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No. 70932-1

**THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

CHRISTINE E. GALBRAITH,

Plaintiff/Appellant,

v.

MICROSOFT CORPORATION,

Defendant/Respondent.

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

RESPONDENT'S BRIEF

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I. INTRODUCTION

In this employment discrimination lawsuit, Appellant Christine Galbraith challenges the trial court's decisions summarily dismissing her claims – each of which was dismissed on multiple, independently sufficient bases – and denying her request to continue the summary judgment hearing because she wanted more time to submit evidence she did not previously file with the trial court. In seeking a reversal of these decisions, Galbraith:

- Misrepresents the record;
- Mischaracterizes applicable law;
- Omits critical material facts while focusing on immaterial ones;
- Relies on conclusory statements rather than specific, admissible material facts;
- Ignores her own admissions and contradictory statements below; and generally
- Disparages Microsoft and others in a transparent effort to distract attention from the fact that she did not provide the trial court with admissible evidence to create any genuine issues of material fact with regard to any of her claims.

This approach failed in the trial court and should fail on appeal. The record below confirms that Galbraith's claims in this matter are largely

based on purported factual assertions in her Complaints and sworn declarations that she later withdrew or contradicted at her deposition, and on other assertions that she later admitted were based on supposition and speculation rather than actual facts. For example, although she asserts in her Complaint that she was unfairly denied promotions, she later admits she never sought such promotions and rejected encouragement from others to do so. Clerk's Papers ("CP") at 15, 17, 35-36, 41. Although she initially alleges she worked "twice as hard" as others, she later admits others may have worked twice as hard as she did. CP at 47-49. Although she initially insists that her job was more difficult than others or that she had more responsibility than others, she later admits she did not know the names or the specific job duties of employees with whom she purported to compare herself. CP at 21-30, 44-49. Although she says others were treated better than she was for similar work, she later admits she had no specific knowledge of the work performed by others or whether they were actually treated better than she was or why they might have received such treatment. CP at 21-30, 44-49. Although she initially alleges she was disabled and was forced to retire for medical reasons, she later admits she did not have any medical condition that interfered with the performance of her job duties. CP at 31-32. Although she alleges she was forced to retire early, she later admits she believed she had earned the right to retire, has

enjoyed her retirement, and has not sought other employment because she no longer wants to work. CP at 11-12. Despite these and other sworn admissions that there is no factual basis for her claims, Galbraith reasserts each of these claims on appeal.

For these and the additional reasons set forth below, Microsoft respectfully asks this Court to affirm the trial court's entry of summary judgment in favor of Microsoft.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Microsoft disputes each of Galbraith's assignments of error to the trial court's decision to enter summary judgment in favor of Microsoft.

III. RESTATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Did the trial court apply the correct standard of review when it granted summary judgment in favor of Microsoft?
2. Did the trial court err in concluding that Galbraith's age, sex, and disability discrimination disparate treatment claims under the Washington Law Against Discrimination ("WLAD") are time barred?
3. Did the trial court err in concluding that Galbraith failed to identify any genuine issues of material fact to support her age, sex, and disability discrimination disparate treatment claims under the WLAD?

4. Did the trial court err in concluding that Galbraith failed to bring forth direct evidence, or any admissible evidence, to support her claim that Microsoft's legitimate, non-discriminatory business reasons for not promoting Galbraith after 2008 were pretext?

5. Did the trial court err in concluding that Galbraith's disparate impact claim fails because she is unable to identify any discriminatory policy, and did Galbraith waive the right to appeal the trial court's ruling on this issue because she did not raise this issue in her appellate brief?

6. Did the trial court err in concluding that Galbraith failed to bring forth any genuine issues of material fact to support her Equal Pay Act claim and to support her improperly raised motion for partial summary judgment on this claim because she failed to identify any employees doing similar work and because Microsoft could have legitimate reasons for any pay differentials?

7. Did the trial court err in concluding that Galbraith failed to bring forth any genuine issues of material fact to support her retaliation claim because she did not engage in any protected activity that is causally linked to an adverse employment action?

8. Did the trial court properly deny Galbraith's request to continue the hearing on Microsoft's Motion for Summary Judgment to

allow her to supplement her opposition materials with additional evidence?

IV. STATEMENT OF THE CASE

A. Procedural History

Galbraith filed this action in King County Superior Court in November 2011, and subsequently amended her complaint twice. In her Second Amended Complaint, Galbraith asserts claims of disparate treatment based on age, sex, and disability under the WLAD; disparate impact age discrimination under the WLAD; retaliation; and violation of the Equal Pay Act. CP at 137-42. Microsoft moved for summary judgment in September 2013. CP at 110-36. At the hearing, and in response to questions from the trial court, Galbraith's counsel expressed surprise at the trial court's request for evidence to support her claims, and asked the court for more time to submit such evidence; a request which the trial court denied. Verbatim Transcript of Proceedings Before The Honorable Kenneth Schubert ("RP") at 18:3-19:11. Following oral argument, the trial court ruled from the bench, and granted Microsoft's motion for summary judgment as to all claims, viewing the facts presented in the light most favorable to Galbraith. CP at 484; RP at 49:4-53:11.

B. Factual Statement

1. Facts Relating to Galbraith's Microsoft Employment

Galbraith was employed by Microsoft for about 20 years until she voluntarily resigned in June 2011. CP at 11-12. Galbraith, who never attended college, started as an entry-level clerical worker in Human Resources, and subsequently worked her way through a variety of human resources and clerical support roles until she retired from a job that paid her more than \$85,000 per year. CP at 86-87.

During her last eight years at Microsoft, Galbraith remained in the same job, a job which she had no interest in leaving. CP at 15, 17, 40-41. As a Solutions Manager, she primarily supported Microsoft's Payroll Department by serving as the interface between Payroll and the applications developers who make changes to payroll-related software applications. CP at 15, 87. If Payroll or her other client groups encountered software problems, or if they wanted software changes, for example, because of a new payroll process requirement, Galbraith's job was to gather information from her client group and package it for presentation to the applications developers who would actually revise the software application. CP at 19, 87. Ideally, she would gather and present information in a way that would most effectively enable the applications

developers to understand and address her client groups' needs. *Id.* Other Solutions Managers at various pay levels supported other client groups and/or software applications, and the job of each such individual varied, often greatly, in complexity and level of responsibility and skill and experience required, depending on the specific client group, software application and/or other circumstances. CP at 20, 87.

In September 2008, Galbraith was promoted from a Level 59 to a Level 60 Solutions Manager based on her past performance, contributions, and skill set. CP at 88-89. This promotion was supported by Salvador Segura, her last supervisor at Microsoft. *Id.* Galbraith did not apply for or even express interest in any other promotional opportunities between 2008 and her June 2011 retirement. CP at 41, 90-91. Although Galbraith was a capable employee who generally performed her job well, she said she was not interested in taking on new assignments outside of her comfort zone and current job, namely, solutions management support of a small number of software applications that served payroll-related functions. *See* CP at 14-15, 88-91. For example, Galbraith did not apply for and refused to consider or accept transfers or promotions to different positions. CP at 15, 17, 35-36, 41, 88-91. She also insisted that she would not work on different teams or support software applications outside her assigned payroll space, and would not accept transfers to different geographical locations even though she was

encouraged by supervisors and colleagues to pursue such opportunities, and even though such transfers may have involved earning more money, a promotion or the opportunity for a promotion. CP at 3-4, 15, 17, 35-36, 41-42, 89-91. Galbraith refused because she enjoyed and felt she was challenged by her role at Microsoft and had no desire to do anything different. CP at 3-4, 35-36, 41, 89-91. After she was directed to expand her role by supporting Microsoft's Employee Benefits group, she complained to other Microsoft employees that performing such duties were "not my job." CP at 4, 50, 64, 86-87.

Galbraith's refusal to seek or accept transfers to other job assignments was significant because Microsoft greatly values adaptability, flexibility, and a demonstrated interest in learning new things and accepting new challenges. CP at 61, 89-90. According to Ms. Galbraith's supervisors and colleagues, Microsoft employees in Ms. Galbraith's organization are generally not considered for promotion unless they work beyond their comfort zone and seek and accept new assignments from time-to-time to support different software applications and/or different client groups. CP at 3-5, 59, 80-81, 85, 89-91. Galbraith admits she resisted and refused to accept or even consider such changing roles or assignments despite being repeatedly encouraged to do so. CP at 35-36.

Microsoft also values a strong work ethic, and many of Galbraith's

supervisors and colleagues explain that they understood that in order to be considered for promotion, they needed to, among other things, accept additional assignments or areas of responsibility, and, or to at least occasionally work long hours or travel for business. CP at 3-5, 60, 80-81, 85, 89-91. These same employees explain that they had Microsoft-issued laptops that would allow them to access and regularly perform work from home outside of core business hours. CP at 4-5, 60, 80-81, 85, 90-91. Galbraith does not dispute any of these facts, and admits she had an entirely different approach to work: she refused to accept a company-issued laptop, she insisted on leaving work promptly around 4:00 p.m. almost every day, she generally refused to work from home on evenings or weekends, and she refused to travel for work after 1997. CP at 16, 26, 89-90. In her last five years at Microsoft, Galbraith even refused to go to training classes to learn new skills, although she admits these classes were strongly encouraged by the company. CP at 13. According to Galbraith, there was nothing more she needed to learn. *Id.*

Galbraith was likewise uninterested in attending company networking or “morale” events at which she and other Microsoft employees were encouraged to establish and strengthen professional connections that were often challenging to establish in the office while she and her colleagues were focused on their daily work activities. CP at 13,

63, 89-90. Further, over the years, Galbraith's former supervisors, Jeff Ward, Angela Graves, and Segura, occasionally received complaints from people both on the business side and the applications development side who would tell them that Galbraith was difficult to work with, often inflexible, and unwilling to assist her colleagues in areas that she felt were "not her job." CP at 4, 64, 86-87.

Despite the fact that she did not apply for and apparently refused to even consider applying for any promotions, and despite her unwillingness to take on new assignments, pursue educational opportunities, change areas of responsibility, or consider new jobs recommended to her by several of her former supervisors as ways to advance at Microsoft, and despite the fact that she asserted in her Complaint that she received no pay raises after 2008, Galbraith testified that she received maximum merit-based salary increases annually and was promoted in 2008. CP at 27, 88-89. However, Galbraith says she should have been promoted at least three more times, or up three more pay levels (in other words, she says she should have been promoted each year until her resignation in June 2011), even though the ostensible "promotions" she sought were not promotions in the ordinary sense; instead, she wanted only to receive more pay for remaining in her same role with the same job responsibilities because she purportedly believes she was "working twice as hard as any other employee" and had "more responsibility than any

other employee.” CP at 40-42, 74, 88-91.

Although Galbraith contends her job responsibilities were “much more than any other employee in her department,” at her deposition *she did not even recognize the names* of many of the dozens of employees with whom she purports to compare herself, and also admitted she had no information about the working hours, job responsibilities, educational backgrounds, qualifications, and travel obligations of most such employees. CP at 21-30, 44-49. Furthermore, Galbraith admits she does not know how many promotions or merit increases her colleagues received, or what they earned, or their performance review scores, or whether those scores or raises or promotions were accurate and/or deserved by those employees. CP at 27-30. Galbraith even admits it is possible that many other Solutions Delivery employees worked twice as hard as she did and may have had substantially more and different responsibilities than she had. CP at 47-49. Although Galbraith refers to an alleged statement by her one-time supervisor Angela Graves suggesting that Galbraith worked harder than her colleagues, in fact, Graves testified that she only had knowledge of the responsibilities and workload of Galbraith and one other employee, and was not therefore qualified to offer an opinion comparing Galbraith’s work with most of her colleagues at Microsoft. CP at 343, 348-49, Sub. 121 Ex. D.

In her 2010 performance review, Galbraith received a 10% contribution ranking¹ because she had “expressed that she has no interest in either increasing her scope of responsibility or potentially mak[ing] a lateral move to explore other areas of the solutions delivery space.” CP at 98. Although Galbraith contends this poor assessment rating was a retaliatory act in response to alleged complaints of discrimination, Galbraith admitted at her deposition that Microsoft’s stated reasons for this low ranking are accurate, and further admits she never complained to Segura (her supervisor) or to Human Resources about purported age, sex, or disability discrimination. CP at 34, 37, 52-53. Galbraith’s only alleged complaints came in 2006 or 2007, when she says she told Jeff Ward that she believed she was not being promoted because of her age and her sex. CP at 33. She similarly complained to Angela Graves in 2008 after, according to Galbraith, Graves told her Segura wanted to promote only “younger” people. CP at 30, 36. However, Graves testified that she never heard Segura make such a statement and Segura vigorously denies any intent and ever making such a statement. CP at 65, 88-89.²

¹ A “contribution ranking” is an assessment of an employee’s anticipated future contributions based on the employee’s historical job performance, ability to take on larger roles at Microsoft, demonstrated competencies, and more. It was one of the annual performance review measurements given to Microsoft employees. CP at 91.

² In response to Microsoft’s Motion for Summary Judgment, Galbraith changed

2. Facts Relating to Galbraith's Medical Condition

Around 2006, Galbraith was diagnosed with an irregular heartbeat. CP at 10. She also purportedly suffered from high blood pressure and hypertension. CP at 10. However, Galbraith admitted at her deposition that these medical conditions did not interfere with her ability to perform her job and she never sought medical leave because of these purported conditions. CP at 31. At some point around 2006 or 2007, when Galbraith says she became overwhelmed with her workload, she requested assistance from Salvador Segura, who promptly responded by engaging two contractors (vendors) to assist Galbraith and others. CP at 31, 38-39, 87-88. Galbraith admits that at no other time did she request assistance for any reason, including her irregular heartbeat or any other medical condition, and further contends that she fully completed all of the job duties assigned to her at all times. CP at 31-32. She admits that no one at Microsoft has ever said she was not performing her job duties as a result of any purported medical problems, and that she could not think of a single person who would say that she was treated less favorably by Microsoft because of her medical condition. CP at 32. Nonetheless, she now argues it was somehow Microsoft's duty to periodically ask her how she was

her recollection of this statement, and now states, in line with Graves' testimony, that she believes that Segura said promotions were being saved for employees who were not close to retirement. CP at 154.

feeling and to make inquiries about her medical situation despite the fact that Microsoft had no indication until several years after her employment ended that she was allegedly suffering from a health condition that was impacting her work. CP at 53, 92; RP at 25:2-16, 28:9-21. When the trial court remarked that it would have been improper for Microsoft to make such unsolicited inquiries regarding her personal health, Galbraith offered no support for her assertion that such inquiries are permitted. RP at 27:2-31:13. Galbraith did not provide the trial court with any medical records or other evidence to support her claim that she was in need of accommodation at work because of a medical condition—to the contrary, she admitted at her deposition that she did not have any medical condition that interfered with her work, and that she was able to satisfactorily complete all of her job duties within a 40 hour work week—and she expressed surprise at the trial court’s contention that such evidence was required to support her claim. CP at 31-32; RP at 18:16-29:18.

3. Facts Relating to Galbraith’s Retirement

Galbraith’s employment at Microsoft ended when she tendered her notice of voluntary retirement in June 2011, eight months shy of her 64th birthday. CP at 11. Galbraith testified that she retired because she was tired of working, she believed she had worked a long and productive career, and she believed she was entitled to take and enjoy her retirement.

CP at 12. Communications with her physician and her financial advisor confirm that she was hoping to retire in 2011, or at least by early 2012, just six months after her actual retirement date. CP at 11, 69-70. In addition, Galbraith testified that she has no desire to return to work because she is enjoying a “rich and full life” in retirement and, as such, has never even attempted to look for employment since she voluntarily retired from Microsoft almost three years ago. CP at 12.

V. ARGUMENT

A. Standard of Review

“Summary judgment rulings are reviewed de novo.” *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008). A defendant in a civil action is entitled to summary judgment when that party shows there is an absence of evidence supporting any element essential to the plaintiff’s claim. *Burton v. Twin Commander Aircraft LLC*, 171 Wn. 2d 204, 222-23, 254 P.3d 778 (2011); CR 56(c). The defendant may support the motion by challenging the sufficiency of the plaintiff’s evidence as to any such material issue. *Id.* To survive summary judgment, a plaintiff has the burden of proving specific and material facts to support each element of her prima face case; she “must do more than express an opinion or make conclusory statements.” *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). The plaintiff cannot rely on ultimate facts,

speculation, conclusions, or conclusory statements of fact to defeat summary judgment.” *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988). Instead, she must come forward with facts that are evidentiary in nature. *Id.*

B. The Trial Court Applied the Correct Standard of Review in its Decision to Grant Microsoft’s Motion for Summary Judgment

Galbraith states that the trial court viewed “all of the evidence in the light most favorable to Microsoft.” Brief of Appellant at 26. This vague assertion is unsupported in Galbraith’s Opening Brief, as well as in the record. Further, in making this statement, Galbraith misunderstands the legal standards associated with surviving a motion for summary judgment. It is Galbraith, not Microsoft, who has the burden to present specific and material facts to support each element of her prima facie case for each of her claims. *See, Hiatt*, 120 Wn.2d at 66. Contrary to what Galbraith appears to suggest (and what she expressly argued in the trial court), the standard is not different in employment discrimination cases. At the summary judgment hearing, Galbraith rejected Judge Schubert’s assertion that she had the burden of proof at summary judgment. Instead, she argued that she need only assert a claim against Microsoft and the burden then shifts to Microsoft to prove that it did not discriminate or otherwise act unlawfully. *See* RP 32:2-18, 28:23-29:18, 43:14-45:14. The

trial court correctly rejected this argument and concluded that Galbraith failed to bring forth sufficient evidence to support her claims, and it did so while reviewing the evidence (what little admissible evidence there was), in the light most favorable to Galbraith. *See* RP 27:10-13; 33:16-19; 49:10-53:11. Galbraith’s conclusory assertion to the contrary is not supported by any facts.

C. The Trial Court Did Not Err In Dismissing Galbraith’s Disparate Treatment Claims as Time-Barred.

As a threshold matter, Galbraith’s disparate treatment age, sex, and disability discrimination claims are time-barred and should therefore be dismissed, as concluded by the trial court. *See* RP 50:21-51:17. The statute of limitations for these claims arising under the WLAD is three years. *Crownover v. State ex. rel. Dept. of Transp.*, 165 Wn. App. 131, 141, 265 P.3d 971 (2011). The period starts to run when the plaintiff “knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action.” *Id.* A motion for summary judgment based on a statute of limitations should be granted when there is no dispute as to when the statutory period commenced. *Cox v. Oasis Physical Therapy, PLLC*, 153 Wn. App. 176, 187, 222 P.3d 119 (2009) (citing *Zaleck v. Everett Clinic*, 60 Wn. App 107, 110, 802 P.2d 926 (1991)). In her Opening Brief, Galbraith cites

Douchette to incorrectly suggest that the statute of limitations should automatically be tolled where equitable grounds exist. However, in this case, as well as in *Douchette*, such equitable circumstances do not exist; in fact, Galbraith does not even attempt to articulate any such purportedly equitable circumstances.

According to her own testimony, Galbraith's disability discrimination claim arose more than four years before she filed suit, when she, at some point in 2006 or 2007, purportedly became overwhelmed with her workload and requested and received assistance from Segura, who engaged two contractors to assist Galbraith (and others). CP at 31-32, 87-88. As to her age and sex discrimination claims, Galbraith alleges that she first complained about allegedly discriminatory actions in 2006, or maybe 2007. CP at 33. At that time she allegedly complained to Jeff Ward, her then-supervisor, stating she believed she was being paid less because of her age or sex (at no time did she believe that her alleged disability affected her pay). *Id.* The statutory period therefore commenced no later than 2006 or 2007 when Galbraith reported her purported belief that she was being discriminated against on the basis of age or sex. Galbraith even alleges that Ward conceded to her at the time that she was being discriminated against which, if true, confirms she was on notice of

purported discrimination.³ CP at 35. Even if Galbraith did not form this belief until the end of 2007, Galbraith's claims are time-barred because she waited to file this lawsuit until November 22, 2011; *four years* after the latest date on which her purported causes of action began to accrue. The trial court therefore properly dismissed Galbraith's claims of discrimination based on age, sex, and disability disparate treatment as time-barred.

Galbraith's lengthy discussion of the manner in which Washington courts consider "serial" or "systematic" violations for purposes of applying the "continuing violation doctrine" is improper and misleading because Washington's Supreme Court specifically rejected the continuing violation doctrine for all workplace discrimination cases when it issued the *Antonius* decision cited by Galbraith. *Cox*, 153 Wn. App. at 191-92. Instead, the Court adopted the rule of *National Railroad Passenger Corp. v. Morgan* (536 U.S. 101, 122 S. Ct. 2061, 153 L.Ed.2d 106 (2002)), under which discrete acts of discrimination (as opposed to a single actionable pattern of conduct that creates a hostile work environment) are barred by the three-year statute of limitations if they occur outside the limitations period.

Galbraith has not presented any evidence of a hostile work environment

³ Microsoft disputes Galbraith's assertions regarding her purported complaints and Ward's purported responses, but is assuming, as it must for purposes of summary judgment and on appeal, that her assertions are true and correct.

that was “sufficiently pervasive as to alter the conditions of employment and create an abusive work environment.” *Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004). To the contrary, Galbraith admitted at her deposition that there was no such pattern of workplace harassment, and does not assert a hostile work environment claim on appeal. *See* CP at 43. Even if she could do so, any such discrete act would be time-barred under the principles set forth in *Antonius*.

D. The Trial Court Did Not Err In Concluding That Galbraith’s Disparate Treatment Claims Fail On The Merits

Even if Galbraith’s disparate treatment claims were not time-barred, they were properly dismissed because Galbraith’s only support for them is her own belief, speculation and conclusory statements, which are not sufficient to defeat summary judgment. *Grimwood*, 110 Wn.2d at 359-60. Galbraith claims Microsoft unlawfully discriminated against her based on age, sex, and disability, in violation of the WLAD. CP at 139-41. To survive summary judgment on these claims, Galbraith must first present a prima facie case of discrimination. *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 488, 84 P.3d 1231 (2004); *Chen v. State*, 86 Wn. App. 183, 189, 937 P.2d 612 (1997). If Galbraith establishes a prima facie case, Microsoft must present a legitimate, non-discriminatory reason for its decisions. *Anica*, 120 Wn. App. at 488. To survive summary judgment,

Galbraith must then produce evidence that Microsoft's reasons are a mere pretext for a discriminatory purpose. *Id.*

1. **Galbraith Cannot Make Out a Prima Facie Case of Disparate Treatment Discrimination**

To the extent that she is alleging a failure to promote claim Galbraith must show that (1) she is a woman; (2) she applied for and was qualified for an available promotion; (3) she was not offered the position; and (4) the promotion went to a male. *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 623-24, 128 P.3d 633 (2006). However, this claim fails because Galbraith admits she did not apply for a promotion, even when she was encouraged to do so by her supervisors and colleagues, and because she presents no evidence to support the other elements (beyond establishing that she is a woman). *See* CP at 15, 17-18, 41. To the contrary, Galbraith admits she did not want a promotion in the ordinary sense; she wanted only to receive more money for performing the same job as narrowly defined by her. CP at 40, 42.

To the extent that Galbraith's age, sex, or disability discrimination claims are based on her allegations that she was paid less than others outside of these protected classes, Galbraith must show (1) she belongs to a protected class, (2) was discharged or suffered some other type of adverse job action, (3) was doing satisfactory work, and (4) was treated

differently than someone not in the protected class. *Chen*, 86 Wn. App. at 189; *Kirby v. Tacoma*, 124 Wn. App. 454, 468, 98 P.3d 827 (2004), review denied, 154 Wn.2d 1007, 114 P.3d 1198 (2005). All four elements must be met. Here again, these claims fail. Even if Galbraith could meet the first three elements (which she cannot because she was not discharged and had not identified any adverse job action), she cannot satisfy the final element because she cannot identify any similarly situated employee who was treated more favorably than she was. In fact, she cannot identify any similarly situated employee whatsoever.

a. **Galbraith Cannot Identify any Similarly Situated Employee**

Galbraith contends she did not receive promotions or pay increases in the same manner as other Microsoft employees in her work group; however, she cannot identify any similarly situated employee outside her protected classes who was held to a different performance standard or otherwise treated more favorably, as she must do to sustain her claims. See *Domingo v. Boeing Employees Credit Union*, 124 Wn. App. 71, 81, 98 P.3d 1222 (2004). In *Domingo*, the plaintiff alleged she was treated differently from others based on her sex, and then subsequently stated in her declaration that she did not know how others were treated. *Id.* The court stated, “[b]ecause Domingo presents no evidence that she was

treated differently from a similarly situated man, summary judgment on Domingo's disparate treatment claim was proper." *Id.* This is precisely the situation presented by Galbraith, who makes an unsubstantiated allegation that unidentified members from outside her protected classes (specifically, "younger" employees and male employees⁴) were treated more favorably and received more promotions (and accompanying pay increases). However, Galbraith testified that she cannot identify any such individual or any differential treatment, and was likewise unable to do so in her opposition to Microsoft's Motion For Summary Judgment. CP at 21-30, 44-49, 153-73. Instead, she makes vague, unsupported assertions that un-named others received unspecified pay raises and unidentified promotions when she did not, or she vaguely asserts that other employees had responsibilities that were less than hers. Galbraith's subjective opinions on such matters are not sufficient for her claim to survive summary judgment. *Chen*, 86 Wn. App. at 190-91.

Although Galbraith asserts in a sworn declaration and several versions of her various pleadings that she was paid less than other employees even though she worked harder and had vastly greater responsibility than all of them, she admitted at her deposition that she does

⁴ Galbraith does not contend that she was denied pay increases or promotions on the basis of her disability. CP at 32.

not know most of her Solutions Manager colleagues and has no knowledge of most of their skills, education, qualifications, work hours, work habits, job duties or job responsibilities. CP at 21-30, 44-49. Galbraith also admitted at her deposition that many of the other employees with whom she purports to compare herself may actually have worked twice as hard as she did, and may have had substantially greater responsibilities than she did, and may have had substantially greater skills and experience than she had. CP at 21-27, 47-49. Having admitted to all of these facts, Galbraith fails to address or acknowledge the significance of these admissions in either her summary judgment motion or on appeal.

Although she asserts she should be compared with Ramana Kotapati—the individual who was hired to fill the vacancy created by her voluntary resignation—Galbraith offers no evidence to rebut Microsoft’s sworn declarations and testimony that Kotapati filled “a higher level role with different and additional responsibilities that included covering Ms. Galbraith’s former duties, but also included many other duties...[with] a far more impactful and strategic role that...Galbraith was unwilling or unable to grown into.” CP at 92, Sub. 121 Ex. A, B. Instead, Galbraith vaguely speculates, without offering any actual evidence, that Kotapati must be doing the same thing she did and should therefore be paid the same as she was, and also speculates, incorrectly and without evidentiary

support, that Kotapati's duties only expanded after she filed this lawsuit. Brief of Appellant at 21. However, Galbraith has already admitted she has no knowledge of Kotapati's qualifications, experience, skills, job duties, responsibilities, work hours or job contributions, or how his job may be different from the position that she previously held. CP at 50-51. The trial court correctly concluded that Galbraith failed to present evidence "of someone similarly situated doing the same work that is either younger or a male that is getting paid more or treated better in some way," and likewise failed to present evidence disputing Microsoft's evidence that Kotapati was hired for an expanded role, and "wasn't a backfill attempt by Microsoft." RP at 52:1-5, 53:22-53:7.

Moreover, Galbraith admits that her work practices were materially different than those of her colleagues. While her colleagues who desired promotions (and associated pay increases) sought new challenges and diversity of experience, frequently attended training, worked long and irregular hours, participated in company-sponsored networking events and social gatherings, and otherwise engaged in activities that were designed to enhance their promotability, Galbraith admits she deliberately restricted her work schedule, refused to travel, refused to consider new jobs and promotional opportunities encouraged by her manager, and otherwise refrained from engaging in activities undertaken by her colleagues to

facilitate and achieve promotions to higher pay levels. CP at 16-17, 26, 35-36, 42. Because Galbraith cannot present any evidence to establish that there are similarly situated Microsoft employees with whom she should be compared for purposes of her claims in this lawsuit (i.e., she fails to identify any other employee who was purportedly treated better than her even though that other employee worked limited hours, refused to take home a Company-issued laptop, refused to attend training, refused to travel and refused to apply for promotions), she fails to establish a prima facie case of age, sex, or disability discrimination, as found by the trial court, and as should be affirmed by this Court.

b. Galbraith Cannot Identify any Differential Treatment

Even if Galbraith could identify a similarly situated Microsoft employee with whom she should be compared, she cannot identify any way in which any such individual was treated more favorably than she was. She admits that she does not know whether, when, how or why most of her colleagues might have been compensated, evaluated or promoted from time-to-time, and specifically admitted at her deposition that her claims of differential treatment are based on her “assumptions” and “beliefs” and “speculation” about all facts that might support her claims in this lawsuit. CP at 49. Although Microsoft has produced over 190,000

pages of documents and information in response to her discovery requests⁵, Galbraith presents no evidence to support her speculative assertion that other employees were treated more favorably than she was. Instead, she admitted in more than 70 pages of deposition testimony that she has no idea what most of her colleagues were doing, or how difficult or complex their jobs were, how long or hard they worked, their qualifications, or their performance reviews, or if they received promotions or pay raises. CP at 21-30, 44-49. Because Galbraith cannot identify any way in which any similarly situated employee was treated more favorably than she was during her career at Microsoft, she cannot establish a prima facie case of discrimination on the basis of age, sex, or disability, and Microsoft is entitled to summary judgment on each such claim.

c. **Galbraith Cannot Establish that She is “Disabled” for Purposes of her Claims in this Lawsuit**

With regard to her disparate treatment disability discrimination claim, Galbraith conceded she had no basis for this claim because her irregular heartbeat did not affect her ability to perform her job and she does not think anyone at Microsoft would say otherwise. CP at 31-32, 43. To the contrary, Galbraith repeatedly asserts that she always satisfactorily

⁵ CP at 7.

performed all of her job duties, that she worked harder than her colleagues, and that she was not appropriately recognized for the ways in which she excelled. CP at 40, 42, 74, 154. At the summary judgment hearing, Galbraith did not argue that her health interfered with her work; instead, she complained that her Microsoft job was so stressful that she needed to de-stress on the weekends. *See* RP 14:23-16:1. Galbraith had no response to Judge Schubert’s observation that an essential purpose of weekends is to allow workers to de-stress. *See* RP at 15:11-15. By making these arguments about her heroic and tireless efforts on behalf of Microsoft, and by admitting that her health never interfered with her ability to perform her job duties, Galbraith concedes that she did not have a qualifying disability for purposes of the WLAD, and also admitted she was not “regarded as” being disabled by anyone at Microsoft. *See* CP at 43. Thus, for purposes of her claim that she was treated less favorably because of a disability, she has conceded there is no basis for her claim. *See Callahan v. Walla Walla Housing Authority*, 126 Wn. App. 812, 820-21, 110 P.3d 782 (2005) (holding that, under the WLAD, a disability has to, among other things, substantially limit the individual’s ability to do the job).

Even if Galbraith could establish that she was disabled, she has not presented any evidence (as discussed above) that she was treated less favorably than any similarly situated, non-disabled employee. Moreover,

to the extent that she seeks to be compensated for some purported failure to accommodate, there can be no basis for such a claim, because an employer's duty to accommodate only arises when the employer knows that an accommodation is medically necessary. *See Wilson v. Wenatchee Sch. Dist.*, 110 Wn. App. 265, 270, 40 P.3d 686 (2002). Galbraith admits she did not need an accommodation because she was able to satisfactorily complete her work without the need for accommodation, and Galbraith admits she never told her supervisor she needed accommodation because of any medical condition. CP at 31-32. Therefore, in addition to the reasons set forth above with respect to the absence of disparate treatment, summary judgment should be affirmed on Galbraith's disability discrimination claims because she did not seek or need accommodation to perform the essential functions of her job, and because she cannot establish that she was disabled or was regarded as disabled by Microsoft. *See Lindblad v. Boeing Co.*, 108 Wn. App. 198, 204, 31 P.3d 1 (2001) (holding that the employer had no duty to accommodate because the employee testified that his disability did not disrupt his work).

Galbraith's unsupported assertions that Microsoft nonetheless had a continuing obligation to make inquiries about or accommodate a purported medical condition it did not know about and which was not affecting her work is untenable. An employer does not have an

investigatory duty to question any employee that it suspects is disabled. *Goodman v. Boeing Co.*, 127 Wn.2d 401, 409, 899 P.2d 1265 (1995). Indeed, the Americans with Disabilities Act specifically warns employers that they must not “make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(A) (1994). According to the U.S. Equal Employment Opportunity Commission, such inquiries are permissible only when an employer has a reasonable belief, based on objective evidence, that an employee’s ability to perform essential functions will be impaired by a medical condition. EEOC Enforcement Guidance: *Disability-Related Inquiries and Medical Examinations of Employees Under The Americans With Disabilities Act*, Section B.A.5 (July 27, 2000). In this case, Galbraith has confirmed there could have been no such objective evidence during her final three years at Microsoft because she had no medical condition that was interfering with her ability to perform her job duties and was, in fact, satisfactorily performing the essential functions of her job. CP at 31-32. As Judge Schubert suggested to Galbraith at the summary judgment hearing, it therefore would probably have been unlawful for Microsoft to make any inquiries about her medical condition during the

final three years of her employment. RP at 30:20-31:22.

Further, Galbraith's assertion that Microsoft was obligated to reduce her workload as an accommodation for her purported health issues likewise is untenable because employers are not required to alter the fundamental nature of a job or to eliminate or reassign job functions as a form of accommodation, which appears to be what Galbraith believes Microsoft should have done (although she offers no evidence of a specific need or desire for any particular accommodation). When citing *Pulcino* for the proposition that "whether an employer has made reasonable accommodation is generally a question of fact for the jury" (Galbraith's Opening Brief at 38), Galbraith omits the subsequent sentence, which states that certain types of requests (such as those advanced by Galbraith) have been found unreasonable as a matter of law, including the accommodation that Galbraith purports to seek – reduction in workload. *See Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 644, 9 P.3d 787 (2010), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). In *Davis v. Microsoft*, 149 Wn.2d 521, 535-36, 70 P.3d 126 (2003), the Washington Supreme Court specifically rejected the plaintiff's claim that a reduction in his workload was a reasonable accommodation. *Id.* Thus, Galbraith cannot reasonably assert that Microsoft was required to reduce her workload as a form of

accommodation, and particularly cannot do so in light of her admissions that her purported health condition never interfered with her ability to perform her job, and that her health remained stable during the last five years of her Microsoft employment. CP at 31-32.

2. **Galbraith Cannot Overcome the Same Actor Inference**

Even if Galbraith could establish a prima facie case (which she cannot for the reasons set forth above), Galbraith cannot meet the higher standard that she must satisfy in this case because of the “same actor inference,” which can only be defeated by an “extraordinarily strong showing of discrimination,” nor to date has she even attempted to do so. *Coghlan v. Am. Seafoods Co., LLC*, 413 F.3d 1090, 1097 (9th Cir. 2005)⁶. When an employee is promoted by the same decision maker she alleges discriminated against her, there is a strong inference that the allegedly discriminatory action was not due to any attribute the decision maker was aware of at the time of the promotion. *See Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 188, 23 P.3d 440 (2001), *overruled on other grounds by*

⁶ Although *Coghlan* did not apply the WLAD, Washington courts generally look to federal law for guidance when construing the WLAD. *Fulton v. State Dept. of Social & Health Serv.*, 169 Wn. App. 137, 153, 279 P.3d 500 (2012). Washington courts apply the same actor inference in WLAD discrimination claims. *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 853, 292 P.3d 779 (2013).

McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006). In such cases, an employee cannot simply rely on a prima facie case of discrimination; to prevail, the employee must present sufficient evidence “answering an obvious question: if the employer is opposed to employing persons with a certain attribute, why would the employer have [promoted] such a person in the first place?” *Id.* at 189.

When Segura promoted Galbraith in 2008, he was fully aware of her sex and was aware generally that she was over 40 years old. CP at 88-91. Galbraith presents no evidence to answer the question of why Segura would have promoted her in the first place if he was opposed to employing, giving salary increases to or promoting women or individuals of her age, because there is no such evidence. In age discrimination cases, a short period of time between a promotion and the alleged adverse action can strengthen the inference that there was no discrimination. *See Griffith v. Schnitzer Steel Indust.*, 128 Wn. App. 438, 454-55, 115 P.3d 1065 (2005), *review denied*, 156 Wn.2d 1027 (2006) (citing *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 464 (6th Cir. 1995) (A “five-year period . . . falls within the short period of time required”)). A maximum of three years passed between Segura’s promotion of Galbraith in 2008 and his alleged failure to promote her again every year thereafter. In light of Galbraith’s admitted refusal to seek or accept transfers or promotions to

other positions (even when her supervisors repeatedly encouraged her to do so), and given her refusal to accept the work, schedule and other burdens that were borne by her colleagues and purported comparators, Galbraith is unable to present an “extraordinarily strong showing of discrimination” to overcome the same-actor inference.

3. Galbraith Cannot Produce Evidence of Pretext

Even if Galbraith could satisfy her burden of presenting a prima facie case of discrimination on the basis of age, sex, or disability (which she cannot), she cannot succeed in showing that Microsoft’s legitimate, non-discriminatory reasons for not promoting her (and providing her with pay increases associated with such promotions) after 2008 are pretextual. The undisputed evidence confirms Microsoft did not promote Ms. Galbraith after 2008 because she failed to apply for any promotions and because Microsoft did not believe she had otherwise earned any promotions (or the pay increases that go along with such promotions) in the position she refused to leave. An employee cannot create an issue of pretext without some evidence that the employer’s legitimate reasons for its decisions are unworthy of belief. *See Domingo*, 124 Wn. App. at 88. Galbraith does not have any evidence to show that Microsoft’s reasons for failing to promote her (and to provide her with pay increases to go along with promotions) after 2008 are unworthy of belief. To the contrary,

Galbraith admits she liked the comfort of her job at Microsoft and wanted to be promoted in place without any change in her role, which is insufficient for a promotion. CP at 15, 35-36, 40, 42, 88-91. Beyond the undisputed facts that Galbraith never applied for any promotions and was not interested in and declined doing so even after being encouraged by Segura, Microsoft has produced undisputed statements from Galbraith's colleagues which confirm that Galbraith failed to do a variety of things that would have caused her to be considered for promotion. Among other things, Galbraith was unwilling to expand the scope of her responsibilities, her work remained focused on smaller and less impactful tactical items rather than on larger and more impactful strategic work, and she insisted on maintaining an inflexible and limited work schedule. CP at 26, 42, 87-91, 94-99, 101-105. Further, Galbraith often struggled to work cooperatively and cordially with her coworkers, and in Segura's opinion, she was inflexible and tended to do "more finger pointing than collaboration and partnership." CP at 94-99, 101-105; *see also Domingo*, 124 Wn. App. at 91 (finding that evidence that employee frequently faced challenges collaborating and communicating with her coworkers supports a finding of summary judgment despite weak evidence of pretext). Galbraith offers no evidence that any of these facts or assessments by Microsoft are in dispute or were not made in good faith.

In an attempt to establish pretext, Galbraith argues that there is “direct evidence of discrimination” based on purported statements by Segura to Graves in 2008 instructing Graves that he would no longer promote Galbraith because she would soon retire. Even if Segura made such statements (which he denies), courts that have considered the issue have concluded it is analytically incorrect to assume retirement is a proxy for age; reasoning that resonated with the trial court as well. RP at 33:6-40:1; *Scott v. Potter*, 182 Fed. Appx. 521, 526 (6th Cir. 2006) (to “retire” brings to mind a voluntary separation of employment based on, among other things, an employee’s years of service, and “years of service” is conceptually distinct from “age.”); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993) (concluding that an employee’s years of service is analytically distinct from age, and an employer can take account of years of service while ignoring age). At most, Segura’s purported statement is no more than a single stray remark, which is not enough to support Galbraith’s claim. *See Scrivener v. Clark College*, 176 Wn. App. 405, 415, 309 P.3d 613 (2013), *review granted*, 179 Wn.2d 1009 (2014) (finding statement that college needed “younger talent” was a stray remark not giving rise to discriminatory intent); *Kirby*, 124 Wn. App. at 467 (finding that reference to plaintiff and others as the “old guard” was a stray remark and not evidence of age

discrimination). Moreover, Segura's purported comment is immaterial unless Galbraith can identify a similarly situated individual who was treated more favorably than she was, and she has not done so.

In a further attempt to salvage her claims, Galbraith argues that she is entitled to relief based on assertions by Graves that Graves believes she (Graves) was subjected to sex discrimination when employed by Microsoft. But Graves has no claims pending in this case, and it is Galbraith who has the burden of establishing a prima facie case that she herself was treated less favorably because of her age or sex or purported disability. The trial court found that Galbraith failed to meet that burden by presenting actual evidence of specific disparate treatment, and Galbraith has not provided any factual basis to support her conclusory assertion that the court was in error.

In sum, in addition to being time-barred, Galbraith's age, sex, and disability discrimination claims based on alleged disparate treatment should be dismissed because, as the trial court correctly concluded, she failed to identify any similarly situated employee, let alone offer evidence that she was treated less favorably than any such employee. Further, Galbraith did not offer any evidence that Microsoft's legitimate, non-discriminatory reasons for its actions were a pretext for discrimination. Because Galbraith voluntarily resigned, she was not interested in taking on any

work or other roles at Microsoft beyond her last job, and cannot produce evidence of discrimination, summary judgment should be affirmed in favor of Microsoft of each of these claims.

E. The Trial Court Did Not Err In Concluding That Galbraith's Retaliation Claim is Meritless

For a plaintiff to establish a prima facie case of retaliation, she must show that (1) she engaged in statutorily protected activity, (2) the employer took adverse employment action against her, and (3) there is a causal link between the protected activity and the adverse action. *Crownover*, 165 Wn. App. at 148 . As the trial court correctly concluded, Galbraith has no evidence to support any element of this claim.

As a threshold matter, Galbraith did not engage in statutorily protected activity. RCW 49.60.210(1) (only opposition to unlawful practices prohibited by the WLAD constitutes protected activity); RCW 49.60.180 (defining unlawful practices). Although she alleges that Segura retaliated against her for having a “bad attitude” and for complaining that she had to work too much and should be getting paid more and promoted more often, such complaints do not constitute protected activity. CP at 137-142. *See Graves v. Dep't of Game*, 76 Wn. App. 705, 712, 887 P.2d 424 (1994) (holding that an employee's complaints of exceedingly high expectations, among other things, did not constitute protected activity

because plaintiff did not identify any alleged basis that would violate the WLAD). Thus, even if Segura had “retaliated” in response to Galbraith’s complaints about her workload, pay or promotions, which he did not, it would not have been unlawful for him to do so because her workload and pay complaints were not statutorily protected conduct. *See id.* Further, Galbraith admits she did not communicate her alleged complaints about discrimination on the basis of age, sex, or any purported disability to Segura or to Human Resources, and further admits she has no evidence to suggest that Segura ever heard about the complaints she purportedly made to Ward and Graves in 2006 and/or 2007. CP at 31-32, 37, 53. Thus, the trial court correctly concluded that Galbraith was unable to support her claim for retaliation, and that such claim should be dismissed at summary judgment. RP 52:6-9.

F. **The Trial Court Did Not Err In Concluding That Galbraith’s Disparate Impact Age Discrimination Claim is Meritless**

As a threshold matter, Galbraith’s disparate impact age discrimination claim is not properly before this court, because Galbraith failed to raise this claim in her Opening Brief. An assignment of error not argued or discussed in an opening brief is waived. *Dickson v. U.S. Fidelity & Guaranty Co.*, 77 Wn.2d 785, 787, 466 P.2d 515 (1970); RAP 10.3(a)(5) (appellate brief should contain argument supporting issues

presented for review, citations to legal authority, and references to relevant parts of the record). Even if this claim was properly before the court, it fails because (1) Galbraith cannot identify a specific policy with a purported disparate impact, and (2) her entire claim is based upon discretionary pay and promotion decisions, which cannot form the basis of a disparate impact claim; and (3) she bases her claim exclusively on her own opinion and speculation.

Galbraith cannot establish a prima facie case of disparate impact age discrimination because she admits she has no evidence of a facially neutral policy that has a disparate impact on employees aged 40 and older. CP at 54-55. In Galbraith's First (¶ 16) (CP Sub. 21) and Second (¶ 17) Amended Complaints (CP at 137-42), Galbraith contends that unidentified policies regarding promotions, compensation and working conditions had a disparate impact on "older employees." CP at 140. However, Galbraith is unable to specifically identify any such policy that allegedly affected anyone other than Galbraith herself, as noted by the trial court. CP at 54-55; RP at 37:15-40:1. Instead, she points to discretionary, subjective pay and promotion decisions by her manager, which cannot form the basis of a disparate impact claim. *See Hudon v. West Valley Sch. Dist. No. 208*, 123 Wn. App. 116, 129, 97 P.3d 39 (2004) (noting that the disparate impact model is ill-suited to wide-ranging challenges to general compensation

policies which lend themselves better to disparate treatment analysis and requiring that objective, non-discretionary criteria must be narrowly defined in plaintiff's complaint in order to sustain a disparate impact claim). Washington courts have long held that a disparate impact claim under the WLAD will fail if the alleged policy at issue is based on subjective, discretionary decisions, such as pay or promotion decisions, or other decisions specific to an individual employee. *See Clarke v. State Attorney Gen.'s Office*, 133 Wn. App. 767, 784, 138 P.3d 144 (2006), *review denied*, 160 Wn.2d 1006 (2007) (holding that the plaintiff's claims that she was not promoted or offered career growth were specific to her and did not suggest a policy or regulation that disparately impacted a protected class); *see also Oliver v. Pac. Nw. Bell Tel. Co., Inc.*, 106 Wn.2d 675, 680-81, 724 P.2d 1003 (1986) (holding that a disparate impact analysis is inappropriate where a policy turns entirely on discretionary decisions).

Here again, Galbraith cannot even point to a particular group of individuals that her vaguely alleged but unidentified policy might have affected. CP at 54-55. Galbraith further admits that her claims in this lawsuit (and, in particular, her disparate impact claim) are based entirely on speculation and supposition about entirely discretionary, subjective pay and promotion decisions, which is not sufficient for her claim to survive a

motion for summary judgment. *See Grimwood*, 110 Wn.2d at 359-60. In an attempt to support her claim, Galbraith relies on an untimely and incomplete expert witness disclosure that seemed to suggest that she may attempt to introduce statistical evidence and expert opinion. CP at 477. Microsoft objected. *Id.* Even if this compilation of employee compensation information had been timely submitted it would be of no consequence because no employee pay information in that exhibit is correlated with job duties, job experience, work product, work skills, work habits or any other information regarding any individual for whom such information is presented. Indeed, there is nothing in Galbraith's so-called expert exhibit that would allow a trier of fact to determine whether any employee identified in that exhibit is similarly situated to Galbraith. As already discussed above, Galbraith has admitted she has no idea whether any of these individuals is more skilled than she is, or has more complex job duties than she had, or why he or she is paid more than Galbraith, or whether any of those individuals might have worked twice as hard as she did. *See* Section IV.B.1, *supra*. In any event, statistical or expert evidence is irrelevant because Galbraith's purported disparate impact claim pertains only to subjective, discretionary decision-making with respect to pay and promotions, which Washington courts have consistently held are not subject to a disparate impact analysis. *See* Section F, *supra*.

G. The Trial Court Did Not Err In Dismissing Galbraith's Equal Pay Act Claim

To establish a prima facie case of wage discrimination under Washington's Equal Pay Act, Galbraith must prove she was paid less than men who were similarly employed. RCW 49.12.175; *see also Adams v. Univ. of Wash.*, 106 Wn.2d 312, 318, 722 P.2d 74 (1986). Washington's Equal Pay Act parallels its federal counterpart, 29 U.S.C. § 206(d), so courts often look to federal interpretation for guidance. *Adams*, 106 Wn.2d at 317-18. If the plaintiff meets her burden of establishing a prima facie case, the employer can raise an affirmative defense by showing the wage disparity is "based in good faith on a factor or factors other than sex." *Id.* at 317 (quoting RCW 49.12.175). In this case, Galbraith has not produced any evidence beyond her own speculation that her male coworkers were doing equal or substantially similar work yet getting paid more. Such speculation is never sufficient for her claim to survive summary judgment. *See Grimwood*, 110 Wn.2d at 359-60. Moreover, Galbraith admits she has no actual knowledge about the workload of most of her male and female colleagues. CP at 21-30, 44-49. She admits she does not know whether her purported comparators were working on the weekends, in the evenings, or whether they had to travel for work. *Id.* She admits she does not know whether her colleagues had college or graduate

degrees, or how their skills, job responsibilities or contributions compared with her or others. *Id.* Her admitted lack of knowledge or evidence on these issues is important because an employer can properly consider and reward professional experience and education without violating the Equal Pay Act, and this is precisely what Microsoft has done. *See Hudson*, 123 Wn. App. at 127 (citing *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1321 (9th Cir. 1994)); CP at 89-90.

As with the rest of her claims in this lawsuit, Galbraith's equal pay claim is based entirely on self-serving belief, speculation and supposition, none of which is sufficient for her claim to survive a motion for summary judgment. *See Grimwood*, 110 Wn.2d at 359-60. When asked for examples of alleged wage disparity at Microsoft, the only specific thing Galbraith could identify was that she had heard that someone named "Tim" was earning significantly more than she was earning in 2011. CP at 29-30. Yet, Galbraith admitted at her deposition that she does not know whether Tim (whose last name she does not know) has a college degree, a graduate degree, or what his prior work experiences were. *Id.* Galbraith also admits she does not know whether he was willing to travel or relocate, or how many hours he worked, and as such, effectively admits she lacks evidence to show that Tim was a similarly situated employee. *See id.*

In contrast to many of her male and female colleagues, Galbraith

admits she does not have a college degree, was not willing to regularly work evenings or weekends, and was not willing to travel. Furthermore, Galbraith cannot present any evidence that she had greater responsibilities than her male colleagues because she admits that she does not know anything about their responsibilities. CP at 21-30, 44-49. Galbraith asserts in her Opening Brief that she supported more software applications than some of her colleagues, but she admitted at her deposition that “the number of software applications” is not a reliable indicator of the complexity or level of responsibility for a Solutions Manager. CP 38. In any event, Galbraith admits she was promoted in 2008 and testified that she received maximum merit-based salary increases annually through 2010. CP at 27-28.

Even if Galbraith could establish a prima facie case of wage discrimination, which the trial court correctly determined she had not, her claim should be dismissed because she has no evidence to refute Microsoft’s assertion that any wage differences between individuals are based on factors other than sex. Galbraith’s performance reviews articulate many of the reasons behind her salary level: For example, according to one such review: “[Galbraith] expressed no interest in either increasing her scope of responsibility or potentially making a lateral move to explore other areas of solutions delivery space. Because of this reason she is most likely to remain

at current stage profile [pay level].” CP at 94. Galbraith admits this assessment in her performance review was accurate, and she has not offered any evidence that her co-workers were similarly reluctant to expanding their roles at Microsoft because she knows nothing about their work. CP at 21-30, 44-49.

While Galbraith attempts to show pretext by arguing she was replaced in her position by someone outside of her protected class (a younger male who started at a higher salary level), she does not have any evidence to support the assertion that the two of them had the same job and equal workloads, job duties, working hours and levels of education and experience. CP at 50-51. Such a comparison is improper and irrelevant because Galbraith was not replaced. Instead, after she resigned, her former duties were added to a new, different, and much expanded position with a much more strategic focus. CP at 92. Here again, Galbraith speculates that this is not true, but offers no evidence to support her assertion. Indeed, she admitted at her deposition that she has no knowledge of relevant facts. CP at 50-51.

Furthermore, replacement by a younger person is not sufficient to show pretext; “rather, the proof required is that the employer ‘sought a replacement with qualifications similar to [her] own, thus demonstrating a continued need for the same services and skills.’” *Grimwood*, 110 Wn.2d

at 363.

Galbraith's reference in her appeal to the Lilly Ledbetter Fair Pay Act of 2009, 24 U.S.C. § 2000e-5(e)(3)(A),(B), is also misleading because that federal statute has no bearing on the purely state law claims in this matter. Moreover, Galbraith has not cited any Washington decision that has applied the Ledbetter Act to Washington state law claims because no Washington court has done so. Even if this Act had been applied to Washington state law claims by Washington courts, the equitable tolling discussed by Galbraith does not change Galbraith's burden of proof with regards to this claim. *See McReynold v. Merrill Lynch & Co., Inc.*, 694 F.3d 873, 888 (7th Cir. 2012).

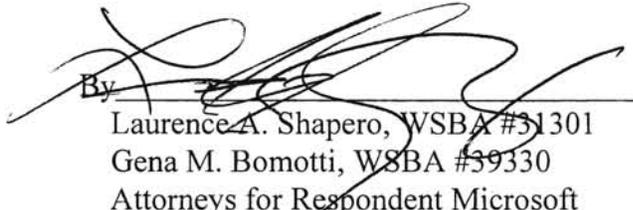
Finally, Galbraith's request for summary judgment in her favor on the Equal Pay Act claim is improper because she did not properly move for such relief; rather, she simply (and improperly) added this request to her Response to Microsoft's Motion for Summary Judgment, and as pointed out by the trial court, relied on distinguishable cases in attempting to do so. CP at 155; RP at 45:9-46:15. Because Galbraith lacks evidence to support her claim of wage discrimination, and because she did not properly file or assert a motion for summary judgment on this issue, the trial court properly dismissed this claim, and properly denied Galbraith's request for summary judgment in her favor on this claim.

VI. CONCLUSION

The undisputed facts demonstrate that Galbraith's claims are meritless, and further demonstrate that she knows each of her claims are based only on her self-serving belief, speculation and supposition. Microsoft therefore respectfully requests that this Court affirm the trial court's entry of summary judgment in favor of Microsoft on each of Galbraith's claims.

RESPECTFULLY SUBMITTED this 5th day of May, 2014.

RIDDELL WILLIAMS P.S.

By 

Laurence A. Shapero, WSBA #31301
Gena M. Bomotti, WSBA #39330
Attorneys for Respondent Microsoft
Corporation

CERTIFICATE OF SERVICE

I, Jazmine Matautia, certify that:

1. I am an employee of Riddell Williams P.S., attorneys for Respondent Microsoft Corporation in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.
2. On May 5, 2014, I served a true and correct copy of the foregoing document on the following party, attorney for Appellant, via email (with permission) as follows:

Ronald L. Jackson, WSBA #14903
Jackson & Co.
600 108th Avenue NE, Suite 543
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Phone: 425-646-6315
Fax: 425-454-6310
Email: ron@ronaldjacksonlaw.com
katie@ronaldjacksonlaw.com

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

SIGNED at Seattle, Washington, this 5th day of May, 2014.



Jazmine Matautia

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This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28. (Find CTA6 Rule 28)

United States Court of Appeals,
 Sixth Circuit.
 Albert SCOTT, Plaintiff-Appellant,

v.

John E. POTTER, Postmaster General of the United States Postal Service, et al., Defendants-Appellees.

No. 05-3991.
 May 31, 2006.

Background: Public employee brought action against public employer, alleging age discrimination and retaliation, in violation of the Age Discrimination in Employment Act (ADEA), and Title VII. The United States District Court for the Southern District of Ohio, 2005 WL 1490976, granted summary judgment in favor of employer. Employee appealed.

Holdings: The Court of Appeals, McKeague, Circuit Judge, held that:

- (1) employee failed to establish prima facie ADEA retaliation claim, and
- (2) alleged statement by supervisor did not establish age discrimination.

Affirmed.

West Headnotes

[1] Civil Rights 78 1252

78 Civil Rights
 78II Employment Practices
 78k1241 Retaliation for Exercise of Rights
 78k1252 k. Causal Connection; Temporal Proximity. Most Cited Cases

Postal Service 306 5

306 Postal Service
 306I Postal Service in General
 306k3 The Postal Service
 306k5 k. Officers, Clerks, and Employees. Most Cited Cases

Postal employee failed to prove a causal connection between his alleged protected activity of filing age discrimination charges with the Equal Employment Opportunity Commission (EEOC) and his placement on emergency leave and subsequent termination, as would establish prima facie ADEA retaliation claim; the EEOC charges were filed years before the adverse employment actions, and there was no other showing that the actions were linked to the EEOC charges. Age Discrimination in Employment Act of 1967, § 4(d), 29 U.S.C.A. § 623(d).

[2] Civil Rights 78 1205

78 Civil Rights
 78II Employment Practices
 78k1199 Age Discrimination
 78k1205 k. Retirement in General. Most Cited Cases

Civil Rights 78 1209

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78 Civil Rights

78II Employment Practices

78k1199 Age Discrimination

78k1209 k. Motive or Intent; Pretext. Most Cited Cases

Alleged statement by supervisor to employee, telling him to “retire and make everyone happy,” was insufficient to establish age discrimination under the ADEA; telling employee to retire did not necessarily refer to employee's age, but rather to his years of service, and there was no evidence that supervisor routinely used term “retire” to express discriminatory bias based on age. Age Discrimination in Employment Act of 1967, § 4(d), 29 U.S.C.A. § 623(d).

***521** On Appeal from the United States District Court for the Southern District of Ohio.

Before: KENNEDY, COLE, and McKEAGUE, Circuit Judges.

OPINION

McKEAGUE, Circuit Judge.

****1** When this lawsuit was filed, Albert Scott worked as a full-time mail handler at the Cincinnati Bulk Mail Center, U.S. Postal Service (the “Service”). He began his employment with the Service in 1966. The Service terminated his employment in February 2002. After an arbitration hearing, the Service reinstated Scott. This lawsuit centers around the events leading up to his termination.

Scott asserts that his termination resulted from various illegal acts by the defendants, including age discrimination and retaliation. The district court disagreed, finding that Scott failed to make out his *prima facie* case for any of his claims. We affirm.

***522 I.**

It is clear from the facts of this case that Scott and his supervisor, Jerry Seale, did not get along. While there does not appear to have been hostilities between the two when Seale first became Scott's supervisor in the mid-1990s, by early 1999, the two began having problems. Scott attributed the change to the fact that he started dating Joyce Staples, the ex-girlfriend of Seale's brother, in 1999. Scott testified that Seale started to follow him around and harass both him and Staples.

Another key aspect of this case is that Scott was, by all accounts, a prolific grievance filer. In addition to filing grievances on his own behalf, he filed grievances on behalf of other employees and assisted them in filing their own grievances. Scott also filed numerous complaints under the Equal Employment Opportunity Act, referred to by the parties as “EEO actions” or simply “EEOs.”

Scott filed several grievances against Seale in 1999, all of which involved either allegations of union collective bargaining agreement and safety violations, or issues involving his relationship with Staples. Scott testified that he also filed “three or four” EEOs against Seale in 1999 and 2000, alleging age discrimination and retaliation. (He did not, however, include copies of these EEOs in the record before us.)

Problems flared up between the two again in October and November 2001, this time involving allegations that Scott spent excessive time in the rest room, and that Seale violated the union's rules on overtime opportunities. A month later in December 2001, the two were involved in another incident, the one which directly led to this lawsuit.

On December 12th, Scott was driving a forklift. Seale walked towards Scott. According to Seale, Scott then deliberately turned the forklift in Seale's direction. Seale had to jump out of the way to avoid being hit. He alleged that Scott had a smile on his face dur-

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ing the encounter.

Scott's account differed. According to him, he was driving in a safe manner, but that Seale began yelling at him for no reason. He denied intentionally trying to hit Seale.

The following day, Seale placed Scott on emergency off-duty status, citing the prior day's incident as grounds. Several days later, Seale notified Scott that he would be terminated from the Service, effective February 1, 2002.

**2 Scott grieved both the emergency leave and termination. While unsuccessful at the administrative level, he did earn a partial victory in arbitration. The arbitrator found that Scott had engaged in unsafe behavior, but ordered he be reinstated in light of his many years of service. The arbitrator specifically declined to award back pay, though, because Scott had "intentionally committed clear and serious violations of established [workplace] safety rules."

Scott filed a complaint with the EEOC, which was denied. He then brought this instant action, alleging retaliation, age discrimination, reverse racial discrimination, disparate impact, hostile work environment, sexual harassment, and a *Bivens* claim. Both sides consented to having the matter heard before a magistrate judge. On the defendants' motion, the magistrate judge granted them summary judgment. Scott timely appealed.

II.

"We review *de novo* the district court's grant of summary judgment" for defendants. *Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247, 252 (6th Cir.2000). Summary judgment is justified "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *523 genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." Fed.R.Civ.P. 56(c). We consider the evidence and draw all reasonable inferences in favor of the nonmoving party. *Mahon v. Crowell*, 295 F.3d 585, 588 (6th Cir.2002).

A. Claims Not Raised on Appeal

Scott does not raise on appeal any issues involving his reverse racial discrimination, disparate impact, hostile work environment, sexual harassment, or *Bivens* claims. "Issues which were raised in the district court, yet not raised on appeal, are considered abandoned and not reviewable on appeal." *Robinson v. Jones*, 142 F.3d 905, 906 (6th Cir.1998) (citing *Enterprise Elec., Inc. v. Mahoning County Comm'rs*, 85 F.3d 257, 259 (6th Cir.1996)).

B. Retaliation

As his first issue on appeal, Scott argues the magistrate judge erred in granting the defendants summary judgment on his retaliation claim. Employers may not retaliate against an employee for engaging in activity protected under Title VII of the Civil Rights Act of 1974 ("Title VII"), 42 U.S.C. § 2000e-3(a), or the Age Discrimination in Employment Act of 1967 (the "ADEA"), 29 U.S.C. § 623(d). Retaliation claims are subject to the *McDonnell-Douglas* burden-shifting framework. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (ADEA); *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir.1987) (Title VII). Initially, to establish a *prima facie* case of retaliation, an employee must show that:

(1) he engaged in activity protected by Title VII [or the ADEA]; (2) the exercise of his civil rights was known to the defendant; (3) thereafter, the defendant took an employment action adverse to the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action.

**3 *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir.2000) (citation omitted). As we have

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explained, “[t]he burden of establishing a *prima facie* case in a retaliation action is not onerous, but one easily met.” *Id.* (citation omitted). If the employee meets the initial burden, the burden of production then shifts to the employer to provide a legitimate, non-discriminatory reason for its conduct. *Balmer v. HCA, Inc.*, 423 F.3d 606, 614-15 (6th Cir.2005). The ultimate burden of persuasion, however, rests with the employee to show that the proffered rationale by the employer was just a pretext for its retaliatory actions. *Id.*^{FN1}

FN1. There is a question-not addressed by either party-whether the federal government has waived sovereign immunity to claims of age-related retaliation by its employees. Courts have differed on the answer. *Compare Forman v. Small*, 271 F.3d 285, 298-99 (D.C.Cir.2001) (“[W]e hold that [29 U.S.C.] § 633a waives sovereign immunity as to claims of retaliation”), with *Cyr v. Perry*, 301 F.Supp.2d 527, 535 (E.D.Va.2004) (“[B]ecause § 633a of the ADEA contains no express and unequivocal language that waives sovereign immunity with respect to retaliation claims, plaintiff’s claims for retaliation under the ADEA are barred by sovereign immunity and must be dismissed.”). While § 633a of the ADEA does not expressly prohibit retaliation by federal employers, the implementing regulations do: “No person shall be subject to retaliation for opposing any practice made unlawful by ... the Age Discrimination in Employment Act....” 29 C.F.R. § 1614.101(b). Moreover, Scott is an employee of the Service, which has a unique relationship with the federal government. As we have explained before, Congress “removed the mantle of sovereign immunity” from the Service when it enacted The Postal Reorganization Act of 1970. *Forest v. U.S. Postal Serv.*, 97 F.3d 137, 142 (6th Cir.1996) (citation omitted).

We need not answer the question here. Although the sovereign-immunity question is a jurisdictional one, we have discretion to address first the merits of the underlying claim. See *Nair v. Oakland County Cmty. Mental Health Auth.*, 443 F.3d 469, 477 (6th Cir.2006) (“[U]nder any circumstances in which the State (or the United States) declines to raise sovereign immunity as a threshold defense, we conclude that the federal courts have discretion to address the sovereign-immunity defense and the merits in whichever order they prefer.”); *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1000 (D.C.Cir.1999) (finding that “a less than pure jurisdictional question” like federal sovereign immunity “need not be decided before a merits question”) (internal quotations omitted). The Tenth Circuit took a similar avenue by refusing to pause “to examine whether any action for retaliation is permissible at all under § 633a.” *Villescas v. Abraham*, 311 F.3d 1253, 1258 (10th Cir.2002).

*524 1. *Protected Activity*

In determining whether Scott has made his *prima facie* case, we must first distinguish between his protected activity and his unprotected activity. “Protected activity” refers to opposing any practice made unlawful under Title VII or the ADEA, or making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Title VII or the ADEA. 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d). The record does not contain an exhaustive account of the administrative grievances Scott filed prior to the adverse actions, or, more importantly, the subject matter of the grievances. Of those grievances that he has included in the record or has provided some specific description, none involve matters protected by either Title VII or the ADEA.

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Rather, they all appear to concern matters covered under his union's collective bargaining agreement, including workplace safety and overtime hours, or the relationship between Scott and Staples. The only evidence of protected activity in the record is Scott's deposition testimony in which he estimated that he filed "three or four" EEOs in 1999-2000 because of age discrimination and retaliation.^{FN2}

FN2. During oral argument, Scott's counsel stated that his client had assisted other employees with their protected activity in September, just a few months before his discharge in December 2001. There is no mention of this activity nor any citation to the record in his appeal brief. Counsel referred us during argument to Scott's brief in opposition to the defendants' motion for summary judgment below. We have reviewed the brief and the attachments included in the record before us, and find no evidence to support counsel's supposition. Indeed the only reference we were able to find to this activity is Seale's testimony that he was aware of Scott's EEO activity and that Scott filed EEO complaints every time he did not "get his way."

2. Causal Connection

[1] We next turn our attention to whether there was a causal connection between the protected activity and the adverse actions about which Scott complains. "To establish the causal connection ..., a plaintiff must produce sufficient evidence from which an inference could be drawn that the adverse action would not have been taken had the plaintiff not filed a discriminatory action." *Nguyen*, 229 F.3d at 563 (citations omitted). Causation can be inferred from indirect or circumstantial evidence, such as "evidence that defendant treated the plaintiff differently from similarly situated employees or that the adverse action was taken shortly after the plaintiff's exercise of protected rights." *Id.* (citation omitted). To survive summary judgment, the

evidence of causation must be "sufficient to raise the inference that [the plaintiff's] protected activity was the *likely reason* for the adverse action." *Zanders v. Nat'l R.R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir.1990) (internal quotations omitted, emphasis added).

Scott's claim rests primarily on his emergency-leave placement and subsequent termination. There is no doubt that these actions were adverse employment actions. We find, however, that the time *525 lag between his EEO activity and these adverse actions is too long, without more, to establish a causal link. Scott filed his EEOs in 1999 and 2000, but was not placed on emergency leave and notified of his termination until December 2001. The extensive time lag negates any inference that Scott's protected activity led to the defendants' subsequent actions. *Cooper v. City of N. Olmsted*, 795 F.2d 1265, 1272 (6th Cir.1986) ("The mere fact that Cooper was discharged four months after filing a discrimination claim is insufficient to support an [inference] of retaliation."); *see also Nguyen*, 229 F.3d at 566-67 (explaining that "previous cases that have permitted a *prima facie* case to be made based on the proximity of time have all been short periods of time, usually less than six months") (quoting *Parnell v. West*, No. 95-2131, 1997 WL 271751, at *3 (6th Cir. May 21, 1997)). Scott has offered no objective evidence to support his causation theory or explain the long time lag.

**4 Scott also alludes to other adverse actions by Seale. He states in a letter written on December 13, 2001, that he was able to settle the earlier EEOs he filed "[w]ith the understanding that there would be no retaliation," but that "[a]s soon as Seale found out about the settlements, he would start all over again." We find that this assertion of adverse action is too vague to withstand scrutiny. Scott fails to support the statement with any *specific* evidence of adverse employment actions closely following the "three or four" EEOs. His conclusory statement that Seale harassed

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him is insufficient to create a genuine issue of material fact. See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990); *Hein v. All Am. Plywood Co.*, 232 F.3d 482, 488 (6th Cir.2000) (explaining that a plaintiff cannot establish a *prima facie* case based on “vague, ambiguous, or isolated remarks”).

As Scott failed to provide evidence sufficient to create a genuine issue of material fact on the issue of causation, the magistrate judge properly granted summary judgment to the defendants on the claim of retaliation. We turn next to Scott's claim of age discrimination.

C. Age Discrimination

To support his age-discrimination claim, Scott must either present direct evidence of discrimination or satisfy the *McDonnell-Douglas* burden-shifting analysis. *Minadeo v. ICI Paints*, 398 F.3d 751, 763 (6th Cir.2005) (citation omitted). Scott relies solely on the former method.

To succeed on a “direct evidence” claim, a plaintiff must come forward with direct evidence that “an illegitimate criterion”—e.g., a person's age, race, or sex—“was a substantial factor” in the adverse employment action. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 276, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (O'Connor, J., concurring), *maj. op. overruled by statute on other grounds*, § 107 of the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071. If such evidence is presented, the burden then shifts to “the employer to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor.” *Id.*

“Direct evidence is evidence that proves the existence of a fact without requiring any inferences.” *Minadeo*, 398 F.3d at 763 (quoting *Rowan v. Lockheed Martin Energy Sys.*, 360 F.3d 544, 548 (6th

Cir.2004)). Specifically, direct evidence of discrimination is “evidence of conduct or statements by persons involved in making the employment decision directly manifesting a discriminatory attitude, of a sufficient quantum and gravity that would allow the factfinder to conclude that attitude more likely than not was a motivating *526 factor in the employment decision.” *Erickson v. Farmland Indus., Inc.*, 271 F.3d 718, 724 (8th Cir.2001) (citations omitted). “[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age,” satisfy this criteria. *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir.1989).

**5 [2] As direct evidence of age discrimination, Scott points to the following remark purportedly made to him by Seale: “Why don't you retire and make everybody happy.” This statement alone does not, however, constitute direct evidence of age discrimination. If, for example, Seale had made a slightly different remark—“Why don't you *quit* and make everybody happy”—it would obviously not be direct evidence of age discrimination—the hypothetical statement does not refer to age or anything related, even tangentially, to age. Several inferences would have to be made to jump from the statement (“quit”) to a discriminatory animus (“quit because you're too old”). Thus, Scott's claim must rest upon the notion that the term “retire” itself somehow directly references or necessarily means a person's age.

To “retire” as opposed to “quit” usually brings to mind a voluntary separation from employment based on, among other things, an employee's years of service. Yet, “years of service” is conceptually distinct from “age.” While both terms apply to many of the same individuals in various contexts, the overlap is not perfect. An older employee might, for example, be a new hire with a particular employer, and therefore have only a couple of years of service. Alternatively, a younger employee might have worked at one employer since graduating high school, and therefore

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have a relatively long period of service with that employer. See *Hazen Paper*, 507 U.S. at 611, 113 S.Ct. 1701. It is true that younger workers typically do not “retire” from an employer, while older workers typically do. Yet, it is this “typicality” rather than “identity” which requires that an inference be drawn before “Why don't you retire” can become evidence of a discriminatory animus like “Why don't you retire; you're too old.” See, e.g., *Davidson v. Quorum Health Group, Inc.*, 1 F.Supp.2d 1321, 1325 (N.D.Ala.1997) (finding the statement “you are old enough to retire, you ought to get on out of here” disparaging, but not direct evidence of discriminatory animus). In short, “retire” and “age” are not synonyms. Cf. *Hazen Paper*, 507 U.S. at 611, 113 S.Ct. 1701 (“Yet an employee's age is analytically distinct from his years of service.”); *Erickson*, 271 F.3d at 725 (“Length of tenure, although it may correlate empirically with age, is not synonymous with age....”).

Nor has Scott shown that the defendants use the term “retire” as a proxy for age to express discriminatory bias. For example, an employer might routinely use a facially innocuous term like “experienced” to refer to an older worker in a disparaging way. If there was evidence of such routine usage, then a statement like “Let's fire him; he's too experienced” would be direct evidence of age discrimination. Cf. *Hazen Paper*, 507 U.S. at 612-13, 113 S.Ct. 1701. This is because no factual inference of discrimination need be drawn from the statement, only a translation need be applied-i.e., “experienced” means “too old” to that particular employer. Here, though, Scott has offered no evidence that the defendants use “retire” as a proxy for “too old” or some other derogatory, age-based term. See *Erickson*, 271 F.3d at 725 (affirming summary judgment where plaintiff failed to show that the defendant used length of tenure as a proxy for age).^{FN3} Accordingly, because Scott has *527 not come forward with any direct evidence of age discrimination, his claim fails.

FN3. Scott relies primarily upon two decisions outside this circuit to support his argument that the statement is direct evidence of age discrimination. Both opinions are, however, distinguishable. In *Ezell v. Potter*, the Seventh Circuit found that the employee had presented direct evidence of age discrimination. One of the employee's supervisors told a new hire that their “plan was to get rid of older carriers and replace them with younger, faster carriers.” *Ezell v. Potter*, 400 F.3d 1041, 1051 (7th Cir.2005). This is clearly direct evidence, as the statement facially exhibits a discriminatory animus against older workers in favor of younger ones-no inferences need be made. In *Owens v. New York City Housing Authority*, the Second Circuit side-stepped the issue of whether purported comments made by an employee's supervisors constituted direct evidence of discrimination. 934 F.2d 405, 409 (2d Cir.1991). The court did note, though, that the comment-the employee's “‘problems’ had to do with her age and entry into menopause”-raised a genuine issue of fact on the issue of pretext. *Id.* at 410. Of course, the derogatory reference to the employee's “age” is exactly what is missing in the present case.

III.

**6 For the foregoing reasons, we AFFIRM summary judgment in favor of the defendants.

C.A.6 (Ohio),2006.

Scott v. Potter

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507 U.S. 604, 113 S.Ct. 1701, 61 Fair Empl.Prac.Cas. (BNA) 793, 61 Empl. Prac. Dec. P 42,186, 123 L.Ed.2d 338, 61 USLW 4323, 16 Employee Benefits Cas. 1881
 (Cite as: 507 U.S. 604, 113 S.Ct. 1701)



Supreme Court of the United States
 HAZEN PAPER COMPANY, et al., Petitioners,
 v.
 Walter F. BIGGINS.

No. 91-1600.
 Argued Jan. 13, 1993.
 Decided April 20, 1993.

Discharged employee brought action under ADEA and ERISA. The United States District for the District of Massachusetts entered judgment finding ADEA and ERISA violations, but finding that violation was not willful, and appeal ensued. The Court of Appeals for the First Circuit, 953 F.2d 1405, affirmed in part and reversed in part. The Supreme Court, Justice O'Connor, held that: (1) without more, discharging employee to prevent his pension benefits from vesting did not violate ADEA, and (2) violation of ADEA is willful if the employee either knew or showed reckless disregard for whether its conduct was prohibited by the statute.

Vacated and remanded.

Justice Kennedy filed a concurring opinion in which Justice Thomas and the Chief Justice concurred.

West Headnotes

[1] Civil Rights 78 1210

78 Civil Rights
 78II Employment Practices
 78k1199 Age Discrimination
 78k1210 k. Disparate treatment. Most Cited

Cases

(Formerly 78k168.1)

There is no disparate treatment under ADEA when factor motivating employer is some feature other than employee's age. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

[2] Civil Rights 78 1210

78 Civil Rights
 78II Employment Practices
 78k1199 Age Discrimination
 78k1210 k. Disparate treatment. Most Cited

Cases

(Formerly 78k168.1)

Disparate treatment theory is available under ADEA. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

[3] Civil Rights 78 1138

78 Civil Rights
 78II Employment Practices
 78k1138 k. Disparate treatment. Most Cited

Cases

(Formerly 78k153)

In disparate treatment case, liability depends upon whether the protected trait actually motivated employer's decision; employer may have relied upon formal, facially discriminatory policy requiring adverse treatment of employees with that trait or employer may have been motivated by protected trait on ad hoc, informal basis but, whatever the decision-making process, disparate treatment claim cannot succeed unless employee's protected trait action

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played a role in that process and had determinative influence on the outcome. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

[4] Civil Rights 78 ↪1204

78 Civil Rights

78II Employment Practices

78k1199 Age Discrimination

78k1204 k. Discharge or layoff. Most Cited

Cases

(Formerly 78k170)

It is the very essence of age discrimination for older employee to be fired because employer believes that productivity and competence decline with old age. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

[5] Civil Rights 78 ↪1201

78 Civil Rights

78II Employment Practices

78k1199 Age Discrimination

78k1201 k. Practices prohibited or required

in general; elements. Most Cited Cases

(Formerly 78k168.1)

Employee cannot rely on age as a proxy for employee's remaining characteristics, such as productivity, but must instead focus on those factors directly. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

[6] Civil Rights 78 ↪1201

78 Civil Rights

78II Employment Practices

78k1199 Age Discrimination

78k1201 k. Practices prohibited or required

in general; elements. Most Cited Cases
(Formerly 78k170)

Civil Rights 78 ↪1206

78 Civil Rights

78II Employment Practices

78k1199 Age Discrimination

78k1206 k. Pensions, retirement plans, and employee benefits. Most Cited Cases

(Formerly 78k170)

Age and years of service are analytically distinct, so that employer could take account of one while ignoring the other, and decision based on years of service is thus not necessarily age-based; firing employee in order to prevent pension benefits from vesting does not, without more, violate ADEA. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

[7] Labor and Employment 231H ↪794

231H Labor and Employment

231HVIII Adverse Employment Action

231HVIII(A) In General

231Hk793 Pensions and Benefits

231Hk794 k. In general. Most Cited

Cases

(Formerly 255k34.1 Master and Servant)

Firing employee in order to prevent his pension benefits from vesting is actionable under ERISA. Employee Retirement Income Security Act of 1974, § 510, 29 U.S.C.A. § 1140.

[8] Civil Rights 78 ↪1576(2)

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

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78k1569 Monetary Relief; Restitution

78k1576 Liquidated Damages

78k1576(2) k. Age discrimination. Most

Cited Cases

(Formerly 78k407)

ADEA does not provide for liquidated damages where consistent with principle of two-tiered liability scheme but, rather, provides for liquidated damages where violation was willful. Age Discrimination in Employment Act of 1967, § 7(b), as amended, 29 U.S.C.A. § 626(b).

[9] Civil Rights 78 ↪ 1576(2)

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

78k1569 Monetary Relief; Restitution

78k1576 Liquidated Damages

78k1576(2) k. Age discrimination. Most

Cited Cases

(Formerly 78k407)

Employer who knowingly relies on age in reaching decision to discharge employee does not invariably commit knowing or reckless violation of ADEA in view of the bona fide occupational qualification defense and exemptions of certain subject matters and persons. Age Discrimination in Employment Act of 1967, §§ 4(f)(1, 2), 7(b), 12(c), as amended, 29 U.S.C.A. §§ 623(f)(1, 2), 626(b), 631(c).

[10] Civil Rights 78 ↪ 1576(2)

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

78k1569 Monetary Relief; Restitution

78k1576 Liquidated Damages

78k1576(2) k. Age discrimination. Most

Cited Cases

(Formerly 78k407)

If employer incorrectly but in good faith and nonrecklessly believes that ADEA permits particular age-based decision, liquidated damages should not be imposed. Age Discrimination in Employment Act of 1967, §§ 4(f)(1, 2), 7(b), 12(c), as amended, 29 U.S.C.A. §§ 623(f)(1, 2), 626(b), 631(c).

[11] Civil Rights 78 ↪ 1576(2)

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

78k1569 Monetary Relief; Restitution

78k1576 Liquidated Damages

78k1576(2) k. Age discrimination. Most

Cited Cases

(Formerly 78k407)

Violation of ADEA is “willful” if employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute. Age Discrimination in Employment Act of 1967, § 7(b), as amended, 29 U.S.C.A. § 626(b).

****1703 *604 Syllabus^{FN*}**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Petitioners fired respondent Biggins when he was 62 years old and apparently a few weeks short of the years of service he needed for his pension to vest. In his ensuing lawsuit, a jury found, *inter alia*, a willful violation of the Age Discrimination in Employment Act of 1967 (ADEA), which gave rise to liquidated damages. The District Court granted petitioners' mo-

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tion for judgment notwithstanding the verdict on the “willfulness” finding, but the Court of Appeals reversed, giving considerable emphasis to evidence of pension interference in upholding ADEA liability and finding that petitioners' conduct was willful because, under the standard of *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128, 105 S.Ct. 613, 625, 83 L.Ed.2d 523, they knew or showed reckless disregard for the matter of whether their conduct contravened the ADEA.

Held:

1. An employer does not violate the ADEA by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service. In a disparate treatment case, liability depends on whether the protected trait—under the ADEA, age—actually motivated the employer's decision. When that decision is wholly motivated by factors other than age, the problem that prompted the ADEA's passage—inaccurate and stigmatizing stereotypes about older workers' productivity and competence—disappears. Thus, it would be incorrect to say that a decision based on years of service—which is analytically distinct from age—is necessarily age based. None of this Court's prior decisions should be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper in any respect. The foregoing holding does not preclude the possibility of liability where an employer uses pension status as a proxy for age, of dual liability under the Employee Retirement Income Security Act of 1974 and the ADEA, or of liability where vesting is based on age rather than years of service. Because the Court of Appeals cited additional evidentiary support for ADEA liability, this case is remanded for that court to reconsider whether the jury had sufficient evidence to find such liability. Pp. 1705-1708.

*605 2. The *Thurston* “knowledge or reckless disregard” standard for liquidated damages applies not only where the predicate ADEA violation is a formal,

facially discriminatory policy, as in *Thurston*, but also where it is an informal decision by the employer that was motivated by the employee's age. Petitioners have not persuaded this Court that *Thurston* was wrongly decided or that the Court should part from the rule of *stare decisis*. Applying the *Thurston* standard to cases of individual discrimination will not defeat the two-tiered system of liability intended by Congress. Since the ADEA affords an employer a “bona fide occupational qualification” defense, and exempts certain subject matters and persons, an employer could incorrectly but in good faith and nonrecklessly believe that the statute permits a particular age-based decision. Nor is there some inherent difference between this case and *Thurston* to cause a shift in the meaning of the word “willful.” The distinction between the formal, publicized policy in *Thurston* and the undisclosed factor here is not such a difference, since an employer's reluctance to acknowledge its reliance on the forbidden factor should not cut *against* imposing a penalty. Once a “willful” violation has **1704 been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, provide direct evidence of the employer's motivation, or prove that age was the predominant, rather than a determinative, factor in the employment decision. Pp. 1708-1710.

953 F.2d 1405 (CA1 1992), vacated and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, in which REHNQUIST, C.J., and THOMAS, J., joined, *post*, p. 1710.

Robert B. Gordon, Boston, MA, for petitioners.

Maurice M. Cahillane, Jr., Springfield, MA, for respondent.

John R. Dunne, for the U.S. as amicus curiae by special leave of the Court.

*606 Justice O'CONNOR delivered the opinion of the Court.

In this case we clarify the standards for liability and liquidated damages under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.*

I

Petitioner Hazen Paper Company manufactures coated, laminated, and printed paper and paperboard. The company is owned and operated by two cousins, petitioners Robert Hazen and Thomas N. Hazen. The Hazens hired respondent Walter F. Biggins as their technical director in 1977. They fired him in 1986, when he was 62 years old.

Respondent brought suit against petitioners in the United States District Court for the District of Massachusetts, alleging a violation of the ADEA. He claimed that age had been a determinative factor in petitioners' decision to fire him. Petitioners contested this claim, asserting instead that respondent had been fired for doing business with competitors of Hazen Paper. The case was tried before a jury, which rendered a verdict for respondent on his ADEA claim and also found violations of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 895, § 510, 29 U.S.C. § 1140, and state law. On the ADEA count, the jury specifically found that petitioners "willfully" violated the statute. Under § 7(b) of the ADEA, 29 U.S.C. § 626(b), a "willful" violation gives rise to liquidated damages.

*607 Petitioners moved for judgment notwithstanding the verdict. The District Court granted the motion with respect to a state-law claim and the finding of "willfulness" but otherwise denied it. An appeal ensued. 953 F.2d 1405 (CA1 1992). The United States Court of Appeals for the First Circuit affirmed judgment for respondent on both the ADEA and ERISA counts, and reversed judgment notwith-

standing the verdict for petitioners as to "willfulness."

In affirming the judgments of liability, the Court of Appeals relied heavily on the evidence that petitioners had fired respondent in order to prevent his pension benefits from vesting. That evidence, as construed most favorably to respondent by the court, showed that the Hazen Paper pension plan had a 10-year vesting period and that respondent would have reached the 10-year mark had he worked "a few more weeks" after being fired. *Id.*, at 1411. There was also testimony that petitioners had offered to retain respondent as a consultant to Hazen Paper, in which capacity he would not have been entitled to receive pension benefits. *Id.*, at 1412. The Court of Appeals found this evidence of pension interference to be sufficient for ERISA liability, *id.*, at 1416, and also gave it considerable emphasis in upholding ADEA liability. After summarizing all the testimony tending to show age discrimination, the court stated:

"Based on the foregoing evidence, the jury could reasonably have found that Thomas Hazen decided to fire [respondent]**1705 before his pension rights vested and used the confidentiality agreement [that petitioners had asked respondent to sign] as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire [respondent]. If it were not for [respondent's] age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. [Respondent] was fifty-two years old when he was hired; his pension rights vested in ten years." *Id.*, at 1412.

*608 As to the issue of "willfulness" under § 7(b) of the ADEA, the Court of Appeals adopted and applied the definition set out in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). In *Thurston*, we held that the airline's facially discriminatory job-transfer policy was not a "willful" ADEA violation because the airline neither "knew [nor] showed reckless disregard for

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the matter of whether” the policy contravened the statute. *Id.*, at 128, 105 S.Ct., at 625 (internal quotation marks omitted). The Court of Appeals found sufficient evidence to satisfy the *Thurston* standard, and ordered that respondent be awarded liquidated damages equal to and in addition to the underlying damages of \$419,454.38. 953 F.2d, at 1415-1416.

We granted certiorari to decide two questions. 505 U.S. 1203, 112 S.Ct. 2990, 120 L.Ed.2d 868 (1992). First, does an employer's interference with the vesting of pension benefits violate the ADEA? Second, does the *Thurston* standard for liquidated damages apply to the case where the predicate ADEA violation is not a formal, facially discriminatory policy, as in *Thurston*, but rather an informal decision by the employer that was motivated by the employee's age?

II

A

[1] The Courts of Appeals repeatedly have faced the question whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age. Compare *White v. Westinghouse Electric Co.*, 862 F.2d 56, 62 (CA3 1988) (firing of older employee to prevent vesting of pension benefits violates ADEA); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (CA7 1987) (firing of older employee to save salary costs resulting from seniority violates ADEA), with *Williams v. General Motors Corp.*, 656 F.2d 120, 130, n. 17 (CA5 1981) (“[S]eniority and age discrimination are unrelated.... We state without equivocation that the seniority a given *609 plaintiff has accumulated entitles him to no better or worse treatment in an age discrimination suit”), cert. denied, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982); *EEOC v. Clay Printing Co.*, 955 F.2d 936, 942 (CA4 1992) (emphasizing distinction between employee's age and years of service). We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other

than the employee's age.

[2] We long have distinguished between “disparate treatment” and “disparate impact” theories of employment discrimination.

“ ‘Disparate treatment’ ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment....

“[C]laims that stress ‘disparate impact’ [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive ... is not required under a disparate-impact theory.” **1706 *Teamsters v. United States*, 431 U.S. 324, 335-336, n. 15, 97 S.Ct. 1843, 1855, n. 15, 52 L.Ed.2d 396 (1977) (citation omitted) (construing Title VII of Civil Rights Act of 1964).

The disparate treatment theory is of course available under the ADEA, as the language of that statute makes clear. “It shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age.*” 29 U.S.C. § 623(a)(1) (emphasis added). See *Thurston, supra*, 469 U.S., at 120-125, 105 S.Ct., at 621-624 (affirming ADEA *610 liability under disparate treatment theory). By contrast, we have never decided whether a disparate impact theory of liability is available under the ADEA, see *Markham v. Geller*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981) (REHNQUIST, J., dissenting from denial

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of certiorari), and we need not do so here. Respondent claims only that he received disparate treatment.

[3] In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. See, e.g., *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-256, 101 S.Ct. 1089, 1093-1095, 67 L.Ed.2d 207 (1981); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576-578, 98 S.Ct. 2943, 2949-2950, 57 L.Ed.2d 957 (1978). The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait. See, e.g., *Thurston*, *supra*; *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 704-718, 98 S.Ct. 1370, 1373-1380, 55 L.Ed.2d 657 (1978). Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. See, e.g., *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Teamsters*, *supra*, 431 U.S., at 334-343, 97 S.Ct., at 1854-1859. Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.

[4][5] Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. As we explained in *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.

“Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stere-

otypes unsupported*611 by objective fact.... Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers.” *Id.*, at 231, 103 S.Ct., at 1057-1058.

Thus the ADEA commands that “employers are to evaluate [older] employees ... on their merits and not their age.” *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422, 105 S.Ct. 2743, 2756, 86 L.Ed.2d 321 (1985). The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

[6] When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is. Pension plans typically provide that an employee's accrued benefits will become nonforfeitable, or “vested,” once the employee completes a certain **1707 number of years of service with the employer. See 1 J. Mamorsky, *Employee Benefits Law* § 5.03 (1992). On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the class of older workers as defined by the ADEA, see 29 U.S.C. § 631(a), may have worked for a particular employer his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily “age based.”

The instant case is illustrative. Under the Hazen

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Paper pension plan, as construed by the Court of Appeals, an employee's pension benefits vest after the employee completes 10 years of service with the company. Perhaps it is true *612 that older employees of Hazen Paper are more likely to be "close to vesting" than younger employees. Yet a decision by the company to fire an older employee solely because he has nine-plus years of service and therefore is "close to vesting" would not constitute discriminatory treatment on the basis of age. The prohibited stereotype ("Older employees are likely to be ___") would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an *accurate* judgment about the employee—that he indeed is "close to vesting."

[7] We do not mean to suggest that an employer *lawfully* could fire an employee in order to prevent his pension benefits from vesting. Such conduct is actionable under § 510 of ERISA, as the Court of Appeals rightly found in affirming judgment for respondent under that statute. See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142-143, 111 S.Ct. 478, 484-485, 112 L.Ed.2d 474 (1990). But it would not, without more, violate the ADEA. That law requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore. Although some language in our prior decisions might be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper *in any respect*, see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) (creating proof framework applicable to ADEA) (employer must have "legitimate, nondiscriminatory reason" for action against employee), this reading is obviously incorrect. For example, it cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not

the ADEA.

We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older *613 thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, cf. *Metz*, 828 F.2d, at 1208 (using "proxy" to mean statutory equivalence), but in the sense that the employer may suppose a correlation between the two factors and act accordingly. Nor do we rule out the possibility of dual liability under ERISA and the ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status. Finally, we do not consider the special case where an employee is about to vest in pension benefits as a result of his *age*, rather than years of service, see 1 *Mamorsky*, *supra*, at § 5.02[2], and the employer fires the employee in order to prevent vesting. That case is not presented here. Our holding is simply that an employer does not violate the ADEA just by interfering with an older employee's**1708 pension benefits that would have vested by virtue of the employee's years of service.

Besides the evidence of pension interference, the Court of Appeals cited some additional evidentiary support for ADEA liability. Although there was no direct evidence of petitioners' motivation, except for two isolated comments by the Hazens, the Court of Appeals did note the following indirect evidence: Respondent was asked to sign a confidentiality agreement, even though no other employee had been required to do so, and his replacement was a younger man who was given a less onerous agreement. 953 F.2d, at 1411. In the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's explanation for its decision—here, that respondent had been disloyal to Hazen Paper by doing business with its competitors—is " 'unworthy of credence.' " *Aikens*, 460 U.S., at 716, 103 S.Ct., at 1482 (quoting *Burdine*,

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450 U.S., at 256, 101 S.Ct., at 1095). But inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present. This issue is now before us in the Title VII context,*614 see *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (CA8 1992), cert. granted, 506 U.S. 1042, 113 S.Ct. 954, 122 L.Ed.2d 111 (1993), and we will not address it prematurely. We therefore remand the case for the Court of Appeals to reconsider whether the jury had sufficient evidence to find an ADEA violation.

B

Because we remand for further proceedings, we also address the second question upon which certiorari was granted: the meaning of “willful” in § 7(b) of the ADEA, which provides for liquidated damages in the case of a “willful” violation.

In *Thurston*, we thoroughly analyzed § 7(b) and concluded that “a violation of the Act [would be] ‘willful’ if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.” 469 U.S., at 126, 105 S.Ct., at 624 (internal quotation marks and ellipsis omitted). We sifted through the legislative history of § 7(b), which had derived from § 16(a) of the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1069, as amended, 29 U.S.C. § 216(a), and determined that the accepted judicial interpretation of § 16(a) at the time of the passage of the ADEA supported the “knowledge or reckless disregard” standard. See 469 U.S., at 126, 105 S.Ct., at 624. We found that this standard was consistent with the meaning of “willful” in other criminal and civil statutes. See *id.*, at 126-127, 105 S.Ct., at 624-625. Finally, we observed that Congress aimed to create a “two-tiered liability scheme,” under which some, but not all, ADEA violations would give rise to liquidated damages. We therefore rejected a broader definition of “willful” providing for liquidated damages whenever the employer knew that the ADEA was “in the picture.” See *id.*, at 127-128, 105 S.Ct., at

624-625.

In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988), an FLSA case, we reaffirmed the *Thurston* standard. The question in *Richland Shoe* was whether the limitations provision*615 of the FLSA, creating a 3-year period for “willful” violations, should be interpreted consistently with *Thurston*. We answered that question in the affirmative.

“The word ‘willful’ is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The standard of willfulness that was adopted in *Thurston*—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—is surely a fair reading of the plain language of the Act.” 486 U.S., at 133, 108 S.Ct., at 1681.

**1709 Once again we rejected the “in the picture standard” because it would “virtually obliterate] any distinction between willful and nonwillful violations.” *Id.*, at 132-133, 108 S.Ct., at 1680-1681.

[8] Surprisingly, the Courts of Appeals continue to be confused about the meaning of the term “willful” in § 7(b) of the ADEA. A number of Circuits have declined to apply *Thurston* to what might be called an informal disparate treatment case—where age has entered into the employment decision on an ad hoc, informal basis rather than through a formal policy. At least one Circuit refuses to impose liquidated damages in such a case unless the employer's conduct was “outrageous.” See, e.g., *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 57-58 (CA3 1989). Another requires that the underlying evidence of liability be direct rather than circumstantial. See, e.g., *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (CA8 1989). Still others have insisted that age be the “pre-

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dominant,” rather than simply a determinative, factor. See, e.g., *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1159 (CA10 1990); *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 158 (CA6 1988). The chief concern of these Circuits has been that the application of *Thurston* would defeat the two-tiered system of liability intended by Congress, because every employer that engages in informal age *616 discrimination knows or recklessly disregards the illegality of its conduct.

We believe that this concern is misplaced. The ADEA does not provide for liquidated damages “where consistent with the principle of a two-tiered liability scheme.” It provides for liquidated damages where the violation was “willful.” That definition must be applied here unless we overrule *Thurston*, or unless there is some inherent difference between this case and *Thurston* to cause a shift in the meaning of the word “willful.”

[9][10] As for the first possibility, petitioners have not persuaded us that *Thurston* was wrongly decided, let alone that we should depart from the rule of *stare decisis*. The two-tiered liability principle was simply one interpretive tool among several that we used in *Thurston* to decide what Congress meant by the word “willful,” and in any event we continue to believe that the “knowledge or reckless disregard” standard will create two tiers of liability across the range of ADEA cases. It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA. The ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a “bona fide occupational qualification” defense, see 29 U.S.C. § 623(f)(1), and exempts certain subject matters and persons, see, e.g., § 623(f)(2) (exemption for bona fide seniority systems and employee benefit plans); § 631(c) (exemption for bona fide executives and high policymakers). If an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular

age-based decision, then liquidated damages should not be imposed. See *Richland Shoe*, *supra*, 486 U.S., at 135, n. 13, 108 S.Ct., at 1682, n. 13. Indeed, in *Thurston* itself we upheld liability but *reversed* an award of liquidated damages because the employer “acted [nonrecklessly] and in good faith in attempting to determine whether [its] plan would violate the ADEA.” 469 U.S., at 129, 105 S.Ct., at 625.

[11] *617 Nor do we see how the instant case can be distinguished from *Thurston*, assuming that petitioners did indeed fire respondent because of his age. The only distinction between *Thurston* and the case before us is the existence of formal discrimination. Age entered into the employment decision there through a formal and publicized policy, and not as an undisclosed factor motivating the employer on an ad hoc basis, which is what respondent alleges occurred here. But surely an employer's reluctance to acknowledge its reliance on the forbidden factor should not cut *against* imposing**1710 a penalty. It would be a wholly circular and self-defeating interpretation of the ADEA to hold that, in cases where an employer more likely knows its conduct to be illegal, knowledge alone does not suffice for liquidated damages. We therefore reaffirm that the *Thurston* definition of “willful”—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—applies to all disparate treatment cases under the ADEA. Once a “willful” violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant, rather than a determinative, factor in the employment decision.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

507 U.S. 604, 113 S.Ct. 1701, 61 Fair Empl.Prac.Cas. (BNA) 793, 61 Empl. Prac. Dec. P 42,186, 123 L.Ed.2d 338, 61 USLW 4323, 16 Employee Benefits Cas. 1881

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Cas. 1881

Justice KENNEDY, with whom THE CHIEF JUSTICE and Justice THOMAS join, concurring.

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I agree with the Court that the Court of Appeals placed improper reliance on respondent's evidence of pension interference and that the standard for determining willfulness announced in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), applies to individual acts of age discrimination as *618 well as age discrimination manifested in formal, company-wide policy. I write to underscore that the only claim based upon the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, asserted by respondent in this litigation is that petitioners discriminated against him because of his age. He has advanced no claim that petitioners' use of an employment practice that has a disproportionate effect on older workers violates the ADEA. See App. 29-30 (amended complaint); 5 Record 71-76 (jury instructions). As a result, nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called "disparate impact" theory of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. As the Court acknowledges, *ante*, at 1706, we have not yet addressed the question whether such a claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA. See *Markham v. Geller*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981) (REHNQUIST, J., dissenting from denial of certiorari); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1216-1220 (CA7 1987) (Easterbrook, J., dissenting); Note, Age Discrimination and the Disparate Impact Doctrine, 34 *Stan.L.Rev.* 837 (1982). It is on the understanding that the Court does not reach this issue that I join in its opinion.

U.S.Mass.,1993.

Hazen Paper Co. v. Biggins

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(Cite as: 413 F.3d 1090)



United States Court of Appeals,
Ninth Circuit.
James W. COGHLAN, Plaintiff-Appellant,
v.
AMERICAN SEAFOODS COMPANY LLC, De-
fendant-Appellee.

No. 03-35314.
Argued and Submitted Feb. 9, 2005.
Filed July 7, 2005.

Background: Commercial fisherman brought lawsuit against employer alleging national-origin discrimination under Title VII and the Washington Law Against Discrimination. The United States District Court for the Western District of Washington, Barbara Jacobs Rothstein, J., granted employer's motion for summary judgment, and appeal was taken.

Holdings: The Court of Appeals, O'Scannlain, Circuit Judge, held that:

- (1) fisherman established a prima facie case of discrimination against employer;
- (2) "same-actor inference" applied; and
- (3) fisherman's allegations were insufficient to rebut same-actor inference.

Affirmed.

West Headnotes

[1] Civil Rights 78 1122

78 Civil Rights
78II Employment Practices
78k1122 k. Discharge or Layoff. Most Cited
Cases

Civil Rights 78 1135

78 Civil Rights
78II Employment Practices
78k1135 k. Promotion, Demotion, and Trans-
fer. Most Cited Cases

Civil Rights 78 1536

78 Civil Rights
78IV Remedies Under Federal Employment Dis-
crimination Statutes
78k1534 Presumptions, Inferences, and Bur-
den of Proof
78k1536 k. Effect of Prima Facie Case;
Shifting Burden. Most Cited Cases

Under *McDonnell Douglas*, the burden of pro-
duction first falls on the plaintiff to make out a prima
facie case of discrimination, and he may do so by
showing that (1) he belongs to a protected class, (2) he
was qualified for the position he held (or for the posi-
tion to which he wished to be promoted), (3) he was
terminated or demoted from (or denied a promotion
to) that position, and (4) the job went to someone
outside the protected class.

[2] Civil Rights 78 1536

78 Civil Rights
78IV Remedies Under Federal Employment Dis-
crimination Statutes
78k1534 Presumptions, Inferences, and Bur-
den of Proof
78k1536 k. Effect of Prima Facie Case;
Shifting Burden. Most Cited Cases

Under *McDonnell Douglas*, after a plaintiff es-

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establishes a prima facie case of discrimination, the burden of production then shifts to the employer, who must present evidence sufficient to permit the factfinder to conclude that the employer had a legitimate, nondiscriminatory reason for the adverse employment action.

[3] Civil Rights 78 1107

78 Civil Rights

78II Employment Practices

78k1107 k. Discrimination by Reason of Race, Color, Ethnicity, or National Origin, in General. Most Cited Cases

Civil Rights 78 1122

78 Civil Rights

78II Employment Practices

78k1122 k. Discharge or Layoff. Most Cited Cases

Civil Rights 78 1135

78 Civil Rights

78II Employment Practices

78k1135 k. Promotion, Demotion, and Transfer. Most Cited Cases

Commercial fisherman established a prima facie case of discrimination against employer, for purposes of Title VII action claiming national-origin discrimination stemming from employer's failure to offer fisherman the important position of mate on board a fishing vessel, by alleging that he belonged to a protected class, specifically, non-Norwegian-born workers, that he was twice not appointed as relief master of the one vessel, that he was removed as mate of that vessel and that he was not appointed master of the another vessel, that people chosen instead were Norwegian-born and thus outside the protected class, and that he had previously served as master of two of

employer's vessels, and was once offered the important position of mate on another, suggesting that he was not incompetent to handle major duties on a relatively large ship. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[4] Civil Rights 78 1544

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

78k1543 Weight and Sufficiency of Evidence

78k1544 k. In General. Most Cited Cases

A plaintiff in an employment discrimination case may meet the burden to show pretext using either direct or circumstantial evidence.

[5] Civil Rights 78 1544

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

78k1543 Weight and Sufficiency of Evidence

78k1544 k. In General. Most Cited Cases

“Direct evidence” of employment discrimination is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption.

[6] Civil Rights 78 1544

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

78k1543 Weight and Sufficiency of Evidence

78k1544 k. In General. Most Cited Cases

Civil Rights 78 1549

78 Civil Rights

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781V Remedies Under Federal Employment Discrimination Statutes

78k1543 Weight and Sufficiency of Evidence

78k1549 k. Sex Discrimination. Most Cited Cases

Direct evidence of discrimination typically consists of clearly sexist, racist, or similarly discriminatory statements or actions by the employer.

[7] Civil Rights 78 1544

78 Civil Rights

781V Remedies Under Federal Employment Discrimination Statutes

78k1543 Weight and Sufficiency of Evidence

78k1544 k. In General. Most Cited Cases

“Circumstantial evidence” of discrimination is evidence that requires an inferential step to demonstrate discrimination and can take two forms; first, the plaintiff can make an affirmative case that the employer is biased, and, second, the plaintiff can make his case negatively, by showing that the employer's proffered explanation for the adverse action is unworthy of credence.

[8] Federal Civil Procedure 170A 2497.1

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2497 Employees and Employment Discrimination, Actions Involving

170Ak2497.1 k. In General. Most Cited Cases

In employment discrimination actions, because direct evidence is so probative, the plaintiff need offer very little direct evidence to raise a genuine issue of material fact, but, when the plaintiff relies on circum-

stantial evidence, that evidence must be specific and substantial to defeat the employer's motion for summary judgment.

[9] Civil Rights 78 1535

78 Civil Rights

781V Remedies Under Federal Employment Discrimination Statutes

78k1534 Presumptions, Inferences, and Burden of Proof

78k1535 k. In General. Most Cited Cases

“Same-actor inference” applied in discrimination action brought by commercial fisherman against employer alleging national-origin discrimination under Title VII, stemming from employer's actions of offering fisherman a less desirable job assignment, where employer had taken favorable action toward fisherman only a year before the earliest adverse employment decision. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[10] Civil Rights 78 1535

78 Civil Rights

781V Remedies Under Federal Employment Discrimination Statutes

78k1534 Presumptions, Inferences, and Burden of Proof

78k1535 k. In General. Most Cited Cases

Federal Civil Procedure 170A 2497.1

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2497 Employees and Employment Discrimination, Actions Involving

170Ak2497.1 k. In General. Most Cited Cases

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The “same-actor inference,” which arises when the same actor was responsible for both the hiring and the firing of a discrimination plaintiff and both actions occur within a short period of time, raising an inference that there was no discriminatory action, is neither a mandatory presumption nor a mere possible conclusion for the jury to draw; rather, it is a strong inference that a court must take into account on a summary judgment motion.

[11] Civil Rights 78 ↪ 1544

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

78k1543 Weight and Sufficiency of Evidence
78k1544 k. In General. Most Cited Cases

Civil Rights 78 ↪ 1548

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

78k1543 Weight and Sufficiency of Evidence
78k1548 k. Promotion or Transfer. Most Cited Cases

American commercial fisherman's allegations that employer appointed an individual of Norwegian origin as relief master of fishing vessel instead of fisherman, that employer removed fisherman as mate of vessel and appointed a Norwegian-born person as master, and that employer simultaneously removed American masters on two others ships and replaced them with Norwegian-born masters were insufficient to rebut same-actor inference, as required for fisherman's Title VII national origin discrimination action; employer based its decisions, in part, on recommendations of fleet operations manager, an American-born citizen who was not biased in favor of Norwegians, and the vessel's performance was poor

and some sort of change in management was needed. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

*1092 Scott E. Collins, Helsell Fetterman LLP, Seattle, WA, argued the cause for the appellant; Jennifer S. Divine, Helsell Fetterman LLP, was on the briefs.

Alex J. Higgins, Stokes Lawrence, P.S., Seattle, WA, argued the cause for the appellee.

Appeal from the United States District Court for the Western District of Washington; Barbara Jacobs Rothstein, District Judge, Presiding. D.C. No. CV-02-01165-BJR.

Before: O'SCANNLAIN, LEAVY; and BEA, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether the showing necessary for an employee to prevail against his employer's motion for summary judgment in this employment discrimination case is heightened because the person who demoted him had previously appointed and promoted him; if so, we must decide whether the employee's evidence of discrimination is sufficient to meet the heightened burden.

I

James Coghlan is a resident of Washington and a commercial fisherman. From 1997 onward, he was employed by American Seafoods Company LLC (ASC), which operates fishing vessels off the coast of the Pacific Northwest and in Alaskan waters. Until the American Fisheries Act (AFA)^{FNI} was passed in 1998, ASC was owned and operated by a Norwegian parent corporation. The AFA required certain fishing companies, including those engaged in the Alaska pollock and cod fisheries, to be American-owned. ASC complied with the law, but its management remains largely the same as it was before the AFA was

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passed and is made up primarily of native Norwegians.

FN1. Pub.L. 105-277, div. C, tit. II, 112 Stat. 2681 (codified as amended in scattered sections of 16 and 26 U.S.C.).

In 1997 Coghlan was working as master^{FN2} of the Victoria Ann when ASC purchased that vessel. He continued to serve as master of the Victoria Ann until 1998, when ASC took the Victoria Ann out of service because provisions of the AFA effectively required it to reduce its active fleet. Many masters, mates, and other crewmembers were laid off, but ASC retained Coghlan and appointed him master of the Katie Ann, one of its six factory trawlers still in service. The person responsible for the decision to retain Coghlan was Inge Andreassen, ASC's Vice President of Operations and a man of Norwegian birth. According to Andreassen's declaration, he selected Coghlan for the job despite the availability of at least one Norwegian candidate, Tor Storkersen.

FN2. The top two positions on fishing boats of this sort are, first, the "master" or "captain" and, second, the "mate."

Coghlan continued to serve as the master of the Katie Ann until 2000, when ASC decided to place another vessel, the American Dynasty, back into operation. At that time ASC appointed Coghlan as mate of the Dynasty; the ship's master was Kristjan Petursson, who was born in Iceland. Again, Andreassen was responsible for the decision to transfer Coghlan. Although the transfer technically involved a step down in rank, from master to mate, Coghlan's new position provided an opportunity to make more money and Coghlan saw it as a desirable change. Coghlan remained mate of the Dynasty until November 2001.

On two occasions in September and October 2001, Petursson had to be temporarily absent as mas-

ter of the Dynasty. On each occasion, instead of appointing Coghlan as the "relief master" (i.e., temporary *1093 master) as Coghlan would have liked, Andreassen selected the Norwegian-born Jarl Hogseth to fill the position. Coghlan considered himself more qualified than Hogseth, especially since he had been serving on the Dynasty for more than a year and knew the vessel. Andreassen stated in his declaration that he made his decision on the basis of a recommendation from Frank Vargas, ASC's Fleet Operations Manager and a native-born American of Filipino ancestry.

In November 2001, Andreassen was dissatisfied with the Dynasty's performance. Its production levels were low and its expenses for equipment replacement were high for a boat of its size. Michael Hyde, the president of ASC, stated in his declaration that he instructed Andreassen to change the Dynasty's leadership and to allow neither Petursson nor Coghlan to serve as its master. After consulting with Frank Vargas as well as Tammy French, ASC's Vice President of Human Resources and an American of non-Nordic heritage, Andreassen removed Coghlan from the vessel and demoted Petursson to the position of mate. Andreassen stated in his declaration that Vargas's recommendation carried special weight because he is in day-to-day contact with the ships and had previously served as master of the Dynasty himself. Andreassen offered the master position to an American of non-Norwegian descent, Mike Kraljevich, who was then serving as a mate on another ASC vessel. Kraljevich declined, however, and Andreassen instead appointed Ole Knotten, a man of Norwegian descent. Knotten had little experience fishing in American waters and only obtained a Coast Guard license shortly before he was to take over as master of the Dynasty, but he had been working on fishing vessels in Russia for more than ten years, including a stint as fishmaster on what Andreassen described as "the most sophisticated factory trawler ever built." Around the same time in late 2001, Andreassen removed the masters on two other ASC vessels, both of whom were American. Both of their replacements were Norwe-

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gian-born men.

With the 2002 fishing season approaching and Coghlan having been removed as mate of the Dynasty, Andreassen offered Coghlan the position of mate on the Katie Ann. (According to the declarations of Andreassen and Vargas, they first considered Coghlan for the master position, but were unable to reach him and got the feeling that he was avoiding them. Coghlan disputes this.) Coghlan found such offer objectionable, considering that he had previously served as master of the Katie Ann and felt that he should be reappointed to that position. Instead, Andreassen appointed Jarl Hogseth as master. Coghlan declined the offer of the mate position and brought this lawsuit in the Western District of Washington.

Coghlan alleged national-origin discrimination under Title VII and the Washington Law Against Discrimination.^{FN3} ASC moved for summary judgment supported by declarations and depositions, arguing that the adverse employment actions regarding Coghlan were motivated by legitimate, nondiscriminatory reasons, namely, the poor performance of the Dynasty in 2001 and observed problems in Coghlan's employment history. The district court granted ASC's motion, and this appeal timely followed.

FN3. He also alleged impermissible retaliation and wrongful discharge in violation of public policy, but does not pursue those claims on appeal.

II

[1][2] We analyze Coghlan's disparate-treatment claim of employment discrimination under the burden-shifting framework outlined by the Supreme Court in *1094McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).^{FN4} Under that framework, the burden of production first falls on the plaintiff to make out a prima facie case of discrimination. He may do so by showing

that (1) he belongs to a protected class, (2) he was qualified for the position he held (or for the position to which he wished to be promoted), (3) he was terminated or demoted from (or denied a promotion to) that position, and (4) the job went to someone outside the protected class. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir.2004). The burden of production then shifts to the employer, who must present evidence sufficient to permit the factfinder to conclude that the employer had a legitimate, nondiscriminatory reason for the adverse employment action. *St. Mary's Honor Center*, 509 U.S. at 506-07, 113 S.Ct. 2742. Finally, if the employer meets that burden, then the *McDonnell Douglas* framework drops out of the picture entirely, and the plaintiff bears the full burden of persuading the factfinder that the employer intentionally discriminated against him. *Id.* at 507-08, 113 S.Ct. 2742.

FN4. Washington's employment discrimination law largely parallels federal law under Title VII, and our treatment of Coghlan's Title VII claim thus applies also to his similar claim under Washington law. *See Hernandez v. Spacelabs Medical Inc.*, 343 F.3d 1107, 1112 (9th Cir.2003).

We proceed to apply the *McDonnell Douglas* framework to the evidence in this case.

A

[3] ASC argues-though only in a footnote-that Coghlan failed to make out a prima facie case of discrimination. ASC admits that Coghlan belonged to a protected class (non-Norwegian-born workers); that he was twice not appointed as relief master of the Dynasty, that he was removed as mate of the Dynasty, and that he was not appointed master of the Katie Ann; and that the people chosen instead were Norwegian-born and thus outside the protected class. It argues, however, that he was not qualified for those positions because he was not performing at a level

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consistent with ASC's expectations. This argument is not convincing.^{FN5} We have emphasized that “[t]he requisite degree of proof necessary to establish a *prima facie* case for Title VII and ADEA claims on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence.” *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir.1994); *see also Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 659-60 (9th Cir.2002) (emphasizing the low threshold for a *prima facie* case and holding that even an employee's self-assessment is relevant evidence). Coghlan has presented enough evidence to meet this minimal burden: most notably, he had previously served as master of two of ASC's vessels, the *Victoria Ann* and the *Katie Ann*, and was offered the important position of mate on the *Dynasty*, suggesting that he was not incompetent to handle major duties on a relatively large ship.

FN5. Moreover, it appears that ASC waived this argument by not presenting it to the district court. *See Harris v. Pulley*, 885 F.2d 1354, 1367 (9th Cir.1988). We need not rest on its waiver, however, because we reject the argument even on its merits.

As for the second step of the *McDonnell Douglas* framework, Coghlan does not dispute that ASC's articulation of nondiscriminatory reasons for its actions was sufficient to cause the framework to drop away and to place the burden back on Coghlan to show that ASC's explanations were actually a pretext for discrimination.

[4][5][6] A plaintiff may meet the burden to show pretext using either direct or circumstantial*1095 evidence. Direct evidence is evidence “which, if believed, proves the fact[of discriminatory animus] without inference or presumption.” *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir.1998) (quoting *Davis v. Chevron, U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir.1994)) (alteration in original). Direct

evidence typically consists of clearly sexist, racist, or similarly discriminatory statements or actions by the employer. *See, e.g., Godwin*, 150 F.3d at 1221 (supervisor stated he “did not want to deal with [a] female”); *Cordova v. State Farm Ins.*, 124 F.3d 1145, 1149 (9th Cir.1997).^{FN6}

FN6. When the evidence in question is of an employer's statements that do not directly concern the plaintiff, it is true that *some* inference is necessary to establish discrimination with regard to the plaintiff. Indeed, strictly speaking, little other than an employer's own admission could establish discriminatory intent without any inference whatsoever. Nevertheless, when evidence establishes the employer's animus toward the class to which the plaintiff belongs, the inference to the fact of discrimination against the plaintiff is sufficiently small that we have treated the evidence as direct. *See Cordova*, 124 F.3d at 1149 (deeming “direct” evidence that the employer had referred to an employee other than the plaintiff as a “dumb Mexican”).

[7][8] Circumstantial evidence, in contrast, is evidence that requires an additional inferential step to demonstrate discrimination. It can take two forms. First, the plaintiff can make an affirmative case that the employer is biased. For example, statistical evidence is circumstantial evidence that could, if sufficiently probative, point to bias. *See Aragon*, 292 F.3d at 663. Second, the plaintiff can make his case negatively, by showing that the employer's proffered explanation for the adverse action is “unworthy of credence.” *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). As the Supreme Court has explained:

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

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tion, and it may be quite persuasive.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The distinction between direct and circumstantial evidence is crucial, because it controls the amount of evidence that the plaintiff must present in order to defeat the employer's motion for summary judgment.^{FN7} Because direct evidence is so probative, the plaintiff need offer "very little" direct evidence to raise a genuine issue of material fact. *Godwin*, 150 F.3d at 1221. But when the plaintiff relies on circumstantial evidence, that evidence must be "specific and substantial" to defeat the employer's motion for summary judgment.^{FN8} *Id.* at 1222 (internal quotation *1096 marks removed); see also *Aragon*, 292 F.3d at 661.

FN7. We have recently suggested that "specific and substantial" evidence may be required even when direct evidence is at issue. See *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1066 (9th Cir.2003). We need not decide today whether that is so, because as we will explain, Coghlan presents no evidence that qualifies as "direct" under the relevant definition.

FN8. Unfortunately, some confusion may arise because the terms "direct" and "indirect" have occasionally been used, even by the Supreme Court, to distinguish the two varieties of circumstantial evidence—that is, evidence affirmatively establishing bias, and evidence negatively discrediting the employer's stated rationale. See, e.g., *Burdine*, 450 U.S. at 256, 101 S.Ct. 1089; *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1093-94 (9th Cir.2001) (quoting *Burdine*). Coghlan thus suggests that evidence such as ASC's choice to pass over Coghlan in favor of an allegedly less-qualified Norwegian qualifies as "direct." We made clear in

Godwin, however, that for purposes of determining the level of evidence necessary to survive a summary judgment motion, "direct" evidence refers only to evidence (such as racist or sexist statements) that proves the fact of discriminatory animus without the need for substantial inference. See *Godwin*, 150 F.3d at 1221; *Stegall*, 350 F.3d at 1066.

Coghlan does not offer any direct evidence of ASC's discriminatory intent. Because his case is entirely circumstantial, he would have to present "specific and substantial" evidence of intentional discrimination to defeat ASC's motion for summary judgment. See *Aragon*, 292 F.3d at 661. His burden is especially steep in this case because of the so-called "same actor inference," to which we now turn.

B

In *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267 (9th Cir.1996), we held that "where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory action." *Id.* at 270-71. That holding is relevant here because Inge Andreassen, the man who made all of the challenged employment decisions, was the same man who appointed Coghlan as master of the Katie Ann in 1998 (over at least one viable candidate of Norwegian descent, according to Andreassen's declaration). He was also the same man who selected Coghlan for the position of mate/fishmate on the Dynasty in 2000, an appointment that Coghlan desired and viewed as a change for the better.

We based our holding in *Bradley* on the principle that an employer's initial willingness to hire the employee-plaintiff is strong evidence that the employer is not biased against the protected class to which the employee belongs. *Id.* Thus, although we phrased the same-actor rule in *Bradley* in terms of "hiring and ... firing," its logic applies no less to cases such as this

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one, in which the plaintiff was not actually fired but merely offered a less desirable job assignment.^{FN9} See *Hartsel v. Keys*, 87 F.3d 795, 804 n. 9 (6th Cir.1996) (applying the same-actor inference where the decisionmaker had not hired the plaintiff but had previously promoted her).

FN9. Cases not involving hiring and firing could arise, no doubt, in which the same-actor inference would be inappropriate. For example, if a plaintiff were alleging that his employer systematically excluded members of a certain class from upper-management positions, then the mere fact that the employer was willing to hire members of that class for lower-level positions would surely not prove otherwise. This is not such a case, though, because the relevant decisionmaker, Andreassen, had not merely hired Coghlan but had appointed him to advanced positions: master of the Katie Ann and mate/fishmate of the Dynasty.

[9] Coghlan offers several reasons why the same-actor inference should not apply, but none is convincing.^{FN10} First, he suggests that application of the same-actor inference in the summary judgment context*1097 is inconsistent with the holding of the Supreme Court in *Reeves*.^{FN11} The Supreme Court held in that case that “a plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.” *Reeves*, 530 U.S. at 148, 120 S.Ct. 2097. In other words: in many cases where the evidence is sufficient for a rational trier of fact to conclude that the employer is lying about its reason for firing or demoting the plaintiff, summary judgment will be inappropriate on that basis alone because a jury could reasonably view the employer’s lie as evidence of its guilt.^{FN12} That holding has no bearing on the same-actor inference, however, because the point of the same-actor inference is that the evidence *rarely is*

“sufficient ... to find that the employer’s asserted justification is false” when the actor who allegedly discriminated against the plaintiff had previously shown a willingness to treat the plaintiff favorably. *Reeves*, then, tells us only that *if* a plaintiff can muster the extraordinarily strong showing of discrimination necessary to defeat the same-actor inference, then the case likely must go to the jury.

FN10. Coghlan argues that the district court mistakenly applied the same-actor inference as a “mandatory presumption overriding all other evidence in the case.” The district court, however, was clearly aware that the same-actor inference was not “mandatory,” since it wrote that “Coghlan fails to rebut the presumption,” whereas a mandatory presumption is by definition irrebuttable. It is true that the district court used the term “presumption” rather than the term “inference” that appears in *Bradley*, and in some contexts, the two terms can have different meanings. It is clear, though, that we did not use the term “inference” in *Bradley* in its technical sense. The point, as *Bradley* makes clear and as the district court understood, is simply that when the allegedly discriminatory actor is someone who has previously selected the plaintiff for favorable treatment, that is very strong evidence that the actor holds no discriminatory animus, and the plaintiff must present correspondingly stronger evidence of bias in order to prevail.

FN11. Though Coghlan does not say so, this is necessarily an argument that *Bradley* is no longer good law, because *Bradley* itself dealt with the summary judgment context.

FN12. The Supreme Court needed to make this explicit in *Reeves* because some lower courts had effectively held that summary judgment was *always* appropriate unless the

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plaintiff presented not only a prima facie case and evidence sufficient to show that the employer's proffered legitimate rationale was pretextual, but *also* additional evidence sufficient to show actual discrimination. *See Reeves*, 530 U.S. at 146-47, 120 S.Ct. 2097.

Coghlan also argues that the same-actor inference is not relevant here because three years elapsed between 1998, when Andreassen appointed Coghlan master of the *Katie Ann*, and 2001, when the earliest of the allegedly discriminatory decisions occurred. *Bradley* did limit its holding to cases where the alleged discrimination took place “within a short period of time” after the favorable action. *Bradley*, 104 F.3d at 270-71. We reject Coghlan's argument, however, for several reasons. First, this length of time would be significant only had Coghlan proffered evidence suggesting that Andreassen developed a bias against non-Norwegians during that period; but he did not. *Cf. Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1286 (9th Cir.2000) (taking the same-actor inference into account when the positive action occurred more than a year earlier than the negative action); *Schnabel v. Abramson*, 232 F.3d 83, 91 (2d Cir.2000) (basing affirmance of summary judgment in an employment discrimination case in part on the fact that the plaintiff “was fired by the same man who had hired him three years earlier”).

Moreover, Andreassen did in fact take favorable action toward Coghlan in 2000, only a year before the earliest adverse employment decision, when he appointed Coghlan mate rather than master of the *Dynasty*. It is undisputed that Coghlan himself viewed the appointment as a favorable employment action; the new job was on a much larger ship and paid significantly more than the old job, and Coghlan was pleased with the change. As Coghlan points out, however, Andreassen declined to characterize the move as a “promotion”; he preferred to call it a “transfer,” and in a literal sense, it was not a promotion because Coghlan went from the rank of master on the *Katie Ann* to the

lower rank of mate on the *Dynasty*. Coghlan argues that it is the decisionmaker's perception, not that of the employee, that controls whether the same-actor inference arises.

*1098 As an abstract proposition, this is doubtless true; for if the decisionmaker did not perceive an employment action as favorable, there would be no basis to assume an absence of bias toward the employee. But the fact that we must look to the decisionmaker's perception does not mean that we are bound by the decisionmaker's label. The question is simply whether the nature of the employment action, viewed from the employer's perspective, is such that it would have been unlikely if the decisionmaker were truly biased against the employee's class. If it is, then the inference fairly arises. In this case, whether or not Coghlan's appointment was classified as a “promotion” in ASC's internal discussion, it is clear that Andreassen intentionally chose to appoint Coghlan to a new, better-paid, more demanding position on a larger ship. The favorable nature of the reassignment satisfies us that the same-actor inference should arise.

Finally, Coghlan suggests that the same-actor inference is just one more factor for the jury to consider in making its decision and should not be used to grant summary judgment to the defendant. That is the law in some circuits, and Coghlan cites cases to prove it. *See, e.g., Williams v. Vitro Servs. Corp.*, 144 F.3d 1438, 1443 (11th Cir.1998) (“[I]t is the province of the jury rather than the court ... to determine whether the inference generated by ‘same actor’ evidence is strong enough to outweigh a plaintiff's evidence of pretext.”). But it is clearly not the law in this circuit, since *Bradley* itself used the same-actor inference to affirm a grant of summary judgment, taking the case away from a jury. *See Bradley*, 104 F.3d at 272; *cf. Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir.1996) (affirming grant of summary judgment on the basis of the same-actor inference); *Lowe v. J.B. Hunt Transp., Inc.*, 963 F.2d 173, 173-74 (8th Cir.1992) (affirming grant of directed verdict on the basis of the same-actor

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inference).

[10] The same-actor inference is neither a mandatory presumption (on the one hand) nor a mere possible conclusion for the jury to draw (on the other). Rather, it is a “strong inference” that a court must take into account on a summary judgment motion. *Bradley*, 104 F.3d at 271. We must consider, then, whether Coghlan has made out the strong case of bias necessary to overcome this inference. It will be useful to consider separately each of the incidents that Coghlan alleges constituted illegal discrimination.^{FN13}

FN13. We may deal at the outset with one of Coghlan's contentions. Among the reasons the district court gave for granting summary judgment was the fact that “Andreassen is a naturalized U.S. citizen who has renounced his Norwegian citizenship.” Coghlan argues that the district court thus “erred in holding that a decision-maker's citizenship controls whether he discriminated against persons with the same citizenship.” Coghlan, however, drastically overstates the reliance placed on Andreassen's citizenship by the district court. It did not hold that the decisionmaker's adopted citizenship “controls” the question of discrimination; it merely found citizenship to be one relevant piece of evidence. We need not decide whether it was wrong to do so, because no inference from Andreassen's citizenship is necessary to conclude that Coghlan has not met his burden of proof.

C

1

[11] In 2001, while Coghlan was serving as mate on the *Dynasty*, the ship's master (Petursson) had to be temporarily absent on two occasions. Each time, Andreassen appointed a Norwegian (Hogseth) as the relief master (that is, the temporary replacement for the absent master) instead of Coghlan. Coghlan argues

that he was more qualified than Hogseth*1099 because he had more experience both with the *Dynasty* and as a factory-trawler master in general. Of course, the quality of Andreassen's business judgment is only relevant insofar as it suggests that his decisions were explainable only as the product of illegal discrimination. See *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir.2002). But in this case there is another, much more plausible, reason for Andreassen's decision: Andreassen stated in his declaration that his decision to appoint Hogseth as relief master was based entirely on the recommendation of Frank Vargas, who, in turn, stated in his declaration that he “strongly recommended Jarl Hogseth to serve as Relief Captain” and disfavored Coghlan because Vargas believed he had poor leadership skills. Coghlan does not offer any evidence that Andreassen's decision was not based on Vargas's recommendation, and Coghlan testified that he does not believe that Vargas harbors any sort of national-origin bias against him. Thus, Coghlan has presented no evidence that would cast doubt on this legitimate explanation of the decision to appoint Hogseth as relief master, and so he cannot rebut the “strong inference” of nondiscrimination that arises under the same-actor rule.

2

In November 2001, Andreassen removed Coghlan as mate of *Dynasty*. At the same time, he demoted Petursson to the mate position and appointed a Norwegian-born person (Knotten) as master. Coghlan argues that this is further evidence of pro-Norwegian bias. It is virtually impossible to credit Coghlan's argument, however, because Andreassen first offered the newly vacant master position to an *American* of non-Norwegian heritage (Kraljevich). Coghlan argues that this fact is no more than evidence against him to be evaluated by the jury at trial. But we cannot see how any reasonable jury could conclude that Andreassen was motivated by pro-Norwegian or anti-American discrimination when his first choice was to replace a Scandinavian master with an American one.^{FN14} The directive to change the leadership of the

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Dynasty came originally from Michael Hyde, an American. And Andreassen made his decision in consultation with Vargas, an American-born American citizen who Coghlan admitted is not biased in favor of Norwegians.

FN14. The fact that Coghlan's demotion occurred as part of a more general rearrangement in which his superior was also demoted makes his claim of intentional bias even more difficult to credit.

Moreover, the record suggests that ASC had legitimate reasons for demoting Coghlan. Andreassen and Vargas viewed the Dynasty as a poor performer, and its repair costs were much higher in proportion to the total tonnage caught than on the other vessels.^{FN15} Indeed, Coghlan himself agreed that the vessel's performance was poor and that some sort of change was needed, though of course he did not think that his own demotion was the right solution.

FN15. Coghlan argues that several ships had higher repair costs in absolute terms. As ASC points out, however, it stands to reason that larger and more complex ships will have higher repair costs than smaller, simpler vessels. What is most relevant is the level of repair costs in proportion to the amount of fish caught, and in those terms the Dynasty was easily the most costly vessel.

As further evidence of ASC's discriminatory intent, Coghlan points to the fact that Andreassen simultaneously removed American masters on two other ships and replaced them with Norwegian-born masters. For two reasons, we find this evidence insufficient to rebut the same-actor inference. First, this "pattern" is hardly a *1100 pattern at all once one considers the fact that the master position on the Dynasty was first offered to an American. Second, even a pattern of three replacements is, under our

precedent, too small a sample to constitute meaningful statistical evidence. See *Aragon*, 292 F.3d at 663-64 (holding that "the fact that three of the four casuals singled out for lay off that night were white" was not deserving of "much weight" because of the small sample size); *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1076 (9th Cir.1986) (holding that "statistical evidence derived from an extremely small universe ... has little predictive value and must be disregarded" (internal quotation marks omitted)); *Shutt v. Sandoz Crop Prot. Corp.*, 944 F.2d 1431, 1433 (9th Cir.1991); see also *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 848-49 (1st Cir.1993) (holding that "a small statistical sample carries little or no probative force to show discrimination" and noting that statistical evidence is generally less relevant in disparate treatment cases than in disparate impact cases because the focus is on the treatment of an individual rather than on an overall pattern); *Aragon*, 292 F.3d at 663 n. 6 (approvingly citing *LeBlanc* for that point). We conclude that Coghlan has not presented sufficient evidence to rebut the same-actor inference with regard to his removal as mate of the Dynasty.

3

The final incident that Coghlan claims is discriminatory occurred in 2002, when Andreassen offered Coghlan the position of mate on the *Katie Ann*. Coghlan had previously been master on that ship, and he claims that Andreassen's decision to appoint the Norwegian-born Hogseth as master was based on Andreassen's pro-Norwegian bias.

It is questionable whether this should even be considered a separate act of discrimination from Coghlan's removal as mate of the Dynasty: upon that removal, instead of simply firing him outright, ASC appointed him as mate of the *Katie Ann*. In any case, however, all the legitimate reasons for removing Coghlan as mate of the Dynasty also apply to not making him master of the *Katie Ann*. Again, Coghlan has not presented evidence sufficient to meet the burden imposed by the same-actor inference.^{FN16}

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FN16. Coghlan also points us to the testimony of Brooks Stevens, an American-born employee of ASC, who stated that he believes ASC gives preferential treatment to Norwegians. Stevens based his belief on the fact that he makes approximately the same salary as Lars Oterhals, a Norwegian employee, even though Oterhals is only a fishmate whereas Stevens is simultaneously both a mate and a fishmate. Upon further questioning, however, he admitted that he was unsure that the salaries were due to Oterhals's Norwegian origin. Michael Hyde testified that Brooks Stevens had stated to him that "he wasn't sure the Norwegians as a whole, but certainly certain Norwegians he thought in the past had received special treatment." Hyde also explained that the salary issue that concerned Stevens was the result of ASC's policy that "there are some boats where you have a person serving as both master and fishmaster ... and yet if you serve two functions, you don't get paid significantly more than if you were only serving one function." Coghlan presents no evidence to suggest that Hyde's description of ASC's salary policy was inaccurate. His evidence, then, reduces to Stevens's mere theory, unsubstantiated by any factual support whatsoever in the record, that his pay may have been related to his American origin. This speculation adds little to Coghlan's case.

III

Employment discrimination cases inevitably present difficult problems of proof, precisely because we cannot peer into the minds of decisionmakers to determine their true motivations. All we can do is apply the evidentiary framework developed in the decisions of the Supreme *1101 Court and our own court. In this case, Coghlan has not presented evidence sufficient to defeat the same-actor inference with

regard to any of the decisions he challenges. The district court was therefore correct to grant summary judgment in favor of ASC.

AFFIRMED.

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United States Court of Appeals,
Seventh Circuit.
George McREYNOLDS, et al., Plaintiffs–Appellants,
v.
MERRILL LYNCH & CO., INC., et al., Defendants–Appellees.

No. 11–1957.
Argued Oct. 24, 2011.
Decided Sept. 11, 2012.

Background: Brokers at a financial services firm sued the firm under § 1981 and Title VII, raising various claims of racial discrimination and seeking to litigate the claims as a class. The United States District Court for the Northern District of Illinois, Robert W. Gettleman, J., 2011 WL 1196859, dismissed, and the brokers appealed.

Holdings: The Court of Appeals, Sykes, Circuit Judge, held that:

- (1) retention-incentive program was a race-neutral compensation system keyed to quality of production;
- (2) complaint failed to allege facts sufficient to support an inference that the retention program itself was adopted because of its adverse effects on black brokers;
- (3) Lilly Ledbetter Fair Pay Act of 2009 affects when discriminatory practices may be challenged under Title VII by extending statute of limitations every time a paycheck is issued, but does not affect the substance of a Title VII claim; and
- (4) conclusion that, if the complaint were construed as a challenge to the firm's underlying discriminatory practices, dismissal would be warranted on grounds that the suit was duplicative of claims in parallel federal litigation was not an abuse of discretion.

Affirmed.

West Headnotes

[1] Federal Civil Procedure 170A 175

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)2 Proceedings
170Ak175 k. Time for proceeding and determination. Most Cited Cases

Federal Civil Procedure 170A 1828

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1828 k. Time of determination; reserving decision. Most Cited Cases

There is no fixed requirement that a court must always defer a decision on a motion to dismiss for failure to state a claim until after the court addresses class certification; a motion to dismiss for failure to state a claim tests the sufficiency of the complaint, and although such a dismissal operates as a final decision on the merits if leave to replead is not granted, it is sometimes appropriate to decide such a motion ahead of class certification. Fed.Rules Civ.Proc.Rules 12(b)(6), 23(c), 28 U.S.C.A.

[2] Civil Rights 78 1141

78 Civil Rights

694 F.3d 873, 115 Fair Empl.Prac.Cas. (BNA) 1668, 96 Empl. Prac. Dec. P 44,615
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78II Employment Practices

78k1141 k. Seniority or merit system. Most Cited Cases

Title VII plaintiffs challenging a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production must establish intent to discriminate; disparate racial impact is insufficient. Civil Rights Act of 1964, § 703(h), 42 U.S.C.A. § 2000e-2(h).

[3] Civil Rights 78 1118

78 Civil Rights

78II Employment Practices

78k1118 k. Practices prohibited or required in general; elements. Most Cited Cases

Employment practice that passes muster under Title VII does not violate § 1981. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[4] Civil Rights 78 1141

78 Civil Rights

78II Employment Practices

78k1141 k. Seniority or merit system. Most Cited Cases

Retention-incentive program that would pay bonuses to a financial services firm's brokers corresponding to their previous levels of production was a race-neutral compensation system keyed to quality of production, and was therefore exempt from challenge under Title VII in the absence of an intent to discriminate, despite a claim that the bonuses incorporated past discriminatory effects of the firm's underlying employment practices. Civil Rights Act of 1964, § 703(h), 42 U.S.C.A. § 2000e-2(h).

[5] Civil Rights 78 1136

78 Civil Rights

78II Employment Practices

78k1136 k. Compensation and benefits. Most Cited Cases

For purposes of the Title VII section providing that "it shall not be an unlawful employment practice ... to apply different standards of compensation ... provided that such differences are not the result of an intention to discriminate," the phrase "such differences" refers back to "standards of compensation," not the actual amount of compensation. Civil Rights Act of 1964, § 703(h), 42 U.S.C.A. § 2000e-2(h).

[6] Federal Civil Procedure 170A 1772

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)3 Pleading, Defects In, in General

170Ak1772 k. Insufficiency in general. Most Cited Cases

To survive a motion to dismiss for failure to state a claim, a complaint must state a claim to relief that is plausible on its face, and a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged; where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[7] Federal Civil Procedure 170A 1772

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

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170AXI(B)3 Pleading, Defects In, in General

170Ak1772 k. Insufficiency in general.
Most Cited Cases

Federal Civil Procedure 170A 1835

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)5 Proceedings

170Ak1827 Determination

170Ak1835 k. Matters deemed admitted; acceptance as true of allegations in complaint.
Most Cited Cases

Although a complaint's factual allegations are accepted as true at the pleading stage, allegations in the form of legal conclusions are insufficient to survive a motion to dismiss for failure to state a claim, and thus, threadbare recitals of the elements of the cause of action, supported by mere conclusory statements, do not suffice. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[8] Federal Civil Procedure 170A 1772

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)3 Pleading, Defects In, in General

170Ak1772 k. Insufficiency in general.
Most Cited Cases

For purposes of a motion to dismiss for failure to state a claim, the plausibility standard calls for a context-specific inquiry that requires the court to draw on its judicial experience and common sense; this is not akin to a probability requirement, but the plaintiff must allege more than a sheer possibility that a defendant has acted unlawfully. Fed.Rules

Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[9] Civil Rights 78 1141

78 Civil Rights

78II Employment Practices

78k1141 k. Seniority or merit system. Most Cited Cases

Brokers at a financial services firm failed to allege facts sufficient to support an inference that a retention program itself was adopted because of its adverse effects on black brokers, as required to state a claim under the Title VII section exempting from challenge race-neutral compensation systems keyed to quality of production in the absence of an intent to discriminate; allegations that the firm knew that a program had a disparate impact on black brokers was insufficient, and with respect to the retention program itself, the complaint alleged discriminatory intent in a wholly conclusory fashion. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[10] Civil Rights 78 1137

78 Civil Rights

78II Employment Practices

78k1137 k. Motive or intent; pretext. Most Cited Cases

Intentional-discrimination claim under Title VII is evaluated the same way as an intentional-discrimination claim arising under the Equal Protection Clause. U.S.C.A. Const.Amend. 14; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[11] Civil Rights 78 1136

78 Civil Rights

78II Employment Practices

694 F.3d 873, 115 Fair Empl.Prac.Cas. (BNA) 1668, 96 Empl. Prac. Dec. P 44,615
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78k1136 k. Compensation and benefits. Most Cited Cases

Civil Rights 78 1505(7)

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

78k1503 Administrative Agencies and Proceedings

78k1505 Time for Proceedings; Limitations

78k1505(7) k. Continuing violations; serial, ongoing, or related acts. Most Cited Cases
(Formerly 78k1530)

Lilly Ledbetter Fair Pay Act of 2009, providing that an unlawful employment practice occurs for purposes of the statute of limitations “each time ... compensation is paid, resulting in whole or in part from [an unlawful employment] decision or other practice,” affects when discriminatory practices may be challenged under Title VII by extending statute of limitations every time a paycheck is issued, but does not affect the substance of a Title VII claim. Civil Rights Act of 1964, §§ 703(h), 706(e)(3)(A), 42 U.S.C.A. §§ 2000e-2(h), 2000e-5(e)(3)(A).

[12] Federal Courts 170B 3940

170B Federal Courts

170BXIX Exclusive, Concurrent, and Conflicting Jurisdiction as Between Federal Courts

170BXIX(C) Pendency and Scope of Prior Proceedings; First-Filed Rule

170Bk3934 Particular Cases, Contexts, and Questions

170Bk3940 k. Labor and employment. Most Cited Cases
(Formerly 170Bk1145)

District court's conclusion that, if complaint were construed as a challenge to Title VII defendant's un-

derlying discriminatory practices, dismissal would be warranted on grounds that the suit was duplicative of claims made in parallel federal litigation was not an abuse of discretion; all of the named plaintiffs in the case were also plaintiffs the other case, and the other litigation challenged the underlying employment practices that were alleged in the instant case to have caused differences in employees' production credits, and by extension in retention awards, and the larger class size and broader scope of the claims in the other litigation supported the district court's holding that any challenge to defendant's underlying employment practices were subsumed in the other case. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[13] Federal Courts 170B 3932

170B Federal Courts

170BXIX Exclusive, Concurrent, and Conflicting Jurisdiction as Between Federal Courts

170BXIX(C) Pendency and Scope of Prior Proceedings; First-Filed Rule

170Bk3932 k. Duplicative actions in general. Most Cited Cases
(Formerly 170Bk1145)

District court has broad discretion to dismiss a complaint for reasons of wise judicial administration whenever it is duplicative of a parallel action already pending in another federal court; for this purpose, a suit is “duplicative” if the claims, parties, and available relief do not significantly differ between the two actions.

[14] Federal Courts 170B 3578

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)2 Standard of Review

170Bk3576 Procedural Matters

694 F.3d 873, 115 Fair Empl.Prac.Cas. (BNA) 1668, 96 Empl. Prac. Dec. P 44,615

(Cite as: 694 F.3d 873)

170Bk3578 k. Dismissal or nonsuit in general. Most Cited Cases

(Formerly 170Bk818)

Federal Courts 170B 3932

170B Federal Courts

170BXIX Exclusive, Concurrent, and Conflicting Jurisdiction as Between Federal Courts

170BXIX(C) Pendency and Scope of Prior Proceedings; First-Filed Rule

170Bk3932 k. Duplicative actions in general. Most Cited Cases

(Formerly 170Bk1145)

In determining whether to dismiss a complaint for reasons of wise judicial administration whenever it is duplicative of a parallel action already pending in another federal court, a district court has significant latitude, and Court of Appeals will reverse only for abuse of discretion.

[15] Federal Courts 170B 3733

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)5 Waiver of Error in Appellate Court

170Bk3733 k. Failure to mention or inadequacy of treatment of error in appellate briefs. Most Cited Cases

(Formerly 170Bk915)

Arguments raised for the first time in a reply brief are waived.

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Before SYKES and TINDER, Circuit Judges, and DeGUILIO, District Judge.^{FN*}

FN* The Honorable Jon E. DeGuilio, United States District Court for the Northern District of Indiana, sitting by designation.

SYKES, Circuit Judge.

In 2005 a group of brokers at Merrill Lynch sued the firm under 42 U.S.C. § 1981 and Title VII raising various claims of racial discrimination and seeking to litigate the claims as a class. Among other things, they alleged that the firm's “teaming” and account-distribution policies had the effect of steering black brokers away from the most lucrative assignments and thus prevented them from earning compensation comparable to white brokers. That litigation is ongoing. See *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir.2012) (reversing the denial of class certification).

Three years after that suit was filed, Bank of America acquired Merrill Lynch, and the companies

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introduced a retention-incentive program that would pay bonuses to Merrill Lynch brokers corresponding to their previous levels of production. In response a similar group of brokers filed a second class-action suit, this time against both Merrill Lynch and Bank of America. The new suit again invoked § 1981 and Title VII, but focused specifically on the retention program. The plaintiffs alleged that the bonuses incorporated previous production levels that were the product of Merrill Lynch's underlying discriminatory policies. The defendants moved to dismiss for failure to state a claim, arguing that the retention program was a race-neutral compensation system keyed to quality of production and was therefore exempt from challenge under § 703(h) of Title VII (codified at 42 U.S.C. § 2000e-2(h)).

The district court granted the motion. The court first held that the retention program qualified as a production-based *877 compensation system within the meaning of the § 703(h) exemption. As such, the program was protected from challenge unless it was adopted with “the intention to discriminate because of race.” 42 U.S.C. § 2000e-2(h). The court then held that the complaint's allegations of discriminatory intent were conclusory, akin to those rejected by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Finally, to the extent that the allegations pertained to the underlying employment practices at Merrill Lynch—the “inputs” that produced the bonuses—the court held that they duplicated the claims in the earlier, ongoing suit. These holdings resolved the § 1981 claim as well, so the court dismissed the entire case with prejudice.

We affirm. As described in the complaint, the retention program awarded bonuses based on a race-neutral assessment of a broker's prior level of production, which suffices to protect the program under § 703(h) unless it was adopted with intent to discriminate. It is not enough to allege, as the complaint does, that the bonuses incorporated the past discriminatory *effects* of Merrill Lynch's underlying

employment practices. See *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). The disparate impact of those employment practices is the subject of the first lawsuit, and if proven, will be remedied there. With respect to the retention program itself, the complaint alleges discriminatory intent in a wholly conclusory fashion, so dismissal was proper under the pleading standards announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and amplified in *Iqbal*.

I. Background

Merrill Lynch & Co. and Merrill Lynch, Pierce, Fenner & Smith, Inc. (jointly, “Merrill Lynch”), are financial-services firms engaged in the retail and institutional sale of various financial products. At the time the present case was filed, Merrill Lynch was the largest retail brokerage firm in the country, employing over 15,000 financial advisors nationwide.^{FN1} These brokers sell the company's financial products and services, and they are paid according to a firm-wide grid formula that applies different commission rates based on the broker's level of production. While the formula is intricate, the basic principle is that a broker's compensation is based on “production credits”—in essence, commissions earned on client assets managed by the broker. The compensation formula is neutral with respect to race.

FN1. The parties refer to Merrill Lynch's financial advisors as “FAs,” but we find that acronym awkward, so we'll call them “brokers” instead.

In 2005 George McReynolds, a black broker, filed a class-action discrimination lawsuit against Merrill Lynch in federal court in the Northern District of Illinois. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 05-cv-6583 (N.D. Ill. filed Nov. 18, 2005) (“*McReynolds I*”). The suit was originally brought by McReynolds as the lone named

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plaintiff and alleged claims of racial discrimination under 42 U.S.C. § 1981, but it was amended in November 2006 to add 16 additional named plaintiffs and a discrimination claim under Title VII, 42 U.S.C. § 2000e-2. The plaintiffs challenged a wide array of Merrill Lynch's employment policies and practices, alleging racial discrimination in hiring, compensation, account distribution, and “teaming” (the grouping of brokers that handle particular accounts).

A major theme of the *McReynolds I* litigation is the allegation that black brokers*878 were systematically steered away from the most lucrative assignments and thus prevented from earning compensation comparable to their white counterparts. The case was assigned to Judge Robert Gettleman, and in 2010 he denied class certification. A panel of this court recently reversed that determination, *see McReynolds*, 672 F.3d at 492, and the litigation is ongoing.

Meanwhile, on September 15, 2008, Bank of America announced that it would acquire Merrill Lynch in a \$50 billion all-stock merger. The transaction closed on January 1, 2009, and Merrill Lynch now operates as a wholly owned subsidiary of Bank of America. As part of the acquisition, the companies decided to pay retention-incentive bonuses to Merrill Lynch brokers based on each broker's production credits. Thus, brokers who had already been earning higher compensation for producing more business would be offered larger bonuses to remain with the firm through the acquisition.

In response to the retention plan, McReynolds and a group of black brokers filed the present suit, making this case “*McReynolds II*.” The named plaintiffs in the two cases are substantially similar, though not identical; all the plaintiffs in this case are also plaintiffs in *McReynolds I*, and the same law firm represents them. Merrill Lynch is a defendant in both cases, and Bank of America is also a defendant in this case.^{FN2}

FN2. We will refer to the defendants collectively as “Merrill Lynch,” unless the context requires otherwise.

The *McReynolds II* complaint once again alleges two claims of racial discrimination—one under 42 U.S.C. § 1981 and one under Title VII—but the substantive focus is far more limited in that this suit challenges only the retention program.^{FN3} In essence the plaintiffs allege that the pervasive past discrimination at Merrill Lynch resulted in production credits that reflected the effects of past discriminatory policies and practices. In turn, the use of production credits to determine retention bonuses amounted to an act of employment discrimination because it had the purpose and effect of depressing the size of bonuses earned by black brokers, or eliminating them altogether. The plaintiffs once again sought class certification.

FN3. The version of the complaint at issue here is the plaintiffs' “First Amended Complaint,” but we refer to it as simply “the complaint.”

The new suit was initially assigned to Judge Matthew Kennelly, and while class discovery was still underway, Merrill Lynch moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Judge Kennelly denied the motion, holding that the plaintiffs had adequately alleged that the retention plan was adopted with intent to discriminate. Merrill Lynch then filed an unopposed motion to transfer the case to Judge Gettleman, the presiding judge in *McReynolds I*. After the case was transferred, the Supreme Court decided *Iqbal*, which made it clear that the new pleading standards the Court had announced two years earlier in *Twombly* applied outside the antitrust context of *Twombly* itself. Based on *Iqbal*, Merrill Lynch renewed its motion to dismiss.

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Judge Gettleman granted the motion. As a threshold matter, the judge opted to resolve the motion to dismiss before ruling on class certification, noting that a Rule 12(b)(6) motion “tests the sufficiency of the complaint, not the merits of the case.” The judge then held that the retention program was a race-neutral production-based compensation system protected by § 703(h) and could be challenged only if it was adopted with *intent* to discriminate, not mere awareness that the program *879 would disfavor black brokers based on the residual effects of past discrimination. The judge held that the complaint’s allegations of intent to discriminate were nothing more than a “[t]hreadbare recital[] of the elements of the cause of action, supported by mere conclusory statements”—the kind of pleading the Supreme Court rejected in *Iqbal*. 556 U.S. at 678, 129 S.Ct. 1937. To the extent that the production-credit “inputs” were themselves the product of discriminatory policies, the judge held that the new suit simply duplicated the litigation already underway in *McReynolds I*.

Finally, Judge Gettleman took note of a case in the Southern District of New York raising a nearly identical challenge to this same retention program, except that it alleged a claim of sex discrimination. See *Goodman v. Merrill Lynch & Co.*, 716 F.Supp.2d 253 (S.D.N.Y.2010). The judge in *Goodman* had dismissed the plaintiffs’ complaint, holding that Merrill Lynch’s retention program was a production-based compensation system protected under § 703(h) and that the complaint failed to adequately allege intentional discrimination. *Id.* at 261–62.

II. Discussion

[1] We review a Rule 12(b)(6) dismissal de novo, construing the complaint in the light most favorable to the plaintiffs, accepting as true all well-pleaded facts, and drawing reasonable inferences in the plaintiffs’ favor. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir.2008). The plaintiffs’ primary argument is that the district court erred in concluding at the pleading stage that the retention-bonus program was a valid

production-based compensation system shielded from challenge by § 703(h). They also maintain that dismissal was inconsistent with the Lilly Ledbetter Fair Pay Act of 2009, Pub.L. No. 111–2, § 3, 123 Stat. 5 (codified at 42 U.S.C. § 2000e–5(e)(3)). Finally, they argue that the district court erroneously concluded that to the extent the allegations in the present complaint focus on Merrill Lynch’s underlying discriminatory practices, they merely duplicate the claims in the *McReynolds I* litigation.^{FN4}

FN4. At the end of their opening brief, the plaintiffs also lodge a procedural objection to the district court’s decision to address the dismissal motion ahead of class certification. Rule 23(c) of the Federal Rules of Civil Procedure provides that the district court must address class certification “early” in the litigation and generally before addressing a motion directed at the merits. See *Bertrand v. Maram*, 495 F.3d 452, 455 (7th Cir.2007). But there is no fixed requirement that the court must *always* defer a decision on a Rule 12(b)(6) motion until after the court addresses class certification. As the district court noted, a motion to dismiss for failure to state a claim tests the sufficiency of the complaint, and although a Rule 12(b)(6) dismissal operates as a final decision on the merits if leave to replead is not granted, it is sometimes appropriate to decide a Rule 12(b)(6) motion ahead of class certification. See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 550, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (affirming dismissal of antitrust claims prior to ruling on class certification); *Greenberger v. GEICO Gen. Ins. Co.*, 631 F.3d 392, 394–96 (7th Cir.2011) (same); *Shlahtichman v. 1–800 Contacts, Inc.*, 615 F.3d 794, 797 (7th Cir.2010) (same).

It was especially appropriate to do so here. As we will explain, this suit essentially

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piggybacks on *McReynolds I*, in which the same plaintiffs are challenging the various employment practices at Merrill Lynch that contribute to the determination of a broker's production credits. Those production credits, in turn, form the basis for the retention bonuses at issue here. Whether the retention-bonus program is insulated from challenge under § 703(h) is a threshold question that can be resolved on the pleadings. To the extent that the plaintiffs are really challenging the disparate impact of the underlying policies that provide the "inputs" for the bonuses, their claim here is subsumed within *McReynolds I*, and if successful, will be remedied there.

***880 A. Section 703(h)**

The plaintiffs assert claims of racial discrimination under § 1981 and Title VII based on what the complaint describes as a long history of discriminatory employment policies and practices at Merrill Lynch that have the effect of denying black brokers the same business opportunities as white brokers. The complaint alleges that Merrill Lynch uses "production credits" to determine compensation, that these production credits reflect the effects of the underlying discrimination, and thus that the retention program, which paid bonuses based on production credits, was adopted with intent to discriminate against black brokers.

[2] Section 703(h) of Title VII provides that certain compensation systems are exempt from challenge as an unlawful employment practice absent intent to discriminate:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which

measures earnings by quantity or quality of production ..., provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin....

42 U.S.C. § 2000e-2(h). The import of § 703(h) is that disparate racial *impact* is insufficient under Title VII to invalidate a "bona fide seniority or merit system," or a "system which measures earnings by quantity or quality of production." Plaintiffs challenging an employment practice or compensation system of this type must establish *intent* to discriminate. *Patterson*, 456 U.S. at 65, 102 S.Ct. 1534.

[3] Section 703(h) thus creates an exception to the general rule that "a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group." *Teamsters*, 431 U.S. at 349, 97 S.Ct. 1843. An employment practice that passes muster under Title VII does not violate § 1981, *Waters v. Wis. Steel Works of Int'l Harvester Co.*, 502 F.2d 1309, 1320 n. 4 (7th Cir.1974), so if the Merrill Lynch retention program is protected under § 703(h), then dismissal of both claims was proper.

1. Production-Based Compensation System

[4] Our first question is whether the retention program qualifies as "a system which measures earnings by quantity or quality of production" within the meaning of § 703(h). The Supreme Court has more often interpreted and applied § 703(h) as it pertains to challenges to seniority and merit systems, but what the Court has said in those contexts guides the analysis here. The most relevant cases for our purposes are *Teamsters* and *Patterson*.

In *Teamsters* the Supreme Court held that a seniority system cannot be challenged under Title VII merely because it incorporates the effects of past acts of intentional discrimination. 431 U.S. at 353-54, 97

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S.Ct. 1843. The Court explained that employees who are the victims of intentional discrimination after Title VII was enacted are entitled to retroactive seniority as a remedy for the violation, *id.* at 347–48, 97 S.Ct. 1843 (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 778–79, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976)), but § 703(h) insulates the seniority system itself from challenge notwithstanding that the system locks in the effects of past discrimination, *id.*

The Court acknowledged that § 703(h) immunized only “bona fide” seniority systems*881 in which differences in treatment were not “the result of an intention to discriminate because of race,” but it declined to hold that any system that perpetuates the effects of past discrimination was not “bona fide” as a result. *Id.* at 353, 97 S.Ct. 1843. Rather, the Court explained that the seniority system in *Teamsters* applied neutrally to all races and “did not have its genesis in racial discrimination,” and was therefore a bona fide seniority system insulated from challenge under § 703(h). *Id.* at 355–56, 97 S.Ct. 1843. *Patterson* reaffirmed the holding of *Teamsters* and clarified that § 703(h) applies equally to seniority systems adopted both before and after the passage of Title VII. 456 U.S. at 77, 102 S.Ct. 1534.

Merrill Lynch argues, and we agree, that *Teamsters* and *Patterson* control the outcome here. The complaint alleges that retention bonuses are determined by production credits—“in essence, commissions earned on client assets managed by the [broker]”—and that the credits are “generated for the [brokers'] assets under management on the purchase or sale of certain investment products.” The complaint further alleges that “[a]ssets under management reflect the total amount of clients' assets that a broker is responsible for managing on the clients' behalf.” As described in the complaint, the production-credit system is about as direct a measure of production as one could imagine in the financial-services industry, and the plaintiffs do not suggest otherwise.

The complaint likewise alleges that “compensation is largely determined by a ‘grid’ formula that applies different commission rates based on a [] [broker's] level of production” and that this formula is “neutral on [its] face.” Nowhere does the complaint allege that the formula is actually *applied* in a discriminatory manner—only that the “inputs” determining a broker's production levels were themselves the products of past discrimination.

Taking these allegations as true, we have little trouble concluding that the retention-bonus program compensates brokers on the basis of production and that it does so in a race-neutral manner. To the extent that the program incorporated the effects of past discrimination, the same was true of the seniority system in *Teamsters*. Just as the *Teamsters* plaintiffs could obtain retroactive seniority as a remedy in a claim addressing the underlying discrimination, so too may the plaintiffs here obtain a remedy for any underlying discriminatory policies if they succeed in their challenge in *McReynolds I*. Stated differently, to whatever extent the plaintiffs can prove they would have received larger bonuses but for the past discrimination affecting their production levels, that loss may be incorporated into the remedy in *McReynolds I*. But the retention program itself is shielded from challenge as a production-based compensation system under § 703(h).

The plaintiffs have several arguments as to why *Teamsters* should not control, but none are ultimately persuasive. First, they rely on a line of cases holding that a compensation scheme is not protected under § 703(h) if it does not actually measure what it purports to measure. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 434–36, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) (holding that § 703(h) does not protect use of testing requirements with a disparate impact on racial minorities where the tests were not shown to be related to job performance); *Ass'n Against Discrimination in Emp't v. City of Bridgeport*, 647 F.2d 256, 272–74 (2d Cir.1981) (racially discriminatory test that did not

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actually measure fitness for the job could not be characterized as a “bona fide merit system” under § 703(h)). The plaintiffs contend that just *882 as the tests in *Griggs* and *Association Against Discrimination* were not really measuring merit, neither is the retention-bonus program really measuring the quality of production.

This comparison does not hold up under scrutiny. The material point in *Griggs* and *Association Against Discrimination* was that the testing devices at issue in those cases were not validly measuring employees' merit to begin with and were only serving to create racial disparities. See *Griggs*, 401 U.S. at 431, 91 S.Ct. 849 (“[N]either the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.”); *Ass'n Against Discrimination*, 647 F.2d at 273 (“[I]t would defy reason to characterize as a ‘bona fide merit system’ a test that does not measure the fitness of those who take it for the positions to be filled according to its results.”). This case is quite different. The complaint itself acknowledges that a broker's production credits do, in fact, reflect “commissions earned on client assets managed by the [broker],” and there is no suggestion that this metric of production is improper. It is also undisputed that brokers who more successfully invest their assets under management earn more production credits and that this calculation is made on an objective and racially neutral basis. In short, a broker's production credits—on which the retention bonuses were based—do in fact measure the “quality of production” as required for the § 703(h) exemption.

This might be a different case if a broker's compensation depended on a subjective analysis of how effectively the broker was representing the firm. If, for example, black brokers were receiving systematically poorer reviews than their white counterparts who performed substantially similar work, and the reviews determined compensation, then Merrill Lynch could not shield the system simply by calling it a merit- or

production-based system—or at least, the § 703(h) issue could not be resolved at the pleading stage. In that situation, the challenger might have an arguable factual basis for a claim under *Griggs* that the evaluations were not actually measuring production. But here, the complaint alleges that the retention-bonus program applies equally to all brokers and uses an objective, mechanical measure of productivity, avoiding any subjective evaluations.

The plaintiffs also argue that § 703(h) should apply only to “piecework” production systems, like the manufacture of physical products on an assembly line, and not the sort of financial-asset production-credit system at issue here. This reading of the statute has no basis in the text and is not compelled by relevant precedent. Section 703(h) states that “it shall not be an unlawful employment practice for an employer to apply different standards of compensation ... pursuant to ... a system which measures earnings by quantity or quality of production.” This language is not limited to piecework systems; indeed, the specific use of the phrase “quantity or quality” plainly expands the reach of § 703(h) beyond quantity-based piecework compensation systems. The plaintiffs point out that where production-based systems are discussed in the legislative history of § 703(h), only piecework systems are mentioned as an example. Consulting legislative history may be an acceptable means of decoding an ambiguous statute, see *DirecTV, Inc. v. Barczewski*, 604 F.3d 1004, 1008 (7th Cir.2010), but the text of § 703(h) is not ambiguous in any relevant respect. It broadly exempts compensation systems based on quantity or quality of production.

*883 Next, the plaintiffs contend that even if the retention program qualifies as a production-based system, it is not “bona fide” as that term is used in § 703(h). See 42 U.S.C. § 2000e-2(h) (“[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation ... pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of

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production....” (emphasis added)). The statute itself does not explain what is meant by “bona fide,” but in *Teamsters* the Supreme Court elaborated on the term in the context of a seniority system:

The seniority system in this litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it “locks” employees into non-line-driver jobs, it does so for all. The [injured employees] ... are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white. The placing of line drivers in a separate bargaining unit from other employees is rational in accord with the industry practice.... It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose.

431 U.S. at 355–56, 97 S.Ct. 1843. The plaintiffs maintain that although the retention program is racially neutral on its face, it cannot be considered “bona fide” because the production-credit system on which it is based had its genesis in Merrill Lynch’s discriminatory policies and practices and was neither negotiated nor maintained free from illegal purpose.

We do not need to grapple with the question whether the term “bona fide” has some specialized meaning in this context.^{FN5} On the most straightforward reading of the statute, the “bona fide” modifier applies to seniority and merit systems, not to production-based compensation systems. To repeat, the statute provides that “it shall not be an unlawful employment practice for an employer to apply different standards of compensation ... pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production.” If the “bona fide” modifier were meant to apply to production-based systems as well as seniority and merit systems, the more natural phrasing would authorize employers to use different standards of compensation “pursuant to a bona fide seniority system, merit sys-

tem, or system which measures earnings by quantity or quality of production.”^{FN6}

FN5. A standard definition of “bona fide” is: “1. Made in good faith; without fraud or deceit. 2. Sincere; genuine.” BLACK’S LAW DICTIONARY 199 (9th ed. 2004).

FN6. We have not been able to find any case that has squarely addressed this interpretive question. The plaintiffs cite *Beasley v. Kroehler Manufacturing Co.*, 406 F.Supp. 926, 928–29 (N.D.Tex.1976), for the proposition that “a production system must be shown to measure the actual quantity or quality of the employee’s production—without employer manipulation—before it qualifies as bona fide.” But *Beasley* says nothing of the sort—indeed, the court went so far as to quote § 703(h) as *excluding* the bona fide language as applied to production-based compensation systems. See *id.* (“Title VII specifically provides that ‘it shall not be an unlawful employment practice for an employer to apply different standards of compensation ... pursuant to a ... quantity or quality of production[.]’ 42 U.S.C. § 2000e–2(h).” (alterations in original)).

The interpretive question is largely irrelevant, however, because even if the “bona fide” modifier applies, the concept is inherently built into what it means for a system to measure quantity or quality of production. Indeed, the “bona fide” question is essentially identical to the question whether the retention-bonus program is, in fact, a production-based system. If there *884 were truly a dispute as to whether the retention program measured production—as would be the case in the “subjective analysis” hypothetical discussed above—then perhaps it could be said that the retention program was not “bona fide.” But as we have explained, the retention program qualifies as a production-based system, so any extra

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“bona fide” analysis is beside the point.

Finally, when the Supreme Court explained why the seniority system in *Teamsters* was “entirely bona fide,” 431 U.S. at 355, 97 S.Ct. 1843, it did so in language that distinguished a bona fide seniority system from one adopted as a “result of an intention to discriminate.” The Court observed that the seniority system qualified as “bona fide” in part because it “did not have its genesis in racial discrimination” and was “negotiated and ... maintained free from any illegal purpose.” *Id.* at 356, 97 S.Ct. 1843. This anticipates the next step in the § 703(h) analysis, which concerns the issue of discriminatory intent.

2. Intent to Discriminate

[5] Because it qualifies as a production-based compensation system, the retention program is exempt from challenge under § 703(h) *provided* it was “not the result of an intention to discriminate because of race.” As an initial matter, the plaintiffs argue that even if the retention program itself was not adopted with a discriminatory purpose, it was based on production levels that reflected the effects of past intentional discrimination, so the actual differences in bonus pay resulted from an intention to discriminate, if only indirectly. This argument relies on a misreading of the statutory language. Appropriately excerpted, § 703(h) provides that “it shall not be an unlawful employment practice ... to apply different standards of compensation ... provided that such differences are not the result of an intention to discriminate.” The phrase “such differences” in the proviso refers back to “standards of compensation,” not the actual amount of compensation.

Teamsters confirms this understanding of the statute. There, it was conceded that the differences in seniority (and thus the differences in employment privileges) were the product of intentional discrimination, but the seniority system itself was nevertheless immune from challenge under § 703(h). The plaintiffs suggest that production-based systems should be

treated differently from seniority systems, but nothing in the text of the statute or the Court’s analysis in *Teamsters* supports limiting that case to its facts. The proviso applies across the board. By its terms, § 703(h) authorizes employers to apply different standards of compensation pursuant to a seniority, merit, or production-based system *provided* that the system was not adopted with a discriminatory purpose. Although *Teamsters* addressed a seniority system, the Court’s interpretation of § 703(h) applies with equal force here.^{FN7} A production-based compensation system, like a seniority or merit system, forfeits the protection of § 703(h) only if the system*885 itself was adopted with the intent to discriminate.

FN7. The EEOC, as an amicus for the plaintiffs, suggests an odd distinction between *Teamsters* and the present case. The agency argues that *Teamsters* involved “discrete acts of discrimination that had immediate and tangible adverse effects on the plaintiffs but were not challenged at the time,” but in this case, “the disparity in compensation under the [retention program] was the first tangible consequence of the discriminatory allocation of accounts and other benefits.” Setting aside whether this distinction is valid in theory, the argument cannot be squared with the complaint, which asserts that Merrill Lynch’s underlying discriminatory policies had a disparate impact on brokers’ wages well before the acquisition by Bank of America, and that those policies are the subject of litigation in *McReynolds I*.

[6] The complaint alleges this intent, but it does so only generally, raising the question whether the allegations pass muster under the heightened pleading standards set forth in *Twombly* and *Iqbal*. To survive a motion to dismiss under Rule 12(b)(6), a complaint must “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. “A claim has facial plausibility when the plaintiff pleads

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factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’ ” *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955) (internal quotation marks omitted).

[7][8] *Iqbal* clarified two working principles underlying the *Twombly* decision. First, although the complaint’s factual allegations are accepted as true at the pleading stage, allegations in the form of legal conclusions are insufficient to survive a Rule 12(b)(6) motion. *Id.* Accordingly, “[t]hreadbare recitals of the elements of the cause of action, supported by mere conclusory statements, do not suffice.” *Id.* Second, the plausibility standard calls for a “context-specific” inquiry that requires the court “to draw on its judicial experience and common sense.” *Id.* at 679, 129 S.Ct. 1937. This is “not akin to a ‘probability requirement,’ ” but the plaintiff must allege “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678, 129 S.Ct. 1937.

[9] Applying these principles here, the allegations that Merrill Lynch knew that the production-credit system had a disparate impact on black brokers are legally insufficient. Instead, the complaint must allege enough factual content to support an inference that *the retention program itself* was adopted *because of* its adverse effects on black brokers. See *Iqbal*, 556 U.S. at 676–77, 129 S.Ct. 1937; *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979).

[10] The plaintiffs suggest that reliance on *Iqbal* and *Feeney* is misplaced because those cases concerned constitutional claims, not statutory claims. The distinction makes no difference. It is well-established that an intentional-discrimination claim under Title VII is evaluated the same way as an intention-

al-discrimination claim arising under the Equal Protection Clause:

Neither [*Washington v. Davis* [426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)] nor [*Personnel Administrator v. Feeney* were Title VII cases, a point emphasized in *Davis*. But when intentional discrimination is charged under Title VII[,] the inquiry is the same as in an equal protection case. The difference between the statutory and constitutional prohibitions becomes important only when a practice is challenged ... based on a theory of “disparate impact,” as distinct from “disparate treatment”....

Am. Nurses’ Ass’n v. Illinois, 783 F.2d 716, 722 (7th Cir.1986) (citation omitted); see also *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1273 (11th Cir.2000) (“[T]o show discriminatory intent [under Title VII], a plaintiff must demonstrate ‘that the decisionmaker ... selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects on an identifiable group.’ ” (alteration in original) (quoting *Feeney*, 442 U.S. at 279, 99 S.Ct. 2282) (internal quotation marks omitted)). By operation of § 703(h), both the Title VII and § 1981 claims require a showing of intentional discrimination,*886 so *Iqbal* and *Feeney* provide the proper decisional framework.

The complaint alleges in some detail that black brokers at Merrill Lynch have been the victims of discriminatory employment policies and practices and that they receive fewer production credits as a result. But much less is said about the retention program itself. The complaint alleges that the retention awards were “based on annualized production credits through September 2008,” that the awards for black brokers “were lower than they would have been absent unlawful discrimination,” and that both Merrill Lynch and Bank of America were aware of this differential and the underlying discriminatory practices that allegedly caused it. As to whether the retention program itself was adopted with discriminatory purpose,

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however, the complaint asserts only the following:

Defendants intentionally designed and implemented retention bonuses based largely on production credits that had a disparate impact on and intentionally discriminated against African Americans and women. Defendants identified and selected for higher compensation the FAs they would try hardest to retain via the retention bonuses, and they knew that they were offering more generous retention packages to white men than to African Americans and women. Simply put, Defendants intended to retain and more generously compensate white men rather than African Americans and women. Defendants did not want to retain African American FAs, and have engaged in policies and practices designed to further their higher rates of attrition.

We agree with the district court that these allegations of intent are the sort of conclusory allegations that are insufficient under *Iqbal*. All four sentences say basically the same thing and at roughly the same level of generality—that Merrill Lynch intentionally designed the retention program based on production levels that incorporated the effects of past discrimination, and that the firm did so with the intent to discriminate against black brokers. Stated as such, the assertion is merely a conclusion, unsupported by the necessary *factual* allegations to support a reasonable inference of discriminatory intent. *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937 (“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”). Indeed, it is helpful to compare this language to the rejected complaint in *Iqbal* itself, which alleged that the defendants “knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff] to harsh conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.” *Id.* at 680, 129 S.Ct. 1937 (internal quotation marks omitted).

The plaintiffs argue that the complaint adequately

alleges intentional discrimination but the district court erroneously rejected the allegations as “implausible” by drawing two improper inferences: first, that the true motive of the retention program was to retain the most productive brokers; and second, that Bank of America would have wanted to avoid discrimination to prevent a lawsuit. Had the complaint adequately alleged intentional discrimination in the first place, this might be a valid point. The “plausibility” standard under *Iqbal* “does not imply that the district court should decide whose version to believe, or which version is more likely than not.” *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir.2010). But the complaint did *not* adequately allege intentional discrimination in the first place. The district court recognized as much, holding that the plaintiffs offered nothing *887 more than conclusory allegations of discriminatory intent.

In any event, our standard of review is *de novo*, and based on our own review of the complaint, we conclude that it contains insufficient factual content to support an inference that the *retention program itself* was intentionally discriminatory. The plaintiffs have alleged that Merrill Lynch's past employment practices had discriminatory effects on black brokers and the firm knew it when it designed the retention program. But however ample the complaint's allegations might be to support a disparate-impact claim *vis-à-vis* the underlying employment practices, they are insufficient to support a claim of intentional discrimination *with respect to the retention program*. Under *Teamsters* the past discriminatory “inputs” are legally irrelevant to the lawfulness of the retention program. The complaint needs to allege some facts tending to support a plausible inference that the retention program *itself* was adopted for a discriminatory purpose.

The complaint contains no factual allegations of this nature. It alleges only that Merrill Lynch was aware of the disparate impact of its policies on black brokers and then asserts in wholly conclusory terms that this impact was the purpose of the retention program. Under a combined reading of *Teamsters* and

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Iqbal, these allegations are legally insufficient to state a claim. This is a complex discrimination claim, and we have observed that under *Iqbal* and *Twombly*, “[t]he required level of factual specificity rises with the complexity of the claim.” *McCauley v. City of Chicago*, 671 F.3d 611, 616–17 (7th Cir.2011) (citing *Swanson*, 614 F.3d at 405). Because the complaint contains only conclusory allegations that the retention program was adopted with intent to discriminate, it fails to state a claim upon which relief may be granted.

B. Lilly Ledbetter Fair Pay Act

[11] The plaintiffs also argue that dismissal was improper under the Lilly Ledbetter Fair Pay Act of 2009, which they claim creates a new cause of action for discriminatory practices whenever compensation is paid pursuant to past discriminatory employment decisions. They argue, in essence, that a new cause of action was created when Merrill Lynch paid the retention bonuses, taking this case outside the ambit of § 703(h). This argument completely misunderstands the Fair Pay Act.

The Act was passed following the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007), which held that Title VII's 180-day statute of limitations begins to run when a discriminatory pay decision is made, not each time compensation is paid, *id.* at 632, 127 S.Ct. 2162. Lilly Ledbetter filed suit within 180 days of receiving a paycheck reflecting an allegedly discriminatory wage, but the employment decisions that caused the claimed disparity in pay occurred much earlier. The Court held that the limitations period began to run at the time the discriminatory employment decisions were made, not each time a paycheck was issued. *Id.* at 627–28, 127 S.Ct. 2162.

In response to this decision, Congress passed the Fair Pay Act, which provides as follows:

For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including*888 each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

42 U.S.C. § 2000e–5(e)(3)(A). The statute thus reverses the decision in *Ledbetter* and clarifies that an unlawful employment practice occurs for purposes of the statute of limitations “each time ... compensation is paid, resulting in whole or in part from [an unlawful employment] decision or other practice.”

The Act therefore concerns the question of *timing*—it affects *when* discriminatory practices may be challenged by extending the statute of limitations every time a paycheck is issued. It is an accrual rule; it does not affect the substance of the claim. Indeed, in *AT & T Corp. v. Hulteen*, 556 U.S. 701, 715–16, 129 S.Ct. 1962, 173 L.Ed.2d 898 (2009), the Supreme Court specifically held that § 703(h), as interpreted in *Teamsters*, survived the Fair Pay Act. *Hulteen* held that a bona fide seniority system was protected by § 703(h) even though it did not retroactively equalize pregnancy leaves taken before the passage of the Pregnancy Discrimination Act (“PDA”). *Id.* at 704–06, 129 S.Ct. 1962. The Court thus applied *Teamsters* in the context of pregnancy discrimination. In holding that the Fair Pay Act did not affect its decision, the Court noted that “AT & T's pre-PDA decision not to award Hulteen service credit for pregnancy leave was not discriminatory, with the consequence that Hulteen has not been ‘affected by application of a discriminatory compensation decision or other practice.’ ” *Id.* at 716, 129 S.Ct. 1962 (quoting 42 U.S.C. § 2000e–5(e)(3)(A)). In other words, by virtue of §

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703(h), the employer had not, in fact, committed an unlawful employment practice, so there was no way that future payments could have “continued” this nonexistent discrimination.

The same is true here. The plaintiffs have challenged only the retention program, but the program is immune from challenge as a race-neutral production-based compensation system under § 703(h). As such, there is no Title VII violation in the first place, so it makes no sense to say that the payment of bonus awards extended the statute of limitations. What the Fair Pay Act *would* do, if applicable here, is allow the plaintiffs another chance to challenge Merrill Lynch's underlying discriminatory practices if the statute of limitations had run on those claims. But the plaintiffs are *already* challenging those practices in *McReynolds I*, so the Fair Pay Act simply has no role to play in this litigation.

C. Construing the Complaint as a Challenge to Underlying Discriminatory Practices

[12][13][14] Finally, the plaintiffs argue that even if the retention program itself is protected, the complaint should be construed as a challenge to the underlying discriminatory practices at Merrill Lynch—about which there are many detailed allegations in the complaint—and the district court therefore should not have dismissed the suit as duplicative of the claims made in *McReynolds I*.^{FN8} This argument would be difficult to win under any circumstances, and it is especially weak here. The district court has broad discretion to dismiss a complaint “ ‘for reasons of wise judicial administration ... whenever it is duplicative of a parallel action already pending in another federal court.’ ” *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223 (7th Cir.1993) (quoting *889 *Ridge Gold Standard Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 572 F.Supp. 1210, 1213 (N.D.Ill.1983)). A suit is duplicative if the “claims, parties, and available relief do not significantly differ between the two actions.” *Ridge Gold*, 572 F.Supp. at 1213. The district court has significant latitude on this

question, and we will reverse only for abuse of discretion. *Serlin*, 3 F.3d at 223.

FN8. Merrill Lynch maintains that the plaintiffs waived this argument by failing to make it in the district court. To the contrary, the plaintiffs specifically raised this argument in their brief in response to the motion to dismiss.

Application of that standard here is quite straightforward. All of the named plaintiffs in this case are also plaintiffs in *McReynolds I*, and the *McReynolds I* litigation challenges the underlying employment practices that are alleged to have caused differences in brokers' production credits, and by extension in the retention awards. The plaintiffs will be able to obtain complete relief in *McReynolds I* because any loss relating to reduced retention awards based on lower production credits can simply be treated as part of the damages in that case should the plaintiffs prevail on the merits.

The plaintiffs insist that because the class and the claims are broader in *McReynolds I*, and Bank of America is named as a defendant here but not in the earlier case, the two actions are sufficiently different to proceed as independent actions. We disagree. The larger class size and broader scope of the claims in *McReynolds I* actually *support* the district court's holding that any challenge to Merrill Lynch's underlying employment practices here is subsumed in the earlier case. And to the extent that Bank of America may be liable as a corporate parent, the plaintiffs can try to amend their complaint in *McReynolds I* to add Bank of America as a defendant. *See EEOC v. Vucitech*, 842 F.2d 936, 944 (7th Cir.1988); *see also Worth v. Tyler*, 276 F.3d 249, 259–60 (7th Cir.2001) (“ ‘When the successor company knows about its predecessor's liability, knows the precise extent of that liability, and knows that the predecessor itself would not be able to pay a judgment obtained against it, the presumption should be in favor of successor liabil-

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ity....' ” (quoting *Vucitech*, 842 F.2d at 945)). But allowing a separate suit seeking the same remedy would be redundant.

[15] Finally, the plaintiffs make the curious assertion that dismissal would “eliminate[] the role of the [EEOC] in investigating employment discrimination claims against employers that repeatedly commit ‘similar or related’ discriminatory acts.” The argument seems to be that the district court’s refusal to entertain this duplicative lawsuit will somehow discourage potential plaintiffs from filing charges with the EEOC and thus prevent the agency from adequately investigating long-standing discriminatory practices. We see no such disincentive. Plaintiffs may always file *new* claims with the EEOC. Dismissal here simply reflects the district court’s conclusion that if the complaint in this case is construed as a challenge to Merrill Lynch’s underlying discriminatory practices, there are not, in fact, any *new* claims being made—only the potential for greater damages in the earlier suit. This conclusion was not an abuse of discretion.^{FN9}

FN9. In their reply brief, the plaintiffs also argue that the case should have been stayed rather than dismissed. *See Gleash v. Yuswak*, 308 F.3d 758, 760 (7th Cir.2002) (“Even when prudence calls for putting a redundant suit on hold, it must be stayed rather than dismissed unless there is no possibility of prejudice to the plaintiff.”). Arguments raised for the first time in a reply brief are waived. *See Mendez v. Perla Dental*, 646 F.3d 420, 423–24 (7th Cir.2011). Moreover, we doubt that the decision to dismiss rather than stay this case could have possibly prejudiced the plaintiffs. As we have noted, to the extent that they prevail on their claims in *McReynolds I*, the plaintiffs will have a complete remedy.

AFFIRMED.

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