

No. 42431-2-II

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

ALEXIS S. SANTOS,
Appellant,

v.

THE WASHINGTON STATE
OFFICE OF THE INSURANCE COMMISSIONER,
and
THE STATE OF WASHINGTON,
Respondents.

ON APPEAL FROM
THURSTON COUNTY SUPERIOR COURT

APPELLANT'S REPLY BRIEF

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ARGUMENT IN REPLY

I. THE OIC CONSTRUES THE RECORD IN ITS FAVOR, IGNORING THE STANDARD OF REVIEW

The OIC's discussion of the record is suited for a jury argument. Given the procedural posture, however, the Court of Appeals does not sit as fact finder. Rather, "the court must construe all facts and inferences in favor of the nonmoving party." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). The OIC ignored this standard of review in its arguments about several facts, some of which are discussed below.

A. The OIC's brief contains several instances in which the OIC describes the facts in the light most favorable to it

1. *Organizational charts and Santos's recollection are evidence supporting a reasonable inference that Santos was demoted*

The OIC, citing the self-serving declaration of Watson, argues that "Santos was never demoted." (Resp'ts' Br. at 24 (citing CP 71.) But on organizational charts dated June 26 and August 17, 2001, Santos is listed on the same line of authority as the Chief Financial Analyst, two assistant deputy commissioners, the Chief Financial Analyst, the Chief Examiner for Market Conduct, and Pat McNaughton, a chief financial examiner. (CP 280-81.) These colleagues were Santos's "contemporaries or equals," he recalls. (CP 341 ¶ 8.) However, a few months after Santos started, "the organization structure was changed," said Santos, and he "was no longer

their contemporary or equal.” (CP 342 ¶ 9.) His recollection is corroborated by a third organizational chart, dated December 11, 2001. (CP 282.) Santos’s job title remains the same, but he is listed as a subordinate of McNaughton. (*Id.*)

This record, viewed as it must be in the light most favorable to Santos, supports a claim of discrimination. *See, e.g., Hampton v. Diago N. Am., Inc.*, 2008 WL 350630, at *9–11 (D. Conn. 2008) (denying the defendants’ motion for summary judgment on an age-discrimination claim and reasoning that evidence of demotion shown in organizational charts would be relevant to discrimination claim); *Dicks v. Information Technologists, Inc.*, 1996 WL 528890, at *2 (E.D. Pa. 1996) (denying summary judgment on discrimination claims where an organizational chart showed a change in hierarchy, and explaining that “on-the-job supervisory authority, the tools needed to perform one’s job, and opportunities for recognition within a professional community are hardly minutiae”). The OIC’s argument that Santos was not demoted belongs in front of the jury. *See, e.g., Barker v. Adv. Silicon Materials, LLC*, 131 Wn. App. 616, 624, 128 P.3d 633 (2006) (“[T]he trial court does not ... assess witness credibility.”).

2. *Santos made repeated requests for web-filtering software in 2004, not a mere pop-up blocker*

The OIC asserts that Santos asked the OIC for a mere “pop-up” filter in 2004, and that Santos had “said he needed the filter to prevent ‘pop-ups’ from interrupting his work.” (Resp’ts’ Br. at 2, 12 (citing CP 62).) The OIC’s brief also asserts, “He said he wanted it to prevent the ‘distraction’ of ‘pop-ups’ appearing on his screen.” (Resp’ts’ Br. at 20–21 (citing CP 62).) The record, however, belies the OIC’s assertions. In an email dated February 10, 2004 from Santos to McNaughton (the OIC’s chief financial examiner), Santos asked for permission to install “a filtering software for my laptop” because the OIC’s local area network (LAN) software “only works if I am connected to the LAN directly” and thus the laptop “has no filter” when the laptop is not plugged into the OIC’s local network. (CP 378.) Nowhere did Santos mention “pop ups.” (*See id.*) In response emails, the OIC’s IT manager referred to “internet filtering software,” not pop ups, and informed Santos that Watson denied the request. (CP 380–82.) The IT manager told Santos that “[i]f the problem is accidental browsing of offensive web sites, closing the offending site and not returning seems a reasonable approach.” (CP 382.) A follow-up email shows that Santos pressed again for filtering software. (CP 119.) However, the OIC IT manager emailed a denial of this request as well. (CP 119.)

Thus, only after litigation began did the OIC take the position that Santos asked for software only to deal with “pop ups.”

3. *The OIC has no basis in the record to argue that Santos and his psychiatrist concealed the nature of his disability*

The OIC attributes bad faith to Santos and his psychiatrist, Dr. Alan Javel, arguing that they “concealed the nature of Santos’ disability because they knew that if OIC discovered that Santos made indiscriminate use of the computer and the network for his own sexual gratification, he would be terminated.” (Resp’ts’ Br. at 22.) But that argument is speculative and improperly argues inferences in favor of the OIC instead of Santos. In fact, on April 7, 2006, the OIC HR manager sent Santos a letter acknowledging “we failed to give you a specific date” to respond to an earlier OIC request for information about his disability. (CP 143.) On that same day, Santos faxed a form entitled “Employee Reasonable Accommodation and Medical Release Form,” authorizing the OIC to confer with Dr. Javel about Santos’s disability and even to obtain “all medical records.” (CP 418.) Later, Dr. Javel exchanged voicemails with the OIC HR manager, and Dr. Javel says he “provided Ms. Burdette with information responsive to her requests and which concerned Mr. Santos’ medical conditions.” (CP 37 ¶ 10, 436 ¶ 26.) This is hardly a record upon which to hold as a matter of law that Santos “concealed” information.

B. Most importantly, the OIC Deputy Commissioner’s self-serving statements about his motives do not resolve the factual question of intent as a matter of law

In attempting to rebut the circumstantial evidence that Watson fired Santos in retaliation for his protected activities, the OIC offers only Watson’s self-serving declaration and the conclusory assertion that Santos’s EEOC complaints “were not a factor.” (Resp’ts’ Br. at 27; *see also id.* at 28 (citing CP 66).) Similarly, to argue that it did not act with a discriminatory motive on the basis of Santos’s disability, the OIC’s response brief says simply, “Watson fired Santos for ... egregious conduct.” (*Id.* at 25.) The evidence for this assertion is only Watson’s termination letter to Santos. (*Id.* (citing CP 211–14).) Watson’s self-serving assertions do not resolve the issue of the OIC’s intent when it terminated Santos.

By the logic of the OIC’s factual argument, an employer’s own statements determine whether the employer acted with a discriminatory motive. However, “‘employers infrequently announce their bad motives orally or in writing.’” *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179, 23 P.3d 440 (2001) (quoting *deLisle v. FMC Corp.*, 57 Wn. App. 79, 83, 786 P.2d 839 (1990)). This common-sense observation from *Hill* implicates two important principles when the employer’s motive is at issue. First, “[t]he determination of a person’s state of mind ... is ordinarily for the trier of

fact and not for the court at summary judgment.” *Turngren v. King County*, 33 Wn. App. 78, 94, 649 P.2d 153 (1982) (citation omitted)). Second, “where material facts are particularly within the knowledge of the moving party, courts have been reluctant to grant summary judgment.” *Riley v. Andres*, 107 Wn. App. 391, 395, 27 P.3d 618 (2001) (citation omitted). Employers are almost always the only people who have direct knowledge of their own motives, but they always say in their declarations that they acted with a pure heart. When “the material facts are based solely upon the moving party’s affidavits, credibility is especially important,” and therefore “the nonmoving party should have the opportunity to expose the moving party’s demeanor while testifying at trial.” *Riley*, 107 Wn. App. at 398 (citation omitted). These principles explain why “summary judgment should rarely be granted in employment discrimination cases.” *Johnson v. Dep’t of Soc. & Health Servs.*, 80 Wn. App. 212, 226, 907 P.2d 1223 (1996). The OIC therefore ignored the correct standard of review when it cited only Watson’s own statements without addressing the countervailing circumstantial evidence.

II. DISCRIMINATION AND RETALIATION WERE A SUBSTANTIAL FACTOR, A JURY MAY FIND

All the employee must do when opposing a motion for summary judgment “is to show by argument from the evidence that a reasonable trier of

fact *could* (but not necessarily *would*) draw the necessary inference” of the employer’s discriminatory intent. *deLisle*, 57 Wn. App. at 83 (emphasis added). To meet this burden, direct evidence of discriminatory motive is not necessary; an inference from the circumstantial evidence may suffice. *E.g., Hill*, 144 Wn.2d at 179. The OIC implies that “pretext” is a separate element that an employee must prove when using circumstantial evidence to show discriminatory or retaliatory motive. That is incorrect, and this Court should clarify the proper standard.

A. The less-burdensome “substantial factor” standard of causation applies to claims under the WLAD

Under RCW 40.60.180(2), it is unlawful for an employer to discharge an employee “*because of age, sex, ... race, creed, color, national origin, ... or the presence of any sensory, mental, or physical disability.*” (Emphasis added.) Similarly, under the anti-retaliation statute, RCW 49.60.210(1), it is unlawful for an employer to terminate an employee “*because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge.*” (Emphasis added.) In light of the word “because,” the question is what the standard is for showing causation under the Washington Law Against Discrimination (WLAD), ch. 49.60 RCW.

As to RCW 40.60.210(1), the Supreme Court held in the seminal case *Allison v. Housing Authority of City of Seattle*, 118 Wn.2d 79, 821 P.2d 34

(1991) that an employee must “prove that retaliation was a substantial factor behind the decision.” *Id.* at 95. The Court concluded that “a rigorous ‘but for’ causation requirement is too harsh a burden to place upon a plaintiff in a retaliation case,” especially “because enforcement of this State’s antidiscrimination laws depends in large measure on employees’ willingness to come forth and file charges or testify in discrimination cases.” *Id.* at 86. Further, the Court recognized that in “situations involving discriminatory or retaliatory discharge ... both legitimate and illegitimate motives often lurk behind those decisions.” *Id.* at 94. Because the “substantial factor” test is suited for such “multiple causation” cases, the Court decided that it was an ideal standard “for ameliorating the harshness of a ‘but for’ standard of causation.” *Id.*

Reaching a similar conclusion in the landmark decision *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995), the Supreme Court held that “substantial factor” is the correct causation standard under RCW 49.60.180(2). Before *Mackay*, “the ‘determining factor’ standard ha[d] been employed by Washington’s Court of Appeals in a number of cases.” *Mackay*, 127 Wn.2d at 306 (collecting cases). That standard, which the Court described as “a high burden of proof” and “very difficult for an employee to meet,” meant that the employee needed

to show that the termination would not have occurred “but for” the employer’s unlawful motive. *Id.* at 309. To prevent Washington’s anti-discrimination laws from becoming “mere rhetoric,” the Court adopted the same “substantial factor” standard as in *Allison*, because “a discrimination action brought pursuant to RCW 49.60.180(2) is also a multiple causation case.” *Id.* at 310.

The “substantial factor” test is thus designed to account for “mixed motive” cases. Indeed, to satisfy the test, the unlawful motive does not have to be the “sole or principal reason” for the firing.” *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 621, 60 P.3d 106 (2002) (citation omitted). “[A] decision motivated even in part by the disability is tainted and entitles a jury to find that an employer violated antidiscrimination laws.” *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1094 (9th Cir. 2007) (interpreting the WLAD). Washington’s juries are expressly instructed that this test is not the same as “but for” causation. *See* 6A Washington Practice: Washington Pattern Jury Instructions—Civil WPI 330.01.01, 330.05.

B. Federal claims of employment discrimination generally require proof of “but for” causation

The standards of causation under federal employment-discrimination cases are very different. Under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.*,

there are no “mixed motive” cases. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 170, 129 S. Ct. 2343 (2009). The ADEA contains similar language to RCW 49.60.180(2), prohibiting adverse employment decisions “because of such individual’s age.” 29 U.S.C. § 623(a)(1). But in *Gross*, unlike in *Allison*, the U.S. Supreme Court held that an employee must show age was a “‘but-for’ cause of the employer’s adverse decision”—a standard that would mean that age was “determinative.” *Gross*, 557 U.S. at 176 (quotation omitted). Under Title VII of the Civil Rights Act of 1964, “mixed motive” claims for race or sex discrimination are allowed, but they are fairly new, originating in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989), which was superseded by 1991 amendments to the Civil Rights Act. 42 U.S.C. § 2000e-2(m). And mixed-motive claims under Title VII are much more limited in remedial power than the WLAD. Damages awards are available only for single-motive cases; where mixed motives are shown, the only available remedies are injunctive relief and attorney fees. *See* 42 U.S.C. § 2000e-5(g)(2)(B).

C. Because federal employment-discrimination claims generally require “but for” causation, the burden-shifting approach from federal cases does not always dispose of WLAD cases

In federal employment-discrimination cases, therefore, the burden-shifting framework for evaluating circumstantial evidence developed under

the single-motive standard for causation. The framework was created in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and modified in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253–56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). *McDonnell-Douglas* and *Burdine* preceded the advent of mixed-motive cases under Title VII. And *Reeves* arose under the ADEA, which, as discussed above, does not allow for mixed-motive claims. So the substantive law underpinning the burden-shifting framework does not necessarily apply in mixed-motive cases.

In fact, Washington appellate courts have recognized before that an employee may proceed in one of two ways when offering circumstantial evidence to show there is an issue for trial on his discrimination claims: first, through the burden-shifting regime of *McDonnell-Douglas/Burdine/Reeves* as adopted in *Hill*, 144 Wn.2d at 185; second, by viewing “pretext” through the simple lens of the “substantial factor” test, whereby “to survive summary judgment [the employee] need show only a reasonable judge or jury could find his disability was a substantial motivating factor for the employer’s adverse actions.” *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 112 P.3d 522 (2005); accord *Riehl v. Food-*

maker, Inc., 152 Wn.2d 138, 149, 94 P.3d 930 (2004). As the plurality recognized in the first mixed-motive case at the U.S. Supreme Court, *Hopkins*, ordinary burden-shifting/pretext analysis might not make sense in mixed-motive cases because “pretext” means “showing that the employer’s proffered explanation is unworthy of credence,” *Burdine*, 450 U.S. at 256, whereas mixed-motive cases acknowledge a legitimate reason might genuinely accompany the illegitimate reasons. *See Hopkins*, 490 U.S. at 246-47. The proper mode of analysis was stated in *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 73, 821 P.2d 18 (1991), the workers’-comp case that influenced *Allison, Mackay*, and other cases interpreting the WLAD: “the plaintiff may respond to the employer’s articulated reason either by showing that the reason is pretextual, or by showing that although the employer’s stated reason is legitimate, the worker’s pursuit of or intent to pursue workers’ compensation benefits was nevertheless a substantial factor motivating the employer to discharge the worker.”

Federal courts are beginning to reach the same conclusion. Originally, federal courts believed that mixed-motive claims were available only when the plaintiff had “direct” evidence of unlawful motive, as opposed to the “circumstantial” evidence that is filtered through the *McDonnell-Douglas/Burdine* burden-shifting framework. However, the U.S. Supreme

Court held in *Desert Palace, Inc. v. Costa*, 39 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003) that circumstantial evidence alone could suffice. *Id.* at 92. With that holding in mind, federal courts have begun to consider whether the “pretext” analysis of the burden-shifting framework is appropriate for mixed-motive cases. In *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008), the Sixth Circuit held that “that the *McDonnell Douglas/Burdine* burden-shifting framework does not apply to the summary judgment analysis of Title VII mixed-motive claims.” Instead, the question is whether an unlawful motive was “a motivating factor.” *Id.*

D. There is sufficient circumstantial evidence for a jury to find an unlawful motive was a substantial factor in Santos’s discharge

Thus, the question is not whether, on summary judgment, reasonable minds may differ on whether the OIC’s proffered reason is worthy of credence. The question is whether the circumstantial evidence creates a genuine issue of fact whether, standing alongside the OIC’s legitimate reasons, Santos’s race, his disability, or retaliation against him were even a partial motivator for the OIC’s discharge of him. As set out in the opening brief, the answer is yes. For example:

- *Comparator evidence.* (See Appellant’s Opening Br. at 22, 36–38, 40, 46.) Evidence that other employees were not dis-

charged despite acts “of comparable seriousness ... is adequate to plead an inferential case that the employer’s reliance on his discharged employee’s misconduct as grounds for terminating him was merely a pretext.” *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976), *cited with approval in Johnson*, 80 Wn. App. at 228. Before Santos, the OIC had suspended or fined employees for similar amounts of internet use, not fired them. (See Appellant’s Opening Br. at 22 (citing CP 280, 318–29). The jury resolves whether other employees are similarly situated enough to be comparators. See *Johnson*, 80 Wn. App. at 230.

- *Suspicious circumstances:* (See Appellant’s Opening Br. at 31, 38–39.) Just three days after Santos spoke with the OIC about the internet filter, telling them, “I explained to the OIC that I needed this filter to minimize distractions and lower my anxiety levels,” the OIC *turned off* the local-network internet filter. (CP 46, 359 ¶ 59.) A jury could infer that the OIC thought it could find an excuse to fire him.
- *Watson’s subjective standards:* (See Appellant’s Opening Br. at 37–38.) “Where termination decisions rely on subjective evaluations, careful analysis of possible impermissible motivations is warranted because such evaluations are particularly susceptible of abuse and more likely to mask pretext.” *Weldon v. Kraft, Inc.*, 896 F.2d 793, 798 (3d Cir. 1990). At his deposition, Watson could not cite any objective standard governing his disciplinary actions under the OIC’s personal-use policies. (CP 609–10.)
- *Proximity in time (for retaliation claim).* (See Appellant’s Opening Br. at 46–47.) “Proximity in time between the discharge and the protected activity, as well as satisfactory work performance and evaluations prior to the discharge, are both factors that suggest retaliatory motivation.” *Estevez*, 129 Wn. App. at 799. Santos’s discharge was subsequent to, among other protected activities, a settlement after his first EEOC complaint, and Watson sent his pre-disciplinary letter *the day after* receiv-

ing Santos's second EEOC complaint. (CP 68 ¶ 10, 196-97, 202-29.)

- *Positive job evaluations (for retaliation claim).* “[E]vidence of satisfactory work performance and supervisory evaluations suggests an improper motive.” *Kahn v. Salerno*, 90 Wn. App. 110, 130-31, 951 P.2d 321 (1998). All of Santos's evaluations were very positive. (CP 284-89.)
- *Demotion, failure to promote despite his qualifications, and statement and treatment regarding white employees (for race-discrimination claim).* (See Opening Br. at 7-13, 9-41.)

What would the result have been if it had been Watson's white male golfing buddy who had no disability and no history of complaining about discrimination at the OIC? There is sufficient evidence for a jury to weigh whether an unlawful motive was a substantial factor in Santos's firing.

III. THE OIC FAILS TO SHOW THERE IS NO GENUINE ISSUE OF MATERIAL FACT REGARDING THE REASONABLE-ACCOMMODATION CLAIM

Only by ignoring the proper legal standards can the OIC argue that there is no genuine issue for trial regarding Santos's claim for reasonable accommodation.

A. There is a question for trial on the element of “disability”

Without acknowledging any of the uncontested medical evidence in the record, the OIC argues that Santos was not disabled under the WLAD. However, “the issue of whether a person is handicapped [disabled] under RCW Ch. 49.60 is a question of fact for the jury.” *Phillips v. City of Seattle*,

111 Wn.2d 903, 910, 766 P.2d 1099 (1989). The jury could find Santos was disabled even under the higher standard for “disability” from *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006), which interpreted “impairment” to mean a condition substantially limiting a major life activity such as sleeping, concentrating, and thinking.¹ *Id.* at 229. Dr. Javel says he diagnosed Santos as suffering from major depressive disorder, “overwhelming anxiety,” “panic attacks,” and impulse-control disorder, from 2001 through 2008. (CP 431 ¶¶ 3–5.) Declarations from Santos, Dr. Javel, Dr. Olsen, and Mr. Williams established that his mental disorders caused, among other things, serious sleep irregularity and problems concentrating. (CP 430–59, 466–91, 492–504.)

Under the WLAD, “[t]he question of disability turns on the *effect* an impairment has on a person’s life, not the diagnosis of the impairment.” *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 481, 205 P.3d 145 (2009) (citations omitted). For instance, “[e]xtreme fatigue as the result of a physiological condition qualifies as a physical impairment that substantially limits

¹The *McClarty* definition of “disability” was amended by statute in RCW 49.60.040(25), which “applies to all causes of action occurring before July 6, 2006, and to all causes of action occurring on or after the effective date of this act.” Laws of 2007, ch. 317, § 3; see also *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 198 P.3d 1021, 1025 (2009) (upholding the statutory amendment against a constitutional challenge). Although there might be some question about which definition applies to this case, Santos argues that a jury could find he was disabled even under the higher *McClarty* standard. (See Appellant’s Opening Br. at 25 n.1.)

a major life activity.” *Id.* (citation omitted). Thus, the OIC commits legal error when it disassociates the effect of Santos’s disability—his problems concentrating, his online compulsion, the adult nature of his online activity—and then claims the effect is not entitled to protection. Dr. Olsen connected Santos’s internet activity to his mental illness, explaining that it “served several psychological functions,” which included boosting Santos’s dopaminergic system and temporarily reversing his feelings of defeat and isolation. (CP 473–74 ¶¶ 15–17.) And, in the opinion of Santos’s mental-health practitioners, any sexual component to his online activity stems from the childhood sexual abuse that underlies his mental disability. (CP 494 ¶¶ 12– 14, 432 ¶ 7.) Thus, both Santos’s condition and its effects may be found a “disability” under the WLAD.

B. There is a question for trial regarding Santos’s qualifications

The OIC is correct that a disabled person seeking an accommodation must be able to perform the essential functions of the job, but the test is “with or without reasonable accommodation.” *Easley v. Sea-Land Serv., Inc.*, 99 Wn. App. 459, 994 P.2d 271 (2000). The OIC suggests Santos’s qualifications should be gauged without considering the reasonable accommodation. This makes no sense. By definition, an accommodation is necessary to allow a disabled person to perform job tasks that he or she

could not otherwise do. If the reasonable accommodation were not considered, disabled persons would never be qualified for the jobs where they need an accommodation. Here, before Santos made his first request for an internet filter and went on leave, his job performance evaluations were all very positive. (CP 288-89.) Dr. Javel suggested that he could perform his job without restrictions as long as an internet filter was installed. (CP 166.) Indeed, by the very fact of having its own internet filter on its local network, the OIC acknowledges that filters enable employees to do their jobs.

C. On notice of Santos’s disability, the OIC did the opposite of nothing—it disabled the filter

Although an employee must give notice of his disability, as Santos did here, the employee does not bear the burden of informing the employer of “the full nature and extent of the disability.” *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408, 899 P.2d 1265 (1995) (citation omitted). Rather, it is enough for the employer to know or have reason to know that the employee suffers from a disability. *See Martini v. Boeing Co.*, 88 Wn. App. 442, 458, 945 P.2d 248 (1997). Once the employer has such actual or constructive notice, it is the *employer* who must “ascertain the nature and extent of [the employee’s] disability.” *Goodman*, 127 Wn.2d at 408 (upholding a jury instruction so stating).

Only by ignoring these features of reasonable-accommodation law can the OIC shift the blame to Santos and claim that it satisfied its affirmative duty. When the OIC HR manager wrote to Dr. Javel, she did not inquire about the nature of Santos’s medical condition, but rather asked about the effects of his medication and whether he can travel and also work face-to-face with peers in the office. (CP 35 ¶ 5, 154–57.) Santos had asked for an internet filter in 2004, and again when he returned from his leave of absence, even telling the OIC that “that I needed this filter to minimize distractions and lower my anxiety levels.” (CP 359 ¶ 59.) After a months-long leave of absence, during which Santos wrote to the OIC, “[m]y disability is mental health” and informed the OIC “when I am well enough to go back to work” that a discussion about reasonable accommodation would be appropriate (CP 404), all Santos asked for was an internet filter. Given the comparative triviality of the filter and the obvious magnitude of his mental-health problems, only by putting its head in the sand could the OIC believe that problems with online activity were not connected with Santos’s disability. Santos had a serious problem with online activity. He had no duty to say more than he did; if the OIC felt it needed more information, it was its duty to ask. *See Goodman*, 127 Wn.2d at 408. But instead, the OIC *disabled*

its local filter, and it was on that date that the OIC first had a problem with Santos's online activity disrupting his work.

IV. EVIDENCE OF THE CONTENT OF THE INTERNET USE SHOULD BE EXCLUDED

The OIC appears to advance a novel and unprecedented theory of appellate procedure: namely, because RAP 9.12 requires that the appellate record on review of a summary-judgment order include the "evidence ... called to the attention of the trial court," the trial court's decision to consider that evidence when ruling on the summary-judgment motion is an unreviewable decision, even if such consideration conflicts with the Evidence Rules. (*See* Resp'ts' Br. at 31 ("Because the evidence was called to the attention of the trial court it is part of the record and this court considers it." (citing RAP 9.12)).) This novel theory must be rejected, and this Court should then rule that the evidence of the content of Santos's internet usage must be excluded from consideration under ER 403.

A. RAP 9.12 does not preclude appellate review of the trial court's ruling on a motion to strike in connection with a motion for summary judgment

RAP 9.12 provides that "[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." "The purpose of this limitation is to effectuate the rule that the appellate court engages in

the same inquiry as the trial court.” *Wash. Fed’n of State Employees v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993). While RAP 9.12 facilitates the same inquiry as the trial court, it does not mean, as the OIC suggests, that an appellate court must reach the same decisions as the trial court. In other words, while the evidence remains formally in the record, the appellate court may reach a different ruling on whether the evidence should be accepted as admissible for purposes of CR 56(e). See *Mithoug v. Apollo Radio of Spokane*, 128 Wn.2d 460, 463, 909 P.2d 291 (1996) (discussing RAP 9.12 and explaining that “there are instances when the trial court should reject evidence brought to its attention”).

The OIC’s argument appears to conflate a motion to strike in the evidentiary-admissibility sense with a motion to strike in the sense of physically removing a document from the record. The correct way to conceive of and review a motion to strike was explained in *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998). In *Folsom*, on a motion for summary judgment, the trial court had “struck portions of an expert witness’s affidavit” because “parts were legal conclusions, mixed statements of law and fact, invasion of the province of the jury, or opinions lacking proper foundation.” *Folsom*, 135 Wn.2d at 662–63. On review, the Supreme Court explained that it “engages in the same inquiry as the trial court when review-

ing an order for summary judgment,” and thus the Court concluded it must “examine *all* the evidence presented to the trial court, including evidence that had been redacted.” *Id.* at 663. However, even though it admonished the parties that it would thus review the complete record, the Court evaluated the record to make its own independent decision about whether evidence should be excluded from consideration. Upon doing so, the Court “affirm[ed] the decision to exclude portions of the expert testimony.” *Id.* at 664. In sum, then, a reviewing court examines the same record as the trial court, but the reviewing court makes an independent decision whether evidence in the record should be excluded as inadmissible under CR 56(e). If the OIC were correct that RAP 9.12 required the reviewing court to accept as admissible the same evidence as did the trial court, then the trial court’s evidentiary rulings in conjunction with summary-judgment motions would be insulated from review.

A motion in limine or to strike evidence is a common feature of summary-judgment practice, and the appellate courts have never held that it precludes appellate review of the evidentiary issues raised. In fact, the Court of Appeals has indicated a party’s failure to file a motion to strike, or some other objection, may constitute a waiver of any evidentiary challenge to the summary-judgment record. *See, e.g., Bonneville v. Pierce County*, 148

Wn. App. 500, 509, 202 P.3d 309 (2008). Only where a party has failed to assign error to a trial court's denial of a motion to strike has an appellate court chosen not to review the trial court's ruling on the motion. *See, e.g., Boguch v. Landover Corp.*, 153 Wn. App. 595, 608 n.4, 224 P.3d 795 (2009).

Here, after the OIC filed its motion for summary judgment, Santos filed a *Motion to Strike and Motion in Limine*, arguing that "any evidence regarding the content [of] Mr. Santos' personal internet, computer, and/or email use should be stricken from the record on summary judgment and excluded from the trial in this matter because it has no probative value and would severely prejudice Mr. Santos." (CP 546.) The trial court denied the motion, and Santos's fifth assignment of error was that "[t]he trial court erred in denying, by its order dated April 1, 2011, Santos's motion in limine and to strike." (Appellant's Opening Br. at 5.) Plainly, the evidentiary issue raised is presented for this Court's review.

B. Under ER 403, the evidence of the content should be excluded

Although a trial court's evidentiary rulings are usually reviewed under an abuse-of-discretion standard, "[t]he de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion."² *Folsom*, 135 Wn.2d at 663.

²Santos is aware of three cases stating an abuse-of-discretion standard of review.

Santos's motion in limine and to strike should have been granted. The OIC asserts on appeal that it "presented evidence of the nature of Santos misconduct because it is the most relevant and probative evidence of the reason for the discharge." (Resp'ts' Br. at 30.) But Santos's supervisors acknowledged a different view at their depositions. At his deposition, Watson said "no" when asked whether he distinguished between Santos using his computer to buy a house as opposed to engage in sexually explicit activity. (CP 534:21-535:11.) Watson further acknowledged that "the deciding factor" when he administered discipline "was the amount of activity," not the content. (CP 535:8-535:12.) Similarly, Odiorne admitted at his deposition

However, these cases fail to cite *Folsom* and instead rely on decisions pre-dating *Folsom*. See *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004) ("Although a 'ruling on a motion to strike is discretionary with the trial court,' a 'court may not consider inadmissible evidence when ruling on a motion for summary judgment.'" (quoting *King County Fire Prot. Dists. No. 16, No. 36 & No. 40 v. Hous. Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994)); *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 416, 58 P.3d 292 (2002) ("We review a trial court's evidentiary rulings, including those made in the course of a summary judgment proceeding, for an abuse of discretion." (citing *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 372, 901 P.2d 1079 (1995)); *Milligan v. Thompson*, 110 Wn. App. 628, 634, 42 P.3d 418 (2002) ("We review evidentiary decisions, including those related to summary judgment, for abuse of discretion." (citing *Sunbreaker*, 79 Wn. App. 372)). By contrast, the de novo standard of review is stated in cases that post-date *Folsom* and that indicate awareness of *Folsom*. See, e.g., *Rice v. Offshore Systems, Inc.*, 167 Wn. App. 77, 85, 272 P.3d 865, 870 (2012) ("We review de novo a trial court ruling on a motion to strike evidence made in conjunction with a summary judgment motion." (citing *Folsom*, 135 Wn.2d at 663)); *Momah v. Bharti*, 144 Wn. App. 731, 749, 182 P.3d 455 (2008) (stating that "[t]he de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion'" (quoting *Folsom*, 135 Wn.2d at 663)); *Southwick v. Seattle Police Officer John Doe #s 1-5*, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008) ("[W]hen a motion to strike is made in conjunction with a motion for summary judgment, we review de novo." (citing *Folsom*, 135 Wn.2d at 663)).

tion that he knew of no OIC policy that ranked non-business web sites or internet content as more or less prohibited than others. (CP 529:21-:24.) Given these admissions, the *amount* of Santos's activity is what mattered for Watson's disciplinary decision, not the *content*.

“‘[U]nfair prejudice’ is that which is more likely to arouse an emotional response than a rational decision by the jury.” *State v. Gould*, 58 Wn. App. 175, 183, 791 P.2d 569 (1990). The OIC presents evidence of the content for its shock value and to elicit an emotional response, spending most of its response brief's introduction on the adult content, describing his activity as “a personal prurient pursuit,” and claiming that the OIC fired Santos because he “misused his state-owned computer for his own sexual gratification.” (Resp'ts' Br. at 1, 16, 23.) A rational view of the evidence, however, must be based on the *amount* of Santos's activity, in light of Watson's admission that the content was not a deciding factor. Santos's motion to strike should have been granted under ER 403.

FOR THE FORGOING REASONS, the judgment of the trial court should be reversed and the case remanded for trial.

DATED this 16th Day of August 2012.


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No. 42431-2-II

STATE OF WASHINGTON

IN THE COURT OF APPEALS, ~~DIVISION II~~
OF THE STATE OF WASHINGTON ~~DEPUTY~~

ALEXIS S. SANTOS, a married
individual,

Appellant,

v.

THE WASHINGTON STATE
OFFICE OF THE INSURANCE
COMMISSIONER, a government
entity, and THE STATE OF
WASHINGTON, a government
entity,

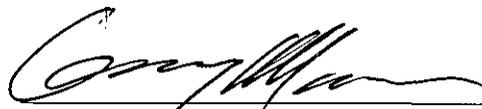
Respondents.

CERTIFICATE OF FILING
AND SERVICE BY MAIL

Today at the U.S. Post Office, I posted for mailing the original and a copy of the *Appellant's Reply Brief* dated August 16, 2012, which reflects the corrections identified in the Praecipe filed on August 6, 2012, to the Clerk of Court, Court of Appeals Division II, 950 Broadway, Suite 300, Tacoma, WA 98402. I also posted for mailing a copy to Mark Jobson, counsel for the respondents, at his mailing address, Torts Division, Washington State Attorney General's Office, P.O. Box. 40126, Olympia WA 98504-0126.

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

SIGNED this 17th day of August 2012.



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