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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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CSILLA MUHL  
Plaintiff/Appellant

v.

DAVIES PEARSON PC  
Defendant/Respondent

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BRIEF OF APPELLANT CSILLA MUHL

(CORRECTED)

Pierce County Cause No. 13-2-07742-1

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JUDITH A. LONNQUIST  
WSBA No. 06421  
BRIAN L. DOLMAN  
WSBA No. 32365  
1218 Third Avenue, Suite 1500  
Seattle, WA 98101  
Tel: (206) 622-2086  
Email: [LOJAL@aol.com](mailto:LOJAL@aol.com)  
Attorneys for Plaintiff

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred by striking expert witness Dr. Rosalind Barnett as a late-disclosed expert without analyzing the *Burnet* factors on the record, particularly when a lesser sanction was available and would have sufficed.
2. The trial court erred in granting summary judgment on Plaintiff's sex discrimination claim where there were material issues of fact to support that sex was a substantial factor in Ms. Muhl's termination.
3. Because a reasonable jury could have found for Ms. Muhl on her retaliation claim where Defendant removed Ms. Muhl from the partnership track and terminated her employment after she raised concerns about sex bias at Davies Pearson, summary judgment on her retaliation claim was improper.
4. The trial court's decisions were stained with a lack of objectivity and violated the appearance of fairness doctrine, such that the case should be considered by a different judge on remand.

### Issues Pertaining to Assignments of Error

- A. Where Plaintiff identifies an expert witness after the disclosure deadline, but before the close of discovery, did the trial court err by refusing to engage in the required *Burnet* analysis or by denying the existence of lesser sanctions? (Assignment of Error Number 1).

- B. Where a long-term employee establishes the following evidence in response to summary judgment in an employment discrimination action: 1) favorable performance ratings, 2) circumstances of preferential treatment by the employer based on an employee's gender, 3) Plaintiff's complaint to her supervisor about observations of sex bias prior to her involuntary termination, 4) Defendant's decision to hire Plaintiff's eventual replacement on the basis of gender, and 5) significant differences in employee discipline to demonstrate pretext – did the trial court err by failing to consider the evidence in the light most favorable to Plaintiff, thereby wrongly dismissing her claims as a result? (Assignments of Error Numbers 2 and 3).
- C. Where the trial court fails to follow established precedent prior to deciding to strike Plaintiff's witness, makes statements as a part of its ruling that were material and factually incorrect, and views the evidence in the favor of the moving party even when unsupported by the record, does the appearance of fairness doctrine require remand for future proceedings before a different trial judge? (Assignment of Error Number 4).

## II. INTRODUCTION

Plaintiff brings this appeal based on the exclusion of her expert witness, the fact that she demonstrated sufficient evidence of discriminatory treatment and rebutted the employer's pretext of alleged performance deficiencies, and received decisions from the trial court that include a residue of unfairness. Interestingly, this was Plaintiff's second experience of working for Defendant. She previously worked for Davies Pearson for over a year when she left the firm to join a departing shareholder in March 1997. Ms. Muhl later returned to the employ of Defendant in October 2006 as a Contract Partner in its family law

department, where she remained for over six years until Defendant terminated her employment in November 2012.

By all accounts, the employer and its clients benefited from Ms. Muhl's services as a family law attorney. During the years of 2010-12, Ms. Muhl received favorable performance ratings, positive case results and revenue collections that were at or near the expectations for her position. For fiscal year 2011, she experienced a financial milestone of collecting revenues that far exceeded her costs as employee. At no time did Davies Pearson provide its employee with a written warning of her allegedly deficient performance, as her supervisors only offered suggestions of subjective areas of improvement. In the year of her termination, Ms. Muhl reasonably estimated that she remained on track of her financial objectives, save for Defendant's decision to cut off her collections and end her employment before the end of the year.

Prior to the decision to terminate her employment, Ms. Muhl made complaints to her employer about unequal treatment. These complaints primarily focused on accountability differences in terms of financial assessments, as well as the loss of intra-firm referrals to a younger, less experienced colleague. In response to Defendant's Motion for Summary Judgment, Plaintiff identified several disparities between the treatment that she experienced and the leeway afforded to younger male attorneys in

the firm. She also proved that Defendant hired Mark Nelson, a male attorney with far less experience, when no position opening existed and without a needs assessment for its family law department. Davies Pearson admitted to hiring Mr. Nelson based, in part, on his gender. Not only did Mr. Nelson siphon off intra-firm referrals from Ms. Muhl, but he effectively became her replacement as the second primary family law attorney following her termination.

In support of its adverse employment action, the law firm relied on several incidents: 1. Ms. Muhl's alleged emotional reaction to a pre-trial ruling while in the presence of her client; 2. An inquiry by Pierce County Superior Court Judge Hickman about Ms. Muhl's courtroom conduct during a trial; and 3. Her decision not to appear on behalf of a different client at a contempt hearing. These incidents are pretextual, as Davies Pearson never raised concern or sought to discipline Ms. Muhl in a contemporaneous manner; the first two events occurred more than a year prior to her termination. The employer either expressed satisfaction with the resolution of these events, enjoyed the financial compensation from Ms. Muhl's services, or realized that she decided against appearing after receiving her client's consent and the outcome did not prejudice his interests.

Ms. Muhl adequately demonstrated reasons for the timing of her disclosure of expert witness Dr. Barnett. She also amply established evidence of discriminatory treatment and rebutted the employer's alleged non-discriminatory basis for her discharge. Due to errors in rulings on these issues, as well as a violation of the appearance of fairness doctrine, Plaintiff requests this Court to reverse and remand to a different judicial officer for trial of this matter.

### **III. STATEMENT OF THE CASE**

#### **A. Background Facts Related to Plaintiff's Appeal**

For more than six years, Plaintiff Csilla Muhl received positive ratings for her professional services as one of two attorneys with a family law practice focus at Davies Pearson. (CP 287-88; 306-07). Despite her professional and financial successes, Defendant terminated her employment in November 2012. (CP 290-91; 314-15). This adverse employment action occurred after Ms. Muhl had voiced concerns that younger male attorneys received more favorable treatment within the firm. (CP 288-89; 309-11). She specifically complained about the loss of intra-firm referrals to a less experienced male attorney, Mark Nelson, whom Davies Pearson admitted to have hired for its family law department because of his gender. (CP 289). The employer also admitted that it hired

Mr. Nelson without an existing family law position opening or evaluating the workload needs to support an additional attorney. (*Id.*). In the end, Mr. Nelson effectively replaced Ms. Muhl as the second attorney with a primary family law practice emphasis, as the firm did not replace Plaintiff following her termination. (*Id.*).

To support its decision to terminate Ms. Muhl's employment, Davies Pearson relies on three incidents of alleged faulty performance: 1. An alleged overwrought response exhibited by Ms. Muhl while in the presence of her client; 2. Ms. Muhl's courtroom conduct during a trial that caused Pierce County Superior Court Judge Hickman to inquire about the propriety of her actions; and 3. Ms. Muhl's informed decision against appearing on behalf of a different client at a contempt hearing. (CP 290; 312-14). Not only had the employer decided against pursuing discipline contemporaneous with these events, but supervisors expressed satisfaction with the resolution of events that occurred more than a year prior. (*Id.*). Defendant also appeared confused as to the timing or resolution of certain events, which conflicted with its reliance on these events as justification for the termination decision. (*Id.*).

Aside from the general notion of more favorable treatment afforded to younger male attorneys, Ms. Muhl also identified other specific instances where male colleagues were able to escape criticism or

preserve their dignity. (CP 290-91; 314-15). This extended to instances of receiving the preferential label of “resignation” or avoiding discipline for misconduct. (*Id.*; CP 289). The firm did not treat Ms. Muhl in a similar manner.

## **B. Litigation History**

Ms. Muhl filed the present lawsuit in Pierce County Superior Court on March 29, 2013, and Defendant filed its answer two months later on May 29, 2013. (Appendix A, Pierce County Linx Cover Sheet). The case was reassigned in May 2013, December 2013, and May 2014.<sup>1</sup> (*Id.*). Also in May 2014, Defendant filed a motion for partial summary judgment, which Judge Stolz granted on June 20, 2014. (*Id.*). On June 27, 2014, Defendant filed a second motion for summary judgment seeking to dismiss Plaintiff’s remaining claims. (*Id.*). Plaintiff’s deadline to disclose her primary witnesses was December 20, 2013. The deadline for additional witness disclosure was May 2, 2014.

Plaintiff delivered a Second Supplemental Witness Disclosure to Defendant on June 16, 2014, which identified Dr. Barnett as an expert witness. The disclosure of Dr. Barnett occurred six weeks after the latter witness disclosure deadline, but prior to the close of discovery by

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<sup>1</sup> The parties reasonably inferred that one or more judges recused themselves due to Defendant’s long standing in the local legal community and the existence of real or perceived conflicts. Until Judge Stolz accepted the case, the number of judicial reassignments raised a question as to whether the parties’ trial date would hold.

approximately the same amount of time. Although the original discovery cutoff had been July 11, 2014, it was extended to July 25, 2014, for reasons unrelated to the date of Plaintiff's witness disclosure. If the case had not been dismissed on summary judgment, the trial was scheduled for September 25, 2014. (*Id.*).

**C. Judge Stolz's Challenged Rulings**

On August 8, 2014, Judge Stolz ruled on Defendant's motion to strike the expert testimony of Dr. Barnett and Defendant's motion for summary judgment. (CP 660, 663). In the course of making those rulings, Judge Stolz made statements that Plaintiff believes create a perception of fairness issue and warrant remand to a different judge. (RP 9, 21-22, 31-32, 34).

Judge Stolz excluded Dr. Barnett because she was disclosed after the deadline for primary witnesses. (RP 10:11-13). Plaintiff disclosed the opinions of Dr. Barnett – a psychologist educated at Harvard, a professor of gender studies and an author of a recently published work on related subject matter – who offered her socio-psychological assessment in regard to the treatment of Ms. Muhl in the workplace. (CP 592-95). While falling beyond the witness disclosure deadline, Ms. Muhl identified the witness after she read Dr. Barnett's book. (CP 588-89). The trial court somehow equated Dr. Barnett to a readily available local attorney that regularly

conducts workplace investigations. (RP 7:12-25). Dr. Barnett offered an expert perspective that is different from the function of a workplace investigator. Even after Plaintiff's counsel expressly alerted the trial court regarding the need to engage in a *Burnet* analysis, the court failed to conduct the required analysis on the record. (RP 5:4-25).

Judge Stolz's initial ruling striking Dr. Barnett, at Verbatim Transcript of Proceedings pages 7:8-8:20, was as follows:

Well, basically, what appears was done is: She went out after the deadline, substantially after the deadline, which was December 20, 2013, that she disclosed her primary witnesses. That includes her experts. Now, and she went out to try to find herself an expert witness late in the game. This case was actually filed in March. I mean, there was plenty of time for her to have identified an expert regarding this. I mean, we all see those cases where some neutral individual is hired to conduct an investigation into, usually, a governmental agency to determine whether or not there's an ongoing pattern of sexual, physical, you know, age, or other discrimination, you know. I mean, there are attorneys who routinely do that kind of investigation, you know. She went out and found somebody very, very, very late in the game to get some sort of an opinion; but she's well past her deadline. The trial date is September. The bottom line is: I am going to strike her as an expert witness in this case. I mean, she hasn't been disclosed in a timely manner. I mean, your discovery cutoff was in July. It was extended, you know; but you just don't come up with an expert opinion this late in the game. I mean your trial date is basically—six weeks away, you know. I mean that's not timely disclosure. That's not the way the rules work. Okay? So I'm going to strike, you know, even setting aside, shall we say, the meat of her opinions, you know, the facts that they may or may

not be based on. I mean these cases are fact-driven; so, you know, at this point, she was disclosed too late.”

(RP 7:8-8:20).

Ms. Muhl’s attorney, Brian Dolman, then sought clarification of the ruling, expressly citing *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) and alerting the court to the requirement that it consider the availability of lesser sanctions on the record prior to choosing one of the harsher remedies allowable to address a discovery violation.

(RP 8:24-9:8).

The court’s response was superficial and dismissive, stating that no other sanction was available. Its analysis lacked any identification of another potential sanction, specifically stating why it was not available, or addressing the other two *Burnet* factors:

The Court: Well, there is no lesser sanction. I mean, the bottom line is: You disclosed her two weeks before the cutoff, you know. I mean, that isn’t sufficient time for someone to go out, hire an expert to review whatever work this other individual did, render an opinion that it’s, you know, based on nothing more than speculation; or it’s actually got some reality to it. I mean, there really is no other way to deal with this because you didn’t bother to get an expert in due diligent time; and you just don’t walk out and hire one, you know, two weeks before the cutoff and expect that you’re going to have meaningful discovery.

Mr. Dolman: And just so that the record is clear, we disclosed her more than two weeks before the discovery cutoff.

The Court: Towards the middle or end of June. The discovery cutoff was—what was it—the 14th?

Mr. Dolman: The 25th.

The Court: The 11th. The discovery cutoff was originally July 11th. I know it got extended but for other reasons, so I'm striking her as an expert witness.

Mr. Dolman: All right. I just want to make sure the record is clear.

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

Mr. Dolman: She certainly has, Your Honor. It's in her report.

The Court: All right. Anyway, but I'm striking her as a witness because she wasn't disclosed timely. Now, let's move on to the summary judgment.

(RP 9:7-10:13).

Judge Stolz then proceeded to grant Defendant's motion for summary judgment in its entirety. (CP 660). She dismissed Plaintiff's sex discrimination claims in spite of the substantial evidence of superior treatment of a male comparator and replacement, as will be discussed below. She also dismissed Plaintiff's retaliation claim, although Plaintiff was removed from the partner track at her firm after complaining about sex

discrimination, despite having recently completed her most financially successful year on behalf of the firm.

In the course of making her rulings, Judge Stolz made several comments that would lead a reasonable person to question whether Ms. Muhl received fair and impartial consideration. Specifically, Judge Stolz expressed a level of knowledge and respect for the Defendant law firm. (RP 32:18-33:2). She also appeared to exaggerate the extent of a reaction by another judicial department in regard to Ms. Muhl's actions at trial; Judge Stolz's statement was not supported by the record in the present case. (RP 30:4-7; CP 312-13, 349). These oral rulings on summary judgment appeared to be based on either bias or outside information from the other judge.

The trial court judge also made other incorrect statements that appeared to purposely aid Defendant, or suggested that she misconstrued the factual record. In one instance, Judge Stolz argumentatively and errantly asserted that Ms. Muhl voluntarily resigned her position. (RP 21:21-22:10; CP 290-91, 314-15). When mistakenly identifying Rebecca Larson as a family law attorney, Judge Stolz conflated the number of female attorneys over 40 years of age within Defendant's family law department to

a total of three. (RP 29:3-6, 32:18-22). Despite comparator evidence of younger male attorneys receiving more favorable treatment, she discounted Ms. Muhl's evidence to state that Plaintiff had merely alleged "some nameless male attorney who received a better rating." (RP 34:2-4; CP 314-315). Judge Stolz also observed – contrary to all other evidence – that Defendant disciplined comparator family law attorney Mark Nelson for a significant error of failing to consult with his client prior to the entry of a divorce decree. (RP 34:4-13; CP 289). Whether considered as single events or collectively, these factual findings and rulings are strong indicators that fairness or judicial impartiality were lacking.

#### IV. ARGUMENT

##### A. Applicable Legal Standards

Appeals from orders granting summary judgment are reviewed *de novo*, with the Court of Appeals engaging in the same inquiry as the trial court. *Marquis v. City of Spokane*, 130 Wn.2d 97, 104-05, 922 P.2d 43 (1996) (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)); *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65, 837 P.2d 618 (1992)). Summary judgment is appropriate only where there are no issues

of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 105 (citing *Fahn v. Cowlitz Co.*, 93 Wn.2d 368, 373, 610 P.2d 857 (1980)). When considering a motion for summary judgment, the trial court must consider all the facts in the light most favorable to the non-moving party, in this case, Ms. Muhl. *Sellsted v. Washington Mut. Sav. Bank*, 69 Wn. App. 852, 859, 851 P.2d 716 (1993); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment should not be granted unless reasonable minds could reach only one conclusion regarding the evidence. *Ruff v. King Co.*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995).

A trial court's ruling admitting or excluding a witness is reviewed for abuse of discretion. However, the trial court invites error and abuses its discretion when it imposes a severe sanction, such as witness exclusion, without first conducting a detailed analysis on the record. *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380, 388 (2013); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Here, the trial judge granted Defendant's motion to exclude Dr. Barnett, Plaintiff's expert witness, without engaging in any detailed analysis on the record. Where the trial court has failed to perform the *Burnet* analysis on the record, the Court of Appeals cannot conduct a substitute analysis of the facts, even if the Court believes that the record provides adequate grounds

for such an analysis. *Blair v. TA-Seattle E. No 176*, 171 Wn.2d 342, 351, 254 P.3d 797 (2011).

**B. The Trial Court Erred in Excluding Plaintiff's Expert Witness without Conducting the Required *Burnet* Analysis.**

A trial court abuses its discretion by excluding a witness without explicitly establishing on the record that (1) the violation was willful, (2) the delay in disclosure substantially prejudiced Defendant's trial preparation, and (3) effective lesser sanctions are unavailable. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Because the court did not establish these three elements, it should not have imposed "one of the harsher remedies allowable under CR 37(b)." *See Id.* The trial court's error in excluding Dr. Barnett was twofold: First, even after Plaintiff's counsel alerted the court to the need for a *Burnet* analysis, the court failed to assess two of the three *Burnet* factors on the record. (RP 8:21-9:18). Second, the court's limited discussion of lesser sanctions was deficient in that it relied exclusively on the lateness of the disclosure without discussing any alternative sanction. (*Id.*) Certainly, the trial court was required to do something more to impartially analyze the situation.

"[I]t is an abuse of discretion to exclude testimony as a sanction for noncompliance with a discovery order absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable

conduct.” *Burnet*, 131 Wn.2d at 494, (quoting *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 706, 732 P.2d 974 (1987); *Smith v. Sturm, Ruger & Co.*, 39 Wn. App., 740, 750, 695 P.2d 600, *rev. den’d*, 103 Wn.2d 1041 (1985)). Although prior cases had suggested that willfulness could be established through a discovery violation alone, in *Blair*, the Washington Supreme Court noted that *Burnet*’s willfulness prong would be meaningless “if willfulness follows necessarily from the violation of a discovery order.” *Blair*, 171 Wn.2d at 350, n. 3. As a result, the trial court committed an error when it excluded Dr. Barnett without establishing facts to support a willful violation of a discovery order. *See Jones*, 314 P.3d at 391-392 (noting that the court erred in finding willfulness simply because the disclosing party had not established “good cause” for the violation, because this reversed the presumption of admissibility). Furthermore, there was no such willful violation here. As Plaintiff’s counsel noted during oral argument, Plaintiff retained and identified Dr. Barnett as soon as was practicable after Dr. Barnett published the work that brought her to Plaintiff’s attention. (RP 5:4-25; CP 588-89).

The trial court likewise failed to discuss whether Plaintiff’s delay in identifying Dr. Barnett substantially prejudiced Defendant’s trial preparation. It remained undisputed that Defendant intended to depose Dr.

Barnett prior to the ruling striking her as an expert witness. (RP 5:14-25). Unlike in past cases where courts applied *Burnet* and approved witness exclusion, here, Dr. Barnett was not identified days or hours before trial. *See Allied Fin. Servs. v. Mangum*, 72 Wn. App. 164, 168, 864 P.2d 1 (1994) (defendants failed to name any witnesses up to the time of trial and could not explain that deficiency); *see also Dempere v. Nelson*, 76 Wn. App. 403, 405, 886 P.2d 219 (1994), *rev. den'd* 126 Wn.2d 1015, 894 P.2d 565 (1995) (trial court excluded a witness who was named 13 days before trial). Rather, Plaintiff named Dr. Barnett as her expert witness before the discovery period expired, with sufficient time for Defendant to depose Dr. Barnett and identify a rebuttal expert if it chose. *See, e.g. Burnet*, 131 Wn.2d at 496-97. The fact that Plaintiff named Dr. Barnett soon after reading her book and retaining her services suggests that Defendant could have identified an expert on a similar timeline and well before trial. (RP 5:4-25; CP 588-89).

The trial court initially excluded Dr. Barnett without any discussion of any of the three *Burnet* factors, citing the lateness of Plaintiff's disclosure as the sole basis for that action. (RP 9:7-10:13). After Plaintiff's counsel noted *Burnet*'s requirement that the court address lesser sanctions on the record, the court briefly mentioned the term "lesser sanctions," but its analysis was cursory and flawed. (RP 8:21-9:18). First,

the court focused on the discovery deadline in stating that no alternative sanction was available. (*Id.*). But, *Burnet* comes into play only where a discovery deadline was missed; if the mere fact of a discovery violation established the unavailability of lesser sanctions, that prong of the *Burnet* analysis would serve no purpose. *See Blair*, 171 Wn.2d at 350, n. 3 (rejecting the same analysis with respect to the willfulness prong). Furthermore, the court refused to consider the actual, modified discovery cutoff, finding that the proximity between plaintiff's disclosure and the *original* discovery cutoff somehow precluded a lesser sanction. (RP 9:19-10:13).

Although Defendant made other arguments in support of exclusion, the court's ruling relied exclusively on the late witness disclosure, and the court's failure to address the *Burnet* factors was in error. (RP 9:7-10:13).

**C. Summary Judgment Was Improper Because There Are Material Questions of Fact to Support Plaintiff's Sex Discrimination Claim.**

In evaluating Washington Law Against Discrimination (WLAD) claims, Washington courts often rely on the burden-shifting analysis articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973). *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181 (2000). Under that framework, the plaintiff must first establish a

*prima facie* case of discrimination by setting forth evidence sufficient to raise an inference of discrimination. *McDonnell Douglas*, 411 U.S. at 802-04. The defendant then must produce evidence of a legitimate nondiscriminatory basis for its adverse employment action, after which the plaintiff has an opportunity to present evidence suggesting that the defendant's purported non-discriminatory rationale for its action is a pretext for discrimination. *Id.* The shifting burdens under *McDonnell Douglas* are burdens of production rather than persuasion; once the plaintiff has produced evidence to support a *prima facie* case and pretext, the ultimate question of discrimination belongs to the jury. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 623, 60 P.3d 106 (Div. 3. 2002) ("Our job is to pass upon whether a burden of production has been met, not whether the evidence *produced* is persuasive. That is the jury's role.").

Although Washington courts look to federal anti-discrimination cases like *McDonnell Douglas*, they follow only those federal "theories and rationales which best further the purposes and mandate of our state statute"<sup>2</sup> because "Washington's Law Against Discrimination contains a sweeping policy statement strongly condemning many forms of discrimination" and requiring courts to construe WLAD liberally in order

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<sup>2</sup> *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 361-62, 753 P.2d 517 (1988).

to achieve its broad remedial purpose.<sup>3</sup> In line with the remedial goals of WLAD and the fact-intensive nature of discrimination inquiries, Washington courts have noted that summary judgment should rarely be granted to employers in employment discrimination cases “because the evidence will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by the jury.” *Davis v. West One Auto. Group*, 140 Wn. App. 449, 456, 461, 166 P.3d 807 (Div. III, 2007); *see also Johnson v. Dept. of Social & Health Services*, 80 Wn. App. 212, 226, 907 P.2d 1223 (Div. I, 1996); *deLisle v. FMC Corporation*, 57 Wn. App. 79, 84, 786 P.2d 839 (Div. I, 1990), *rev. den.*, 114 Wn.2d 1026. Here, when the record and inferences therefrom are viewed in the light most favorable to Plaintiff, a grant of summary judgment on her sex discrimination claim was not proper, and the trial court should be reversed.

1. Ms. Muhl Made Out A Prima Facie Case of Sex Discrimination.

A plaintiff’s burden at the *prima facie* stage “is not onerous.” *Johnson v. Dept. of Social & Health Svcs.*, 80 Wn. App. 212, 228, 907 P.2d 1223 (1996) (quoting *Tex. Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 253-55, 101 S. Ct. 1089, 1094 (1981)). An employee makes out

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<sup>3</sup> *Allison v. Housing Authority of City of Seattle*, 118 Wn.2d 79, 85-86, 821 P.2d 34 (1991).

a *prima facie* case of sex discrimination by introducing evidence to support that (1) she is a member of a protected class; (2) she was performing her duties satisfactorily; (3) she was terminated; and (4) she was replaced by a male employee or otherwise was terminated under circumstances that give rise to an inference of discrimination.<sup>4</sup> See *Hill*, 144 Wn.2d at 181; see also *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (“The burden of establishing a *prima facie* case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.”).

These *prima facie* case factors are flexible and are subject to context-appropriate modifications. *Grimwood*, 110 Wn.2d at 367. They were designed to assure that an employee “has his [or her] day in court despite the unavailability of direct evidence” of discrimination. *Stork v. Int’l Bazaar*, 54 Wn. App. 274, 280 (1989). Here, Ms. Muhl satisfied her *prima facie* burden, as described below.

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<sup>4</sup> This standard grows from *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089 (1982) which described the *prima facie* case as testing whether the evidence would reasonably support an inference of discrimination if the defendant were silent as to its motives.

a. *Ms. Muhl Is a Female.*

The WLAD prohibits sex-based discrimination against both men and women. Any adverse employment action taken because of Ms. Muhl's female sex would be prohibited by RCW 49.60.

b. *Ms. Muhl Was Performing Her Job Satisfactorily.*

Ms. Muhl introduced evidence to support that her job performance as of the time of her termination was satisfactory. Ms. Muhl's performance ratings on her formal evaluations ranged from average to excellent in the two years leading up to her termination. (CP 306-07). Defendant's shareholders did not inform Ms. Muhl of any deficiencies in her performance at the time, other than constructive feedback regarding strengths and areas for improvement. (CP 287-88; 308-11). Exhibit E to Ms. Muhl's declaration reflects notes from an October 2011 meeting with Shareholder Ron Coleman, Ms. Muhl's assigned mentor, containing overall positive feedback with interspersed constructive pointers. (*Id.*; CP 290, 312-14, 338-39). She never received any written warning, letter of reprimand, performance improvement plan or similar indicator of performance deficiencies. (*Id.*). In addition, in each of the three years leading up to her termination, Ms. Muhl qualified for a performance bonus above her base salary. (CP 308-09). In 2011, Ms. Muhl's last full year at

Davies Pearson, she earned fees surpassing by approximately \$80,000 the financial goals Defendant set for her. (*Id.*).

c. *Ms. Muhl Was Terminated.*

Termination is a central adverse employment action under RCW 49.60. RCW 49.60.180(2). On October 30, 2012, Ron Coleman met with Ms. Muhl and informed her that she was expected to transition out of the firm. (CP 315). Whereas male employees were given the opportunity to resign in lieu of termination (in one case even following serious misconduct), Ms. Muhl was given no such option. (CP 314-15, 360). Defendant's employee roster identifies Ms. Muhl as "Terminated." (*Id.*). This circumstance was all the more unusual considering that Ms. Muhl kept working beyond her notice, whereas the employer immediately dismissed a male colleague that committed serious misconduct. (CP 291).

d. *The Circumstances Surrounding Ms. Muhl's Termination and Replacement Support an Inference of Discrimination.*

Ms. Muhl began her legal career at Davies Pearson in 1996. (CP 304-05). She left to take a position with a departing shareholder, but was recruited back to the firm in 2006, after developing a successful family law practice. (*Id.*). Before the firm hired Mark Nelson in 2011, Davies Pearson Shareholder Jim Tomlinson confirmed that Ms. Caulkins and Ms. Muhl were the two family law attorneys at Davies Pearson. (CP 289).

Another Shareholder, Ronald Coleman, confirmed that Davies Pearson hired Mr. Nelson because of his sex without any demonstrated need for an additional family law attorney. (*Id.*). Mr. Nelson's attorney fee income during 2011 and 2012 confirms that Davies Pearson did not have sufficient work for a third full-time family law attorney. (CP 335-36). However, rather than terminating or transferring Mr. Nelson, the less experienced attorney with substantially lower fee recovery than Ms. Muhl, Davies Pearson then terminated Ms. Muhl and retained Mr. Nelson as the firm's second family law attorney. (CP 289).

2. Plaintiff Provided Sufficient Evidence of Pretext to Require a Trial.

The plaintiff's final burden on summary judgment is limited, and the trial court here erred in holding that Ms. Muhl had not discharged that burden. *See Sellsted*, 69 Wn. App. at 860. In order to establish pretext, an employee need not produce evidence beyond that offered to establish a *prima facie* case. *Id.* (citing *Burdine*, 450 U.S. at 255, n. 10). Likewise, because we do not expect employers to announce their bad motives, no direct evidence is necessary to survive summary judgment. *Selsted, supra.* (citing *deLisle v. FMC Corp.*, 57 Wn. App. 79, 83, 786 P.2d 839 (Div. 1 1990)). Rather, an employee simply must produce enough evidence that a reasonable trier of fact could, but not necessarily would, draw the

inference that sex was a factor in the challenged employment decision. *See Id.*

During the course of this litigation, Defendant alleged that Ms. Muhl displayed performance deficiencies that provided a legitimate non-discriminatory basis for her termination. However, summary judgment was improper because Plaintiff provided sufficient evidence of pretext to require a jury trial on her sex discrimination claim. (CP 290-91, 312-15).

a. *Plaintiff Introduced Evidence to Support That Her Alleged Performance Deficiencies Were Insufficient to Motivate Her Termination.*

When presented evidence that an employer's stated basis for an adverse action is false or not the true reason, the trial court should ultimately find pretext. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("It is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation."). Similarly, employees may satisfy the third phase of the *McDonnell Douglas* test by presenting evidence to suggest that, even if an employer's purported legitimate non-discriminatory reason for termination was a factor in the discharge, it was "insufficient to motivate the adverse employment decision." *Sellsted*, 69 Wn. App. at 860. A temporal gap between a complaint that allegedly supported termination and the termination itself provides such evidence. *Kuyper v. Dep't of Wildlife*, 79

Wn. App. 732, 738-39, 904 P.2d 793 (1995) (Stating that a plaintiff can demonstrate pretext by showing that the employer's stated reasons for an adverse action did not occur close in time to the action); *see also Sellsted*, 69 Wn. App. at 865 (noting that satisfactory performance close in time to a termination supports pretext).

In the present case, two of the three events Defendant highlighted to support Ms. Muhl's termination occurred more than a year before the termination itself and did not lead to any disciplinary action at the time they occurred. (CP 290; 312-14). Furthermore, the instance in which Ms. Muhl allegedly demonstrated excessive emotion in the context of a judge's preliminary ruling related to a case that, prior to the termination, had resulted in a favorable outcome for both the client and the firm. In the second instance, the trial judge and Mr. Coleman both expressed satisfaction with the outcome of the issue long before the termination. (CP 313, 349).

With respect to the contempt hearing, it occurred after Defendant had already informed Ms. Muhl that she would not qualify for shareholder status. (CP 309, 313-14). Furthermore, in that instance, Ms. Muhl's allegedly deficient performance consisted of Ms. Muhl not attending a hearing on behalf of a client who had expressly instructed her not to attend. (CP 313-14). Particularly given Defendant's handling of more

severe breaches by Mr. Nelson, as discussed *infra* at p. 13, a jury could find that Ms. Muhl's performance shortcomings were not the true reason for a termination that was remote in time from the incidents Defendant has cited.

The timing of the termination also supports pretext in that the decision came on the heels of Ms. Muhl's most successful year financially on behalf of the firm; she had recovered \$329,000 in fees for Defendant, had received a performance bonus, and had not received any of the disciplinary notices that were available to Defendant as precursors to termination. Plaintiff proffered evidence to suggest that Defendant typically follows a practice of written disciplinary notifications. (CP 287).

Furthermore, the fact that Defendant did not hire a new family law attorney to replace Ms. Muhl calls into question whether her termination genuinely was based on performance. (CP 289). Mr. Nelson's earnings prior to the termination highlighted that the firm did not have sufficient business to support three family law attorneys. Based on experience, longevity with the firm, and earnings, Mr. Nelson would have been the natural choice for dismissal or transfer to another department. That Defendant opted instead to terminate Ms. Muhl (allegedly because of performance) but did not replace her with a new hire supports an inference

that it was Ms. Muhl's sex, rather than her performance, that motivated the termination. (*Id.*).

- b. *Defendant's Explicit Reliance on Sex as a Factor in Hiring Mr. Nelson Supports a Presumption that Sex Also Was a Factor in Terminating Ms. Muhl and Retaining Mr. Nelson as Defendant's Second Family Law Attorney.*

References to protected class status in the context of a challenged employment action can support a finding of discrimination. *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321 (11th Cir. 2011). In *Smith*, the trial court granted summary judgment on the employee's race discrimination claim because the Caucasian plaintiff was a supervisor and his proposed comparators were non-supervisory employees. The Eleventh Circuit rejected the trial court's reasoning, identifying factors that could lead a reasonable jury to conclude that race played a role in the decision to terminate (rather than suspending) the Caucasian plaintiff for sending a racist email. For example, the court noted that the disciplinary matrix prepared in the context of the termination decision expressly identified the race of each of the people accused of sending the offensive email. *Id.*

Here, in 2011, Davies Pearson hired Mark Nelson without any demonstrated need for an additional family law attorney. (CP 289). When Mr. Nelson was hired, the firm began supplying the younger male

associate with intra-firm referral work and began to cut Ms. Muhl's file referrals off. (*Id.*).

A Shareholder of Davies Pearson acknowledged that Mr. Nelson was hired because of his sex. (CP 289). Mr. Coleman attempted to justify his statement that Mr. Nelson was hired because of his sex by stating that Davies Pearson wanted male and female lawyers in the family law unit because some clients prefer to work with a lawyer of one gender over another. (*Id.*).

A defendant can establish a legal defense to a discrimination complaint if sex is a *bona fide* occupational qualification for the stated position; however, such a defense is only available where "excluding members of a particular protected status group is 'essential to ... the purposes of the job.'" *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 358, 172 P.3d 688 (2007). That standard only is met where "substantially all" members of the protected class would be unable to perform the duties of the job. *Id.* Client preference does not establish a *bona fide* occupational qualification (BFOQ) for a position. *Franklin Co. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 646 P.2d 113, 117 (1982), (*citing Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971), *cert. denied*, 404 U.S. 950, 92 S.Ct. 275 (1971)) (rejecting a proposed BFOQ based on customer preference for female flight attendants). The sex of an attorney is

not critical to “authenticity or genuineness” similar to a model or actor; nor does it relate to “conventional standards of sexual privacy” as with a locker-room attendant or intimate apparel fitter. *Id.* at 118. *Furthermore, absent a defensible BFOQ, an employer may not attempt to achieve sexual balance by hiring an employee of a particular sex for a position. Id.* at 118-19. Unless substantially all two-woman teams would be unable to perform the required functions of a job or the essential functions of the program would be undermined by a two-woman team, preference for a male employee because of his sex is unlawful. *Id.* at 119. This is contradictory to the evidence, as Susan Caulkins and Ms. Muhl successfully served Defendant’s family law department prior to Mr. Nelson’s hire. (CP 289).

A reasonable jury could conclude that, just as Davies Pearson considered Mr. Nelson’s sex in hiring him to join the family law group, it considered Mr. Nelson’s and Ms. Muhl’s respective sex in deciding to terminate the latter and to retain the less-experienced male employee. This particularly is true given that they earned similar salaries and Ms. Muhl brought in hundreds of thousands of dollars more income the firm during their two years of overlapping employment. (CP 308-09, 335-36).

c. *The Superior Treatment of Male Employees Who Demonstrated Performance Deficiencies also Supports a Finding of Sex Discrimination.*

Where the employer has justified the plaintiff's termination by citing alleged misconduct, the plaintiff can establish pretext and survive summary judgment if an employee outside the plaintiff's protected class committed acts of similar seriousness without being similarly disciplined. *Johnson v. Dept. of Social & Health Svcs.*, 80 Wn. App. 212, 227, 907 P.2d 1223 (Div. II 1996). In the context of analyzing pretext, the *McDonnell Douglas* Court noted that "[e]specially relevant to such a showing would be evidence that white employees involved in acts ... of comparable seriousness to the [African-American plaintiff's acts] were nevertheless retained or rehired. [A discrimination defendant] may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races." *McDonnell Douglas*, 411 U.S. at 804.

In the present case, Ms. Muhl was singled out for negative treatment that her male colleagues did not experience in similar circumstances. (CP 289-91, 314). For example, when Ms. Muhl mistakenly ordered lunch for a work meeting that conflicted with a CLE session she planned to attend, Mr. Coleman responded by questioning Ms.

Muhl's integrity. (*Id.*). A male employee who made the same mistake on the same day did not appear to receive the same rebuke. (*Id.*).

More significantly, Ms. Muhl allegedly was terminated because of performance deficiencies related to demonstrating what her employer felt was excessive emotion in court on one occasion, declining to appear at a hearing her client instructed her not to attend, and misinterpreting a court ruling in a way that the judge ultimately indicated he understood and Mr. Coleman indicated she handled well. (CP 290-91, 312-14). In contrast, Mr. Nelson's own significant performance deficits did not likewise result in termination. (CP 289). Specifically, Mr. Nelson erroneously divorced a client that did not wish to be divorced, yet Defendant did not discipline or terminate Mr. Nelson. (*Id.*). Given that a reasonable person could find that Mr. Nelson's performance breach was substantially more serious than the issues Defendant has highlighted in justifying Ms. Muhl's termination, *Johnson and McDonnell Douglas* support a finding of pretext here.

- d. *A Jury Could Find that Defendant's Comparatively Greater Investment in its Male Family Law Associate Supports Plaintiff's Sex Discrimination Claim.*

Defendant's relative financial investment in Mr. Nelson versus its female family law associates also supports a finding of pretext. 2010 was Susan Caulkins's first year with the firm. She brought in \$288,000. 2011 was Mark Nelson's first year. He brought in \$132,000 to the firm. In the

year after each associate's respective first year, Ms. Caulkins retained her \$80,000 salary whereas Mr. Nelson received a salary increase. (CP 308-09, 334-36).

***Base Salary as a Percentage of Fees 2010-2012*** (CP 334-36).

	2010 Fees	2010 Salary	2010 %	2011 Fees	2011 Salary	2011 %	2012 Fees	2012 Salary	2012 %
Csilla Muhl	244,914	80,000	33%	329,360	80,000	24%	216,433	85,000	39%
Susan Caulkins	288,142	80,000	28%	253,019	80,000	32%	290,470	90,000	31%
Mark Nelson				132,042	76,410	58%	171,754	84,000	49%

Nor did the Defendant invest in its female family law associates in the form of bonuses that acknowledged their financial benefit to the firm. The result was that, in the period immediately leading up to Ms. Muhl's termination, the firm demonstrated a willingness to invest in Nelson by paying him over half of the money he brought into the firm during 2011-12. In contrast, the two female associates in the group received total compensation that reflected less than a third of their fee recovery during the same period. (CP 308-09, 334-36).

***Total Compensation as a Percentage of Fee Income 2010-2012*** (CP 334-36).

	2010 Fees	2010 Comp	2010 Comp %	2011 Fees	2011 Comp	2011 Comp %	2012 Fees	2012 Comp.	2012 Comp %
Csilla Muhl	244,914	81,000	33%	329,360	90,000	27%	216,433	85,000	39%
Susan Caulkins	288,142	87,500	30%	253,019	81,503	32%	290,470	90,000	31%
Mark Nelson				132,042	76,410	58%	171,754	84,000	49%

Similarly, a reasonable jury could find that Defendant invested in male associates through enhanced promotional opportunities. Defendant has suggested during this litigation that, whereas Ms. Muhl was not qualified for shareholder status, two other female employees—Susan Caulkins and Rebecca Larson—were offered such status during the same time period. (CP 24-25, 307-08). However, in June 2012, in the context of telling Ms. Muhl that she was not being considered for shareholder status, Ron Coleman specifically identified Ms. Caulkins and Ms. Larson as other employees who were not on track for shareholder status and would remain associates.<sup>5</sup> (CP 309-12). Mr. Coleman’s statement, coupled with the fact that Defendant now identifies both Ms. Caulkins and Ms. Larson as qualified for shareholder status highlights that, prior to this litigation, Defendant failed to give women fair consideration for such a promotion even where they were qualified. (CP 307-09).

Particularly considered in tandem, the evidence that Ms. Muhl’s performance shortcomings were not the true reason for her termination, that her male coworker’s deficiencies did not result in termination, that sex was an explicit consideration in selecting personnel for the family law department, and that Davies Pearson made more substantial investments in

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<sup>5</sup> Ms. Caulkins’s eventual promotion to shareholder was a post-remedial measure that occurred during the course of this litigation.

the development and advancement of its male associates, Plaintiff established sufficient evidence of pretext that her sex discrimination claim should have gone to a jury. Plaintiff therefore respectfully requests that this court reverse the trial court and remand for a jury trial of her sex discrimination claim.

**D. Ms. Muhl's Retaliation Claim Also Should Have Proceeded To Trial.**

Under Washington law, it is unlawful for an employer to “discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by” the Washington Law Against Discrimination. RCW 49.60.210. To establish a *prima facie* case of retaliation, a plaintiff must show that 1) she complained of discrimination, 2) she suffered an adverse employment action, and 3) there was a causal connection between the exercise of the statutory right and the adverse action. *Wilmot v. Kaiser Alum.*, 118 Wn.2d 46 (1991); *Allison v. Seattle Housing Auth.*, 118 Wn.2d 79 (1991); accord *Graves v. Dep't of Game*, 76 Wn. App. 705, 712 (Div. III 1994); see also: WPI 330.05. Our courts have observed that “[b]ecause employers rarely will reveal they are motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose.” *Vasquez v. State*, 94 Wn.

App. 976, 985 (Div. III, 1999), *review den'd*, 138 Wn.2d 1019 (1999);  
*Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991).

1. Ms. Muhl Objected to the Superior Treatment Defendant Provided to Mr. Nelson.

For purposes of the first prong of the retaliation inquiry, the plaintiff need not demonstrate that the conduct she opposed rose to the level of actionable discrimination under WLAD. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006) (holding that the scope of the Title VII retaliation provision is broader than its discrimination provision).

In November 2011, Ms. Muhl complained to Davies Pearson shareholder Ron Coleman that the firm was providing support and opportunities to the male family law associate that were not provided to its female associates. (CP 309-11).

2. Following Ms. Muhl's Complaint, Davies Pearson Removed Her from Its Partnership Track and Then the Firm.

In order to qualify as an “adverse action” for purposes of a retaliation claim, an employer’s act need not affect the terms or conditions of the plaintiff’s employment. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). Rather, any act that would have the effect of discouraging a reasonable employee from making or supporting a

charge of discrimination constitutes an “adverse action” for purposes of establishing retaliation. *Id.* Given that WLAD is broader than Title VII and is to be more liberally construed,<sup>6</sup> this case is *a fortiori* to *Burlington Northern*.

In the present case, after Ms. Muhl’s complaint, Davies Pearson decided to remove her from the partnership track and then to terminate her employment with the firm. (CP 309-12, 314-15). Both actions are sufficiently negative that they could dissuade a reasonable person from participating in a protected activity. As a result, Ms. Muhl met the second element of the retaliation inquiry.

3. Plaintiff Introduced Adequate Evidence of Causation that Summary Judgment Dismissal Was an Error.

The third retaliation element is met by establishing that the employee complained of discrimination, the employer knew of it, and adverse action ensued. *Graves*, 76 Wn. App. at 712. Where there is adequate circumstantial evidence of retaliation to permit a reasonable jury to conclude that retaliation was a substantial factor in an adverse action, the court should not “engage in a mechanical inquiry into the amount of time between the [protected activity] and the alleged retaliatory action.”

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<sup>6</sup> See e.g.: *Marquis v. Spokane*, 130 Wn.2d 97, 922 P.2d 43 (1996).

*Anthoine v. North Central Co. Consortium*, 605 F.3d 740, 751 (9th Cir. 2010); *Kahn v. Salerno*, 90 Wn. App. 110, 130, 951 P.2d 321 (1998).

Here, there was sufficient evidence of causation that Plaintiff's retaliation claim should have gone to the jury. (CP 288-89). Ms. Muhl's fee income performance in 2011 should have merited consideration for partnership status. (CP 307-08). Instead, following her complaint, at the next opportunity and for the first time, Ms. Muhl was informed that she was no longer on the partner track and that if she wanted to pursue a partnership-level position, she would need to do so at another firm. (CP 309-12, 314-15). Adding insult to injury, Mr. Coleman also noted that Ms. Muhl was not getting any younger and should make the transition soon if partnership was her goal. (*Id.*). Thereafter, Mr. Coleman informed her that she was required to transition out of the firm altogether.

In the context of this sex discrimination litigation, Defendants have claimed that two other female employees were qualified for partnership, despite having significantly lower earnings than Ms. Muhl as of the time she was removed from the partnership track in 2012. (CP 24-25, 308-09). If the jury believes that Defendant truly considered Ms. Caulkins and Ms. Larsen to be qualified for partnership in spite of their lower fee earnings, a reasonable jury could conclude that Defendant's decision to disqualify Ms.

Muhl from the partner track on the heels of her most successful earnings year was motivated in part by her discrimination complaint.

Similarly, Defendant's decision to record Plaintiff's separation as a "termination" supports a finding of retaliation. (CP 290-91). When a colleague was involuntarily separated following severe misconduct, Davies Pearson recorded his termination as a resignation. (CP 360). In contrast, Defendant's records reflect that Ms. Muhl is the sole separated attorney whose separation was recorded as a termination. (*Id.*). Because a reasonable person could fear that such a designation would make it more difficult to find future employment, it reasonably would deter individuals from participating in protected activity. The fact that this designation was reserved for Plaintiff alone among Defendant's separated attorneys, despite the fact that at least one terminated individual engaged in severe misconduct, supports that the designation was retaliatory. Summary judgment was improper and should be reversed.

**E. Because Comments and Actions by the Trial Judge Would Lead a Disinterested Person to Question Whether Plaintiff Received a Fair, Neutral, and Impartial Hearing, a Different Judicial Officer Should Consider the Case on Remand.**

A judicial proceeding only is valid if it would appear to a reasonably prudent and disinterested observer that "all parties obtained a fair, impartial, and neutral hearing." *State v. Bilal*, 77 Wn. App. 720, 722,

893 P.2d 674 (1995); *State v. Ladenburg*, 67 Wn. App. 749, 754-55, 840 P.2d 228 (1992). When assessing a case under the appearance of fairness doctrine, the reviewing court must evaluate how the hearing would appear to a reasonable person. *State v. Martinez*, 76 Wn. App. 1, 8, 884 P.2d 3 (Div. I 1994) (concluding that the doctrine had not been violated where the judge made rulings in favor of both parties and came to reasoned conclusions).

In the present case, several shortcomings in the August 8 hearing could lead a reasonably prudent and impartial observer to question whether Ms. Muhl received a fair hearing. As was discussed *supra* at pp. 7-12, the court failed to heed the requirements of established case law when considering Defendant's motion to exclude Plaintiff's expert witness, even after Plaintiff's counsel explicitly directed the court to the relevant precedent.

Judge Stolz also made comments that could lead a reasonable observer to question her attention to the evidence favorable to Ms. Muhl, her reliance on input outside of the record in the case, or both. For example, Judge Stolz insisted that Ms. Muhl had resigned her position, even where Defendant's own records unequivocally state that Ms. Muhl was terminated. (RP 21:21-22:10; CP 290-91, 314-15). Although there was no such evidence in the record, Judge Stolz relied on what appeared to

be her own impressions of the size and division of departments in Davies Pearson. (RP 32:18-33:2). Significantly, Judge Stolz stated that Ms. Muhl's behavior in a separate case had outraged one of Judge Stolz's colleagues, Judge Hickman, where there was no evidence in the record to support that characterization. (RP 30:4-7; CP 312-13, 349). On the contrary, the evidence submitted in the case included a bland letter from Judge Hickman regarding the matter in question. (*Id.*). Given the lack of evidence to support Judge Stolz's dramatic characterization of Judge Hickman's impressions, a reasonable observer likely would be concerned either that Judge Stolz lacked attention to critical evidence favorable to Ms. Muhl<sup>7</sup> or that she received information outside of the record regarding impressions that Judge Hickman never shared in his communications with Ms. Muhl. In either case, Judge Stolz's statements during the summary judgment/motion to strike hearing create significant appearance of fairness concerns.

The appearance of fairness doctrine considers the impressions of an impartial viewer who is knowledgeable about all of the relevant facts and legal factors at play in a case. *In re Marriage of Davison*, 112 Wn. App. 251, 257, 48 P.3d 358 (2002) (*quoting Sherman v. State*, 128 Wn.2d

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<sup>7</sup> Judge Stolz also mistakenly referred to Rebecca Larsen as a third female attorney in family law, supporting that women were able to succeed in that department for purposes of Ms. Muhl's sex discrimination claim. However, Ms. Larsen was not a family law attorney.

164, 206, 905 P.2d 355(1995)). In this instance, that would mean that the relevant witness would be aware of what was (and was not) in the record and of the expectation that the court view the facts in the light most favorable to the non-moving party given the summary judgment context. Here, Judge Stolz viewed critical facts such as Ms. Muhl's termination status in the light most favorable to *the defendant*, supplemented the record with her impression of outside facts favorable to *the defendant*, and failed to undertake legal analysis required by established precedent in the course of ruling for the defendant. Given that, an impartial viewer likely would be concerned that Ms. Muhl failed to receive fair consideration in the context of the August 8 hearing, such that this matter should be considered by a different judge on remand

**F. Plaintiff Requests Attorneys' Fees under RCW 49.60.030 and RAP 18.1.**

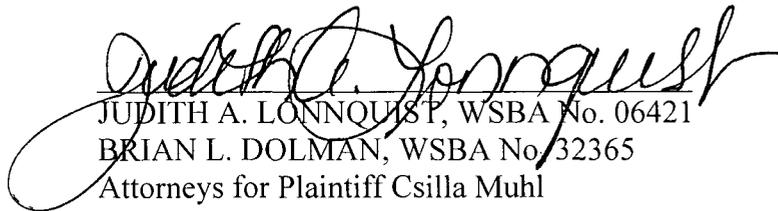
Plaintiff is entitled under RCW 49.60.030(2) to reasonable attorneys' fees on appeal if she ultimately prevails on one or more substantive WLAD claims at trial. *See Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930 (2004). Plaintiff requests such fees on appeal. RAP 18.1.

#### IV. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Court reverse summary judgment and remand for trial of Plaintiff's claims before a different judge. Plaintiff likewise requests that the trial court's ruling to exclude her expert witness, on the basis of her untimely disclosure, be reversed. Should the Court grant this relief, Plaintiff further request the attorneys' fees and costs necessarily incurred on this appeal.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of December, 2014.

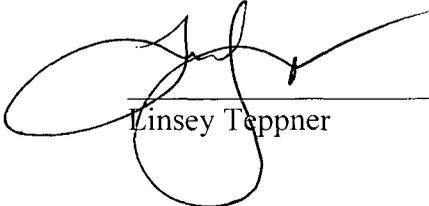
LAW OFFICES OF  
JUDITH A. LONNQUIST, P.S.

  
JUDITH A. LONNQUIST, WSBA No. 06421  
BRIAN L. DOLMAN, WSBA No. 32365  
Attorneys for Plaintiff Csilla Muhl

CERTIFICATE OF SERVICE

I, Linsey Teppner, an employee of the Law Offices of Judith A. Lonquist, P.S., declare under penalty of perjury that on December 12, 2014, I caused to be served upon the below-listed parties, via the method of service listed below, a true and correct copy of the foregoing document.

Party	Method of Service
Lori M. Bemis Dave J. Luxenburg McGavick Graves 1102 Broadway, Suite 500 Tacoma, WA 98402	<input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Regular Mail <input type="checkbox"/> Facsimile

  
\_\_\_\_\_  
Linsey Teppner

## Appendix A

**Pierce County Superior Court Civil Case 13-2-07742-1**

Case Title: CSILLA NUHL VS. DAVIES PEARSON PC  
Case Type: Tort - Other  
Access: Public  
Track Assignment: Complex  
Jury Size: 12  
Estimated Trial Length:  
Dept Judge: **02 KATHERINE M. STOLZ**  
Resolution: 08/08/2014 Summary Judgment  
Completion: 08/08/2014 Judgment/Order/Decree Filed

**Litigants**

Name	Type	Status
<b>MUHL, CSILLA</b>	Plaintiff	
<b>Attorney for MUHL, CSILLA</b>		<b>Bar Number</b>
<b><u>JUDITH A. LONNQUIST</u></b>	Atty for Plaintiff/Petitioner	6421
<b>DAVIES PEARSON PC</b>	Defendant	
<b>Attorneys for DAVIES PEARSON PC</b>		<b>Bar Number</b>
<b><u>Dave Luxenberg</u></b>	Atty for Defendant	28438
<b><u>Lori Marie Bemis</u></b>	Atty for Defendant	32921

**Filings**

Filing Date	Filing	Access	Pages	Microfilm
03/29/2013	FILING FEE RECEIVED \$240.00	Public	0	
03/29/2013	CASE INFORMATION COVER SHEET	Public	1	
03/29/2013	ORDER SETTING ORIGINAL CASE SCHEDULE	Public	1	
03/29/2013	SUMMONS	Public	2	
03/29/2013	COMPLAINT FOR DAMAGES AND OTHER RELIEF	Public	6	
05/02/2013	AFFIDAVIT/DECLARATION OF SERVICE	Public	1	
05/03/2013	NOTICE OF APPEARANCE	Public	3	
05/03/2013	NOTICE OF ABSENCE/UNAVAILABILITY	Public	3	
05/08/2013	LETTER FROM DEPARTMENT 5	Public	1	
05/09/2013	REASSIGNED TO DEPT 5	Public	1	
05/29/2013	ANSWER	Public	5	
05/29/2013	DECLARATION OF SERVICE	Public	1	
10/01/2013	CONFIRMATION OF JOINDER OF PARTIES, CLAIMS AND DEFENSES	Public	3	
10/02/2013	JURY DEMAND - 12	Public	1	
11/06/2013	NOTICE OF ABSENCE/UNAVAILABILITY	Public	3	
11/06/2013	PROTECTIVE ORDER (RE: CONFIDENTIAL DISCOVERY DOCUMENTS, NOT RELATED)	Public	9	
12/19/2013	REASSIGNMENT LETTER	Public	1	
01/29/2014	NOTICE OF ABSENCE/UNAVAILABILITY	Public	3	
02/27/2014	NOTICE OF ABSENCE/UNAVAILABILITY	Public	3	
05/08/2014	LETTER FROM DEPARTMENT 2	Public	1	
05/08/2014	REASSIGNED TO DEPT 14	Public	1	
05/08/2014	REASSIGNED TO DEPT 2	Public	1	
05/20/2014	NOTE FOR JUDGES MOTION CALENDAR	Public	1	
05/23/2014	NOTE FOR JUDGES MOTION CALENDAR	Public	2	
05/23/2014	MOTION TO CONTINUE	Public	5	
05/23/2014	AFFIDAVIT/DECLARATION OF COUNSEL IN SUPPORT	Public	4	
05/23/2014	AFFIDAVIT/DECLARATION OF COUNSEL IN SUPPORT	Public	4	
05/23/2014	MOTION FOR PARTIAL SUMMARY JUDGMENT	Public	13	
05/23/2014	AFFIDAVIT/DECLARATION IN SUPPORT	Public	10	
05/23/2014	AFFIDAVIT/DECLARATION IN SUPPORT	Public	40	
05/23/2014	AFFIDAVIT/DECLARATION IN SUPPORT	Public	89	
05/23/2014	AFFIDAVIT/DECLARATION OF SERVICE	Public	2	
06/04/2014		Public	4	

	RESPONSE IN OPPOSITION TO MOTION TO CONTINUE		
06/04/2014	DECLARATION OF BRIAN KING	Public	5
06/04/2014	DECLARATION OF LORI M. BEMIS	Public	5
06/04/2014	AFFIDAVIT/DECLARATION OF SERVICE	Public	2
06/05/2014	NOTE FOR JUDGES MOTION CALENDAR	Public	2
06/05/2014	REPLY IN SUPPORT	Public	4
06/05/2014	DECLARATION OF BRIAN L DOLMAN	Public	4
06/09/2014	RESPONSE TO MOTION	Public	9
06/09/2014	DECLARATION OF CSILLA MUHL	Public	10
06/13/2014	ORDER DENYING MOTION	Public	2
06/16/2014	REPLY IN SUPPORT	Public	12
06/16/2014	REPLY DECLARATION OF LORI M. BEMIS	Public	9
06/16/2014	AFFIDAVIT/DECLARATION OF SERVICE	Public	2
06/19/2014	NOTE FOR JUDGES MOTION CALENDAR	Public	1
06/19/2014	MOTION FOR RECONSIDERATION	Public	5
06/19/2014	AFFIDAVIT/DECLARATION IN SUPPORT	Public	8
06/20/2014	CLERK'S MINUTE ENTRY	Public	2
06/20/2014	ORDER GRANTING PARTIAL SUMMARY JUDGMENT	Public	2
06/25/2014	RESPONSE IN OPPOSITION	Public	11
06/25/2014	DECLARATION OF LORI M. BEMIS	Public	42
06/25/2014	AFFIDAVIT/DECLARATION OF SERVICE	Public	2
06/26/2014	PRAECIPE	Public	3
06/27/2014	CLERK'S MINUTE ENTRY	Public	2
06/27/2014	NOTE FOR JUDGES MOTION CALENDAR	Public	1
06/27/2014	MOTION FOR SUMMARY JUDGMENT	Public	11
06/27/2014	DECLARATION OF SUSAN L. CAULKINS	Public	15
06/27/2014	DECLARATION OF RONALD COLEMAN	Public	17
06/27/2014	DECLARATION OF ANGELA COOPER	Public	38
06/27/2014	DECLARATION OF REBECCA M. LARSON	Public	2
06/27/2014	DECLARATION OF LAMONT LOO	Public	18
06/27/2014	DECLARATION OF ANNE PECK	Public	12
06/27/2014	DECLARATION OF JAMES TOMLINSON	Public	16
06/27/2014	DECLARATION OF LORI M. BEMIS	Public	112
06/27/2014	AFFIDAVIT/DECLARATION OF SERVICE	Public	2
06/27/2014	ORDER EXTENDING DISCOVERY CUTOFF	Public	2
06/30/2014	NOTICE OF ABSENCE/UNAVAILABILITY	Public	3
07/02/2014	NOTE FOR JUDGES MOTION CALENDAR	Public	1
07/10/2014	PRETRIAL ORDER	Public	4
07/28/2014	RESPONSE IN OPPOSITION	Public	19
07/28/2014	DECLARATION OF C. MUHL	Public	56
07/28/2014	DECLARATION OF J. SKALSKI	Public	4
07/29/2014	DECLARATION OF B. DOLMAN	Public	85
07/31/2014	NOTE FOR JUDGES MOTION CALENDAR	Public	1
07/31/2014	MOTION TO STRIKE	Public	20
07/31/2014	AFFIDAVIT/DECLARATION OF SERVICE	Public	2
08/06/2014	REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	Public	23
08/06/2014	REPLY DECLARATION OF LAMONT LOO	Public	4
08/06/2014	REPLY DECLARATION OF MARK NELSON	Public	8
08/06/2014	REPLY DECLARATION OF BRIAN KING	Public	4
08/06/2014	REPLY DECLARATION OF DAISY BROWN	Public	7
08/06/2014	REPLY DECLARATION OF LORI M. BEMIS	Public	73
08/06/2014	AFFIDAVIT/DECLARATION OF SERVICE	Public	2
08/06/2014	DECLARATION OF CSILLA MUHL	Public	4
08/06/2014			43

	DECLARATION OF R. BARNETT	Public
08/06/2014	RESPONSE IN OPPOSITION	Public 5
08/07/2014	PRAECIPE W/DECLARATION	Public 6
08/07/2014	REPLY IN SUPPORT OF MOTION TO STRIKE	Public 7
08/07/2014	DECLARATION OF LORI M. BEMIS	Public 4
08/07/2014	AFFIDAVIT/DECLARATION OF SERVICE	Public 2
08/07/2014	DECLARATION OF LINSEY M. TEPPNER	Public 3
08/08/2014	CLERK'S MINUTE ENTRY	Public 2
08/08/2014	CLERK'S MINUTE ENTRY	Public 2
08/08/2014	ORDER GRANTING MOTION FOR SUMMARY JUDGMENT	Public 3
08/08/2014	ORDER GRANTING MOTION TO STRIKE	Public 2
08/18/2014	NOTE FOR JUDGES MOTION CALENDAR	Public 1
08/18/2014	DEFENDANT'S MOTION FOR AWARD OF COSTS	Public 3
08/18/2014	DECLARATION OF DAVE LUXENBERG	Public 2
08/18/2014	AFFIDAVIT/DECLARATION OF SERVICE	Public 2
08/27/2014	NOTICE OF APPEAL WITH FEE	Public 7
08/28/2014	LETTER FROM ATTORNEY	Public 1
08/28/2014	TRANSMITTAL LETTER COPY FILED	Public 1
08/29/2014	COST BILL	Public 3
08/29/2014	JUDGMENT	Public 3
08/29/2014	ORDER GRANTING MOTION FOR AN AWARD OF COSTS	Public 2
09/02/2014	NOTICE OF ABSENCE/UNAVAILABILITY	Public 3
09/25/2014	DESIGNATION OF CLERK'S PAPERS	Public 4
09/30/2014	CLERK'S PAPERS PREPARED	Public 4
10/10/2014	REQUEST FOR COPIES OF CLERK'S PAPERS	Public 1
10/13/2014	RECEIPT(S) OF FUNDS \$2024.75	Public 1
10/13/2014	NOTICE OF FILING A VERBATIM REPORT	Public 1
10/13/2014	CLERK'S PAPERS SENT	Public 1



**PURCHASE COPIES**

### Proceedings

Date	Calendar	Outcome
11/08/2013	DEPT 05 - JUDGE HOGAN (Rm. 2-E ) Unconfirmed 12:00 Status Conference	Cancelled/Stricken
06/06/2014	DEPT 02 - JUDGE STOLZ (Rm. 214A) Unconfirmed 9:00 Motion(Adjust Trial Date) Scheduled By: JUDITH LONNQUIST	Cancelled - Not Confirmed
06/13/2014	DEPT 02 - JUDGE STOLZ (Rm. 214A) Confirmed 9:00 Motion(Adjust Trial Date) Scheduled By: JUDITH LONNQUIST	Motion Held
06/20/2014	DEPT 02 - JUDGE STOLZ (Rm. 214A) Confirmed 9:00 Motion - Part Summary Judgment Scheduled By: Anita Acosta	Motion Held
06/27/2014	DEPT 02 - JUDGE STOLZ (Rm. 214A) Confirmed 9:00 Motion - Reconsideration Scheduled By: JUDITH LONNQUIST	Motion Held
07/25/2014	DEPT 02 - JUDGE STOLZ (Rm. 214A) Unconfirmed 9:00 Motion - Summary Judgment Scheduled By: Anita Acosta	Cancel via Web-Rescheduled
08/08/2014	DEPT 02 - JUDGE STOLZ (Rm. 214A) Confirmed 9:00 Motion - Summary Judgment	Summary Judgment Held

Scheduled By: Anita Acosta

08/08/2014 DEPT 02 - JUDGE STOLZ (Rm. 214A)  
Confirmed 9:00 Motion(Other: STRIKE)

Motion Held

Scheduled By: Anita Acosta

08/29/2014 DEPT 02 - JUDGE STOLZ (Rm. 214A)  
Confirmed 9:00 Motion(Other: AWARD OF COSTS PURSUANT TO RCW 4.84.030)

Ex-Parte w/ Order Held

Scheduled By: Anita Acosta

09/05/2014 DEPT 05 - JUDGE HOGAN (Rm. 2-E )  
Unconfirmed 12:00 Pretrial Conference

Cancelled/Stricken

09/25/2014 DEPT 02 - JUDGE STOLZ (Rm. 214A)  
Confirmed 9:00 Trial

Cancelled/Stricken

**Original Case Schedule Items**  
Event Schedule Date

**Judgments**

Cause #	Status	Signed	Effective	Filed
<u>14-9-08566-5</u>	OPEN as of 08/29/2014	KATHERINE M. STOLZ on 08/29/2014	08/29/2014	08/29/2014

This calendar lists Confirmed and Unconfirmed Proceedings. Attorneys may **obtain access rights** to confirm/strike selected proceedings. Currently, any proceedings for the Commissioners' calendars can be stricken, but only Show Cause proceedings for the Commissioners' calendars can be confirmed.

Unconfirmed Proceedings will not be heard unless confirmed as required by **the Local Rules of the Superior Court for Pierce County**.

- Hearing and location information displayed in this calendar is subject to change without notice. Any changes to this information after the creation date and time may not display in current version.
- Confidential cases and Juvenile Offender proceeding information is not displayed on this calendar. Confidential case types are: Adoption, Paternity, Involuntary Commitment, Dependency, and Truancy.
- The names provided in this calendar cannot be associated with any particular individuals without individual case research.
- Neither the court nor clerk makes any representation as to the accuracy and completeness of the data except for court purposes.

Created: Friday November 21, 2014 10:27AM

WINSTON J. JAMES, CLERK  
COURT REPORTER  
SUPERIOR COURT