No. 92510-1

Court of Appeals No.46602-3-II

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

Csilla Muhl,

Appellant,

v.

Davies Pearson, P.C.,

Respondent.

PETITION FOR REVIEW

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
Shelby R. Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033
Attorney for Respondent

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INTRODUCTION

Respondent Davies Pearson, P.C. proved to the satisfaction of both lower courts three legitimate, non-discriminatory reasons for terminating Appellant Csilla Muhl. These include a "meltdown" causing her client to demand a new attorney, conduct prompting the trial court to question her behavior, and failing to appear at a client's contempt hearing because he could not pay her. Coupled with years of well-documented sub-par performance, the trial court correctly dismissed Muhl's discrimination claims as a matter of law.

But the appellate court reversed, inferring material questions of fact from circumstantial evidence, largely Muhl's own opinion her work was satisfactory, or her speculation about why she was let go. Muhl's perception of herself is irrelevant. She can defeat summary judgment only with facts, not supposition. And the appellate court cannot act as a superpersonnel agency, second-guessing the professional standard to which Davies holds its lawyers.

Erring again, the appellate court refused to consider whether a ***Burnet*** violation was harmless error. These errors resulted in numerous conflicts with this Court's cases and raise questions of substantial public interest. This Court should accept review and reverse the appellate court.

ISSUES PRESENTED FOR REVIEW

1. Did the appellate court erroneously fail to apply a harmless error analysis where evidence was excluded under ***Burnet***, *infra*?

2. Did the trial court properly grant summary judgment on Muhl's sex discrimination claim, where (a) Muhl failed to establish a *prima facie* case that she was doing satisfactory work and that she was replaced by someone outside the protected class; and (b) her failed *prima facie* case did not rebut Davies' legitimate, nondiscriminatory reasons for firing her, so (c) she thus failed to establish pretext?

3. Did the trial court properly grant summary judgment on Muhl's retaliation claim, where she was terminated over 9-months after her complaint, following a continuous pattern of poor performance, and immediately following one of three events ruled a legitimate nondiscriminatory basis for termination?

FACTS RELEVANT TO PETITION FOR REVIEW

A. Since at least 2008, staff and other attorneys in Muhl's practice group had significant concerns about her work.

Appellant Csilla Muhl worked at Davies Pearson from 1996 to 1997, leaving the firm to work with a departing shareholder. CP 304-05. Muhl returned to Davies in 2006, joining shareholders Anne Peck and Jim Tomlinson in the family law group. CP 143-44, 155-56, 289.

Peck helped mentor Muhl from 2008 to 2010, experiencing the following significant problems with Muhl's work: (1) overbilling; (2) mismanaging discovery and litigation; (3) wasting staff time; (4) assigning staff tasks that exceeded their capabilities; and (5) failing to instill confidence in clients. CP 85, 143-45, 153-54. Tomlinson had previously addressed the same issues with Muhl. CP 156-57.

In October 2008, shareholders relayed staff concerns that Muhl was unprepared for trial, and Peck learned that Muhl had mishandled discovery. CP 145, 156. Peck later learned that a client was very dissatisfied with Muhl's two-month delay in preparing his documents, caused by Muhl delegating the task to a paralegal who was unqualified for it. CP 151. Peck raised her many concerns with shareholders and the firm administrator, suggesting that Muhl be put on a performance plan or terminated. CP 85, 145, 151. She felt that Muhl was "[i]ll-suited" to litigation, but that her general likability delayed addressing her poor performance. CP 144.

As Tomlinson continued transitioning out of family law and stopped taking new cases in 2009, Davies hired Susan Caulkins to work in the family law group. CP 53, 125-26, 144. The entire family law group was women – Muhl, Peck, and Caulkins. CP 53-54.

Caulkins assumed a mentoring role with Muhl, prompted by increasing performance issues. CP 55. Caulkins shared Peck's concerns about Muhl, including that she: (1) failed to project professionalism and confidence; (2) dominated staff time with unbillable or unproductive work; (3) assigned work that was beyond staff capability; (4) gave poor instructions; (5) failed to manage litigation; and (6) and so badly mishandled calls from prospective clients that she lost clients. CP 55-56. Caulkins repeatedly addressed these problems with Muhl and with shareholders. CP 59.

Firm administrator Angela Cooper fielded more staff complaints about Muhl than any other attorney, and most staff assigned to Muhl asked to transfer. CP 85-87, 527. Their complaints echoed Peck, Tomlinson, and Caulkins. CP 55-56, 85-86, 144-45, 156-67. Cooper included Muhl in the hiring process to try to alleviate this problem, but complaints about Muhl never ended. *Id.*

Effective January 2010, Davies had to reduce Muhl's salary based on her collections for 2007 through 2009, and on her revenue projection for 2010. CP 140. Muhl never met her annual hourly goal and rarely came within her range of anticipated collections. CP 69, 127, 140. Davies could no longer sustain Muhl's salary. CP 140.

B. In addition to continued poor performance, three specific events led to Muhl's termination.

In October 2010, Muhl sought a continuance on the first day of trial after opposing counsel produced financial documents the night before. CP 56-57, 224-25, 312. The trial court bifurcated the trial, continuing the financial issues. CP 225. Muhl then returned to the office in "considerable panic," repeatedly stating in front of the client, staff, and attorneys: "I can't do this, I'm not ready, why would the judge do this?" CP 56, 312. The client became very concerned, demanding that another attorney take over. CP 56. Caulkins intervened and was able to restore calm. CP 57. This incident was very concerning to all who knew about it. CP 56-57, 69.

In 2010, Peck retired, Tomlinson was rapidly phasing out of family law, and Muhl and Caulkins reported that they were over-worked. 143, 439. In January 2011, Davies hired Mark Nelson to work principally in family law and criminal law. CP 496, 538-39. The family law practice group has continued to grow since then. CP 438. After Nelson joined Davies, Muhl had her highest earning year, one of only two in which she surpassed her financial goal. CP 69, 131.

In February 2011, Caulkins gave Muhl a memo addressing her "meltdown" in front of the client, critiquing her trial performance,

and reiterating her poor time-management, lack of focus, and unprofessional demeanor. CP 61-63. Caulkins sent her memo to Muhl's supervising shareholder, Ron Coleman, who found the incident "very concerning." CP 57, 69. Coleman repeatedly tried to facilitate necessary improvement with Muhl. CP 427.

In June 2011, the trial court sent Muhl a letter regarding her conduct in the same trial. CP 57, 273. The appellate court misunderstood this incident as Muhl asking her expert a question in violation of a pretrial order. Op. at 2. Judge Hickman excluded witnesses from court pretrial, explaining that he wanted to hear testimony "uninfluenced" by others. CP 273 (emphasis omitted). Yet Muhl's valuation expert, Shelly Drury, testified that Muhl told her about the opposing expert's prior testimony and that Muhl had not sought an order allowing Drury to observe the trial because she thought that Judge Hickman would deny the request. *Id.*

Judge Hickman saw this is an effort to circumvent his pre-trial order, asking Muhl to explain. CP 273. Although Muhl's explanation satisfied Judge Hickman, the shareholders had significant concerns about this incident, and none could recall a similar one. CP 70, 347.

In July 2011, Coleman told Muhl that she was overbilling and under-collecting, stating "[w]e have a billable hours requirement and

it is meaningless if everyone did what you are doing." CP 76. During one of their regular mentor meetings in November 2011, Muhl expressed dissatisfaction about her pay and progress at Davies, but Coleman did not find her arguments compelling. CP 69. Muhl had a rare good year in 2011, but admitted that it was an anomaly and predicted that she would not do as well in 2012. *Id.* And Muhl continued to have problems with collections, inefficient use of staff time, and a lack of self-confidence. CP 276, 337. Muhl also stated her feeling that Davies did not recognize, promote, and retain female attorneys effectively, and had failed to support her practice. CP 310. Coleman did not take this as a complaint about discrimination, so did not relay Muhl's comments to others. CP 69.

In December 2011, Muhl raised transitioning out of Davies and Coleman responded that Davies was not asking her to leave, but would support her if she elected to do so. CP 70-71.[1] Despite Muhl's failure to ever meet her hourly goal, Muhl received a bonus for 2011, a rare year that she surpassed her financial goal. CP 127, 131.

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[1] Although Muhl's notes state her intent to discuss transitioning out, she claimed uncertainty as to whether she and Coleman discussed it. CP 231-33, 275-76.

In June 2012, Coleman followed up with Muhl on her transition out of Davies. CP 71. According to Muhl, Coleman told her that she was not a candidate for shareholder, but could remain at Davies as an associate. CP 311, 345.[2] Though the conversation about transitioning from Davies was "vague," "Muhl was positive about the idea and agreed." *Id.* Muhl's hours and billings then decreased. *Id.*

In September 2012, Muhl elected not to attend her client's contempt hearing, despite being counsel of record. CP 313-14, 580. Muhl argued on appeal that she felt bound by her client's instructions not to attend. Op. at 3. But Muhl's declaration in response to the contempt motion stated that she would be taking her child to school and that her client could not afford her and understood that he would "need to proceed on his own." CP 520.

The morning of the contempt hearing, Caulkins learned that Muhl would not attend the hearing and that the client faced jail time and financial sanctions. CP 57-58, 71. Caulkins immediately went to court, introduced herself to the client, and explained that they were still counsel of record and that she would like to be with him during

[2] Muhl argued below that Coleman also commented on her age, which Coleman denied. CP 71, 311, 345. This is irrelevant as Muhl did not appeal from the summary judgment dismissal of her age discrimination claims. BA 1.

the hearing. CP 58, 587. The client welcomed and appreciated Caulkins' representation. CP 587.

Caulkins notified Tomlinson and Coleman about this incident and her concerns about Muhl's prospects for improvement. CP 58. The shareholders found Muhl's willingness to place "money over the client's interest" part of a troubling pattern of conduct. CP 555-56; *also* CP 71, 430, 544.

Within the next week or so, the shareholders decided that Muhl could no longer continue practicing at Davies. CP 71-72, 142, 559. On September 13, managing shareholder Lamont Loo instructed the shareholders not to talk about Muhl's departure until she decided how she would like to handle the announcement. CP 125, 142. On the 28th, Loo and Coleman told Muhl that she could announce her departure as a resignation, transition, or termination. CP 71, 415, 559. Coleman asked Muhl for a decision by October 1, but heard nothing from her. CP 71-72. Coleman emailed Muhl on October 3, but again hearing nothing, told Muhl that Loo would tell the other associates that Muhl was transitioning out. CP 72, 84.

C. The trial court dismissed Muhl's claims on summary judgment, but the appellate court reversed.

Muhl sued Davies, alleging several claims, including gender discrimination. CP 5-6. Davies filed two summary judgment motions, seeking to dismiss all of Muhl's claims. CP 12-52; BR 1. In response to Davies' second motion, Muhl disclosed a purported expert witness, Dr. Rosalind Barnett, six-months after the discovery cut-off, providing her report over a month later. CP 450, 453. Davies moved to strike Barnett's report on multiple grounds, including that it was (1) untimely filed; (2) lacking adequate foundation; (3) speculative; and (4) irrelevant. CP 449-86; BR 18-22, 41-42.

The trial court granted Davies' motion to strike Barnett's report and dismissed all of Muhl's claims on summary judgment. CP 660-62, 663-64. Muhl appealed the summary judgment dismissal of her wrongful termination and retaliation claims and the order striking Barnett's report. CP 665-71. The appellate court reversed, holding that the court erroneously struck Barnett's report without properly applying the ***Burnet*** test, and holding that material questions of fact precluded summary judgment. ***Muhl v. Davies Pearson, P.C.***, No. 46602-3-II (October 20, 2015). Davies seeks review.

REASONS THIS COURT SHOULD ACCEPT REVIEW

A. The appellate court's holding on the exclusion of Muhl's witness conflicts with this Court's decisions in *Keck v. Collins* and *Jones v. City of Seattle*. RAP 13.4(b)(1).

The appellate court reversed the trial court's exclusion of Muhl's late-disclosed expert under ***Burnet***, *infra*, declining to consider Davies' argument that the evidence was inadmissible on numerous evidentiary grounds. Op. at 7-8. Davies does not seek review of the holding on ***Burnet***. But the appellate court erroneously failed to consider harmless error, in conflict with ***Keck*** and ***Jones***, *infra*. This Court should accept review and reverse.

Very recently in ***Keck v. Collins***, this Court held for the first time that the three-part ***Burnet*** test applies where a trial court excludes evidence untimely filed under the timelines governing summary judgment. ***Keck v. Collins***, __ Wn.2d __, ¶25, 357 P.3d 1080, __ (2015) (***Burnet v. Spokane Ambulance***, 131 Wn.2d 484, 933 P.2d 1036 (1997)). The Court reversed, noting that the parties did not dispute that the excluded evidence created a genuine issue of material fact. ***Keck***, at ¶25 n.7. As the concurrence reminded, however, failing to properly apply the ***Burnet*** factors "is not per se reversible error." ***Keck*** at ¶43 (Gonzalez concurring) (citing ***Jones v. City of Seattle***, 179 Wn.2d 322, 338, 360, 314 P.3d 380 (2013)).

Rather, "[r]eversal is strong medicine and will not be administered when it is plain from the record that the error was harmless." *Id.*

In stark contrast to ***Keck***, Muhl did not argue that Barnett's report created a material question of fact and the appellate court did not address that issue. BA 18-39; Reply 12-17; Op. at 6-8. Absent a holding that Barnett's report creates a question of fact, its exclusion is harmless. The appellate decision is at odds with ***Keck***.

The appellate court's decision similarly contradicts ***Jones***, in which this Court held, for the first time, that a ***Burnet*** violation could be harmless, where the excluded evidence was irrelevant, unfairly prejudicial, or "merely cumulative." ***Jones***, 179 Wn.2d at 355-60. Contrary to ***Jones***, the appellate court refused to consider Davies' argument that the court should affirm on the alternate ground that Barnett's report was inadmissible on numerous evidentiary grounds.[3] Op. at 7-8. This issue was not, as the appellate court held, limited to

[3] As just one example of speculation, Barnett opined that the "model minority" stereotype that Asian women are hardworking and successful might explain why shareholder Sok-Khieng Lim excelled at Davies, despite being female. BR 20-21; CP 378-79, 460-61. Lim was not deposed and submitted no declaration, and Barnett had no knowledge of her workplace performance. CP 460-61. And as far as relevance, Barnett addressed the subconscious process, "confirmation bias," which has no bearing on the intentional torts Muhl alleged. BR 41-42; CP 372-74, 457-58.

a single sentence, but was briefed at length. *Compare id. with* BR 18-22, 41-42. This Court should accept review.

B. The appellate court's erroneous WLAD analysis conflicts with numerous decisions of this court, and the other appellate courts, and presents an issue of substantial public interest. RAP 13.4(b)(1), (2) & (4).

The opinion appropriately applies the standard ***McDonnell Douglas***[4] test for cases where, as here, a "plaintiff lacks 'direct evidence of discriminatory animus.'" Op. at 9 (quoting ***Hill v. BCTI Income Fund-I***, 144 Wn.2d 172, 180, 23 P.3d 440 (2001), *overruled in part*, ***McClarty v. Totem Elec.***, 157 Wn.2d 214, 137 P.3d 844 (2006)). The court thus noted that the plaintiff must first make out a *prima facie* case, showing that she (1) is in a protected class; (2) was discharged; (3) was doing satisfactory work; and (4) was replaced by someone outside the protected class. *Id.* at 9, 11.[5] As discussed below, the appellate court erred in holding that Muhl met her burden as to the third and fourth elements.

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[4] ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[5] Citing, *inter alia*, ***Hill***, 144 Wn.2d at 181; ***Domingo v. Boeing Emps. Credit Union***, 124 Wn. App. 71, 78, 80, 98 P.3d 1222 (2004); ***Short v. Battle Ground Sch. Dist.***, 169 Wn. App. 188, 204, 279 P.3d 902 (2012), *overruled in part*, ***Kumar v. Gate Gourmet, Inc.***, 180 Wn.2d 481, 325 P.3d 193 (2004).

If the employee meets her burden, then the employer must show legitimate, nondiscriminatory reasons justifying the termination. Op. at 10, 14.[6] Davies concededly met its burden of production. *Id.* at 14; BA 25. Thus, the presumption of discrimination dropped out of the case, and Muhl had to prove discrimination, either by showing that Davies' reasons were "unworthy of belief," or that discrimination was a "substantial factor" in her firing. *Id.* at 10-11, 15-17.[7] The court's analysis conflicts with many of the authorities cited.

1. Muhl's work was not satisfactory.

To avoid summary judgment, Muhl had to show "specific and material facts to support each element of the prima facie case." ***Domingo***, 124 Wn. App. at 77 & n.6 (citing ***Hill***, 144 Wn.2d at 181). The appellate court held that Muhl met the third element of her *prima facie* case by showing that she was doing satisfactory work. Op. at 11-12. The court ignores the vast evidence of Muhl's many failings.

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[6] Citing ***Hill***, 144 Wn.2d at 182; ***Grimwood v. Univ. of Puget Sound, Inc.***, 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988); ***Domingo***, 124 Wn. App. at 77, ***Currier v. Northland Servs., Inc.***, 182 Wn. App. 733, 743, 332 P.3d 1006 (2014), *rev. denied*, 182 Wn.2d 1006 (2015).

[7] Citing ***Hill***, 144 Wn.2d at 181-82, ***Scrivener v. Clark Coll.***, 181 Wn.2d 439, 446-48, 334 P.3d 541 (2014); ***Domingo***, 124 Wn. App. at 77; ***Wilmot v. Kaiser Aluminum & Chem. Corp.***, 118 Wn.2d 46, 73, 821 P.2d 18 (1991); ***Kuyper v. Dep't of Wildlife***, 79 Wn. App. 732, 738, 904 P.2d 793 (1995); ***Sellsted v. Wash. Mut. Sav. Bank***, 69 Wn. App. 852, 859-60, 851 P.2d 716 (1993), *overruled in part*, ***Mackay v. Acord Custom Cabinetry***, 127 Wn.2d 302, 898 P.2d 284 (1995)

From the outset, Muhl's interactions and communications with staff were problematic, and most asked to be reassigned. CP 55-56, 85-86, 144, 153-54, 527. Muhl failed to timely manage discovery and to properly control litigation, seeming ill-suited to the adversarial process. CP 56, 60, 144, 156. She also had significant difficulties with obtaining, retaining, billing, and collecting from clients. CP 55, 58-59, 69, 76, 140, 276. In addition, there are the three incidents that the appellate court determined were legitimate, nondiscriminatory reasons for her termination. Op. at 14. This is undisputed evidence of Muhl's less-than-satisfactory work. Her claim thus fails.

This and other Washington courts have often noted that they are "ill-equipped to act as super personnel agencies." ***White v. State***, 131 Wn.2d 1, 19-20, 929 P.2d 396 (1997) (quoting ***White v. State***, 78 Wn. App. 824, 840, 898 P.2d 331 (1995) (citing ***Wash. Fed'n of State Employees v. State Personnel Bd.***, 29 Wn. App. 818, 820, 630 P.2d 951 (1981))). Muhl's unsatisfactory performance is an undisputed, objective fact. *See, e.g.*, ***Grimwood***, 110 Wn.2d at 365 (employee's failure to contradict objective facts fatal on summary judgment). The appellate court contradicted these and many other Washington precedents by overturning summary judgment here. This Court should accept review and reverse.

2. Nelson did not replace Muhl.

The appellate court also held that Muhl raised facts suggesting that Nelson "replaced" her, although he worked about 70% in family law, and 30% in criminal law. Op. at 13-14; CP 497. It is undisputed that Davies hired Nelson soon after one of its family law attorneys retired, and while another was rapidly phasing out of family law, leaving Caulkins and Muhl complaining that they were "overworked." CP 143, 439. This occurred at least 18 months before Muhl's termination. CP 143, 144, 355, 496, 538-39.

After his hiring, Nelson – who had no prior family law experience – did not receive any in-house referrals, much less Muhl's referrals, but worked under Caulkins. CP 497. Muhl acknowledged that she did not know where referrals went. CP 236. She lost referrals simply because her colleagues had lost confidence in her. CP 434.

The appellate court expressed concern that an employer could, with "ease," use an "artifice" to "thwart" the WLAD "by acting with the slightest foresight and hiring the terminated employee's future replacement before actually terminating the employee." Op. at 13. Facts evidencing such an "artifice" could certainly raise a genuine issue (*e.g.*, where the new employee is hired in some proximity to the termination). There are no such facts in this case.

It is undisputed that Nelson was a productive and necessary part of the family law group long before Muhl's departure. Paying two lawyers for 18 months just to create a defense against an unforeseen, baseless discrimination claim would hardly constitute "ease." And there is no evidence that Davies used even "the slightest foresight" to "thwart" the WLAD by hiring Nelson ***18 months*** before terminating Muhl. Even alleging such a conspiracy – among nine lawyers – defies common sense. This Court should review this important question of first impression.

3. Muhl did not establish pretext.

The appellate court held that Muhl raised genuine issues of material fact on pretext based on two allegations. Op. at 15-17. First, Muhl's alleged *prima facie* showing that she was doing satisfactory work raised a genuine issue on whether the employer's proffered justification (a) had a basis in fact, or (b) was not a motivating factor for its decision. Op. at 15 (citing ***Scrivener***, 181 Wn.2d 447-48). Second, the court held that "references to Nelson's sex in hiring him" raised a genuine issue regarding pretext. *Id.* at 16-17.

As explained at length above, there is a great deal of undisputed, objective evidence that Muhl was not a satisfactory attorney. The appellate court ignored most of it. Nor could a

reasonable juror find that Muhl's many failings were not a substantial factor in her firing. This is not a genuine issue of material fact.

On the court's second point, a reasonable juror may not infer discrimination where shareholders wanted to add a male to an all-female family law group. With Nelson, the group was 66% female. Nor is it reasonable to infer that Nelson "replaced" Muhl – he was hired 18 months earlier to replace other exiting lawyers. The trial court ruled correctly under existing law, but the appellate court contradicted that law. This Court should grant review and reverse.

4. The Court of Appeals improperly used Muhl's insufficient *prima facie* case to prove pretext.

The appellate court held that "Muhl satisfied her burden of producing evidence to create a prima facie case and ***that evidence*** raises a genuine issue of material fact as to" pretext. Opinion at 16-17 (emphasis added). While it is not impossible for a *prima facie* case to raise an issue of fact on pretext,[8] here it does not. As discussed above, Muhl did not establish that she was doing satisfactory work, and Nelson's hiring provides no evidence of discrimination against Muhl, whom he did not replace. This Court should grant review.

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[8] And indeed, the appellate court expressly notes that it is not holding that "making a prima facie case necessarily raises genuine issues of material fact about pretext." Op. at 17 n.4.

C. The court's retaliation analysis conflicts with this Court's decision in *Wilmot* and raises an issue of substantial public interest. RAP 13.4(b)(1) & (4).

To establish a *prima facie* case of retaliation, Muhl must show that: (1) she engaged in a protected activity; (2) Davies took an adverse employment action; and (3) there was a causal link between the two. ***Wilmot***, 118 Wn.2d at 68.[9] As to the third element, the appellate court held that Muhl created a rebuttable presumption of causation that precludes judgment as a matter of law "by establishing that [she] participated in opposition activity, that [Davies] knew of the opposition activity, and that [Muhl] was discharged." Op. at 17-18 (citing ***Wilmot***, *supra*). But this Court agreed only "in general with this approach," explaining that temporal proximity and employee performance remain key to the employee's *prima facie* case on causation. ***Wilmot***, 118 Wn.2d at 68-69. The appellate court's failure to evaluate causation in light of Muhl's poor performance and the 9-month-plus gap between Muhl's complaint and her termination, directly contradicts ***Wilmot***. Op. at 17-18.

And as the appellate court acknowledged, the outer limit of temporal proximity is an "open question" (Op. at 20) – and one of

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[9] If Muhl establishes a prima facie case, the ***McDonnell Douglas*** burden shift addressed above applies. ***Wilmot***, 118 Wn.2d at 68.

substantial public interest that this Court should resolve. RAP 13.4(b)(4). Again, Muhl received a bonus immediately after complaining, continued to perform poorly, failed to appear at her client's contempt hearing (the third "legitimate, nondiscriminatory reasons to justify Muhl's termination," Op. at 14) and was then terminated – over 9 months after her complaint. CP 69, 71-72, 127, 142, 310. On these fact, Muhl cannot make out a *prima facie* retaliation case, and these facts would rebut any presumption in her favor in any event.

CONCLUSION

This Court should accept review and reverse.

RESPECTFULLY SUBMITTED November 20, 2015.

MASTERS LAW GROUP, P.L.L.C.

Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL AND/OR EMAIL

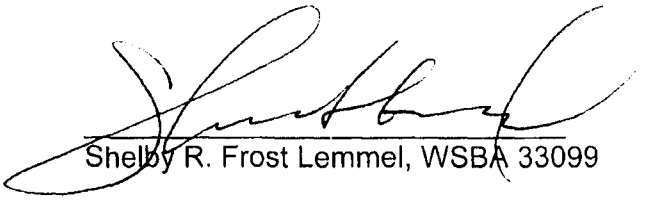
I certify that I caused to be mailed, postage prepaid, via U.S. mail, and/or emailed, a copy of the foregoing **ANSWER TO PETITION FOR REVIEW** postage prepaid, via U.S. mail on the 30th day of November 2015, to the following counsel of record at the following addresses:

Lori M. Bemis
Dave J. Luxenburg
McGavick Graves
1102 Broadway, Suite 500
Tacoma, Wa 98402

x U.S. Mail
____ E-Mail
____ Facsimile

Judith A. Lonnquist
Brian Dolman
Law Offices of Judith A. Lonnquist, P.S.
1218 Third Ave, Suite 1500
Seattle, WA 98101

x U.S. Mail
____ E-Mail
____ Facsimile



Shelby R. Frost Lemmel, WSBA 33099

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CSILLA MUHL, Appellant, v. DAVIES PEARSON, P.C., Respondent.	No. 46602-3-II UNPUBLISHED OPINION

BJORGEN, J. — The trial court dismissed Csilla Muhl's wrongful termination and retaliation claims against Davies Pearson P.C. on summary judgment. Muhl appeals, claiming that the trial court erred by (1) striking her expert witness without performing the analysis required by *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.3d 1036 (1997), (2) dismissing her claims when material issues of fact remained about each, and (3) violating the appearance of fairness doctrine, necessitating the assignment of this case to a different superior court department on remand.

We hold that (1) the trial court erred by striking the report of Muhl's expert without complying with *Burnet*, (2) material issues of fact remain about Muhl's wrongful termination and retaliation claims, and (3) the trial court did not violate the appearance of fairness doctrine.

Consequently, we reverse both the order striking the report of Muhl's expert and the order of summary judgment, and we remand this matter for further proceedings consistent with this opinion.

FACTS

Muhl began working as an attorney for Davies Pearson in 1996. She left the firm in 1997, but returned in 2006 in the capacity of a "Contract Partner" after Davies Pearson recruited her to work in its family law group.

In October 2010, Muhl moved to continue a client's matter in trial court, referred to as the "K" trial,[1] to allow her to obtain necessary discovery. When the trial court denied the motion, Muhl had what Susan Caulkins, another Davies Pearson attorney, would later call a "meltdown" in front of "K" and some of the firm's staff. Clerk's Papers (CP) at 61. The client, upset by Muhl's loss of composure, initially demanded that another Davies Pearson attorney handle the case, although she later withdrew that demand.

When the "K" matter later went to trial, Muhl asked her expert witness a question that the trial court viewed as an attempt to circumvent a pretrial order. The trial court wrote Muhl a letter expressing its concerns and requesting that she address them. Muhl told her firm mentor, attorney Ron Coleman, about the letter and asked for his help in drafting her response. Muhl responded to the trial court by offering a legitimate reason for asking the expert witness the question; the trial court accepted her explanation and stated that it considered the matter closed. Muhl informed Coleman of this, and he replied that everything "look[ed] good." CP at 348.

Muhl's work in the "K" trial "helped the client achieve a very favorable outcome." CP at 313. Despite this result, Caulkins wrote a detailed memo critiquing Muhl's performance in the

[1] The use of the client's last initial was intended to protect her confidentiality.

case and gave the memo to Muhl. Muhl, however, disregarded the memo as criticism from a peer, because Caulkins had no supervisory authority over her.

In early 2011, Davies Pearson hired attorney Mark Nelson. The firm's shareholders believed that its family law group needed a male attorney, and the lone male attorney working in this group had just left it. Muhl contended that after the firm hired Nelson she received fewer intra-firm referrals, which were critical to her practice.

Nelson's hiring caused Muhl to question the treatment of female employees at Davies Pearson. In November 2011, Muhl met with Coleman and challenged the firm's treatment of its female attorneys. Muhl discussed firm diversity and leadership and noted that Davies Pearson had "[o]nly 1 woman [s]hareholder out of 11 total[] [and] 4 female attorneys [out of] 20 total." CP at 339. From this, Muhl inferred that "[f]emale attorneys do not appear to be recognized, promoted or retained" and asked Coleman, "[d]oes the firm have any interest in having female presence/partners?" CP at 339. According to Muhl, Coleman later indirectly answered this question by telling her that most of the female associates at the firm, including Muhl herself, were not on track to become shareholders.

Muhl did not raise concerns about sexual discrimination at the firm with any other shareholder. Coleman never discussed the substance of his November 2011 meeting with Muhl with any of the other shareholders.

In September 2012, one of Muhl's clients told her at the last minute that he did not want to pay her to appear and represent him at a contempt hearing. Muhl, feeling bound by the rules of professional conduct, acceded to the client's wishes and did not appear. Given the timing of the client's directive, Muhl did not file a notice of withdrawal until after the hearing. Caulkins discovered the hearing on the day it was scheduled during a routine check of the court's docket.

Knowing that Muhl was not working, Caulkins went to the hearing and appeared on behalf of the client. Caulkins's appearance on the client's behalf "did not make any difference to the outcome" and the client expressed no dissatisfaction with Muhl's failure to appear. CP at 314.

Caulkins complained about the incident to Tomlinson and Coleman, and Davies Pearson's Board of Directors eventually recommended that the firm terminate Muhl's employment. Seven of Davies Pearson's shareholders, Coleman included, voted to accept that recommendation. After the vote, Muhl was given a choice: she could resign or Davies Pearson would terminate her employment. Muhl chose termination, telling the firm that she "wanted to be honest about this and not sugarcoat anything." CP at 560. Davies Pearson granted Muhl's request, ending her employment at the end of November 2012.

Muhl then filed suit against Davies Pearson, alleging, among other matters, that her termination resulted from sexual discrimination and retaliation for opposing sexual discrimination, both violations of the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. Davies Pearson denied all wrongdoing.

The trial court initially ordered the disclosure of the parties' witnesses by late December 2013. Muhl later discovered a book on gender discrimination written by Dr. Rosalind Barnett and retained her as an expert. Six months after the witness disclosure deadline, Muhl gave Davies Pearson a supplemental witness list that included Barnett's name and moved to extend the discovery deadline. The court granted that request, extending the deadline until July 25, 2013. On July 24, Muhl produced Barnett's report, which opined that Muhl's termination was the result of gender inequities and gender discrimination at Davies Pearson.

Davies Pearson moved to strike Barnett's report for a number of reasons, including a failure to comply with the local rules, specifically Pierce County Local Rule 26 governing

discovery. Muhl contended the trial court should deny the motion to strike Barnett's report, because she had "disclosed the expert's identity at or very near the time it became known." CP at 637. She argued that her disclosure of Barnett as soon as possible foreclosed a finding of willfulness under *Burnet* and that lesser sanctions would vindicate the purposes of discovery. The trial court determined that Muhl had hired Barnett "very, very, very late in the game," and ordered that "[t]he expert witness report of Dr. Rosalind Barnett is stricken." Verbatim Report of Proceedings (VRP) (Aug. 8, 2013) at 7-8; CP at 664. When Muhl's attorney raised the necessity of analyzing the *Burnet* factors on the record and asked about a lesser sanction, the trial court stated, "[T]here is no lesser sanction," because it perceived Davies Pearson would lack sufficient time to obtain its own expert to rebut Barnett's testimony.

Davies Pearson also moved for summary judgment on Muhl's claims. The firm contended that Muhl could not show that her termination was motivated by discriminatory or retaliatory animus and that it had permissible reasons for the termination. Muhl opposed summary judgment on the wrongful termination claim by contending that her employment record, which contained satisfactory to favorable reviews and which had no document that would have served as a precursor to termination, allowed the inference that Davies Pearson's articulated reasons for replacing her with Nelson, a male, were pretextual. Muhl opposed summary judgment on the retaliation claim by arguing that she had proven a prima facie case of retaliation, which precluded summary judgment.

The trial court held that Muhl had failed to show a prima facie case of wrongful termination and determined that no reasonable person could conclude that Davies Pearson's articulated reasons for Muhl's termination were pretextual, disposing of both her wrongful termination and retaliation claims.

Muhl appeals the order granting Davies Pearson's motion to exclude Barnett's report and the order granting its motion for summary judgment.

ANALYSIS

I. EXCLUSION OF BARNETT'S REPORT

Muhl first argues that the trial court abused its discretion by striking Barnett's report without first finding that her failure to timely disclose Barnett as a witness (1) was willful and (2) incapable of remedy with a lesser sanction. Davies Pearson responds that the trial court properly excluded Barnett's report because (1) the discovery sanction is moot, (2) the trial court properly concluded that lesser sanctions would not have served the purposes of the discovery rule, and (3) Barnett's declaration was inadmissible under a number of evidence rules.

The civil rules allow the trial court to impose sanctions to enforce its discovery orders. CR 37. We review the trial court's imposition of discovery sanctions for an abuse of discretion. *Blair v. TA-Seattle East No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011).

The trial court's discretion in imposing discovery sanctions "is cabined" by *Burnet*, 131 Wn.2d 484, and its progeny. *Jones v. City of Seattle*, 179 Wn.2d 322, 338, 314 P.3d 380 (2013), *as corrected* (Feb. 5, 2014). Those cases require the trial court to consider three factors before imposing "'one of the harsher remedies allowable under CR 37(b).'" *Burnet*, 131 Wn.2d at 494 (quoting *Snedigar v. Hodderson*, 53 Wn. App. 476, 487, 768 P.2d 1 (1989)). These factors include (1) whether the failure to comply with a discovery order was willful or deliberate, (2) whether the discovery violation substantially prejudiced the other party, and (3) whether lesser sanctions would vindicate the purposes of discovery. *See Burnet*, 131 Wn.2d at 494. The trial court must make specific findings on each of these factors to comply with *Burnet*, *In re Dependency of M.P.*, 185 Wn. App. 108, 117, 340 P.3d 908 (2014) (citing *Teter v. Deck*, 174

Wn.2d 207, 216-17, 274 P.3d 336 (2012)), although the findings need not be made in writing. *Teter*, 174 Wn.2d at 217.

Davies Pearson argues that we should not even reach the merits of Muhl's claim because it is moot, contending that Muhl appeals the trial court's exclusion of Barnett at trial, not on summary judgment. We disagree. The order Muhl appeals struck Barnett's opinion itself and there is nothing about Muhl's assignment of error that limits her appeal to the exclusion of Barnett's testimony at trial. Given the record and that Muhl is appealing the dismissal of her claims on summary judgment, any natural reading of Muhl's assignment of error is that it is aimed at the exclusion of Barnett's opinion on summary judgment and at trial.

Reaching the merits of Muhl's claim, we hold that the trial court abused its discretion by granting Davies Pearson's motion to strike Barnett's opinion for two reasons. First, as Muhl argues, the trial court made no specific finding of willfulness, focusing instead on the fact that Muhl had failed to timely disclose Barnett. A failure to comply with a discovery order is not necessarily a willful violation. *Blair*, 171 Wn.2d at 350 n.3; *see Jones*, 179 Wn.2d at 343. Accordingly, the trial court failed to make the necessary findings on the first *Burnet* factor.

Second, the trial court's finding about the inadequacy of lesser sanctions focused on the time remaining between the disclosure of Barnett and the discovery cut-off and trial. But the trial court did not consider whether extending the discovery cut-off or continuing trial would have prejudiced Davies Pearson. The failure to consider those alternative sanctions constitutes inadequate consideration as to "whether a lesser sanction would suffice" under *Burnet*'s third factor. *In re M.P.*, 185 Wn. App. at 118.

Davies Pearson urges us to affirm the exclusion of Barnett's opinion on alternative grounds, specifically its "inadequate foundation, the speculation and conjecture upon which the

opinion is based, and the fact that the opinion is irrelevant as to a species of intentional tort in so far as it describes an unconscious process." Br. of Resp't at 41. The above quotation is the sum total of Davies Pearson's argument on the issue, which appears to be an attempt to incorporate its trial briefing into its appellate brief. We generally decline to address issues given passing treatment, *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 416, 120 P.3d 56 (2005), and specifically forbid parties from arguing issues by incorporating trial briefs. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1988). We decline Davies Pearson's invitation to affirm on alternative grounds.

Because the trial court failed to comply with the holdings of *Burnet* and its progeny, we reverse the order striking Barnett's report.

II. SUMMARY JUDGMENT

Muhl next contends that the trial court erred by granting Davies Pearson summary judgment, claiming that material issues of fact remain on (1) whether she established prima facie cases of wrongful termination and retaliation and (2) whether the legitimate reasons Davies Pearson offered to justify her termination were pretextual. Davies Pearson contends that no material issues of fact exist as to either Muhl's prima facie cases or pretext on its part and that it was entitled to judgment as a matter of law. We agree with Muhl.

A. Standard of Review

We review a trial court's grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). We view the evidence, and all inferences reasonably allowed by the evidence, in the light most favorable to the nonmoving party when reviewing an order of summary judgment. *Lakey*, 176 Wn.2d at 922. Summary judgment is appropriate where no genuine issue of material

fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c). "A genuine issue of material fact exists when reasonable minds could differ on the facts controlling the outcome of the litigation." *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

B. The *McDonnell Douglas* Framework

Washington applies the burden shifting analysis prescribed by the Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), to statutory discrimination claims where the plaintiff lacks "direct evidence of discriminatory animus." *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001) (emphasis omitted), *overruled on other grounds*, *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). Wrongful termination and retaliation claims brought under the WLAD are statutory discrimination claims. RCW 49.60.180(2), .210(1); *Domingo v. Boeing Emps. Credit Union*, 124 Wn. App. 71, 80, 98 P.3d 1222 (2004) (sex discrimination); *Short v. Battle Ground Sch. Dist.*, 169 Wn. App. 188, 205, 279 P.3d 902 (2012) (retaliation), *overruled on other grounds*, *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 325 P.3d 193 (2014) (retaliation). Muhl presented no direct evidence of discrimination or retaliation. Consequently, the *McDonnell Douglas* framework applies to her claims.

Under *McDonnell Douglas*, the plaintiff bears the initial burden of production in making out a prima facie case of wrongful termination or retaliation. *Hill*, 144 Wn.2d at 181; *Domingo*, 124 Wn. App. at 78; *Short*, 169 Wn. App. at 204. If the plaintiff makes this showing, a rebuttable presumption of discrimination or retaliation arises. *Hill*, 144 Wn.2d at 181 (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)); *Domingo*, 124 Wn. App. at 77; *Short*, 169 Wn. App. at 204. If the plaintiff fails to make

out a prima facie case, the defendant is entitled to judgment as a matter of law. *Hill*, 144 Wn.2d at 181; *accord Domingo*, 124 Wn. App. at 77-78; *Short*, 169 Wn. App. at 204.

If the plaintiff discharges his or her burden of making out a prima facie case of discrimination or retaliation, "the employer must articulate a legitimate, nondiscriminatory reason for termination . . . [t]o go forward." *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988); *accord Domingo*, 124 Wn. App. at 77; *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 743, 332 P.3d 1006 (2014), *review denied*, 182 Wn.2d 1006 (2015). The employer bears the burden of production, not of persuasion, in offering a legitimate reason for the termination. *Hill*, 144 Wn.2d at 181. If the employer fails to discharge its burden of production, the plaintiff is entitled to judgment as a matter of law "because no issue of fact remains in the case." *Hill*, 144 Wn.2d at 181-82 (quoting *Kastanis v. Educ. Emps. Credit Union*, 122 Wn.2d 483, 490, 859 P.2d 26, 865 P.2d 507 (1993)).

If, however, the employer carries its burden, it successfully rebuts the presumption created by the plaintiff's prima facie case, *Hill*, 144 Wn.2d at 182, and the plaintiff bears the burden of producing evidence that discrimination or retaliation was a "substantial factor" in the termination. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 446-47, 334 P.3d 541 (2014); *Domingo*, 124 Wn. App. at 77. The employee may carry this burden by offering evidence that creates a material issue of fact either that the employer's reasons were pretextual or that, although the stated reasons were legitimate, discrimination or retaliation was nonetheless a substantial factor motivating the discharge. *Scrivener*, 181 Wn.2d at 446-47; *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 73, 821 P.2d 18 (1991). Where the employee makes out a prima facie case and offers evidence of pretext "sufficient to disbelieve the employer's proffered explanation," a fact finder generally must determine the "true reason for the adverse employment

action . . . in the context of a full trial." *Hill*, 144 Wn.2d at 185. The exception to this general rule occurs where, despite the evidence of a prima facie case and pretext offered by the employee, no rational trier of fact could conclude that the action was discriminatory or retaliatory. *Hill*, 144 Wn.2d at 188-89 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)).

C. Muhl's Wrongful Termination Claim

Muhl contends that she made out a prima facie case of wrongful termination and produced evidence from which a jury could refuse to credit Davies Pearson's justifications for her termination, making summary judgment inappropriate. Davies Pearson contends that Muhl failed to show a prima facie case or pretext. Muhl is correct.

1. The Prima Facie Case

RCW 49.60.180(2) proscribes the discharge of any employee on the basis of sex. To establish a wrongful discharge claim under RCW 49.60.180(2), the plaintiff must show that he or she "(1) is a member of a protected class; (2) was discharged; (3) was doing satisfactory work; and (4) was replaced by a person . . . outside the protected group." *Domingo*, 124 Wn. App. at 80. Here, the parties dispute only the last two elements.

a. Satisfactory Work

Muhl contends that she created a material issue of fact as to whether she was performing satisfactorily. She notes that (1) she received no written notice of deficient performance in the time leading up to her termination, (2) her performance reviews were satisfactory to good in the two years before her termination, and (3) she received a performance bonus each of the three years before her termination. Davies Pearson contends that Muhl was not performing satisfactorily given three "significant" incidents: her loss of composure in front of "K," her

question that triggered the trial court's letter in the "K" trial, and her failure to appear on behalf of her client at the contempt hearing.

In the light most favorable to Muhl, the record shows the following about her performance: (1) she received satisfactory or better performance reviews, (2) Davies Pearson never required Muhl to carry out a performance improvement plan or imposed performance related discipline on her, despite apparently using these devices, (3) she qualified for performance bonuses in 2009, 2010, and 2011, (4) the client involved in the October 20, 2010 incident where Muhl allegedly lost her composure allowed Muhl to try the case and Muhl obtained a satisfactory outcome for her, (5) the October 20, 2010 incident occurred more than two years before her termination, (6) she addressed the trial court's concerns in the "K" trial and the court accepted her explanations, (7) Coleman stated that the trial court's response to Muhl in that trial "look[ed] good," CP at 348, (8) the trial court's acceptance of Muhl's explanation occurred in July 2011, more than a year before her termination, (9) the client informed her that he did not want her to show up at the contempt hearing in September 2012, and (10) the client did not express any dissatisfaction with her failure to appear at the contempt hearing.

From this evidence, a reasonable fact finder could determine that Muhl was performing satisfactorily. Her employment record does not show any deficiencies, and she received performance bonuses in each of three years leading up to her firing. At least one of these bonuses appears to have come after two of the incidents that Davies Pearson used to justify Muhl's termination. Muhl made out the third element of a prima facie case of sex discrimination: that she was doing satisfactory work.

b. Replacement by a Person Outside the Protected Class

Muhl also contends that she created a material issue of fact as to whether she was replaced by a person outside the protected class because Nelson, a male, essentially took up her duties at the firm. Davies Pearson contends that Muhl fails to create a material issue of fact because Nelson was at the firm 18 months before her firing and did not replace her, citing *LeBlanc v. Great American Insurance Co.*, 6 F.3d 836, 846 (1st Cir. 1993).

In the light most favorable to Muhl, the record shows that Davies Pearson hired Nelson to put a male attorney in its family law group and that Nelson's hiring resulted in him receiving the work that used to go to Muhl. From this evidence, a reasonable fact finder could determine that Nelson replaced Muhl.

In addition, Davies Pearson's argument that Nelson did not replace Muhl because his hiring predated her firing runs aground on the policies and purposes of the WLAD. The WLAD "contains a sweeping policy statement strongly condemning many forms of discrimination . . . [and it] requires that '[it] be construed liberally for the accomplishment of the purposes thereof.'" *Allison v. Hous. Auth. of Seattle*, 118 Wn.2d 79, 85-86, 821 P.2d 34 (1991) (quoting RCW 49.60.020). Accepting Davies Pearson's argument as a matter of law would allow an employer to escape liability under the WLAD by acting with the slightest foresight and hiring the terminated employee's future replacement before actually terminating the employee. The ease with which this artifice would allow employers to thwart the WLAD is contrary to the legislature's intent. A jury should determine the factual question of whether Nelson replaced Muhl.

We also reject Davies Pearson's argument that Nelson did not replace Muhl because he merely received her duties in a reorganization after her termination. The firm's reliance on

LeBlanc for that proposition is mistaken. *LeBlanc*, and its forerunner, *Barnes v. GenCorp. Inc.*, 896 F.2d 1457 (6th Cir. 1990), are "reduction in [work] force" cases. *E.g.*, 6 F.3d at 845. A work force reduction "occurs when business considerations cause an employer to eliminate one or more positions within the company." *Barnes*, 896 F.2d at 1465. The courts treat reduction in workforce terminations differently than other types of terminations for purposes of discrimination claims. *Barnes*, 896 F.2d at 1464-65. In reduction in workforce cases, when the employee's duties are shifted among the remaining employees, the employee is not considered "replaced." *Barnes*, 896 F.2d at 1465. "A person is replaced only when another employee hired or reassigned to perform the plaintiff's duties." *Barnes*, 896 F.2d at 1465. Davies Pearson has not, at any point, stated that it terminated Muhl's employment because of staffing considerations. Quite the contrary, it has repeatedly justified the termination on performance grounds. Having done so, and in light of Muhl's evidence that Nelson essentially replaced her, Davies Pearson cannot rely on *Barnes* and *LeBlanc* to nullify Muhl's showing of this element of her prima facie case.

2. Nondiscriminatory Reasons Justifying the Termination

Although not directly an issue here, Davies Pearson offered legitimate, nondiscriminatory reasons to justify Muhl's termination, resting her termination on three incidents: the emotional display in front of "K," the letter from the trial judge in the "K" trial, and the failure to appear at the contempt hearing. CP at 490-91. Davies Pearson met its burden of production under the second prong of *McDonnell Douglas*.

3. Pretext

Muhl contends that three elements create a genuine issue of material fact as to whether the reasons used by Davies Pearson to justify her termination were pretextual. We find at least two of them create material issues of fact and need not reach the remainder.

To show pretext, Muhl needed to create a genuine issue of material fact as to whether Davies Pearson's justifications for terminating her were "unworthy of belief." *See Kuyper v. Dep't of Wildlife*, 79 Wn. App. 732, 738, 904 P.2d 793 (1995); *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 859-60, 851 P.2d 716 (1993), *overruled on other grounds*, *McKay v. Acord Custom Cabinetry*, 127 Wn.2d 302, 898 P.2d 284 (1995). To create such a material issue of fact, the employee "'must show, for example, that the reason has no basis in fact, it was not really a motivating factor for the decision, it lacks a temporal connection to the decision or was not a motivating factor in employment decisions for other employees in the same circumstances.'" *Scrivener*, 181 Wn.2d at 447-48 (quoting *Kuyper*, 79 Wn. App. at 738-39).

a. Muhl's Performance

As noted above, Muhl has made the showing necessary to establish a prima facie case of sex discrimination. Part of that showing is that she was performing in a satisfactory manner. Muhl's prima facie case thus created genuine issues of material fact on the first two elements of the *Scrivener* test set out above: whether the proffered justification has a basis in fact or was not really a motivating factor for the termination. *Scrivener*, 181 Wn.2d at 447-48. Evidence of a prima facie case can establish pretext. *See Sellsted*, 69 Wn. App. at 859-60 (citing *Burdine*, 450 U.S. at 255 n.10; *Thornbrough v. Columbus & Greenville R. Co.*, 760 F.2d 633, 640 (5th Cir. 1985)). Muhl has raised a genuine issue of material fact as to whether Davies Pearson's assertion of unsatisfactory performance was pretextual.

b. References to Nelson's Sex in Hiring Him

Muhl's evidence regarding Davies Pearson's desire to have a male employee in its family law group also creates a genuine issue of material fact regarding pretext. *Sellsted*, 69 Wn. App. at 860 (citing *Burdine*, 450 U.S. at 255 n.10; *Thornbrough*, 760 F.2d at 640). Davies Pearson's shareholders testified that they wanted a male attorney in the family law group. Nelson continues to work there. Muhl does not. From these facts the jury could reasonably infer that Davies Pearson replaced Muhl with Nelson on the basis of sex and refused to credit its articulated reasons for the termination. *See Scrivener*, 181 Wn.2d at 447-48.

Davies Pearson contends that the statements about the need for a male attorney were "'stray' remarks . . . 'unrelated to the decisional process.'"[2] Br. of Resp't at 31-32 (quoting *Flynn v. Portland Gen. Elec. Co.*, 958 F.2d 377 (9th Cir. 1992)).[3] Assuming that the stray remarks doctrine has validity in Washington after the Supreme Court's decision in *Scrivener*, see 181 Wn.2d at 448, these are not stray remarks unrelated to the decisional process. Instead, they go directly to Davies Pearson's alleged reasons for terminating Muhl.

To summarize the analysis of the wrongful termination claim, Muhl satisfied her burden of producing evidence to create a prima facie case and that evidence raises a genuine issue of material fact as to whether Davies Pearson's proffered reasons for terminating Muhl were

[2] Davies Pearson also attempts to limit the remarks to Coleman, but Coleman stated that Davies Pearson's shareholders in general wanted a male in the family law group.

[3] We remind Davies Pearson that it cannot cite to unpublished cases such as *Flynn* without meeting certain requirements. *See* GR 14.2, RAP 10.4(h), and FRAP 32.1(a)(ii). This citation did not meet those requirements.

pretextual.[4] Summary judgment in Davies Pearson's favor on the wrongful termination claim was granted in error.

D. The Retaliation Claim

Muhl contends that (1) she engaged in statutorily protected activity and (2) Davies Pearson knew of her activity, establishing a prima facie case of retaliation and making summary judgment inappropriate. Davies Pearson contends that (1) Muhl did not engage in statutorily protected activity and (2) her termination was too attenuated from any protected activity to give rise to an inference of retaliation. Muhl is correct.

1. The Prima Facie Case

RCW 49.60.210 proscribes retaliatory employment actions against those who have "opposed any practices forbidden by this chapter." RCW 49.60.180 forbids a number of practices, including discrimination in hiring based on sex, RCW 49.60.180(1), and "discriminat[ion] against any person in compensation or in other terms or conditions of employment because of . . . sex." RCW 49.60.180(3). To establish a prima facie case of retaliatory discharge, the plaintiff must show "(1) he or she engaged in statutorily protected activity; (2) an adverse employment action was taken; and (3) there was a causal link between the employee's activity and the employer's adverse action." *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 797, 120 P.3d 579 (2005). The parties dispute the first and third elements.

[4] We do not suggest that making a prima facie case necessarily raises genuine issues of material fact about pretext.

a. Statutorily Protected Activity

The first element of a prima facie case for retaliation requires the plaintiff to show that he or she engaged in statutorily protected activity. The WLAD protects employees who "oppose[] employment practices forbidden by antidiscrimination law." *Alonso v. Qwest Commc'ns Co.*, 178 Wn. App. 734, 754, 315 P.3d 610 (2013). It is not necessary that the WLAD actually proscribe the employer's conduct; so long as the employee reasonably believes he or she is opposing discriminatory practices, the statute protects the employees conduct. *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 743, 332 P.3d 1006 (2014).

In the light most favorable to Muhl, the record shows that in her meeting with Coleman she noted the dearth of female attorneys and shareholders at the firm, stated her belief that the dearth showed the firm's failure to "recognize[], promote[] or retain[]" female attorneys, and asked whether the firm was indifferent to the lack of gender diversity. CP at 339. From that evidence, a reasonable fact finder could determine that she opposed gender discrimination at Davies Pearson, which is statutorily protected activity. *Short*, 169 Wn. App. at 206 (citing *Estevez*, 129 Wn. App. at 798-99). Davies Pearson contends that Muhl simply "recite[d]" the firm's demographics at the meeting and this did not constitute a complaint. Br. of Resp't at 35. This argument, however, is based on an incomplete presentation of the record, omitting statements that appear to constitute complaints. Muhl established the first element of a prima facie case of retaliation.

b. Causal Connection

The third element of a prima facie case requires the employee to show a causal connection between the statutorily protected activity and an adverse employment action. An employee may create a rebuttable presumption of a causal connection, *Wilmot v. Kaiser*

Aluminum & Chemical Corp., 118 Wn.2d 46, 69, 821 P.2d 18 (1991), by establishing that the employee participated in opposition activity, that the employer knew of the opposition activity, and that the employee was discharged. *Wilmot*, 118 Wn.2d at 69. That presumption, if unrebutted, precludes judgment as a matter of law. *Wilmot*, 118 Wn.2d at 69.

Davies Pearson argues that Muhl cannot show that "it" knew of her opposition activity, preventing the presumption of retaliation from arising. The firm argues that the record shows that none of the shareholders voting on Muhl's termination, save Coleman, knew of her complaints, precluding any showing of retaliatory intent by the firm. While true, the record also indicates that other shareholders voting on Muhl's termination relied on information from co-shareholders with knowledge of Muhl's actions. A reasonable inference from that evidence is that those shareholders relied on Coleman's representation of events given his status as Muhl's mentor, his familiarity with the issues leading to the termination vote, and his receipt of Muhl's complaints about sex discrimination. We have recognized that an employer may commit a retaliatory act where a person uses his or her influence over the employer's decision-making process to give effect to his or her animus. *Cf. City of Vancouver v. Pub. Emp't Relations Comm'n*, 180 Wn. App. 333, 351-52, 354, 325 P.3d 213 (2014). Genuine issues of material fact remain as to whether Coleman used his influence to cause Davies Pearson's shareholders to vote to terminate Muhl.

Davies Pearson argues that, if a presumption of causation existed, the delay between Muhl's complaints to Coleman in November 2011 and her termination in November 2012 rebuts it. Looking first to Washington law on the issue, our courts have acknowledged that temporal proximity between protected activity and termination can indicate retaliation. *Estevez*, 129 Wn.

App. at 799. The outer limits of this temporal proximity, however, remain an open question under state law.

Davies Pearson cites federal precedent holding that anything longer than eight months between the protected activity and the termination makes the adverse employment action too remote to allow an inference of causation. We decline to follow the holdings of those cases, which are simply persuasive, and instead adopt the reasoning used by the Ninth Circuit in *Coszalter v. City of Salem*, 320 F.3d 968 (9th Cir. 2003) and its progeny.

In *Coszalter*, the court reasoned that "a specified time period cannot be a mechanically applied criterion. A rule that any period over a certain time is per se too long (or, conversely, a rule that any period under a certain time is per se short enough) would be unrealistically simplistic." 320 F.3d at 977-78. The court based this conclusion on the recognition that a person harboring a desire to retaliate against someone opposing protected activity might wait for time to pass to disguise their true motives. 320 F.3d at 977-78. To account for this, the court held that "[w]hether an adverse employment action is intended to be retaliatory is a question of fact that must be decided in light of the timing and the surrounding circumstances." *Coszalter*, 320 F.3d at 978.

As discussed above, Muhl offered evidence from which a rational trier of fact could determine that her termination was pretextual. Given that evidence, a rational finder of fact could determine that the delay here was not too long to preclude an inference of causation. *See Coszalter*, 320 F.3d at 977-79. Genuine issues of material fact remain on whether a causal relation lies between Muhl's protected activity and her termination.

Davies Pearson further argues that no rational trier of fact could find that it retaliated against Muhl for her opposition to sex discrimination, since it gave her a bonus just after her

complaints to Coleman. Although a reasonable fact finder could determine that the bonus defeats Muhl's claim of retaliation, one could also reasonably find retaliation in spite of the bonus. A genuine issue of material fact remains on this issue as well.

Finally, Davies Pearson argues that there can be no presumption of a causal link between Muhl's protected activity and her termination, since Coleman participated in the decision to hire and fire her. Where the same decision maker hires and fires an employee in a short period of time, "there is a strong inference that he or she was not discharged" due to discriminatory or retaliatory animus. *Hill*, 144 Wn.2d at 189 (emphasis omitted). Here, however, the time between Muhl's hiring and firing was sufficiently long enough that retaliatory animus could enter the picture, making the *Hill* rule inapplicable.

2. Summary

Muhl met her burden of showing a prima facie case of retaliation. The manner in which she did so raised a rebuttable presumption of causation. Davies Pearson failed to rebut that presumption. Genuine issues of material fact remain on Muhl's retaliation claim, and summary judgment in Davies Pearson's favor on that claim was inappropriate. *Wilmot*, 118 Wn.2d at 69.

III. APPEARANCE OF FAIRNESS

Finally, Muhl contends that she did not receive a fair hearing on summary judgment and that the appearance of fairness doctrine requires us to remand her cause to a different department for further proceedings. Davies Pearson contends that the trial court did not violate the appearance of fairness doctrine, because it properly considered the relevant law and evidence. We agree with Davies Pearson.

Washington's "appearance of fairness doctrine seeks to ensure public confidence by preventing a biased or potentially interested judge from ruling on a case." *In re Marriage of*

Meredith, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009). We review appearance of fairness doctrine claims in two stages. *See State v. Dominguez*, 81 Wn. App. 325, 330, 914 P.2d 141 (1996). First, the party alleging bias "must support the claim with evidence of the trial court's actual or potential bias" sufficient to overcome this court's presumption that the trial court "perform[ed] its functions regularly and properly without bias or prejudice." *West v. Wash. Ass'n of County Officials*, 162 Wn. App. 120, 136-37, 252 P.3d 406 (2011). If the party makes that showing, we then review whether "a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing." *Meredith*, 148 Wn. App. at 903 (citing *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995)). If the appearance of fairness doctrine is violated, we may order that a cause be assigned to a different judge on remand. *E.g.*, *State v. A.W.*, 181 Wn. App. 400, 414, 326 P.3d 737 (2014).

Muhl fails to overcome the presumption that the trial court performed impartially. The record before this court shows, at best, that the trial court erred in applying the law.[5] An error in applying the law, however, is not evidence of judicial bias. *Bus. Servs. of Am. II, Inc. v. WaferTech LLC*, 159 Wn. App. 591, 600, 245 P.3d 257 (2011), *appeal filed*, 184 Wn. App. 1013 (2014). Muhl fails to show personal animus by the trial judge, *e.g.*, *In re Custody of R.*, 88 Wn. App. 746, 762-63, 947 P.2d 745 (1997), personal bias or a conflict of interest by the trial court, *e.g.*, *Tatham v. Rogers*, 170 Wn. App. 76, 103, 283 P.3d 583 (2012), or that the trial judge was

[5] Muhl claims that the trial court in this proceeding engaged in fact finding outside the record by speaking with the trial judge in the "K" proceeding about the letter described above and by determining that the trial judge was "outraged" based on that investigation. Such fact finding would violate the appearance of fairness doctrine. *State v. Madry*, 8 Wn. App. 61, 69-71, 504 P.2d 1156 (1972). Muhl's presentation of the record, however, appears incorrect. From the transcript, it appears that the trial court characterized the judge in the "K" proceeding as outraged based simply on having read the letter he wrote, which was in the record and which essentially accused Muhl of violating a pretrial order.

impermissibly exercising her authority, *e.g.*, *A.W.*, 181 Wn. App. at 411-12. The appearance of fairness doctrine was not violated, and remand to a different department is unnecessary.

IV. ATTORNEY FEES

Both parties request attorney fees.

RAP 18.1 allows fees on appeal if authorized by applicable law and the party requests fees in compliance with RAP 18.1(b). RCW 49.60.030(2) authorizes a prevailing plaintiff to recover attorney fees, including those on appeal. *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 786, 249 P.3d 1044 (2011). Should Muhl eventually triumph on her WLAD claims, the trial court must calculate and order an appropriate award of attorney fees. *Frisino*, 160 Wn. App. at 786.

Davies Pearson requests statutory costs and attorney fees under RAP 18.1 and RCW 4.84.030 and .080. RCW 4.84.030 allows statutory costs and attorney fees to a "prevailing party." A prevailing party under the provision "is the one who has an affirmative judgment rendered in his favor at the conclusion of the entire case." *Ennis v. Ring*, 56 Wn.2d 465, 473, 353 P.2d 950 (1959); *Stott v. Cervantes*, 23 Wn. App. 346, 348, 595 P.2d 563 (1979). Given our disposition of Muhl's claims, this case is not concluded. On remand the trial court must calculate and award statutory attorney fees and costs to Davies Pearson if it receives judgment in its favor at the conclusion of the case. *See* RCW 4.84.030, .080.

CONCLUSION

We reverse the order striking Barnett's report and the order granting Davies Pearson summary judgment on Muhl's wrongful termination and retaliation claims. We remand the

matter for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, J.
BJORGEN, J.

We concur:

Johanson, C.J.
JOHANSON, C.J.

Melnick, J.
MELNICK, J.

MASTERS LAW GROUP

November 19, 2015 - 3:30 PM

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