002) ("[A]s we have repeatedly held, '[b]oth of these statutes [i.e., § 1981 and Title VII] have the same requirements of proof and use the same analytical framework.' ").
- 8 For the purpose of the motion for summary judgment, Defendant has not challenged the other prima facie elements.
- 9 Plaintiff recorded several conversations he had with his colleagues, family and other third parties. (See, e.g., Pl. Dep. at 297, 301-02); (Def. Ex. E to Doc. No. 23.) These conversations have been transcribed and are part of the summary judgment record. (*Id.*) Plaintiff made the statement that "Choi works for me" during one of these conversations which he recorded.
- 10 In its opening summary judgment brief, Defendant delineated three categories of alleged protected activities upon which it speculated Plaintiff would rely. (Def. Summ. J. Br. at 24.) In his summary judgment response, Plaintiff only relies upon one of the categories enumerated in Defendant's brief. The court, therefore, does not address the other two categories in this opinion and deems Plaintiff to have abandoned any reliance thereon. Cf. *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir.1995) ("the onus is upon the parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned.").

- 11 The court notes that Defendant has not cited any similar decision from the Eleventh Circuit, and the court is not aware of one.
- 12 Given the court's findings, the court need not and declines to address Defendant's arguments pertaining to the third prima facie element.
- 13 In addition to denying that he "did the things in the September 16 Murakami meeting that Duckworth claims he did," (*id.* at 29), Plaintiff argues that Choi is a similarly-situated Korean employee who acted in "lockstep" with him during the meeting. Yet, Plaintiff says that Choi was treated more favorably because he was not fired. To show pretext, a plaintiff may rely on evidence of disparate treatment of a similarly-situated employee outside the protected class. *See Rioux*, ---F.3d ---, ---, 2008 WL 710441, *5 (analyzing sufficiency of comparator evidence at the *McDonnell Douglas* pretext stage). Because the evidence is otherwise sufficient to raise a genuine issue of material fact on the question of pretext, the court need not factor into its decision whether Choi, in fact, is a similarly-situated employee.

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