

NO. 41499-6-II

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

JO-ANN FULTON,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Robert Covington, a Division Director within the Department of Social and Health Services (“Department”), assumed oversight for the Claims Processing Office after a mid-2006 reorganization. One of his first responsibilities was to fill the Office Chief and Operations Manager positions, which were filled only on an acting basis at that time. Mr. Covington started with the Office Chief position, the higher-ranking of the two. After a competitive recruitment process, Mr. Covington offered the Office Chief position to Karen De Leon, a woman whom the interview panel had ranked as the top candidate. Because the other top candidates for the Office Chief position were so outstanding, Mr. Covington confirmed with Human Resources that he could offer the Operations Manager position to the second-ranked Office Chief candidate, and did so, hiring Milton Haire.

Jo Ann Fulton did not apply for the Office Chief position and therefore was not considered for the Operations Manager position. In this lawsuit, she complains that the selection of Milton Haire constituted gender discrimination. However, no one—male or female—who did not apply for the Office Chief position was considered for the Operations Manager position. Due to the lack of any evidence of gender

discrimination, the trial court granted the Department's Motion for Summary Judgment.

In this appeal, Ms. Fulton attempts to analogize her case to cases where word-of-mouth hiring systems were utilized to perpetuate all-white workforces. Those cases found an inference of discriminatory intent because such hiring systems appeared to be designed to exclude minority applicants and perpetuate existing racial disparities in the workplace. Yet Ms. Fulton has presented no evidence of *any* gender disparities in her workplace. Further, the fact that Mr. Covington selected a woman for the higher-ranking Office Chief position negates any inference that he had a discriminatory animus against women. Quite simply, there is no evidence in the record that the hiring process used to select the Operations Manager was tainted by gender discrimination. The order granting the Department's Motion for Summary Judgment should be affirmed.

II. RESTATEMENT OF ISSUES

A. Did the trial court properly dismiss Ms. Fulton's gender discrimination claim for failure to establish a prima facie case where she did not apply for the Office Chief position, was treated no differently than other employees who did not do so, and Mr. Covington was unaware that she had expressed interest in the Operations Manager position?

B. Did the trial court properly dismiss Ms. Fulton's gender discrimination claim where she failed to show that Mr. Covington's reasons for not promoting her—he did not go through the time and expense of a second recruitment because the first had yielded outstanding, motivated candidates and he was unaware of her interest in the position—were pretext for gender discrimination?

C. Did the trial court properly dismiss Ms. Fulton's gender discrimination claim where Mr. Covington treated men and women the same in the hiring process, Mr. Covington selected a woman for the higher-ranking Office Chief position, and there is no evidence of a gender disparity in the workplace?

III. RESTATEMENT OF THE CASE

A. Mr. Covington Based The Operations Manager Promotion On The Results Of The Formal, Open, And Competitive Office Chief Hiring Process

In mid-2006, there were two positions in the Claims Processing Office of the Department's Health and Recovery Services Administration that were filled only on an acting basis.¹ The positions were the Office Chief and the Operations Manager, which reported to the Office Chief.² Maryanne Lindeblad, the Division Director responsible for the Claims Processing Office at that time, initiated a formal recruitment process to fill

¹ CP at 59-60, 99-100.

² CP at 59-60, 99-100.

the Office Chief position on a permanent basis.³ Although Ms. Fulton was the acting Office Chief at the time, she did not apply.⁴

On or about August 1, 2006, a reorganization occurred that resulted in oversight of the Claims Processing Office being transferred from Ms. Lindeblad to Robert Covington, another Division Director.⁵ Applications and resumes were collected for the Office Chief position prior to the reorganization, so Mr. Covington took steps to complete the hiring process.⁶ Top candidates were selected for interviews based on their resumes and cover letters.⁷ The interviews were conducted by a panel of three managers, including Mr. Covington and Ms. Lindeblad.⁸

After the interviews, the panel unanimously ranked Karen De Leon, a woman, as the top candidate.⁹ As a result, Mr. Covington, the appointing authority who made the final decision regarding the position, appointed Ms. De Leon Office Chief on August 22, 2006.¹⁰

After filling the Office Chief vacancy, Mr. Covington was still faced with the Operations Manager vacancy. But he also had an outstanding candidate pool of individuals who had just been vetted

³ CP at 99-100.

⁴ CP at 59, 62.

⁵ CP at 100, 124.

⁶ CP at 59-60, 100.

⁷ CP at 59-60.

⁸ CP at 60, 100.

⁹ CP at 60, 100.

¹⁰ CP at 59-60, 100.

through the formal, open, and competitive process used to select the new Office Chief.¹¹ The top candidates had been outstanding and motivated to assume higher-level responsibilities, as evidenced by their applications for Office Chief.¹² These candidates were also qualified for the Operations Manager position, as the qualifications for Office Chief were more demanding.¹³ As a result, Mr. Covington sought confirmation from Human Resources that he could offer the Operations Manager position to the second-ranked Office Chief candidate without expending additional time and resources on a second formal recruitment process.¹⁴

Human Resources confirmed that a second recruitment was not required.¹⁵ Because the Operations Manager was a Washington Management Service (WMS) position, the recruitment and hiring practices were to be “inherently flexible.”¹⁶ In fact, Mr. Covington could have hand-picked any qualified individual as Operations Manager, but instead he sought to appoint an individual who had been vetted through a formal, open, and competitive recruitment process for a higher-ranking position.¹⁷

¹¹ CP at 59-60.

¹² CP at 60, 138.

¹³ CP at 60.

¹⁴ CP at 60, 138-39.

¹⁵ CP at 60.

¹⁶ CP at 89-90.

¹⁷ CP at 59-60, 138-39.

As a result, Mr. Covington appointed Milton Haire, a man who had been unanimously ranked as the second candidate for the Office Chief position, as Operations Manager on August 31, 2006.¹⁸ Ms. Fulton concedes that Mr. Haire was well-qualified for even the *higher-ranking* Office Chief position.¹⁹ He was an outstanding candidate with leadership skills acquired from experience with both the Air Force and the Department.²⁰ He had over two-and-a-half years experience in claims management and over 12 years experience as a manager.²¹ He had extensive knowledge of the Washington State Medicaid Information System, great written and oral communication skills, and a working knowledge of federal and state Medicaid laws, rules, regulations, and policies.²² His record also showed a history of having been an effective supervisor.²³

At the time he promoted Mr. Haire, Mr. Covington was unaware that Ms. Fulton, who had not applied for the Office Chief position, had ever expressed any interest in being Operations Manager.²⁴

¹⁸ CP at 60-61, 100.

¹⁹ CP at 154.

²⁰ CP at 60-61.

²¹ CP at 61.

²² CP at 61.

²³ CP at 61, 87.

²⁴ CP at 62, 138.

B. Prior Events Occurring Five Months Before Mr. Covington's Oversight Of The Claims Processing Office

Ms. Fulton cites events that occurred over five months prior to Mr. Haire's promotion in August 2006, including her service as acting Operations Manager from October 2005 to March 2006 and her statement in March 2006 to a former Department employee that she would like to return to that position in the future, as support for her claim that Mr. Covington discriminated against her due to her gender.

In October 2005, Ms. Fulton was a Medical Assistance Specialist 5.²⁵ That month, Kathy Eberle, the then-acting Division Director overseeing Ms. Fulton's Office, promoted Ms. Fulton to acting Operations Manager.²⁶ This promotion, which resulted in a 15 percent pay raise for Ms. Fulton, was done without a competitive recruitment process—one was not required because the position was a WMS position.²⁷ This promotion was non-permanent—it was expected to last approximately six months, during which time Ms. Eberle could complete a recruitment to fill the position on a permanent basis.²⁸ While serving in this position, Ms.

²⁵ CP at 89, 123.

²⁶ CP at 75.

²⁷ CP at 75, 81, 89-90, 99.

²⁸ CP at 75-76, 81.

Fulton's return rights were to her permanent position as a Medical Assistance Specialist 5.²⁹

In March 2006, Ms. Eberle, who had returned to her permanent position as Office Chief, left for a position with a different agency.³⁰ As Ms. Eberle left, Ms. Fulton asserts that Ms. Eberle asked her if she would serve as acting Office Chief while the Division Director, Maryanne Lindeblad, sought to fill the position permanently.³¹ Ms. Fulton asserts that she agreed and told Ms. Eberle that she would like to return to the Operations Manager position after the Office Chief position was permanently filled.³²

Ms. Eberle left the Department that same month, and thus was not employed by the Department when Mr. Covington filled the Operations Manager position five months later.³³ There is no evidence in the record that Ms. Eberle relayed Ms. Fulton's interest in returning to the Operations Manager position to anyone else, that Ms. Fulton asked Ms. Eberle to do so, or that Ms. Fulton made any subsequent expressions of interest in the position during the following *five months* before Mr. Covington promoted

²⁹ CP at 75-76, 85.

³⁰ CP at 75-76.

³¹ CP at 124.

³² CP at 124.

³³ CP at 76.

Mr. Haire. At no time did Ms. Eberle offer Ms. Fulton the Operations Manager position on a permanent basis.³⁴

Ms. Lindeblad appointed Ms. Fulton acting Office Chief on March 27, 2006.³⁵ This promotion, which resulted in an additional 13 percent pay raise for Ms. Fulton, was also done without a competitive recruitment process—one was not required because the position was a WMS position.³⁶ While serving in this position, Ms. Fulton's return rights were to her permanent position as a Medical Assistance Specialist 5.³⁷

As indicated above, Ms. Fulton ultimately did not apply for the permanent Office Chief position and Mr. Covington thus did not consider her for either the permanent Office Chief or the permanent Operations Manager positions. She was treated no differently than other employees not motivated to apply for the Office Chief position—male or female—including *a man* who had also previously served as Operations Manager.³⁸ Further, there is no evidence in the record that Mr. Covington was aware of Ms. Fulton's prior service as acting Operations Manager, which had concluded several months before Mr. Covington became her supervisor.

³⁴ CP at 76.

³⁵ CP at 99.

³⁶ CP at 81, 89-90, 99, 104.

³⁷ CP at 89.

³⁸ CP at 138.

C. Procedural History

Ms. Fulton filed the instant action on July 16, 2009, alleging that Mr. Covington's failure to appoint her as permanent Operations Manager in August 2006 constituted gender discrimination under RCW 49.60.180.³⁹ The Department moved for summary judgment, which the trial court granted on October 29, 2010.⁴⁰

IV. ARGUMENT

A. Standard Of Review

When reviewing an order of summary judgment, this Court engages in the same inquiry as the trial court. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 463, 98 P.3d 827 (2004). The purpose of summary judgment is to avoid unnecessary trials. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). If there is no genuine issue of material fact, summary judgment shall be granted. CR 56(e). This Court may affirm the trial court's ruling on any grounds adequately supported in the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

³⁹ CP at 5-9.

⁴⁰ CP at 141-42.

B. The *Hill v. BCTI* Burden-Shifting Scheme Requires Evidence Of Mr. Covington’s Discriminatory Intent

Ms. Fulton’s ultimate burden in this lawsuit was to prove that Mr. Covington intentionally discriminated against her due to her gender.⁴¹ *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-81, 23 P.3d 440 (2001), *overruled on other grounds McClarty v. Totem Elec.*, 157 Wn.2d 214, 228, 137 P.3d 844 (2006). In employment discrimination suits, such as the instant case, where the plaintiff lacks direct evidence of discriminatory intent, Washington courts employ a burden-shifting scheme to rule on summary judgment motions. *Hill*, 144 Wn.2d at 180. While this scheme obviates the need for *direct* evidence of discriminatory intent, a plaintiff is still required to provide *circumstantial* evidence of discriminatory intent. *Id.* at 179-80, 189-90.

Under this burden-shifting scheme, Ms. Fulton bore the initial burden of establishing a *prima facie* case of intentional gender discrimination with specific and material facts. *Hill*, 144 Wn.2d at 181; *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992).

⁴¹ It is undisputed that Mr. Covington had sole and final authority regarding who to hire as Operations Manager. As a result, only *his* intent is relevant. *See Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 438, 457-58, 115 P.3d 1065 (2005) (holding that evidence regarding non-decision makers is not relevant); *Kirby*, 124 Wn. App. at 467-68 (same); *see also Brungart v. BellSouth Telecomm., Inc.*, 231 F.3d 791, 800 (8th Cir. 2000) (holding that only evidence concerning the ultimate decision maker is relevant because the defendant “corporation itself did not actually make the decision to take the adverse employment action; Nelson made that decision, albeit on the corporation’s behalf”).

Although the elements of a prima facie case may vary from case to case, the burden these elements must satisfy does not—Ms. Fulton was required to show actions that, if unexplained, indicated that Mr. Covington likely did not promote Ms. Fulton due to her gender. *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 575-76, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978), cited with approval in *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988). Because Ms. Fulton did not meet this burden, the Department was “entitled to prompt judgment as a matter of law.” *Hill*, 144 Wn.2d at 181.

If Ms. Fulton had established a prima facie case of discrimination, the burden would have then shifted to the Department to articulate a legitimate, nondiscriminatory reason for not promoting Ms. Fulton. *Hill*, 144 Wn.2d at 181. This is a burden of production, not persuasion. *Id.*

After the Department articulated such a reason, the burden would shift back to Ms. Fulton to demonstrate that the stated reason was pretext for intentional gender discrimination. *Hill*, 144 Wn.2d at 182; *Kuyper v. State*, 79 Wn. App. 732, 736, 904 P.2d 793 (1995). To do so, Ms. Fulton was required to provide evidence that: “(1) the employer’s reasons have no basis in fact; or (2) even if the reasons are based on fact, the employer was not motivated by the reasons; or (3) the reasons are insufficient to motivate the adverse employment decision.” *Chen v. State*, 86 Wn. App.

183, 190, 937 P.2d 612 (1997). As Ms. Fulton did not meet this burden, the trial court properly granted the Department judgment as a matter of law. *Hill*, 144 Wn.2d at 182.

Yet evidence of pretext alone would be insufficient to avoid summary judgment if Ms. Fulton failed also to provide sufficient evidence that her gender was a substantial factor in Mr. Covington's decision to promote Mr. Haire. *Hill*, 144 Wn.2d at 188-90. In conducting this analysis, courts may also consider evidence of nondiscrimination. *Id.* at 186. Only if the record contains *reasonable* but competing inferences of discrimination and nondiscrimination would Ms. Fulton be entitled to a trial. *Id.* at 186-90.

The trial court's dismissal of Ms. Fulton's claim should be affirmed for three independent reasons, as she failed all three stages of the burden-shifting scheme. First, she did not establish a prima facie case of discrimination. Second, she did not establish that Mr. Covington's stated reasons were pretext for discrimination. Third, there is no evidence that Mr. Covington discriminated against Ms. Fulton due to her gender.

C. Ms. Fulton Did Not Establish A Prima Facie Case That Her Gender Was The Likely Reason She Was Not Promoted

A prima facie case of gender discrimination in a failure-to-promote case ordinarily requires evidence that (1) the plaintiff is a woman; (2) she

applied for and was qualified for an available position; (3) she was not offered the position; and (4) the position went to a man. *See Kirby*, 124 Wn. App. at 466. The purpose of requiring a plaintiff to apply for a position is to eliminate an “obvious” reason for not promoting her—lack of knowledge of her interest in the position. *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1133 (11th Cir. 1984). It is undisputed that Ms. Fulton did not apply for the Office Chief position and that Mr. Covington was unaware that Ms. Fulton had expressed interest in the Operations Manager position.⁴²

In “unusual” cases, a plaintiff may establish a prima facie case without applying for a position. *Yartzoﬀ v. Thomas*, 809 F.2d 1371, 1374 (9th Cir. 1987). Ms. Fulton contends that Mr. Covington’s promotion of Mr. Haire is such an unusual case, Brief of Appellant (Appellant’s Brief) at 22-24, *even though* Mr. Covington contemporaneously promoted a woman to a *higher-ranking* position. Although the elements of a prima facie case may vary from case-to-case, those elements must always show actions that, if unexplained, indicate that discrimination more likely than not occurred. *Furnco*, 438 U.S. at 575-76.⁴³ In other words: “[A] proper

⁴² CP at 62, 138.

⁴³ *See also Shannon v. Pay ‘N Save Corp.*, 104 Wn.2d 722, 726-27, 709 P.2d 799 (1985) (quoting *Furnco*), *overruled on other grounds by Blair v. Washington State Univ.*, 108 Wn.2d 558, 740 P.2d 1379 (1987); *Callahan v. Walla Walla Hous. Auth.*, 126 Wn. App. 812, 819, 110 P.3d 782 (2005) (“The specifics of the prima facie case are

prima facie case identifies sex as the likely reason for the denial of a job opportunity.” *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 761 (9th Cir. 1980).⁴⁴

As a result, federal courts have found prima facie cases established when a plaintiff has not applied for a position *when there is other evidence of discriminatory intent*. One such situation is when a plaintiff is deterred from applying for a position due to the employer’s discriminatory practices and would have applied but for those practices.⁴⁵ Another is when a plaintiff has an interest in a position but reasonably believes that an application would be futile due to a pervasive discriminatory policy.⁴⁶

Ms. Fulton does not contend that discriminatory deterrence or futility is at issue in this case. Instead, she argues that she has established a prima facie case of discrimination because (1) Mr. Covington did not

suggested by the particular form of discrimination alleged. In general, the plaintiff must produce sufficient evidence to enable a jury to find that the adverse employment action was, more likely than not, the result of unlawful discrimination.”).

⁴⁴ Although Washington courts consider federal employment law rulings as “a source of guidance” in interpreting the Washington Law Against Discrimination, RCW 49.60, they are not binding. *Hill*, 144 Wn.2d at 180. To the extent Fulton contends federal authorities permit her to establish a prima facie case, or otherwise survive summary judgment, without demonstrating that her gender Ms. was the likely reason Mr. Covington promoted Mr. Haire, the Department contends those authorities do not represent the law of Washington and should not be followed.

⁴⁵ See, e.g., *Int’l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 337-38, 365-67, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977) (concerning employer with significant racial disparities in workforce and substantial evidence that minorities’ hiring requests were ignored and that minorities were given false or misleading information about hiring procedures).

⁴⁶ See, e.g., *Reed*, 613 F.2d at 758, 761-62 (concerning employer that closed special training programs to women and described its advancement program as “The Plan for Every Man” and as being available to “men under 35”).

conduct a second formal recruitment process to select the Operations Manager; and (2) Ms. Fulton expressed an interest in the Operations Manager position to an employee who left the Department five months before the challenged promotion. Appellant's Br. at 22-24. Yet these facts do not demonstrate that Mr. Covington acted with discriminatory intent, and the federal cases Ms. Fulton relies upon do not indicate that such facts establish a prima facie case.

1. Mr. Covington Based His Decision On The Results Of A Formal, Open, And Competitive Process

As detailed above, Mr. Covington based his decision to promote Mr. Haire on the results of the formal, open, and competitive process utilized to select the permanent Office Chief. This process included posting for the position, receiving applications and resumes, and conducting interviews by a three-person panel. At the conclusion of this process and after conferring with Human Resources, Mr. Covington offered the Operations Manager job to the individual who had been unanimously ranked by the interview panel as the second-ranked Office Chief candidate.

In contrast, in *Equal Employment Opportunity Commission v. Metal Service Co.*, 892 F.2d 341 (3rd Cir. 1990), the first of the two

federal cases Ms. Fulton relies upon,⁴⁷ the employer had an all-white work force and utilized a word-of mouth hiring practice. *Id.* at 350. The *Metal Service* court noted:

Metal Service maintained a word-of-mouth hiring practice among its existing employees. Such an informal hiring process, in conjunction with an all white workforce, is itself strong circumstantial evidence of discrimination. Several courts have held that word-of-mouth hiring practices that carry forward racial imbalances are discriminatory.

...

[I]t is hardly surprising that such a system of recruitment produced few, if any, black applicants. As might be expected, existing white employees tended to recommend their own relatives, friends and neighbors, who would likely be of the same race.

Id. (internal citations and quotation marks omitted). Further, the African-American plaintiffs were required to undergo a “burdensome,” yet fruitless, application process, “while white applicants were being hired . . . through word-of-mouth.” *Id.* at 351.

In *Carmichael*, 738 F.2d at 1126, the second case Fulton relies upon, the plaintiff produced “strong statistical evidence” of

⁴⁷ Ms. Fulton cites a third federal case in support of her contention that she may establish a prima facie case without applying for a position, but the plaintiff in that case *actually applied* for an open position. *Lowe v. City of Monrovia*, 775 F.2d 998, 1006 (9th Cir. 1986). The court in that case merely held that the employer’s defense—that it did not consider the application until a later time due to its own policies—was properly raised at the pretext stage of the burden-shifting scheme, and not at the prima facie stage. *Id.* at 1005-06. Further, the plaintiff in *Lowe* had no need to establish a prima facie case, as she had direct evidence of discrimination due to discriminatory statements made by the defendant. *Id.* at 1006-07. As Ms. Fulton neither applied for any position nor has direct evidence of discrimination, *Lowe* is inapplicable.

discrimination,⁴⁸ the employer utilized a word-of mouth hiring practice and had no formal procedures for reviewing candidates. *Id.* at 1133. As Ms. Fulton states, the employer “clearly” used its hiring practices “to maintain an all-White sales force.” Appellant’s Br. at 16. The *Carmichael* court noted that “such subjective procedures can lead to racial discrimination, both because important information may be available only to whites and because such procedures place no check on individual biases.” 738 F.2d at 1133. The employer in *Carmichael* attempted to justify its practice by arguing that it was a small company where everyone ate lunch together, so everyone would know about job postings. *Id.* at 1133 n.2. The African-American plaintiff responded with evidence that he did not eat lunch with everyone else, “because each time that I attempted to sit with the other employees, the foreman ... had a way of telling what he termed nigger jokes.” *Id.* at 1133 n.2. As a result, the plaintiff could not express interest in the position, because he “had no way of knowing” that it was open. *Id.* at 1132.

⁴⁸ *Carmichael*, 738 F.2d at 1131. Only three of 44 employees were black. *Id.* at 1133 n.2. “Few blacks have worked at Birmingham Saw Works, and those who have (with a single exception) have been restricted to janitorial and repair shop jobs. Only one black has ever worked in City Sales, and none have worked in Outside Sales, Office, Receiving or Pick Up. In addition, the plaintiff produced evidence tending to indicate, for example, that blacks were required to do certain jobs (washing cars and mowing lawns) not required of whites.” *Id.* at 1131. Further, the trial court had found that the employer *had* discriminated against the plaintiff concerning his wages—a finding that was not challenged on appeal. *Id.* at 1135.

The formal, open, and competitive process Mr. Covington used to select the Operations Manager is a far cry from the discrimination-laden, word-of-mouth systems utilized in *Metal Service* and *Carmichael*. In fact, Mr. Covington's procedure was substantially more formal and rigorous than the non-competitive processes associated with Ms. Fulton's acting appointments as Operations Manager and Office Chief, which resulted in Ms. Fulton receiving a *30 percent raise*.⁴⁹

Further, Ms. Fulton concedes that there was no pattern of discriminatory promotion practices at the Department⁵⁰—and thus there was no gender disparity to perpetuate. Nor is there any evidence of women being subject to different application procedures than men. In addition, Ms. Fulton was not precluded from expressing interest in the permanent Operations Manager position due to a lack of information. Ms. Fulton was well aware that the Operations Manager position had not been permanently filled, as she supervised the position as acting Office Chief and she claims she *did* express interest in that position to a former

⁴⁹ Based on Fulton's characterization of the law, her two acting appointments would subject the Department to jury trials on discrimination claims brought under RCW 49.60.180 by other individuals who had expressed interest in these two positions if they were different from Ms. Fulton in terms of age, gender, marital status, sexual orientation, race, religion, national origin, military status, or disability.

⁵⁰ CP at 152 (A: "[I]n my years of working for the State and working in claims processing, it goes in spurts. There's been men, all men at the top; there's been men and women at the top; there's been all women at the top[.]" Q: "So based on your experience, I take it you didn't perceive any kind of bias in favor or against women or men --" A: "No." Q: "—in promotions?" A: "No.") (Deposition of Ms. Fulton).

employee in March 2006. Simply put, the factors relied upon by the *Metal Service* and *Carmichael* courts in finding a prima facie case are simply not present in Ms. Fulton's case.

2. Ms. Fulton's Single Comment To A Former Employee Is Irrelevant To Mr. Covington's Alleged Discriminatory Intent

Even if Ms. Fulton were able to bring the integrity of the process Mr. Covington used into question, she recognizes that she would still be required to show that she made a sufficient expression of interest in the Operations Manager position to establish a prima facie case. Appellant's Br. at 23-24. Yet the only expression of interest Ms. Fulton made was to Ms. Eberle as Ms. Eberle was leaving the Department. There is no evidence in the record that Ms. Eberle relayed this information to anyone else, that Ms. Fulton asked Ms. Eberle to do so, or that Ms. Fulton made any subsequent expressions of interest in the following *five months* before Mr. Covington promoted Mr. Haire. This single comment to a former employee is not relevant to a prima facie showing regarding *Mr. Covington's* intent and stands in stark contrast to the expressions of interest found in *Metal Service* and *Carmichael*.

In *Metal Service*, the plaintiffs "did everything reasonably possible" to make their interest in applying for a job known:

The evidence is undisputed that both brothers went to Metal Service's office and tried to apply for employment directly with the company. When informed of the company's hiring process, they promptly applied through Job Service. Both brothers specifically expressed an interest in working for Metal Service on the Job Service application form. They periodically checked on their applications. In Willie Brown's case, he went back several times to Metal Service to try to apply directly to the company when he reasonably believed, through newspaper accounts or rumor, that the company was hiring. Indeed, they followed precisely the procedure established by Metal Service for how a person applies for a job with the company.

892 F.2d at 349. White applicants were hired through word-of-mouth and were not given the runaround the plaintiffs were given. *Id.* at 351.

In *Carmichael*, the plaintiff's efforts were such that "the record permit[ted] only one conclusion as to whether the defendant knew the plaintiff was interested in the [promotion]." 738 F.2d at 1134. Prior to the challenged promotion, the plaintiff had *both* expressed interest in promotions to his employer *and* filed an EEOC complaint complaining that he had been continuously passed over for promotions. *Id.* Further, the court held that there was no discernable reason why the employer had considered the white individual who had received the promotion but not the plaintiff. *Id.*⁵¹

⁵¹ The plaintiff in *Carmichael* challenged a second promotion decision but, with respect to that promotion, the Eleventh Circuit merely remanded that issue for consideration by the trial court because the trial court had erred by applying the wrong standard. 738 F.2d at 1133-34.

In this case, there is no evidence that Ms. Fulton “did everything reasonably possible” to express her interest in the position, or that Mr. Covington was actually aware of that interest. Further, there is no evidence of any inexplicable differential treatment of Ms. Fulton and male candidates. Nor is there any evidence that Mr. Covington was aware of Ms. Fulton’s prior service as acting Operations Manager. Simply put, there is nothing about Ms. Fulton’s single prior expression of interest in the Operations Manager position that assists Ms. Fulton in meeting her initial burden of identifying gender as the likely reason she was not promoted.

D. Ms. Fulton Did Not Establish That Mr. Covington’s Reasons For Promoting Mr. Haire Were Pretext For Gender Discrimination

Even if Ms. Fulton had established a prima facie case, she failed to establish that Mr. Covington’s reasons for promoting Mr. Haire—Mr. Covington’s reliance on the Office Chief candidate pool, his unawareness of Ms. Fulton’s interest in the position, and his assessment of Ms. Fulton’s managerial skills—were pretext for gender discrimination. To make such a showing, Ms. Fulton was required to provide evidence that: “(1) the employer’s reasons have no basis in fact; or (2) even if the reasons are based on fact, the employer was not motivated by the reasons; or (3) the

reasons are insufficient to motivate the adverse employment decision.”

Chen, 86 Wn. App. at 190.

1. Mr. Covington Promoted The Second-Ranked Office Chief Candidate To Operations Manager

Mr. Covington’s first reason for promoting Mr. Haire was his decision to use the results of the formal, open, and competitive process used to fill the Office Chief position to also fill the Operations Manager position. The Office Chief candidates had demonstrated that they were motivated to assume higher-level responsibilities by applying for the Office Chief position. Ms. Fulton was not so motivated, as she did not apply for the Office Chief position. Further, the top candidates for Office Chief had been outstanding, were vetted through a formal application and interview process, and met the qualifications for Office Chief, which were more demanding than those for Operations Manager. Using the same candidate pool also saved the time and resources involved in initiating a second formal recruitment process.

Due to these considerations, Mr. Covington obtained confirmation from Human Resources that he had the flexibility to offer the Operations Manager position to the candidate who the Office Chief interview panel had unanimously ranked second. This flexibility arose from the fact that the Operations Manager position was a WMS position. The Legislature

created WMS in 1993 to allow for “flexible recruitment and hiring procedures.” RCW 41.06.500. This flexibility is repeated in WAC 357-58-185, which states that policies for WMS positions “must be inherently flexible and permit methods and strategies to be varied and customized for each recruitment and selection need.” General government civil service rules concerning promotions and hiring do not apply to WMS positions. WAC 357-58-055.⁵²

Ms. Fulton concedes that Mr. Covington promoted Mr. Haire because he was the second-ranked Office Chief candidate. Appellant’s Br. at 5, 29-30. Yet she contends that this reason, while true, simply does not qualify as a “legitimate, nondiscriminatory reason,” and thus she had no need to demonstrate pretext. Appellant’s Br. at 29-30. The sole authority Ms. Fulton cites in support of this assertion is *Carmichael*.

Yet the reason challenged in *Carmichael* was an employer “incorrectly assum[ing] the plaintiff was uninterested in the job,” 738 F.2d

⁵² At its core, this appears to be Ms. Fulton’s issue with the Operations Manager promotion. Ms. Fulton’s prior service had been in general classified positions, which may have required a formal posting and separate recruitment process for each position. CP at 89-90. Thus, Mr. Covington’s selection of Mr. Haire as permanent Operations Manager without a separate recruitment process may have seemed foreign or “wrong” to Ms. Fulton. Ms. Fulton’s counsel confirmed this before the trial court. VRP 17 (Mr. King: “I think I agree that the issue is right there. That really hones it down. Do the rules, including the WACs, require a little more notice in a situation like this? And I would say they do. Ma’am, if you want to be the manager, you have to apply for the chief job. Otherwise, who would know that? There’s no notice. So that’s what I would say in summary.”) Yet, as discussed above, there is no evidence that Mr. Covington’s process, which he confirmed with Human Resources, violated the WAC, or that Mr. Covington’s decision to not engage in a second, separate recruitment process was motivated by discriminatory intent.

at 1133-34, which is a separate issue discussed below, not reliance on the results of a prior competitive recruitment process to fill a second position. Thus, *Carmichael* is inapposite and Ms. Fulton has cited *no* authority that precludes an employer from relying on the candidate pool from one position to fill another similar position.

Indeed, if reliance on a prior candidate pool were barred from being a “legitimate nondiscriminatory reason,” the flexibility inherent in hiring for WMS positions would be written out of the law—flexibility which permitted Ms. Fulton to increase her salary 30 percent through non-competitive appointments to two acting WMS positions.

2. There Is No Evidence Mr. Covington Was Aware Of Ms. Fulton’s Interest In The Operations Manager Position

The second reason why Ms. Fulton was not promoted is that Mr. Covington did not know that Ms. Fulton had expressed interest in the position. Ms. Fulton’s own authorities state that this is an “*obvious* nondiscriminatory reason” for not promoting an individual. *Carmichael*, 738 F.2d at 1133 (emphasis added).

The validity of an employer’s unawareness as an explanation for not hiring a plaintiff was confirmed in *Morgan v. Federal Home Loan Mortgage Corp.*, 328 F.3d 647 (D.C. Cir. 2003). In that case, the plaintiff, an African-American male, had applied for a posted position in July 1997,

but was told that the position had already been filled. *Id.* at 653. The same position became vacant in November 1997, however, and the employer offered the position, without posting it, to a white female who had also applied for the position in July 1997. *Id.* The court held that the plaintiff's race discrimination claim had been properly dismissed because the plaintiff had failed to rebut the plaintiff's nondiscriminatory reason for not hiring him—that the defendant “was not aware that [the plaintiff] remained interested after he was informed in mid-July that the position had been filled.” *Id.* at 654.⁵³

Ms. Fulton does not contend that Mr. Covington was aware of her interest, and she does not even attempt to make the requisite showing of any of the three methods for showing pretext identified in *Chen*, 86 Wn. App. at 190. Ms. Fulton, in fact, does not squarely address this reason in her Opening Brief, but her arguments imply that she believes that this reason, while true, does not qualify as a “legitimate, nondiscriminatory reason” where a plaintiff has no notice of, and no opportunity to apply for, the position, and thus she has no need to demonstrate pretext. Appellant's

⁵³ See also *Pressley v. Haeger*, 977 F.2d 295, 297 (7th Cir. 1992) (“Racial discrimination is an intentional wrong. An empty head means no discrimination. There is no ‘constructive intent,’ and constructive knowledge does not show actual intent. Ignorance may be reprehensible, but not because it is racial discrimination. A supervisor who does not find out what is going on in the workplace should be sacked as incompetent, not lumped with bigots.”).

Br. at 29-30. The sole authority Fulton cites in support of this assertion is *Carmichael*.

Even if Ms. Fulton's portrayal of the law were accurate, which it is not, *see Morgan*, 328 F.3d at 654, Ms. Fulton had *both* notice of the position *and* an opportunity to apply for it. Unlike the plaintiff in *Carmichael*, who was unaware that the relevant position was vacant, 738 F.2d at 1132-33, Ms. Fulton *was* aware that the Operations Manager position, a position that reported directly to her and that Ms. Fulton claims she *did* express interest in to a former employee in March 2006, had not been permanently filled. Further, Ms. Fulton had just as much of an opportunity to apply for the position as anyone else—by means of applying for the Office Chief position—and there is no evidence in the record that anyone was given privileged access to the Operations Manager position through knowledge that an application for Office Chief would be considered an application for Operations Manager. In contrast, the employer in *Carmichael* relied entirely upon an informal, “word-of-mouth” system devoid of any formal review procedures. *Id.* at 1133.

Further, the language Ms. Fulton relies upon from *Carmichael* was born of a concern that the employer had rendered itself willingly ignorant of an employee's interest in a position to mask discrimination. 738 F.2d at 1134 (“Given the plaintiff's evidence that only one black has ever worked

in sales, the court should consider the possibility that the defendant assumed Carmichael would not be interested in sales *because* he is black.” (emphasis in original)). As Ms. Fulton states, the employer “clearly” used its hiring practices “to maintain an all-White sales force.” Appellant’s Br. at 16. In cases, such as *Morgan* and the instant case, where there is no evidence that hiring practices were used to perpetuate racial or gender disparities, an employer’s lack of awareness of an employee’s interest in a position is, as the *Carmichael* court stated, an “obvious nondiscriminatory reason.” *Id.* at 1133.⁵⁴

Finally, as mentioned above, the court in *Carmichael* ultimately held that “the record permit[ted] only one conclusion as to whether the defendant knew the plaintiff was interested in the [position]”—and that conclusion was that the defendant *was* aware of the plaintiff’s interest. *Id.* at 1134. In Ms. Fulton’s case, the opposite is true. The only conclusion *this* record permits is that Mr. Covington was *not* aware that Fulton was interested in the Operations Manager position.

⁵⁴ Twenty-six years after it decided *Carmichael*, the Eleventh Circuit reaffirmed that an employer’s lack of awareness of an employee’s interest in a promotion is a valid defense to a discrimination claim, *even if* the position is not posted. *Nance v. Ricoh Electronics, Inc.*, No. 08-16429, 381 Fed. Appx. 919, 922 (11th Cir. June 4, 2010). Citation to unpublished federal opinions decided after January 1, 2007, is permitted. GR 14.1(b); Fed. R. App. P. 32.1. A copy of the opinion is provided as App. A.

3. Even If Ms. Fulton Had Applied, Mr. Covington Did Not Believe She Was The Best Candidate For The Position

A third reason for Mr. Covington's decision to promote Mr. Haire is that, even if Ms. Fulton had applied for the Office Chief position, he would not have promoted her to Operations Manager.⁵⁵ In fact, *Ms. Fulton herself* does not even contend that she was the most qualified person to fill the Operations Manager position.⁵⁶ Based on his observations of Ms. Fulton's interactions with others, as well as his own interactions with her, Mr. Covington observed that Ms. Fulton did not deal well with stressful situations and had poor people and problem solving skills.⁵⁷ As a result, Mr. Covington lacked confidence in Ms. Fulton's abilities to fulfill management responsibilities.⁵⁸

Ms. Fulton contends that this reason is pretext for discrimination because she did not meet "one-on-one" with Mr. Covington, and does not recall any "stress inducing" interactions with him, prior to Mr. Haire's promotion.⁵⁹ Yet these assertions do not undermine Mr. Covington's

⁵⁵ CP at 62-63.

⁵⁶ CP at 154.

⁵⁷ CP at 62-63, 138.

⁵⁸ CP at 62-63, 138.

⁵⁹ Appellant's Br. at 30-31; CP at 124. Ms. Fulton mischaracterizes the record when she states that she and Mr. Covington never met "face-to-face" prior to Mr. Haire's promotion. Appellant's Br. at 31. Rather, Ms. Fulton's declaration states that they never met "one-on-one" before the promotion and expressly admits that Ms. Fulton *had* met Mr. Covington in other settings in the workplace *prior to Mr. Haire's promotion*. CP at 124.

stated reasons—Ms. Fulton concedes that she *had* interacted with Mr. Covington prior to Mr. Haire’s promotion,⁶⁰ thus providing him opportunities to assess her abilities, and Ms. Fulton’s own assessment of her interactions with him do not demonstrate pretext. *Parsons v. St. Joseph’s Hosp. and Health Care Ctr.*, 70 Wn. App. 804, 810, 856 P.2d 702 (1993) (holding that an employee’s disagreement with her employer’s evaluation of her job performance does not demonstrate pretext).

E. Ms. Fulton Has Provided No Evidence That Mr. Covington—Who Contemporaneously Promoted A Woman To A Higher Position—Did Not Promote Ms. Fulton Because She Is A Woman

Even if Ms. Fulton had established a prima facie case and pretext, which the Department does not concede, the trial court should still be affirmed because Ms. Fulton has failed to identify *any* evidence that Mr. Covington discriminated against her due to her gender. *Hill*, 144 Wn.2d at 186-90. There are several reasons for this.

First, to survive summary judgment, Ms. Fulton was required to answer an “obvious” question: if Covington harbored a discriminatory animus towards women, why did he promote Ms. De Leon, *a woman*, to Office Chief, *a higher-ranking position*, at the same time he made the

⁶⁰ CP at 124.

challenged Operations Manager promotion?⁶¹ *See Hill*, 144 Wn.2d at 189-90. While this question, often referred to as the “same actor inference,” ordinarily arises when the same individual hires and fires the same employee, such an inference is even stronger in this case. Whereas a plaintiff in the ordinary case must explain why the same individual hired her and then fired her from the same position after the passage of some time, Ms. Fulton must explain why Mr. Covington promoted a woman to a *higher-ranking position* than the one at issue *at the same time* as the promotion at issue. Ms. Fulton’s inability to answer this question alone mandates dismissal of her claim. *Id.* at 189-90; *Griffith*, 128 Wn. App. at 453-55.

Second, Ms. Fulton was not the only individual with prior experience as Operations Manager who was neither considered nor selected for the Operations Manager position because they did not apply

⁶¹ Ms. Fulton cites *O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996), for the proposition that Mr. Covington’s promotion of Ms. De Leon is “of no consequence” to Ms. Fulton’s claim. Appellant’s Br. at 27. *O’Connor*, however, merely held that the fact that a plaintiff over 40 years old is replaced with another person over 40 years old is not an *absolute bar* to an age discrimination claim *where the plaintiff is able to demonstrate that her dismissal was “because of his age.”* *Id.* at 312-13 (emphasis in original). This was due, in part, to the fact that age, unlike gender, is a *relative* characteristic, and thus it is the disparity in ages between two individuals that matters, not whether they are both over 40. *Id.* In any event, Ms. Fulton has provided no evidence that the challenged promotion occurred “because of her gender.” Nor does *O’Connor* eliminate the “same actor inference” or otherwise render Ms. De Leon’s promotion irrelevant.

for the Office Chief position. A *man* also fits that description.⁶² Thus, Mr. Covington's decision to base his promotion decision on the results of the Office Chief recruitment affected men and women the same.

Finally, the only gender-related evidence in the record is the genders of the relevant individuals. In *Hill*, the Washington Supreme Court held that the plaintiff's age discrimination claim should be dismissed because, *inter alia*, the only age-related evidence was the ages of the persons involved, there was no evidence of any relevant age-related remarks or other age discrimination, and there was no evidence that the plaintiff's age proved problematic in his position. *Hill*, 144 Wn.2d at 190; *see also Griffith*, 128 Wn. App. at 455-56. The same is true here. There is no *reasonable* but competing inference that Mr. Covington discriminated against Ms. Fulton due to her gender when he promoted Mr. Haire.

V. CONCLUSION

Ms. Fulton presents no evidence that Mr. Covington's decision to promote Mr. Haire was motivated by discriminatory intent, as she is required to do to support her claim of gender discrimination. This Court

⁶² CP at 138.

should affirm the trial court's order granting summary judgment and dismissing Ms. Fulton's claims with prejudice.

RESPECTFULLY SUBMITTED this 29th day of April, 2011.

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DIVISION II

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STATE OF WASHINGTON

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Breanne Higginbotham, Legal Assistant

APPENDIX A

381 Fed.Appx. 919, 2010 WL 2222479 (C.A.11 (Ga.))
 (Not Selected for publication in the Federal Reporter)
 (Cite as: 381 Fed.Appx. 919, 2010 WL 2222479 (C.A.11 (Ga.)))

HThis 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 Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals,
 Eleventh Circuit.
 Greg NANCE, Plaintiff-Appellant,

v.

RICOH ELECTRONICS, INC., Defendant-Appellee.

No. 08-16429
 Non-Argument Calendar.
 June 4, 2010.

Background: Caucasian former employee filed suit under § 1981, claiming that employer had racially discriminatory policy and failed to promote employee because he was not Asian. The United States District Court for the Northern District of Georgia, Richard W. Story, J., 2008 WL 926662, granted employer summary judgment. Employee appealed.

Holdings: The Court of Appeals held that:

- (1) employee failed to establish prima facie case of race discrimination;
- (2) exclusion of witnesses' declarations was justified sanction; and
- (3) justice did not require amendment to add retaliation claim.

Affirmed.

West Headnotes

[1] Civil Rights 78  **1234**

78 Civil Rights

78II Employment Practices

78k1232 Reverse Discrimination

78k1234 k. Race, color, ethnicity, or na-

tional origin. Most Cited Cases

Caucasian employee was neither qualified for nor applied for engineering manager position, as required to establish prima facie case of race discrimination under § 1981 based on his nonpromotion to position that was filled by Asian, since all of employee's supervisors averred that they did not believe employee possessed project management skills required for promotion, and that employee never inquired about any promotions, so they did not realize that he was interested in managerial position that was not posted. 42 U.S.C.A. § 1981.

[2] Federal Civil Procedure 170A  **1278**

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(A) In General

170Ak1278 k. Failure to respond; sanctions.

Most Cited Cases

Caucasian employee's failure to disclose names of witnesses and their expected testimony for race discrimination suit under § 1981 was not substantially justified or harmless, warranting sanction excluding witnesses' declarations that employee submitted to support his response to employer's summary judgment motion, where employer had no opportunity to conduct thorough discovery and depose non-disclosed witnesses that employee relied upon to support crux of his arguments. 42 U.S.C.A. § 1981; Fed.Rules Civ.Proc.Rules 26(a), 37(c)(1), 28 U.S.C.A.

[3] Federal Civil Procedure 170A  **865**

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(F) Supplemental Pleadings

170Ak864 Complaint

170Ak865 k. Time for filing. Most Cited

Cases

Although Caucasian employee was terminated during litigation of his § 1981 race discrimination suit against employer, justice did not require supplementation to add retaliation claim, since employee had

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attempted to delay proceedings throughout course of case, he had failed to conduct any discovery during extended time he was granted, his termination occurred over seven months after discrimination alleged in his complaint, he moved to amend two days before end of discovery period and during summary judgment proceedings, so supplementation would have been akin to starting new action, and he would not be prejudiced as he could bring separate retaliation action. 42 U.S.C.A. § 1981; Fed.Rules Civ.Proc.Rule 15(d), 28 U.S.C.A.

*920 Stephen Michael Katz, Law Offices of Stephen M. Katz, Marietta, GA, for Plaintiff-Appellant.

Antonio D. Robinson, Littler Mendelson, PC, Atlanta, GA, for Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia. D.C. Docket No. 06-02396-CV-RWS-1.

Before EDMONDSON, WILSON and ANDERSON, Circuit Judges.

PER CURIAM:

**1 Greg Nance, a Caucasian employee at Ricoh Electronics, Inc. ("REI"), appeals the grant of summary judgment to REI on his action filed under 42 U.S.C. § 1981, alleging that REI had a racially discriminatory policy and failed to promote him to engineering manager because he was not Asian. Nance alleged that REI promoted Choon Park, an Asian employee who was not qualified, to the engineering manager position. On appeal, he argues that the *921 district court erred in: (1) granting summary judgment to REI after finding that he failed to establish a prima facie case of discrimination; (2) excluding witness declarations that he submitted because he failed to comply with the disclosure requirements of Rule 26 of the Federal Rules of Civil Procedure; and (3) denying his motion to supplement the pleadings to add a retaliation claim based upon his termination during the litigation.

I. Motion for Summary Judgment

Nance argues that the district court erred in granting summary judgment to REI because he established a genuine issue of material fact based on circumstantial evidence. He argues that the record indicates that REI had a policy of reserving particular

positions for Asian employees. He further argues that REI had a pretextual reason for not promoting him. In support of his arguments, he cites to witness declarations that the court had stricken for failing timely to disclose these witnesses pursuant to Rule 26 of the Federal Rules of Civil Procedure.

"We review *de novo* a district court's grant of summary judgment, applying the same legal standards as the district court." Chapman v. AI Transp., 229 F.3d 1012, 1023 (11th Cir.2000) (en banc). The moving party is entitled to summary judgment when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c)(2). We "review the record, and all its inferences, in the light most favorable to the nonmoving party." Benson v. Tocco, Inc., 113 F.3d 1203, 1207 (11th Cir.1997) (citation omitted). To establish a prima facie case of a violation of 42 U.S.C. § 1981 for failure to promote based on circumstantial evidence, a plaintiff must show that: (1) he "is a member of a protected class;" (2) he "was qualified and applied for the position;" (3) he "was rejected despite [his] qualifications;" and (4) another equally or less qualified employee who was not a member of the protected class was promoted. Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1089 (11th Cir.2004).^{FN1}

^{FN1.} Wilson was a Title VII case; however, we review claims under Title VII and § 1981 under "the same analytical framework" because these claims "have the same requirements of proof." Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1330 (11th Cir.1998).

[1] Here, there is no dispute that Nance is a member of a protected class. However, Nance fails to satisfy the second element required to show a prima facie case of discrimination—that he was qualified and applied for the position. See Wilson, 376 F.3d at 1089. One of the necessary skills for the engineering manager position was project management. The engineering manager spends 30% of his time managing projects, whereas six other tasks account for the remaining 70%. Thus, project management is the cornerstone of the position. REI witnesses, Paul Tsai, Carl Wilson, and Frantz Pierre, all of whom oversaw Nance's performance, attested in their respective affidavits that they did not believe that Nance possessed

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the requisite project management skills to be promoted to engineering manager. Although Nance argues that he was qualified for the position, an employee's testimony about his qualifications constitutes "weak and insubstantial" evidence. See *Ford v. Gen. Motors Corp.*, 656 F.2d 117, 119 (5th Cir.1981) (holding that plaintiff's own testimony and hearsay testimony constituted "weak and insubstantial" evidence).^{FN2} The only evidence Nance sought to introduce in *922 opposition to REI's motion for summary judgment was evidence to show that Park was not qualified for the engineering manager position and that REI had treated at least one non-Asian employee applicant differently from Park.

FN2. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business of September 30, 1981.

**2 Moreover, Nance did not apply for the engineering manager position. He alleged that the position was not posted. Even if the position was not posted, however, we have held that the failure to post a job, "even where preselection violates corporate personnel policies, ... does not necessarily indicate racial discrimination." See *Springer v. Convergys Customer Mgmt. Group Inc.*, 509 F.3d 1344, 1350 (11th Cir.2007) (per curiam). Thus, by itself, REI's failure to post the position does not allow Nance to prove the second element of the prima facie case. Furthermore, Tsai, Wilson, and Pierre attested, without dispute from Nance, that Nance never inquired about any promotions, so they did not realize that he was interested in the position at issue. Therefore, because Nance fails to set forth a prima facie case of discrimination, the district court properly granted summary judgment to REI.

II. Exclusion of the Witnesses' Testimonies

Nance argues that the district court erred in excluding the declarations of his witnesses in support of his response to REI's motion for summary judgment. He argues that he disclosed these witnesses and their expected testimonies during his deposition in a related case, and that such deposition took place before initial disclosures were due in the present case. He argues that REI would not have been prejudiced if the witnesses' testimonies were admitted. He further argues that the witnesses' testimonies were relevant to con-

firm that: (1) REI had a discriminatory policy against non-Asians; (2) REI provided a false explanation for its policy; and (3) no reasonable employer would have hired Park instead of Nance for the management position.

We review a district court's decision regarding a motion to strike evidence for abuse of discretion. *Benson*, 113 F.3d at 1208 (citation omitted). Federal Rule of Civil Procedure 26(a)(1)(A)(i) states that, aside from exceptions that are inapplicable to the present case:

a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information-along with the subjects of that information-that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment[.]

Rule 37(c) provides the consequences for a party's failure to disclose, pursuant to the requirements of Rule 26. "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed.R.Civ.P. 37(c)(1). When determining "whether the exclusion of a witness was an abuse of discretion, an appellate court should consider the explanation for the failure to disclose the witness, the importance of the testimony, and the prejudice to the opposing party." *Fabrica Italiana Lavorazione Materie Organiche, S.A.S. v. Kaiser Aluminum & Chem. Corp.*, 684 F.2d 776, 780 (11th Cir.1982) (citation omitted).

**3 [2] Here, Nance contends that he provided the names of his witnesses during his deposition with REI that took place on January 22, 2007. However, Nance acknowledges that the deposition was for another REI discrimination case, and he does not dispute that REI's counsel in the present case was not present for the deposition*923 in the related case. Thus, although Nance may have disclosed the names of witnesses for the other case, he failed to do so for the present case. He argues that, "[e]arly in the litigation," he provided "a detailed statement of the information that the wit-

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nesses possessed or the information that [he] believed the witnesses possessed.” However, he cites to the same January 22, 2007 deposition in support of his argument, which he attached to his opposition of REI’s motion for sanctions, which was filed *after* the district court entered summary judgment in the present case.

Moreover, Nance fails to provide any argument that his lack of disclosure was substantially justified. Instead, he argues that REI was not prejudiced because his witnesses were either current or former REI employees “with whom [REI] was familiar.” Because Nance did not disclose these witnesses, REI did not have the opportunity to depose them and conduct thorough discovery. REI would be further prejudiced because Nance relied upon these witnesses to support the crux of his arguments that: (1) REI had “a policy of discrimination against non-Asians;” (2) REI provided a false explanation for its policy; and (3) “no reasonable employer would have selected Park over Nance for the management position at issue.” Thus, Nance does not show that his failure to disclose witnesses was substantially justified or harmless. See Fed.R.Civ.P. 37(c)(1). Therefore, the district court did not abuse its discretion when it prohibited Nance from admitting the testimony of his undisclosed witnesses.

III. Motion to Supplement the Pleadings

Nance argues that the district court abused its discretion in denying his motion to supplement the pleadings to add a retaliation claim based on Nance’s termination during the litigation because the retaliation claim would require extensive discovery and would be tantamount to starting a new case. He argues that the district court should have granted his motion because it knew that: (1) in another case, REI admitted to having a policy that preferred Asian employers; (2) he was fired “under highly suspicious circumstances ... including the timing of the termination near the end of the discovery period;” (3) regarding one of Nance’s witnesses who had an exemplary record, REI skipped three steps of discipline and instead, gave a final written warning to his witness; and (4) a federal investigator was concerned that REI was acting in retaliation.

We review a plaintiff’s motion to amend his complaint for abuse of discretion. Hinson v. Clinch County, Ga. Bd. of Educ., 231 F.3d 821, 826 (11th Cir.2000). Federal Rule of Civil Procedure 15(d) provides, “On motion and reasonable notice, the court

may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” A district court shall freely give leave to amend “when justice so requires.” Laurie v. Ala. Court of Criminal Appeals, 256 F.3d 1266, 1274 (11th Cir.2001) (per curiam) (quotation marks omitted). “There must be a substantial reason to deny a motion to amend,” such as “undue delay, bad faith, dilatory motive on the part of the movant, ... undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment.” Id. (alteration in original) (internal citations and quotations omitted).

****4 [3]** Here, Nance sought to supplement his pleadings by alleging retaliation from his termination that occurred over seven months after the discrimination alleged in his complaint. Although he moved to amend his complaint only two weeks after REI terminated his employment, this was ***924** also two days before the end of the discovery period. The district court found that “[t]he discovery period proved almost entirely fruitless” for Nance because he failed to comply with the disclosure requirements of Rule 26(a). The district court also found that allowing Nance to amend his complaint would not support the purpose of Rule 15(d) because it “would have the effect of beginning this case anew on entirely different footing, and in effect form an entirely distinct action.”

The district court did not abuse its discretion in denying Nance’s motion to amend with a retaliation claim. Throughout the course of this case, Nance attempted to delay the proceedings. In addition to failing to comply with Rule 26(a)’s disclosure requirements, he filed motions to extend the discovery period and to extend the time to file a response to REI’s motion for summary judgment. When the court granted his motion to extend the discovery period, he failed to conduct any discovery. Allowing Nance to supplement his complaint would have been akin to starting a new action because his current employment discrimination claim was in summary judgment proceedings, and the discovery period was to end in two days. Moreover, the district court correctly noted that its denial of Nance’s motion would not cause him prejudice because he was not precluded from bringing a separate action based on the later conduct. See Manning v. City of Auburn, 953 F.2d 1355, 1360 (11th Cir.1992) (holding that res judicata does not bar those

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claims that arose after the original pleading is filed in
the earlier proceeding).

Upon review of the record and consideration of
the parties' briefs, we affirm.

AFFIRMED.

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