No. 72012-1-I

No. 92349-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

E CPY

REBECCA A. RUFIN,

Plaintiff/Petitioner,

v.

CITY OF SEATTLE and JORGE CARRASCO,

Defendants/Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT

The Honorable Beth M. Andrus

Case No. 11-2-01374-7

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Rebecca Rufin, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Rufin seeks review of the unpublished Court of Appeals decision entered on August 17, 2015, a copy of which is in the Appendix at pages A-1 through A-11.[1] This case involves a female manager currently employed at Seattle Parks and Recreation Department, who years earlier, while employed at Seattle City Light (SCL"), provided evidence during an investigation of a gender-based complaint by another female SCL manager, to the effect that Superintendent Jorge Carrasco mistreated women and favored men. Soon after providing that testimony, feeling harassed and fearing retaliation, she transferred out of Carrasco's organization and went to the Parks Department. Several years later she sought to return to SCL because her promotional opportunities at Parks were dwindling (she had gone as high as she could go there), so she applied for two job opportunities at SCL, a few months apart, both in chains of command leading to Carrasco. Petitioner was denied the

[1] The Court of Appeals rulings, denying petitioner's motions to publish and for reconsideration, are attached as A-12 and A-13.

positions in both instances. When she sought an explanation for the failure to hire her, Carrasco's Human Resources Officer told her she had "burned her bridges." Rufin's theory of the case is that Carrasco held retaliatory animus towards Rufin for her reports and testimony of his misconduct, and that after she applied for each job, he learned of Rufin's application and directed his subordinates to ensure she was not hired. That explains why Rufin did so well in the application process until upper management (Carrasco's direct reports) got involved—each time their involvement coincided with the end of her favorable treatment in the hiring process.

The trial court permitted one retaliation claim to go to trial and dismissed the other claim at summary judgment—then excluded from the jury any evidence of the second job application leaving it to appear this was a one-time event. The jury found for the City. The Court of Appeals affirmed the grant of partial summary judgment and affirmed the decision to exclude any evidence of the second application from the jury. Petitioner seeks review because the decision of the Court of Appeals is in conflict with prior Court of Appeals and Supreme Court decisions, and because the petition involves issues of substantial public interest.

C. ISSUES PRESENTED FOR REVIEW

Issue No. 1: At summary judgment in a retaliation case brought under the WLAD, whether the proper causation element should be the one

articulated in Davis v. West One Auto Group: whether retaliation was a substantial motive behind the adverse employment action?

Issue No. 2: Whether in a case alleging retaliation under RCW 49.60.210, a plaintiff who presents circumstantial evidence probative of retaliatory intent is nevertheless required in all cases to also produce admissions from the relevant decision-maker(s), admitting either that they had knowledge of the plaintiff's statutorily protected activity or that they were influenced in their decision by a person with such knowledge?

Issue No. 3: The trial court found that there was an issue of material fact regarding whether retaliation was a substantial factor in Rufin's non-hiring for the CMEM position. Was it error for the trial court to fail to consider Rufin's evidence "cumulatively" and to instead analyze the LPSM hiring process "separately" from the evidence presented regarding the CMEM hiring process during the same time period?

Issue No. 4: Rufin was one of only three candidates for the LPSM position rated "High" by all four interview panelists. The other two candidates were advanced to a second interview, while Rufin was not. When such decision was made, the LPSM Hiring Manager gave different justifications to the City's Personnel Specialist and to Ms. Rufin for why Rufin did not advance. Neither of the justifications given at the time were consistent with the justification he relied upon after litigation commenced.

Did the trial court err in excluding all evidence about the inconsistencies and irregularities in the LPSM hiring process from the trial of the retaliation claim based on the CMEM hiring process during the same time period, which Rufin offered as proof of a "pattern" of retaliation?

D. STATEMENT OF THE CASE

1. Rufin Reported Gender Discrimination by Superintendent Jorge Carrasco, Who Was Informed of the Allegations Against Him During an Investigation and a Later Lawsuit.

Before Carrasco took over as Superintendent, Becky Rufin was a respected leader, manager, and engineer at City Light. CP 575-77. In January 2006, Ms. Rufin gave a 4-page single-spaced statement to the Seattle Mayor's office, in which she recounted the discriminatory conduct towards her by City Light Superintendent Jorge Carrasco. CP1696-99, 1635-36. Rufin made detailed allegations. CP1696-99. The City's investigator interviewed Rufin about her allegations on January 13, 2006. *See* CP 2224, 2205. Less than two weeks later, Carrasco was interviewed and questioned about the allegations against him. CP 2224; CP 1984 (119:12-14; 120:9-17). Carrasco admits the investigator informed him that certain persons complained that he mistreated women and informed him of those allegations, CP 2011 (36:5-8, 36:17-22), but claims he does not remember the details of the discussion. Id. (35:9-15).

By March 2006, Rufin's experience with City Light had drastically

changed under Carrasco's leadership. CP 577-78. She no longer felt respected or encouraged, her input and opinions were not valued by Carrasco, she was not promoted, and was in fact demoted, in a reorganization. CP 578-94 (¶¶ 16-48). Rufin decided to accept a position with the City's Parks Department as the Engineering Manager, a position she still holds today. CP 592-94 (¶¶ 44, 49). At the Parks Department, Rufin is unable to advance in an engineering capacity, because she is currently at the highest rank that requires an engineering degree. Id.

In October 2006, another City Light employee, Wanda Davis, filed a lawsuit alleging gender discrimination at City Light. *See* CP 2229. Rufin was deposed in the *Davis* matter in September 2007 and was questioned about her experience at City Light and her allegations that Carrasco had discriminated against Rufin based on her gender. CP 2081-94.

Carrasco was deposed in the *Davis* lawsuit in October 2007—four weeks after Rufin's deposition. *See* CP 1979, 2081. Carrasco answered questions about the investigation of Tobin's 2006 complaint and admitted that he was informed of the outcome of the investigation. CP 1984, 1988. Carrasco was specifically asked by Davis' counsel about the work performance of Rebecca Rufin and her unsuccessful candidacy for the Power Supply Asset Management Director position. CP 1987-88. "The parties do not dispute that Rufin's participation as a witness constituted

protected activity for a retaliation claim." Op., at 2.

2. Rufin Attempted To Return To City Light.

In 2010, 2011, and 2012, Ms. Rufin sought to return to Seattle City Light by applying for two (2) positions: a Civil / Mechanical Engineer Manager ("CMEM") position, and a Large Projects Senior Manager ("LPSM") position. CP 625-26, 628, 2311.

a. Rufin Was Rejected For the CMEM Position.

The hiring manager for the CMEM position was Mike Haynes. CP 1132. He was a direct report to Steve Kerns. CP 1134. Kerns was a direct report to Superintendent Carrasco. CP 1187 (¶ 2), CP 2052 (22:19-23:1). Carrasco was the person who Rufin claims had the retaliatory animus. In the 2011 CMEM hiring process, Haynes initially supported Rufin with high marks, but his position changed—he lowered his marks for Rufin and raised them for McLean (a male candidate he had marked lower than Rufin)—after Kerns got involved in the interview process. McLean was offered the job but refused, and the position was left open even though Rufin was the second ranked candidate after the third interview. Haynes then refused to even consider Rufin for the same position in a later posting (2012), because, he said, it "was not a good use of time and resources." CP 1136. This dramatic change in Haynes' position is unexplained and is the core of this claim. As delineated below, Kerns' involvement in the hiring

process was unusual, and the paperwork seemed to indicate that Rufin was approved for hire to the position. Those facts support Rufin's theory of the case: that Carrasco learned of Rufin's application and directed his subordinate to ensure she was not hired.

In November 2010, Rufin applied for the CMEM position and was the only candidate the resume review panel unanimously rated "High." CP 625, 1140-43. For months, Rufin received no information on the status of her application, but then ran into one of the resume raters, who told her that someone "complained" and the hiring process had come to a halt. CP 625-26.

In August 2011, Rufin submitted a second application for the CMEM position, after learning a new hiring process for the position was opening up. CP 626. Again, Rufin was unanimously rated "High" by the resume review panel. CP 4042-44. She, along with two candidates who also received unanimous "High" ratings from the resume review panel and two candidates who received a mix of "Medium" and "High" ratings, advanced to the First Interview stage with three interview panelists. *Cf.* id., and CP 4046-48. Only Rufin and one other candidate (Mr. McLean) received unanimous "High" ratings in the First Interview. CP 4046-48.

Still, four candidates, including Rufin and Mr. McLean, advanced to the Second Interview stage, with three different interview panelists. CP

2280-82. Mike Haynes, the Hiring Manager for the CMEM position, was on the second interview panel. Id.; CP 2048 (9:14-23). In the Second Interview, Rufin was the only candidate unanimously rated "High." CP 2280-82. No other candidate received even one "High" rating. Id. Hiring Manager Haynes wrote in his notes that Mr. McLean "needed more depth." CP 2280. Haynes made no critical comments about Rufin and told his assistant that Rufin "did really well" at her interview. Id.; CP 1975.

Rufin then advanced to the "qualification audit" stage of the hiring process, which City Light's Personnel Specialist testified indicates the Second Interview panel identified Rufin as the top candidate and recommended her for hire. CP 2267-68 (¶¶ "o," 11, 12); CP 2285. This occurred on or before September 21, 2011. Id. Thus, the paper record shows a decision to hire Rufin for the CMEM position was made after the Second Interview. Id.; CP 2267-68 (¶¶ "o," 11, 12); CP 2285. The City did not notify Rufin she was recommended for hire or offer her the job. CP 2307 (¶ 2).

In November 2011, the same four candidates who participated in the Second Interview stage—in which only Rufin received a "High" rating—were invited to a Third Interview, with Haynes and his boss, Steve Kern. CP 2290, 2296. It was "not typical" for Kern to do interviews for jobs below Haynes. CP 2077 (8:24-9:1). Haynes admits he did not plan to

have a Third Interview and only decided to do so after the Second Interview was complete. CP 2050 (15:2-6; 17:20-22). One of the candidates withdrew before the Third Interview, leaving Rufin, McLean, and another person as the remaining candidates. CP 2296.

Haynes and Kern collaborated about the interviews before deciding how to rate the candidates. CP 2053-54 (29:10-30:1). Haynes then reversed his previous ratings for Rufin and McLean. *See* CP 2280; *cf.* CP 2290. He lowered his rating for Rufin from "High" to "Medium" and raised his rating for McLean from "Medium" to "High." Id. Kern's ratings were identical to Haynes. CP 2290, 2296. They both rated the third candidate "Medium." Id. The City offered the CMEM job to Mr. McLean, who turned it down. CP 2054 (30:2-4; 31:4-6). Instead of hiring Rufin, who had previously been the top candidate and recommended for hire, the City did not fill the position and the job remained vacant. Id. (31:7-12).

Susan McClure, the Personnel Specialist assigned to Haynes' division, recalls a conversation with another Personnel Specialist working with Haynes. *See* CP 2262 (¶ 4); CP 1128-29. After learning McClean did not take the job, McClure asked if it was offered to Rufin and was told by the other Personnel Specialist that there was 'an issue' with her." Id.

In April 2012, the City opened up the CMEM hiring process once again, and Rufin applied for a third time. CP 628. In May 2012, nine (9)

candidate resumes were rated by three raters. CP 1312-16; CP 4109-111. Only two (2) candidates receive unanimous "high" ratings—Rufin and a male candidate with the initials I.D. Id. By June 2012, Rufin had not received any communication about her application, so she sent an email to Superintendent Carrasco, and requested a meeting to discuss the results of the August 2011 CMEM hiring process. CP 719. The next day, the City sent Rufin a letter informing her that "we will not be considering your application at this time for this [CMEM] position." CP 1961.

Meanwhile, the City interviewed five candidates; only one of whom (I.D.) was rated equal to Rufin at the resume rating stage. CP 4113 (CP 2193). The other four candidates who advanced had all received lower ratings than Rufin. *See* CP 4109-111; *cf.* CP 4113. Two of the candidates interviewed received "Medium" ratings from all the panelists, and advanced to the Second Interviews, including I.D. and another candidate with the initials D.S. CP 4117-122; CP 1136 (¶ 15). The City did not fill the CMEM position and it remained vacant for another year. CP 1136-37.

b. City Managers Told Rufin the Hiring Decision Was "Political" and She Had "Burned Her Bridges".

In April 2012, Rufin met with Darnell Cola, the Director of the City's Large Projects and Asset Management Division. CP 2021 (5:16-25), 2025 (21:20-23). Cola had been a panelist on the Second Interview

panel for the CMEM job in September 2011 and rated Rufin "High." CP 2281. During their conversation, Cola brought up the CMEM position and told Rufin that Mike Haynes informed Cola that the decision not to hire her was a ***"political"*** one. CP 2103 (20:13-21:10); CP 2027 (27:23-29:2).

On June 11, 2012, Superintendent Carrasco responded to Rufin's email inquiring about the CMEM position and why she had been turned down during the 2011 hiring process. CP 1963. In responding, Carrasco copied DaVonna Johnson, the H.R. Officer who reported directly to Carrasco, and asked Johnson to respond on his behalf. Id.; CP 2058-59 (5:14-6:2). Johnson met with Rufin on June 20, 2012. CP 628. In that meeting, Johnson told Rufin that she had "***burned her bridges***" and would never be considered for any future management positions at Seattle City Light. Id.; CP 2145-46 (189:13-190:5).

c. Rufin Was Rejected for the LPSM Job Contemporaneous With the CMEM Rejections.

The hiring manager for the LPSM position was Darnell Cola. CP 113, 124, 1122. He was a direct report to Phil West, the Officer of the Customer Service and Energy Delivery Branch of SCL, who was a direct report to Carrasco. CP 130 (App. at A-14); CP 2021, 124, 1257 (Rufin Dep. at 75:19-21). Once West entered the interview process, Cola, who had encouraged Ms. Rufin to apply for the position, changed his view of

her qualifications, and Ms. Rufin's successful application process stopped. CP 1065. Cola's change of heart upon West's involvement is the core of this claim. These facts support Rufin's theory of the case: that Carrasco learned of Rufin's application and directed his subordinate to ensure she was not hired. In December 2011, Rufin applied for the LPSM position. CP 2311. Cola and Haynes both rated the resumes of twenty-two candidates and they rated the resumes of the same five candidates, including Rufin, "High." CP 4093-95. All five were invited to the First Interview, but one declined. CP 1304. Rufin interviewed February 9, 2012. CP 2311. The First Interview panel included Cola and three others. CP 1300-06. The four panelists unanimously rated Rufin "High." Id. Two other candidates were also rated "High" by the first panel. On February 13, 2012, the City's Personnel Specialist, Ms. Ogunyemi, documented in the official Hiring Status Report for the LPSM position that all ***three*** were unanimously recommended for a Second Interview. *See* CP 2303 (¶ 4); CP 1120; CP 1300-06.

Then, in a separate entry the next day, Ogunyemi documented that Phil West (Carrasco's direct report) made the decision to exclude Rufin from further interviews. Even though the interview panel recommended that three applicants would proceed to the next level, only "Cheryl and Glynda" were "***Two*** decided for 2nd inter[view] by **Phil West** *due to their*

technical expertise and familiarity with CL [Projects]." CP 2303 (¶5) (emphasis added); CP 1120, 4075. Ms. Ogunyemi testified, "This is what Darnell [Cola] told me." CP 2303 (¶5). While this is the only contemporaneously documented reason for Rufin's failure to advance in the LPSM hiring process, after she was rated "High"— equal with Cheryl and Glynda who advanced[2]—Hiring Manager Cola testified it is not the reason Rufin did not advance. *See* CP 1124 (¶8), and CP 1302. (One of the two who advanced and received a second interview that Rufin did not receive was not a licensed professional engineer like Rufin and did not have any background in an electrical utility like Rufin. *See* CP 2312-13.)

Less than three months after Rufin was rejected in the LPSM hiring process, Cola told her that the decision not to hire her for the CMEM position was "political"[3] and H.R. Officer Johnson told her that she "burned her bridges" and would never be considered for any future management positions at City Light. CP 628; CP 2145-46 (189:13-190:5).

3. The Court Granted Summary Judgment As To One Claim And Denied Summary Judgment As To The Other; Then Excluded That Evidence From the Jury; The Court Of Appeals Affirmed.

Rufin filed suit under the WLAD alleging that the failure to hire her for either the CMEM or LPSM positions was retaliation. CP 316-37.

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[2] *See* CP 1300-06.
[3] CP 2103 (20:13-21:10); CP 2027 (27:23-29:2).

The City and Carrasco moved for summary judgment on the retaliation claim. CP 1067-92, 1191-1218. The trial court denied summary judgment as to the CMEM job; but dismissed the claim as to her contemporaneous non-hiring for the LPSM job. CP 3131-32. In its oral ruling, the trial court repeatedly stated that it analyzed the evidence of the CMEM and LPSM hiring processes "separately." RP (Feb. 27, 2014), at 58. Reconsideration was sought and denied. CP 2394-2405, 2444.

The trial court also granted a motion in limine excluding from trial all evidence and testimony about the failure to hire Rufin for the LPSM job during the same period it refused to hire her for the CMEM job.[4]

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Court Of Appeals Decision Is In Conflict With Prior Court of Appeals and Supreme Court Decisions Regarding Acceptable Methods for Showing a Causal Link.

To date, this Court has not addressed the elements of a prima facie case in retaliation cases brought under the WLAD at summary judgment, and how the evidence should be considered.[5] But Scrivener provides guidance, which the Court of Appeals ignored. "[S]ummary judgment to an employer is seldom appropriate in the WLAD cases because of the

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[4] CP 3519, RP (Mar. 27,2014), 46-47, 80-82; RP (Apr. 7, 2014) 63.

[5] Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 70, 821 P.2d 18 (1991) is a common law wrongful discharge case, which only provides the analysis for evaluating a prima facie case at summary judgment in a workers' compensation claim context.

difficulty of proving a discriminatory motivation." Scrivener v. Clark College, 181 Wn.2d 439, 445, 334 P.3d 541 (2014). *See also* Davis v. West One Auto Group, 140 Wn. App. 449, 456 (2007) (Stephens, J.) (summary judgment in favor of the employer in a discrimination case often inappropriate because often reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury). The Court of Appeals ignored those admonitions and affirmed the dismissal of the LPSM claim finding that, "Rufin failed to establish any causal connection between the protected activity and the adverse action." *See* Op., 5-6. This may be the wrong test. It may be that petitioner is required to show evidence that retaliation was a substantial motive behind the adverse employment action. Davis, 140 Wn. App. at 460. The trial court also ignored evidence (like the "burned your bridges" comment) and failed to view the evidence in the light most favorable to the petitioner. As in Scrivener and Davis, here, "[t]he parties presented reasonable but competing inferences of discriminatory and nondiscriminatory intent. Therefore, a jury should weigh the evidence." Scrivener, 181 Wn.2d at 450.

a. Circumstantial Evidence of Retaliation Includes Proof That Defendant's Explanations Are Not Believable.

"Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional

discrimination, and it may be quite persuasive."[6] "Multiple, incompatible reasons [for an action] may support an inference that none of the reasons given is the real reason. ... Conflicting reasons or evidence rebutting their accuracy or believability are sufficient to create competing inferences. ... Such inconsistencies cannot be resolved at the summary judgment stage."[7] "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle ... that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'"[8]

Hiring Manager Darnell Cola gave three different reasons for Rufin's failure to advance in the LPSM hiring process. Personnel Specialist Ogunyemi testified, "Darnell told me" that "***Two*** decided for 2nd inter[view] by Phil West *due to their technical expertise and familiarity with CL* [*Projects*]." CP 2303 (¶5). This is the only contemporaneous documentation as to why Rufin did not advance, and Cola admits it is not the true reason. *See* CP 1124 (¶8), and CP 1302. The City's "lack of documentation" for the real reasoning is "circumstantial

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[6] Currier v. Northland Servs., Inc., 182 Wn. App. 733, 748-49, 332 P.3d 1006 (2014), *review denied*, 182 Wn.2d 1006, 342 P.3d 326 (2015), *quoting* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).
[7] Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 623-24, 60 P.3d 106 (2002).
[8] Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 184, 23 P.3d 440 (2001), *quoting* Reeves, 530 U.S. at 147-48.

evidence that the proffered ... justifications were fabricated post hoc."[9]

When Rufin asked Cola about her non-selection, Cola offered a second rationale, telling Rufin the "deciding factor" was her alleged lack of experience in the disciplinary process. *Compare* CP 2312 *and* CP 2303 (¶5). Yet, once litigation commenced, Cola dropped that reason and presented a completely different, third justification, testifying that although "Rufin was a strong candidate, ... there were some concerns about the lack of detail in her responses to some of the questions." *See* CP 1124. Yet, the contemporaneous documentation of Rufin's interview gave no hint of such concerns, resulting instead in Rufin being unanimously rated "High" by all the panelists, including Cola. *See* CP 1300-06. "Although [Cola's] 'shifting explanations are acceptable when viewed in the context of other surrounding events ... such weighing of the evidence is for a jury, not a judge.'"[10]

b. The Stray Remarks Doctrine Was Rejected In Scrivener.

Under Scrivener v. Clark College, the statements of H.R. Officer Johnson and Hiring Manager Cola, stating Rufin "burned her bridges" and that a hiring decision rejecting her was "political," are circumstantial evidence probative of retaliatory intent, even when "not made directly in

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[9] Griffith v. Schnitzer Steel Industries, Inc., 128 Wn. App. 438, 450, 115 P.3d 1065 (2005); *accord* Currier, 182 Wn. App. at 747-49.
[10] Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998).

the context of an employment decision or uttered by a non-decision-maker." *See* Scrivener, 181 Wn.2d at 443, 450, n.3 (2014) (rejecting "stray remarks" doctrine). It was error for both the trial court and the Court of Appeals to not consider such evidence as support for Rufin's claim that the LPSM hiring process was retaliatory. At summary judgment, "the court must review the record 'taken as a whole.'" Reeves, 530 U.S. at 150. "All of the evidence - whether direct or indirect - is to be considered cumulatively." Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (9th Cir.2003). Yet, the trial court was explicit that it reviewed the evidence relating to the CMEM rejection "separately."[11]

c. Evidence of a Pattern of Retaliation is Admissible.

The evidence supporting the CMEM and LPSM claims overlap, and the fact that Plaintiff was shut out of a hiring process twice, under similar, irregular circumstances is itself evidence of retaliatory intent.

The fact that Rufin presented a "pattern" of irregularities and inconsistencies, which she experienced not only in the LPSM process, but also in the earlier the CMEM process, is further evidence of retaliatory intent.[12] In the LPSM process, Rufin was the only candidate rated "High" who did not advance to a second interview. Such "[p]roof of different

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[11] RP (Feb. 27, 2014), at 58.
[12] Wilmot, 118 Wn.2d at 69.

treatment by way of comparator evidence is relevant and admissible" evidence of discriminatory intent.[13] The fact that this difference in treatment occurred contemporaneous with the City's failure to select her for the CMEM position, when Rufin was the only candidate to receive **any** "High" ratings in the second interview (and Rufin had ***unanimous*** "High" ratings), bolstered her claim that the CMEM non-hiring was retaliatory.

2. The Petition Involves Issues Of Substantial Public Interest That Should Be Determined By The Supreme Court.

The Court of Appeals supported its decision by citing to Carrasco's affidavit, Cola's and other manager's statements denying knowledge or improper action. Op., at 5-6. But these are issues for the jury. *See* Felsman v. Kessler, 2 Wn. App. 493, 496-97, 468 P.2d 691 (1970) ("[W]here material facts averred in an affidavit are particularly within the knowledge of the moving party, it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying."); *accord* Hernandez v. SpaceLabs Medical, Inc., 343 F.3d 1107, 1113-14 (9th Cir. 2003) (what-did-he-know-and-when-did-he-know-it questions inappropriate for resolution on summary judgment of Title VII and RCW 49.60 retaliation claims).

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[13] Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 33, 244 P.3d 438 (2010).

The WLAD contains strong wording about the importance of eliminating discrimination to our "free and democratic state." RCW 49.60.010. "The legislature directs us to construe the WLAD liberally." Scrivener, 181 Wn.2d at 441, *citing* RCW 49.60.020. Whether a plaintiff alleging retaliation under RCW 49.60.210 must in every case produce admissions from the relevant decision-maker(s), admitting either that they had knowledge of the plaintiff's statutorily protected activity or were influenced in their decision by a person with such knowledge, is thus a matter of substantial public interest. There is a high probability the issue presented in this case will recur in many more cases. The EEOC reported that retaliation claims were the most common charge filed with the agency in 2014, alleged in 42.8 percent of all charges. *See* App. at A-15. This Court's elucidation of what claimants must prove to survive summary judgment in cases alleging retaliation under RCW 49.60.210 will guide the analysis of trial court decisions in innumerable retaliation cases to follow.

F. CONCLUSION

Summary judgment should be reversed as to the LPSM retaliation claim and the case remanded for a new trial on the claim for retaliation with respect to Rufin's non-hiring for both the CMEM and LPSM positions, so the jury can review the allegations together and consider all of the circumstantial evidence supportive of the claims cumulatively.

Respectfully submitted this 8th day of October, 2015.

THE SHERIDAN LAW FIRM, P.S.

By: s/ John P. Sheridan
John P. Sheridan, WSBA # 21473
Mark Rose, WSBA# 41916

Attorneys for Petitioner

DECLARATION OF SERVICE

Jodie Branaman states and declares as follows:

1. I am over the age of 18. I am competent to testify in this matter, and am a legal assistant for the Petitioner's attorney of record. I make this declaration based on my personal knowledge and belief.

2. On October 8, 2015, I emailed to the following attorneys:

Carolyn Boies Nitta / Molly Daily
City of Seattle Attorneys Office
600 Fourth Avenue, 4th Floor
Seattle, WA 98104

David Bruce / Ryan Solomon
Savitt Bruce & Willey
1425 Fourth Avenue, Suite 800
Seattle, WA 98101

a copy of the PETITION FOR REVIEW.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of October, 2015, at Seattle, King County, Washington.

s/Jodie Branaman
Jodie Branaman, Legal Assistant

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REBECCA A. RUFIN, an individual, Appellant, v. CITY OF SEATTLE, a municipality, and JORGE CARRASCO, an individual, Respondents.	)	No. 72012-1-I UNPUBLISHED OPINION FILED: August 17, 2015

TRICKEY, J. — To establish a prima facie case of retaliation under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, the employee must show that the employee engaged in statutorily protected activity which resulted in the employer taking an adverse action against the employee. Here, the employee failed to establish a causal connection between her protected activity and the employer's decision to not hire her for one of the positions for which she applied. Summary judgment dismissal of the retaliation claim was appropriate.

Nor did the trial court err in its various evidentiary rulings or in denying the employee's motion for a new trial on the other retaliation claim that proceeded to trial, but which resulted in a defense verdict.

The trial court is affirmed.

FACTS

Rebecca Rufin worked for Seattle City Light from 1990 through 2006. In 2005, Seattle City Light was undergoing reorganization under Jorge Carrasco, the general manager and chief executive officer. Rufin applied for four director positions. She was selected to be interviewed for three of those positions.

In 2006, Rufin left to take a position with the Seattle Parks and Recreation Department. At that time, Rufin was still in the running for a power supply asset management director position (PSAMD), which remained unfilled by a permanent hire until June of 2008, when Pam Johnson accepted the position.

In January of 2006, while still employed at City Light, Rufin submitted a statement to and was interviewed by an independent investigator, Lawton Humphrey, regarding gender discrimination allegations asserted by Betty Tobin, another City Light employee. Humphrey found no support for those allegations.

In October of 2006, after Rufin had left, she was deposed by Wanda Davis in a gender discrimination lawsuit that Davis had filed against City Light. The focus of the deposition was Rufin's 2006 statement that she made during the Tobin investigation. The Davis suit was unsuccessful. The parties do not dispute that Rufin's participation as a witness constituted protected activity for a retaliation claim.

In 2010, 2011, and 2012, Rufin applied for employment back at City Light for two open positions: (1) a civil and mechanical engineer manager (CME), and (2) a large projects senior manager (LPSM). She was not hired for either position.

Rufin applied for the CME position in August of 2011. City Light interviewed Rufin for the position on three separate occasions, but terminated the hiring process without filling the position.

In 2012, Rufin interviewed for the LPSM position, a position for which she had been invited to apply by Mike Haynes, who was the hiring authority for the CME position. In March of 2012, she was notified that she was not chosen. City Light relisted the CME position in April 2012. Rufin reapplied, but again was not chosen.

Rufin filed a complaint against City Light and its director, Jorge Carrasco, under chapter 49.60 RCW, claiming gender discrimination and retaliation for taking part in protected activity approximately four years prior to her application for employment.

City Light & Carrasco moved for summary judgment, resulting in the following orders:

- Partial summary judgment order entered August 7, 2013, dismissing Rufin's claims for discrimination and disparate treatment with respect to any events occurring prior to October 5, 2009;

- Partial summary judgment order entered March 27, 2014, dismissing Rufin's disparate treatment discrimination claims and all claims for retaliation in connection with Rufin's application or nonhiring for the LPSM position.

The remaining issues were tried to a jury, which returned a defense verdict on all claims. Rufin appeals, contending the trial court erred in summarily dismissing her retaliation claim relating to the LPSM position and in making certain other evidentiary rulings.

ANALYSIS

Partial Summary Judgment

In February 2014, the trial court partially granted City Light's and Carrasco's motions for summary judgment dismissing Rufin's claims for sex discrimination and her retaliation claims relating to her nonhiring for the LPSM position. However, the trial court permitted the retaliation claim under RCW 49.60.210(1) to go to the jury because there was circumstantial evidence alleged that, if believed, Carrasco may have been aware of Rufin's application for the CME position.

This court reviews de novo a trial court's grant of summary judgment, engaging in the same inquiry as the trial court. Korslund v. DynCorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as matter of law. CR 56(c); Fulton v. State Dep't of Soc. & Health Servs., 169 Wn. App 137, 147, 279 P.3d 500 (2012). Employment discrimination cases often present genuine factual disputes that preclude summary judgment. Scrivener v. Clark College, 181 Wn.2d 439, 445, 334 P.3d 541 (2014). However, Washington courts have granted summary judgment in employment discrimination cases where the plaintiff fails to establish each element of the claim. Domingo v. Boeing Emps. Credit Union, 124 Wn. App. 71, 77-78, 98 P.3d 1222 (2004).

To prevail, Rufin had to establish a prima facie case of retaliation. Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 68, 821 P.2d 18 (1991). To establish a prima facie case of retaliation under the WLAD, Rufin must show (1) she engaged in statutorily protected activity, (2) City Light took some adverse employment action

against her, and (3) there is a causal link between her protected activity and City Light's adverse action. Estevez v. Faculty Club of Univ. of Wash., 129 Wn. App 774, 797, 120 P.3d 570 (2005).

Conclusory, speculative testimony in affidavits is insufficient to meet that burden. Thornhill Publ'g Co. Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979). Bare assertions that a genuine material issue exists, however, will not defeat a summary judgment motion in the absence of actual evidence. Trimble v. Wash. State Univ., 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

A plaintiff need not show that retaliation was the only or "but for" cause of the adverse employment action. Allison v. Housing Auth. of Seattle, 118 Wn.2d 70, 95-96, 821 P.2d 34 (1991). However, the plaintiff must show that it was at least a "substantial factor" in the employer's decision to retaliate. Allison, 118 Wn.2d at 95-96. Here, there is nothing more than speculation.

City Light does not dispute that Rufin engaged in protected activity, or that nonhiring is an adverse employer action. Thus, the only question remaining is whether Rufin alleged sufficient facts showing a causal link between her involvement in the protected activity and City Light's not hiring her for the LPSM position. This she failed to do.

Darnell Cola, director of asset management and large projects, was the hiring manager and direct supervisor of the LPSM position. Each of the hiring committee members submitted declarations that they had no knowledge of Rufin's participation as a witness in either the investigation or the subsequent lawsuit. Each also averred that it was a unanimous decision to send Ruth Steiner and another female candidate to the

second round of interviews. There was clear evidence presented that the persons responsible for making the decision to advance Rufin to the next level of the reviewers were not aware of the protected activity. Thus, Rufin failed to establish any causal connection between the protected activity and the adverse action.

Jorge Carrasco submitted an affidavit stating that he was unaware that Rufin had submitted a written statement as part of the independent investigation of Tobin's experience. The independent investigator, Humphrey, informed Carrasco only of her conclusion that Tobin's allegations were unsubstantiated. She did not give him any additional information regarding the investigation. Rufin admitted in her deposition that there was no evidence that Carrasco had ever learned about her written statement.

Rufin argues that because the court found that an issue of fact may exist as to whether City Light retaliated against her in failing to select her for the CME position, an issue of fact necessarily existed for her application for the LPSM position.

But Rufin's own deposition indicated that the hiring manager and the other panel members interviewing her were not aware of her 2006 statement in the Tobin claim or of her 2007 deposition in that case. In fact, when asked whether she believed that Carrasco was aware of the LPSM position that Rufin was seeking, she said it was possible, stating, "That I'm less confident of, but I'm—if he was not directly aware, then I believe that Phil West was aware that Jorge did not like me."[1] This is mere speculation that does not give rise to a reasonable inference or provide circumstantial evidence. Accordingly, the trial court correctly dismissed the claim.

[1] Clerk's Papers (CP) at 1259.

Evidentiary Rulings

Rufin argues that the trial court erred in several of its evidentiary rulings and that she should be entitled to a new trial. We review a trial court's decisions to admit or exclude evidence for an abuse of discretion. Salas v. Hi Tech Erectors, 168 Wn.2d 664, 668, 230 P.3d 583 (2010). A trial court abuses is discretion when its decision is manifestly unreasonable or based on untenable grounds. Salas, 168 Wn.2d at 668-69.

A. Excluding evidence of Rufin's application and interview for the LPSM position.

The court excluded evidence that Rufin had applied for and was denied the LPSM position under ER 402 and ER 403 because the court had dismissed that claim on summary judgment. Rufin sought to admit the evidence to prove that Carrasco had a pattern of retaliating against her.

There was no nexus between the decision to not hire Rufin for the LPSM position and the allegations of retaliation. Without such a nexus, the acts were not relevant under ER 402 and its probative value was outweighed by the danger of unfair prejudice and confusion under ER 403. Lodis v. Corbis Holdings, Inc., 172 Wn. App 835, 863-64, 292 P.3d 779 (2013).

Rufin argues that excluding the facts of the LPSM hiring process prevented her from establishing a pattern of not hiring her in 2011 and 2012. She contends that the acts were admissible as proof of motive or intent under ER 404(b). However, before admitting such evidence, the court must balance the probative value of the evidence versus its potential for prejudice. Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 444-45, 191 P.3d 879 (2008).

Here, the trial court did so and found the probative value minimal when compared to the danger of confusing the jury and wasting trial time. The court concluded that there was insufficient evidence to link the denial of the LPSM job to any alleged retaliation and that there was no evidence of Carrasco being involved in the LPSM decision-making process.

Further, a pattern of retaliation or discrimination cannot be established when the claims themselves have been determined to not be discriminatory or retaliatory. See Waters v. Genesis Health Ventures, Inc., 400 F. Supp. 2d 808, 811-812 (E.D. Pa. 2005) (defendant precluded from offering testimony of another regarding acts of discrimination by the defendant when that witness's complaint for discrimination had already been dismissed on summary judgment).

No evidence was produced that there was a nexus between Rufin's protected activity and her not being hired for the LPSM position. Thus, the trial court did not abuse its discretion.

B. Admitting the outcome of the Tobin investigation and Davis litigation while excluding the evidence underlying both matters.

Davis Litigation:

Rufin informed the court that Davis was not testifying and that she intended to only introduce the existence of the lawsuit and that Rufin had been subpoenaed to testify. The City did object to the limited scope of evidence, and the court agreed that the outcome of the Davis lawsuit was irrelevant at that stage and excluded it.

The parties stipulated that "(1) In October 2006, Wanda Davis filed a discrimination complaint against the City of Seattle; (2) On December 19, 2007, Jorge

Carrasco was added as an individual defendant in that case."[2] However, on cross-examination, Rufin's counsel queried Carrasco about the nature of the pleadings, specifically linking Rufin's 2007 deposition as the reason that Carrasco was added as a defendant in that suit. Carrasco denied knowing Rufin had been deposed. This line of questioning raised strong inferences that the reason Carrasco was later added individually to the Davis complaint was because of Rufin's 2007 deposition, thereby providing a motive for Carrasco's retaliation.

Before redirect, defense sought to introduce the dismissal of the Davis litigation by the district court and its subsequent affirmation on appeal by the Ninth Circuit. Because the dismissal of the suit rebutted the inference raised by plaintiff's questioning, the court allowed its admission, ruling that Rufin's questioning had opened the door to the evidence.

When a subject is opened up by a party on cross-examination, the other party may cross-examine on redirect within the scope of the examination in which the subject matter was first introduced. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). The trial court did not abuse its discretion, particularly here, where plaintiff's counsel delved into the allegations of the Davis case, intimating that Carrasco had discriminated against both women and in particular, had retaliated against Rufin for her involvement in that case without permitting the City to show that no discrimination had been found.

[2] CP at 3251.

Tobin Investigation:

On March 31, 2014, the court provided the parties with a lengthy oral ruling on the defense motion in limine to exclude or limit the scope of Tobin's testimony under ER 404(b). The court subsequently entered a written order on the motion:

> Defendants' motion regarding claims by Ms. Tobin is GRANTED in Part and DENIED in Part; Ms. Tobin may testify about competing for the PSAMD position, that she thought she was passed over because of her gender, that she complained of gender discrimination, that her complaint was investigated and that she participated in that investigation, and that the investigation concluded that no discrimination had occurred. Ms. Tobin may not testify about any purported retaliation against her in 2006 after the conclusion of the investigation. Evidence of Ms. Tobin's settlement with the City is excluded under ER 408 and 403.[3]

In accordance with the court's ruling, Tobin testified that she perceived she was being treated differently. She also testified that she met with other women employees, including Rufin, about their perceived mistreatment.

Rufin testified that she had learned that the Tobin investigation concluded with a finding of no discrimination because "Carrasco treated males as badly as he did females."[4] Further, Rufin testified that she left "first of all" because she had been approached by the Parks Department and offered a position there.[5]

Rufin's own testimony in effect supports City Light's position that there was no discrimination. Excluding the admission of Tobin's settlement with City Light and the results of the Davis suit did not prejudice Rufin.

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[3] CP at 3518-19.

[4] Report of Proceedings (RP) (Apr. 1, 2014) at 114.

[5] RP (Apr. 1, 2014) at 114.

In sum, the trial court properly dismissed the one claim on summary judgment and did not abuse its discretion in any of its evidentiary rulings.

Affirmed.

Trickey, J.

WE CONCUR:

Leach, J.

Dwyer, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REBECCA A. RUFIN, an individual, Appellant, v. CITY OF SEATTLE, a municipality, and JORGE CARRASCO, an individual, Respondents.	No. 72012-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Rebecca A. Rufin, has filed a motion for reconsideration herein. The court has taken the matter under consideration and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 9th day of September, 2015.

FOR THE COURT:

Trickey, J

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REBECCA A. RUFIN, an individual, Appellant, v. CITY OF SEATTLE, a municipality, and JORGE CARRASCO, an individual, Respondents.	)	No. 72012-1-I ORDER DENYING MOTION TO PUBLISH

The appellant, Rebecca A. Rufin, has filed a motion to publish herein. The court has taken the matter under consideration and has determined that the opinion is not of precedential value.

Now, therefore, it is hereby

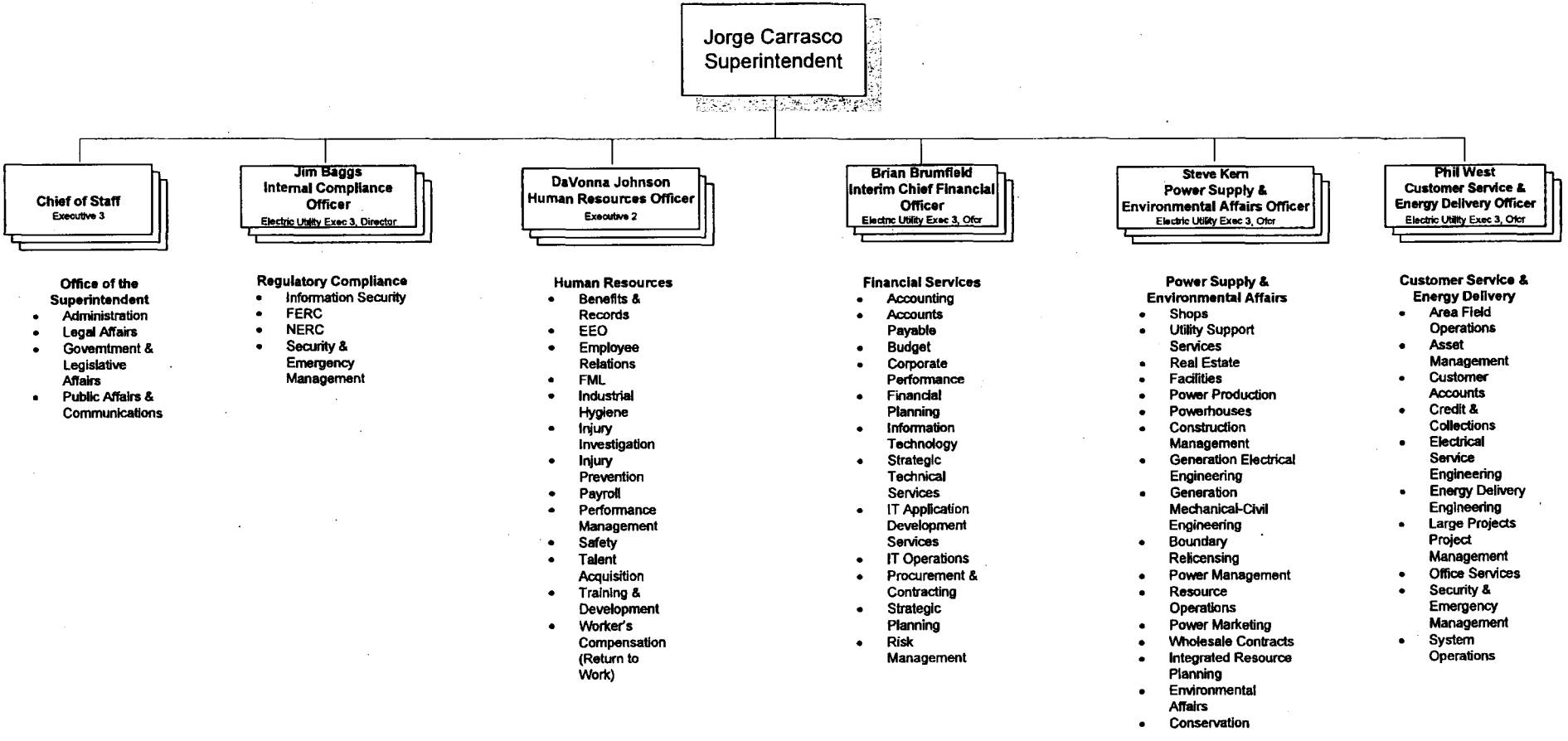
ORDERED that the unpublished opinion filed August 17, 2015, shall remain unpublished.

Done this 9th day of September, 2015.

FOR THE COURT:

Trickey, J

Seattle City Light Superintendent Executive Team



CP0130
2-14

U.S. Equal Employment Opportunity Commission

PRESS RELEASE
2-4-15

EEOC Releases Fiscal Year 2014 Enforcement and Litigation Data

Percentage of Claims Alleging Retaliation Reaches Record High, While Number of Charges Decrease

WASHINGTON-The U.S. Equal Employment Opportunity Commission (EEOC) today released a comprehensive set of fiscal year 2014 private sector data tables providing detailed breakdowns for the 88,778 charges of workplace discrimination the agency received. The fiscal year ran from Oct. 1, 2013, to Sept. 30, 2014.

The number of charges filed decreased compared with recent fiscal years, due in part to the government shutdown during the reporting period. While charge filings were down overall compared to the previous fiscal year, first quarter charge filings--which included the period of the shutdown--were 3,000 to 5,000 less than the other quarters.

Among the charges the EEOC received, the percentage of charges alleging retaliation reached its highest amount ever: 42.8 percent. The percentage of charges alleging race discrimination, the second most common allegation, has remained steady at approximately 35 percent. In fiscal year 2014, the EEOC obtained $296.1 million in total monetary relief through its enforcement program prior to the filing of litigation.

The number of lawsuits on the merits filed by the EEOC's Office of General Counsel throughout the nation was 133, up slightly from the previous two fiscal years. A lawsuit on the merits involves an allegation of discrimination, compared with procedural lawsuits, which are filed mostly to enforce subpoenas or for preliminary relief. Monetary relief from cases litigated, including settlements, totaled $22.5 million.

"Behind these numbers are individuals who turned to the EEOC because they believe that they have suffered unlawful discrimination," said EEOC Chair Jenny R. Yang. "The EEOC remains committed to meaningful resolution of charges and strategic enforcement to eliminate barriers to equal employment opportunity."

The updated data include the popular tables of Statutes by Issue and Bases by Issue. "Bases" refers to the protected characteristics giving rise to the discrimination, such as sex or age. In contrast "issue" is the discriminatory action, such as discharge or failure to promote.

More specifically, the charge numbers show the following breakdowns by bases alleged in descending order.

- Retaliation under all statutes: 37,955 (42.8 percent of all charges filed)
- Race (including racial harassment): 31,073 (35 percent)
- Sex (including pregnancy and sexual harassment): 26,027 (29.3 percent)
- Disability: 25,369 (28.6 percent)
- Age: 20,588 (23.2 percent)
- National Origin: 9,579 (10.8 percent)
- Religion: 3,549 (4.0 percent)
- Color: 2,756 (3.1 percent)
- Equal Pay Act: 938 (1.1 percent) but note that sex-based wage discrimination can also be charged under Title VII's sex discrimination provision
- Genetic Information Non-Discrimination Act: 333 (0.4 percent)

These percentages add up to more than 100 because some charges allege multiple bases, such as discrimination on the bases of race and color, or sex and retaliation.

In fiscal year 2014, 30 percent of the charges filed with EEOC alleged the issue of harassment on various bases, such as race harassment or harassment on the basis of disability. Preventing harassment through systemic enforcement and targeted outreach is a priority issue for the Commission. The January 14, 2015 Commission meeting focused on Workplace Harassment. The new table for All Harassment Charges includes sexual harassment as well as other forms of harassment. Sexual Harassment still remains as a separate table, joined by new tables showing charges of Race Harassment as well as Charges Alleging Harassment Other than Sexual Harassment.

Discharge continues to be the most common issue for all bases under Title VII, the ADEA and the ADA. Allegations of harassment for all bases were the next most frequently cited issue, with the exception of race. For the basis of

race, discriminatory terms and conditions of employment was the second most frequently cited issue (9,332), with harassment being the third (9,023).

The updated tables also include Charges by State. The greatest number of charges were filed in Texas (8,035), followed by Florida (7,528) and California (6,363).

The EEOC enforces the nation's laws prohibiting discrimination in employment. Further information about the EEOC is available at www.eeoc.gov.

OFFICE RECEPTIONIST, CLERK

To: Jodie Branaman
Subject: RE: Rufin v. City of Seattle, et al.

Received on 10-09-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e
mail attachment, it is not necessary to mail to the court the original of the document.

From: Jodie Branaman [mailto:jodie@sheridanlawfirm.com]
Sent: Friday, October 09, 2015 10:24 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: FW: Rufin v. City of Seattle, et al.

From: Jodie Branaman
Sent: Thursday, October 8, 2015 4:14 PM
To: 'supreme@courts.wa.gov' <supreme@courts.wa.gov>
Cc: Jack Sheridan <jack@sheridanlawfirm.com>; Mark Rose <mark@sheridaawfirm.com>; Ashalee May <ashalee@sheridanlawfirm.com>
Subject: Rufin v. City of Seattle, et al.

Washington Supreme Court
Attention: Clerk of the Court

Re: Rufin v. City of Seattle and Jorge Carrasco
Supreme Court Case No. _____

Appeal from King County Superior Court
Case No. 11-2-01374-7
Hononorable Beth M. Andrus

Attached please find Plaintiff/Petitioner's *Petition for Re*[illegible]*r* filing with the Court in the above entitled and numbered case.

John P. Sheridan, WSBA #21473
Mark W. Rose, WSBA #41916
Attorneys for Plaintiff/Petitioner
jack@sheridanlawfirm.com
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