

No. 44326-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PETER and RACHAEL ATKINSON, Appellants,

v.

LES SCHWAB TIRE CENTERS OF WASHINGTON, INC., a
Washington corporation, Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

In this employment discrimination lawsuit, Appellants Peter and Rachael Atkinson (hereinafter “Mr. Atkinson”¹) challenge three of the trial court’s decisions: (i) summarily dismissing Mr. Atkinson’s claims; (ii) denying Mr. Atkinson’s second motion for sanctions; and (iii) striking inadmissible statements from three supporting declarations without identifying the specific statements.

In seeking reversal of these decisions, Mr. Atkinson misrepresents the record, omits critical material facts and harps on immaterial ones, relies on conjecture and conclusory statements rather than specific, admissible material facts, and seeks to vilify Les Schwab and its counsel in a transparent effort to distract attention from the substance of his claims. This approach failed at the trial court level and is equally unavailing on appeal. Les Schwab respectfully submits that this Court should affirm the trial court’s decisions.

¹ No claim has ever been brought on behalf of Mrs. Atkinson. In addition, the actual plaintiff is the bankruptcy trustee and not Mr. Atkinson. (CP 481 at 9-21).

**II. RESTATEMENT OF ISSUES PERTAINING TO
ASSIGNMENTS OF ERROR**

1. Did the trial court properly grant summary judgment as to Mr. Atkinson's reasonable accommodation and discrimination claims when he presents two irreconcilable versions of himself and his migraine condition? Yes. (Assignment of Error No. 1)

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(Assignment of Error No. 1)

5. Did Mr. Atkinson abandon his hostile work environment claim when he failed to address it in opposing summary judgment? Yes.

(Assignment of Error No. 1)

6. Does Mr. Atkinson's hostile work environment claim fail as a matter of law in any event given the lack of record support for it? Yes.

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7. Did the trial court properly deny Mr. Atkinson's second motion for sanctions when (i) Mr. Atkinson's questions were irrelevant to his claims on summary judgment and were asked in an effort to elicit "I don't know" answers; (ii) Les Schwab thoroughly prepared its speaking agent to answer questions relating to designated topics; and (iii) Les Schwab supplemented its answers to provide requested information even though irrelevant on summary judgment? Yes. (Assignment of Error No. 2)

8. Did the trial court properly strike “inadmissible statements” from three declarations even though it did not specify which statements were stricken? Yes. (Assignment of Error No. 3)

III. STATEMENT OF THE CASE

A. Pre-2006

Mr. Atkinson is in his mid-30s and has had a chronic migraine condition since he was a child. (CP 52 at 24-25; 57 at 6-8; 61 at 11-19).

In 1993, while in high school, Mr. Atkinson began working part-time at a Les Schwab store in Aberdeen, Washington. (CP 53 at 25; 54 at 1-9). His stepfather was the store manager. (CP 52 at 16-19; 55 at 9-13). In 1996, Mr. Atkinson transferred to the Longview, Washington store as a full-time Sales & Service employee doing tire work. (CP 54 at 22-25; 55 at 1-4, 18-24).

In January 2003, Rory Cox hired Mr. Atkinson as the second assistant manager at the Chehalis, Washington store. (CP 55 at 18-25; 56 at 1-23). Mr. Cox was the manager of the Chehalis store and Aaron Moore was the first assistant manager. (CP 56 at 18-19 and 24-25). They both knew about Mr. Atkinson’s migraine condition before he was hired. (CP 59 at 7-25; 60 at 1-20).

As reflected in his performance reviews, Mr. Atkinson had strengths but also certain performance issues as the second assistant

manager. (CP 189 at ¶ 2; 195; 197). For example, he struggled with commitment to his work, sometimes lacked proper follow through, had communication issues, and did not always have the crew's respect. (CP 195; 197).

B. 2006

1. Mr. Atkinson is Promoted to First Assistant Manager

In April 2006, Mr. Moore left the store and Mr. Cox promoted Mr. Atkinson to first assistant manager. (CP 58 at 13-23). Mike Palin became the second assistant. (CP 58 at 24-25; CP 59 at 1-3). Mr. Cox hoped and expected Mr. Atkinson would continue to grow as an assistant manager and meet the increased challenges and expectations of being the first rather than the second assistant manager. (CP 189-90 at ¶ 3).

2. The Chehalis Store and the First Assistant Manager Position

During the time Mr. Atkinson worked at the Chehalis store it was open Monday through Friday from 8:00 a.m. to 6:00 p.m. and Saturdays from 8:00 a.m. to 5:00 p.m. but would often open early and close late to meet customer needs. Mr. Cox, Mr. Atkinson, and Mr. Palin would arrive at the store about an hour before it opened to do office work and prepare for customers and stayed an hour or more after the store closed to wrap up

the day's work. (CP 190 at ¶ 5). They regularly worked 70-80 hours per week. (CP 68 at 18-20; 190 at ¶ 5; 705 at 191:22-192:3; 731 at No. 29).

The store was extremely busy with thousands of retail customers each week as well as myriad commercial accounts and more than \$5 million in annual sales. To help handle this large volume of work, the store had about 28-30 non-exempt employees, including two Sales & Administrative employees handling calls and paperwork at the front counter, six Brake & Alignment technicians, and a crew of about 20 Sales & Service employees in the bays doing tire work and handling commercial accounts. (CP 190 at ¶ 6).

It was a fast-paced retail environment and the management team always needed to be available to ensure work was done safely and customers received the highest level of service. This meant being flexible in how they spent their time and adapting to constantly changing conditions. Mr. Atkinson and the rest of the management team could not always take a lunch break or other break during the day or would take one and be interrupted because they were needed back in the store. (CP 190-91 at ¶ 7).

Mr. Atkinson's daily job duties included supervising the hourly employees, overseeing daily operations, creating budgets, handling customer complaints and employee conflicts, supervising training and

safety, and assisting in service work. (CP 95 at 17-25; 96 at 1-4; 124 at 1-20; 137-38; 157; 190 at ¶ 4). Mr. Cox needed to have trust and confidence in Mr. Atkinson at all times and even more so when Mr. Cox was out of the store (e.g., for vacation, days off, meetings, etc.). (CP 190 at ¶ 4).

Although the hours were long and the work could be stressful, Mr. Atkinson was well compensated for his efforts. As first assistant manager, he received a salary, shared directly in the store's profits, and earned about \$115,000 annually in salary and bonus his last two full years of employment. (CP 112 at 19-25; 113 at 1-20). He took three full weeks of vacation each year and received a full benefits package and generous retirement contribution. (CP 104; 105 at 1-7). He liked living in the Chehalis area and never considered transferring to another store. (CP 95 at 10-16).

C. Mr. Atkinson's July 2006 Email

On July 10, 2006, a few months after Mr. Cox promoted him to first assistant, Mr. Atkinson emailed John Britton and Ray Compton (his managers at the Longview store who at that point were executives in Les Schwab's corporate office) asking for career advice after his migraines were "brought up [by Mr. Cox] as something that may not allow [him] to continue [his] goals of Les Schwab store management." (CP 86 at 3-9; 134). In response, Mr. Britton called Mr. Atkinson and assured him his

migraines would have no bearing on his future with Les Schwab. (CP 84 at 21-25; 85 at 1-9).

D. Mr. Atkinson Continues to Have Performance Issues as First Assistant Manager

During the next 18 months, Mr. Atkinson continued to have the same types of performance issues Mr. Cox saw when he was the second assistant manager. As first assistant manager, more was expected of Mr. Atkinson, and his performance deficiencies were thus more glaring and created more problems for the store than when he was a second assistant. (CP 191 at ¶ 9).

E. Mr. Atkinson Fails to Make the Manager's List

In late December 2007, Mr. Atkinson wanted to get onto the store manager's "list" in order to be eligible to run for open manager positions. (CP 87 at 4-10). Although Mr. Cox had ongoing concerns about Mr. Atkinson's performance as first assistant manager, he wanted to support his effort to achieve his career goals and thus approved and supported his application. (CP 87 at 11-22; 191 at ¶ 10). Getting on the list was highly competitive, however, and most assistant managers did not make it on the first try. (CP 88 at 19-25; 89 at 1-4; 235 at ¶ 3). A review board received "peer review" comments from store employees and others and interviewed each applicant. (CP 236 at ¶ 4).

Mr. Atkinson did not do well in his interview and certain of his peer review comments were concerning. (CP 236 at ¶ 5; 239-55). For example, under Leadership Skills, one of the peer reviews stated Mr. Atkinson created a “triangle” in which he would hide to avoid working, he took long lunches and a lot of breaks, and he belittled employees to motivate them. (CP 243). In response to Job Knowledge and Experience, his peers stated he is not reliable, can be unorganized and flaky, and does not manage his time well. (CP 244). Finally, under Personal Characteristics, he was described as disrespectful when speaking to hourly employees and lacking integrity. (CP 245). The comments were generally consistent with the types of concerns Mr. Cox had regarding Mr. Atkinson’s performance.

Mr. Atkinson was not selected for the manager’s list. (CP 91 at 15-19). His migraine condition was not discussed during this process. (CP 93 at 12-15). He does not assert a claim in this lawsuit regarding his failure to make the list.

In February 2008, two of the members of the manager’s list review board, Gary Wanderscheid (Regional Manager) and George Saddler (Area Manager), drove to Chehalis from Portland to meet with Mr. Atkinson and Mr. Cox to discuss Mr. Atkinson’s interview and the peer review comments he received. The purpose of the meeting was to give Mr.

Atkinson a better understanding of the review process and how he could do better the next time he applied for the manager's list. They encouraged him to continue to develop his management skills, including improving his relationship with his crew through better communication. They urged him to use the next 12 months to work on resolving his performance issues so they would not come up again the next time he applied. The goal was to help Mr. Atkinson succeed in his effort to promote to store manager. (CP 92 at 13-25; 93 at 1-5; 126 at 2-10; 191 at ¶ 11; 199-201; 236 at ¶ 6).

F. Mr. Atkinson's Performance Issues Continue throughout 2008 and into 2009

After meeting with management and reviewing the issues that surfaced during the manager's list process, it was up to Mr. Atkinson to show initiative and improve his performance. During the next several months, however, Mr. Atkinson's performance issues remained unresolved. (CP 192 at ¶ 12). In March 2008, Mr. Cox noted that Mr. Atkinson still needed to improve his communication and leadership skills. (CP 192 at ¶ 12; 203). In July 2008, Mr. Cox again noted these concerns and Mr. Atkinson's need to earn the crew's respect so they would listen to him and do what was needed. (CP 192 at ¶ 12; 205).

Throughout this time, Mr. Cox kept his Area Manager, Greg L'Hommedieu, apprised of Mr. Atkinson's performance issues and how

they were adversely affecting store morale and operations. (CP 192 at ¶ 13).

In December 2008, Mr. Cox met with Mr. Atkinson to discuss pending performance issues. Mr. Atkinson recalls being told during the meeting that he needed to work hard and try to gain the crew's respect. (CP 94 at 15-18; 192 at ¶ 14). Mr. Cox drafted notes of the meeting. (CP 192 at ¶ 14; 207-11).

In early January 2009, Mr. Cox advised Mr. L'Hommedieu that Mr. Atkinson's "level of motivation and work ethic doesn't instill respect in our crew," which "leads to a challenge as far as leadership," and it was thus difficult to trust Mr. Atkinson running the store when Mr. Cox was not there. Mr. Cox cited examples of situations where Mr. Atkinson had mishandled situations with crew members and also noted his lack of progress in the 12 months since Mr. Wanderscheid and Mr. Saddler came to Chehalis to meet with them. (CP 192 at ¶ 15; 213; 215-16; 218). At this point, Mr. L'Hommedieu recommended Mr. Atkinson be removed from his position but Mr. Cox said he wanted to give Mr. Atkinson one more chance. (CP 192 at ¶ 15; 226 at ¶ 6-7; 230).

Also in early January 2009, Mr. Cox and Mr. L'Hommedieu met with Mr. Atkinson to discuss the fact he was still underperforming. They explained, for example, how the store management team could not count

on him to complete tasks correctly or in a timely manner, the crew had become “somewhat apathetic toward [him] because they do not have confidence that he will follow through on any of his tasks and makes poor decisions,” and he socialized too much with customers rather than focusing on his job. During that meeting, Mr. Atkinson admitted that he had not put forth the effort to improve and had in fact lost the motivation to improve after being told in February 2008 that he would need to wait 12 months before applying for the manager’s list again. (CP 226 at ¶ 7; 233). Mr. Cox and Mr. L’Hommedieu explained that he was being given one last chance and needed to improve his job performance “dramatically and in a prompt manner” or he would be removed from his position. (CP 124 at 21-25; 125 at 1-7; 165-66 at No. 4; 233).

G. Mr. Atkinson is Stepped Down from his First Assistant Manager Position

Unfortunately, after that January meeting, Mr. Atkinson still did not show the needed improvement. (CP 192 at ¶ 17). On March 6, 2009, Mr. Cox and Mr. L’Hommedieu met with Mr. Atkinson again and this time removed, or “stepped him down,” from his position due to ongoing poor job performance. (CP 102 at 7-25; 103 at 1-2; 192 at ¶ 18; 220; 226 at ¶ 8). He then had 30 days of unpaid leave to find an hourly position in

another store or his employment would be terminated.² (CP 72 at 24-25; 73 at 1-10; 131-32; 192-93 at ¶ 18).

H. Mr. Atkinson Becomes Totally Disabled and Unable to Work in any Capacity

According to Mr. Atkinson, during his tenure as first assistant manager (i.e., April 2006 to March 6, 2009), about 80-90% of the time his migraine condition did not affect his ability to do his job. (CP 77 at 7-13). Of the remaining 10-20%, 90% of the time he was still able to do his job even if he was not at the “top of his game.” (CP 79 at 25; 80 at 1-21). There were no parts of the job he could not do in such circumstances and he feels he did his job well at all times. (CP 80 at 16-24; 95 at 22-25; 96 at 1-18). During the remaining 1-2% of the time Mr. Atkinson needed to stay home from work, leave early, or take short breaks in the break room. Specifically, he testified that he only missed work about one to three times per year due to migraines while another three to five times per year he went home early. (CP 438 at 59:2-22 and at 60:3-10). He was never told he could not leave early if needed. (CP 438 at 60:13-61:25; CP439 at 62:1-8). He took an average of one to two uninterrupted 20-30 minute lunch breaks per week and sometimes as many as four per week. (CP 435

² Les Schwab has 114 stores in Washington, and assistant managers other than Mr. Atkinson have been removed from their positions for performance reasons and gone into Sales & Service positions. Some employees have later promoted back to assistant manager. (CP 107 at 10-25; 108-09; 110 at 1:-20; 225 at ¶ 2; 236-37 at ¶ 7).

at 49:18-25; 436 at 50:1-11). A few times a week he would sit in the break room for one to 15 minutes with the lights off but sometimes during that time was needed in the store. (CP 439 at 63:10-64:7).

Despite this, after being stepped down from his assistant manager position on March 6, 2009, Mr. Atkinson did not apply for an hourly Sales & Service position with the possibility of moving back toward a management position. Instead, that same day, he suddenly applied for leave under the Family and Medical Leave Act (FMLA). (CP 74 at 11-17; 75 at 19-25; 76 at 1-6; 133). His doctor provided a certification stating he could not perform any of the essential functions of his job and in fact could not perform “work of any kind, including light duty tasks.” (CP 178 at 21-25; 179-80; 184-85). This was the first time Mr. Atkinson had ever provided Les Schwab with any note from his doctor relating to his migraine condition. (CP 71 at 3-18).

Then, on March 9, 2009 (just three days after being removed from his assistant manager position), Mr. Atkinson applied to the federal Social Security Administration (SSA) for total disability benefits.³ (CP 62 at 21-25; 63 at 1-3; 64 at 9-25; 65 at 1-4; 122-23; 124 at 1-20; 129-30; 144-64).

³ Meanwhile, Mr. Atkinson also applied for and received unemployment benefits from the Employment Security Department (ESD) based on his representation that he was fully able to work. (CP 116 at 24-25; 117-21; 124 at 21-25; 125 at 1-17; 139-43; 165-68).

In the Disability Report he submitted, Mr. Atkinson described his condition as follows:

Complex Hereditary Migraine Headaches Complex migraine headaches cause so much severe pain throughout the cycle of the migraine that I am physically incapable of moving or interacting with others. The pain caused by the migraines can make my body shake uncontrollably and vomit. I experience three to six severe migraines every week and each can last from a few hours to a few days. I have had this condition since childhood and after years of medication and research, nothing has helped my condition.

(CP 122-23; 144-55 at 145).

In explaining how his condition affected his ability to work, Mr.

Atkinson stated:

With the severe pain from the migraines I have an extremely hard time concentrating on tasks, I need to close my eyes because of the pain from the base of my head and I am physically limited to staying in bed due to the pain being centered around the top of my spinal cord. I cannot walk, drive, lift objects or interact with others when my migraines occur. The pain from my migraines severely limits my abilities to walk, drive, see, interact with others and exert physical or emotional force. Even after a migraine, my body is so worn down, everything I do is not to my full capacity. I am physically drained and depressed after a migraine because of the toll it takes on my body by staving off pain. It isn't until two days after a migraine that I am feeling back to full capacity, and by then, another migraine attack sets in.

(CP 122-23; 144-55 at 145).

When asked about any job-related changes, Mr. Atkinson stated:

My migraine headaches have worsened over the past years and it has been continually difficult to work scheduled days consistently. I had switched scheduled days off to counter the days I was incapacitated. The migraines continued to affect my ability to work and I started missing one to two days a week when I was scheduled to work at least five or six days a week. I continually missed multiple days of work, took extra time off to consult physicians and perform medical tests and diagnosis. Even if I was at work, the pain from the migraines limited me at everything I was doing, to a point that other employees had to cover for me as I got sick and fatigued from the pain.

(CP 122-23; 144-55 at 146).

On April 6, 2009, Mr. Atkinson's employment was terminated as he had not moved into a Sales & Service position within 30 days. (CP 193 at ¶ 19; 222). He remains eligible for rehire. (CP 237 at ¶ 8).

On June 9, 2009, over three months after Mr. Atkinson was removed from his assistant manager position, his doctor confirmed that, because of his "disability caused by migraine headaches," he should "not return to work." (CP 181 at 24-25; 182 at 1-14; 186-87 at 187). At about the same time, SSA approved his total disability claim, and he began receiving over \$25,000 per year in benefits. (CP 114 at 3-13; 115 at 3-16). He continues to collect these benefits due to total disability and being physically unable to work. (CP 62 at 25; 63 at 1-6).⁴

⁴ Incredibly, in the face of all this, Mr. Atkinson contends the only thing preventing him from working at a new job is an alleged non-compete agreement. (p. 5). This is a spurious assertion as he is not subject to any such agreement. (CP 482 at 11-25; 483 at 1; 692 at 140:4-22).

I. Procedural History

In December 2009, Mr. Atkinson filed this lawsuit. The discovery deadline was October 10, 2012. On September 20, 2012, Mr. Atkinson unilaterally noted a 30(b)(6) deposition for October 1 (a date Les Schwab was unavailable) and identified 34 topics. On September 28, 2012, Les Schwab objected to those topics and moved for summary judgment of all claims. On October 2, Mr. Atkinson re-noted the deposition for October 10 and identified the same 34 topics. Les Schwab again objected and moved for a protective order as to 14 of the topics. (The motion was not heard prior to the deposition.) On October 15, Mr. Atkinson responded to Les Schwab's motion for summary judgment and requested a Rule 56(f) continuance. On October 16, he responded to Les Schwab's protective order motion and cross-moved for sanctions and again for a Rule 56(f) continuance. The trial court found Les Schwab did not fully meet its 30(b)(6) obligations, issued a monetary sanction, ordered a second 30(b)(6) deposition, and allowed Mr. Atkinson to supplement his summary judgment opposition after the deposition.

On October 26, 2012, Mr. Atkinson deposed Les Schwab's speaking agent for a second time. On October 31, he filed his supplemental opposition to Les Schwab's motion for summary judgment. In doing so, he asked for additional sanctions against Les Schwab based

on the second 30(b)(6) deposition and submitted three declarations that he could have included with his first opposition, as they had no relation to information gleaned from the second 30(b)(6) deposition. On November 1, Les Schwab filed a motion to strike the three declarations and all of Mr. Atkinson's 30(b)(6) arguments. On November 6, Les Schwab filed its reply in support of summary judgment. At the November 9 summary judgment hearing, the trial court considered the three declarations except to the extent they contained inadmissible statements, denied the second motion for sanctions, and summarily dismissed Mr. Atkinson's claims.

On November 13, 2012, Mr. Atkinson moved for reconsideration of the trial court's summary judgment order. Les Schwab opposed the motion, and Mr. Atkinson replied. On December 10, the trial court denied the motion.

IV. ARGUMENT

A. Mr. Atkinson's Burden on Summary Judgment

Mr. Atkinson's first assignment of error is that the trial court erroneously granted summary judgment in favor of Les Schwab. As explained below, based on the record before the court, the decision to grant summary judgment was entirely proper and should be affirmed as to all claims.

Summary judgment shall be granted "if the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue as to any material fact and the party bringing the motion is entitled to judgment as a matter of law." Sheehan v. Cent. Puget Sound Reg'l Transit Auth., 155 Wn.2d 790, 797, 123 P.3d 88 (2005); CR 56(c). The opposing party must go beyond the pleadings and designate specific facts to show that there is a genuine issue for trial. White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Speculation and conjecture are not enough.⁵ If the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the court should grant the motion." Young v. Key Pharma., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).⁶

⁵ See, e.g., Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 430-31, 38 P.3d 322 (2002) ("Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of facts will not suffice."); Heath v. Uraga, 106 Wn. App. 506, 512, 24 P.3d 413 (2001) ("The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits accepted at face value.").

⁶ Mr. Atkinson contends summary judgment is inappropriate in employment discrimination cases. (p. 39). This is incorrect as courts routinely grant summary judgment in such cases where, as here, it is appropriate. See, e.g., Snyder v. Med. Serv. Corp., 145 Wn.2d 233, 35 P.3d 1158 (2001) (summary judgment affirmed on all claims, including disability discrimination); Crownover v. Dep't of Transp., 165 Wn. App. 131, 265 P.3d 971 (2011) (summary judgment of retaliation claims affirmed); Becker v. Cashman, 128 Wn. App. 79, 114 P.3d 1210 (2005) (summary judgment affirmed as to accommodation and disability discrimination claims); Kirby v. City of Tacoma, 124 Wn. App. 454, 98 P.3d 827 (2004) (summary judgment of disability discrimination claim affirmed).

This Court reviews de novo the trial court's order granting summary judgment. Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 922, 296 P.3d 860 (2013).

B. The Trial Court Properly Dismissed Mr. Atkinson's Claims Based on His Irreconcilable Positions Regarding His Disability

There are two irreconcilable Mr. Atkinsons in this case, and this alone is a basis for summary judgment on his reasonable accommodation and discrimination claims.

One is the Mr. Atkinson who, on March 6, 2009 (the day he was removed from his assistant manager position), applied for FMLA leave claiming he was completely unable to work and, on March 9, 2009, applied to SSA for total disability benefits also asserting a complete inability to work. To apply for the latter, he completed a form describing his condition and how it affected his ability to work. In the application, which he testified he intended to fill out accurately as it was being submitted to a federal agency, he asserted his migraine condition worsened "over the past years" such that he "started missing one to two days a week," "continually missed multiple days of work, took extra time off..." and "[e]ven if I was at work the pain from the migraines limited me at everything I was doing, to a point that other employees had to cover

for me as I got sick and fatigued from the pain.” (CP 122-23; 144-55 at 146).

The other Mr. Atkinson is the one who, in an effort to support his claims in this lawsuit, testified in deposition that about 80-90% of the time his migraine condition did not affect his ability to do his job, while the overwhelming majority of the remaining 10-20% he might not have performed at the “top of his game” but still feels he did his job well at all times. (CP 77 at 7-13; 79 at 25; 80 at 1-24; 95 at 22-25; 96 at 1-18). According to this Mr. Atkinson, only 1-2% of the time he needed to miss work, leave work early (and was never told he could not do so), or sit in the break room for a few minutes. (CP 438 at 59:2-22, 60:3-61:25; 439 at 62:1-8, 63:10-23).

These two versions of Mr. Atkinson’s alleged disability could not be more different, and any attempt to reconcile them fails. Mr. Atkinson is simply changing stories depending on the forum in order to obtain maximum advantage in both. This alone is a basis for summary judgment on his accommodation and discrimination claims. See, e.g., Musarra v. Vineyards Dev. Corp., 343 F.Supp.2d 1116, 1123 (M.D. Fla. 2004) (summary judgment granted for employer when “[t]he undisputed material facts do not show a person who simply has credibility issues, but a situation where plaintiff deliberately and clearly claimed disability,

asserted specific facts in support of the claimed disability in order to obtain disability benefits from two sources, and now wants to change his story in order to defeat a summary judgment motion as to his ADA claim.”)

C. The Trial Court Properly Dismissed Mr. Atkinson’s Accommodation Claim on Summary Judgment

Even if, despite providing two irreconcilable stories, Mr. Atkinson is permitted to present a reasonable accommodation claim, the claim fails as a matter of law for several reasons and was properly dismissed on summary judgment.

To prove Les Schwab failed to reasonably accommodate him, Mr. Atkinson must show (i) he has a disability that (a) substantially limited his ability to perform the essential functions of his job or (b) medical documentation indicates would be aggravated to the point of becoming substantially limiting if there was no accommodation; (ii) he was qualified to perform the essential functions of the assistant manager position; (iii) he notified Les Schwab of his disability and its substantial limitations; and (iv) Les Schwab nevertheless failed to reasonably accommodate his disability. Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 145, 94 P.3d 930 (2004); Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 29-30, 244

P.3d 438 (2010). For several separate and independent reasons, Mr. Atkinson cannot meet this burden.

1. Mr. Atkinson Was Fully Accommodated

The record reveals that, under either version of events, Mr. Atkinson received extensive accommodation. According to the Mr. Atkinson who applied for SSA benefits, he was, for example, able to “continually miss multiple days of work,” often including “one to two days of work per week,” take extra time off to consult with doctors, and have other employees cover for him when he was unable to function at work if he felt sick or fatigued. In other words, if he was unable to work, he did not work. Likewise, according to the Mr. Atkinson who testified in this lawsuit, he was fully capable of working 80-90% of the time and during the other 10-20% of the time was allowed to stay home when he could not come to work due to his condition, leave early when his condition prevented him from staying at work, and take short breaks as necessary. Given Mr. Atkinson’s testimony regarding Les Schwab’s extensive modifications to his work demands, his claim for failure to accommodate was properly dismissed on summary judgment.

Beyond all this, on March 6, 2009, when Mr. Atkinson was removed from his first assistant manager position, he was offered reasonable accommodation by being given the opportunity to move within

30 days into an hourly Sales & Service position. In that position, he would have worked about 40 hours per week, been legally entitled to lunch and rest breaks, and not had the demands (or compensation) associated with managing the store. (CP 190 at ¶ 6; 705 at 191:22-192:3; 731 at No. 30).

Mr. Atkinson contends he was not aware of the 30-day opportunity to obtain a Sales & Service position until he received an April 3, 2009 letter from Les Schwab. (pp. 32-33). Even assuming this is true, it is legally irrelevant because per the FMLA notice he submitted on March 6, 2009, he could not work under any circumstance in any event. Moreover, the opportunity for Mr. Atkinson to apply for a Sales & Service position continued after the April 6, 2009 termination date as he has remained eligible for rehire with the company.

Faced with this clear record of accommodation, Mr. Atkinson asserts that he used to receive certain accommodations that were then taken away. (pp. 6, 31-32, 40-41). This, too, is without merit. Mr. Atkinson does not even identify the alleged accommodation(s) at issue or how it or they were reduced or withdrawn. Instead, he makes vague references to “the accommodation of flexibility” (p. 31) and “the accommodation which Les Schwab has always provided.” (p. 40). These

conclusory statements are legally insufficient to show a failure to accommodate.

Mr. Atkinson's effort to compare himself with another Chehalis store employee (William Stidham) who has a migraine condition also fails. (pp. 19-20). Mr. Stidham had a completely different job (brake & alignment technician) and no management duties, a 40 hour workweek and much lower compensation. (CP 510 at 6:5-21). Also, he was a non-exempt employee and thus legally entitled to receive regular uninterrupted meal and rest breaks, whereas Mr. Atkinson's breaks might need to be interrupted due to his management responsibilities. In other words, Mr. Atkinson and Mr. Stidham were not "similarly situated" and any attempted comparison between them is thus legally irrelevant.⁷

2. Mr. Atkinson Did Not Engage in the Interactive Process

Mr. Atkinson's accommodation claim also fails because he did not participate in an interactive process with Les Schwab. An employee has a

⁷ See, e.g., Vasquez v. County of Los Angeles, 349 F.3d 634, 641 (9th Cir. 2003) (alleged comparator with greater responsibility was not "similarly situated" because "[e]mployees in supervisory positions are generally deemed not to be similarly situated to lower level employees"); Knigh t v. Brown, 797 F.Supp.2d 1107, 1127 (W.D. Wash. 2011) ("In general, individuals are similarly situated when they have similar jobs and display similar conduct"; coworkers were not similarly situated when they had different ranks and worked different shifts); Parayno v. Potter, 2010 WL 4923100 at *4 (W.D. Wash.) (explaining that plaintiff was not similarly situated to employees who worked in different facilities, had different responsibilities, and/or were subject to a different supervisory structure).

legal obligation to notify his employer if he needs or wants an accommodation:

An employer must be able to ascertain whether its efforts at accommodation have been effective in order to determine whether more is required to discharge its duty. The employee therefore has a duty to communicate to the employer whether the accommodation was effective. This duty flows from the mutual obligations of the interactive process. To hold otherwise would be inequitable to the employer and would undercut the statute's goal of keeping the employee with the impairment on the job. Further, the employee must communicate this information while the employer still has an opportunity to make further attempts at accommodation. Providing information to the employer only after being discharged does not satisfy this duty; at that point, the opportunity for the employer to correct the deficiency has passed. And, it would create a liability trap for the employer that the statute does not intend.

Frisino v. Seattle Sch. Dist., 160 Wn. App. 765, 783, 249 P.3d 1044 (2011).

Mr. Atkinson fell far short of meeting this obligation. Indeed, as explained above, it is undisputed that Les Schwab knew Mr. Atkinson had a migraine condition and (under either of Mr. Atkinson's version of events) provided him with significant accommodations. If Mr. Atkinson felt he needed more it was incumbent upon him to tell Les Schwab. Yet, he readily admits he never asked Mr. Cox or anyone else at Les Schwab for further accommodation. (pp. 6, 35-36, 38).

Moreover, Mr. Atkinson also admits he never provided Les Schwab with anything from his doctor indicating he needed additional accommodations to his job duties. (CP 71 at 3-18). Indeed, it is undisputed that even though he saw his doctor on a regular basis he never even *discussed* such accommodations with her. (CP 71 at 3-18; 503 at 25:5-16). He cannot now come in after the fact and claim such accommodations were needed.

3. Mr. Atkinson's Retroactive Accommodation Requests are Unreasonable as a Matter of Law

Mr. Atkinson's reasonable accommodation claim also fails because the accommodations he now claims he needed to continue in his first assistant manager position are unreasonable as a matter of law.

In his deposition, Mr. Atkinson testified that (his FMLA certification notwithstanding) if he had not been removed from his assistant manager position on March 6, 2009, he could have continued working with certain accommodations. (CP 66 at 12-14). Specifically, he unequivocally stated he needed and should have been provided with 40-50 hour workweeks, daily 30-minute lunch breaks, and flexibility to stay home, sit in the break room as needed, or leave early. (CP 67 at 17-25; 68 at 1-12; 69 at 20-25; 70 at 1-2; 80 at 25; 81; 82 at 1-18).

As a matter of law, even if Mr. Atkinson had actually requested such accommodations, he was not entitled to the accommodation of his choosing and Les Schwab was not required to eliminate or modify essential functions of the job as an accommodation. Frisino v. Seattle Sch. Dist. No. 1 *supra*, 160 Wn. App. at 779; Griffith v. Boise Cascade, Inc. 111 Wn. App. 436, 444, 45 P.3d 589 (2002).

Yet, the accommodations Mr. Atkinson never sought but now insists he needed and should have received are just that -- a request to fundamentally change his job duties. As the Washington Supreme Court has made clear, showing up and working required hours (even when those hours are more than 40 per week) constitutes an essential function of a job and thus need not be eliminated or modified as a reasonable accommodation. Davis v. Microsoft Corp., 149 Wn.2d 521, 532-535, 70 P.3d 126 (2003) (explaining that employee who could not work beyond 40 hours per week due to disability was not qualified to perform essential functions of job). Given the demands of the assistant manager job at the extremely busy Chehalis store, Mr. Atkinson could not be assured of an uninterrupted lunch or uninterrupted breaks whenever he wanted. Nor could he have the flexibility to arrive late or leave early at a moment's

notice.⁸ He had a store to run. Most significantly, Mr. Atkinson could not transform his first assistant manager position into a 9-5 job. As explained above, this was a 70-plus hour a week job and he was compensated accordingly.

Mr. Atkinson contends the Davis case does not apply, and therefore summary judgment was improper, because, unlike the plaintiff in that case, Mr. Atkinson did not request an accommodation. (pp. 35-36, 38). This argument fails for three reasons. First, the timing of the request (i.e., whether during his employment or during this lawsuit) does not change the fact that he expressly identified certain accommodations he would have needed to continue working which, under Davis, are unreasonable as a matter of law. Second, Mr. Atkinson's failure to request an accommodation during his employment (which defeats his accommodation claim as explained *supra*) cannot be used in this context to somehow prove Les Schwab violated the law by failing to accommodate him. Third, he cannot base his accommodation claim on a request made after his employment ended. Frisino, supra, 160 Wn. App. at 783.

⁸ As discussed above, however, Mr. Atkinson was able to stay home or leave early if he was unable to perform his job due to his migraine condition.

D. The Trial Court Properly Dismissed Mr. Atkinson’s Disability Discrimination Claim on Summary Judgment

Mr. Atkinson’s disability discrimination claim (i.e., that his migraine condition was a substantial factor in the decision to terminate his employment) also fails as a matter of law. First, he was terminated for a legitimate, non-discriminatory reason, i.e., well-documented, ongoing performance issues, and there is no admissible material evidence to the contrary. Second, as of March 6, 2009, he was not qualified to perform the essential functions of the first assistant manager position (or any other job) in any event.

A discrimination claim is analyzed pursuant to the “shifting burdens” analysis originally set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Becker, *supra*, 128 Wn. App. 79, 85-86. A major purpose of the analysis is to “identify meritless suits and to stop them short of full trial.” Douglas v. Anderson, 656 F.2d 528, 535 (9th Cir. 1981).⁹

If Mr. Atkinson can establish his prima facie case, the burden of production, not persuasion, shifts to Les Schwab to articulate legitimate non-discriminatory reasons for its decisions. Becker, 128 Wn. App. at 85-86. The burden would then revert to Mr. Atkinson. To survive dismissal,

⁹ Washington courts look to federal discrimination law in interpreting the WLAD. Clarke v. Shoreline Sch. Dist. 106 Wn.2d 102, 118, 720 P.2d 793 (1986).

he must present specific, admissible evidence upon which a jury could reasonably conclude the stated reason for his discharge is, in fact, a pretext for unlawful discrimination, i.e., that his migraine condition was a substantial factor in his termination. Id. at 85-86.

To establish a prima facie case, Mr. Atkinson must prove: (i) he has a statutorily-protected disability; (ii) Les Schwab knew of his disability; (iii) notwithstanding the disability he was qualified for, and satisfactorily performing, his job; and (iv) he was replaced by a non-disabled individual. Becker, 128 Wn. App. at 85 (citing Riehl, supra, 152 Wn.2d at 150). Mr. Atkinson cannot meet the third prong of this standard for two separate and independent reasons.

1. Mr. Atkinson Was Terminated for Legitimate, Non-Discriminatory Reasons

Mr. Atkinson's disability discrimination claim fails because he was not satisfactorily performing his job duties and Les Schwab had a legitimate, non-discriminatory reason for his termination. The evidence of Les Schwab's concerns about his performance is well documented, as are the repeated efforts to help him succeed and the final warning he received before the decision was ultimately made to remove him from his position.

As explained *supra* (pp. 8-12), it is undisputed that Mr. Atkinson had serious performance issues in the first assistant manager position for

more than one year before his termination. In December 2007, he applied for and was denied a spot on the manager's list because he interviewed poorly and received negative peer reviews which highlighted these performance issues. In February 2008, the Area Manager, the Regional Manager, and Mr. Cox met with Mr. Atkinson to discuss the manager's list process, what he could have done better, and what he needed to improve upon in terms of job performance. They also notified him that he would be unable to apply again for 12 months and encouraged him to use that time to work on his performance issues and become a better assistant manager.

Mr. Atkinson did not do so and instead continued to have performance issues during 2008. In December 2008, Mr. Cox met with Mr. Atkinson to review these issues again. Then, in early January 2009, Mr. Cox and Mr. L'Hommedieu met with Mr. Atkinson and gave him one last chance to improve his performance.¹⁰ In response to this warning, Mr. Atkinson admitted he had lost his motivation to improve after being told he had to wait 12 months before he could apply for the manager's list again. Finally, in March 2009 he was removed from his assistant manager

¹⁰ In the very first sentence of his Opening Brief and repeatedly thereafter, Mr. Atkinson claims he was terminated without warning. (pp. 1, 4, 27, 28). This is legally irrelevant but also incorrect. He was warned at his January 2009 meeting with Mr. Cox and Mr. L'Hommedieu. (CP 226 at ¶ 7; 233). In March 2009, when Mr. Atkinson applied for unemployment benefits, he acknowledged being warned. (CP 124 at 21-25; 125 at 1-17; 165-68 at 165-66).

position with the opportunity to obtain a Sales & Service job and potentially promote back from there to a management role.

Mr. Atkinson has no answer to these undisputed material facts and therefore elects to ignore them in his Opening Brief and, again, relies instead upon legally irrelevant testimony and conclusory allegations. For example, Mr. Atkinson submits the deposition testimony of three store employees (Rob Rider, Manuel Mendez, and Jesse Aumiller) who spoke well of him. (pp. 16-18). The testimony of these non-management employees is completely irrelevant. They had no role whatsoever in the evaluation of Mr. Atkinson's performance or the decision to remove him from his assistant manager position. A non-decision-maker's subjective thoughts about a plaintiff do not create a genuine issue of material fact or otherwise defeat summary judgment.¹¹

Mr. Atkinson fares no better when he trumpets testimony from one of these employees (Mr. Rider) who stated he thought Mr. Atkinson's termination might have been because of his migraine condition. Indeed, Mr. Atkinson claims this "testimony alone should have been sufficient to

¹¹ See, e.g., Lee v. State of Minn. Dep't of Commerce, 157 F.3d 1130, 1135 (8th Cir. 1998) (personal opinions by non-decisionmakers do not support reasonable inference of discrimination); Johnson v. Gen. Bd. of Pension & Health Benefits of the United Methodist Church, 2012 WL 638731 at *7 (N.D. Ill.) (and cases cited therein) (former coworkers' personal opinions legally irrelevant); McKinley v. Skyline Chili, Inc., 2012 WL 3527222 at *6-7 (S.D. Ohio) (and cases cited therein) (former coworkers' personal opinions are speculative, fail to create genuine issue of material fact, and do not establish pretext).

preclude summary judgment.” (p. 16). Mr. Atkinson is incorrect. The employee’s statement is inadmissible as it lacks proper foundation and is legally irrelevant in any event because, again, he was not a decision-maker. Further, Mr. Rider acknowledges he was not involved with the decision, has no personal knowledge of why the decision was made, and has never discussed the decision with Mr. Cox or any other management person. (CP 958 at ¶ 2).

Simply put, Mr. Atkinson’s conjecture that his disability was somehow a substantial factor in his termination does not establish the stated reason was a “pretext” for unlawful discrimination.¹² In essence, Mr. Atkinson asks the Court to second-guess Les Schwab’s decision, which, of course, is not the Court’s role.¹³ As noted above, many other

¹² See, e.g., Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983) (plaintiff’s “mere assertions that [defendant employer] had discriminatory motivation and intent” were inadequate to preclude summary judgment); Fulton v. DSHS, 169 Wn. App. 137, 162, 279 P.3d 500 (2012) (internal quotations and citations omitted) (“[A]n employee’s disagreement with her supervisor’s assessment of her job performance does not demonstrate pretext or give rise to a reasonable inference of discrimination.”); Griffith v. Schnitzer Steel Indus., 128 Wn. App. 438, 447, 115 P.3d 1065 (2005) (“employee’s subjective beliefs and assessments as to his performance are irrelevant” to show pretext); Chen v. State, 86 Wn. App. 183, 191, 937 P.2d 612 (1997) (“An employee’s assertion of good performance to contradict the employer’s assertion of poor performance does not give rise to a reasonable inference of discrimination.”).

¹³ See e.g., White, *supra*, 131 Wn.2d 1, 19-20, citing Washington Fed’n of State Employees v. The State Personnel Bd., 29 Wn. App. 818, 820, 630 P.2d 951 (1981) (“As we have said many times, the courts of this state are ill equipped to act as super personnel agencies.”); Richards v. City of Seattle, 2008 WL 2570668 at *10 (W.D. Wash.) (“The Court’s function . . . is not to second-guess the employer’s interpretation of its policies and regulations, but rather to assess whether sufficient evidence of discriminatory or retaliatory behavior has been presented to warrant a trial.”).

assistant managers have been removed from their position for performance reasons. Mr. Atkinson was treated no less favorably than they were.

2. Mr. Atkinson Was Not Qualified for the Assistant Manager Position

His performance issues aside, Mr. Atkinson's discrimination claim also fails because, as of March 6, 2009, he was not qualified for his position, as he could not perform the essential functions of the job—or any other job, for that matter—with or without reasonable accommodation.

On March 9, 2009, Mr. Atkinson applied to SSA for total disability based on his physical inability to work. An individual may receive Social Security disability benefits only if he is disabled. 42 U.S.C. § 423(a). For purposes of such benefits, an individual who is under age 55 and able to see is disabled *only when* he is unable “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A). The disability must be *so severe* as to render the individual unable “to do his previous work” or “any other kind of substantial gainful work which exists in the national economy.” 42 U.S.C. § 423(d)(2)(A). In other words, whether Mr. Atkinson's migraine condition was a substantial factor in his termination or not, he

was completely disabled and thus unable to perform the job in any event.¹⁴

This alone ends the analysis and defeats his claim.

In response, Mr. Atkinson contends the law allows him to apply for SSA benefits and then file a disability discrimination claim against Les Schwab. (pp. 33-34, 36-37). He is correct that the mere fact he applied for SSA benefits does not defeat his claim here. As set forth in Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999), however, the very case upon which he relies in his Opening Brief (pp. 33-34, 36-37), he must be able to explain how his prior representations are consistent with his current claim:

We believe that, in context, these two seemingly divergent statutory contentions are often consistent, each with the other. Thus pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA. *Nonetheless, an ADA plaintiff cannot simply ignore her SSDI contention that she was too disabled to work. To survive a defendant's motion for summary judgment, she must explain why that SSDI contention is consistent with her ADA claim that she could "perform the essential functions" of her previous job, at least with "reasonable accommodation."*

Cleveland, 526 U.S. at 797-98 (emphasis added).

¹⁴ See, e.g., Parra v. Astrue, 481 F.3d 742 (9th Cir. 2007) (citing section 423(d)(1)(A) and setting forth five-step analysis of whether a claimant is disabled, including claimant's ability to perform past relevant work or other substantially gainful activity); Edlund v. Massanari, 253 F.3d 1152, 1159-60 (9th Cir. 2001) ("Pursuant to the SSA's own internal procedures, once a claimant has shown he suffers from a medically determinable impairment, he next has the burden of proving that these impairments or their symptoms affect his ability to perform basic work activities.").

Courts routinely dismiss claims on summary judgment based on the principles established in Cleveland. In Swonke v. Sprint, Inc., 327 F.Supp.2d 1128 (N.D. Cal. 2004), for example, the court granted summary judgment for the employer and explained:

However, addressing a defense that a plaintiff's prior claim of total disability should provide a basis for judicial estoppel of any later inconsistent claim, the court has held that the plaintiff is not automatically barred. The Ninth Circuit explained in Johnson that the standards governing the decision whether to grant disability benefits may be different than the standard under the ADA or FEHA. Thus, the courts must take a case-by-case approach to evaluate the particular statements and facts that have been asserted.

Having said this, however, we emphasize that *material factual statements* made by an individual in prior disability applications or proceedings may be binding in subsequent ADA claims.

In this case, the Ninth Circuit's analysis saves plaintiff from a *per se* rejection of his position on estoppel grounds, but it still leaves him with the evidentiary problem of having made material factual statements as to his total disability and having acted in accordance. In other words, the problem is not that his positions are logically inconsistent, it is that he so consistently acted in accordance with being totally disabled.

Swonke, 327 F.Supp.2d 1128, 1135-36 (emphasis in original), quoting Johnson v. State of Oregon, 141 F.3d 1361, 1369 (9th Cir. 1998).

Jackson v. Simon Prop. Group, Inc., 795 F.Supp.2d 949 (N.D. Cal. 2011) is also on point. There, plaintiff's claims were summarily dismissed where, despite contrary representations made during the lawsuit, medical

information submitted to his employer at the time of termination indicated he could not work. See also, e.g., Musarra, supra, 343 F.Supp.2d at 1123 (“It is also clear that under Cleveland plaintiff’s prior statements of complete disability and inability to work are in sharp conflict with his current claim that he is and was a qualified individual with a disability.”)

This is exactly the situation presented here and why summary judgment was properly granted. Mr. Atkinson is bound by the representations he made in March 2009. Again, on March 6, 2009, he submitted an FMLA medical certification indicating he could not work under any circumstance for an indeterminate period of time. Then, three days later, on March 9, he told SSA he “continually missed multiple days of work” and “even if I was at work, the pain from the migraines limited me at everything I was doing, to a point that other employees had to cover for me as I got sick and fatigued from the pain.” A few months later, in June 2009, Mr. Atkinson’s doctor noted his ongoing inability to work, i.e., “Because of the patient’s degree of disability caused by migraine headaches, I have recommended that Mr. Atkinson not return to work.”

In his Opening Brief, Mr. Atkinson makes no effort to explain how, given these prior representations, he could have a valid reasonable accommodation or disability discrimination claim. Instead, based on his testimony in this lawsuit, he asserts he was actually able to work without

any problems 80-90% of the time, rarely needed to miss work, and could have kept working as an assistant manager had he not been stepped down and then terminated. That is not an explanation; rather, it is a new and totally inconsistent version of events. Under Cleveland and its progeny, Mr. Atkinson's claim fails as a matter of law.

E. The Trial Court Properly Dismissed Mr. Atkinson's Retaliation Claim on Summary Judgment

Mr. Atkinson's retaliation claim is also fatally flawed and was properly dismissed on summary judgment. He contends Mr. Cox removed him from his assistant manager position on March 6, 2009 to retaliate against him for sending an email to Mr. Britton and Mr. Compton on July 10, 2006. (p. 41; CP 127 at 8-25; 128 at 1-13). This claim fails as a matter of law.

Mr. Atkinson cannot establish a prima facie case of retaliation. To do so he must show (i) he engaged in statutorily protected activity; (ii) Les Schwab took adverse employment against him; and (iii) that retaliation was a substantial factor behind the adverse action. Donahue v. Central Wash. Univ., 140 Wn. App. 17, 26, 163 P.3d 801 (2007); Milligan v. Thompson, 110 Wn. App. 628, 638-39, 42 P.3d 418 (2002) (applying same burden-shifting scheme to retaliation claim as under discrimination claim).

Mr. Atkinson cannot establish the first prong of this test because to engage in a statutorily protected activity, he would have had to send his email in opposition to an action he reasonably believed violated the WLAD. Vasquez v. DSHS, 94 Wn. App. 976, 984-85, 974 P.2d 348 (1999) (retaliation complaint dismissed because plaintiff was not opposing any conduct actually prohibited by the WLAD). Mr. Atkinson did not send his email to oppose what he believed was a violation of the WLAD. Rather, the subject line of the e-mail is “Career Advice,” and he sent it to ask his former managers from the Longview store that very thing -- career advice given his stated interest in applying for a store manager position. Further, he could not have reasonably believed Mr. Cox, who promoted him to first assistant manager a few months earlier, violated the WLAD by suggesting his migraine condition, which caused him frequently to call in sick and miss work, might conflict with his goal of becoming a store manager. Indeed, if anything, Mr. Cox’s comment was prescient given that in March 2009 Mr. Atkinson became unable to work at all because of his migraine condition.

Even if the July 2006 email did qualify as protected activity, Mr. Atkinson still cannot establish the third prong of the test because he sent the email almost *three years* before he was removed from his assistant manager position. The glaring lack of temporal proximity between these

two events negates any inference of retaliation as a matter of law. Courts routinely reject any such inference based on gaps of time far shorter than the one here.¹⁵

The absence of this requisite causal link is all the more evident given intervening events. For example, in December 2007 – 18 months after the email was sent – Mr. Cox approved and supported Mr. Atkinson’s effort to get onto the manager’s list and thus advance toward his career goal of becoming a store manager. This is exactly the opposite of retaliation. Then, in January 2009, when Mr. L’Hommedieu wanted to remove Mr. Atkinson from his position, Mr. Cox prevailed upon him instead to give Mr. Atkinson a final warning and yet another chance to meet performance expectations. This, too, is the exact opposite of retaliation. See, e.g., Bennett v. Saint-Gobain Corp., 507 F.3d 23, 32-33 (1st Cir. 2007) (“positive development” during temporal gap, such as receiving more favorable performance review and salary increase, undermines any causality argument).

¹⁵ See, e.g., Francom v. Costco Wholesale Corp., 98 Wn. App. 845,862-863, 991 P.2d 1182 (2000) (explaining 15 months was too long to show causality). See also, e.g., Clark County Sch. Dist. v. Breedon, 532 U.S. 268, 273-74 (2001) (explaining adverse action taken 20 months after employee’s complaint “suggests, by itself, no causality at all” and citing cases where three and four month gaps of time were insufficient to show causality); Manatt v. Bank of Am., 339 F.3d 792, 802 (9th Cir. 2003) (nine month gap too long); Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054 (9th Cir. 2002) (18 month gap too long; citing cases ranging from four to 12 months).

Mr. Atkinson's claim also fails to the extent he alleges Mr. Cox retaliated against him by working him harder, complaining when he was affected by his migraines, undermining his authority, and overly criticizing him. (p. 41).

First, none of these is an adverse employment action.¹⁶

Second, even if it could be actionable, Mr. Atkinson does not cite any specific, admissible materials facts in the record to support his claim that Mr. Cox treated him more harshly after his July 2006 email. Nor does he identify when this alleged harsh treatment took place, how often it occurred, or in what context. Instead, again, he offers nothing more than his own speculation that Mr. Cox "developed an animus for" him because he sent the email. This falls far short of the sort of what is needed to survive summary judgment. See, e.g., Steckl v. Motorola, Inc., supra, 703 F.2d 392, 393.

Finally, even if Mr. Atkinson could establish a prima facie case, Les Schwab plainly had a legitimate, non-retaliatory basis for its actions, and Mr. Atkinson presents nothing to suggest the performance concerns

¹⁶ Tyner v. DSHS, 137 Wn. App. 545, 564-65, 154 P.3d 920 (2007) ("An actionable adverse action must involve a change in employment conditions that is more than an 'inconvenience' or alteration of job responsibilities, such as reducing an employee's workload or pay."). See also, e.g., Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006) (explaining that adverse action normally involves more than "petty slights, minor annoyances, and simple lack of good manners"); Barrett v. Whirlpool Corp., 556 F.3d 502, 517-18 (6th Cir. 2009) (no hostile work environment when co-workers gave employee cold shoulder and supervisor ignored certain of her requests).

discussed above that led to his being removed from his assistant manager position were a pretext for unlawful termination. Indeed, there is nothing in the record to support any aspect of his retaliation theory as, again, his speculation and conjecture are not enough as a matter of law.

Mr. Atkinson's retaliation claim was properly dismissed.

F. Mr. Atkinson Does Not Have a Hostile Work Environment Claim

On appeal, Mr. Atkinson asks this Court to reverse the trial court's dismissal of his hostile work environment claim. (pp. 6, 41-42). Yet, there is no ruling to reverse, as Mr. Atkinson abandoned his hostile work environment claim during the summary judgment process when, in his oppositions, he failed to respond to Les Schwab's points or even identify it as a claim.¹⁷ (CP 386-404; 664-72). Even if he had not abandoned his claim, however, it would still fail as a matter of law.

To prove this claim, Mr. Atkinson must show he was subjected to harassment that (i) was unwelcome; (ii) was disability-based; (iii) affected the terms and conditions of his employment; and (iv) is imputable to Les Schwab. Robel v. Roundup Corp., 148 Wn.2d 35, 44-45, 59 P.3d 611

¹⁷ See, e.g., RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."); Demelash v. Ross Stores, Inc., 105 Wn. App. 508, 527, 20 P.3d 447 (2001) (declining to consider claim plaintiff "failed to argue . . . in response to [defendant's] motion for summary judgment" and explaining the appellate court "generally will not review an issue, theory or argument not presented at the trial court level").

(2002); Clarke v. State Attorney Gen. Office, 133 Wn. App. 767, 785, 138 P.3d 144 (2006).

To satisfy the third element, the alleged conduct “must be both objectively abusive and subjectively perceived as abusive by the victim.” Clarke, 133 Wn. App. at 785. Also, it must be sufficiently severe or pervasive as to alter the conditions of employment. Robel, 148 Wn.2d at 44. It is not sufficient if the conduct is merely offensive. Washington v. Boeing Co., 105 Wn. App. 1, 10, 19 P.3d 1041 (2000). Moreover, “[c]asual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law.” Glasgow v. Georgia-Pac. Corp., 103 Wn.2d 401, 406, 693 P.2d 708 (1985).

Mr. Atkinson’s claim falls miles short of meeting this standard for three reasons. First, the hostile work environment section of his Opening Brief does not actually address the claim or cite any facts to support it but rather regurgitates the relevant law. (pp. 41-42). Second, there is no evidence Mr. Atkinson actually believed his workplace was hostile as he instead simply characterized it as “uncomfortable.” (CP 83 at 7-9). Third, there is no evidence the workplace could have been hostile to a reasonable person. He cannot identify any crew member who made a negative comment about his migraine condition, and he recalls the second assistant

manager saying something to the effect of, “Oh, he got another little headache” but does not recall when this happened. (CP 97 at 9-25; 98 at 1-5). Meanwhile, he felt he was performing well in Chehalis and did not want to transfer to another store. In the absence of any evidence of an objective or subjectively hostile work environment, Mr. Atkinson’s claim would fail even if he had properly preserved it below.

G. The Trial Court Properly Ruled on the Parties’ Procedural Claims

Mr. Atkinson contends the trial court abused its discretion when it denied his second motion for sanctions and struck inadmissible statements from three of his supporting declarations. (pp. 6, 42-44). These arguments are without merit and should be rejected on appeal. Indeed, he only raises these procedural issues to distract from the fact he does not have a genuine response to the substantive dismissal of his claims on summary judgment. Under any standard, the trial court’s rulings were proper and should be affirmed.

1. The Trial Court Properly Denied Mr. Atkinson’s Second Motion for Sanctions

This Court should affirm the trial court’s denial of Mr. Atkinson’s second motion for sanctions.

On appeal, Mr. Atkinson essentially tries to make a Rule 56(f) argument, i.e., that he was unable to obtain the evidence he needed to

respond to, and ultimately defeat, Les Schwab's motion for summary judgment. Specifically, he claims, "All of the discovery sought by the plaintiffs was directly material to issues and arguments raised by Les Schwab in its motion for summary judgment." (p. 42). Yet, in his second sanctions motion he did not even assert Rule 56(f) or meet that rule's requirements.

Nor did Mr. Atkinson in any other way indicate what evidence he legitimately still needed. Now, on appeal, he continues to point to questions from his counsel that were clearly intended to elicit "I don't know" answers and have nothing to do with the merits of his claims. Such questions included, for example, how retirement benefits are invested (even though Mr. Atkinson transferred his account to Edward Jones) (CP 472 at 6-14; 694 at 147:19-148:11), the relationship between deferred compensation and non-compete contracts (even though Les Schwab's speaking agent previously explained that the non-compete Mr. Atkinson signed at age 16 in 1993 was superseded by the non-solicitation agreement he signed as an assistant manager in 2006) (CP 692 at 140:4-18; 693 at 143:7-13), and where the company's CEO (who has absolutely no connection to this case) is admitted to practice law (CP 705 at 191:4-12). Even though these questions, and the myriad others like them, were completely irrelevant to summary judgment or this case, Les Schwab

provided Mr. Atkinson with responses to certain unanticipated questions through a written, verified response. (CP 947 at ¶ 3; 950-57).

Moreover, the record clearly shows that Les Schwab's speaking agent prepared in good faith (indeed, spent seven hours preparing in addition to the several hours dedicated to the first deposition) and answered each question based on her understanding of the topics and her thorough preparation.

The court's decision denying Mr. Atkinson's second sanctions motion should thus be affirmed.

2. The Trial Court Properly Granted Les Schwab's Motion to Strike to the Extent Declarations Included Inadmissible Statements

Mr. Atkinson's final assignment of error is that the trial court abused its discretion "in ruling that portions of declaration testimony should be stricken, without specifying which portions were actually stricken, and which were not." (p. 6). He cites no legal authority for this contention. It, too, is without merit and should be rejected.

Les Schwab moved to strike the disputed declarations for two reasons. Mr. Atkinson submitted them in support of his supplemental opposition even though they had nothing to do with the continued deposition and could have been submitted with his initial opposition. The declarations also lacked proper foundation and were replete with

inadmissible hearsay. The trial court struck all inadmissible statements but otherwise considered the declarations in granting summary judgment. For several reasons, this was not an abuse of discretion as Mr. Atkinson now claims.

First, the trial court's decision to strike any inadmissible statements was fully consistent with Lewis County Local Rule 5(e):

Affidavits and declarations in support of or in opposition to any motion or part thereof shall be made only on personal knowledge, shall set forth only such facts as would be admissible in evidence, and shall show affirmatively that the affiant or declarant is competent to testify to the specific matters set forth therein. Argument, comment, and nonexpert opinion shall be excluded from affidavits and declarations.

Second, Mr. Atkinson approved the form of the trial court's order before it was signed (CP 1078-80), explained in his motion for reconsideration that the court denied Les Schwab's motion to strike except to "'obvious' portions of the declarations which were hearsay," and then asserted he did "not request reconsideration of this part of the Court's order." (CP 994). Under these circumstances, he cannot legitimately contend on appeal that the order should be reversed.

Third, Mr. Atkinson's assertion that the trial court erroneously struck the declarations and, instead, "should have stricken only those portions which were truly inadmissible" (p. 43), is nonsensical and

unnecessary, as that is exactly what the court did. In other words, the trial court did not strike the declarations in their entirety but rather only to the extent they contained inadmissible statements. Again, Mr. Atkinson acknowledged this and stated it is “obvious” which portions of the declarations those were.

For all these reasons, Mr. Atkinson’s assignment of error should be denied.

V. CONCLUSION

The trial court thoughtfully and fully considered Mr. Atkinson’s claims and the parties’ procedural motions. Indeed, before issuing its orders, it gave Mr. Atkinson multiple opportunities—two summary judgment oppositions, oral argument, a motion for reconsideration, and a reply in support of that motion—to comprehensively argue and defend his claims and procedural arguments. The record on appeal amply supports the trial court’s disposition of Mr. Atkinson’s claims and its ancillary procedural rulings. The Court should therefore affirm each of the trial court’s decisions.

RESPECTFULLY SUBMITTED this 23rd day of May, 2013.

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No. 44326-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PETER and RACHAEL ATKINSON, Appellants,

v.

LES SCHWAB TIRE CENTERS OF WASHINGTON, INC., a
Washington corporation, Respondent.

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on May 23, 2013, I arranged for the foregoing Brief of Respondent to be transmitted via electronic mail to

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Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.
Merdelin V. JOHNSON, Plaintiff,
v.

GENERAL BOARD OF PENSION AND HEALTH
BENEFITS OF the UNITED METHODIST
CHURCH, Defendant.

Nos. 02 C 5221, 04 C 6158.
Feb. 23, 2012.

Merdelin V. Johnson, Evanston, IL, pro se.

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OPINION AND ORDER

CHARLES RONALD NORGLÉ, District Judge.

*1 Before the court is *pro se* Plaintiff Merdelin Johnson's ("Johnson") Motion for Judgment as a Matter of Law or in the Alternative, Motion to Set Aside Verdict and Judgment or Motion for a New Trial ("Plaintiff's Motion"). Plaintiff's Motion arises from a December 15, 2011 jury verdict on two claims of retaliation. For the following reasons, Plaintiff's Motion is denied.

I. BACKGROUND

In 2002, Johnson, a black woman of Jamaican origin, brought this lawsuit pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981. Johnson alleged that her former

employer, the General Board of Pension and Health Benefits of the United Methodist Church ("General Board") and its managing director, Alexandra Jung ("Jung"), failed to promote her because of her race and national origin, retaliated against her based upon complaints of such discrimination, and unfairly discharged her. In 2004, Johnson sued the General Board and various individual defendants alleging sexual harassment. The cases were consolidated and nearly all of Johnson's claims were dismissed on motions to dismiss or on summary judgment.^{FN1} By the time the case went to trial in December of 2011, only two claims of retaliation against the General Board remained: (1) that the General Board failed to promote Johnson to a Team Leader position in March 2001 because she had previously complained of discrimination both within the General Board and to the EEOC and (2) that the General Board again failed to promote her to a Team Leader position in January 2003, also because she previously complained of discrimination both internally and to the EEOC.

^{FN1} Five district judges have presided over this case since it was filed in 2002. Originally assigned to Judge Lefkow's calendar, the case was reassigned to Judge Manning in April 2005, to Judge Plunkett in June 2006, to Judge Andersen in July 2006 and, after Judge Andersen retired, to this Court in October 2010.

These two retaliation claims were tried to a jury over seven days in December 2011. On December 15, 2011, the jury found in favor of the General Board on both claims and the Court entered final judgment in favor of the General Board. Johnson now moves for judgment as a matter of law pursuant to Rule 50(b) or, in the alternative, to set aside the verdict pursuant to Rule 60(b) and for a new trial pursuant to Rule 59(a).

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II. DISCUSSION

A. Johnson's Motion for Judgment as a Matter of Law Pursuant to Rule 50(b)

A Rule 50(b) motion should be granted only if, “on the basis of the admissible evidence, no rational jury could have found for the prevailing party.” *Bogan v. City of Chi.*, 644 F.3d 563, 572 (7th Cir.2011). In assessing a motion under Rule 50(b), courts view the evidence and all reasonable inferences in the light most favorable to the party who prevailed under the verdict and do not make credibility determinations, draw inferences from the facts, or weigh the evidence. *Id.* “[The] inquiry is limited to the question whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed.” *Wallace v. McGlothlin*, 606 F.3d 410, 418 (7th Cir.2010) (quotation omitted). Courts in employment discrimination cases are to be “particularly careful ... to avoid supplanting [their] view of the credibility or weight of the evidence for that of ... the jury.” *Emmel v. Coca-Cola Bottling Co. of Chi.*, 95 F.3d 627, 630 (7th Cir.1996) (quotation omitted).

*2 Johnson argues that the evidence at trial was insufficient to support a verdict in favor of the General Board.^{FN2} This argument fails on both procedural and substantive grounds. Procedurally, Johnson's Rule 50(b) motion is barred because she failed to make a Rule 50(a) motion before the case was submitted to the jury. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n. 5, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008) (“A motion under Rule 50(b) is not allowed unless the movant sought relief on similar grounds under Rule 50(a) before the case was submitted to the jury.”); see also *Wallace*, 606 F.3d at 418; *Prod. Specialties Grp., Inc. v. Minsor Sys., Inc.*, 513 F.3d 695, 699 (7th Cir.2008).

^{FN2}. In support of her Rule 50 argument, Johnson also states that “[t]he evidence ad-
duced at the time of trial in this action so

overwhelming favored the General Board that reasonable jurors could arrive only at a verdict in the General Board's favor.” Pl.'s Mot. 2. The Court considers this to be a misstatement and does not construe it against Johnson.

Even if Johnson's Rule 50(b) motion was not procedurally barred, she fails to establish that a reasonable jury would have lacked a sufficient evidentiary basis to find for the General Board. To the contrary, there was sufficient evidence presented at trial that (1) Johnson was not selected for promotion because she lacked the necessary interpersonal and leadership skills, not because she filed complaints, and (2) Johnson's complaints of discrimination were not a factor in the General Board's decision to promote other candidates. For example, Jung, the general manager, testified that she did not know about Johnson's complaints at the time she made the decision not to promote her in 2001. Jung further testified that Johnson was not promoted because she lacked the interpersonal and leadership skills necessary for the position, explaining that Johnson was at times irrational, inconsistent, and argumentative with her supervisors.^{FN3} Johnson examined Jung at length, both as an adverse witness and on cross examination. It was for the jury to assess Jung's credibility and affix the proper weight, if any, to her testimony. Given the testimony at trial, there was sufficient evidence in the record from which a rational jury could find in favor of the General Board. Johnson's Rule 50(b) motion is procedurally and substantively deficient and is therefore denied.

^{FN3}. In her reply brief, Johnson argues that the General Board's Rule 50(b) argument is “undermined” because another General Board employee was promoted despite poor interpersonal skills. Because this argument is raised for the first time in the reply brief, it is waived. *Mendez v. Perla Dental*, 646 F.3d 420, 423–24 (7th Cir.2011). Furthermore, the

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emails attached in support of this argument, see Pl.'s Reply to Def.'s Resp. in Opp'n to Pl.'s Mot. Ex. A, are stricken because they were not admitted into evidence.

B. Johnson's Motion to Set Aside Verdict Pursuant to Rule 60(b)

Johnson next argues that the verdict should be set aside pursuant to Rule 60(b). Johnson asserts that “[m]anipulative tactics which violate the spirit of fairness were used at every turn” and claims she was “prevented from presenting her case or upholding her most fundamental constitutional rights.” Pl.’s Mem. of Law in Supp. of Pl.’s Mot. 4 [hereinafter Pl.’s Mem.]. She further claims that witnesses testified falsely regarding when they learned of her complaints of discrimination and that the Court “deprived Johnson of the ability to effectively impeach Ms. Jung with her deposition testimony ... and improperly interrupted Ms. Jung testimony.” *Id.* at 4–5. The Court construes Johnson’s motion as seeking relief under Rule 60(b)(3) and/or (6).

“Relief under Rule 60(b) is an extraordinary remedy granted only in exceptional circumstances.” *Nelson v. Napolitano*, 657 F.3d 586, 589 (7th Cir.2011) (citation omitted). Rule 60(b)(3) provides that a court may relieve a party from a final judgment for “fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party.” Fed.R.Civ.P. 60(b)(3). “To obtain relief under Rule 60(b)(3), a party must show that she has a meritorious claim that she was prevented from fully and fairly presenting at trial as a result of the adverse party’s fraud, misrepresentation, or misconduct.” *Wickens v. Shell Oil Co.*, 620 F.3d 747, 758–59 (7th Cir.2010) (quotation omitted). A party seeking to set aside a judgment under Rule 60(b)(3) must prove fraud by clear and convincing evidence. *Id.* at 759. Rule 60(b)(6), the “catchall” provision of Rule 60(b), *Bakery Mach. & Fabrication, Inc. v. Traditional Baking, Inc.*, 570 F.3d 845, 848 (7th Cir.2009), permits courts to relieve parties of judgments for “any

other reason that justifies relief,” Fed.R.Civ.P. 60(b)(6). “Relief under Rule 60(b)(6) requires a showing of extraordinary circumstances justifying the reopening of a final judgment.” *Arrieta v. Battaglia*, 461 F.3d 861, 865 (7th Cir.2006) (internal quotation marks and citations omitted).

*3 Johnson’s assertion that witnesses “testified falsely” does not give rise to Rule 60(b)’s extraordinary relief. Johnson had the opportunity to and did in fact attempt to impeach the General Board’s witnesses, leaving it to the jury to affix the appropriate weight to their testimony.

Johnson’s claim that the Court improperly interrupted Jung’s testimony also falls short. Johnson questioned Jung as an adverse witness and again on cross examination. The General Board correctly observes that the Court only intervened after Johnson repeatedly asked the same questions and became argumentative. “A district judge is free to interject during a direct or cross-examination to clarify an issue, to require an attorney to lay a foundation, or to encourage an examining attorney to get to the point.” *United States v. Washington*, 417 F.3d 780, 784 (7th Cir.2005) (citing Fed.R.Evid. 614(b)); see also *United States v. Levine*, 180 F.3d 869, 872 (7th Cir.1999) (“Interference with cross examination in these circumstances is fully justified; a judge is entitled to keep the trial moving and confine examination to relevant issues.”); Fed.R.Evid. 611(a) (“The Court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to ... avoid wasting time ... [and] protect witnesses from harassment or undue embarrassment.”). For these reasons, Johnson’s motion for relief pursuant to Rule 60(b) is denied.

C. Johnson's Motion for a New Trial Pursuant to Rule 59(a)

In the alternative, Johnson seeks a new trial pursuant to Rule 59(a). Rule 59(a)(1)(A) provides that, after a jury trial, a court may grant a new trial on all or

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some of the issues “for any reason for which a new trial has heretofore been granted in an action at law in federal court.” The Court has discretion to order a new trial for any of the following reasons: (1) the verdict was against the weight of the evidence; (2) the damage award was excessive; or (3) for other reasons, the trial was not fair to the party bringing the motion. See *Kapelanski v. Johnson*, 390 F.3d 525, 530 (7th Cir.2004). Courts will not “set aside a jury verdict if a reasonable basis exists in the record to support the verdict, viewing the evidence in the light most favorable to the prevailing party, and leaving issues of credibility and weight of evidence to the jury.” *Id.* “A verdict will be set aside as contrary to the manifest weight of the evidence only if ‘no rational jury’ could have rendered the verdict.” *Moore ex rel. Estate of Grady v. Tuelja*, 546 F.3d 423, 427 (7th Cir.2008) (citation omitted). “Jury verdicts deserve particular deference in cases with simple issues but highly disputed facts.” *Id.* (quotation omitted).

1. Sufficiency of the Evidence under Rule 59

Johnson first argues that she is entitled to a new trial because the Jury verdict was against the “clear weight of the evidence.” Pl.’s Mem. 5–6. Johnson relies on the same arguments set forth in her Rule 50(b) motion and, in her reply, asserts that “[t]here was no evidence to sustain the jury’s verdict in favor of the General Board.” Pl.’s Reply to Def.’s Resp. in Opp’n to Pl.’s Mot. 4 [hereinafter Pl.’s Reply]. Johnson’s argument is without merit. As set forth above, there was sufficient evidence presented at trial that (1) Johnson was not selected for promotion because she lacked the necessary interpersonal and leadership skills, not because she filed complaints, and (2) Johnson’s complaints of discrimination were not a factor in the General Board’s decision to promote other candidates. In light of this record, Johnson has not established that “no rational jury” could have rendered the verdict. Johnson’s motion for a new trial because the verdict was against the clear weight of the evidence is denied.

2. Erroneous Evidentiary Rulings

*4 Johnson asserts that several evidentiary rulings, both admissions and exclusions, entitle her to a new trial. To obtain a new trial based on an erroneous evidentiary ruling, the movant must show that the ruling affected “a substantial right of the party.” Fed.R.Evid. 103(a)(2). Where the alleged error occurred during trial, the Court “will grant a new trial only if the error had a substantial influence over the jury, and the result reached was inconsistent with substantial justice.” *EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 440 (7th Cir.2012) (quotation omitted). “Evidentiary errors satisfy this standard only when a significant chance exists that they affected the outcome of the trial.” *Id.* (quotation omitted); see also *Alverio v. Sam’s Warehouse Club, Inc.*, 253 F.3d 933, 942 (7th Cir.2001) (“[E]ven if a judge’s rulings are found to be erroneous, they may be deemed harmless if the record indicates that the end result of the trial would have remained unchanged.”). “A party seeking a new trial based on a district court’s alleged erroneous evidentiary rulings bears a ‘heavy burden.’” *BP Amoco Chem. Co. v. Flint Hills Res., LLC*, 697 F.Supp.2d 1001, 1025 (N.D.Ill.2010) (quoting *Alverio*, 253 F.3d at 942). The Court addresses each of Johnson’s evidentiary arguments below.

a. Barbara Boigegrain’s Deposition Testimony

Johnson contends that the exclusion of General Board CEO Barbara Boigegrain (“Boigegrain”) as a trial witness warrants a new trial because Boigegrain’s testimony would have impacted the jury’s assessment of Jung’s intent and behavior. To the contrary, Boigegrain’s testimony was properly excluded at a pretrial conference as having no probative value. Judge Andersen ruled that:

With respect to the CEO, after studying her deposition, we don’t see how she has any probative knowledge that would help us understand whether or not the failure to promote was retaliatory.... And I don’t see that she has really good knowledge of the

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procedures or of your particular circumstances. So for now, unless something comes up during the trial that would make her opinion relevant, I cannot see having her testify.

Tr. of Pretrial Conf. Vol. 4, at 2 (June 8, 2010). Johnson fails to establish that this alleged error “affects a substantial right” and, even if she could establish error, the exclusion of Boigengrain's testimony was harmless in light of her limited knowledge of the facts relevant to this case. Johnson's motion for a new trial based on the exclusion of Boigegrain's testimony is denied.

b. General Board's Employment Handbook

Johnson claims that the exclusion of the General Board's employment handbook warrants a new trial because it “severely prejudiced” her ability to establish the “primary elements in this case.” Pl.'s Mem. 7. Johnson's argument on this issue is perfunctory and undeveloped and the Court need not respond to it. *See Harvey v. Town of Merrillville*, 649 F.3d 526, 532 (7th Cir.2011) (arguments that are perfunctory, undeveloped, or unsupported by authority are waived). In any event, it was Johnson, not the General Board, who moved to preclude admission of this exhibit in the first instance. *See Order Regarding Pretrial Issues (“Plaintiff's motion in limine D, to exclude defendant's exhibit no. 1, the General Board Employee Handbook produced during discovery, is denied.”)* (emphasis added). Finally, the exclusion of the handbook was harmless as it offered little, if any, probative value as to the General Board's reasons for not selecting Johnson for promotion. Johnson's motion for a new trial based on the exclusion of the General Board's employment handbook is denied.^{FN4}

FN4. Johnson asserts in her reply brief that, in addition to the employment handbook, she also sought to introduce the General Board's Managers' Manual to establish that the General Board deviated from its own policy. Because this argument is raised for the first

time in the reply brief, it is waived. *Mendez*, 646 F.3d at 423–24.

c. Gloria Taylor's and Gertrude Livernois's Deposition Testimony

*5 Johnson argues that the Court erroneously allowed the General Board to introduce the deposition testimony of Gloria Taylor (“Taylor”). To the contrary, the General Board made timely deposition designations for Taylor, *see* Joint Am. Final Pretrial Order, and notified Johnson prior to trial of its inability to serve Taylor with a subpoena, *see* Def.'s Resp. to Pl.'s Mot Ex. 1. Further, the General Board properly established that Taylor was unavailable as a witness pursuant to Federal Rule of Evidence 804(a). The Court did not err in allowing the General Board to introduce Taylor's deposition testimony.

Nor did the Court err in precluding Johnson from introducing unspecified portions of Taylor's testimony. Johnson was precluded from introducing the deposition testimony because she failed to make deposition designations. *See Tome Engharria E. Transportes, Ltda v. Malki*, No. 94 C 7427, 2003 WL 21372466, at *4 (N.D.Ill. June 12, 2003) (holding that deposition transcripts “may not be offered at trial” when a party, in defiance of a pretrial order, fails to “provide page and line deposition designations”). Finally, as the General Board correctly explains, the exclusion of Taylor's deposition testimony was harmless. Among other things, Johnson introduced exhibits and testified to the incidents involving Taylor. Johnson's motion for a new trial based on Taylor's deposition testimony is denied.

Johnson also contends that the Court erroneously barred her from reading portions of human resource director Gertrude Livernois's (“Livernois”) testimony. On November 30, 2011, counsel for the General Board informed Johnson that, “[w]e will not be calling Gertrude Livernois to testify at trial, as she is unavailable. We won't know if we will offer any deposition designations until you close your case.” Pl.'s Mot. Ex. D.

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When Johnson sought to offer Livernois's deposition testimony at trial, the Court barred it because Johnson failed to make deposition designations. See Malki, 2003 WL 21372466, at *4. The General Board did not attempt to introduce Livernois' deposition testimony. In any event, the exclusion of Livernois's unspecified testimony was harmless. Johnson's motion for a new trial based on this exclusion is denied.

d. Supplemental Exhibits

Johnson argues that the exclusion of her supplemental exhibits, PX 484–502, warrants a new trial. Johnson claims that these exhibits would have supported her claims that an employee, Shelia Owens, was promoted by Jung despite having “documented performance issues with interpersonal skills and communication.” Pl.'s Mem. 8. The General Board argues that these exhibits were properly excluded because they were not included in the Amended Final Pretrial Order or in the binders of trial exhibits that Johnson provided to the General Board on December 5, 2011. Johnson does not dispute that these documents were not attached to the Amended Final Pretrial Order. Instead, she argues that they should have been admitted because they were part of a previous pretrial order submitted to Judge Andersen in June 2010. *Id.* 8–9.

*6 “[A] trial court may properly exclude evidence or theories not raised in a pretrial order absent an abuse of discretion.” Gorlikowski v. Tolbert, 52 F.3d 1439, 1444 n. 3 (7th Cir.1995); see also Saunders v. City of Chi., 320 F.Supp.2d 735, 740 (N.D.Ill.2004) (barring party from “introducing any exhibits not listed in the final pretrial order”). “The determination as to whether or not parties should be held to pretrial orders is a matter for the discretion of district court judges.” Hotaling v. Chubb Sovereign Life Ins. Co., 241 F.3d 572, 578 (7th Cir.2001) (quotation omitted); see also Gorlikowski, 52 F.3d at 1444 (“The trial court's decision concerning the modification or enforcement of a pretrial order is reviewed for an abuse of discretion.”). It was the final pretrial order, not

previous drafts, that limited the evidence and issues to be presented at trial in this case. See Order Regarding Pretrial Issues 6 (“Exhibits in the *Final* Pretrial Order and supplements thereto to which the parties did not object may be admitted into evidence at trial.” (emphasis added)). There is no dispute that Johnson's supplemental exhibits were not listed in the Amended Final Pretrial Order and the Court has discretion to enforce that order and exclude them. Therefore, Johnson's motion for a new trial based on the exclusion of her supplemental exhibits is denied.

e. Counseling Records

Johnson argues that, by barring her counseling records—a social worker's notes and testimony of Johnson's alleged conversations with a chaplain—the jury was denied the opportunity to hear evidence in support of compensatory damages, thus warranting a new trial. The Court's rulings were not erroneous. Johnson did not call the social worker or the chaplain as witnesses and she did not argue at trial that the social worker's notes or her conversations with the chaplain qualify under a hearsay exception. Further, she now argues that the social worker's notes should be admitted as self-authenticating under Rule 902. Johnson did not raise this argument at the time of the ruling and it is therefore waived. Stephens v. Miller, 13 F.3d 998, 1008 n. 5 (7th Cir.1994). In any event, any error was harmless because the counseling records were offered for purposes of compensatory damages, an issue that never reached the jury in light of the verdict in favor of the General Board. Johnson's motion for a new trial based on the exclusion of counseling records is denied.

f. Self-Evaluations and Personal Opinions

Johnson seeks a new trial based on the Court's exclusion of documents containing her self-evaluations and personal opinions, including a document that she authored entitled “Response to my Review for Period 1/1/02 thru 5/31/02.” Pl.'s Mot. Ex. H. The document includes statements such as, “I completed a very high number of work items,” “I

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know I have performed beyond average,” “I believe I have been deliberately excluded from projects,” and “I’ll continue to do my job well and that is: giving a 110%.” *Id.* The final line reads, “Please attach to Review and forward with 15 attachments to Human Resources to be placed in my file.” *Id.*

*7 Johnson’s assertion that this and other self-evaluation documents were erroneously excluded is without merit. Her self-evaluations and responses to performance reviews were properly excluded as hearsay. Further, “a plaintiff’s own opinions about [her] work performance or qualifications do not sufficiently cast doubt on the legitimacy of [her] employer’s proffered reasons for its employment actions.” *Brown v. Ill. Dept. of Natural Res.*, 499 F.3d 675, 684 (7th Cir.2007) (quoting *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1181 (7th Cir.2002)); see also *A.B. Leach & Co. v. Peirson*, 275 U.S. 120, 128, 48 S.Ct. 57, 72 L.Ed. 194 (1927) (Holmes, J.) (“A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts.”). Johnson provides no basis upon which to admit these documents and, even if she did, their exclusion was harmless in light of their limited probative value. Multiple General Board witnesses testified that they did not consider Johnson’s self-evaluations in making the decision not to select her for the two promotions at issue. Johnson’s motion for a new trial based on the exclusion of self-evaluations and performance review responses is denied.

g. Training Exhibits

Johnson claims that the Court erred by excluding a series of emails that “would show Helen Exarhakos testimony as false when she testified that she asked Plaintiff to conduct power of attorney training after December 2002” Pl.’s Mem. 10. In support, Johnson attaches six pages of email communication, only two of which contain communications with Helen Exarhakos (“Exarhakos”) about power of at-

torney training. See Pl.’s Mot. Ex. 1.^{FN5} The General Board notes that one of the emails, MJ 1319, was not included in Johnson’s trial exhibits and the other, MJ 1340, was offered and received as part of Johnson’s Exhibit 221. In any event, the exclusion of these one sentence emails was harmless in light of their limited probative value. Johnson’s motion for a new trial based on the exclusion of exhibits related to power of attorney training is denied.

^{FN5}. The first email, labeled MJ 1319, is from Exarhakos to Andrew Boyer, with Johnson appearing in the “cc” field. It reads, “Andy, Could you please help Merdelin with the POAs? I will have Darcel train Debbie Johnson. Thanks, Helen.” Pl.’s Mot. Ex. 1. The second email, labeled MJ 1340, is from Exarhakos to fifteen individuals, including Johnson. It reads, “[t]he following will be the assignments for POAs: Andy: A–L. [:] Merdelin M–Z[.] Thanks, Helen.” *Id.*

h. Co-Worker and Customer Comments

Johnson contends that the Court erroneously excluded exhibits containing “employees and customers’ comments.” Pl.’s Mem. 10. This assertion is without merit. The opinions of co-workers and other non-decision making third parties, such as customers, were properly excluded as irrelevant. See, e.g., *Van v. Peters*, No. 08 C 4718, 2010 WL 2609646, at *5 (N.D.Ill. June 24, 2010) (“[T]he statements of two coworkers who stated they believe [plaintiff] can perform at the Grade 13 level is not enough to support her failure to promote claim as ‘isolated comments by co-workers regarding a plaintiff’s abilities’ are not relevant to the issue of an employer’s knowledge or reasoning in making promotion decisions.” (quoting *Rabinovitz v. Pena*, 89 F.3d 482, 487 (7th Cir.1996))); see also *Sirvidas v. Commonwealth Edison Co.*, 60 F.3d 375, 378 (7th Cir.1995); *Campbell v. Univ. of Akron*, 211 F. App’x 333, 347 (6th Cir.2006). Further, in light of the limited probative value of this evidence, any error was harmless. Johnson’s motion for a new

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trial based on the exclusion of co-worker and customer comments is denied.

i. Call Recordings

*8 Johnson contends that the exhibits “relating to the General Board’s illegal recording of Johnson’s personal telephone calls in respect to compensatory and punitive damages and the conduct of the Defendant, should have been accepted by the Court.” Pl.’s Mem. 11. To the contrary, this evidence was properly excluded in the pretrial order:

There is no evidence that Plaintiff was treated any differently than any other employees with respect to the General Board’s recording of employee telephone calls, and the call recording issue is not relevant to Plaintiff’s remaining claims. As explained during the pretrial conference, Plaintiff is precluded from introducing evidence at trial regarding the recording of personal telephone calls, and her motion for reconsideration on this issue is denied.

Order Regarding Pretrial Issues 5–6; *see also* Tr. of Pretrial Conf. Vol. 4, at 2–3 (June 8, 2010). Johnson’s motion for a new trial based on the exclusion of exhibits relating to the General Board’s recording of personal telephone calls is denied.

j. Dismissed Promotion Claims

Johnson contends that the exclusion of testimony regarding “the positions she had applied for but did not receive ... spelt doomed to her case.” Pl.’s Mot. 5. To the contrary, Johnson was properly precluded from testifying about these previous promotion decisions because those issues were previously dismissed from this case and Johnson has failed to establish that testimony regarding those decisions was relevant to this trial. *See Capuano v. Consol. Graphics, Inc.*, No. 06 C 5924, 2007 WL 2688421, at *5–6 (N.D.Ill. Sep.7, 2007); *see also Kaplan v. City of Chi.*, No. 99 C 1758, 2005 WL 1026574, at *4 (N.D.Ill. Apr.22, 2005) (barring plaintiff from presenting evidence from pre-

viously dismissed retaliation claims). In any event, the exclusion of this evidence was harmless—it was not relevant to the two promotion decisions at issue and its admission would likely have confused the jury and been prejudicial. Johnson’s motion for a new trial based on the exclusion of testimony regarding promotion decisions that were previously dismissed from the case is denied.

k. Judicial Bias

Johnson claims that the Court was “inherently bias[ed]” towards her, warranting a new trial. Pl.’s Mot. 3. “Federal judges have wide discretion to determine the role that they will play during the course of a trial.” *Washington*, 417 F.3d at 783. As set forth above, a district judge is “free to interject during a direct or cross-examination to clarify an issue, to require an attorney to lay a foundation, or to encourage an examining attorney to get to the point.” *Id.* at 784. A judge must not, however, “assume the role of an advocate for either side.” *United States v. Martin*, 189 F.3d 547, 553 (7th Cir.1999). When seeking a new trial based on judicial bias, the movant must show that the judge’s conduct “so impair[ed] the lawyer’s credibility in the eyes of the jury as to deprive the client of a fair trial.” *Chlopek v. Federal Ins. Co.*, 499 F.3d 692, 703 (7th Cir.2007). “[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.” *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994).

*9 Johnson asserts judicial bias because: (1) her requests for “at least three side-bars” were denied whereas the General Board’s requests were generally granted; (2) her request to have her sister, a non-lawyer who was previously listed as a witness, act as her trial “assistant” was denied, whereas the General Board was allowed “to have a person who was not an attorney put exhibits on the Elmo”; (3) the Court made “derogatory remarks” in the presence of the jury; (4) the Court accepted Judge Andersen’s pretrial

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rulings and rejected Johnson's efforts to clarify those rulings; (5) the Court did not inform Johnson of her right to appeal; (6) the case was moved to trial "quickly rather than moving forward on the merit[s]." Pl.'s Mot. 3–4. Johnson's assertions do not support a bias or partiality challenge.

First, with respect to denial of sidebar requests, "it is clear that a party is not automatically entitled to a sidebar, as the Court has discretion to manage the proceedings before it." Washington v. Ill. Dept. of Revenue, No. 01–3300, 2006 WL 2873437, at *2 (C.D.Ill. Oct.5, 2006). If Johnson wished to raise the issue outside the presence of the jury, "she could have done so at a break in the trial, or through a motion in limine." *Id.* Johnson has not established that the denial of a sidebar request interfered with the proper presentation of trial testimony.

Second, Johnson's contention that she was improperly denied the assistance of her non-attorney sister is without merit. The Court's decision not to allow Johnson's sister to act as her trial assistant is well within its "broad discretion to manage trials." United States v. Wingate, 128 F.3d 1157, 1161 (7th Cir.1997); see also United States v. Winbush, 580 F.3d 503, 508 (7th Cir.2009) ("It is well settled that issues of trial management are left to the district judge, and we intervene only when it is apparent that the judge has acted unreasonably. The occasions for intervention are rare.") (internal quotation omitted). Further, Johnson fails to show that this denial deprived her of a fair trial.

Third, Johnson's contention that the Court made "derogatory remarks" is without merit. Johnson contends that when she "testified that she wished she did not have to be at court, the Court remark centered on her being the Plaintiff." Pl.'s Mot. 4. Johnson's testimony suggested to the jury that the General Board had initiated this case. The Court's remark was not derogatory but rather was an attempt to clarify for the jury that Johnson, not the General Board, was the plaintiff

in the case.

Fourth, the Court properly considered and agreed with the pretrial rulings by retired Judge Andersen. The law of the case doctrine requires so much. See Brengetty v. Horton, 423 F.3d 674, 680 (7th Cir.2005) ("[T]he law of the case doctrine in these circumstances reflects the rightful expectation of litigants that a change of judges midway through a case will not mean going back to square one.") (quoting Best v. Shell Oil Co., 107 F.3d 544, 546 (7th Cir.1997)).

*10 Fifth, unlike in criminal cases, there is no requirement in civil cases that the judge provide notice of appellant rights on the record. See, e.g., Slaughter v. United States Marshal's Serv., No. 89 C 2386, 1989 WL 85015, at *1 (N.D.Ill. July 21, 1989) ("[A] judge is required to inform a defendant of his or her right to appeal only in criminal cases pursuant to Rule 32(a) of the Federal Rules of Criminal Procedure; a similar right does not exist in civil cases."). Pursuant to 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a), if Johnson wishes to appeal, she must file a notice of appeal with the district clerk within thirty days after entry of the judgment or order appealed from.

Sixth, Johnson's claim of bias because the case moved "quickly" to trial is inaccurate and without merit. This case has been pending since 2002, has been presided over by five district judges, and was previously scheduled for trial in June 2010, a date that was continued upon Johnson's request. This case did not move quickly to trial and any claim of bias on this basis is rejected. In any event, any alleged bias was harmless. See Liteky, 510 U.S. at 555; Chlopek, 499 F.3d at 702–03. For these reasons, Johnson's motion for a new trial because the Court was "inherently bias[ed]" is denied.^{FN6}

FN6. In her reply, Johnson argues that the

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Court expressed bias when it sustained the General Board's objection to her testimony in narrative format. Because this argument is raised for the first time in the reply brief, it is waived. Mendez, 646 F.3d at 423–24. In any event, the denial of a *pro se* plaintiff's request to testify in narrative format is “well within the proper exercise of the judge's discretion.” Hutter N. Trust v. Door Cnty. Chamber of Commerce, 467 F.2d 1075, 1078 (7th Cir.1972).

I. Remaining Arguments

The Court has reviewed Johnson's remaining evidentiary arguments and concludes that they are without merit.

3. Jury Instructions and Verdict Form

Finally, Johnson argues that she is entitled to a new trial based on what she characterizes as prejudicial errors in the jury instructions and verdict form. The Court reviews challenged instructions to determine whether “the instructions as a whole were sufficient to inform the jury of the applicable law,” and will grant a new trial “only if an instruction so misled the jury that the deficiency prejudiced the [plaintiff].” Fox v. Hayes, 600 F.3d 819, 843 (7th Cir.2010) (citations omitted); see also Malone v. Reliastar Life Ins. Co., 558 F.3d 683, 689 (7th Cir.2009) (“An erroneous jury instruction is not prejudicial unless, ‘considering the instructions as a whole, along with all of the evidence and arguments, the jury was misinformed about the applicable law.’” (quoting Susan Wakeen Doll Co. v. Ashton–Drake Galleries, 272 F.3d 441, 452 (7th Cir.2001))). “There is no idealized set of perfect jury instructions, but the instructions must be correct statements of law and supported by the evidence.” Hefferman v. Bd. of Trs. of Ill. Cmty. Coll. Dist. 508, 310 F.3d 522, 528 (7th Cir.2002) (internal citation and quotation omitted). The Court considers the verdict form “in light of the instructions given.” Happel v. Walmart Stores, Inc., 602 F.3d 820, 827 (7th Cir.2010).

As an initial matter, Johnson failed to properly preserve her objections to the jury instructions and verdict form. Federal Rule 51(c)(1) requires the party objecting to the jury instructions to “do so on the record, stating distinctly the matter objected to and the grounds for the objection.” The objection “must be specific enough that the nature of the error is brought into focus.” Schobert v. Ill. Dept. of Transp., 304 F.3d 725, 729 (7th Cir.2002) (citation omitted). Moreover, the objecting party must “explain what is wrong with the proposed instruction; it is not enough simply to submit an alternative instruction.” *Id.* (citation omitted). While there are no formal requirements, the district court “must be made aware of the error prior to instructing the jury, so that the judge can fix the problem before the case goes to the jury.” *Id.* at 729–30 (citation omitted). A party may not state one ground when objecting at trial under Rule 51 and later attempt to rely on a different ground for the objection on a motion for a new trial. *Id.* at 730.

*11 Johnson claims that she did not “have an opportunity to make an objection” to the General Board's proposed instructions. Pl.'s Reply 12. This cannot be so. Johnson was present in the courtroom throughout the jury instruction process. An objection is timely when made “promptly after learning that the instruction ... will be, or has been, given.” Fed.R.Civ.P. 51(c)(2)(B). By Johnson's own account, she failed to make a timely objection on the record, let alone make an objection with “sufficient specificity to apprise the district court of the legal and factual bases for any perceived defect.” Chestnut v. Hall, 284 F.3d 816, 819 (7th Cir.2002). Because Johnson failed to satisfy the requirements of Rule 51, her objections to the instructions and verdict form are waived. *Id.* at 819–20.

In any event, Johnson fails to establish that the instructions as whole warrant a new trial. Johnson contends that the “one-sided” jury instructions failed to state the elements of retaliation and that the adverse

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employment action instructions “catered to the facts of the Defendant's theory of this case.” Pl.'s Mem. 12–13. To the contrary, the adverse employment action instructions state the elements of retaliation, are supported by Seventh Circuit caselaw, and draw largely from the Seventh Circuit Pattern Civil Jury Instructions.

Johnson also claims that the “jury's deliberations would have taken a very different course if it had been instructed on what constitute adverse actions for retaliation claims or had been told how to determine those adverse actions.” Pl.'s Reply 14. The comments to the Pattern Jury Instructions explain that, “[w]hat constitutes an ‘adverse employment action’ in the context of a retaliation claim is not entirely clear. The Committee does not use ‘adverse action’ in this instruction as a term of art, but merely as a placeholder for the specific act alleged.” Seventh Circuit Pattern Jury Instruction § 3.02, cmt. d. Consistent with this guidance, and following Seventh Circuit precedent, the Court instructed the jury that “documenting an employee's behavior” and “negative performance evaluations” do not, on their own, constitute adverse employment actions in the context of retaliation. *See* Def.'s Proposed Jury Instruction Nos. 16, 17 (citing controlling authority). These instructions were not in error. As a whole, the instructions and the verdict form accurately state the law. Furthermore, even if the instructions were in error, a new trial is unnecessary because Johnson fails to establish that the instructions misled the jury or changed the outcome of the trial. *See Fox*, 600 F.3d at 843; *see also Prod. Specialties Grp., Inc.*, 513 F.3d at 700 (finding that, despite erroneous instruction, the movant “has not met its burden of establishing that the error affected substantial rights, i.e., that the outcome probably would have been different without the error”) (quotation omitted).

III. CONCLUSION

*12 For the foregoing reasons, Plaintiff's Motion is denied.

IT IS SO ORDERED.

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Western Division.
Mary I. McKINLEY, Plaintiff,
v.
SKYLINE CHILI, INC., Defendant.

No. 1:11-CV-344.
Aug. 14, 2012.

Jonathan Britton Allison, Kelly Mulloy Myers, Fre-
king & Betz, Cincinnati, OH, for Plaintiff.

Anthony Joseph Caruso, Megan Brittney Hall, Cin-
cinnati, OH, for Defendant.

OPINION & ORDER

S. ARTHUR SPIEGEL, Senior District Judge.

*1 This matter is before the Court on Defendant's Motion for Summary Judgment (doc. 17), Plaintiff's Response (doc. 26), and Defendant's Reply (doc. 28). For the reasons indicated herein, the Court GRANTS the Defendant's motion.

I. BACKGROUND

On July 21, 2011, Plaintiff Mary McKinley filed an Amended Complaint raising numerous federal and state claims arising from the termination of her employment with Skyline Chili, Inc. ("Defendant") (doc. 10).

Plaintiff, a female born in 1954, began working for Defendant in March 2006 as a District Manager (doc. 10). In 2008, after receiving two positive yearly reviews, Plaintiff was promoted to Market Manager, the first for the Cincinnati Market (doc. 17, doc. 20).

The Market Manager position involved a pay increase, higher bonus potential, and broader responsibilities compared to the District Manager position (*Id.*). In April of 2009, Jay Swallow, who served as District Manager for the Dayton market during Plaintiff's tenure as a District Manager in Cincinnati, was also promoted to the position of Market Manager, for the Dayton area (doc. 17, doc. 26).

Beginning in 2008, Plaintiff's supervisor Debbie Chitwood began to raise concerns regarding Plaintiff's performance (doc. 17). Specifically, as a Market Manager in 2008, Plaintiff received a written annual performance review that included concerns over response times to customer complaints (*Id.*). In April 2009, Ms. Chitwood wrote an email to Plaintiff addressing concerns over Plaintiff's follow-up with customer complaints (*Id.*). According to Ms. Chitwood, Plaintiff was "off her performance target and was struggling with her Market Manager role" in April 2009 (*Id.*, doc. 19). In December of 2009, Plaintiff received a negative written annual performance review, that stated specifically, "[Plaintiff] has struggled in her leadership effectiveness as the Market Manager this past year ..." (doc. 17). Ms. Chitwood continued to have concerns over Plaintiff's job performance through May of 2010, and on May 25, Ms. Chitwood met with Plaintiff and gave her a letter outlining a number of those concerns (*Id.*).

After receiving the letter, Plaintiff complained to Shari Bleuer, Director of Human Resources for Skyline Chili, approximately two days later (doc. 26). Plaintiff claims to have mentioned she felt discriminated against and that "all of [her] team members were significantly younger and some [were] male" (doc. 26).

In November of 2010, after serving as Market Manager for the Dayton Market, Mr. Jay Swallow was

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promoted to Director of Operations over the Cincinnati and Dayton markets (doc. 17). Plaintiff was then “reporting directly” to Mr. Swallow (*Id.*). Soon after receiving “feedback” from Mr. Swallow, Ms. Chitwood terminated plaintiff on December 1, 2010 in a termination letter dated November 30, 2010 (*Id.*). The letter noted that the termination was the “result of a number of ongoing performance issues,” including “erosion of Plaintiff’s leadership acumen” and “lack of communication or misconduct.” (*Id.*).

*2 Plaintiff alleges that her employment was improperly terminated by Defendant and claims: (1) Age Discrimination in violation of the Age Discrimination in Employment Act (“ADEA”); (2) Age Discrimination under Ohio Revised Code Chapter 4112; (3) Gender Discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., (“Title VII”) (4) Gender discrimination in violation of Ohio Revised Code Chapter 4112; (5) Retaliation in violation of the ADEA and Title VII; (6) Retaliation in violation of Ohio Revised Code Chapter 4112; and (7) Retaliation and Interference under the Family Medical Leave Act (“FMLA”).^{FN1}

^{FN1}. As Defendant noted in oral argument, Plaintiff has abandoned its FMLA claim (7) and therefore the Court will not address it further.

On April 1, 2012, Defendant filed a Motion for Summary Judgment on Plaintiff’s Claims (doc. 17). Oral arguments were heard from both parties on May 25, 2012. For the following reasons, Defendant’s motion will be GRANTED.

II. STANDARD

Although a grant of summary judgment is not a substitute for trial, it is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56; see also, e.g., *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir.1993); *Osborn v. Ashland County Bd. of Alcohol, Drug Addiction and Mental Health Servs.*, 979 F.2d 1131, 1133 (6th Cir.1992) (per curiam). In reviewing the instant motion, “this Court must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir.1993), quoting in part *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (internal quotation marks omitted).

The process of moving for and evaluating a motion for summary judgment and the respective burdens it imposes upon the movant and the non-movant are well settled. First, “a party seeking summary judgment ... bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact[.]” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); see also *LaPointe*, 8 F.3d at 378; *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 405 (6th Cir.1992); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir.1989). The movant may do so by merely identifying that the non-moving party lacks evidence to support an essential element of its case. See *Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A.*, 12 F.3d 1382, 1389 (6th Cir.1993).

Faced with such a motion, the non-movant, after completion of sufficient discovery, must submit evidence in support of any material element of a claim or defense at issue in the motion on which it would bear the burden of proof at trial, even if the moving party has not submitted evidence to negate the existence of

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that material fact. See Celotex, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). As the “requirement [of the Rule] is that there be no genuine issue of material fact,” an “alleged factual dispute between the parties” as to some ancillary matter “will not defeat an otherwise properly supported motion for summary judgment.” Anderson, 477 U.S. at 247–48 (emphasis added); see generally Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1310 (6th Cir.1989). Furthermore, “[t]he mere existence of a scintilla of evidence in support of the [nonmovant’s] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant].” Anderson, 477 U.S. at 252; see also Gregory v. Hunt, 24 F.3d 781, 784 (6th Cir.1994). Accordingly, the non-movant must present “significant probative evidence” demonstrating that “there is [more than] some metaphysical doubt as to the material facts” to survive summary judgment and proceed to trial on the merits. Moore v. Philip Morris Cos., Inc., 8 F.3d 335, 339–40 (6th Cir.1993); see also Celotex, 477 U.S. at 324; Guarino, 980 F.2d at 405.

*3 Although the non-movant need not cite specific page numbers of the record in support of his claims or defenses, “the designated portions of the record must be presented with enough specificity that the district court can readily identify the facts upon which the non-moving party relies.” Guarino, 980 F.2d at 405, quoting Inter-Royal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir.1989) (internal quotation marks omitted). In contrast, mere conclusory allegations are patently insufficient to defeat a motion for summary judgment. See McDonald v. Union Camp Corp., 898 F.2d 1155, 1162 (6th Cir.1990). The Court must view all submitted evidence, facts, and reasonable inferences in a light most favorable to the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); United States v. Diebold, Inc., 369 U.S. 654,

82 S.Ct. 993, 8 L.Ed.2d 176 (1962). Furthermore, the district court may not weigh evidence or assess the credibility of witnesses in deciding the motion. See Adams v. Metiva, 31 F.3d 375, 378 (6th Cir.1994).

Ultimately, the movant bears the burden of demonstrating that no material facts are in dispute. See Matsushita, 475 U.S. at 587. The fact that the non-moving party fails to respond to the motion does not lessen the burden on either the moving party or the Court to demonstrate that summary judgment is appropriate. See Guarino, 980 F.2d at 410; Carver v. Bunch, 946 F.2d 451, 454–55 (6th Cir.1991).

III. Discussion

A. Plaintiff's State and Federal Age Discrimination Claims

The Age Discrimination in Employment Act of 1967 (“ADEA”) as amended, 29 U.S.C. § 623(a),^{FN2} prohibits employers from discriminating “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” Plaintiffs may use either direct or circumstantial evidence to prove unlawful discrimination but, regardless of the type of evidence presented, the burden of persuasion remains at all times with the plaintiff to demonstrate that “age was the ‘but-for’ cause of the challenged ... action.” Gross v. FBL Financial Services, Inc., 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009).

^{FN2}. Plaintiff also alleges violations of Ohio’s age-discrimination laws, O.R.C. § 4112. Under Ohio law, the elements and burden of proof in a state age-discrimination claim parallel the ADEA analysis. See McLaurin v. Fischer, 768 F.2d 98, 105 (6th Cir.1985) (citing Barker v. Scovill, Inc., 6 Ohio St.3d 146, 451 N.E.2d 807, 808 (1983)). See also Ercegovich v. Goodyear

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Tire & Rubber Co., 154 F.3d 344, 357 (6th Cir.1998). Therefore, the Court applies the same analytical framework to Plaintiff's state-law age-discrimination claims as it does for the ADEA-based claims, and the Court's resolution of Plaintiff's ADEA-based claims likewise resolves Plaintiff's state-law age-discrimination claims. See, e.g., Daugherty v. Sajar Plastics, Inc., 544 F.3d 696, 702 (6th Cir.2008) (applying analysis under federal Americans with Disabilities Act to Ohio's disability discrimination statute to resolve both claims).

1. *Prima Facie* Case

An employee seeking to establish a *prima facie* case of age discrimination must show (1) that he or she was forty-years or older at the time of his or her dismissal; (2) that he or she was subjected to adverse employment action; (3) that he or she was qualified for the position; and (4) that he or she was replaced by a younger person. McDonald v. Union Camp, 898 F.2d 1155, 1160 (6th Cir.1990). See also McDonnell Douglas Corp. v. Green, 441 U.S. 792, 802, 99 S.Ct. 2400, 60 L.Ed.2d 646 (1973). Whether or not Plaintiff meets the third “qualified for the McDonnell Douglas Corp. v. Green, 441 U.S. Whether or not Plaintiff meets the third Plaintiff's *prima facie* case that the parties dispute.

*4 Citing McDonald v. Union Camp, Defendant argues that Plaintiff was not qualified for her position because she failed to meet its legitimate expectations (doc. 17, citing 898 F.2d at 1160). Specifically, Defendant points to Plaintiff's negative performance review of 2009, documentation in her personnel file regarding her poor performance, the May 25, 2010 written warning, and the termination letter of November 30, 2010, all of which, according to Defendant, show that Plaintiff failed to meet Defendant's expectations regarding, for example, leadership and sales and profitability (*Id.*). For further support for this argument that the Court should look to Defendant's

assessment of Plaintiff's performance for guidance on whether she was qualified for her position, Defendant points the Court to Demasellis v. St. Mary's of Michigan, No. 10-12138-BC (E.D.Mich.2011) and Smith v. Appalachian Regional Healthcare, Inc., No. 07-166-ART (E.D.Ky.2009), which, Defendant asserts, are examples of courts finding that the failure to meet a defendant's legitimate expectations means that, as a matter of law, the plaintiff should be found unqualified (doc. 28).

In contrast, Plaintiff argues that, in order to determine whether she has shown she is qualified for the purposes of making her *prima facie* case, the Court should look only to Plaintiff's objective qualifications-e.g., her education, experience in the industry, and possession of the requisite general skills (doc. 26, citing Wexler v. White's Fine Furniture, Inc., 317 F.3d 564 (6th Cir.2003) and Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir.1999)). Plaintiff contends that the Court should look to her qualifications and performance from before the events linked to her discharge, independent of the allegedly nondiscriminatory reasons for her discharge that are proffered by Defendant.

Plaintiff has the right of it here. Both Wexler and Cline hold that “a court may not consider the employer's alleged nondiscriminatory reason for taking an adverse employment action when analyzing the *prima facie* case.” Wexler, 317 F.3d at 574, citing Cline, 206 F.3d at 660-61. Demasellis and Smith, the cases cited by Defendant, are neither binding on this Court nor do they compel a finding that Plaintiff here was not qualified. Those cases do not address employees being fired for subjective reasons, like poor leadership, and instead focus on objective reasons for the termination, like an employee's verbal abuse of a patient directly in violation of the employment contract. See, e.g., DeMasellis, 2011 WL 5404268 at *15. The standard for “qualified” in the context of employment discrimination should not be based on the subjective and arbitrary reasoning of the defendant

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employer because that can too easily mask discrimination. See Wexler, 317 F.3d at 575. Therefore, the Court will continue to apply the objective test set forth in Wexler to determine if Plaintiff was qualified for the position and will look to whether she has presented evidence that her qualifications were “at least equivalent to the minimum objective criteria required for employment in the relevant field ... [such as her] education, experience in the relevant industry, and demonstrated possession of the required general skills.” *Id.* at 576.

*5 Applying the Wexler standard, the Court easily concludes that no reasonable juror could find that Plaintiff’s years of experience in the industry, including several successful years working for Defendant, would not meet the “minimum objective criteria for employment in her field.” Therefore, Plaintiff has shown she was qualified for the position from which she was terminated and has established a *prima facie* case under the McDonnell Douglas framework.

2. Pretext

Because Plaintiff has established a *prima facie* case under the McDonnell Douglas framework, the burden shifts to Defendant to present a legitimate business reason for Plaintiff’s termination. McDonald v. Union Camp, 898 F.2d at 1160. Defendant’s legitimate business reasons for Plaintiff’s termination include that her supervisor, Ms. Chitwood, lost confidence in Plaintiff’s leadership abilities because, *inter alia*, her stores suffered loss of sales and profitability, Plaintiff consistently failed to timely follow up on customer complaints, she exhibited a lack of responsiveness to accounting, and she failed to timely file financial documents (doc. 17). Defendant contends that Ms. Chitwood lost confidence in Plaintiff’s credibility and that Plaintiff suffered from both a lack of communication and miscommunication.

Defendant has met its burden of producing a legitimate business reason for terminating Plaintiff. Thus, the burden shifts back to Plaintiff to proffer

evidence sufficient for a reasonable jury to find, by a preponderance of evidence, that Defendant’s reasons for her termination were mere pretext and that, but for her age, Plaintiff would not have been terminated. Gross, 557 U.S. at 176; McDonald v. Union Camp, 898 F.2d at 1160.

A plaintiff can show pretext in three ways. See Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1083–84 (6th Cir.1994). First, the plaintiff can show that the proffered reasons had no basis in fact. Manzer, 29 F.3d at 1083–84. This first type of showing consists of evidence that the proffered basis for the plaintiff’s adverse treatment never happened, *i.e.*, that they were false. *Id.* Second, the plaintiff can show that the reasons given by the employer were insufficient to motivate discharge. *Id.* This second showing ordinarily consists of evidence that other similarly-situated individuals were more favorably treated. *Id.* Third, the plaintiff can show that the defendant’s proffered reason did not actually motivate the adverse action. *Id.* In order to make this third type of showing, the plaintiff must introduce additional evidence of discrimination. (*Id.*)

The Sixth Circuit has cautioned that courts should “avoid formalism” in the application of the Manzer test, “lest one lose the forest for the trees.” Chen v. Dow Chem. Co., 580 F.3d 394, 400, n. 4 (6th Cir.2009). Pretext, the court observed, “is a commonsense inquiry: did the employer fire the employee for the stated reason or not? This requires a court to ask whether the plaintiff has produced evidence that casts doubt on the employer’s explanation, and, if so, how strong it is.” *Id.*

*6 To establish pretext under the second Manzer prong, that similarly-situated individuals were more favorably treated, Plaintiff proffers testimony of members of Defendant’s own management team-*i.e.*, some of Plaintiff’s coworkers, which Plaintiff contends show that Plaintiff was better qualified than Jay Swallow for the Director of Operations position.

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Plaintiff also proffers testimony that, she contends, shows that Mario Nocero, another younger man, was slated to be promoted to Market Manager, despite being less qualified than Plaintiff. In addition, Plaintiff offers evidence that she argues establishes a question as to the factual basis of Defendant's articulated reasons for her termination, which goes to *Manzer's* first prong.

Defendant replies, and this Court agrees, that none of these arguments taken individually or as a whole satisfies the standard set forth in *Manzer* or otherwise casts doubt on Defendant's reasons for terminating Plaintiff's employment. Plaintiff has simply failed to present evidence from which a reasonable jury could conclude that Defendant's proffered reasons for Plaintiff's termination were pretext for impermissible discrimination.

a. Plaintiff has failed to show that other similarly situated employees were treated more favorably.

Plaintiff claims that “everyone in management who worked with and knew [her] believed her to be more qualified [than Jay Swallow],” and proffers testimony from her former co-workers to support her assertion that Defendant acted pretextually. Three District Managers who worked with Plaintiff, Heather Pressler, Mario Nocero and Angela Hornsby, each claimed that they felt Plaintiff was more qualified for the Director of Operations position that Mr. Swallow eventually filled and that Plaintiff was treated less favorably than Mr. Swallow. Plaintiff also points to her team member's testimony that she was “a thousand times more qualified [than Jay Swallow]” and that those working for her “would lay down and die for her.” (doc. 26). In addition, Plaintiff contends that Ms. Chitwood intended to demote Plaintiff and replace her with Mr. Nocero, a younger man, as Market Manager.

Unfortunately, the evidence Plaintiff points to as support for her assertion that similarly situated younger men were treated more favorably than she was fails to do so. First, to the extent Plaintiff relies on

the opinions of her coworkers to show that she was better-qualified than Mr. Swallow for the promotion to Director of Operations, that opinion testimony is insufficient to show pretext. As Defendant notes, federal courts have consistently held that a plaintiff's former coworkers' personal opinions of the plaintiff's past work performance fail to create a genuine issue of material fact. *See, e.g., Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124–1125 (7th Cir.1994) (“The mere submission of materials from a coworker or supervisor indicating that an employee's performance is satisfactory ... does not create a material issue of fact”); and *Hawkins v. Pepsico, Inc.*, 203 F.3d 274, 280 (4th Cir.2000) (“Alleged opinions of [plaintiff's] coworkers as to her work qualifications are close to irrelevant.”). *See also, Gardner v. Wayne County*, 520 F.Supp.2d 858, 864–865 (E.D.Mich.2007) (“Plaintiff has cited no case law supporting the proposition that a co-worker's opinion that Plaintiff was terminated based on her race constitutes direct evidence of race discrimination.”).

*7 The affidavits and testimony presented to establish Plaintiff's qualifications and Mr. Swallow's comparative lack of qualifications are, essentially, speculation. Plaintiff has presented no evidence showing that Ms. Hornsby, Mr. Nocero or Ms. Pressler have any facts to support their assertions. For example, no evidence exists on the record that any of them had the opportunity to observe Mr. Swallow or to legitimately compare his abilities as a Market Manager to Plaintiff's abilities as a Market Manager or that any of them had any personal knowledge of Mr. Swallow's conduct or qualifications. Nor is there any evidence that any of them had access to Plaintiff's personnel file or were otherwise fully informed of the full range of her work as Market Manager. Absent specific facts, their testimony cannot serve to defeat summary judgment. *See, e.g., Miller v. Alladin Temp-Rite, LLC*, 72 Fed.Appx. 378, 380 (6th Cir.2003).

At this stage in the process, Plaintiff must point to

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a genuine issue of *fact* as to whether Defendant's stated reasons for her termination were pretext for discrimination. Neither her perception nor her coworkers' perceptions of her performance speaks to that issue. At most, they simply reflect their personal opinions about Plaintiff's work, but the existence of differing opinions simply does not create a genuine dispute of material fact as to whether Defendant's stated reasons masked impermissible discrimination.

Plaintiff points the Court to *Grace v. University of Cincinnati*, No. 1:10-cv-315 (S.D.Ohio Aug. 19, 2011) as support for her argument that an employer's subjective opinion about an employee's leadership abilities or credibility should be assessed by a jury. However, *Grace* is distinguishable from the instant case and does not compel a finding of pretext here. In *Grace*, the court held that the employer's subjective determination that the plaintiff was "in over his head" required the issue of pretext to go to the jury, noting that the defendant's "reliance on subjective factors is inscrutable and not subject [to] validation by any means except by judging her credibility." *Id.* at 15. Those "subjective factors" that the *Grace* court found required assessment by a jury were "intangible and amorphous qualities, such as his demeanor and his facial expressions during meetings." *Id.* at 14. Those qualities are quite unlike the leadership, credibility and communication qualities assessed and found deficient by Defendant in the instant case. In addition, the *Grace* court found important the fact that the evaluator in *Grace* was of a different race and gender than the plaintiff alleging discrimination on those bases. Here, both the evaluator, Ms. Chitwood, and Plaintiff are the same gender and roughly the same age. Further, in *Grace*, the employer had little chance to observe the plaintiff other than his demeanor in a few meetings over the course of a few months; this left a genuine dispute over the issue of pretext because of the short time frame. Here, Plaintiff worked for Defendant for several years, and Defendant's reasons for firing Plaintiff are well-established in the record and contain both subjective and objective reasons and

conclusions made over months and years. *Grace* is simply inapposite.

*8 Finally, even if she could show that Mr. Swallow and/or Mr. Nocero were more favorably treated, Plaintiff has failed to show that they were similarly-situated to her. To qualify as similarly-situated, the plaintiff and the colleagues to whom she seeks to compare herself must have dealt with the same supervisor, have been subject to the same standards, and have engaged in the same conduct. *Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir.1992). Defendant contends Mario Nocero does not qualify as a similarly-situated individual compared to Plaintiff (doc. 28). This Court agrees. As Defendant notes, Mr. Nocero was a District Manager, whose duties, responsibilities, pay, and bonus potential were different from that of a Market Manager (*Id.*). Thus, because they were not similarly situated, Mr. Nocero cannot properly be used as a comparator for Plaintiff to show that Defendant's decision to terminate her employment was pretext for discrimination.

As to Jay Swallow, Plaintiff has shown that they were both Market Managers, both reported to Ms. Chitwood, and Mr. Swallow was eventually promoted over Plaintiff. However, Plaintiff has not presented any evidence showing that the two of them engaged in the same conduct but were treated differently. That is, it is not enough to point to someone who held the same position. A comparator must be more similar than that to be able to provide a legitimate source from which discrimination may properly be inferred. Had Plaintiff produced, for example, evidence that Ms. Chitwood promoted Mr. Swallow ahead of Plaintiff despite finding Mr. Swallow's leadership and communication skills to be deficient, an inference of discrimination might be reasonable. But Plaintiff has not produced sufficient evidence of any performance deficiencies on the part of Mr. Swallow or that any difference in Defendant's treatment of these two was anything other than a business decision based on months and years of job performance. As discussed previously, even

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though Defendant's own management team thought she was "a thousand times more qualified," those opinions alone are simply insufficient to establish pretext. So, although Mr. Swallow and Plaintiff were both Market Managers, the fact that Plaintiff was terminated and Mr. Swallow promoted doesn't in and of itself establish pretext without some sort of evidence that they engaged in the same *conduct* and were treated differently.

b. Plaintiff has not shown that the basis of Defendant's articulated reasons for her termination are not based in fact.

Plaintiff argues that a jury could find Ms. Chitwood and Ms. Bleuer incredible because of "misrepresentations about events material to this litigation" (doc. 26). Plaintiff then lists a number of facts she disputes regarding claims made by Ms. Chitwood and Ms. Bleuer (*Id.*). This is not enough to survive summary judgment. The standard, as set forth in *Manzer*, is that the plaintiff must show that the proffered reasons had no basis in fact. *Manzer*, 29 F.3d at 1083–84. This consists of evidence that the proffered bases for the plaintiff's adverse treatment never happened, *i.e.*, that they were false. *Id.* Plaintiff has not presented evidence that the reasons for her termination did not actually happen, only that a jury might not believe everything that Ms. Chitwood or Ms. Bleuer said. While this might create a dispute as to, for example, whether Ms. Chitwood told Mr. Nocero that he was going to be promoted to Market Manager, it does not create a genuine dispute as to whether the reasons given for Plaintiff's termination were pretextual. Because Plaintiff has presented no substantive evidence that the reasons for termination were false, her argument fails.

c. Conclusion as to Plaintiff's Age Discrimination Claims

*9 In short, Plaintiff has failed to create a genuine dispute of material fact with respect to whether Defendant honestly believed in its reasons for terminating Plaintiff's employment. It is not enough that she

simply allege a dispute over the facts on which her discharge was based, nor is it enough that she and some of her coworkers believe she was discriminated against. Plaintiff needed to have "put forth evidence which demonstrates that [Defendant] did not 'honestly believe' in the proffered non-discriminatory reason[s]" for Plaintiff's termination. *Braithwaite v. Timken Co.*, 258 F.3d 488, 493 (6th Cir.2001). To determine whether Defendant had an honest belief in its reasons, the Court asks whether Defendant made a reasonably informed and considered decision before terminating Plaintiff's employment. *Id.* at 494. Plaintiff has presented no evidence creating a genuine dispute about whether Defendant's decision was reasonably informed and considered. Thus no reasonable juror could find that Plaintiff's termination was pretext for impermissible discrimination and that she would not have been terminated but-for her age.

B. Plaintiff's State and Federal Sex Discrimination Claims

Plaintiff claims that Defendant violated Title VII and Ohio Revised Code §§ 4112.02(a) and 4112.99 by impermissibly discriminating against and treating her differently because of her sex (doc. 26).^{FN3} For the reasons discussed above, Plaintiff's sex discrimination claim cannot survive summary judgment: whether the alleged discrimination was on the basis of her age or her sex, she has failed to proffer evidence showing that Defendant's decision to terminate her employment was pretextual.

^{FN3} Chapter 4112.02 of the Ohio Revised Code prohibits an employer from terminating an employee on the basis of color, religion, sex, military status, national origin, disability, age or ancestry. Ohio Rev.Code § 4112.02. Similar to age discrimination claims, state sex discrimination claims are generally construed in the same manner as federal laws because Ohio anti-discrimination laws prohibit the same conduct as Title VII. See *Shoemaker*

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er-Stephen v. Montgomery County Bd. of Com'rs, 262 F.Supp.2d 866, 874 (S.D. Ohio 2003).

c. Plaintiff's Retaliation Claims

To establish a *prima facie* case of retaliation, Plaintiff must show (1) that she engaged in a protected activity; (2) that she was subjected to an adverse employment action; and (3) that there is a causal link between the two. *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006).

Defendant argues that Plaintiff's retaliation claims fail both because Plaintiff failed to establish that she engaged in a protected activity and because she failed to establish that a causal link existed between any protected activity and her termination.

Plaintiff claims she engaged in protected activity when she talked to Ms. Bleuer, the Director of Human Resources, after receiving the letter on May 25, 2010 from Ms. Chitwood that outlined a number of her concerns regarding Plaintiff's leadership skills, including as they related to resolving customer complaints (doc. 26). Plaintiff claims to have told Ms. Bleuer she felt discriminated against and that "all of [her] team members were significantly younger and some [were] male" (doc. 26). This, she asserts, was a complaint of discrimination and, thus, a protected activity.

Federal courts have generally held that "vague charges of discrimination" are "insufficient to constitute opposition to an unlawful employment practice," which is considered a protected activity. *Booker v. Brown and Williams Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir.1989). "An employee may not invoke the protections of the Act by making a vague charge of discrimination. Otherwise, every adverse employment decision by an employer would be subject to challenge under either state or federal civil rights legislation

simply by an employee asserting a charge of discrimination." *Id.*

*10 Here, Plaintiff's complaint is not sufficient to constitute "opposition" as defined in *Booker*. Her charge of discrimination is precisely what the Sixth Circuit has defined as a "vague charge of discrimination." As such, her complaint to Ms. Bleuer cannot be considered "protected activity."

Even if Plaintiff's complaint to Ms. Bleuer could properly be construed as protected activity, and even if she could be seen to have established a causal connection between that complaint and her termination, her retaliation claims fail for the same reasons as her age and sex discrimination claims fail: she has not shown that Defendant's reasons for her termination were pretextual. Consequently, Defendant has successfully shown that no genuine dispute of material fact exists with respect to whether Plaintiff was terminated in retaliation for engaging in a protected activity.

IV. CONCLUSION

Plaintiff has failed to show that a reasonable jury could find that Defendant's actions were pretext for age or sex discrimination, or that she was retaliated against for engaging in protected activity. Consequently, the Court GRANTS Defendant's Motion for Summary Judgment (doc. 17).

SO ORDERED.

S.D. Ohio, 2012.
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Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,
 at Seattle.

Myrna U. PARAYNO, Plaintiff,

v.

John E. POTTER, Defendant.

No. C09-487 MJP.

Nov. 29, 2010.

Myrna U. Parayno, Des Moines, WA, pro se.

Curman M. Sebree, Sebree Law Offices, Seattle, WA,
 for Plaintiff.

Kayla Stahman, Rebecca Shapiro Cohen, US Attor-
 ney's Office, Seattle, WA, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MARSHA J. PECHMAN, District Judge.

*1 This matter comes before the Court on Defendant John E. Potter's motion for summary judgment. (Dkt. No. 40.) Having reviewed the motion, the response (Dkt. No. 44), the reply (Dkt. No. 48), and all supporting papers, the Court GRANTS the motion for summary judgment. The Court also GRANTS Plaintiff's motion to strike.

Background

Myrna Parayno is a Postal Service employee who pursues claims against the Postmaster General, John Potter, for failure to accommodate her disability, for engaging in racial discrimination, and for retaliation. She has worked in various capacities in the Postal Service in Washington since 1981. (Parayno Decl. ¶ 2.) Parayno suffers from fibromyalgia and a sleep

disorder. (Parayno Decl. ¶ 4.) She states that she is substantially limited in the major life activity of sleeping. (Dkt. No. 44 at 12-13.) She was diagnosed in 2002 with fibromyalgia and in 2005 with insomnia. (Despreaux Dep. at 10.) However, Parayno maintains she has suffered from both conditions since 2000. (Parayno Decl. ¶ 11.) With work start time of 7:00 a.m., she can obtain five to six hours of sleep. (*Id.*) Parayno has taken various medications to try to control her insomnia and interrelated fibromyalgia since 2000. (*Id.* ¶ 13.)

For roughly three years prior to the summer of 2007, Parayno had worked in the Seattle Airport Mail Center with a start time of 7:00 a.m. (Parayno Decl. ¶¶ 10, 14.) She was able to sleep five to six hours a night with a 7:00 a.m. start time. (*Id.* ¶ 14.) In June 2007, the Postal Service abolished a number of positions at the Airport Mail Center and changed the shift hours for employees, including Parayno. (Stahman Decl. Ex. 9.) On June 8, 2007, Parayno was reassigned to a shift commencing from 4:00 a.m. (*Id.*) While she had previously been able to sleep five to six hours a night with a 7:00 a.m. shift start, she was unable to sleep more than two to three hours a night with the 4:00 a.m. start time. (Parayno Decl. at ¶¶ 6-7.) Parayno developed insomnia and severe anxiety after four weeks of the early start time. (*Id.* at ¶ 7.) Parayno then started to use annual sick leave and leave without pay for three hours a day so that she could start her shift at 7:00 a.m. instead of 4:00 a.m. (*Id.* ¶ 8.) She kept up this modification until she obtained a new position on December 1, 2007. (*Id.* ¶ 9.)

Parayno's doctor, Michele Despreaux, issued a recommendation that Parayno start no earlier than 7:00 a.m. in order to accommodate her fibromyalgia and insomnia. (Parayno Decl. Ex. 2 at 17.) Parayno submitted Dr. Despreaux's letter along with a request for accommodation on July 6, 2007. (*Id.* ¶ 15; *Id.* Ex.

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2.) On July 17, 2007, Kenn Messenger, the Airport Mail Center Plant Manager, responded by stating that no job matching the one requested existed at the Airport Mail Center. (Parayno Decl. Ex. 4.) He instead offered a position starting at 7 a.m. on Bainbridge Island as a Sales, Services, Distribution Associate. (*Id.*) Messenger came up with the Bainbridge position after looking at a number of other available jobs and picking the one that best fit Parayno's restrictions. (Stahman Decl. Ex. 13; 2008 Messenger Dep. at 37–45.)

*2 On July 30, 2007, Parayno rejected this offer, stating that the commute would still force her to wake up too early. (Parayno Decl. ¶ 17) On July 31, 2007, Messenger sent Parayno a letter stating that her request was forwarded to the District' Reasonable Accommodation Committee for review. (*Id.*) The Committee eventually denied the request, finding there to be inadequate evidence of disability. (Parayno Decl. ¶ 23.) The Committee never acted on Parayno's request to reconsider the decision. (*Id.* ¶¶ 24–26.)

On August 1, 2007, Messenger verbally offered Parayno a position as a Window Clerk at the Broadway Station in Seattle with a start time of 9:30 a.m. (2008 Parayno Dep. at 77–78; 2008 Messenger Dep. at 40–41.) Because Parayno was not qualified for this position, Messenger offered her the necessary training. (2008 Parayno Dep. at 80.) Parayno rejected the job, and the offer was never reduced to writing. Parayno eventually applied for and received a bid position at the Airport Mail Center with a start time of 6:00 a.m., which fit her doctor's amended restriction which permitted this earlier start time. (Stahman Decl. Ex. 14; Despreaux Dep. 24.)

On May 16, 2008 the Postal Service instituted yet another realignment at the Airport Mail Center and abolished Parayno's position and assigned her to a new position with a 4:00 a.m. start time. (2010 Parayno Dep. at 124; Stahman Decl. Ex. 15.) Parayno requested an accommodation to start at 7:00 a.m., which

was provisionally granted upon request. (2010 Parayno Dep. at 59.) Within a month for of the request, the permanent schedule change was approved. (*Id.* at 141–142.) In February 2009, Parayno obtained a position at the Burien Station with a 7:00 a.m. start time. (*Id.* at 59.)

During her employment, Parayno has filed two EEO complaints relevant to the pending matter. In the first, dated September 26, 2007, Parayno complained that she was instructed not to use time keeping form (Form 1260), whereas white and non-Filipino employees were allowed to use the form. (Stahman Decl. Ex. 17.) She also complained that she was being denied reasonable accommodations for a later start time. (*Id.*) It is unclear what happened with this complaint. She also filed a complaint on June 16, 2008, stating that she was retaliated against, though the specifics are very slim. (Stahman Decl. Ex. 19.) The EEO Investigative Services Office for the Postal Service dismissed her claim for retaliation and race/sex discrimination. (*Id.* Ex. 20.)

Analysis

A. Standard

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there are no genuine issues of material fact for trial and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Material facts are those “that might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The underlying facts are viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Once the moving party has met its initial

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burden, the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

B. Rehabilitation Act

*3 Defendant argues that Parayno's Rehabilitation Act claim fails because she has not established that she is "disabled" under the Act. The Court agrees.

"The standards used to determine whether an act of discrimination violated the Rehabilitation Act are the same standards applied under the Americans with Disabilities Act ('ADA')." Coons v. Sec. of United States Dep't of Treasury, 383 F.3d 879, 884 (9th Cir.2004) (citing 29 U.S.C. § 794(d); 29 C.F.R. § 1614.203(b); McLean v. Runyon, 222 F.3d 1150, 1153 (9th Cir.2000)). Under the ADA, an individual is disabled if she: (1) has a physical or mental impairment that substantially limits one or more of the individual's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. Those who are disabled are entitled to a reasonable accommodation at work to ensure the person can continue to work.

Parayno contends that she is impaired only in the major life activity of sleep by virtue of her insomnia and fibromyalgia. (Dkt. No. 44 at 12–13.) Sleep is a major life activity. Head v. Glacier Northwest Inc., 413 F.3d 1053, 1060 (9th Cir.2005). Parayno does not argue she is impaired in the major life activity of work. She does provide evidence that she suffers from insomnia that is affected, in part, by the start time of her job. The question posed is whether she is "substantially limited" in the activity of sleeping.

The Court is to consider several factors in determining whether an individual is "substantially limited" in a major life activity: (1) the nature and sever-

ity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term impact of the impairment. 29 C.F.R. § 1630.2(j)(2). A substantial limitation is one that shows Parayno is "unable to perform a major life activity that the average person in the general population can perform" or that she is "[s]ignificantly restricted as to the condition, manner or duration under which [she] ... can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."

Parayno is not substantially limited in the major life activity of sleep. Parayno's fibromyalgia and insomnia prompted her doctor to impose a limitation that she start work no earlier than 7 a.m. (although this changed to 6 a.m. on November 20, 2007 and reverted back to 7 a.m. on July 8, 2008). (Parayno Decl. Ex. 2 at 17; Dkt. No. 41–1—at 21, 23.) Her insomnia appears to be controlled with a later start time and, to some extent, medication. That her job exacerbates her insomnia is not evidence of a substantial limitation on sleeping that rises to the level of a disability. She is able to enjoy the life activity of sleep with a small change in her start time. There is inadequate evidence that she is substantially limited in the life activity of sleep. As the Seventh Circuit has held "[i]f a job keeps [an employee] awake, and in turn causes some sort of sleep deficit disorder, it is pretty obvious that the job is the problem, not that the [employee] is disabled." Baulos v. Roadway Express, Inc., 139 F.3d 1147, 1153 (7th Cir.1998).

*4 The Court therefore finds that Parayno has failed to demonstrate that she is disabled under the Rehabilitation Act. The Court GRANTS summary judgment in favor of Defendant on this claim.

C. Race Discrimination: Disparate Treatment

Defendant seeks dismissal of Parayno's claim of discrimination (disparate treatment) claim. Parayno fails to show that anyone similarly situated was treated

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differently with regard to accommodation and other related issues.

Title VII makes it unlawful for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race...” 42 U.S.C. § 2000e-2(a)(1). To make out a claim for race discrimination under a disparate treatment theory, the plaintiff must show: (1) she belongs to a protected class; (2) she was performing according to her employer's legitimate expectations; (3) she was subject to an adverse employment action; and (4) similarly situated individuals outside her protected class were treated more favorably. *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir.2006). If the plaintiff meets these marks, the burden shifts to the defendant to establish a “legitimate, nondiscriminatory reason” for the alleged action. *Id.* If the defendant is successful, the presumption of discrimination disappears and burden shifts back to the plaintiff to establish discrimination or a dispute of fact related thereto.

There are two methods by which a disparate treatment plaintiff can meet the standard of proof required by Fed.R.Civ.P. 56(c). First, a disparate treatment plaintiff may offer evidence, direct or circumstantial, “that a discriminatory reason more likely motivated the employer” to make the challenged employment decision. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Second, a disparate treatment plaintiff may alternatively offer evidence “that the employer's proffered explanation is unworthy of credence.” *Id.* This method often allows a plaintiff to defeat a defendant's motion for summary judgment by offering proof that the employer's legitimate, nondiscriminatory reason is actually a pretext for racial discrimination. *Cornwell*, 439 F.3d at 1028.

Parayno's claim that she was treated differently from similarly situated Caucasian employees who

made accommodation requests is flawed. As the Court holds, Parayno is not disabled under the Rehabilitation Act and was not entitled to a reasonable accommodation. Even assuming she was entitled to a reasonable accommodation, Parayno fails to show that she was treated differently from other similarly situated individuals. Parayno does not provide any particular analysis of those persons she claims are similarly situated. Instead, the government explains that of the ten individuals Parayno highlights, only two requested shift changes, as Parayno did. (Sykes Decl. ¶ 4(a).) One of these two was a mail handler and neither one worked in the same facility as Parayno or had the same supervisor. (*Id.* ¶ 4(a).) The second employee had different responsibilities and was subject to a different supervisory structure. (*Id.*) Parayno has failed to show that she is similarly situated to any person for purposes of pursuing a disparate treatment claim, even assuming she was entitled to a reasonable accommodation.

*5 Parayno also states that she was discriminated when denied the use of Form 1260 to record time when the punch-clock was unavailable. (Parayno Decl. ¶ 30.) There is nothing showing that this has any relation to racial bias or discrimination. She has not pointed to any similarly situated persons who were treated differently with regard to this form. The Court rejects this claim and GRANTS the motion for summary judgment on this issue.

D. Retaliation

Parayno argues that Messenger retaliated against her because she filed EEO complaints. (Dkt. No. 44 at 19.) The claim fails in its merits.

Defendant first argues that Parayno failed to exhaust her retaliation claim. “Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable ‘unlawful employment practice.’ ” *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 111, 114 (2002). “[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed

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charges.” *Id.* at 113. There is one passing reference to retaliation in Parayno's second EEO complaint, which satisfies Parayno's burden of exhaustion. (Dkt. No. 41–2 at 14.)

To sustain her retaliation claim, Parayno must show that she engaged in a protected activity, her employer subjected her to an adverse action and that there is a causal link between these two actions. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir.2000). An adverse action is one that is “reasonably likely to deter employees from engaging in protected activity.” If Parayno meets this burden, the government must produce a legitimate nondiscriminatory reason for its decision. If Defendant does so, Parayno must then demonstrate that the reason was a pretext for retaliation.

Parayno argues she suffered several retaliatory acts: (1) she was denied a reasonable accommodation for her disability; (2) she was denied an application for access to the Processing and Distribution Center (“P & DC”) in 2008, while others who had not filed EEO complaints had such access; (3) refusing to allow her use of the Form 1260, while others who didn't complain to the EEO could; and (4) she received threatening letters.

There is no support for any of these claims. First, as explained above, Parayno was not entitled to a reasonable accommodation because she is not disabled. Second, Parayno has failed to explain or point to evidence as to how she was discriminated with regard to the PD & C in 2008. Third, while Parayno complained about being denied use of the Form 1260 in an EEO complaint, she provides no evidence that this was connected to any protected activity and why this rises to the level of protected activity. Fourth, Parayno has failed to point to any letter that threatened her employment. Two letters she received in 2007 regarding her request for accommodation provide an alternative position and list as one of several possible choices that she may instead resign. (Parayno Decl.

Exs. 4–5.) The letters bear no mark of retaliation and Parayno has failed to show their connection to her filing of either EEO complaint. The Court DISMISSES the claim. There is no evidence of an adverse action related to Parayno engaging in protected activity.

*6 Parayno's best evidence of retaliation is testimony from Messenger that he thought she abused the complaint process. He testified: “I believe Ms. Parayno abuses the [EEO complaint] process quite frequently so I don't have a lot of respect for her as an employee.” (2010 Messenger Dep. at 73.) He clarified that “I think she's a wonderful person, and I enjoy being around her.” (*Id.*) He explained further that he found “her unwillingness to resolve issues locally and simply, and in my opinion, reasonably, was less than satisfying.” (*Id.* at 74–75.) While this is evidence of Messenger's distaste for Parayno's use of the complaint process, it is not sufficient to fill the gaps in Parayno's claims of retaliation (i.e., adverse actions and protected activities).

The Court GRANTS summary judgment and DISMISSES Parayno's discrimination claim.

E. Motion to Strike

Parayno asks the Court to strike Defendant's references to Parayno's past employment infractions that occurred between 11 to 20 years before she brought this action. (Dkt. No. 44 at 2.) The Court agrees. This information is irrelevant and needlessly inflammatory. The Court GRANTS the motion and strikes these references.

Conclusion

The Court GRANTS Defendant's motion for summary judgment in full. Parayno has failed to demonstrate that she is disabled as required by the Rehabilitation Act. She has failed to produce any material facts to sustain her claim of disparate treatment on the basis of her race. She has pointed to no

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adverse actions linked to her filing of an EEO complaint sufficient to support her retaliation claim. The Court GRANTS Parayno's motion to strike and does not consider any facts related to her past employment infractions.

The clerk is ordered to provide copies of this order to all counsel.

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Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,
at Seattle.

Ed RICHARDS, individually, Plaintiff,
v.

The CITY OF SEATTLE, a municipality, and Jorge
Carrasco, an individual, Defendants.

No. C07-1022Z.
June 26, 2008.

John P. Sheridan, Law Office of John P. Sheridan,
Seattle, WA, for Plaintiff.

Erin L. Overbey, Fritz E. Wollett, Seattle City Attor-
ney's Office, David Nelson Bruce, Rachel M. Farkas,
Savitt & Bruce LLP, Seattle, WA, for Defendants.

ORDER

THOMAS S. ZILLY, District Judge.

*1 THIS MATTER comes before the Court on defendants City of Seattle's and Jorge Carrasco's respective motions for summary judgment. Having reviewed all papers filed in support of and in opposition to the motions, and having considered the oral arguments of counsel, the Court does hereby ORDER:

- (1) The City of Seattle's motion for summary judgment, docket no. 57, is GRANTED;
- (2) Jorge Carrasco's motion for summary judgment, docket no. 56, is GRANTED; and
- (3) The Clerk is directed to enter JUDGMENT in favor of the City of Seattle and Jorge Carrasco and to send a copy of this Order to all counsel of record.

Introduction

The Court concludes that trial in this matter would be totally useless. *See Davis v. W. One Auto. Group* 140 Wash.App. 449, 461, 166 P.3d 807 (2007) (the "object and function of the summary judgment procedure is to avoid a useless trial"). Nothing would be gained by seating a jury to hear testimony that fails to establish a prima facie case of disparate treatment, retaliation, or hostile work environment.

This case is related to the companion case entitled *Davis v. City of Seattle*, Case No. C06-1659Z, in which the Court previously granted summary judgment in favor of defendants City of Seattle and Jorge Carrasco. As in the companion case, plaintiff's submissions here in opposition to the pending motions for summary judgment are voluminous. And, as in the companion case, despite their bulk, plaintiff's materials here lack the specificity needed to survive a motion for summary judgment. Indeed, the filings in this case are more haphazard and lacking in detail than in the companion case. In this matter, plaintiff's counsel has confusingly filed three declarations of his own, containing a total of 1,622 pages of exhibits, which are duplicatively paginated and which plaintiff has often inadequately cited merely by an "A" followed by a page number. *See* Sheridan First Decl. (docket nos. 130-133) (containing appendix pages 1-975); Sheridan Second Decl. (docket no. 134) (containing appendix pages 1-536); Sheridan Third Decl. (docket no. 135) (containing appendix pages 1-111). Meanwhile, plaintiff's own declaration references exhibits that were never attached. *See* Richards Decl. (docket no. 143).^{FNI} Moreover, plaintiff's brief is riddled with unclear or incomplete citations to the record, as well as citations to nonexistent evidence. *See, e.g.*, Plaintiff's Response at 13-14 (docket no. 138-2) (citing "Kefgen at" certain pages, presumably meaning the deposition testimony of Mr. Kefgen, which was not

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included in plaintiff's original submissions, and which was not made part of the record until over a month after defendants filed their reply briefs in support of their respective motions for summary judgment).

FN1. In his declaration, plaintiff appears to be describing exhibits that are appended to and identified in plaintiff's counsel's first declaration; however, plaintiff's declaration inappropriately attempts to provide the foundation for the missing documents.

Finally, just like in the companion case, plaintiff relies primarily upon inadmissible hearsay, innuendo, and sheer speculation. Plaintiff offers no statistical analysis on which to base his claim that he has been treated less favorably than those outside his protected class, and he does not draw the requisite link between his sexual orientation or protected activities and the decisions made by Seattle City Light and Jorge Carasco. In sum, notwithstanding the yet again mountainous amount of materials, the majority of which plaintiff does not cite or justify including in the record,^{FN2} plaintiff fails to identify any genuine issue of material fact that would preclude summary judgment or necessitate a trial.^{FN3}

FN2. As the Ninth Circuit has explicitly held, counsel bear an obligation to provide in their briefs adequate references to the evidence upon which they rely. *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026 (9th Cir.2001). The Court is not required to independently sift through all of the exhibits attached to the various affidavits or declarations submitted in opposition to a summary judgment motion or to scour the record looking for genuine issues of material fact. *Id.* If an attorney representing a party resisting summary judgment has not sufficiently cited in the response brief the critical evidence demonstrating a need for trial, the attorney cannot otherwise accomplish the task

by merely heaping reams of paper upon the Court. Nevertheless, the Court independently, unaided by plaintiff's counsel, has climbed the mountain created by plaintiff, has reviewed all of the materials submitted by plaintiff, and has found no admissible evidence that would raise any triable issue of fact.

FN3. Due to the "sloppy and haphazard format" of plaintiff's response that resulted in "literally days of needless review" by defendants' attorneys, the City of Seattle seeks sanctions. Reply at 16-17 (docket no. 153). Although plaintiff's poor presentation more than justifies the City of Seattle's request, the Court declines to award sanctions.

Background

A. Plaintiff's Employment History

*2 Plaintiff Ed Richards is a homosexual man who works for Seattle City Light, an electric utility owned by the City of Seattle. In this lawsuit, he alleges disparate treatment on the basis of sexual orientation, hostile work environment, and retaliation under both state and municipal law. *See* Second Amended Complaint (docket no. 192). He also asserts claims under 42 U.S.C. § 1983. *Id.* Plaintiff was hired by Seattle City Light in 1998 as a Generation Apprentice. Richards Decl. at ¶ 3 (docket no. 143). Plaintiff first worked at the Cedar Falls/Tolt site,^{FN4} but was transferred approximately three months later to the South Substation in Seattle. *Id.* at ¶¶ 3 & 5. At some point during plaintiff's apprenticeship, he worked at the North Substation under the supervision of Mike Wright. *Id.* at ¶ 9. On an unspecified date, Mr. Wright indicated to plaintiff that he believed men and women should have traditional roles and asked whether plaintiff or his partner "was the man." *Id.*

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FN4. Plaintiff complains that, while an apprentice at the Cedar Falls/Tolt site, he was subjected to discrimination with respect to reimbursement for mileage and commuting time. He expresses discontent about needing to involve the union before receiving reimbursement, but he does not make any claim for unpaid wages or business expenses.

Throughout plaintiff's apprenticeship, for unexplained reasons, his classmates called him "Special Ed." *Id.* at ¶ 8; *see* Richards Dep. at 22:2-12, Exh. F to Wollett Decl. (docket no. 63) (plaintiff never inquired why his classmates nicknamed him "Special Ed," and plaintiff cannot identify any unfair treatment by his classmates that was due to his sexual orientation). During his fourth apprentice year, an instructor inadvertently produced laughter from the students by stating to a visitor during class that he had to get the homework ready because "there is a ferry leaving soon." Richards Decl. at ¶ 10; *see* Richards Dep. at 95:25-97:2, Exh. F to Wollett Decl. Plaintiff speculates that his classmates laughed because they interpreted the comment to mean that he was a "fairy" who was "leaving soon," but plaintiff concedes that the instructor did not have any derogatory intent. Richards Decl. at ¶ 10; Richards Dep. at 96:24-97:1, Exh. F to Wollett Decl. At yet another undetermined date, while working as an apprentice in the Transformer Shop, plaintiff was asked by a journeyman whether he worried about being infected with the human immunodeficiency virus, which causes acquired immune deficiency syndrome ("AIDS"). Richards Decl. at ¶ 11. After plaintiff responded that he had no more reason to worry about infection from his partner than the journeyman did from his wife, the journeyman spoke to plaintiff only when required. *Id.*

In 2002, plaintiff completed the four-year apprenticeship program. *See id.* at ¶¶ 12-13. He worked at the Duwamish Substation while awaiting permanent assignment. *Id.* at ¶ 12. According to plaintiff, apprentices are permitted to pick their assignments in

order of their ranking; plaintiff was ranked third in his class. *Id.* Although unclear from his vaguely worded declaration, plaintiff apparently expressed a desire to work at the Massachusetts Street Substation, but he was asked personally by Paula Rose to accept an assignment at the South Substation. *Id.* at ¶¶ 12 & 13. Plaintiff believes that Ms. Rose made the request because the lower ranked apprentices had indicated an unwillingness to work at the South Substation due to the presence there of Heather Talbot. *Id.* at ¶ 13. Ms. Talbot was known for displaying "unstable and emotional behavior" toward her fellow crew members, Sheridan First Decl. at 262 (docket no. 130), and plaintiff does not attribute any discriminatory animus to the reluctance of other apprentices to work with Ms. Talbot. Indeed, plaintiff himself felt "relief" when Ms. Talbot subsequently left the South Substation crew and he no longer had to be "on guard as to what would cause Ms. Talbot's angry episodes." Richards Decl. at ¶ 15. In his declaration, plaintiff recites that a lower ranked classmate received the Massachusetts Street Substation assignment, but he does not indicate what consequence might have resulted had he not agreed to the South Substation posting or how such employment action was related to his sexual orientation.^{FN5}

FN5. Although plaintiff alleges that the South Substation personnel were collectively known as the "Gay Crew," *see* Richards Decl. at ¶ 13, plaintiff offers no evidence to support his assertion that homosexual employees were "quarantined," *see id.* at ¶ 85, at the South Substation. Indeed, plaintiff offers no evidence that former South Substation crew members Heather Talbot, Rick Marino, and Karl Horne are homosexual, and he provides no specific information, *i.e.*, name, job title, sexual orientation, assignment dates, etc., regarding other workers on his crew at various points in time. Plaintiff asserts that a recently hired employee, Aaren Thompson, is homosexual and was assigned to the South Substation, Richards Decl. at ¶

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45, but he does not indicate how many other homosexual employees were contemporaneously hired or where they were assigned, and he does not state whether any heterosexual employees are currently on his crew. Moreover, plaintiff concedes that, because he was “treated very well” at the South Substation, he never applied to transfer to another crew through the bidding process under the applicable collective bargaining agreement. *See* Richards Dep. at 83:4-19, Sheridan Second Decl. at 484 (docket no. 134).

*3 In the fall of 2002, plaintiff began working on a crew headed by Wanda Davis. *See id.* at ¶ 14. In April 2004, plaintiff was scheduled to temporarily assume Ms. Davis's duties as crew chief while she was on vacation. *Id.* at ¶ 16; *see also* Sheridan First Decl. at 263 (docket no. 130). In conjunction with Ms. Davis, plaintiff conducted an expectations meeting at the Shoreline Substation with Karl Horne in advance of Mr. Horne's anticipated rotation to the South Substation. Richards Decl. at ¶ 16. Shortly thereafter, Mr. Horne accused Ms. Davis of discrimination. *See* Report by Kathleen O'Hanlon, Sheridan First Decl. at 257-74 (docket no. 130). After an investigation, Ms. Davis was exonerated as to the discrimination claim, but was found in violation of workplace expectations. *See id.* Ms. Davis was subsequently suspended from work for two days; plaintiff, however, was not subject to any investigation or any disciplinary action. *See* Sheridan First Decl. at 834-74 (docket no. 133-6).

While the internal complaint filed by Karl Horne against Wanda Davis was under investigation, Bill Ivie became the Acting Stations Constructor and Maintenance Supervisor, a position he held from November 2004 until July 2006, when he retired from Seattle City Light. Richards Decl. at ¶ 21; Sheridan First Decl. at 285 (docket no. 130). Although plaintiff complains that Mr. Ivie had “a nasty temper,” Richards Decl. at ¶ 21, he makes no contention that Mr. Ivie's poor management style stemmed from animus

toward homosexuals. Indeed, plaintiff has previously indicated that “Mr. Ivie treated him pretty well” and that they “got along well, primarily because they had both been in the Navy.” Andrade Decl. at ¶ 8 (docket no. 62). Moreover, plaintiff has recently withdrawn his claim that Mr. Ivie discriminated on the basis of sexual orientation in allocating overtime hours. *See* First Amended Complaint at ¶¶ 2.28, 2.30, and 2.55 (docket no. 148); *compare* Second Amended Complaint (docket no. 192). Such allegation ran contrary to the statistical evidence concerning plaintiff's overtime and out-of-class earnings as compared with his peers during the years Mr. Ivie held the supervisory position at issue. *See* Exhs. B & C to Zimmerman Decl. (docket no. 61). Thus, although Mr. Ivie apparently did not communicate well, yelling at and displaying angry behavior toward men and women alike, Sheridan First Decl. at 291-93 (docket no. 130), plaintiff benefitted financially during Mr. Ivie's tenure, accruing more overtime and out-of-class earnings than most of his peers.

In October 2005, plaintiff filed an internal complaint against a co-worker, Philip Irvin, for sending an e-mail message to fellow employees concerning Seattle City Light's participation in the Gay Pride Parade.^{FN6} *See* Richards Decl. at ¶ 25; Exh. M to Andrade Decl. (docket no. 62). A consultant retained to perform an investigation concluded that Mr. Irvin's e-mail was disrespectful, conflicted with workplace expectations, and should have been directed to management rather than co-workers. Exh. M to Andrade Decl. Mr. Irvin issued an apology in February 2006, which plaintiff indicated was satisfactory. *Id.*; Richards Dep. at 114:11-14, Exh. E to Wollett Decl. (docket no. 63). Plaintiff did not pursue the matter any further. Richards Dep. at 115:5-11, Exh. E to Wollett Decl.

^{FN6} In 2007, plaintiff successfully lobbied for a Seattle City Light Bucket Truck to appear in the Gay Pride Parade. Richards Decl. at ¶ 34. Plaintiff drove the truck in the parade.

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Id. In connection with planning efforts related to the parade, plaintiff heard from someone in the Seattle Office of Civil Rights (“SOCR”) that Superintendent Carrasco had allegedly stated concerns about employees being naked during the parade and expressed surprise that “[t]hey really celebrate this in Seattle.” *Id.* at ¶ 35. Plaintiff suggests that such evidence demonstrates an animus toward homosexuals on the part of Superintendent Carrasco. Plaintiff, however, has not provided a declaration from the SOCR employee who had this supposed conversation with Superintendent Carrasco, and plaintiff’s declaration concerning such double hearsay does not constitute admissible evidence. *See Fed.R.Evid.* 805; *see also Fed.R.Evid.* 802. Thus, the Court will not consider such evidence in deciding the pending motions for summary judgment. *See Fed.R.Civ.P.* 56(e). Plaintiff also complains about Superintendent Carrasco’s failure to shake hands with plaintiff’s partner at a graduation ceremony, *see Richards Decl.* at ¶ 36, but plaintiff concedes that Superintendent Carrasco did not at that time know plaintiff is homosexual, *id.*, and he provides nothing more than pure inadmissible speculation concerning the reason why Superintendent Carrasco did not shake hands with his partner.

*4 In November 2006, Seattle City Light received an anonymous written complaint alleging that plaintiff and Wanda Davis allowed a non-employee to enter the South Substation and practice for an upcoming apprenticeship working test. Exh. E to Andrade Decl. (docket no. 62). An investigation was performed by Colleen Kinerk, an attorney and partner in the firm of Cable, Langenbach, Kinerk & Bauer, LLP. Andrade Decl. at ¶¶ 10-12 & Exh. F. The decision to use Ms. Kinerk’s services was based in part on Ms. Davis’s then pending litigation (the companion case) and her assertion therein that Seattle City Light’s Employee

Relations Manager, Branda Andrade, who otherwise would have conducted the investigation, was biased. *Id.* at ¶ 10. Ms. Kinerk was selected because she is highly regarded and had not previously worked for the City of Seattle or Seattle City Light. *Id.* at ¶ 11.

In December 2006, Ms. Kinerk submitted a 22-page report, opining that plaintiff and Ms. Davis had violated safety protocols, workplace expectations, and ethics standards. *See Letter Report* dated December 29, 2006, Exh. G to Andrade Decl. (docket no. 62). Ms. Kinerk summarized the undisputed facts as follows. Aaron Duvall was Ms. Davis’s daughter’s boyfriend. *Id.* at 4. During the time in question, he was seeking acceptance into Seattle City Light’s apprenticeship program. *Id.* As part of the application process, he was required to take a “working test.” *Id.* at 11. The test took place on October 11, 2006, at the Canal Substation. *Id.* at 6 n. 6. Mr. Duvall did not perform well enough to continue as a candidate for the apprenticeship program. *Id.* Sometime prior to the test, however, Ms. Davis assisted Mr. Duvall in gaining access to the South Substation. *Id.* at 4. During this visit, Mr. Duvall was suited in a harness and allowed to ascend and descend a steel structure in the South Substation yard. *Id.*

Ms. Davis alleged that plaintiff was the person who suggested that Mr. Duvall should climb the steel structure. *Id.* at 5. When Ms. Kinerk interviewed plaintiff, however, he indicated that Ms. Davis expressly requested him to provide help to Mr. Duvall.^{FN7} *Id.* at 6. Plaintiff, described by a co-worker as a person who “observes the chain of command,” *id.* at 8, then selected a harness for Mr. Duvall, provided safety instructions, and proceeded up the steel structure in front of Mr. Duvall. *Id.* at 6. Once on the structure, plaintiff encouraged Mr. Duvall to simulate the use of binoculars, release his grip, and rely on the harness to hold him. *Id.* During this time, Ms. Davis served as the “safety watch person” on the ground. *Id.* at 7.

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FN7. In his declaration, plaintiff complains that he was provided an inexperienced shop steward during the interview by Ms. Kinerk. Plaintiff, however, fails to explain how a different shop steward would have affected the answers he gave to Ms. Kinerk's questions. Plaintiff does not dispute the underlying facts, and he has provided no basis for believing that his choice (or lack of choice) of shop steward would have changed the result of Ms. Kinerk's investigation or was in any way related to his sexual orientation. Moreover, even if plaintiff's shop steward lacked the requisite experience, his gripe should be directed at his union, not the defendants in this case.

Based on her investigation, which involved numerous interviews and a review of the relevant contractual and regulatory provisions, as well as internal policies, Ms. Kinerk concluded that permitting a non-employee to enter a restricted and potentially dangerous work site, without prior approval of a supervisor, and then climb a steel structure was a violation of safety protocols concerning which plaintiff and Ms. Davis had, contrary to their denials, received sufficient training. *Id.* at 15-20. Moreover, the type and level of assistance provided to Mr. Duvall was of a nature intended to confer an advantage over other candidates taking the apprenticeship working test, and therefore constituted a breach in fact and in appearance of the City of Seattle's ethics standards. *Id.* at 20-22.

*5 In February 2007, plaintiff was advised of proposed disciplinary action, namely a five-day suspension. Richards Decl. at ¶ 30; Andrade Decl. at ¶ 12 (docket no. 62). Following plaintiff's and Ms. Davis's submission of materials in response to Ms. Kinerk's report, Ms. Kinerk was asked to make additional inquiries and provide a supplemental report. Andrade Decl. at ¶ 12. Ms. Kinerk subsequently interviewed five current crew chiefs and one former crew chief, as

well as six individuals who were involved in security, training, or recruiting for Seattle City Light. *See* Supplemental Letter Report dated June 18, 2007, Exh. H to Andrade Decl. Ms. Kinerk made the following findings. No crew chief believed that he or she had authority to permit a non-employee to access a substation. *Id.* at ¶ II.B.1. In addition, the consensus among crew chiefs was that they would not have allowed a non-employee to enter a substation to climb a structure. *Id.* at ¶ II.B.7. One crew chief opined that, had he done so, "he would have been fired." *Id.* at 14.

Based on the reports prepared by Ms. Kinerk, and after considering plaintiff's responsive memoranda and attachments, as well as his statements made during a *Loudermill* hearing at which he was present and accompanied by a union representative, Seattle City Light Superintendent Jorge Carrasco issued a written decision suspending plaintiff for five days without pay. Letter dated July 24, 2007, Exh. I to Andrade Decl. (docket no. 62). In his written decision, Superintendent Carrasco noted that plaintiff acknowledged he had "engaged in the underlying activity," but denied that his "actions violated any safety or ethical rules." *Id.* Superintendent Carrasco concluded, however, that plaintiff had failed "to establish to [his] satisfaction that [plaintiff's] conduct was justifiable or appropriate." *Id.* A few months later, in response to plaintiff's inquiries, Seattle City Light's Director of Energy Delivery Operations, Bernie Ziemianek, explained in a written memorandum that the suspension would be served from October 29 through November 2, 2007, and that plaintiff would be eligible for out-of-class assignments and promotions after March 29, 2008, at the latest; he might, however, have out-of-class and promotional opportunities earlier if he "demonstrate[d] to [Mr. Ziemianek's] satisfaction that [he had] learned from the experience, that the misconduct will not recur, and that [he] will exercise good leadership and judgment skills in the future." Sheridan First Decl. at 711-712 (docket no. 133-3).

Back in February 2007, around the time when

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plaintiff was advised of the proposed five-day suspension, but before Ms. Kinerk had completed her supplemental investigation, plaintiff had applied for a two-year out-of-class Craft Instructor-Apprenticeship position. Richards Decl. at ¶ 32; Johnson Decl. at ¶ 2 & Exh. A (docket no. 58). Plaintiff was advised via e-mail that he had not been chosen to interview for the position. Exh. 16 to Richards Dep., Exh. E to Wollett Decl. (docket no. 63). In response to plaintiff's inquiry, South Area Field Operations Manager Rich Morales indicated via e-mail that the reason plaintiff was not interviewed was a determination by Personnel Specialist Susan McClure that plaintiff did not meet the five-year experience requirement. Exh. 18 to Richards Dep., Exh. E to Wollett Decl. Upon further investigation, Ms. McClure's calculation proved incorrect because it failed to take into account the last year of apprenticeship, which could arguably be counted pursuant to a memorandum authored in October 2000 by former Director Pam Smith-Graham. Johnson Decl. at ¶ 2 & Exh. B. Ms. McClure, however, made this alleged error with regard to every applicant, thereby deeming three other employees, Dawn Nelson, Jay Jackson, and Rich Togerson, also ineligible for the position. *Id.* at ¶ 4-7 & Exhs. C-G. Plaintiff provides no basis for believing that these three employees are homosexual or that sexual orientation played any role in concluding that they and/or plaintiff did not meet the minimum qualifications for the job.

*6 In 2007, plaintiff also sought promotion to crew chief. West Decl. at ¶ 3 (docket no. 59). Plaintiff was ranked second among his peers. *Id.* & Exh. B. Due to complaints from applicants about the process, Seattle City Light decided to repeat it. *Id.* After scores were retallied, plaintiff still ranked second, but the rankings of other candidates changed. Exh. B to West Decl. By the time promotional decisions were being made, however, plaintiff was not eligible due to the disciplinary sanctions stemming from his role in Mr. Duvall's accessing of the South Substation and climbing of a structure. West Decl. at ¶ 3.

B. Discipline of Other Employees

With regard to his claim that discipline has been meted out in a discriminatory or retaliatory fashion, plaintiff has provided no statistical analysis. Instead, plaintiff offers anecdotal evidence concerning three employees that he contends were sanctioned less harshly for their respective offenses, namely Karl Horne,^{FN8} Rodney Dunlap,^{FN9} and Ed Kefgen.^{FN10} Plaintiff also submits disciplinary memoranda and/or letters issued to twelve other employees. *See* Exhs. 3 and 4 to Simpson Decl. (docket no. 126). The evidence plaintiff has provided does not support his argument that he has been punished more severely due to his sexual orientation or protected activities, but rather shows that his five-day suspension was commensurate with his misconduct and with the discipline imposed on other employees for violations of safety protocols.^{FN11} As indicated by the documents attached to the declaration of Joe Simpson, Business Representative for Local 77, International Brotherhood of Electrical Workers, at least five other Seattle City Light employees were disciplined in 2007 and early 2008 for unsafe conduct, including failure to wear the proper safety gear (five-day suspension), failure to unhook a hoist attached to a reel secured on the rear of a jeep before attempting to drive away, causing the crane's support brackets to break away from the building's wall (five-day suspension recommended, three-day suspension plus remedial training imposed), failure to "rack out" a breaker (three-day suspension), and bringing conductive equipment closer than the minimum approach distance without approved protective barriers (seven-day suspension for crew chief and five-day suspension for journey level lineworker). *See* Simpson Decl. at 48-53, 60-65, 72-79, 81-94. With the exception of the last incident, no bodily injuries were involved, and none of these safety violations were combined with ethics or other workplace violations. As to the employee for whom Superintendent Carrasco agreed to reduce the number of days of suspension, the disciplinary letter indicates that the employee "acknowledged that [he was] at fault and

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accept[ed] full responsibility for the accident.” *Id.* at 64-65. In contrast, plaintiff continued throughout the disciplinary process to deny that his actions were wrong. *See* Exh. I to Andrade Decl. (docket no. 62).

FN8. Karl Horne was disciplined for leaving a USB flash drive containing inappropriate material plugged in to a computer at the South Substation and then failing, after an investigation had commenced, to disclose the activity to management. Sheridan First Decl. at 767-68 (docket no. 132). Unlike plaintiff’s wrongdoing, Mr. Horne’s misconduct did not involve any safety violations, and plaintiff makes no showing that Mr. Horne’s punishment was not commensurate with his actions or with discipline imposed on other employees for similar misbehavior.

FN9. Rodney Dunlap received a reprimand for improperly using a work vehicle for personal business and inappropriately transporting a non-employee therein. Sheridan First Decl. at 931 (docket no. 133-8). Mr. Dunlap’s transgression bears little or no similarity to plaintiff’s actions, which placed a non-employee at potential risk of serious injury.

FN10. In 2007, Ed Kefgen was suspended for one day without pay for shoving another employee. West Decl. at ¶ 3.5 (docket no. 59); Sheridan First Decl. at 895 (docket no. 133-6). As a result of this disciplinary action, pursuant to an unwritten policy prohibiting promotion and out-of-class assignments for one year following substantial discipline, Mr. Kefgen was deemed ineligible for a promotion. West Decl. at ¶ 3.5; Ziemianek Decl. at ¶ 5 (docket no. 60). Such policy had also been applied in 2004 and 2006 when other employees had sought promotions after receiving discipline. Andrade Dep. at

278:2-280:22, Exh. M to Wollett Decl. (docket no. 63); Hardie Decl. at ¶ 5 (docket no. 157). Although the City of Seattle concedes that Mr. Kefgen inappropriately received out-of-class assignments after his suspension, it explains that Mr. Kefgen’s supervisor acted contrary to management instructions in making such assignments, that the supervisor was chided for doing so and was consequently denied a promotion, and that the supervisor subsequently left Seattle City Light and went to work for another employer. Heimgartner Decl. at ¶ 7 (docket no. 158). Thus, plaintiff’s allegation that the unwritten policy has been “selectively applied” to him on account of sexual orientation or protected activity lacks any factual basis.

FN11. Moreover, this same evidence actually contradicts plaintiff’s assertion that, on account of his sexual orientation or protected activity, Seattle City Light has “selectively applied” to him the unwritten policy rendering suspended employees ineligible for promotion and out-of-class assignments for a certain period of time. According to the documents supplied by plaintiff, in February 2008, a crew chief and a journey level lineworker who were both suspended for safety violations were explicitly advised in letters notifying them of the recommended discipline that, as a result of the suspensions, they would not be eligible for promotion for one year or for out-of-class opportunities for at least six months. Exh. 4 to Simpson Decl. (docket no. 126). Thus, the evidence demonstrates uniform application of the unwritten policy. Plaintiff, however, attempts to rely on these letters to show that the unwritten policy was a “new practice,” applied for the first time in his case. The letters do not support plaintiff’s broad proposition; the

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most they establish is that Seattle City Light has begun including standard language about the unwritten policy in its discipline notifications. See Hardie Decl. at ¶¶ 5 & 6 (docket no. 157) (although the unwritten policy was applied in 2004 and 2006, as well as to Ed Kefgen, on whose behalf the union never raised any challenge, in light of the claim in the companion case that “this practice was additional unfair discipline,” Seattle City Light started “writing it into disciplinary letters to avoid any future claims of lack of notice.”). Meanwhile, with regard to plaintiff, Seattle City Light prepared a tailored memorandum communicating to him the effect of his suspension and the steps he could take to regain management's trust. Sheridan's First Decl. at 711-12 (docket no. 133-3).

Discussion

A. Summary Judgment Standard

*7 The Court must grant summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is material if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In support of its motion for summary judgment, the moving party need not negate the opponent's claim, Celotex, 477 U.S. at 323; rather, the moving party will be entitled to judgment if the evidence is not sufficient for a jury to return a verdict in favor of the opponent, Anderson, 477 U.S. at 249.

When a properly supported motion for summary judgment has been presented, the adverse party “may

not rely merely on allegations or denials” in its pleadings. Fed.R.Civ.P. 56(e). The non-moving party must set forth “specific facts” demonstrating the existence of a genuine issue for trial. Id.; Anderson, 477 U.S. at 256. A party cannot create a genuine issue of fact by simply contradicting his or her own previous sworn statement, Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999), or by asserting “some metaphysical doubt” as to the material facts, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Likewise, discrediting the testimony proffered by the moving party will not usually constitute a sufficient response to a motion for summary judgment. Anderson, 477 U.S. at 256-57.

To survive a motion for summary judgment, the adverse party must present “affirmative evidence,” which “is to be believed” and from which all “justifiable inferences” are to be favorably drawn. Id. at 255, 257. When the record, however, taken as a whole, “could not lead a rational trier of fact to find for the nonmoving party,” summary judgment is warranted. See Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 988 (9th Cir.2006); see also Beard v. Banks, 548 U.S. 521, 126 S.Ct. 2572, 2578, 165 L.Ed.2d 697 (2006) (“Rule 56(c) ‘mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.’” (quoting Celotex, 477 U.S. at 322)).

B. Statute of Limitations

The City of Seattle moves for summary judgment with respect to claims accruing more than three years and sixty days before plaintiff filed this action. Plaintiff instituted this suit on July 5, 2007. Complaint (docket no. 1). The statute of limitations for claims brought under the Washington Law Against Discrimination (“WLAD”) is three years. Antonius v.

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King County, 153 Wash.2d 256, 261-62, 103 P.3d 729 (2004); see RCW 4.16.080(2) (action for personal injury must be commenced within three years). The statute of limitations applicable to plaintiff's claims under 42 U.S.C. § 1983 is also three years. RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1058 (9th Cir.2002). The statute of limitations is tolled during the sixty-day period of mandatory presentment to a local governmental entity. See RCW 4.96.020(4). Thus, the relevant date for purposes of the statute of limitations analysis in this case is May 6, 2004. The City of Seattle argues that all causes of action based on discrete acts occurring before this date are time barred.

*8 Plaintiff's only response is that the three-year statute of limitations does not apply to hostile work environment claims. Plaintiff's Response at 23 (docket no. 138-1). Plaintiff's assertion is a poorly worded summary of the relevant law. As explained more fully in the Court's order granting summary judgment in favor of defendants in the companion case,^{FN12} although acts contributing to a hostile work environment are treated as one unlawful employment practice for purposes of the statute of limitations, discrete acts, such as termination, failure to promote, denial of transfer, or refusal to hire, cannot qualify as related acts, and therefore, are not themselves cognizable unless occurring within the limitations period. Antonius v. King County, 153 Wash.2d 256, 264, 103 P.3d 729 (2004) (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 108-13, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002)). Here, plaintiff does not deny that any delay or reluctance on the part of Seattle City Light in paying his commuting expenses while he was an apprentice constituted a discrete act, or that plaintiff's assignment to the South Substation at the end of his apprenticeship had the requisite "degree of permanence" to trigger his duty to assert his rights. Moreover, plaintiff offers no explanation of how the comments or teasing of co-workers during the course of his apprenticeship, about which plaintiff never complained to management, can be imputed to Seattle City Light. See Washington v. Boeing Co., 105

Wash.App. 1, 11, 19 P.3d 1041 (2000) (before an employee's actions are imputed to the employer, a plaintiff must demonstrate that the employer (1) authorized, knew, or should have known of the harassment, and (2) failed to take reasonably prompt and adequate corrective action). Thus, with respect to events occurring during plaintiff's apprenticeship, as well as all discrete acts prior to May 6, 2004, the Court GRANTS summary judgment in favor of the City of Seattle.

FN12. See Order at 27-29 (docket no. 249), Davis v. City of Seattle, Case No. C06-1659Z (W.D.Wash. Jan. 22, 2008).

C. Merits of Plaintiff's Claims

1. Disparate Treatment and Retaliation

To defeat the pending motions for summary judgment, plaintiff must, at a minimum, establish a prima facie case of either disparate treatment or retaliation. See Hines v. Todd Pac. Shipyards Corp., 127 Wash.App. 356, 370-71, 112 P.3d 522 (2005) ("Washington courts have adopted the McDonnell Douglas/Burdine three-part burden allocation framework for disparate treatment cases." (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981))); see also Tyner v. Dep't of Soc. & Health Servs., 137 Wash.App. 545, 564, 154 P.3d 920 (2007) (the McDonnell Douglas/Burdine "burden shifting scheme also applies to retaliation claims").

To present a prima facie case of disparate treatment, plaintiff must prove that (i) he is a member of a protected class, (ii) he was treated less favorably than a similarly situated non-protected employee, and (iii) the non-protected employee was doing the same work. See Clarke v. Office of the Attorney Gen., 133

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Wash.App. 767, 788-89, 138 P.3d 144 (2006). To make out a prima facie case of retaliation, plaintiff must establish that (i) he engaged in statutorily protected activity, (ii) Seattle City Light and/or Jorge Carrasco took some adverse employment action against him, and (iii) a causal link exists between the protected activity and the adverse action. See Tyner, 137 Wash.App. at 563, 154 P.3d 920.

*9 Only if plaintiff presents sufficient evidence of a prima facie case does the burden shift to Seattle City Light and Superintendent Carrasco to provide evidence of legitimate, nondiscriminatory reasons for their actions.^{FN13} See id. at 563-64, 154 P.3d 920; see also Hines, 127 Wash.App. at 371, 112 P.3d 522. The final burden rests on plaintiff to produce evidence that the asserted reasons are merely a pretext. See Hines, 127 Wash.App. at 371, 112 P.3d 522. To establish pretext, plaintiff must put forward specific evidence indicating that the articulated nondiscriminatory reasons are “unworthy of belief.” See id. at 372, 112 P.3d 522. “Speculation and belief are insufficient to create a fact issue as to pretext. Nor can pretext be established by merely conclusory statements of a plaintiff who feels that he has been discriminated against.” Id. (quoting McKey v. Occidental Chem. Corp., 956 F.Supp. 1313, 1319 (S.D.Tex.1997)). Moreover, summary judgment may be granted in favor of an employer even when the employee has created a weak issue of fact concerning pretext, if abundant, uncontroverted, independent evidence indicates that no discrimination or retaliation occurred. See Tyner, 137 Wash.App. at 564, 154 P.3d 920 (quoting Milligan v. Thompson, 110 Wash.App. 628, 637, 42 P.3d 418 (2002) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000))).

FN13. Jorge Carrasco has cited two Washington cases in support of his assertion that his burden is limited to showing that his decision to suspend plaintiff was based on substantial evidence that he reasonably be-

lieved was true. Reply at 5 (docket no. 152). The cited cases, however, did not involve claims of discrimination or retaliation, and they addressed only whether the respective terminations for “just cause” or a specified infraction constituted breaches of the employment contracts. See Gaglidari v. Denny’s Restaurants, Inc., 117 Wash.2d 426, 815 P.2d 1362 (1991); Baldwin v. Sisters of Providence in Wash., Inc., 112 Wash.2d 127, 769 P.2d 298 (1989). Thus, the Court has not applied the standard proposed by Mr. Carrasco.

In this case, plaintiff fails to present even a prima facie case of disparate treatment or retaliation. Although plaintiff discusses Karl Horne and Bill Ivie at great length, he does not describe any adverse employment action stemming from his dealings with either man. Plaintiff was not disciplined in connection with Ms. Davis’s inappropriate treatment of Mr. Horne, and plaintiff does not identify any ill treatment, financial or otherwise, that he received from Mr. Ivie.^{FN14} Plaintiff’s assertion that co-worker Phil Irvin’s apology was not genuine does not present an actionable claim; plaintiff admits that he accepted the apology relating to Mr. Irvin’s e-mail concerning the Gay Pride Parade, and that he did not further pursue the matter. Even if Mr. Irvin continued to harbor anti-homosexual sentiments, plaintiff has no basis for imputing them to Seattle City Light; the undisputed evidence indicates that Seattle City Light promptly investigated plaintiff’s complaint, confronted Mr. Irvin about his behavior, and resolved the problem to plaintiff’s expressed satisfaction. See Washington, 105 Wash.App. at 11, 19 P.3d 1041.

FN14. Plaintiff instead tries to compare himself to Mr. Ivie, offering the declaration of co-worker Carol Girdis, who has recounted a previous instance in which Mr. Ivie brought a non-employee into the South Substation. See Girdis Decl. at 1-3 (docket no.

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114). Plaintiff's reliance on such evidence is misplaced. Ms. Girdis makes no contention that Mr. Ivie allowed the non-employee to climb a structure in the substation yard or assisted the non-employee in doing so. Moreover, even if Mr. Ivie's actions violated Seattle City Light policies, the fact that he was not caught or punished does not vindicate plaintiff's behavior. Finally, to the extent Ms. Girdis's testimony is being offered as evidence of Mr. Ivie's harassing conduct, Ms. Girdis herself admits that she "did not report his behavior to anyone," *id.* at 4, and therefore, any mistreatment of Ms. Girdis by Mr. Ivie cannot be imputed to Seattle City Light. See Washington, 105 Wash.App. at 11, 19 P.3d 1041.

As to the alleged miscalculation of plaintiff's seniority date, which led to him being deemed ineligible for the Craft Instructor-Apprenticeship position, plaintiff has not established that he was treated any differently or less favorably than similarly situated non-protected employees. Plaintiff does not challenge or contradict the City of Seattle's evidence that the same calculation method was applied to all candidates and that three other employees, who have not been identified by plaintiff as homosexual, were also disqualified and not interviewed for the position. Finally, with regard to his five-day suspension, plaintiff has not demonstrated that he was punished more severely than heterosexual or non-litigating employees engaging in comparable violations of safety protocols. Plaintiff's contention that the proximity between the date he filed this lawsuit and the date he was advised of Superintendent Carrasco's final decision demonstrates the requisite retaliatory causal link lacks merit. Ms. Kinerk's initial report was issued in December 2006, and plaintiff was advised of proposed disciplinary action in February 2007, months before he initiated this action. Ms. Kinerk's supplemental report, from which plaintiff could infer that the recommended sanction was likely to be imposed, was available in

June 2007, a couple of weeks before plaintiff filed suit. Although Superintendent Carrasco's written decision post-dates plaintiff's complaint by nineteen days, the sequence of events in this case does not create a presumption of retaliatory motive.^{FN15} See Wilmot v. Kaiser Alum. & Chem. Corp., 118 Wash.2d 46, 69, 821 P.2d 18 (1991) ("[p]roximity in time between the claim and the firing is a typical beginning point, coupled with evidence of satisfactory work performance and supervisory evaluations" (emphasis added)). To adopt plaintiff's simplistic approach would encourage every employee with advance warning of disciplinary action to file suit before the sanction is imposed so as to preserve the ability to claim retaliation. The Court declines to do so.

FN15. Likewise, Paula Rose's alleged statement that plaintiff is "collateral damage" for Ms. Davis's lawsuit, Richards Decl. at ¶ 46, does not prove the requisite causal link. As an initial matter, plaintiff does not provide a declaration from Ms. Rose, and he fails to establish that Ms. Rose's statement to him is admissible hearsay. Statements concerning the reasons for an adverse employment action are admissible under Rule 801(d)(2)(D) only if the declarant was involved in the decision. See Taylor v. Battelle Columbus Labs., 680 F.Supp. 1165, 1171 (S.D. Ohio 1988) (citing Hill v. Spiegel, Inc., 708 F.2d 233 (6th Cir.1983)); see also Young v. James Green Mgmt., Inc., 327 F.3d 616, 622 n. 2 (7th Cir.2003) (quoting Aliotta v. Nat'l R.R. Passenger Corp., 315 F.3d 756 (7th Cir.2003)). Plaintiff has offered no evidence that Ms. Rose participated in the decision to suspend him or that Ms. Rose had the authority to discuss or express views about the disciplinary process. Moreover, even if admissible, Ms. Rose's statement does no more than express a personal opinion having nothing to do with any protected activities on plaintiff's part.

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*10 Even if, however, plaintiff is presumed to have presented a prima facie case of discrimination or retaliation, the adverse decision here rests on legitimate grounds, and plaintiff must present some evidence that the articulated basis for his suspension is “unworthy of belief.” See *Hines*, 127 Wash.App. at 372, 112 P.3d 522. Plaintiff has not done so. Instead, plaintiff asserts that the City of Seattle and Superintendent Carrasco have failed to articulate a legitimate reason for plaintiff’s suspension, citing *Davis v. Team Elec. Co.*, 520 F.3d 1080 (9th Cir.2008). *Team Elec.*, however, is entirely distinguishable. In *Team Elec.*, shortly after the plaintiff filed an employment discrimination claim, she was laid off. *Id.* at 1094. Although the employer laid off sixteen other workers for economic reasons, the employer could not articulate why it chose to lay off the plaintiff in particular. *Id.* (“as the company conceded at oral argument, there is no evidence in the record as to why Davis in particular was laid off”). On the other hand, the evidence indicated that the plaintiff was senior to electricians that were retained by the employer and that she was considered by her supervisors to be a skilled and dedicated worker. *Id.* Thus, the Ninth Circuit concluded that the plaintiff had presented sufficient evidence to raise a genuine issue of material fact concerning whether the employer had a retaliatory motive for laying her off. *Id.* at 1095. In contrast, the adverse employment action here involves only plaintiff and Wanda Davis. The five-day suspension was based on specific reasons outlined in two written reports by an external investigator, a memorandum advising plaintiff of the proposed disciplinary action, and a letter by the final decision-maker, all of which are part of the record in this case. In sum, this case simply bears no resemblance to *Team Elec.*

Although plaintiff continues to discount the conclusions drawn by Ms. Kinerk and adopted by Superintendent Carrasco,^{FN16} he does nothing to undermine the City of Seattle’s explanation for the suspension.^{FN17} The Court’s function in a case of this nature is

not to second-guess the employer’s interpretation of its policies and regulations, but rather to assess whether sufficient evidence of discriminatory or retaliatory behavior has been presented to warrant a trial. Here, plaintiff does not make the requisite showing; he does not dispute the wrongdoing that led to his suspension, and he offers no evidence that similar misconduct by non-protected employees has been less harshly punished. The Court therefore GRANTS summary judgment in favor of the City of Seattle and Jorge Carrasco as to plaintiff’s disparate treatment and retaliation claims.

FN16. In disputing Ms. Kinerk’s report, plaintiff has inappropriately extrapolated from deposition testimony provided by Christopher Heimgartner, the Customer Service and Energy Delivery Officer for Seattle City Light. During his deposition, Mr. Heimgartner indicated that no policy violation would have occurred if plaintiff and Wanda Davis had obtained permission in advance of assisting Aaron Duvall to climb the structure at the South Substation. See Heimgartner Dep. at 53:16-54:2, Sheridan Second Decl. at 96-97 (docket no. 134). Citing this testimony, plaintiff asserted at oral argument that “safety is a red herring” because Mr. Duvall’s climb could have been authorized. Plaintiff’s contention misses the mark. Plaintiff offers no evidence that, had he and Ms. Davis asked, they would have received permission for the climb. In addition, regardless of whether the climb was inherently safe or unsafe, Seattle City Light had legitimate liability concerns justifying its insistence on management approval as a condition precedent to this type of behavior. Plaintiff’s other attacks on Ms. Kinerk’s report are equally misguided, particularly his implied argument that a safety policy must anticipate and articulate every possible way in which an employee could be injured or

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injure someone else, which is an onerous standard unsupported by any authority. Plaintiff's submission of declarations from other Seattle City Light employees, whose positions or relationships to this case are not fully explained, is likewise of no avail. For example, Phil Boulton describes various non-employees, including fire and police personnel, who have been allowed into a substation, but he does not identify anyone else who has climbed a structure in the yard. *See* Boulton Decl. at 3 (docket no. 113). Kari Lundquist discusses job shadowing by current employees, but does not address whether such opportunities are available to candidates or other non-employees or the climbing of any structures by anyone. *See* Lundquist Decl. at 3 (docket no. 118). Finally, Alice Lockridge states that "teaching is not cheating" and indicates that "it is not cheating to tell the test taker[s] what will be expected of them and letting them try the test or practice for it before the actual test happens," Lockridge Decl. at 4 (docket no. 116), but she does not speak to the use of Seattle City Light facilities for test preparation or to the practice of providing opportunities to one candidate that were not made available to any other applicant. Finally, plaintiff offers no basis for concluding that Ms. Lockridge speaks for Seattle City Light or that her opinions are other than merely her own.

FN17. Plaintiff's contention that resort to an external investigator, namely Colleen Kinerk, itself constitutes evidence of discriminatory animus lacks any merit. Plaintiff's underlying assumption that, had Seattle City Light handled the matter internally at the supervisor level, as he suggests is customary, he would have received less severe or perhaps no disciplinary sanctions is based on nothing more than wishful thinking.

Moreover, to the extent an internal review had produced similar results, for example, an equivalent, slightly shorter, or perhaps longer suspension, the City of Seattle would have been subject to attack for not involving an external investigator. This type of "no-win" challenge proves nothing of any relevance to the disposition of this case.

2. Hostile Work Environment

Plaintiff attempts to transmute his various disparate treatment claims into one hostile work environment claim. Plaintiff may not do so. Discrete acts, such as refusal to promote, denial of transfer, suspension, and demotion, are independently actionable, and they may not be cobbled together into a harassment claim. *See Antonius*, 153 Wash.2d at 264, 103 P.3d 729; *see also Morgan*, 536 U.S. at 113 ("discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges"). Indeed, were the Court to accept plaintiff's view, then the hostile work environment rubric would serve no purpose; it stands in contrast to discrete acts of discrimination or retaliation, and it operates in circumstances when an independent act is not sufficient to cause distress, but a series of similar or related acts is intolerable. To prove a claim of hostile work environment, plaintiff must establish that the harassment at issue (i) was unwelcome, (ii) was due to his membership in a protected class, (iii) affected the terms and conditions of his employment, and (iv) was imputable to his employer. *Clarke*, 133 Wash.App. at 785, 138 P.3d 144. To satisfy the third element, the harassment must be "sufficiently pervasive so as to alter [his] employment conditions" and the conduct must be more than merely offensive. *Id.* "The conduct must be both objectively abusive (reasonable person test) and subjectively perceived as abusive by the victim." *Adams v. Able Bldg. Supply, Inc.*, 114 Wash.App. 291, 297, 57 P.3d 280 (2002) (citing *Harris v. Forklift Sys.*, 510 U.S. 17, 21-22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)).

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*11 Plaintiff does not allege any actionable harassing conduct by Bill Ivie or any other supervisor. Moreover, he offers no evidence that any harassing activities by co-workers or the like could be imputed to Seattle City Light or Superintendent Carrasco; he describes no incident in which he complained about harassment and his employer failed to take reasonably prompt and adequate corrective action. See *Washington v. Boeing Co.*, 105 Wash.App. 1, 11, 19 P.3d 1041 (2000); see also *Sangster v. Albertson's, Inc.*, 99 Wash.App. 156, 164-65, 991 P.2d 674 (2000) (observing that, when a supervisor is alleged to have created a hostile work environment, an employer may raise an affirmative defense requiring proof that the employer exercised reasonable care to prevent and promptly correct harassing behavior and the plaintiff unreasonably failed to take advantage of such preventive or corrective opportunities (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998))). Finally, the behavior about which plaintiff complains fails to satisfy either the sufficiently pervasive or the objectively abusive standard, and therefore, does not as a matter of law support a claim for hostile work environment. Thus, the Court GRANTS summary judgment in favor of the City of Seattle and Jorge Carrasco with respect to plaintiff's hostile work environment claim.

3. Section 1983 Claims

In this context, to establish a violation of 42 U.S.C. § 1983, plaintiff must prove that Seattle City Light and/or Jorge Carrasco acted with the intent to discriminate. See *Sischo-Nownejad v. Merced Cmty. Coll. Dist.*, 934 F.2d 1104, 1112 (9th Cir.1991); see also *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 n. 16, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984) (relief is authorized under Section 1983 only when intentional discrimination has been proven or admitted). Having failed to demonstrate disparate treatment or retaliation under the WLAD,^{FN18} plaintiff likewise has not met the purposeful discrimination

requirement for a Section 1983 claim based on equal protection. See *Sischo-Nownejad*, 934 F.2d at 1112 (citing *Knight v. Nassau County Civil Serv. Comm'n*, 649 F.2d 157, 161-62 (2d Cir.1981)). The Court therefore GRANTS summary judgment in favor of the City of Seattle and Jorge Carrasco with regard to plaintiff's claims under Section 1983.

FN18. Plaintiff asserts that Jorge Carrasco is individually liable pursuant to both the WLAD's aiding and abetting provision, RCW 49.60.220, and Section 1983. Plaintiff also raises claims under the Seattle Municipal Code. In light of the Court's rulings on the causes of action brought under the WLAD, the Court also GRANTS summary judgment against plaintiff on the individual claims against Jorge Carrasco and the claims based on municipal law.

Conclusion

For the foregoing reasons, the Court GRANTS both pending motions for summary judgment. Judgment shall be entered forthwith in favor of the City of Seattle and Jorge Carrasco.

IT IS SO ORDERED.

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