

65936-7

65936-7

No. 65936-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CRAIG RICE, an individual,

Appellant,

v.

OFFSHORE SYSTEMS, INC., a Washington Corporation,

Respondent.

BRIEF OF RESPONDENT

Matthew C. Crane, WSBA No. 18003
Susan K. Kaplan, WSBA No. 40985
Attorneys for Respondent Offshore Systems, Inc.

BAUER MOYNIHAN & JOHNSON LLP
2101 Fourth Avenue, Suite 2400
Seattle, Washington 98121
Telephone: 206-443-3400
Facsimile: 206-448-9076
E-mail: mcrane@bmjlaw.com
E-mail: skkaplan@bmjlaw.com

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ISSUE ON APPEAL 2

III. STATEMENT OF THE CASE..... 2

 A. BACKGROUND..... 2

 B. FIRE INCIDENT 3

 C. TERMINATION 6

 D. REBUTTAL STATEMENT 8

IV. ARGUMENT 9

 A. SUMMARY JUDGMENT WAS PROPER BECAUSE RICE FAILED TO MEET HIS BURDEN TO SHOW THAT OSI'S REASONS FOR TERMINATION WRE PRETEXTUAL..... 9

 1. Summary of Argument 9

 2. The trial court properly granted summary judgment because Rice failed to show that OSI's reasons for termination had no basis in fact. 11

 3. Rice failed to establish pretext because he failed to demonstrate that OSI's preferred reasons were not reasonable or motivating factors for the decision to terminate his employment...... 16

 a. *OSI's reasons for termination were both objectively reasonable and consistent with the standards of conduct set forth in OSI's employee manual.* 16

 b. *OSI's stated reasons were clearly the motivating factors for its termination of Rice's employment* 17

4. No reasonable jury could conclude that OSI terminated Rice's employment because of his age..... 20

B. THE POLICE REPORTS WERE PROPERLY CONSIDERED AS EVIDENCE BECAUSE THEY WERE BOTH AUTHENTICATED AND NOT OFFERED FOR THE TRUTH OF THE MATTER ASSERTED..... 21

1. The trial court correctly denied Rice's motion to strike because the police reports were properly authenticated. 21

2. The police reports were admissible because they were submitted as supporting the reasons for OSI's termination decision rather than the truth of the matters asserted in them..... 22

V. CONCLUSION 23

TABLE OF AUTHORITIES

CASES

| | |
|--|----------------|
| <i>Burnmeister v. State Farm Ins. Co.</i> , 92 Wn. App. 359, 966 P.2d 921 (1998)..... | 21 |
| <i>Chen v. State</i> , 86 Wn. App. 183, 190, 937 P.2d 612, review denied, 133 Wn.2d 1020 (1997)..... | 10, 14, 15 |
| <i>Domingo v. Boeing Employees' Credit Union</i> , 124 Wn. App. 71, 77–78, 98 P.3d 1222 (2004)..... | passim |
| <i>Elrod v. Sears, Roebuck & Co.</i> , 939 F.2d 1466, 1470 (11th Cir. 1991) | 12 |
| <i>Ezold v. Wolf, Block, Schorr & Soli-Cohen</i> , 983 F.2d 509, 545 (3d Cir. 1992), cert. denied 114 S.Ct. 88, 510 U.S. 826 (1993)..... | 18 |
| <i>Frazoni v. Hartmarx Corp.</i> , 300 F.3d 767, 772 (7th Cir. 2002) | 11 |
| <i>Griffith v. Schnitzer Steel Indus., Inc.</i> , 128 Wn. App. 438, 447, 115 P.3d 1065 (2005), review denied, 156 Wn.2d 1027 (2006)..... | 10, 14, 20 |
| <i>Grimwood v. Univ. Puget Sound, Inc.</i> , 110 Wn.2d 355, 360–61, 753 P.2d 517 (1988)..... | 12, 14, 15, 23 |
| <i>Hiatt v. Walker Chevrolet Co.</i> , 120 Wn.2d 57, 66, 837 P.2d 618 (1992)..... | 10 |
| <i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172, 182, 23 P.3d 440 (2001)..... | 10, 11, 12, 20 |
| <i>Hoffman v. MCA, Inc.</i> , 144 F.3d 1117, 1122 (7th Cir. 1998) | 18 |
| <i>Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.</i> , 122 Wn. App. 736, 748–49, 87 P.3d 774 (2004)..... | 22 |

| | |
|---|--------|
| <i>Johnson v. Express Rent & Own, Inc.</i> , 113 Wn. App. 858, 862 n. 4, 56 P.3d 567 (2002)..... | 13, 23 |
| <i>Kirby v. City of Tacoma</i> , 124 Wn. App. 454, 467, 98 P.3d 827 (2004), review denied, 154 Wn.2d 1007 (2005)..... | 10 |
| <i>Marshall v. AC & S Inc.</i> , 56 Wn. App. 181, 185, 782 P.2d 1107(1989)..... | 14 |
| <i>Nidds v. Schindler Elevator Corp.</i> , 113 F.3d 912, 918–19 (9th Cir. 1996), cert. denied, 118 S.Ct. 369, 522 U.S. 950 (1997) | 18, 20 |
| <i>Payne v. Vill. of Elwood</i> , 957 F.2d 517, 519 (7th Cir. 1992) | 20 |
| <i>Reeves v. Sanderson Plumbing Products, Inc.</i> 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)..... | 19, 20 |
| <i>Smith v. Behr Process Corp.</i> , 113 Wn. App. 306, 338–39, 54 P.3d..... | 23 |
| <i>Stegall v. Citadel Broad. Co.</i> , 350 F.3d 1061, 1066 (9th Cir. 2003) | 10 |
| <i>Subia v. Riveland</i> , 104 Wn. App. 105, 112, (2001) | 11 |
| <i>Villiarimo v. Aloha Island Air, Inc.</i> , 281 F.3d 1054, 1063 (9th Cir. 2002) | 12, 13 |
| <u>RULES</u> | |
| ER 803(a)(3) | 24 |
| RAP 10.3(a)(5)..... | 24 |

I. INTRODUCTION

Craig Rice's employment was terminated as a result of his misconduct, not because of any alleged age discrimination. Respondent Offshore Systems, Inc. ("OSI") discharged Rice because of his shocking conduct and serious violations of company rules while he responded to a vessel fire at OSI's Dutch Harbor, Alaska facility on December 12, 2007. Rice's reprehensible misconduct—which included being intoxicated on duty and harassing and interfering with fire and police officials responding to the fire—was the reason for termination of his employment.

Despite the obvious evidence of his misconduct, Rice sued OSI for alleged age discrimination. After engaging in discovery, OSI filed a motion for summary judgment to dismiss Rice's claim because there was simply no evidence of any discrimination. At the summary judgment hearing, the trial court, the Hon. Douglass North, found that OSI's reasons for termination were legitimate and non-discriminatory. The trial court concluded that Rice failed to show that OSI's stated reasons for its decision to terminate his employment were a pretext, as they were based in fact, they were reasonable bases for termination, and they were the motivating factors in its decision. Thus, the court below properly granted summary judgment in favor of OSI and dismissed Rice's lawsuit.

II. ISSUE ON APPEAL

Did the trial court properly grant summary judgment and dismiss Rice's age discrimination case when it found that OSI's reasons for termination of Rice's employment—his intoxication on duty and his interference with fire and police officials responding to the fire at its facility—were legitimate and non-discriminatory, and when Rice failed to raise a genuine issue of material fact that OSI's reasons were (1) based in fact, (2) reasonable; and (3) motivating factors?

III. STATEMENT OF THE CASE

A. BACKGROUND

In 1991, at age 43, Rice was hired by OSI to work at its Dutch Harbor facility as a stevedore. CP 47. During Rice's 17 years with OSI, he held positions of forklift driver, night foreman, and finally yard foreman, which is the third-most senior position at OSI's Dutch Harbor facility and the position he was holding at the time of his termination. CP 48, 340.

As yard foreman, Rice's management style consisted of a substantial amount of yelling at and berating his subordinates. CP 67–68, 79–80. Rice's supervisor, Facilities Manager Jared Davis, repeatedly worked with Rice to improve his relations with subordinates. CP 79-80, 84. Rice was verbally reprimanded on several occasions, and he received

several written reprimands because of his abusive treatment of employees.
CP 58–59, 79–80, 84.

B. FIRE INCIDENT

On December 12, 2007, the day of the fire, Rice was the acting Facilities Manager and the most senior employee working at the OSI facility because of vacation and leave taken by the highest two managers. CP 53, 71. At approximately 6:39 pm, a vessel owned by OSI's customer, Fishing Company of Alaska (“FCA”), caught fire while tied to another FCA vessel moored at the north end of OSI’s main dock. CP 88.

When the fire started, Nick Reed, the assistant yard foreman and Rice's subordinate, was off-duty, but when he learned about the fire and was informed that no one could reach Rice, Reed went to Rice’s house to find him. CP 68. When he entered Rice's house, Reed could smell alcohol and music was playing loudly. Id. Reed found Rice on the couch passed out or asleep with loud music playing in the room. Id. After he roused Rice and told him about the fire, Rice’s speech was slurred and he appeared intoxicated. Id., CP 365.

Based on those observations and his knowledge that when Rice was not at work he was generally drinking, Reed concluded that Rice was intoxicated. CP 365. Because he believed Rice was intoxicated and should not report to the fire, Reed asked Rice to advise him how he should

respond rather than for Rice to respond personally. CP 68–69, 365.

However, and despite his evidently intoxicated state, Rice insisted on accompanying Reed to the scene of the fire. CP 56, 60, 68–69, 365.

When Reed and Rice arrived at the scene, fire and police officials from the nearby town of Unalaska were onsite, and Fire Chief Johnson had already set up Incident Command in front of the burning vessel's dock. CP 86. Police officer Brandon Hunter had established a security perimeter around the scene, and when Rice arrived, he approached Officer Hunter and informed him that he was the responsible party for OSI. Id. Rice then began demanding answers about the status of the fire. Id., CP 57. Rice became very upset and agitated when he was told that the Fire Department had just begun its attack on the fire and no update was currently available. CP 86.

Although a definitive all-clear was not available for almost an hour, Fire Chief Johnson provided updates to Rice as they were available. Id. According to official reports, while waiting for updates, Rice shockingly “repeatedly attempted to interfere with the fire response,” stating that “it wasn’t the fire department’s call what happened at his dock.” Id. Rice also appeared intoxicated to the fire and police officers, as he strongly smelled of alcohol and he did not appear to be acting rationally. CP 86–87.

At one point, Rice was concerned that the vessel's proximity to OSI's fuel tanks was endangering the OSI facility and personnel. CP 86, 345–46. However, Fire Chief Johnson did not think that the fuel tanks were being threatened or presented any danger to the OSI personnel or facility. CP 86. The fire was relatively small and all signs pointed toward it being contained on the vessel. CP 87.

Despite the Fire Chief's professional assessment that the fuel tanks were not in danger, even more shockingly, Rice *threatened to cut the FCA vessels loose to be towed out to the bay to burn*. CP 60, 87. Unalaska Police Sergeant Shockley saw the disruption Rice was causing and approached Rice. CP 87. She explained to Rice that cutting the vessels loose was not an option. *Id.* She also told Rice that the fire department had control over the scene until the fire was contained, and Rice “needed to allow them to perform their jobs.” He then began shouting at Sergeant Shockley that he “was in charge of OSI,” and he demanded that “the two FCA vessels be towed into the bay and left to burn out there.” CP 60, 88. As he started to move towards a group of firefighters to carry out his threat—a plan he admittedly had already put into place by making arrangements with a local towing vessel—Sergeant Shockley was forced to physically restrain him. CP 68, 88, 346–47; Br. of Appellant at 12. Rice screamed at Sergeant Shockley, telling her to get her hands off him

and that she could not tell him what to do. CP 88–89. Rice, outrageously, spat at Sergeant Shockley and called her several offensive names, including “dyke” and “bitch.” CP 69. Rice was told in no uncertain terms that he was acting disorderly and would be arrested if he did not calm down. CP 87.

Finally, after Rice had been yelling about being in charge for several more minutes, Unalaska Fire Captain Deffendall came over and spoke to Rice about the status of the fire, and Rice calmed down and left the scene. CP 87, 89. Rice was on-duty when he responded to the fire as he clocked back in for the two hours he was at the scene and was paid for that time. CP 54, 85.

C. TERMINATION

When the fire occurred, Facilities Manager Jared Davis was on vacation. CP 72. After he returned, he was informed about Rice’s abusive and appalling behavior towards the fire and police officers responding to the fire. CP 74. Davis immediately investigated and spoke with Sergeant Shockley, Nick Reed, Glenn McConachie (the OSI night foreman on duty during the fire), FCA's representative, and Rice to ascertain what really happened. CP 74, 81. Davis also reviewed the police reports about the fire incident. Id.

Davis' knowledge of Rice's general drinking habits, his harsh treatment of employees and customers over the years, and Rice's rude and bigoted comments to Sergeant Shockley on previous occasions led Davis to believe that what he was told by those witnesses and what he learned about Rice's behavior from the police reports were not only true, but also were mostly likely understated. CP 75–80, 84.

When he completed his investigation, Davis concluded that: 1) Rice was on duty and intoxicated during the fire incident; 2) Rice harassed fire and police officials responding to the fire; 3) as the third-most senior OSI employee, Rice set an extremely bad example for his fellow employees and subordinates; 4) his outrageous behavior jeopardized customer relations and hurt OSI's reputation with local officials; and 5) Rice potentially put OSI at risk of serious liability had he carried out his dangerous plan to have the FCA vessels towed away from the dock to burn in the bay. CP 77, 82, 84.

As the Facilities Manager, Davis did not want to lose Rice because employee retention is difficult in remote and inhospitable Dutch Harbor, and knowledgeable, experienced employees are rare. CP 79–81, 84, 341. Although Davis valued Rice's experience and loyalty to OSI, under the circumstances, he felt he had no choice but to terminate Rice's

employment. CP 81–82, 84. It was one of the hardest decisions he has ever had to make, both personally and in his career. CP 81.

D. REBUTTAL STATEMENT

In his Appellant's Brief, Rice asserts that alleged comments such as "old goat," "senile," and "too old to stay on the job" directed toward him constituted a pattern of discrimination. Br. of Appellant at 1. However, Rice was unable to say when, where, or under what contexts those alleged comments were made, nor were they ever heard by anyone else. CP 366, 375–76. At most, they were part of good-natured teasing and joking between Rice and Davis, as Rice himself never voiced an objection to this teasing and he admitted he “worked hard to keep the working environment light and enjoyable by cracking jokes and trying to be lighthearted.” CP 343, 370.

Rice also asserts that OSI did not have a policy on how to deal with emergencies when only one manager was on site and, therefore, he “had no choice but to respond.” Br. of Appellant at 7-8, 21. However, it does not take a written policy or anything more than common knowledge to call 911 when there is a fire and let the professional firefighters do their job. CP 69.

Finally, Rice erroneously asserts that OSI has a progressive discipline policy whereby employees receive lesser discipline in the first

instance of misconduct. Br. of Appellant at 8, 24-25. However, Rice had been warned about his conduct on prior occasions. CP 58–59, 79–80, 84. More importantly, Rice was, admittedly, an at-will employee, and OSI's employee handbook explicitly informed him that being intoxicated on duty and disorderly on company premises could result in immediate dismissal, a fact he clearly knew and understood. CP 50–51, 57, 61, 92–95.

IV. ARGUMENT

A. SUMMARY JUDGMENT WAS PROPER BECAUSE RICE FAILED TO MEET HIS BURDEN TO SHOW THAT OSI'S REASONS FOR TERMINATION WRE PRETEXTUAL.

1. Summary of Argument

The dispositive issue at the summary judgment hearing was whether Rice was able to demonstrate that OSI's legitimate, nondiscriminatory reasons for termination were unworthy of belief or pretext for a discriminatory purpose. To demonstrate that an employer's reasons are unworthy of belief, the employee must establish that the employer's reasons for termination (1) had no basis in fact, (2) were not reasonable grounds upon which to base the termination, or (3) were not motivating factors in the termination of other similarly situated

employees.¹ Griffith v. Schnitzer Steel Indus., Inc., 128 Wn. App. 438, 447, 115 P.3d 1065 (2005), review denied, 156 Wn.2d 1027 (2006) (citing Kirby v. City of Tacoma, 124 Wn. App. 454, 467, 98 P.3d 827 (2004), review denied, 154 Wn.2d 1007 (2005)). If the employee cannot present sufficient evidence to show that the employer's reasons are unworthy of belief or mere pretext, summary judgment is proper, and the employer is entitled to dismissal. Domingo v. Boeing Employees' Credit Union, 124 Wn. App. 71, 77-78, 98 P.3d 1222 (2004); Chen v. State, 86 Wn. App. 183, 190, 937 P.2d 612, review denied, 133 Wn.2d 1020 (1997); Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 182, 23 P.3d 440 (2001).

To survive summary judgment, Rice was required to create a genuine issue of material fact and show specific and material facts of each element of his discrimination case. Hiatt v. Walker Chevrolet Co., 120 Wn.2d 57, 66, 837 P.2d 618 (1992); Chen, 86 Wn. App. at 190; Stegall v. Citadel Broad. Co., 350 F.3d 1061, 1066 (9th Cir. 2003) (“[Plaintiff] must proffer ‘specific’ and ‘substantial’ evidence of pretext to overcome [defendant’s] summary judgment motion.”).² The trial court granted

¹ Rice did not even attempt to present evidence on the third factor. In fact, Rice admitted that OSI would have terminated any employee, regardless of age, for behavior similar to his during the fire incident. CP 57. Rice also argues that the totality of the evidence should have been considered by the trial court, but he fails to cite any authority for such a totality-of-evidence rule. Br. of Appellant at 2.

² Rice argues that an employee "need only present evidence which tends to undermine or discredit an employer's grounds for termination," but neither case he cites, Subia v.

summary judgment because Rice failed to meet his burden to show that OSI's reasons for termination were a pretext or unworthy of belief. Verbatim Report of Proceedings at 28–29. The trial court considered all of Rice's proffered evidence and held that, because OSI's reasons for termination were clearly based in fact, were reasonable, and motivated OSI's decision to terminate Rice's employment, there was no evidence of pretext. Id. Therefore, OSI was entitled to summary judgment. Id.

2. The trial court properly granted summary judgment because Rice failed to show that OSI's reasons for termination had no basis in fact.

Rice's evidence was insufficient to raise a genuine issue of material fact as to whether OSI's reasons for termination had a basis in fact because Rice failed to demonstrate that OSI did not honestly believe its reasons for termination. In determining whether a stated reason is a pretext, courts only consider whether the employer honestly believed the reasons it offers. Frazoni v. Hartmarx Corp., 300 F.3d 767, 772 (7th Cir. 2002) (“[P]retext requires more than a showing that the business decision was mistaken, ill considered or foolish, and . . . so long as the employer honestly believed the reason given for the action, pretext has not been

Riveland, 104 Wn. App. 105, 112, (2001) nor Hill v. BCTI Income Fund-I, 144 Wn.2d 172 (2000), stands for such a vague proposition. Br. of Appellant at 19.

shown.”). The Eleventh Circuit’s opinion in Elrod v. Sears, Roebuck & Co. is particularly instructive on this issue:

We must make an important distinction before proceeding any further. Much of [plaintiff’s] proof at trial centered around whether [plaintiff] was in fact guilty of the sexual harassment allegations leveled at him by his former co-workers. We can assume for purposes of this opinion that the complaining employees interviewed by [the decision-maker] were lying through their teeth. The inquiry . . . is limited to whether [the decision-makers] *believed* that [plaintiff] was guilty of harassment, and if so, whether this belief was the reason behind [plaintiff’s] discharge.

939 F.2d 1466, 1470 (11th Cir. 1991) (emphasis in original); see also Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1063 (9th Cir. 2002) (“In judging whether [defendant’s] proffered justifications were ‘false,’ it is not important whether they were *objectively* false . . . only . . . that an employer honestly believed its reason for its actions, even if its reason is foolish or trivial or even baseless.”).

In other words, evidence of misconduct is considered from the perception of the decision-maker, not the employee. Grimwood v. Univ. Puget Sound, Inc., 110 Wn.2d 355, 360–61, 753 P.2d 517 (1988). Courts should not be “used as a forum for appealing *lawful* employment decisions simply because employees disagree with them.” Hill, 144 Wn.2d at 190 n. 14 (emphasis in original). Whether an employee actually engaged in inappropriate conduct and whether an employer should have relied on

witness statements is irrelevant to the issue of pretext. Domingo, 124 Wn. App. at 88–89 (“Incorrect thinking on the [decision-maker’s] part does not prove the [employer’s] explanation is a pretext.”); see also Johnson v. Express Rent & Own, Inc., 113 Wn. App. 858, 862 n. 4, 56 P.3d 567 (2002).

For example, in Villiarimo, the plaintiff argued that her employer’s proffered reasons were false because the witnesses to her alleged misconduct (for which she was terminated) were not credible. 281 F.3d at 1063. The court held that this argument was “unavailing” because it did not constitute evidence that defendant did not honestly believe the proffered reasons. Id. Likewise, in Domingo, the court granted summary judgment because the plaintiff’s argument that she did not engage in misconduct was not evidence that the decision-maker did not, in good faith, believe that the plaintiff engaged in the misconduct for which she was fired. Domingo, 124 Wn. App. at 89.

Here, OSI did not need to establish that Rice was in fact intoxicated or that he conclusively harassed or interfered with police and fire officials, as long as Davis, as the decision-maker, honestly believed that Rice engaged in such misconduct.

Rice attempted to show OSI’s decision lacked a factual basis by submitting a self-serving declaration containing his own subjective beliefs

that he was not intoxicated, he did not harass or interfere with the firefighters or police officers responding to the fire emergency, and that he never yelled at or belittled his subordinates.³ CP 340–50. However, “an employee's subjective beliefs and assessments as to his performance are irrelevant,” and “[a]n employee's assertion of good performance to contradict the employer's assertion of poor performance [do] not give rise to a reasonable inference of discrimination.” Griffith, 128 Wn. App. at 447; Chen, 86 Wn. App. at 190. To avoid summary judgment, Rice must do more than simply deny wrongdoing; he must produce specific and significantly probative evidence that OSI’s reasons had no basis in fact. In the absence of such production of evidence, OSI was entitled to judgment as a matter of law. Id. at 190–91; Grimwood, 110 Wn.2d at 365.

In Domingo, the employer was entitled to summary judgment when the plaintiff presented evidence and arguments similar to those made by Rice here. Specifically, the plaintiff asserted that her denial of misconduct demonstrated that the employer’s reasons lacked a factual basis. Domingo, 124 Wn. App. at 88–89. The court rejected this argument, finding that the employer’s choice to believe other employees and not the plaintiff was not evidence of pretext, and denial of misconduct

³ To the extent that Rice’s declaration contradicted his earlier deposition, his declaration cannot raise a genuine issue of material fact. Marshall v. AC & S Inc., 56 Wn. App. 181, 185, 782 P.2d 1107(1989).

is “insufficient to raise an issue of fact.” Id. Like the plaintiff’s denial in Domingo, Rice’s denial of his own misconduct fails to create a genuine issue of material fact as to whether OSI’s reasons were based in fact.⁴

There was clearly a basis in fact for OSI’s reasons for terminating Rice’s employment. There was overwhelming and independent evidence of Rice’s misconduct, including the deposition testimony of Reed describing the fire incident and two police reports, relied upon by Davis, corroborating Reed’s version of events, all of which described Rice as being intoxicated and acting in a reprehensible manner. Rice’s actions during the fire were well documented, and he presented no evidence that the decision was not made based on a good faith belief that he committed the very misconduct described by every eyewitness to the fire incident, with the only exception being Rice’s irrelevant, self-serving statements.

Because evidence of pretext is evaluated from the perception of the decision-maker, the fact that OSI believed its employees and other witness statements about Rice’s misconduct was not evidence of pretext and did

⁴ The declaration from an OSI customer does not provide any evidence that OSI’s reasons for termination had no basis in fact. Grimwood, 110 Wn.2d at 364 (“None of these letters [from customers], however, came from anyone charged with the direct supervision and evaluation of his overall performance. The letters were insufficient to overcome the reasons for plaintiff’s termination articulated by defendant.”); see also Chen, 86 Wn. App. at 192 (finding declaration from employee’s colleagues insufficient to establish pretext because none who signed the declaration attesting to the employee’s good communication skills and good relationships with his fellow coworkers were charged with supervising and evaluating the employee).

not create a genuine issue of material fact as to whether the OSI's reasons for termination had a factual basis. Summary judgment was properly granted.

3. Rice failed to establish pretext because he failed to demonstrate that OSI's proffered reasons were not reasonable or motivating factors for the decision to terminate his employment.

a) *OSI's reasons for termination were both objectively reasonable and consistent with the standards of conduct set forth in OSI's employee manual.*

Termination of Rice's employment due to his misconduct was objectively reasonable. Yelling at fire and police officials responding to a vessel fire, calling them obscene names while intoxicated, spitting at them, and attempting to push them out of the way in order to cut the vessel loose to burn in the harbor, all during an emergency when they are trying to bring the fire under control, is so clear and obvious misconduct (especially given Rice's admitted title as safety officer for OSI, CP 340–41, 345) that it was objectively reasonable for OSI to terminate Rice's employment based upon it. Rice's misconduct was also a violation of company policy and an express basis for immediate termination. The OSI employee manual explicitly prohibits intoxication on the job, as well as obscene and abusive language and disruptive behavior on company premises, and

warns employees of immediate termination for violations of this policy.⁵

CP 71, 92–95. Rice admitted that being intoxicated while on duty was not only a violation of company policy but also terminable misconduct. CP 57, 61.

b) *OSI's stated reasons were clearly the motivating factors for its termination of Rice's employment.*

OSI articulated its reasons for terminating Rice's employment by letter dated January 18, 2008, the same day his employment was terminated. CP 84. OSI's decision was made by Davis after he had returned from vacation, conducted his investigation, and reached his conclusions. OSI's reasons for Rice's termination were his actions and misconduct during the fire response.

Rice argues that comments allegedly made by Davis that he was an "old goat" and by others that he was "senile" show that a discriminatory animus motivated OSI's termination decision. However, these alleged comments fail to demonstrate discriminatory intent because, even if true, at most, they were only stray, isolated remarks as Rice failed to identify when or in what context such statements may have been made. Because Rice failed to provide any evidence they were related to the termination

⁵ "Occurrences of any of the following violations, because of their seriousness, may result in immediate dismissal without warning[:] . . . Being intoxicated . . . while at work . . . Occurrences of any of the following activities . . . may be subject to disciplinary action, including possible immediate dismissal[:] . . . Obscene or abusive language . . . disorderly/antagonistic conduct on company premises." CP 92–93.

decision, such alleged comments are simply too remote and indefinite to support an inference of discriminatory intent. Domingo, 124 Wn. App. at 90 (“Without evidence about the context of the remark, it is impossible to know whether it is related to [the employee’s] termination, whether [the decision-maker] innocently made the comment in an unrelated context, or said it as a joke. [The employee] has not demonstrated that the comment was anything but an isolated, stray remark.”); Nidds v. Schindler Elevator Corp., 113 F.3d 912, 918–19 (9th Cir. 1996), cert. denied, 118 S.Ct. 369, 522 U.S. 950 (1997) (finding comments about “old timers” were insufficient to preclude summary judgment because the employee could not tie the comments directly to the termination decision); Ezold v. Wolf, Block, Schorr & Soli-Cohen, 983 F.2d 509, 545 (3d Cir. 1992), cert. denied 114 S.Ct. 88, 510 U.S. 826 (1993) (Stray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision.”); Hoffman v. MCA, Inc., 144 F.3d 1117, 1122 (7th Cir. 1998) (finding that a decision-maker repeatedly telling an employee “you’re getting old” was not evidence of pretext because it was a conversational jab in a social setting and not evidence of intent to fire the employee because of his age.)

Rice's reliance on Reeves v. Sanderson Plumbing Products, Inc. is also misplaced. 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) Reeves is inapposite to the issue of whether an employee has presented sufficient evidence to demonstrate pretext. In Reeves, the Supreme Court did not find that alleged discriminatory comments by a decision-maker showed that an employer's reasons were untrue or mere pretext. 530 U.S. at 145–46, 152 (2000). Rather, the Court found that the Fifth Circuit erred when it disregarded the alleged discriminatory comments in its analysis of whether there was sufficient evidence for the jury's ultimate finding that termination decision was discriminatory. Id. However, to even reach this ultimate issue, an employee must first establish pretext. See Domingo, 124 Wn. App. at 78. Rice failed to do so on summary judgment.

Rice further argued that his actions and misconduct the night of the fire were not the motivating reasons for his termination because OSI allegedly gave "shifting" reasons for its decision. Br. of Appellant at 23. However, there were no such shifting reasons. Rice admitted he was initially told his employment was terminated because of his misconduct during the fire. CP 349 ("Jared [Davis] informed me that he was firing me because of the fire on December 12, 2007."). This was the same reason stated in the letter of January 18, 2008. Even different justifications for an

adverse employment action are not sufficient to defeat summary judgment when those justifications “are not incompatible,” Nidds, 113 F.3d at 918.

Similar to the alleged comments in Domingo, the trial court below found that the alleged comments proffered by Rice did not demonstrate that OSI’s reasons for termination were untrue or were not the motivating factors for the termination decision. Because Rice failed to raise a genuine issue of material fact on the bases for his termination, summary judgment was appropriate.⁶

4. No reasonable jury could conclude that OSI terminated Rice's employment because of his age.

At most, Rice's assertions of pretext and stray, isolated comments create only a weak issue of fact, such that no reasonable trier of fact could possibly conclude his employment was terminated because of his age:

even in this situation, an employer will still be entitled to judgment as a matter of law if no rational trier of fact could conclude that discrimination was a substantial factor in the employer's action.

Griffith, 128 Wn. App. at 448 (citing Reeves, 530 U.S. at 148; Hill, 144 Wn.2d at 186–87; Domingo, 124 Wn. App. at 78). Being intoxicated on the job, calling emergency responders obscene names, spitting at them,

⁶ Because summary judgment rulings are reviewed de novo, Rice’s argument that the trial court erred by weighing the evidence, making credibility determinations, and resolving disputed issues of material fact (Br. of Appellant at 31) should be disregarded. See Payne v. Vill. of Elwood, 957 F.2d 517, 519 (7th Cir. 1992) (“Because this Court must review the record *de novo* we need not consider whether the district court and the magistrate made credibility determinations.”).

and attempting to push them out of the way in order to cut the vessel loose to burn in the harbor, all during an emergency when they are trying to bring the fire under control, is so clear and obvious misconduct that no reasonable trier of fact would conclude that his employment was terminated because of his age. Therefore, summary judgment was properly granted.

B. THE POLICE REPORTS WERE PROPERLY CONSIDERED AS EVIDENCE BECAUSE THEY WERE BOTH AUTHENTICATED AND NOT OFFERED FOR THE TRUTH OF THE MATTER ASSERTED.

1. The trial court correctly denied Rice's motion to strike because the police reports were properly authenticated.

Rice asserts that the police reports should have been stricken in the summary judgment hearing because they are not authenticated. Br. of Appellant at 35. However, the trial court found that the authenticity of the police reports was not an issue because "you can use them to show what information Mr. Davis was using in making his decision." Verbatim Report of Proceedings at 27–28. Unlike in Burnmeister v. State Farm Ins. Co., cited by Rice, here, the police reports were properly authenticated by Davis in his declaration attesting to what documents and statements he personally considered in making his termination decision. 92 Wn. App. 359, 966 P.2d 921 (1998); CP 237–44.

Furthermore, Rice never seriously challenged their authenticity as genuine reports prepared by the Unalaska police department regarding what occurred the night of the fire, and since he produced them in discovery, he cannot object to their lack of authentication. CP 219, 222–29. “[A]uthentication may be satisfied when the party challenging the document originally provided it through discovery.” Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 748–49, 87 P.3d 774 (2004) (finding that when a plaintiff produced disputed documents in discovery, “the documents were sufficiently authenticated for summary judgment purposes.”).

2. The police reports were admissible because they were submitted as supporting the reasons for OSI’s termination decision rather than the truth of the matters asserted in them.

Evidence offered to show an employer’s motivation for its decision to terminate an employee is admissible under the state of mind exception to the hearsay rule. Domingo, 124 Wn. App. at 79 & n.13; ER 803(a)(3). Because the police reports were not submitted to prove as gospel truth that Rice was intoxicated and harassing officials but, rather, solely for the purpose of showing Davis’ legitimate, non-discriminatory reasons, his motivation for terminating Rice’s employment, and his honest belief,⁷ the

⁷ Rice also generally objects to declarations by Davis and Reed for containing “speculative, conclusory, self-serving statements that were not based on personal knowledge and were therefore inadmissible.” Br. of Appellant at 36. However, Rice

trial court properly considered that evidence.⁸ Rice's motion to strike those exhibits was thus properly denied.

V. CONCLUSION

Rice failed to present any evidence that OSI's legitimate, non-discriminatory reasons for termination were unworthy of belief or pretextual. In contrast, OSI presented clear evidence that its reasons for terminating Rice's employment were based in fact, reasonable, and the motivating reasons behind its decision. Because Rice failed to raise a

fails to specify or cite to the record which statements in what declarations he objected to as required by RAP 10.3(a)(5); there is also no declaration or affidavit by Reed in the record. Therefore, this objection should not be considered. See Smith v. Behr Process Corp., 113 Wn. App. 306, 338–39, 54 P.3d 665 (2002) (refusing to review “sweeping” hearsay objections that lacked “specific argument” about the statements).

⁸ Rice argues in a footnote that Davis' state of mind was not at issue because the focus on summary judgment was pretext and only evidence produced by Rice could have been considered during the court's pretext analysis. Br. of Appellant at 35 n. 13. Rice fails to cite any legal authority supporting such a proposition and, in fact, settled authorities compel the opposite conclusion. The perception of the decision-maker must be considered when determining whether the reasons for termination have a basis in fact and are the motivating reasons for an employee's dismissal. Grimwood, 110 Wn.2d at 364; Domingo, 124 Wn. App. at 88–89; Johnson, 113 Wn. App. at 862 & n. 4 (“[P]retext is a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs. If an employer fires an employee in a good faith but mistaken belief as to the factual basis, there is no pretext.”) (internal citations omitted).

genuine issue of material fact as to whether his termination was based on a discriminatory intention, summary judgment should be affirmed.

DATED this 16th day of March, 2011.

BAUER MOYNIHAN & JOHNSON LLP

A handwritten signature in black ink, appearing to read "Matthew C. Crane", written over a horizontal line.

Matthew C. Crane, WSBA No. 18003

Susan K. Kaplan, WSBA No. 40985

Attorneys for Respondent Offshore Systems, Inc.

